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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

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DENNIS LANE AND ELIZABETH LANE,

Appellants,

v.

LAWRENCE L'HOMMEDIEU,

Respondent.

APPELLANTS' OPENING BRIEF

Steven E. Turner
Miller Nash LLP
500 East Broadway, Suite 400
Vancouver, Washington 98666-0694
(360) 699-4771

Attorneys for Appellants
Dennis Lane and Elizabeth Lane

pm TED-EX 1/4/08

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I. Assignment of Error

Appellants Dennis and Elizabeth Lane sued the respondent Lawrence L'Hommedieu to enforce a restrictive covenant that prohibits the installation of any septic system "within fifty feet of the banks of the Washougal River or any tributary thereof." At the trial, the Lanes proved that Mr. L'Hommedieu had knowingly installed two septic systems that violated the fifty-foot setback required by the covenant. The trial court agreed, finding that the covenant was valid and enforceable and that both septic systems violated the setback. Nevertheless, the trial court declined to enforce the covenant.

The trial court provided two legal rationales for refusing to enforce the covenant. First, the trial court concluded that the "deed restriction has been outmoded and lost its usefulness as to modern septic systems." (Finding No. 17) Second, the trial court concluded that "[a]lternatively, the *balancing of the equities* also weighs against enforcement of the deed restriction ..." (Finding No. 27)

The trial court erred, however, in applying each rationale. First, the trial court misapplied the "change-in-circumstances" defense to enforcement of the covenant because the technological changes relied upon do not render the covenant obsolete. Second, any "balancing of the

equities" is reserved solely for the "innocent" defendant who proceeds unaware of the covenant, but Mr. L'Hommedieu admitted he was fully aware of the covenant before he proceeded to violate it.

Because both rationales are contrary to Washington law, the judgment should be reversed and an injunction should issue requiring Mr. L'Hommedieu to comply with the covenant on his property.

II. Issues Presented

The Lanes' appeal presents this Court with three distinct issues.

Changed Circumstances. "A covenant that runs with the land may be enforced by a successor of the covenantee or against a successor of the covenantor."¹ But a party may assert a change in circumstances as a defense to the covenant. This defense applies if there is "a material change in the character of the neighborhood . . . so as to render perpetuation of the restriction of no substantial benefit to the dominant estate and to defeat the object or purpose of the restriction."² Here, there was no evidence of a material change in the character of the 460 acres

¹ *Lane v. Skamania Co., et al.*, Court of Appeals Division II Docket No. 31772-9-II ("*Lane I*"). For the Court's convenience, a copy of its earlier opinion in this same matter is included in the Appendix at the end of this brief.

² *St. Luke's Evangelical Lutheran Church v. Hales*, 13 Wn. App. 483, 485, 534 P.2d 1379 (quoting Annot. 4 A.L.R.2d 1111, 1119 (1949)), review denied, 86 Wn.2d 1003 (1975).

covered by the original covenant. Moreover, while Mr. L'Hommedieu proved his septic system was highly sophisticated and unlikely to pollute the river, he did not prove that the distance between his system and the stream had become irrelevant, or that the fifty-foot setback had been rendered obsolete by changes in septic system technology. Did the trial court err in its Conclusion of Law that "[a]lthough generally valid, as applied to Lots 8 and 9 and Mr. L'Hommediue's septic systems, the deed restriction does not apply"?

Balancing the Equities. In determining whether to enforce a covenant, a trial court is normally entitled to balance the relative benefits and hardships of enforcing the covenant. But our Supreme Court carved out an exception to this rule: it does not apply to those who proceed to build with knowledge of the covenant. "The benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the *innocent defendant* who proceeds *without knowledge or warning* that his structure" violates the covenant.³ Here, Mr. L'Hommedieu was repeatedly warned—and admittedly knew—that his septic systems would violate the covenant, but he built them anyway. Did the trial court err by balancing the equities in favor of Mr. L'Hommedieu?

³ *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691, 974 P.2d 836 (1999).

Wrongfully Enjoined. The trial court awarded Mr. L'Hommedieu attorney's fees of \$12,513 as damages for the Lanes "wrongfully" obtaining provisional injunctive relief. But the Lanes acted in good faith in bringing their claim, and the preliminary injunction was terminated when the trial court erroneously granted summary judgment against the Lanes. Should the Lanes be punished for seeking to prevent the violation of the covenant before a legal determination of the parties' rights and responsibilities could be made?

III. Statement of the Case

A. Description of the Restrictive Covenant

In 1944, a restrictive covenant was imposed on 460 acres of real property lying adjacent to the Washougal River in Skamania County. (Finding of Fact ("Finding" No. 1)⁴ The property covered by the covenant closely follows the contours and meanders of the river, as shown by the parcels numbered 1-5 in the following demonstrative map.

⁴ The Trial Court's Findings of Fact and Conclusions of Law are located in the Clerk's Papers at pages 676 to 683. For the Court's convenience, a copy is also included in the Appendix at the end of this brief.



The deed restriction prohibits use of the property in a manner that will pollute the river and establishes a minimum fifty-foot setback between any septic system and the banks of the river and its tributaries:

The aforesaid property or any buildings or structures erected thereon, shall not be used for any purpose which will cause pollution [sic] to the waters of the Washougal River or any tributary thereof, and all sewage disposal shall be by means of a septic tank of standard design, and ***no septic tank or drainage shall discharge within fifty feet of the banks of the Washougal River or any tributary thereof.*** (Finding No. 2) (Emphasis added)

As found by the trial court: “The purpose of this deed restriction was to prevent pollution to the Washougal River (‘River’) or its tributaries.” (Finding No. 3)

B. History of Mr. L'Hommedieu's Property

Respondent Lawrence L'Hommedieu owns two parcels of property, totaling roughly one acre, that sit within southernmost end of the 460 acres covered by the covenant. (Finding Nos. 6, 7, and 10)

Mr. L'Hommedieu's parcels, known as Lots 8 and 9 of the River Glen Subdivision, border directly on the Washougal River. Moreover, there is a stream that cuts across the middle of Mr. L'Hommedieu's property and flows directly into the Washougal River. (Finding Nos. 8 and 9) While the parties contested the origin and age of this stream, there is no dispute

that the stream existed in its present location for many years before Mr. L'Hommedieu acquired his property. (Finding Nos. 8 and 10)

In 1998, Mr. L'Hommedieu built a home on one of his two lots. The septic system for this home was located on his other lot and—consistent with the covenant—the septic system and its drain field were located more than 50 feet away from the stream flowing across his property. (Finding No. 10)

Roughly four years later, in 2002, Mr. L'Hommedieu made plans to construct a new, larger home on his other lot. The plans called for the existing home and the new home to be served by two separate septic systems. The only problem was that—whereas before there had been one septic system that complied with the covenant—Mr. L'Hommedieu's plan “meant that each of the drainfields for the septic systems on Lot 8 and Lot 9 would be within 50 feet of the stream.” (Finding No. 10)

C. Procedural History

The appellants, Dennis and Elizabeth Lane, own two lots just to the North of Mr. L'Hommedieu's property. After they learned of Mr. L'Hommedieu's plans, the Lanes became concerned that the planned septic systems might be too close to the tributary. (Reporter's Transcript

(“RT”) 108:5-13) The Lanes sued for a permanent injunction and promptly moved for a Temporary Restraining Order “to halt the construction until the legal issues could be resolved.” (RT 109:14-19) The Lanes sought the TRO against Mr. L’Hommedieu because they “wanted to settle it before he built a house so there wouldn’t be so many problems afterwards.” (RT 109:20-110:2) As the trial court noted in its findings, the Lanes brought their suit in good faith. (Finding No. 26)

Several months after the TRO and preliminary injunction were issued, Mr. L’Hommedieu moved the court for summary judgment. The trial court granted the motion and quashed the injunction. Although the trial court found that the covenant was generally valid and applied to Mr. L’Hommedieu’s property, the trial court nevertheless granted summary judgment, on two alternative grounds.

First, the trial court concluded that the stream that flowed across Mr. L’Hommedieu’s property and into the Washougal River was not a “tributary” of the river within the intention of the covenant. Alternatively, the trial court concluded that “changed circumstances”—*i.e.*, improvements in septic tank technology—excused Mr. L’Hommedieu from complying with this covenant. As the Court explained in its oral ruling:

[I]f Mr. L'Hommedieu's actions somehow polluted the river, first of all, the state wouldn't let him put {in} a septic system But in this case, the purpose of the covenant to prevent pollution is not defeated by Mr. L'Hommedieu's actions, because, again, the unconverted {sic} affidavits are that this septic system . . . is a very sophisticated system, that it's probably more efficient than a septic system would have been in 1944 using the standards that were in effect in 1944.⁵

The Lanes, believing the trial court had erred, and there being no just reason for delay, sought an order allowing an immediate appeal. The Lanes secured the right to make an interlocutory appeal, and they appealed this Court to reverse the summary judgment.

