

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 36544-8-II
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

DENNIS LANE AND ELIZABETH LANE,
Appellants,
v.
LAWRENCE L'HOMMEDIEU,
Respondent.

APPELLANTS' REPLY BRIEF

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I. Summary of Reply

A. The Trial Court Misapplied The "Changed Circumstances" Defense

Both parties agree that there was no change in the "neighborhood" that would excuse Mr. L'Hommedieu's violation of the deed restriction. The parties differ, however, on whether the court properly excused Mr. L'Hommedieu's violation under the "changed circumstances" defense. In essence, the trial court used this defense to rule that the covenant still controlled the rest of the 460 acres—just not Mr. L'Hommedieu's property. The opposition brief advances numerous arguments in support of the trial court's "variance" approach, but none justifies the trial court's novel application of the "changed circumstances" defense.

For example, Mr. L'Hommedieu claims his septic system will never actually pollute the river. But even if this were true, it does not address the fundamental problem: in order to excuse a violation due to changed circumstances, the trial court must

strike the covenant as to all property covered by the covenant, not just individual properties.

Similarly, Mr. L'Hommedieu states that, due to technological and regulatory advances, the trial court properly struck down the covenant as obsolete. But this is not true. Instead, the trial court upheld the covenant as "generally valid," it just did not apply to Mr. L'Hommedieu's property.

In sum, the trial court erred by seeking to walk a "middle path"—one that upheld the covenant for all other property owners but waived it for Mr. L'Hommedieu. Because this approach is contrary to Washington law, it should be rejected.

B. The Trial Court Balanced The Equities, But It Had No Discretion To Do So

The Supreme Court's pronouncement is clear: a trial court may excuse a deed restriction violation by balancing the equities, but only if the violator proceeded unknowingly.¹

Here, Mr. L'Hommedieu concedes that he did not proceed

¹ *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999).

unknowingly, yet he asks this Court to affirm the trial court's balancing of the equities.

Mr. L'Hommedieu argues that the trial court could balance the equities so long as it did not consider the cost of decommissioning the septic systems. But this argument relies on a strained interpretation of both the trial court's decision and of Washington law. In reaching its decision, the trial court clearly did balance the relative harms and benefits of applying the covenant to Mr. L'Hommedieu's property. Moreover, even if the trial court refrained from considering one particular type of harm, it still lacked any authority to balance any equities. When a valid deed restriction is knowingly violated, the trial court must enjoin the violation—regardless of any balancing of the equities.

II. The Proper Standard of Review is *De Novo*

In the instant appeal, the Lanes assign two errors of law to the trial court:

- (1) the trial court erred in the way it applied the changed circumstances defense; and
- (2) the trial court erred by balancing the equities, even though it lacked the authority to do so.

When an error of law is assigned to a trial court, the proper standard of review is *de novo*. In opposition, Mr. L'Hommedieu asserts the substantial evidence standard of review controls this appeal. But this standard would apply only if the basis of the Lanes' appeal were factual in nature. Because the Lanes do not assign error to any of the trial court's findings that are truly factual findings, Mr. L'Hommedieu's argument is without merit, and the proper standard of review is *de novo*.

In his effort to convince this Court to adopt the more lenient "substantial evidence" standard of review,

Mr. L'Hommedieu mischaracterizes both the Lanes' arguments on appeal and the trial court's findings.

For example, Mr. L'Hommedieu argues that the balancing of the equities is an inherently factual exercise and, therefore, the substantial evidence standard applies. But the Lanes do not assign error to the *manner* in which the trial court balanced the equities; they assign error to the fact that the trial court balanced the equities *at all*.

Similarly, Mr. L'Hommedieu mischaracterizes the way the trial court applied the changed circumstances defense. The opposition claims the trial court used this defense to rule that the "the deed restriction has been rendered unnecessary."² But if the trial court had so found, then it would have stricken the deed restriction throughout the entire 460 acres. Instead, the trial court excused only Mr. L'Hommedieu's violation.

² Respondent's Brief, p. 18.

In sum, Mr. L'Hommedieu proposes the wrong standard of review because he poses the wrong questions. The question is not: "Did the trial court balance the equities correctly?" The question is: "Did the trial court err by balancing the equities at all?" And the question is not: "Is Mr. L'Hommedieu's technology so sophisticated that there is no risk of pollution?" The question is: "Can trial courts grant individual variances from deed restrictions based on the defense of changed circumstances?" Because the issues on appeal are inherently legal issues, this Court should give no heightened deference to the trial court's legal conclusions and should apply a *de novo* standard of review.

