

No. 38941-0-II

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

CITY OF TACOMA,

Plaintiff/Respondent

and

JOHNNIE E. LOVELACE, LOIS S. COOPER, and
JAMES V. LYONS and RENEE D. LYONS

Intervenor-Plaintiffs/Appellants,

v.

NORTHSHORE INVESTORS, LLC, NORTHSHORE GOLF
ASSOCIATES, INC., and HERITAGE SAVINGS BANK,

Defendants/Respondents.

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BY
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TABLE OF CONTENTS

I. ARGUMENT 1

 A. Intervenor’s Restrictive Covenant and Common
 Plan-Based Claims Were Not Before the Court on
 Investor’s and Associates’ Summary Judgment
 Motion..... 1

 1. Pleadings..... 1

 2. Oral Argument and the Court’s Oral Ruling 4

 3. Though Not Conventional Third-Party
 Beneficiaries, Intervenor’s are Entitled to
 Enforce the Restrictive Covenant Created
 by the OSTA 5

 4. The Benefits of a Running Restrictive
 Covenant May Be Enforced by Remote
 Parties 5

 5. The OSTA’s Running Covenant Terms and
 Language Have Legal Significance and
 Cannot be Ignored or Disregarded 7

 6. Intervenor’s Common Plan Claims are not
 Based on Conventional Third Party
 Beneficiary Status 11

 B. The OSTA Conveyed a Non-Possessory Real
 Property Interest to Tacoma 12

II. CONCLUSION 13

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<u>Burton v. Douglas County</u> , 65 Wn.2d 619, 399 P.2d 68 (1965).....	8
<u>Deep Water Brewing v. Fairway Resources Ltd.</u> , 2009 Wash. App. Lexis 2327, 215 P.3d 990 (2009)	6, 7, 11
<u>Fransen v. Board of Natural Resources</u> , 66 Wn.2d 672, 404 P.2d 432 (1965)	13
<u>Johnson v. Mt. Baker Park Presbyterian Church</u> , 113 Wash. 458, 194 Pac. 536 (1920).....	12
<u>King County v. Boundary Review Board</u> , 122 Wn.2d 648, 860 P.2d 1024 (1993)	2
<u>Lake Limerick v. Hunt Mfd. Homes</u> , 120 Wn. App. 246, 84 P.2d 295 (2004)	12
<u>Lakeview Condo v. Apartment Sales</u> , 146 Wn.2d 194, 43 P.2d 1233 (2002).....	11
<u>Mayer v. Pierce County Medical Bureau</u> , 80 Wn. App. 416, 909 P.2d 1323 (1995)	9
<u>Riss v. Angel</u> , 131 Wn.2d 612, 934 P.2d 669 (1997)	9
<u>Rodruck v. Sand Point Etc. Comm.</u> , 48 Wn.2d 565, 295 P.2d 714 (1956)	7
<u>Save Sea Lawn Acres v. Mercer</u> , 140 Wn. App. 411, 166 P.3d 770 (2007)	6
<u>Seattle v. Fender</u> , 42 Wn.2d 213, 254 P.2d 470 (1953)	8
<u>Shafer v. Board of Trustees</u> , 76 Wn. App. 267, 883 P.2d 1387 (1994).....	8
<u>Slater v. Bird</u> , 40 Wn.2d 848, 246 P.2d 460 (1952).....	2
<u>State v. Whatcom Cy. Superior Court</u> , 103 Wn.2d 610, 694 P.2d 27 (1985)	13
<u>Stokes v. Kummer</u> , 85 Wn. App. 682, 936 P.2d 4 (1997)	5

<u>Tacoma v. O'Brien</u> , 85 Wn.2d 266, 534 P.2d 114 (1975)	13
<u>Vikingstad v. Baggott</u> , 46 Wn.2d 494, 282 P.2d 824 (1955)	5
<u>Wagner v. Wagner</u> , 95 Wn.2d 94, 621 P.2d 1279 (1980).....	9
<u>Wilson Court v. Tony Maroni's, Inc.</u> , 134 Wn.2d 692, 952 P.2d 590 (1998)	8
<u>Zunino v. Rajewski</u> , 140 Wn. App. 215, 165 P.3d 57 (2007).....	10