On the appeal, this Court rejected the trial court's first rationale for granting summary judgment. This Court held factual issues remained regarding whether the stream was a "tributary," precluding summary judgment on that basis. This Court also rejected the trial court's alternative grounds of "changed circumstances." This Court noted that no "material change in the neighborhood" was identified. Moreover, this Court held that there remained a factual question whether technological improvements had rendered the fifty-foot setback obsolete:

In essence, the trial court's ruling makes the location of the septic systems irrelevant because it is premised on the assumption that the systems will never pollute the Washougal River.⁶

⁵ This same passage is quoted in this court's prior decision in *Lane I*.

⁶ *Lane I*.

In line with its opinion, this Court remanded the case so the trial court could take evidence and decide whether the stream was a "tributary" and whether the location of septic systems had been rendered irrelevant—thus rendering the covenant obsolete—by the improvements in septic-system technology.

D. Mr. L'Hommedieu Was Fully Aware of the Covenant

After the trial court quashed the preliminary injunction—and while this case pending on appeal—Mr. L'Hommedieu decided to proceed with his plans. He went ahead and disconnected the one septic system that complied with the fifty-foot setback and he installed two septic systems that violated the setback. As his testimony shows, Mr. L'Hommedieu acted with prior knowledge of the covenant before installing the offending septic systems.

For example, Mr. L'Hommedieu admitted he knew about the covenant before he implemented his plan:

Q Oh. You started submitting some proposals to the government in 2002?

A That is correct.

Q Okay. And at that time you had Stoner Bell [the engineer put one septic system for one house on Lot 8; correct?

A Yes.

Q And one septic system for the house on Lot 9; correct?

A That's correct.

Q Okay. And before you implemented this plan to put in the septic systems and actually put the septic systems in the ground, you knew of the restriction in the covenants; correct?

A That is correct.

(RT 330:4-16)

Similarly, Mr. L'Hommedieu admitted he installed the two offending septic systems while the lawsuit was pending:

Q The lawsuit was filed before you built your new house; correct?

A Yes, it was.

Q The lawsuit was filed before you disconnected the existing house from its septic system; correct?

A Yes, it was.

Q When the lawsuit was filed, by the time the lawsuit was filed, you knew of the restriction in the covenant; correct?

A Yes, I did.

Q Okay. And you knew that the restriction said you couldn't have a septic system drain or discharge within 50 feet of the Washougal River or any tributary thereof; correct?

A Yes.

Q And with that knowledge, you installed two septic systems on Lots 8 and 9; correct?

A Yes.

Q And one of the septic systems drain was roughly 25 feet from the creek; correct?

A It's 28 feet.

Q Twenty-eight feet?

A Yes.

Q Okay. And the other one drains within about 35 feet of the creek?

A Yes, 30, a little bit more than that, yes.

Q So about 35 feet?

A Yes.

Q Both of them were within 50 feet?

A They both were.

(RT 331:12-332:16)

Third, Mr. L'Hommedieu admitted he was aware that he could lose the case and that his systems might have to be removed:

Q So you put these septic systems, knowing that there was a risk that they would be found to violate the covenant; correct?

A I didn't feel at the time it was a violation of the covenant.

Q That's not my question, though. My question was, you knew there was a risk that it would be found to be a violation of the covenant, didn't you, Mr. L'Hommedieu?

A If that's a -- if that's deemed a tributary and that we're polluting it, there would be a risk, yes.

Q Okay. So you knew if there was a risk you would be ordered to take those septic systems out?

A yes.

Q And you went ahead anyway?

A Yes.

(RT 332:17-333:9)

Thus, there can be no dispute that Mr. L'Hommedieu proceeded with full knowledge of the restrictive covenant and with knowledge of the risk that he could be forced to unwind and remedy his violations of the covenant.

E. The Trial Court Found the Stream Was a Tributary

As directed by this Court on remand, the trial court did take evidence regarding the history, characteristics, and magnitude of the stream that crosses Mr. L'Hommedieu's property and flows directly into the Washougal River. The evidence presented by the Lanes convinced the trial court to reverse its earlier ruling that the stream was not a "tributary."

The trial court judge summed up his new position as follows:

The first issue to be addressed is whether or not the creek is a tributary. I had previously held that the creek was not a tributary; however, upon listening to further evidence, I am convinced that it does meet the requirements of being a tributary to the Washougal River.

(RT 716:14-19)

As a result, the trial court included in its findings of fact the finding that "[t]he aforesaid stream is now a tributary of the Washougal River." (Finding No. 9)

F. The Trial Court Concluded the Covenant was Valid But Declined to Enforce it Against Mr. L'Hommedieu

The trial court further reached the legal conclusion—as it had reached earlier and as this Court had held in *Lane I*—that the covenant remains valid. "The 1944 deed restriction is a valid restriction." (Conclusion of Law No. 1) But despite finding that the stream was a tributary, and despite concluding that Mr. L'Hommedieu's property is bound by the restrictive covenant, the trial court still refused to enforce the covenant against Mr. L'Hommedieu. "Although generally valid, as applied to Lots 8 and 9 and Mr. L'Hommedieu's septic systems, the deed restriction does not apply." (Conclusion of Law No. 2)

G. The Covenant Still Serves Its Intended Purpose

The trial court's refusal to enforce the covenant against Mr. L'Hommedieu seems to be based on the evidence regarding the

sophisticated nature of the particular septic systems that he had placed within the fifty-foot buffer. Mr. L'Hommedieu submitted "overwhelming evidence" to prove to the trial court that his systems were unlikely to pollute the river. (Finding No. 19) The trial court agreed, noting that the systems "were approved by the county agency responsible for insuring that the streams and rivers of Skamania County are not polluted" and that Mr. L'Hommedieu's septic systems, "although located within 50 feet of the stream, is actually less likely to pollute the stream than a conventional gravity system 50 feet from the stream."

The Lanes did not, and do not contest, these facts. Instead, the Lanes sought to negate the "changed circumstances" defense by proving that changes in septic system technology had not rendered the restriction obsolete, and that maintaining some minimum buffer between septic systems and the river—or its tributaries—still advanced the covenant's purpose of protecting the river from pollution.

First, the Lanes showed that any system—no matter how sophisticated—is not fail proof. Mr. L'Hommedieu admitted this on cross-examination:

Q Right. And this system is not fail proof; correct?

A That's correct.

(RT 343:2-3)

In fact, Exhibit 14 is the manufacturer's installation and maintenance manual for Mr. L'Hommedieu's system. Under the header "System Failures," the manual states:

[S]everal types of failures can occur in a unit with a wide variety of components and systems present in this plant. Mechanical, electric and process failures are the predominant concerns. Some components are subjected to more than one type of failure. Any mechanical or electrical failure will result in a process failure.

(Exhibit 14, pages 14-7; RT 343-344.)

In particular, the manual describes potential failures, including "mechanical failure of the blower," "electrical failure of the blower," "oxygen starvation of the biomass," and it then provides a three-page "Troubleshooting Guide" discussing 19 different possible causes of failures to the system.

The manual continues to list "eight things that you can't put into the system, including liquid fabric softeners," "animal fats," and "bacon grease." (RT 345) Mr. L'Hommedieu admitted that if any of these prohibitions were violated, the system could fail. (RT 345)

The Lanes also introduced the testimony of their sanitation expert, Robert Sweeney. He testified that a sophisticated system does not render

setbacks irrelevant or obsolete. To the contrary, Mr. Sweeney testified that the more complicated a system is, the higher the risk of failure:

Q Couldn't any septic system fail?

A Yes, the more complicated, the more likely to fail.

(RT 166:21-22)

Similarly, regardless of how sophisticated a particular system may be technologically, any system is only as good as the people who are responsible for using, maintaining, and monitoring the system. In Mr. Sweeney's experience, it is people who are the "weak link" in preventing system failures:

A Now, is it important to maintain the system once it's up and operating for it to operate properly?

A Yes.

Q And have you seen situations where people have failed to maintain their system properly?

A That's traditionally been the weak link in waste water treatment systems, and that still occurs.

(RT 130:17-23)

Not only do people fail to maintain their systems properly, according to Mr. Sweeney, they also have been known to override the system's monitors:

Q Now, is it primarily up to the property owner or to the government to ensure that the systems are being maintained properly?

A It's primarily up to the owner.

Q Have you ever come across systems that have any type of monitors or alarms that the system is not functioning properly?

A Yes, most of the more complicated systems do have some alarms.

Q Have you ever seen any owners either ignore or override those alarms?

A Yes, it's not uncommon for people to disconnect the audible alarm or remove the light bulb that's part of the alarm system.

Q Have you ever seen anyone actually cut the wires within the control panel to stop the beeping or the blinking?

A Yes, some have done that. It's usually not required because you can just pull the wire out, it's not hard wired.

Q Oh, so it's just like a plug you can pull out?

A Yes.

Q I see. And you've seen that happen?

A Yes.

(RT 132:3-25)

For these reasons, Mr. Sweeney testified that septic-system setbacks are the last line of defense protecting surface water from the potential pollution by septic systems:

Q And there was some questions regarding how any system could fail, do you recall those?

A Yes.

Q And if a septic system fails and you have surface water nearby, what's the final line of defense?

A Soil.

Q Does the distance between the drain field and the surface water matter?

A Yes.

Q If you moved the drain field further away from the surface water, does that increase or decrease the risk of pollution?