III. Rebuttal of Respondent's Arguments

A. The Trial Court Misapplied The "Changed Circumstances" Defense

1. The Trial Court Did Not Base its Ruling on Any Change in the "Neighborhood"

The trial court spent a substantial portion of its findings recounting changes within the River Glen subdivision. As a result, the Lanes spent a portion of their opening brief showing that these changes were insufficient to support a defense based on any changed neighborhood conditions. Mr. L'Hommedieu does not contest this point, so it requires no further discussion.

2. The Trial Court Misapplied the Defense to Grant a "Variance" From the Covenant

As noted above, the trial court upheld the covenant as still valid. Nevertheless, the trial court excused Mr. L'Hommedieu's clear violations of the covenant due to his sophisticated technology. The Lanes concede that a change in technology may invalidate a covenant. But if the covenant had been rendered obsolete by technology, then it would have to be

obsolete for all covered properties, not just for one or two parcels.

In other words, the trial court would have had to find that technological changes had rendered setbacks *irrelevant* to all septic systems that have been installed, or that may be installed, throughout the 460 acres. But the evidence did not prove any such fundamental change in technology. Instead, the evidence merely proved that Mr. L'Hommedieu's particular septic system was highly unlikely to pollute the river.

But this limited proof does not render the covenant obsolete. The evidence also showed there were other septic systems that had been installed—and that may be installed in the future—that were still standard gravity systems. As Mr. L'Hommedieu's sanitation expert testified: "the gravity systems in this region are definitely putting the [Washougal River] region at risk."³

³ Report of Proceedings ("RP") at 565-66.

Thus, the trial court did not find any sweeping changes in technology had rendered the covenant obsolete throughout the 460 acres. Instead, the trial court found the technological sophistication of Mr. L'Hommedieu's particular septic systems provided enough protection against pollution that the 50-foot setback would not provide any additional protection.

While such an *ad hoc*, piecemeal approach may be appropriate in granting variances from local zoning and regulations, it is not an appropriate way to apply the changed circumstances doctrine to deed restrictions. Professor Stoebuck has noted that the changed circumstances doctrine should not be used to excuse individual violations of a covenant, in the nature of granting variances from the covenant. "A better result is that the change of neighborhood doctrine extinguishes, not merely

one remedy, but the right itself, *i.e.*, extinguishes the covenant."⁴

Anticipating this problem, Mr. L'Hommedieu argues the trial court did extinguish the covenant. But this argument misstates the trial court's holding. Rather than extinguishing the covenant, the trial court found the covenant as valid and binding today as it was the day it was enacted—more than sixty years ago—in 1944.⁵ Nevertheless, the trial court declined to apply the covenant to Mr. L'Hommedieu.

By doing so, the trial court sought to tread a middle path between upholding the covenant in general but not applying it in this specific case. But this middle path does not exist; our courts have not applied the changed conditions defense in this manner. To the contrary, in the one reported decision applying

⁴ 17 William B. Stoebeck & John W. Weaver, *Washington Practice: Real Estate: Property Law*, § 3.8 at 144 (2004).

⁵ Findings of Fact and Conclusions of Law, Conclusion No. 1.

this defense, the court invalidated the covenant for all properties touched by the covenant.

In *St. Luke's Evangelical Lutheran Church v. Hales*, the covenant at issue prohibited the use of the property for "business purposes of any kind."⁶ The covenant covered roughly 500 lots, but many of the property owners had long been using their lots "for business purposes, i.e., automobile repair shop in a private garage, nursery, greenhouse, swimming pool business, to name a few."⁷ The appellate court agreed that the character of the neighborhood had changed so materially that further application of the covenant would serve no purpose, and it struck the covenant entirely.

By contrast, the only property owner in this case who is currently violating the 50-foot setback is Mr. L'Hommedieu. In other words, the only "changed circumstances" shown by

⁶ *St. Luke's Evangelical Lutheran Church v. Hales*, 13 Wn. App. 483, 484, 534 P.2d 1379 (1975).

⁷ *Ibid.*

Mr. L'Hommedieu was his own septic system. To analogize to *St. Lukes*, this would be like a single property owner arguing that the covenant prohibiting businesses should be invalidated because that single property owner was already using his own property for business. For obvious reasons, such a "bootstrap" argument should not be allowed to justify an individual owner's violation of a covenant.

There is yet another reason this Court should not affirm the "middle path" that was taken by the trial court. If the trial courts can waive enforcement of any covenant simply by finding the particular violation would cause no actual harm to the other property owners, then the usefulness of restrictive covenants will be greatly diminished. Restrictive covenants are routinely used today to impose uniform restrictions on property owners within a particular area or neighborhood. If the courts start making *ad hoc* decisions regarding which violations do cause harm and which do not, the chances of uniform

enforcement would be greatly diminished, thus reducing the usefulness of restrictive covenants—like the one at issue in this case—that routinely give any property owner the right to seek injunctive relief to enforce the covenant.