STATUTES

RCW 64.04.010	10
RCW 64.040.020.....	10

OTHER AUTHORITIES

17 William B. Stoebuck & John W. Weaver, <u>Real Estate: Property Law</u> , Washington Practice, § 3.2 (2d. ed. 2004)	5
17 William B. Stoebuck & John W. Weaver, <u>Real Estate: Property Law</u> , Washington Practice, § 3.20 (2d. ed. 2004).....	11
20 Am. Jur. 2d <u>Covenants, Conditions, and Restrictions</u> § 28 (1995).....	8
5 Richard R. Powell, <u>Powell on Real Property</u> 670[2] (1991).....	8
Restatement (Third) of the Law of Property: Servitudes, § 2.14 (1998).....	12

TREATISES

William B. Stoebuck, <u>Running Covenants: An Analytical Primer</u> , 52 Wash. L. Rev. 861 (1977)	8
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I. ARGUMENT

A. Intervenors' Restrictive Covenant and Common Plan-Based Claims Were Not Before the Court on Investors' and Associates' Summary Judgment Motion

Investors and Associates assert that all of Intervenors' claims and causes of action were subsumed or otherwise incorporated within the their joint summary judgment motion. The record in the case belies their assertion.

1. Pleadings

The first cause of action in the Complaint of Intervenor-Plaintiffs (CP 168-171) alleges that in addition to Intervenors being third-party beneficiaries of the OSTA, “the OSTA is also a restrictive covenant, running with the land, which [Intervenors] are entitled to enforce.” CP 169. This followed Intervenors' factual assertion that the “OSTA and CZA qualify as restrictive covenants and operate as a common plan.” CP 158. Through this cause of action, Intervenors sought a declaratory adjudication that “the OSTA runs with the land and is binding on the Golf Course and all current and subsequent owners thereof.” CP 171. Intervenors' prayer for relief sought a declaratory judgment that the “OSTA runs with land and is binding on the Golf Course and all current and subsequent owners of the Golf Course.” CP 177.

The purpose of a complaint's factual and legal allegations is to put the court and opposing parties on notice that an issue is being raised. King County v. Boundary Review Board, 122 Wn.2d 648, 660, 860 P.2d 1024 (1993). Pleadings, taken as a whole, are liberally construed. Slater v. Bird, 40 Wn.2d 848, 849, 246 P.2d 460 (1952). The record in this case demonstrates that Intervenors adequately pleaded both the restrictive covenant and common plan theories.

Investors' and Associates' joint summary judgment motion begins with a statement of "Relief Requested" that makes only the following obtuse observation regarding Intervenors' claims and causes of action: "Finally, Intervenors have no third-party beneficiary rights under any of the agreements." CP 1421.

In the course of Investors' and Associates' 35-page summary judgment motion, the term "common plan" does not appear. A section of the summary judgment motion argues that Intervenors were not intended third-party beneficiaries of the OSTA and/or CZA. CP 1450-1453. In the preface to that section of the motion, Investors and Associates assert that "[a]ll of Intervenors' causes of action and requests for relief are predicated upon [the assertion of intended third-party beneficiary status]." CP 1450. The summary judgment motion's

conclusion repeats the general refrain from the “Relief Requested” section of the motion: “Finally, Intervenors are not third-party beneficiaries to any of the agreements that are at issue.” CP 1454. At no point, however, does Investors’ and Associates’ summary judgment motion expressly state that Investors and Associates were moving to dismiss Intervenors’ claims based on common plan and restrictive covenant theories.

Intervenors’ opposition to Investors’ and Associates’ summary judgment motion dealt with both the restrictive covenant and common plan theories, pointing out with respect to the running covenant that the critical “run with the land” language contained in the OSTA is unique to restrictive covenants and had no other conceivable purpose for its inclusion in the OSTA. CP 1694. With respect to the restriction created by the covenant, Intervenors emphasized the OSTA’s express language that “[t]he use of the land (golf course) shall be restricted solely to golf course and open space use.” CP 1694.

Investors’ and Associates’ summary judgment reply argued, without any supporting authority, that because Intervenors were not parties to or otherwise mentioned in the language of the OSTA or the CZA, Intervenors had no enforceable third-party rights. CP 1884.