A Moving it further away would decrease the risk of pollution.

Q And vice versa, if you moved the drain field closer to the surface water, does that increase or decrease the risk of pollution?

A Increase.

(RT 177:22-179:2)

In sum, Mr. Sweeney testified that changes in septic system technology had not rendered irrelevant the distance between surface water and any septic system—including Mr. L'Hommediue's sophisticated systems:

Q Would you have approved this system if the siting of it had been, say, a foot away from the creek?

A No.

Q Would you have approved it if it were five feet away

from the creek?

A No.

Q Would you have approved it if it were ten feet away from the creek?

A No.

(RT 179:6-14)

The Lanes' expert was not alone in expressing the opinion that setbacks still matter. Mr. L'Hommedieu's expert, Bruce Scherling, agreed with the Lanes' expert that even Mr. L'Hommedieu's sophisticated system should be kept a certain distance away from the stream. Mr. Scherling admitted that—regardless of how well the system treats the effluent—one must "always" maintain a certain buffer:

Q Right. Now as it exists now, there are two drain fields on Mr. L'Hommedieu's properties that are within the 100-foot setback from the stream; correct?

A Yes.

Q And they're each less than 50 feet; correct?

A Yes.

Q And one's about 25 feet?

A Correct.

Q And you would not have approved that system if the drain field were ten feet from the stream; correct?

A Correct. I legally could have, but I would not have.

Q Right. Because you thought it would have caused too much risk of pollution?

A Right, I would have had other options.

Q Right. And you would not have approved that system if the drain field were 15 feet from the stream?

A No.

Q That's right?

A Correct.

Q Okay. And that's true even though the system is designed to operate to Treatment Standard One; correct?

A Correct, yes.

Q So even with that treatment standard in place, and assuming that it operates properly, you still require a minimum distance from the stream for approval?

A Always.

(RT 590:14-591:14)

Similarly, Mr. L'Hommediue's sanitation expert confirmed that the closer any septic system is to the stream, the higher the risk there is of pollution:

Q Okay. Because the closer you go, the higher risk there is of pollution; correct?

A Yes.

Q And even with all the advances in septic system technology that exist today and anything that you can think of in the future, can you think of a single system

you would approve where the drain field is one foot from the stream?

A Never.

Q And can you think of a single system that you would approve that is even ten feet from the stream?

A If it's intermittent I'm comfortable.

Q Let's forget about intermittent, 'cause that's --

A If it's year-round --

Q Yeah.

A -- there's got to be other options.

(RT 591:16-592:5)

Finally, Mr. L'Hommedieu's sanitation expert begrudgingly agreed with the Lanes' sanitation expert that—in the event of a system failure—the physical distance between the septic system and the surface water is the final defense against pollution:

Q Exactly. So the final defense against pollution is the setback; correct?

MR. RODABOUGH: Objection, asked and answered.

THE COURT: Overruled, you may answer.

A What was the question?

Q If the system fails, for whatever reason --

A Correct.

Q -- the final defense against pollution is the setback from the surface water or whatever else you're trying to

protect?

A Not in all situations.

Q In this situation?

A Yes, assuming normal household waste, yes.

(RT 600:9-21)

The two sanitation experts' opinions were further bolstered by the pertinent provisions of the Washington Administrative Code that relate to minimum setbacks between septic systems and flowing surface waters. The Lanes introduce the then-current WAC provisions (Exhibit 17), which generally required a minimum setback of 100 feet between Mr. L'Hommedieu's systems and the tributary. The Lanes also introduced the newest version of these same provisions, which became effective July 1, 2007. The Lanes' sanitation expert noted that, even though septic system technology had improved substantially between the passage of these provisions, the updated provisions of the WAC (Exhibit 18) continue to require the same 100-foot setback between Mr. L'Hommedieu's systems and the tributary.

Q So has that distance been reduced between the old code and the new code?

A No.

Q Have there been improvements in on-site septic system

technology between the passage of the old code and the new code?

A Yes.

Q And in your opinion, why does the new code still require 100-foot setback from the drain field to the creek?

MR. RODABOUGH: Objection. Calls for speculation.

THE COURT: Overruled. You may answer.

A These are tried and true safety factors.

(RT 145:4-15)

Mr. L'Hommedieu will be quick to point out that he received a variance from the County and that it approved his septic systems. Just as it had done in its ruling on the summary judgment, the trial court seemed to rely again on the variance in reaching its decision. (Finding No. 14.) But Mr. L'Hommedieu's individual variance does not diminish the point that, as far as the Washington Administrative Code is concerned, the minimum setback between septic systems and flowing surface water should not be reduced, despite the current advances in septic system technology.

In sum, the Lanes presented the trial court with ample evidence that—despite advances in septic system technology—setbacks still matter. Both sanitation experts testified that the risk of pollution rises as the

setback shrinks, and they agreed that physical separation is the last line of defense against pollution. Moreover, the WAC has not reduced the minimum setback, even for state-of-the-art systems like Mr. L'Hommedieu's. Thus, there was no substantial evidence that the 50-foot buffer mandated by the restrictive covenant had been rendered obsolete by technological advances.

IV. Standard of Review

The Lanes do not challenge the factual findings made by the trial court that are truly factual in nature.⁷ The Lanes do contend, however, that the trial court committed two errors of law. First, the trial court misapplied the "changed circumstances" test by concluding that, while the covenant was generally valid, it did not apply to one particular property owner because he proved his violation was unlikely to cause actual harm. Second, the trial court erroneously considered a "balancing of the equities" even though this treatment is reserved for the "innocent" defendant who proceeds without knowledge of the restrictive covenant. Because this

⁷ While characterized as factual findings, the Lanes contend that Finding Nos. 17, 18, and 27 are actually legal conclusions, and the Lanes challenge them as such.

appeal presents this Court with two legal issues, the standard of review is *de novo*.

V. Legal Authority and Analysis

A. The Covenant is Valid and Enforceable

Throughout this litigation, the restrictive covenant at issue in this case has been found to be valid and enforceable. Despite Mr. L'Hommedieu's multiple arguments to the contrary, the trial court concluded, during the prior summary judgment proceedings, that the covenant was valid and binding upon Mr. L'Hommedieu's property. On appeal, this Court affirmed the trial court's conclusion that the covenant was valid. And once again, on remand, the trial court again concluded that the "1944 deed restriction is a valid restriction." (Conclusion of Law No. 1)

B. There Is No Recognized Defense to Enforcement

Because the covenant is clearly valid and applies to Mr. L'Hommedieu's property, the starting point of the analysis must be: is there any recognized affirmative defense that would excuse Mr. L'Hommedieu's clear violations of the covenant? The trial court

decision—while not expressly stating which recognized affirmative defense it was using—seems to come down to only two viable possibilities. First, the court applied the "changed circumstances" doctrine when it concluded that "[t]he deed restriction has been outmoded and lost its usefulness as to modern septic systems." (Finding No. 17) Second, the court applied the "balancing of the equities" test when it concluded that "the balancing of the equities also weighs against enforcement of the deed restriction" (Finding No. 27) As shown by this brief, however, the trial court misapplied both rationales for not enforcing the covenant.

1. There Was No Radical Change in the "Neighborhood"

In general, a restrictive covenant "has an indefinite life, subject to termination by conduct of the parties or a change in circumstances which renders its purpose useless."⁸ In *Lane I*, this Court discussed the type of evidence that someone resisting enforcement of a covenant must adduce in order to establish the change of neighborhood defense.

As a defense to enforcement of a covenant, a party may assert changed neighborhood conditions. Professor Stoebuck described the changed neighborhood doctrine as

⁸ *Thayer v. Thompson*, 36 Wn. App. 794, 797, 677 P.2d 787 (1984) (citations omitted).

follows: The fact pattern that gives rise to the defense is that the neighborhood covered by a covenant . . . has so changed since the covenant was made that to enforce it against one owner would be of no substantial benefit to the persons attempting to enforce it.

This Court also cited *St. Luke's Evangelical Lutheran Church v. Hales*, in which the Court of Appeals described the change as "[s]uch a [radical] change in the neighborhood conditions as to defeat the purpose of the original restriction and as to make equitable interference unjust and futile."⁹ In other words, "[t]his defense applies if there is 'a material change in the character of the neighborhood . . . so as to 'render perpetuation of the restriction of no substantial benefit to the dominant estate and to defeat the object or purpose of the restriction.'"¹⁰

Here, there was no evidence presented to the trial court that would show such a change occurred throughout the area covered by the covenant. The covenant in question covered 460 acres along a two-mile stretch of the Washougal River. The River Glen Subdivision comprises roughly 10 of the 460 acres covered by the covenant and only several hundred feet of the two miles of riverfront covered by the covenant. Thus, even if conditions within the River Glen Subdivision had changed dramatically

⁹ *St. Luke's Evangelical Lutheran Church v. Hales, supra*, at 488.

¹⁰ *Id.* at 485 (quotations omitted).

since the covenant was created, this would amount to a change in only two percent of the total property covered by the covenant. Any changes within this small corner of the covered property would be inadequate to support a finding that the circumstances had so radically changed throughout the area covered by the covenant that the covenant's purpose had been defeated.