In a further effort to prop up the trial court's "variance" approach, Mr. L'Hommedieu argues that there is precedent for a change in technology being used to excuse a particular violation of a deed restriction. Mr. L'Hommedieu cites the case of *Lenhoff v. Burch Bay Real Estate, Inc.* to support this proposition.⁸ But the *Lenhoff* decision does not support such a broad proposition.

In *Lenhoff*, the trial court held that the structure in question was a violation of the covenant—even though the structure used technology that was not foreseen at the time the covenant was drafted. The Court of Appeals reversed the injunction—not because of the change in technology—but

⁸ *Lenhoff v. Burch Bay Real Estate, Inc.*, 22 Wn. App. 520, 587 P.2d 1087 (1978).

because it disagreed with the way the trial court balanced the equities. Thus, the *Lenhoff* case does not stand for the broad proposition for which it is cited by Mr. L'Hommedieu.

Mr. L'Hommedieu further seeks to support the trial court's "variance" approach by arguing that the change in technology has rendered obsolete the covenant's 50-foot setback. Mr. L'Hommedieu argues that "[t]he covenant is outmoded because it is based on a defunct premise" that "the primary mechanism for treating the effluent was the soil itself."⁹ Therefore, according to Mr. L'Hommedieu, the trial court correctly ruled the covenant was obsolete. But this argument suffers from two problems.

First, the trial court did not rule the covenant was obsolete. Instead, the trial court concluded that "[t]he 1944 deed restriction is a valid restriction."¹⁰ Thus, the trial court agreed with the Lanes that the 50-foot setback continues to

⁹ Respondent's Brief, p. 25.

¹⁰ Findings of Fact and Conclusions of Law, Conclusion No. 1.

advance the covenant's purpose of protecting the river from pollution.

Second, Mr. L'Hommedieu's argument would have the effect of selectively striking the 50-foot setback language out of the covenant. The covenant already has a general provision that prohibits using property in a manner that would cause pollution to the Washougal River. But the covenant also provides a much more specific limitation—no septic system can discharge within 50 feet of the river or any tributary thereof. By doing so, the drafters of the covenant were obviously looking to establish a bright-line rule that would provide additional protection to the river. Much like a basic speed law precludes repetitive litigation regarding whether driving 45 M.P.H. in a 35 M.P.H. zone truly poses a safety hazard, the inclusion of the 50-foot bright-line setback precludes repetitive litigation regarding whether any particular septic system truly poses a pollution hazard to the river.

Finally, Mr. L'Hommedieu argues that regulations have rendered the covenant obsolete. Again, the trial court did not find the covenant to be obsolete, and this Court should not strike the covenant based on regulations that are less stringent than the covenant.

Here, the covenant imposes a bright-line 50-foot setback. The regulations would seem to be more stringent because they generally impose a 100-foot setback for conventional systems. But the 100-foot setback can be waived by the authorities, or the regulations may be relaxed or entirely vacated in the future. Thus, the covenant's 50-foot setback is more protective than the regulations: the covenant cannot be waived, and it cannot be repealed except by a unanimous vote of the covered property owners. Thus, the current regulations have not rendered the covenant obsolete.

Mr. L'Hommedieu tries to re-write the record by arguing that the regulation's 100-foot setback does not apply to his

system, even though his own expert, Bruce Scherling, testified that the Washington Administrative Code table requiring the 100-foot setback is the "starting point of setbacks when we talk about drain fields"¹¹ Mr. L'Hommedieu also argues that his system could "literally discharge 0 feet from a water source."¹² But this also contradicts Mr. Scherling's admission that he would not have approved this system unless it were at least 15 feet from the stream, and that he would "never" approve any system "where the drain field is one foot from the stream."¹³ This contention also contradicts Mr. Scherling's testimony that the "final defense against" the risks of septic-system failures is the setback and that, in Mr. L'Hommedieu's situation, "the final defense against pollution is the setback from the surface water or whatever else you're trying to protect."¹⁴

¹¹ RP at 562-63.

¹² Respondent's Brief, p. 29.

¹³ RP 590-91.

¹⁴ RP 598-99.

The bottom line is that—despite technological and regulatory advances—setbacks still matter. Thus, the 50-foot setback is not "obsolete," and the trial court did not find that it was. Accordingly, this Court should reject Mr. L'Hommedieu's invitation to exceed the trial court's legal conclusion and hold that the covenant is obsolete. Accepting the invitation would invalidate prohibitions against pollution that have controlled hundreds of acres of land stretching several miles along the Washougal River's riverbank.

