

COURT OF APPEALS
DIVISION II

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No. 38941-0-18 STATE OF WASHINGTON
BY JW CLERK

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.

BRIEF OF RESPONDENT CITY OF TACOMA

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION1

II. STATEMENT OF ISSUE2

III. STATEMENT OF THE CASE3

 A. Statement of Facts3

 B. Procedural History7

IV. ARGUMENT: THE LIMITATION ON USE OF THE GOLF COURSE IS A REAL PROPERTY INTEREST CONVEYED TO THE CITY AS A CONDITION OF APPROVING THE OPEN SPACE TAX CLASSIFICATION9

 A. State law expressly authorizes cities to require the grant of property interests as a condition of open space tax agreements.9

 B. The OSTA is in the form required for the conveyance of real property.....15

V. CONCLUSION20

TABLE OF AUTHORITIES

Cases

<i>City of Olympia v. Palzer</i> , 107 Wn.2d 225, 728 P.2d 135 (1986).....	12
<i>Go2Net, Inc. v. C I Host, Inc.</i> , 115 Wn. App. 73, 60 P.3d 1245 (2003)....	20
<i>Zunino v. Rajewski</i> , 140 Wn. App. 215, 165 P.3d 57 (2007).....	17, 18, 19

Statutes

RCW 64.04.010	15
RCW 64.04.020	15, 17, 19
RCW 64.04.030-.050.....	16
RCW 64.04.130	2, 9, 10, 15, 16, 19, 20
RCW 84.34.020	10
RCW 84.34.020-.050.....	11
RCW 84.34.037	2, 10, 11, 12, 13, 14, 15, 16
RCW 84.34.200-.250.....	11, 14, 15
RCW 84.34.210	11
RCW Ch. 84.34	4, 10, 12

Other Authorities

17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW (2d ed. 2004)	11, 12, 16
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I. INTRODUCTION

Respondent City of Tacoma agrees with the first argument raised in the Corrected Brief of Appellants (at pp. 9-17): the Open Space Tax Agreement (“OSTA”) conveyed a non-possessory property interest in the Golf Course to the City by granting the City the authority to restrict use of the property to golf course and open space.¹

This appeal arises from a declaratory judgment action that the City, as plaintiff, brought against two defendants: North Shore Golf Associates, Inc. (“NSGA”), the owner of the Golf Course, and Northshore Investors, LLC (“Investors”), which has submitted an application to build 860 residential units on the Golf Course, thus ending the open space and golf course use of the property. In that action, the City asserted various claims based on the OSTA (and on a Concomitant Zoning Agreement that applies to the Golf Course), one of which was the City’s property interest in the Golf Course granted by the OSTA. Appellants Lovelace, Cooper, and Lyons requested and received permission to intervene in support of the City in the declaratory judgment action. On summary judgment, the superior court granted most of the relief the City sought. With regard to the OSTA, the superior court ruled that the golf course and open space designation remains binding and enforceable by the City, and that the

¹ Tacoma takes no position on other issues and arguments raised by Appellants.

property owners cannot unilaterally terminate the OSTA. No party has appealed those rulings.

However, the superior court also ruled that the OSTA did not convey a property interest to the City. Having achieved most of the relief it sought, the City did not appeal from the superior court judgment and is thus a Respondent in this appeal.² Because Appellants (the Intervenors below) have appealed the ruling that the OSTA did not convey a property interest, that issue is before this Court. The City stands by its position that the OSTA did convey a property interest. Therefore, in its capacity as a Respondent the City submits this response to Appellants' brief setting forth the facts and law showing that the OSTA provisions granting the City authority to restrict uses on the Golf Course constitute a property interest held by the City.

II. STATEMENT OF ISSUE

Did the OSTA, which met all of the legal requirements for conveyance of real property and which restricted the use of the property to golf course and open space unless the City agrees otherwise, create a real property interest held by the City that satisfies the requirements of RCW 64.04.130 and RCW 84.34.037(4)?

² Defendants NSGA and Investors did not appeal either and are also Respondents before this Court.

III. STATEMENT OF THE CASE

A. Statement of Facts

The North Shore Golf Course, which is the subject of the Open Space Taxation Agreement at issue in this appeal, is a part of North Shore Country Club Estates (hereinafter “Country Club Estates”), an approximately 338-acre planned residential district (PRD) consisting of residential areas and the 18-hole Golf Course. CP 1297. The City adopted the PRD classification in 1981 at the request of the landowners, including NSGA, the Golf Course owner, and in return for the agreements set forth in the OSTA and other documents as described below.