Moreover, one could just as easily argue that the purpose of the covenant—to protect the Washougal River from pollution—is advanced by the creation of small residential lots within the covered area. As the lots get smaller, and the housing density increases, the covenant's setback becomes even more important to protect the river. As noted by this Court in *Lane I*: "While restrictive covenants were once disfavored . . . modern courts have recognized the necessity of enforcing such restrictions to protect the public and private property owners from the increased pressures of urbanization."¹¹

¹¹ *Lane I* (quoting *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 179, 810 P.2d 27, review denied, 117 Wn.2d 1013 (1991)).

2. Changes in Technology Have Not Rendered the Covenant Obsolete

While there is no case in Washington so holding, it is possible that a change in technology could render a restrictive covenant obsolete. For example, a restrictive covenant may seek to avoid the blight of telephone poles and wires by prohibiting all property owners from having telephones in their homes. A change in technology—*i.e.*, cellular telephone technology—could render such a covenant obsolete, because property owners could have telephones in their homes without the necessity of installing any telephone poles or wires. In such a case, it could be said that the covenant has been terminated by a change in technology.

Here, the trial court relied heavily on the technological sophistication of Mr. L'Hommedieu's septic systems in reaching the decision not to enforce the covenant. For example, the trial court found that Mr. L'Hommedieu's systems "are designed and approved to achieve the State's highest effluent quality standard," and they include an "aerobic treatment unit," an "ultraviolet disinfectant light," and "pressure distribution laterals." (Finding No. 13) The trial court referred to these systems as "sophisticated" (Finding No. 14) and found that there is "very

little, if any, possibility that L'Hommedieu's septic systems would pollute the stream or the Washougal River." (Finding No. 19)

But these technological advances are not a qualitative change in septic system technology that render the setback obsolete; instead, they are an incremental improvement in the quantitative risk posed by the septic systems. The experts were unanimous in their opinions that: (1) every septic system, no matter how technologically advanced, still poses a risk of pollution; (2) that the shorter the setback, the higher the risk of pollution; (3) that they would not have approved these systems had they been located closer to the tributary; and (4) that physical separation is still the last line of defense against potential pollution of the river.

In sum, the setback still matters, the covenant still advances its purpose of protecting the river from pollution, and the covenant has not been rendered obsolete by the improvements in septic system technology. To return to the hypothetical telephone example, Mr. L'Hommedieu's evidence regarding the sophisticated nature of his systems would be tantamount to arguing that telephones should be allowed in one particular house because it would require *fewer* telephone poles and wires—not because technology had *eliminated the need for them altogether*. Such an argument should be rejected.

The reason the trial court reached the wrong legal conclusion was because it answered the wrong question. The question is not: "Will Mr. L'Hommedieu's septic system actually pollute the river?" The question is: "Does a 50-foot setback throughout all 460 acres still, to this day, reduce the risk of pollution to the river." Because the undisputed answer to the correct question is in the affirmative, the covenant has not—as a matter of law—been rendered obsolete, and the doctrine of changed circumstances does not warrant terminating the covenant.

3. The Changed Circumstances Doctrine Should Not be Applied in a Piecemeal Fashion to Grant Individual "Variances" from the Covenant

The trial court ultimately found that the covenant was "generally valid" but carved out an exception, in the nature of a "variance," for Mr. L'Hommedieu's particular septic systems. This approach is not warranted by the "changed circumstances" doctrine. Under the doctrine, the covenant should be determined either to be valid or invalid throughout the entire area covered by the covenant. As Professor Stoebuck has written, "A better result is that the change of neighborhood doctrine extinguishes,

not merely one remedy, but the right itself, *i.e.*, extinguishes the covenant."¹²

This result is preferable because it avoids all of the ills that the trial court's "variance" approach invites. Under this approach, the enforcement of covenants would not be uniform. Instead, the enforcement would turn on the particular facts for each piece of property that comes before the courts. This could turn the courts into a covenant-variance hearing board, could result in inconsistent decisions throughout the restricted property, and could lead to a patchwork of enforcement. All of this could lead to inequitable results where property subject to the same covenant could be put to dramatically different uses depending on the financial condition of the property owner and the skill of the owner's lawyers. Such an *ad hoc* approach would also lead to more litigation as each property owner tried to prove to the court that his or her particular violation of the covenant would not cause any actual harm.

In sum, the "changed circumstances" doctrine does not provide a legally adequate excuse for Mr. L'Hommedieu's knowing decision to install two septic systems that violate the setback required by the

¹² 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* sec. 3.8, at 144 (2004).

covenant. The trial court erred in applying this affirmative defense to justify its refusal to enforce the covenant against Mr. L'Hommedieu, and this Court should reverse and remand with directions to enforce the covenant.

C. The Trial Court Erroneously Applied Balanced the Equities, Even Though Mr. L'Hommedieu Proceeded with Full Knowledge

The alternative basis cited by the trial court for not enforcing the covenant is that the "balancing of the equities" did not militate in favor of enforcement. As the trial court concluded:

Alternatively, the balancing of the equities also weighs against enforcement of the deed restriction as demonstrated by the aforementioned findings, among others, (1) the lack of benefit to the Lanes, L'Hommedieu and the public if the deed restriction is enforced, (2) the resulting loss of a legally buildable lot if the deed restriction is enforced, (3) and the sophistication of L'Hommedieu's septic systems.

(Finding No. 27)

The Lanes do not contend that the trial court abused its discretion in *the manner* in which it balance the equities. Rather the trial court erred by conducting *any balancing of the equities whatever* because Washington law clearly prohibited the trial court from doing so.

In the case of *Hollis v. Garwall, Inc.*, the Supreme Court confronted squarely the issue presented here: can one who builds with actual knowledge of the covenant ask the court to balance the equities should it find the covenant has been violated?¹³ In *Hollis*, the Supreme Court answered the question plainly and clearly. “[T]he benefit of the doctrine of balancing the equities, or relative hardships, is reserved for the innocent defendant who proceeds without knowledge or warning that his activity encroaches upon another's property rights.”¹⁴

The Supreme Court’s prohibition in *Hollis* has been adhered to consistently by Washington’s courts.

For example, in *Hanson v. Hanly*,¹⁵ one neighbor sued another regarding the construction of a large barn-like structure used to store boats, old cars, and various other “junk.” The properties were within a subdivision that had a restrictive covenant prohibiting buildings “not ... customarily appurtenant to suburban residences.”¹⁶ The court found that the barn violated this covenant and order its removal, despite the defendants’ offer to modify the structure and its use in an attempt to

¹³ *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999).

¹⁴ *Id.* at 700-701.

¹⁵ 62 Wn.2d 482, 383 P.2d 494 (1963).

¹⁶ *Hanson v. Hanly*, 62 Wn.2d 482, 483-84, 383 P.2d 494 (1963).

conform to the covenant. The court did not engage in any “balancing of the equities” because the defendant constructed the barn after he was put on notice that it violated the restrictive covenant.

Similarly, in *Reading v. Keller*,¹⁷ the defendants built their house twenty feet from the street, despite the covenant prohibiting distances less than thirty feet. The neighbors warned the defendants of the violation before the house was built, and the neighbors threatened to sue if the defendants did not rectify the situation. The defendants built anyway, and the neighbors sued. The trial court entered judgment requiring the defendants to move the house back ten feet. The Supreme Court affirmed, without engaging in any balancing of the relative benefits and burdens, noting that “the appellants [defendants], with knowledge of the restrictive building covenant, built their home in violation of it.”¹⁸

Another example is the case of *Foster v. Nehls*,¹⁹ in which the court ordered the defendants to remove the entire top story of their house. The court gave substantial consideration to the fact that the defendants had been notified by their neighbors, before the pouring of the foundation, that the house would violate the restrictive height covenant. Despite the threat

¹⁷ 67 Wn.2d 86, 406 P.2d 634 (1965).

¹⁸ *Id.* at 89.

¹⁹ 15 Wn. App. 749, 551 P.2d 768 (1976).

of litigation, the defendants persisted and built the house. The defendants were ordered to remove the entire upper story in order to comply with the covenant.

When taken a step further, intentional flagrant bad acts can result in the razing of the entire house. In *Heath v. Uraga*,²⁰ the defendants not only violated the height restriction, but continued to build on the house even after the committee to which they had submitted proposed plans rejected those plans. The defendants refused all attempted negotiations with the neighborhood committee regarding the height of the house. Despite all warnings, the defendants had completely finished construction by the time of the trial. The trial court ordered the entire house razed. The appellate court affirmed, rejecting the defendants' offer (made for the first time on appeal) to lower the house in order to bring it into compliance. Because the defendants built their house with "full knowledge" that the plans were incomplete and unapproved and that the height violated the express terms of the covenant, the judgment was affirmed.

The courts' uniform adherence to the prohibition in *Hollis v. Garwall* has continued with several recent decisions.

²⁰ 106 Wn. App. 506, 24 P.3d 413 (2001).

In *Edleman v. Riviera Sec.*, the Court of Appeals affirmed an “injunction requiring complete demolition of the Edlemans' house and garage” because it violated various setbacks set forth in the restrictive covenants.²¹ On appeal, the Edlemans argued that the trial court “erred by refusing to balance the equities of the parties before issuing the injunction requiring demolition of their home and garage.” The Court of Appeals responded simply: “We disagree.”