2. Oral Argument and the Court's Oral Ruling

At oral argument on the cross motions for summary judgment, counsel for Intervenors directed the Court to the narrow scope of Investors' and Associates' summary judgment motion relative to Intervenors' claims (that Intervenors did not have conventional third-party beneficiary status) and that Investors' and Associates summary judgment motion did not address or encompass Intervenors restrictive covenant and common plan claims. RP (December 19, 2008) at p. 67, ll. 13-24. At the time of the trial court's oral ruling on the cross-motions for summary judgment, counsel for Intervenors argued that the issues of restrictive covenant and common plan (including the related doctrine of equitable servitude) were not within the narrow scope of Investors' and Associates' summary judgment motion. RP (January 9, 2009) at p. 15, ll. 8-10. Notwithstanding the lack of a specific motion by Investors and Associates to dismiss Intervenors' restrictive covenant and common plan claims, the summary judgment order issued by the trial court dismissed all of Intervenors' claims. CP 1974. Intervenors have not appealed the dismissal of their conventional third-party beneficiary-based claims, but seek reversal of the dismissal of their restrictive covenant and common plan claims, claims that are not premised on conventional third-party beneficiary law or analysis.

3. Though Not Conventional Third-Party Beneficiaries, Intervenor are Entitled to Enforce the Restrictive Covenant Created by the OSTA

Investors' and Associates' motion for summary judgment against Intervenor was, by the terms of the "Relief Requested" and legal argument contained in the motion, narrowly limited to causes of action premised on Intervenor's allegations that they were third-party beneficiaries of the OSTA and CZA. CP 1450-55. Intervenor's restrictive covenant and common plan theories are not premised on conventional third-party beneficiary status. See Vikingstad v. Baggott, 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955).

4. The Benefits of a Running Restrictive Covenant May Be Enforced by Remote Parties

The existence of a running real covenant is a question of law. Stokes v. Kummer, 85 Wn. App. 682, 689-90, 936 P.2d 4 (1997). The law of running covenants may confer a benefit on parties remote to the original agreement creating the covenant because the covenant relates to parcel of land and the remote party steps into a relationship with the same parcel. See 17 William B. Stoebuck & John W. Weaver, Real Estate: Property Law, Washington Practice, § 3.2 at 126 (2d. ed. 2004).

Two recent cases from the Washington Court of Appeals supply context to the Intervenor's running covenant claims and Intervenor's

ability to maintain a cause of action to enforce the open space and golf course requirements, even though Intervenors may not be conventional third party beneficiaries of the OSTA.

In Save Sea Lawn Acres v. Mercer, 140 Wn. App. 411, 166 P.3d 770 (2007), the court of appeals recognized that the doctrine of implied reciprocal servitudes could create rights in covenants that ran with the land to lots other than those immediately involved in a plat. Id. at 421-22. In that case, the court declined to enforce covenants across the lines of sub-divisions created at different times. Id. In this case, the golf course subdivision and restrictive covenant in the OSTA were created together in the fall of 1981. See CP 1962 ¶ 6-1963 ¶ 8.

Deep Water Brewing v. Fairway Resources Ltd., 2009 Wash. App. Lexis 2327, 215 P.3d 990 (2009), involved an agreement that was part of a dedication of a public right of way. The agreement included height restrictions on land that would be served by the right of way. Id. at 11. The court of appeals declined to enforce the height restriction element of the agreement on a third-party beneficiary basis, but ultimately enforced the height restriction as a running covenant, confirming that restrictive running covenants may be enforced by entities that are not conventional third-party beneficiaries of the agreements

creating such covenants. Id. at 19. The court of appeals held that because the height restriction covenant “touched and concerned the land . . . it therefore reached beyond those obligations that are generally limited to the contracting parties only.” Id.

5. The OSTA’s Running Covenant Terms and Language Have Legal Significance and Cannot be Ignored or Disregarded

It is undisputed that the OSTA is a contract between NSGA and Tacoma. CP 1478-80. Here, the language of the OSTA supports the conclusion that NSGA and Tacoma intended to create a running covenant restricting use of the golf course property to open space. An express term of the OSTA contract is that the golf course property “shall be restricted solely to golf course and open space use.” CP 1478 at ¶ 2. A second express term of the OSTA states that the “agreement shall run with the land . . . and be binding upon the heirs, successors and assigns of the parties hereto.” CP 1478 at ¶ 5.