In order for NSGA to buy the Golf Course property (which it was then leasing) in the late 1970s, it had to reach agreement with the developers who were purchasing the surrounding property and also held option purchase rights to the Golf Course. CP 720, 773, 780-81, 1395-95. In return for an agreement that allowed it to acquire the Golf Course, NSGA promised to subject the Golf Course property to the master planning process and restrict its use, for such period as required by the City of Tacoma, to golf course purposes and to open space. CP 1394-95 (Agreement Concerning North Shore Golf Course, dated May 10, 1979, hereafter “1979 Agreement”).

In 1979, NSGA participated as an owner in an application submitted to the City for reclassification of the Country Club Estates property, including the Golf Course, from R-2 to R-2 PRD. CP 845-47. The requested R-2 PRD zoning classification provided for greater flexibility than the existing R-2 zoning did for large scale residential developments, allowing approval for approximately 350 residential units above what would have been permitted under the standard R-2 zoning code requirements. CP 837, 1297. NSGA also submitted a separate application to the City for establishment of Open Space Current Use Classification for the Golf Course pursuant to RCW Ch. 84.34. CP 849-56.

On February 10, 1981, the PRD and open space classification applications were considered by the Hearing Examiner at a single combined hearing, which Mr. Pat Comfort, the attorney for and an officer of NSGA, attended and participated in. CP 858-69, 717. Mr. Comfort testified that NSGA was committed to operate the Golf Course as a recreational facility for the public pursuant to its purchase contract and could not change the use of the Golf Course under the “existing contract relationship.” CP 720, 860-61, 1276-77.

As anticipated in the 1979 Agreement, the Hearing Examiner concluded that it was necessary to permanently restrict use of the Golf

Course property to golf course purposes and open space in return for granting the R-2 PRD zoning classification for the proposed Country Club Estates development. CP 1286. The Hearing Examiner recommended approval of the requested R-2 PRD zoning classification, conditioned upon NSGA entering into a binding legal agreement “to insure the golf course use, which was relied upon to gain the density for this request, is clearly tied to the applicant’s use in perpetuity.” *Id.* Similarly, the Hearing Examiner recommended approval of NSGA’s application for the open space classification, provided that “[t]he property shall remain open for recreational use as a public Golf Course” and that NSGA execute an agreement in order to provide a use in perpetuity of the Golf Course property in conjunction with the development of Country Club Estates. CP 868.

NSGA received copies of the Hearing Examiner’s decisions and recommendations to the City Council pertaining to the OSTA and rezone requests and had full knowledge of the determinations of the Hearing Examiner that the Golf Course remain perpetually available for open space, density, and other uses as a precondition for PRD-2 zoning classification approval. CP 869, 789-90. NSGA also had full knowledge of the determination of the Hearing Examiner pertaining to use of the Golf Course for golf course and open space use in perpetuity, as a condition for

approval of its own request for open space tax classification. CP 1286-87. With that knowledge, NSGA proceeded to negotiate the terms of the OSTA, including providing a proposed form of the OSTA to the Office of the City Attorney, which included the restriction of the Golf Course property to golf course and open space use and the requirement that the City approve of any change in the land use. CP 885-94.

On or about September 21, 1981, NSGA and duly authorized representatives of the City executed the OSTA. CP 656-65. The OSTA provides that “[th]e use of [the Golf Course] shall be restricted solely to golf course and open space use. No use of such land other than as specifically provided hereunder shall be authorized or allowed without the express consent of the City of Tacoma.”³ *Id.* ¶ 2. The OSTA further provides that the “agreement shall be effective commencing on the date the legislative body receives the signed agreement from the Owner and shall remain in effect until such time as nullified by the City of Tacoma.” *Id.* ¶ 7. The OSTA provides that the agreement shall run with the land and be binding on the heirs, successors and assigns of the parties. *Id.* at ¶ 5. The OSTA contains a full and complete legal description of the Golf Course property to which it applies. *Id.*, Exhibit A.

In 2007, NSGA as owner and Investors as applicant submitted

³ A copy of the OSTA is attached as an appendix to this brief.

applications to the City for approval of permits to end the use of the Golf Course for golf course and open space use, and to replace the Golf Course with 860 residential units. CP 1116-25.