In doing so, the court invoked *Hollis v. Garwall*. “The benefit of the doctrine of balancing the equities, however, is reserved for the innocent party who proceeds without knowledge or warning that his structure encroaches upon another’s property or property rights.”²² The court noted further that “if a party takes a calculated risk by proceeding, despite notice that doing so violates the property rights of others, that party forfeits the right to a balancing of the equities.” Thus, the Court of Appeals held that the trial court was correct in its refusal to balance the equities:

The trial court’s findings that the Edlemans were on notice that their construction was in violation of the covenants are supported by substantial evidence. Those

²¹ *Edleman v. Riviera Sec.*, 137 Wn. App. 665, 151 P.3d 1038 (2007).

²² *Id.* at 671.

findings support the trial court's conclusion that the Edlemans are not entitled to a balancing of the equities.

Similarly, in *Wimberly v. Caravello*, the Court of Appeals upheld a trial court's injunction calling for the removal of a three-story garage/home office, "despite the fact that the structure was substantially completed."²³ On appeal, the defendant argued that the plaintiffs had "failed to show how they would be harmed by this building."²⁴ The Court of Appeals rejected this argument, ultimately holding that: "Mr. Caravello forfeited the benefit of balancing relative hardship by proceeding with construction after receiving notice he was invading the property rights of his neighbors" by violating the covenant. The court further noted that Mr. Caravello was warned of impending objections as soon as the planned dimensions of his structure became known, and he further compounded his own injury by continuing to build after the lawsuit was filed and served on him.

The same is true for Mr. L'Hommedieu. He was warned by the Lanes of the impending violation of the covenant's setback as soon as the Lanes learned of it. At trial, Mr. L'Hommedieu admitted that he knew of

²³ 136 Wn. App. 327, 149 P.3d 402 (2006).

²⁴ *Id.*

the potential violation as early as March 2003. He was also served with a complaint alleging a violation of the covenant in June 2003, and he was temporarily enjoined from building the house by a preliminary injunction entered on July 17, 2003. In its preliminary injunction order, this Court stated that the Lanes had a “clear equitable right to a preliminary injunction based on the covenant” and that there was an imminent danger of invasion of that right “because the septic plan proposed by L’Hommedieu contemplates construction of a septic system within fifty feet of a Class V stream ...”

Despite these warning signs, Mr. L’Hommedieu took a calculated risk. After the injunction was lifted, and while this case was up on appeal, Mr. L’Hommedieu commenced and completed the construction of a new house, and he installed two septic systems which drained within 50 feet of the stream. Mr. L’Hommedieu admitted on the stand that, while he was building his new house, he knew there was a risk that the septic systems would be found to violate the covenant and might have to be removed.

In sum, Mr. L’Hommedieu is not an “innocent builder” who is entitled to a balancing of the equities. As such, he was not entitled to be excused from complying with the covenant based on any balancing of the equities. Accordingly, the trial court clearly erred when it based its

decision, in the alternative, on its balancing of the equities, and the trial court should be reversed on this ground as well.

D. The Lanes Did not "Wrongfully" Obtain a Preliminary Injunction

Finally, the trial court concluded that the Lanes "wrongfully enjoined" Mr. L'Hommedieu when the Lanes sought and obtained provisional injunctive relief. (Conclusion of Law No. 3) Based on this conclusion, the trial court awarded Mr. L'Hommedieu "damages in the amount of \$12,513 for attorneys fees incurred in quashing the preliminary injunction." (Ibid.) This money was spent obtaining the summary judgment which, it turns out, was not proper and was reversed by this Court.

If this Court again reverses the trial court and directs it to enter an injunction enforcing the covenant against Mr. L'Hommedieu, then it should also reverse the award of damages for a "wrongful" injunction. But, even if this court were to allow Mr. L'Hommedieu's violations of the covenant to stand, the Lanes should not be punished for seeking a TRO/preliminary injunction. The Lanes did so in the hopes of avoiding the very situation in which the parties now find themselves—facing the

potential of having to unwind the violations of the covenant at great expense. There was no finding by the trial court that the Lanes proceeded in an improper manner or in bad faith in obtaining the provisional relief, and it was prudent for them to do so. Accordingly, at a minimum, the trial court's award of \$12,513 in attorney's fees should be reversed.

VI. Conclusion

For the foregoing reasons, the Lanes respectfully request this Court reverse the trial court's judgment and remand this case to the trial court with directions to enter a judgment that enjoins Mr. L'Hommedieu's continued violations of the covenant.

DATED this 4th day of January, 2008.

MILLER NASH LLP



Steven E. Turner
WSBA No. 33840

Attorneys for Appellants
Dennis and Elizabeth
Lane

APPENDIX

Findings of Fact and Conclusions of Law

Lane v. Skamania County, et al., Court of Appeals No. 31772-9-II,
Opinion

1 1. Plaintiffs' claim for injunctive relief to enforce a deed restriction and Defendants'
2 affirmative defenses thereto.

3 2. Defendants' claim for damages.

4 The witnesses who were called and testified at the trial include Dennis Lane, Elizabeth
5 Lane, David Gorman, Robert Sweeney, David Prosser, Lawrence L'Hommedieu, Shelane
6 L'Hommedieu, David L'Hommedieu, Dennis Taylor, Gary Taylor, Mark Mazeski, Stephen
7 Swope, Bruce Scherling, and Steven Roberts. The exhibits which were offered, admitted into
8 evidence, and considered by the court, are set forth in the clerk's official Exhibit List.

9 Based on the evidence presented at trial, the Court makes the following Findings of
10 Fact:

11 **FINDINGS OF FACT**

12 1. On August 5, 1944, a deed restriction was created on 460 acres of real property
13 lying adjacent to the Washougal River in Skamania County ("County"), Washington. The
14 deed describes the real property as:

- 15 a. the northwest quarter (1/4) of the northwest quarter (1/4) of Section 14
16 b. the southwest quarter (1/4) of the southwest quarter (1/4) of Section 14
17 c. the east half (1/2) of Section 15
18 d. the west half (1/2) of the west half (1/2) of the northwest quarter (1/4) of
Section 23
19 e. the west half (1/2) of the northwest quarter (1/4) of the southwest quarter (1/4)
of Section 23.

20 ("conveyance area").

21 2. This deed restriction reads, in relevant part, as follows:

22 [t]he aforesaid property or any buildings or structures erected thereon, shall not
23 be used for any purpose which will cause pollution (sic.) to the waters of the
Washougal River or any tributary thereof, and all sewage disposal shall be by
means of a septic tank of standard design, and no septic tank or drainage shall

1 discharge within fifty feet of the banks of the Washougal River or any tributary
2 thereof.

3 3. The purpose of this deed restriction was to prevent pollution to the Washougal
4 River ("River") or its tributaries.

5 4. At the time that this deed restriction was created in 1944, the conveyance area
6 was rural in nature and had not been subdivided.

7 5. In 1944, a watercourse flowed off of a hill west of the River, flowing toward
8 both the River and real property within the conveyance area that is now owned by Defendants
9 Lawrence and Shelane L'Hommedieu ("L'Hommedieu"). This watercourse did not flow
10 directly into the River. Rather, the watercourse dispersed in an area of flat topography,
11 thereby creating a marsh in which the water percolated into the ground.

12 6. The plat for the River Glen Subdivision ("Subdivision") was approved by the
13 County in 1966. The majority of the Subdivision is within the conveyance area. Plat
14 approval created 25 urban-sized lots of approximately one-third to one-half acre each. The
15 County approval established each lot in the Subdivision as a separate residential building site.

16 7. In 1973, David L'Hommedieu, Defendant Lawrence L'Hommedieu's father,
17 purchased Lot 8 in the Subdivision. David L'Hommedieu subsequently bought Lot 9 of the
18 River Glen subdivision in the late 1980s or early 1990s. Lot 8 is adjacent to Lot 9. Lots 8 and
19 9 each have approximately 75 feet of River frontage.

20 8. At the time that David L'Hommedieu purchased Lot 8 in 1973, a stream existed
21 that emptied into the River. The stream was located generally along the common boundary
22 between Lots 8 and 9. David L'Hommedieu's predecessor in interest created the stream by
23 digging a ditch that drained the previously marshy area.

GROEN STEPHENS & KLINGE LLP
11100 NE 8th Street, Suite 750
Bellevue, Washington 98004
Telephone (425) 453-6206
FAX (425) 453-6224

1 9. The aforesaid stream is now a tributary of the Washougal River. At the time that
2 this deed restriction was created in 1944, it was not a tributary because it did not flow into the
3 River. However, after the ditch was constructed that drained the marshy area directly into the
4 River, it became a tributary.

5 10. David L'Hommedieu subsequently deeded both Lots 8 and 9 to his son,
6 Lawrence L'Hommedieu. In 1998, Lawrence L'Hommedieu constructed a small home on Lot
7 8. The drainfield for the septic system was located on Lot 9, and was more than 50 feet from
8 the stream flowing across the property. L'Hommedieu made plans in 2002 to construct a new,
9 larger home on Lot 9. The existing home on Lot 8 and the new home on Lot 9 were to be
10 served by separate septic systems wholly contained on each lot. This meant that each of the
11 drainfields for the septic systems on Lot 8 and 9 would be within 50 feet of the stream.