B. The Trial Court Was Precluded from Balancing the Equities

The Supreme Court has made it abundantly clear: "[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."¹⁵ Numerous cases since *Hollis*

¹⁵ *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 699-700, 974 P.2d 836 (1999) (citation omitted) (emphasis added).

have required knowing violations of deed restrictions to be removed, regardless of any balancing of equities. The courts in these cases did not require the complaining party to prove any actual harm, and they did not consider the relative hardships to the two sides. They simply enjoined the violation and ordered that it be corrected, even if doing so meant removing an large storage structure, moving a house ten feet further from the street, removing the upper story of a house, razing a three-story garage/home office, or even razing an entire house.

Mr. L'Hommedieu concedes—as he must—that he proceeded to install the two septic systems with full knowledge and warning that they each violated the 50-foot setback. Nevertheless, Mr. L'Hommedieu argues that the trial court was not precluded from balancing the equities. But none of Mr. L'Hommedieu's arguments has merit.

First, Mr. L'Hommedieu argues that the court could balance the equities, so long as it did not consider the expense

of decommissioning the septic systems. Mr. L'Hommedieu argues that the trial court considered only one harm—that caused by the loss of a buildable lot. It is, frankly, difficult to believe that the trial court could ignore in its analysis of the relative hardship the hardship that would fall upon Mr. L'Hommedieu if the covenant were enforced. For if it were, Mr. L'Hommedieu would have to remove or cease using either septic system and he would not be able to live in either of the houses that he built on his property. Moreover, even if the trial court did not consider certain hardships and only considered other hardships, it does not cure the trial court's legal error. Under *Hollis*, the trial court simply lacked any authority or discretion to weigh the relative hardships because Mr. L'Hommedieu proceeded with advance knowledge of the covenant.

Second, Mr. L'Hommedieu asks this court to disregard all of the cases in which our courts have refused to balance the

equities for the benefit of a knowing violator.

Mr. L'Hommedieu attempts to distinguish these cases by arguing that they all involved property owners who were "trying to profit" from violating the covenant.¹⁶ But it is impossible to distinguish these cases on this basis.

Mr. L'Hommedieu is also "trying to profit" from his violations of the covenant. He removed one septic system that complied with the covenant and installed two septic systems so he could build a second house on his property. Mr. L'Hommedieu admitted at trial that he then listed both houses for a combined price of 1.35 million dollars.¹⁷ Thus, Mr. L'Hommedieu would clearly benefit from his violation, just as much as any of the other violators have benefited from building a structure that violates a deed restriction. There is no difference.

Finally, Mr. L'Hommedieu cites *Holmes Harbor Water Co., Inc.* for the proposition that injunctive relief should be

¹⁶ Respondent's Brief, p. 43.

¹⁷ RP 349:18-23.

denied if the harm exceeds the benefit.¹⁸ But this citation ignores the fact that the Supreme Court expressly distinguished *Holmes Harbor*, and refused to apply this general proposition, when the person violating the covenant acted with advance knowledge or warning. In rejecting any balancing of the equities in *Hollis*, the Supreme Court observed it had long held that "the 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."¹⁹ Thus, Mr. L'Hommedieu's citation to *Holmes Harbor Water Co.* is off the mark, and this Court should follow the Supreme Court's holding and the long line of cases running since then.

¹⁸ *Holmes Harbor Water Co. v. Page*, 8 Wn. App. 600, 603, 508 P.2d 628 (1973).

¹⁹ *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999) (citing *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968)).

IV. Conclusion

This case is not a morality play in which the outcome should hinge on the purity of the parties' motives. This case calls for the straightforward application of an abundantly clear deed restriction. To protect the Washougal River from the threat of pollution, the drafters of the deed restriction prohibited the installation of any septic system that discharges "within fifty feet of the banks of the Washougal River or any tributary thereof."

More than a hundred years ago, Justice Oliver Wendell Holmes observed that "hard cases make bad law."²⁰ Here, the law is clear: The covenant has not been rendered obsolete by any changed circumstances, and the trial court could not balance the equities. This case is "hard" because Mr. L'Hommedieu may suffer a substantial hardship if his violation is enjoined. But that is the risk he took when he

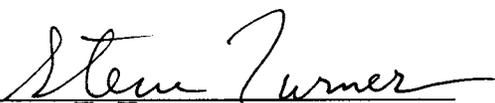
²⁰ *Northern Securities Co. v. United States*, 193 U.S. 197, 364 (1904).

decided to install the systems with full knowledge of the covenant, and it is the price that needs to be paid to avoid creating "bad law" regarding the enforcement of deed restrictions.

For the foregoing reasons, the Lanes respectfully request this Court reverse the trial court's judgment and remand the case with instructions to enforce the covenant and enjoin Mr. L'Hommedieu's ongoing violations.

DATED this 9th day of May, 2008.

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Steven E. Turner

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