The “run with the land” language of the OSTA is critical and legally significant. It is the type of contractual wording used to create running restrictive covenants. The phrase “run with the land” is uniquely and exclusively associated with restrictive covenants. See, e.g., Rodruck v. Sand Point Etc. Comm., 48 Wn.2d 565, 574-75, 295 P.2d 714 (1956); Seattle v. Fender, 42 Wn.2d 213, 217-18, 254 P.2d

470 (1953); William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861, 867 (1977).

A covenant is an "an agreement or promise of two or more parties that something is done, will be done, or will not be done . . . [t]he term covenant generally describes promises relating to real property that are created in conveyances or other instruments." Shafer v. Board of Trustees, 76 Wn. App. 267, 274, 883 P.2d 1387 (1994) (quoting 5 Richard R. Powell, *Powell on Real Property* 670[2] (1991)). No particular words are necessary to create a running restrictive covenant, but the intent to create a restriction must be clear from the written instrument. See 20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 28 (1995). Clear and unambiguous language in a restrictive covenant will be given its manifest meaning. Burton v. Douglas County, 65 Wn.2d 619, 621-22, 399 P.2d 68 (1965). The open space restriction in the OSTA is clear and unambiguous. CP 1962, ¶ 6.

Washington law requires that force and effect be given to the terms of a contract, and Washington follows the objective manifestation theory of contracts, under which a contract is interpreted by the objective meaning of the words actually used. Wilson Court v. Tony Maroni's, Inc., 134 Wn.2d 692, 699, 952 P.2d 590 (1998). Under the

objective manifestation rule, courts can “neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it.” Wagner v. Wagner, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). In construing restrictive covenants, courts must ascertain the intent of the parties establishing the covenant. Riss v. Angel, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). An agreement containing a restrictive covenant should be construed in its entirety, and the language should be given its ordinary and common meaning. Id.

An interpretation of a contract “which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.” Mayer v. Pierce County Medical Bureau, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). The trial court’s dismissal of “all” of Intervenors’ claims renders the express terms of the OSTA meaningless. Dismissal of Intervenors’ restrictive covenant claims, based on the notion that such claims are under the penumbra of conventional third-party beneficiary law, results in the untenable situation where key terms of the OSTA are ignored or disregarded in contravention of the contracting parties’ express agreement and mutual intent.

The form required for a restrictive covenant is minimal under Washington law; RCW 64.04.010 requires that conveyance be by deed and RCW 64.040.020 specifies that the deed be in writing and signed by the party to be bound. The OSTA fulfills these requirements because it was assigned and acknowledged by the authorized representatives of NSGA. CP 1478-79. No particular words are necessary to create a covenant. Zunino v. Rajewski, 140 Wn. App. 215, 222, 165 P.3d 57 (2007). Instruments that are “signed, sealed and delivered” and convey some property interest meet the statutory requirements. Id. at 223.

The restrictive covenant provision in the OSTA must be viewed in the context of the situation that existed at the time the agreement was made. NSGA was seeking re-zone approval that would enable it as a developer to construct single family residences adjacent to the golf course in greater density than would otherwise have been allowed under the prior zoning restrictions. CP 1962. The golf course was the centerpiece of the newly-created neighborhood. In creating a neighborhood centered around a golf course, it is clear that parties remote to the OSTA—purchasers of the lots authorized by the re-zone and their successors—would accrue the “benefit” of the OSTA’s open space restrictions for the golf course property. Those remote parties

(Intervenors) should be entitled to enforce the benefits of the restrictive covenant arising from the OSTA. Washington municipalities may enter into agreements that create covenants that run with the land as part of a land use scheme. Lakeview Condo v. Apartment Sales, 146 Wn.2d 194, 201, 43 P.2d 1233 (2002).

The dismissal of Intervenors' running restrictive covenant claims on the basis that such were part and parcel of a conventional third party beneficiary theory in essence makes the restrictive covenant terms of the OSTA a nullity. Those terms should be given the force and effect intended when the agreement was made. The OSTA's open space and golf course restrictions should be allowed to be enforced by Intervenors as a running restrictive covenant, just as the height restriction portion of the contractual agreement in Deep Water was enforceable as a restrictive covenant by remote entities.