12 11. The Washington Administrative Code generally requires a 100-foot setback from
13 surface waters for septic systems. Setbacks may be less than 100 feet if an approved
14 alternative on-site septic system is installed that meets stringent effluent quality standards.

15 12. Conventional gravity septic systems are composed of three components: a tank,
16 distribution lines or laterals, and soil. The tank separates the solid and liquid wastes, but does
17 not significantly reduce fecal coliforms. The effluent then moves by gravity from the tank out
18 to perforated drain lines and into the soil. These systems rely primarily upon the soil to treat
19 the effluent.

20 13. L'Hommedieu's septic systems are designed and approved to achieve the State's
21 highest effluent quality standard. Specifically, L'Hommedieu's systems are comprised of a
22 standard two-compartment septic tank, an aerobic treatment unit ("ATU"), an ultraviolet
23

1 disinfectant light ("UV light"), and pressure distribution laterals. Effluent enters the septic
2 tank which separates the solid and liquid wastes. Then, the ATU creates any oxygen rich
3 environment for organisms that facilitates rapid biodegradation and decomposition of the
4 effluent. The effluent is further treated by a UV light, which inactivates fecal coliform via
5 electromagnetic radiation. Finally, pressurized septic laterals provide for an even distribution
6 of effluent throughout the drainfield soil. Unlike conventional gravity systems, this system
7 pretreats the effluent before discharge into the soil.

8 14. L'Hommedieu's sophisticated septic systems were approved by the County
9 agency responsible for insuring that the streams and rivers of Skamania County are not
10 polluted.

11 15. In 1944, septic systems consisted of tanks that were either open bottom or led to
12 a gravity drainfield. Such systems would likely pollute a watercourse located within 50 feet.
13 Even conventional gravity systems are now much improved over the systems used in 1944.

14 16. L'Hommedieu's septic system, although located within 50 feet of the stream, is
15 actually less likely to pollute the stream than a conventional gravity system 50 feet from the
16 stream.

17 17. There would be no substantial benefit to the public, to the plaintiffs, or to the
18 environment by enforcing the 50-foot setback as it applies to L'Hommedieu. The deed
19 restriction has been outmoded and lost its usefulness as to modern septic systems.

20 18. Enforcing the deed restriction would mean that one building lot would be useless
21 for its intended purpose that is to construct a residence thereon. It was intended at the time
22
23

1 that the Subdivision was created that each lot would be a lot allowing for the construction of a
2 residence.

3 19. The overwhelming evidence in this case is that there is very little, if any,
4 possibility that L'Hommedieu's septic systems would pollute the stream or the Washougal
5 River.

6 20. Over the years since 1944, there have been numerous instances within the
7 conveyance area where structures and septic systems have been constructed closer than 50
8 feet to the Washougal River or its tributaries. The Mascos, owners of Lots 2, 3, 4, and 5,
9 maintained an outhouse that was closer than 50 feet to the River. Similarly, Lot 9, which is
10 now owned by L'Hommedieu, had a septic system that discharged within 50 feet of the
11 stream.

12 21. The Lanes have constructed a deck very near the River which contains treated
13 lumber which is now considered a pollutant, and there is always the possibility that rainwater
14 could leach the chemicals in the deck and thus pollute the River.

15 22. The Lanes brought this suit to enjoin L'Hommedieu from constructing their new
16 house and installing septic systems on Lots 8 and 9 closer than 50 feet to the aforementioned
17 stream.

18 23. The Lanes obtained a Temporary Restraining Order ("TRO") on June 9, 2003,
19 which was converted to a preliminary injunction on June 26, 2003. On August 29, 2003, the
20 Court granted summary judgment in favor of L'Hommedieu and quashed the injunction.
21 L'Hommedieu incurred \$12,513 in attorney's fees to quash the preliminary injunction.

1 Summary judgment was subsequently reversed on appeal. The instant trial followed on
2 remand.

3 24. As a result of the TRO and preliminary injunction, L'Hommedieu was delayed in
4 constructing the house on Lot 9 for approximately 6 months from June of 2003 to December
5 2003.

6 25. L'Hommedieu originally applied for a \$352,000 construction loan on April 18,
7 2003. In March of 2005, subsequent to completing construction of the house, L'Hommedieu
8 received a 30-year loan for \$580,000. The interest rate in 2003 was 5.65% and in March of
9 2005 the interest rate was 6%. However, the two loans were for differing amounts and the
10 Court finds that the 6 months delay did not cause Mr. L'Hommedieu any substantial damages
11 for loss of favorable financing, increased construction costs, or loss of use of a completed
12 house.

13 26. The Lanes did not bring this suit in bad faith.

14 27. Alternatively, the balancing of the equities also weighs against enforcement of
15 the deed restriction as demonstrated by the aforementioned findings, including, among others,
16 (1) the lack of benefit to the Lanes, L'Hommedieu and the public if the deed restriction is
17 enforced, (2) the resulting loss of a legally buildable lot if the deed restriction is enforced, (3)
18 and the sophistication of L'Hommedieu's septic systems.

19 CONCLUSIONS OF LAW

20 1. The 1994 deed restriction is a valid restriction.

21 2. Although generally valid, as applied to Lots 8 and 9 and L'Hommedieu's septic
22 systems, the deed restriction does not apply.

317729MAJ

DO NOT CITE. SEE RAP 10.4(h).

Court of Appeals Division II
State of Washington

Opinion Information Sheet

Docket Number: 31772-9-II
Title of Case: Dennis & Elizabeth Lane, Appellants v. Skamania
Co. etal, Respondents
File Date: 08/03/2005

SOURCE OF APPEAL

Appeal from Superior Court of Skamania County

Docket No: 03-2-00082-7

Judgment or order under review

Date filed: 04/29/2004

Judge signing: Hon. E. Thompson Reynolds

JUDGES

Authored by Elaine Houghton
Concurring: David H. Armstrong
J Dean Morgan

COUNSEL OF RECORD

Counsel for Appellant(s)
Steven Erik Turner
Miller Nash LLP
500 Broadway St Ste 400
Vancouver, WA 98660-3324

Counsel for Respondent(s)
John Maurice Groen
Groen Stephens & Klinge LLP
11100 NE 8th St Ste 750
Bellevue, WA 98004-4469

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DENNIS LANE and ELIZABETH LANE, No. 31772-9-II
husband and wife,

Appellants,

v.

SKAMANIA COUNTY, a municipal
corporation,

Defendant,

LAWRENCE L'HOMMEDIEU and
JANE DOE L'HOMMEDIEU, husband
and wife,

UNPUBLISHED OPINION

Respondents.

HOUGHTON, P.J. -- After Dennis and Elizabeth Lane sought to enforce a restrictive covenant, the trial court granted Lawrence L'Hommedieu's motion for partial summary judgment. The Lanes appeal, claiming that genuine issues of material fact preclude summary judgment. We agree and reverse and remand.

FACTS

This appeal involves the validity and interpretation of a 1944 covenant. The parties generally do not dispute the facts.

In September 1944, E.E. and Pearl Carroll and Russell and Viretta Ward sold property in Skamania County (the county) to Millard and Verna Christal. The deed described the property:

The Northwest quarter (1/4) of the Northwest quarter (1/4) and the Southwest quarter (1/4) of the Southwest quarter (1/4) of Section 14, and the East half (1/2) of Section Fifteen (15) and the West half (1/2) of the West half (1/2) of the Northwest quarter (1/4) and the West half (1/2) of the Northwest quarter (1/4) of the Southwest quarter (1/4) of Section twenty-three {23} in township 2 North, Range 5 East of the Willamette Meridian, in the County of Skamania, State of Washington.

I Clerk's Papers (CP) at 10.

Additionally, the deed contained a restrictive covenant:

{T}he aforesaid property or any buildings or structures erected thereon, shall not be used for any purpose which will cause pollution {sic} to the waters of the Washougal River or any tributary thereof, and all sewage disposal shall be by means of a septic tank of standard design, and no septic tank or drainage shall discharge within fifty feet of the banks of the Washougal River or any tributary thereof.

These covenants may be voided and made of no effect by the unanimous consent of all owners of the property above described.

I CP at 11.

These properties changed hands several times. In 1966, the county engineer approved a plat map of the River Glen subdivision, portions of which are bound by the covenant. The parties agree that the chains of title for the properties in question trace back to the 1944 deed.

The Lanes and L'Hommedieu own adjacent property in the River Glen subdivision. Both parties' property borders the Washougal River. The Lanes own Lots 6 and 7 and have a home on the parcels. L'Hommedieu owns Lots 8 and 9, the property to the south of the Lanes' parcels. A waterway runs mostly along the border of Lots 8 and 9.

L'Hommedieu lived in an existing home on Lot 8. He wanted to build a second home on Lot 9. As part of the construction project, he proposed to build two septic systems. The plans called for the septic systems to be located approximately 18 feet from the waterway.

According to the Skamania County Code (SCC), certain streams, creeks, and rivers must have a 25-foot buffer zone, unless the property owner receives a variance. SCC 21A.04.020(C) (3) (b) and (4) (c) (v). The code regulated the waterway on L'Hommedieu's property. SCC, Appendix C (defining 'Class V' streams, creeks, or rivers as 'all natural waters not classified as Class I, II, III or IV, including streams with or without well-defined channels, areas of perennial or intermittent seepage, ponds,

natural sinks and drainageways having short periods of spring or storm runoff'). Because his proposed septic systems were within the 25-foot buffer zone, L'Hommedieu sought and received a variance.

The Lanes filed a petition for review under the Land Use Petition Act (LUPA), challenging the variance. This petition also sought permanent relief enjoining any construction on L'Hommedieu's property violating the 1944 covenant.

L'Hommedieu moved for partial summary judgment on the covenant claim. The trial court granted the motion. In its oral ruling, the trial court determined the following: (1) the Lanes could enforce the covenant, (2) the covenant's purpose was to prevent pollution of the Washougal River, (3) the waterway on L'Hommedieu's property did not constitute a 'tributary' as intended by the original parties to the covenant, and (4) the purpose of the covenant was not defeated by the septic systems because they were 'very sophisticated' and 'probably more efficient than a septic system would have been in 1944 using the standards that were in effect in 1944.'² Report of Proceedings (8/28/2003) (RP) at 7.

The trial court denied the Lanes' motion for reconsideration. It also affirmed the land use decision that granted the variance.³

The Lanes appeal.

ANALYSIS

Interpretation of the Covenant, L'Hommedieu's Arguments

L'Hommedieu urges us to affirm because the covenant is unenforceable. He sets forth several of the arguments that he asserted below in his motion for partial summary judgment. The court disagreed, determining that the covenant was valid and enforceable. We address his arguments before turning to the Lanes' assignments of error.

Validity of the Covenant

A 'covenant' is 'a covenantor's promise to a covenantee to do or to refrain from doing something, which the covenantee may enforce in court.'¹⁷ William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* sec. 3.1, at 123 (2004). A covenant that runs with the land may be enforced by a successor of the covenantee or against a successor of the covenantor. *17 Wash. Practice* sec. 3.1, at 123.

Generally, there are two types of running covenants, real covenants (developed and enforced at law) and equitable covenants (developed and enforced in the Chancery). *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691, 974 P.2d 836 (1999). But distinctions between these types of covenants have 'largely vanished' from Washington case law. *1515--1519 Lakeview Boulevard Condo. Assoc. v. Apartment Sales Corp.*, 146 Wn.2d 194, 203, 43 P.3d 1233 (2002).

Running covenants are useful because, inter alia, they 'permit the creation of stable arrangements for shared use of land, providing an alternative to acquisition of fee-simple interests for transportation corridors and natural-resource exploitation.'¹⁸ *Lake Limerick Country Club v. Hunt Manufactured Homes, Inc.*, 120 Wn. App. 246, 253, 84 P.3d 295 (2004) (quoting *Restatement (Third) of Property: Servitudes* sec. 1.1 cmt. a, at 9 (2000)). 'While restrictive covenants were once disfavored . . . modern courts have recognized the necessity of enforcing such restrictions to protect the public and private property owners from the increased pressures of urbanization.'¹⁹ *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 179, 810 P.2d 27, review denied, 117 Wn.2d 1013 (1991).

In *1515--1519 Lakeview*, our Supreme Court set forth the elements of a running covenant:

(1) a promise which is enforceable between the original parties; (2) which touches and concerns; (3) which the parties intended to bind successors; and (4) which is sought to be enforced by an original party or a successor, against an original party or a successor in possession; (5) who has notice of the covenant or has not given value.

146 Wn.2d at 203 (quoting William B. Stoebuck, Running Covenants: An Analytical Primer, 52 Wash. L. Rev. 861, 909-10 (1977)). If the covenant does not meet these requirements, it is simply a contract enforceable only by the original parties. 1515--1519 Lakeview, 146 Wn.2d at 202.

Here, the September 1944 covenant read, in relevant part:

{T}he aforesaid property or any buildings or structures erected thereon, shall not be used for any purpose which will cause pollution {sic} to the waters of the Washougal River or any tributary thereof, and all sewage disposal shall be by means of a septic tank of standard design, and no septic tank or drainage shall discharge within fifty feet of the banks of the Washougal River or any tributary thereof.

These covenants may be voided and made of no effect by the unanimous consent of all owners of the property above described.

I CP at 11.

The parties dispute two elements, namely, whether the 1944 covenant constituted an enforceable promise and whether L'Hommedieu had sufficient notice.

Enforceable Promise

First, L'Hommedieu claims that the covenant is not enforceable because it contains an illusory promise. In the alternative, he argues that the covenant terminated by merger.

L'Hommedieu raises his merger argument for the first time on appeal. A party may state a basis to affirm for the first time on appeal if the 'record has been sufficiently developed to fairly consider the ground.' RAP 2.5(a). That is not the case here and we do not address the argument.⁴

L'Hommedieu's primary argument, however, is that the 1944 contract was illusory and thus the covenant is unenforceable.

A supposed promise is illusory if it is so indefinite that it cannot be enforced or if its performance is optional or discretionary on the part of the promisor. *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 317, 103 P.3d 753 (2004). Illusory contracts cannot be enforced because they lack consideration. *St. John Med. Ctr. v. Dep't of Soc. & Health Servs.*, 110 Wn. App. 51, 68, 38 P.3d 383, review denied, 146 Wn.2d 1023 (2002).

Here, the relevant language reads: 'These covenants may be voided and made of no effect by the unanimous consent of all owners of the property above described.' I CP at 11. When the Carrolls and Wards transferred the property, the Christals became the sole 'owners of the property above described.' I CP at 11. Arguably, then, performance of the covenant became optional or discretionary at the time of transfer because of the Christals' sole ownership.

Assuming, without finding, that the September 1944 promise was illusory, the Christals incorporated the covenant by reference in subsequent property transfers. On November 6, 1944, the Christals, retaining section 23 and part of section 14, sold another part of section 14 and all of section 15 to the Tappendorffs. And the deed stated that the transfer was subject to 'conditions and restrictions as contained in {the} deed of record.' II CP at 135. Thus, on November 6, 1944, the 'out' clause was no longer contractually problematic because there were multiple 'owners of the property above described.' I CP at 11. When the deed incorporated the covenant, it revived its terms.

Further, the Tappendorffs quickly sold their portion of section 14 to the Montchalins on November 14, 1944, keeping section 15. Similarly, their deed incorporated the covenant by reference; the transfer remained subject to 'building restrictions and conditions of record.' II CP at 137. On this date, there were three couples who owned property subject to covenant,

rendering the 'out' clause permissible.

Because later deeds incorporated the covenant by reference, the covenant remains enforceable.

Notice

Next, L'Hommedieu contends that he did not have notice of the covenant. In support of his argument, he cites his declaration, which states that both he and numerous neighbors in the subdivision were unaware of the covenant.

Like his merger claim, L'Hommedieu did not assert this argument below. Nor did the trial court make a ruling on this basis. Under RAP 2.5(a), then, he may present this ground to affirm only if there is sufficient evidence in the record to fairly consider it. But the evidence in the record suggests that L'Hommedieu had constructive notice of the covenant.

RCW 65.08.070 provides that when conveyances of real property are recorded, these conveyances are valid as against subsequent purchasers:

A conveyance of real property . . . may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration . . . of the same real property or any portion thereof whose conveyance is first duly recorded.

RCW 65.08.060(3) defines the term 'conveyance' as 'every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected.'

When persons record a covenant, then, third parties are deemed to have constructive notice of such covenants. 17 Wash. Practice sec. 3.16, at 155. As described by Professor Stoebuck:

Notice may be actual or constructive. . . . {T}he recording of an instrument that conveys an interest in land imparts notice of the contents of that instrument to persons who subsequently acquire interests in the land. The recording of an instrument containing an equitable restriction imparts notice of it to persons who later acquire interests in the burdened land. Since covenants are usually contained in formal, recorded instruments, persons subsequently dealing with the land are usually charged with constructive notice of them.

17 Wash. Practice sec. 3.16, at 155-56 (footnotes omitted).

Here, L'Hommedieu had constructive notice of the covenant.⁵ The covenant can be found in deeds recorded in September and November 1944. Whether he had actual notice is a matter for the fact finder. But because the Christals recorded the deed, and thus the covenant, L'Hommedieu had sufficient notice.

As such, the trial court properly found the existence of a valid covenant.

Interpretation of the Covenant, the Lanes' Argument
Nature of the Waterway

The Lanes first argue that reasonable minds could differ as to whether the waterway, bordering L'Hommedieu's property, constitutes a 'tributary' within the covenant's meaning.

On review of any pleadings, depositions, answers to interrogatories, admissions, and affidavits on file, summary judgment is available if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co., 104 Wn. App. 597, 601, 17 P.3d 626 (2000), review denied, 143 Wn.2d 1023 (2001); CR 56(c).⁶ When resolving a motion for summary judgment, we view the facts and all reasonable inferences in the light most favorable to the nonmoving party. Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 668, 911 P.2d 1301

(1996). Engaging in the same inquiry as the trial court, we review orders granting summary judgment de novo. Mercer Place Condo. Ass'n, 104 Wn. App. at 601.