6. Intervenors' Common Plan Claims are not Based on Conventional Third Party Beneficiary Status

Under common plan theory, the owners of lots within an area covered by the common plan or scheme may enforce restrictive covenants placed upon burdened land. See 17 William B. Stoebuck & John W. Weaver, Real Estate: Property Law, Washington Practice, § 3.20 at 163 (2d. ed. 2004). Such covenants may be enforced in "good

conscience” and equity. Johnson v. Mt. Baker Park Presbyterian Church, 113 Wash. 458, 464-65, 194 Pac. 536 (1920). In such situations, lots contained within the common plan area are “implied” beneficiaries (as opposed to intended third-party beneficiaries) of all express servitudes imposed to carry out the general plan. Restatement (Third) of the Law of Property: Servitudes, § 2.14 (1998). A recorded declaration of property restrictions creates a servitude. Lake Limerick v. Hunt Mfd. Homes, 120 Wn. App. 246, 258, 84 P.2d 295 (2004). The OSTA was recorded in Pierce County. CP 1478.

B. The OSTA Conveyed a Non-Possessory Real Property Interest to Tacoma

The trial court’s summary ruling that the OSTA did not create a real property interest in Tacoma was patently erroneous. The undisputed facts and legal basis for the conveyance of a real property interest to Tacoma are thoroughly and exactly explicated in the Brief of Respondent City of Tacoma and, for the sake of brevity and to avoid useless duplication, are hereby adopted by Intervenor by reference.

Tacoma has not sought review of the portion of the summary judgment decision holding that the OSTA did not create or transfer a real property interest held by Tacoma in the golf course property. See CP 1964 at ¶ h. Investors and Associates argue that absent an appeal by

Tacoma, Intervenors have no standing to assert that the OSTA created a real property interest held by Tacoma.

While it may be true that Intervenors do not have traditional standing regarding Tacoma's real property interest resulting from the OSTA, the Washington courts have recognized that in appropriate situations, members of the public are conferred standing when the issue involves governmental status or actions, so-called "taxpayer standing." See State v. Whatcom Cy. Superior Court, 103 Wn.2d 610, 614, 694 P.2d 27 (1985). See also Tacoma v. O'Brien, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); Fransen v. Board of Natural Resources, 66 Wn.2d 672, 404 P.2d 432 (1965). "Taxpayer standing" is related to the protection of the public interest. Id.

In this case, Tacoma has undisputedly alleged and made the case that it is in Tacoma's interest that it be declared to have a non-possessory real property interest in the golf course property. CP 18-19. As a matter of policy, Intervenors should be accorded "taxpayer standing" to see that Tacoma's interest and the public's interest be preserved.

II. CONCLUSION

For the reasons set forth, the court of appeals should reverse the trial court's dismissal of all of Intervenors' claims. It should declare

that the OSTA created a restrictive running covenant enforceable by remote entities such as Intervenor. In the alternative, it should remand for trial Intervenor's restrictive covenant and common plan-based claims for declaratory relief. The court of appeals should reverse the trial court's summary judgment ruling that the City of Tacoma does not have a property interest in the Golf Course.

DATED this 13th day of November, 2009.



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STATE OF WASHINGTON
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IN THE
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Plaintiff/Respondent,)	DECLARATION OF SERVICE
and)	
)	
JOHNNIE E. LOVELACE, an individual;)	
LOIS S. COOPER, an individual; and)	
JAMES V. LYONS and RENEE D. LYONS,)	
a marital community,)	
)	
Intervenor-Plaintiffs/Appellants,)	
v.)	
)	
NORTH SHORE GOLF ASSOCIATES,)	
INC., a Washington corporation;)	
NORTHSHORE INVESTORS, LLC, a)	
Washington limited liability company; and)	
HERITAGE SAVINGS BANK, a Washington)	
corporation,)	
)	
Defendants/Respondents.)	
_____)	

The undersigned declares under the penalty of perjury under the laws of the state of Washington that on the date set forth below, true and correct copies of the Reply Brief of Appellants were served by agreement, via e-mail, in PDF format, on the following:

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