When interpreting a covenant, our primary objective is to discern the parties' intent. Lakes at Mercer, 61 Wn. App. at 179. We generally look to the covenant's purpose to determine such intent. Lakes at Mercer, 61 Wn. App. at 180.

As a general rule, the parties' intentions present questions of fact. Paradise Orchards Gen. P'ship v. Fearing, 122 Wn. App. 507, 517, 94 P.3d 372 (2004), review denied, 153 Wn.2d 1027 (2005). We interpret terms as a question of law when (1) the interpretation does not depend on the use of extrinsic evidence or (2) if extrinsic evidence is used, only one reasonable interpretation can be drawn from it. Tanner, 128 Wn.2d at 674. Summary judgment is rarely appropriate when extrinsic evidence is needed. Hearst Communications, Inc. v. Seattle Times Co., 120 Wn. App. 784, 791, 86 P.3d 1194 (2004), aff'd, P.3d (2005).

Washington follows the context rule in which 'extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent.' Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). The contract need not be ambiguous before extrinsic evidence is admissible. Berg, 115 Wn.2d at 669. In Hollis, our Supreme Court extended the context rule to restrictive covenants. 137 Wn.2d at 686.

We give undefined terms their 'plain, ordinary and popular' meaning. Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 576, 964 P.2d 1173 (1998) (quoting Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 877, 784 P.2d 507 (1990)). We may ascertain this meaning by reference to standard English dictionaries. Queen City Farms, Inc. v. Cent. Nat'l Ins. Co., 126 Wn.2d 50, 77, 882 P.2d 703 (1994).

When clear and unambiguous, we interpret a covenant's terms as a question of law. Paradise Orchards, 122 Wn. App. at 517 (applying contract law). A provision is ambiguous if it is fairly susceptible to two different, reasonable interpretations. McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 733, 837 P.2d 1000 (1992). But a term is not ambiguous simply because the parties suggest opposing meanings. Paradise Orchards, 122 Wn. App. at 517. Summary judgment is proper if the term, viewed in light of the parties' objective manifestations, has only one reasonable meaning. Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 85, 60 P.3d 1245 (2003).

Here, the covenant provides that 'no septic tank or drainage shall discharge within fifty feet of the banks of the Washougal River or any tributary thereof.' I CP at 11 (emphasis added). In competing declarations, the parties disputed the nature of the waterway.

In his declaration, L'Hommedieu described the waterway:

The ditch that runs through my lots is manmade {sic}. It is not a natural creek. The entire vicinity has historically been fairly wet. The ditch functions to help channel surface waters for better drainage of the area. The ditch is approximately two feet wide and typically has no more than a few inches of flowing water. Although an exact year is uncertain, the ditch was constructed sometime after 1966 when the area was subdivided.

I CP at 18.

In contrast, the Lanes claimed that the waterway had a natural source: {The} stream begins across Washougal River Road, the major route along the Washougal River, and is piped under Washougal River Road and River Glen Road and flows across the L'Hommedieu property to the Washougal River. The source is an underground spring and possibly a mountain lake on a mountain on the other side of the Washougal River Road. We have followed this stream to its source.

II CP at 224.

In its ruling, the trial court first noted that it had reviewed both declarations. It then determined that the waterway was not a 'tributary' within the meaning of the covenant: {L'Hommedieu's} affidavit states that the stream across his property is man-made and was constructed after 1966.

And this is somewhat supported by the affidavit of Dennis and Elizabeth Lane

I cannot find under those facts that this {waterway} meets the requirements for being a tributary of the Washougal River. I don't think that was what was intended. I'd have to go back to the intent of the original people who created the covenant, and they didn't even know anything about this at that time, obviously, this was 1944. It wasn't in existence in 1944. . . . It does not appear to meet the definition of a tributary.

RP at 5-7 (emphasis added). When making this ruling, then, the trial court determined the original parties' intentions, an issue generally reserved for the fact finder. And although the parties disputed these facts, the trial court found that the waterway had been man-made.

Further, the term 'tributary' remains ambiguous because it has more than one reasonable meaning. The covenant does not define the term 'tributary.' I CP at 11. But the common and ordinary meaning of 'tributary' is '{a} stream flowing directly or indirectly into a river.' Black's Law Dictionary 1545 (8th ed. 2004). This definition does not distinguish between naturally-occurring and man-made waterways. Both interpretations are reasonable. Further, man-made channels often capture natural run off displaced by impervious or developed areas. Accordingly, the trial court erred in granting summary judgment on this issue.

Purpose of the Covenant

Finally, the Lanes contend that there is a 'reasonable inference that the 50-foot setback continues to serve its intended purpose of protecting the Washougal River.' Appellant's Brief at 23. They claim that the trial court improperly applied the doctrine of changed neighborhood conditions.

As a defense to enforcement of a covenant, a party may assert changed neighborhood conditions. 17 Wash. Practice sec. 3.8, at 142. Professor Stoebuck described the changed neighborhood doctrine as follows: The fact pattern that gives rise to the defense is that the neighborhood covered by a covenant . . . has so changed since the covenant was made that to enforce it against one owner would be of no substantial benefit to the persons attempting to enforce it. This means, of course, that within the neighborhood the covenant is not now being observed in a number of locations, either because owners are violating it or because persons who might have enforced it have waived enforcement.

17 Wash. Practice sec. 3.8, at 142.

This defense applies if there is 'a material change in the character of the neighborhood

. . . so as to 'render perpetuation of the restriction of no substantial benefit to the dominant estate and to defeat the object or purpose of the restriction.'" St. Luke's Evangelical Lutheran Church v. Hales, 13 Wn. App. 483, 485, 534 P.2d 1379 (quoting Annot. 4 A.L.R.2d 1111, 1119 (1949)), review denied, 86 Wn.2d 1003 (1975). The availability of this defense is generally a question of fact. St. Luke's, 13 Wn. App. at 486.

Here, the trial court explained its ruling:

{I}f Mr. L'Hommedieu's actions somehow polluted the river, first of all, the state wouldn't let him put {in} a septic system But in this case, the purpose of the covenant to prevent pollution is not defeated by

Mr. L'Hommedieu's actions, because, again, the unconverted {sic} affidavits are that this septic system

. . . is a very sophisticated system, that it's probably more efficient than a septic system would have been in 1944 using the standards that were in effect in 1944.

There's an affidavit from another engineer that says, well, this is a good system, however, it could fail. Well, yes, certainly anything could fail. But assuming that the system is maintained and kept up, I'd have to presume that . . . it does control pollution. Which, again, was the purpose of the covenant all along . . . to prevent things from being either built or a septic {system} from being discharged, which would somehow pollute the Washougal River.

RP at 7 (emphasis added). This ruling does not identify a material change in the neighborhood. Nor does it state whether other owners have violated the covenant or waived enforcement. Notably, these issues are questions of fact.

Even if the trial court had identified a material change in the neighborhood, questions of fact remain. The fact finder should decide whether the septic systems' technological sophistication renders the covenant unnecessary. In essence, the trial court's ruling makes the location of the septic systems irrelevant because it is premised on the assumption that the systems will never pollute the Washougal River. This issue is not one properly resolved on summary judgment.

Reversed and remanded.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, P.J.

We concur:

Morgan, J.

Armstrong, J.

1 Although the parties live in a subdivision, the covenant does not derive from a common plan. Rather, the covenant originated in 1944, long before the development of the River Glen subdivision.

2 We may use the trial court's oral ruling to interpret its consistent written ruling. State v. Ward, 125 Wn. App. 138, 145, 104 P.3d 61 (2005).

3 Initially, the Lanes named the county as a defendant. By stipulation, the county is not a party on appeal.

4 Under the merger doctrine, a covenant terminates if a single person or group of persons owns both the benefited and burdened land. Schlager v. Bellport, 118 Wn. App. 536, 539, 76 P.3d 778 (2003) (noting that when the benefit and burden merge, 'the {covenant} ceases to serve any function. Because no one else has an interest in enforcing the {covenant}, {it} terminates.') (quoting Restatement (Third) of Property sec. 7.5 cmt. a (2000)).

Here, L'Hommedieu's motion for partial summary judgment correctly noted that the 1944 deed does not identify the benefited land. Nor did the parties present other evidence to identify such property. Because we cannot determine whether the benefited and burdened land came under common ownership, we do not address his merger argument.

5 Because L'Hommedieu had constructive notice, we do not examine his declaration.

6 CR 56(c) provides, in relevant part: '{T}he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'

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JAN 7 2008
STATE OF WASHINGTON
BY

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Appellant's Opening Brief on:

Samuel A. Rodabough
Groen Stephens & Klinge LLP
11100 N.E. 8th Street, Suite 750
Bellevue, Washington 98004-4469

by the following indicated method:

- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, and deposited with the United States Postal Service at Vancouver, Washington, on the date set forth below.

DATED this 4th day of January, 2008.


Steven E. Turner