B. Procedural History

Because NSGA and Investors asserted to the City in the course of the application that the Golf Course was not bound by the OSTA (or by other documents not at issue in this appeal), the City brought a declaratory judgment action against NSGA and Investors, seeking a declaration and judgment that the OSTA and (and the other documents) are binding and enforceable on the Golf Course. CP 1-79. Among other relief, the City requested that the court declare that the use restrictions in the OSTA remain binding and enforceable unless and until the City approves a different use; that the OSTA cannot be unilaterally terminated by NSGA or its successors and assigns; and that the rezone to R2-PRD was conditioned on maintenance of the Golf Course as open space. CP 19. The City also requested a declaration that the OSTA created a property interest for the City in the Golf Course and a judgment quieting title in the City to that interest. CP18-19, 22-33, 225.

Johnnie Lovelace, Lois Cooper, and James and Renee Lyons, who are residents of Country Club Estates, the residential portion of the PRD that includes the Golf Course, sought and received permission to intervene

in the declaratory judgment action. CP 80-117, 179-86. The intervenors joined in the City's motion for partial summary judgment and, in addition to other issues, they argued that the OSTA created a property interest for the City in the Golf Course. CP 1651-53, 1694-96.

On cross motions for summary judgment, the superior court, the Honorable Russell W. Hartman, entered a judgment largely in favor of the City. It stated that the golf course and open space land use designations in the OSTA remain binding and enforceable unless and until the City approves a different use; the OSTA cannot be unilaterally terminated by NSGA or its successors and assigns; and the rezone to R2-PRD was conditioned on maintenance of the Golf Course as open space. CP 1964-65. However, the court entered judgment in favor of NSGA and Investors to the extent that it stated the relationship created by the OSTA is not a real property interest but an open space land use designation. CP 1965.

Neither the City nor Defendants NSGA and Investors appealed from the superior court judgment. The intervenors did appeal and in addition to other issues specifically sought relief from the portions of the superior court judgment stating that the OSTA does not constitute a property interest held by the City. Notice of Appeal, p. 2; Appellants' Brief, pp. 1, 9-17.

IV. ARGUMENT: THE LIMITATION ON USE OF THE GOLF COURSE IS A REAL PROPERTY INTEREST CONVEYED TO THE CITY AS A CONDITION OF APPROVING THE OPEN SPACE TAX CLASSIFICATION

A. State law expressly authorizes cities to require the grant of property interests as a condition of open space tax agreements.

The superior court correctly ruled that the OSTA gives the City the right to limit the Golf Course to open space and golf course use and that that right cannot be unilaterally terminated by the Course owners. CP 1964.⁴ However, the court erroneously failed to recognize that state law expressly declares that such a right is an interest in real property. A provision in the statutory chapter governing conveyances of real property states:

A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes, any land or improvement on the land, whether the right or interest be appurtenant or in gross, may be held or acquired by any ... city Any such right or interest shall constitute and be classified as real property. All instruments for the conveyance thereof shall be substantially in the form required by law for the conveyance of any land or other real property.⁵

RCW 64.04.130 (emphasis added).

⁴ Neither NSGA, Investors, nor any other party has appealed that portion of the judgment.

⁵ As shown in the next subsection, the OSTA is substantially in the form required by law for the conveyance of real property.

The right granted to the City in the OSTA is the right to restrict the use on the Golf Course property to golf course and open space use until the City agrees to other uses. *See* OSTA, ¶¶ 2 & 7 and Judgment, ¶¶ 2(a) & (b) at CP 656-65 and 1964. This right falls squarely within the expansive definition of “[a] development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to ... limit the future use of, or conserve for open space purposes, any land or improvement on the land” and as such it “shall constitute and be classified as real property.” RCW 64.04.130.

Not only does the real property statute unequivocally define the type of right granted to the City in the OSTA as an interest in property, but also the open space taxation statute expressly provides that a city can require the grant of an easement or similar property interest as a condition of approving a request for current use classification of open space land:

The granting authority in approving in part or whole an application for land classified or reclassified pursuant to RCW 84.34.020(1) may also require that certain conditions be met, including but not limited to the granting of easements.

RCW 84.34.037(4).

In the open space statute, RCW Ch. 84.34, the Legislature recognized the importance of preserving open space, and provided two closely interrelated means for advancing that important state interest.

First, the statute allows owners of property that qualifies as “open space land” to apply for and receive current use classification resulting in substantially reduced property tax assessments. RCW 84.34.020-.050. Second, the statute authorizes owners of open space property to convey to cities (or other government or conservancy entities) rights in property necessary to ensure its preservation as open space. RCW 84.34.200-.250. Contrary to the contentions of NSGA and Investors in superior court, these provisions are not exclusive, and both portions of the statute authorize cities (and other entities) to acquire property interests to protect open space land. RCW 84.34.210 allows cities to acquire a wide range of property interests by any means (except eminent domain). In addition, as noted above and particularly relevant here, RCW 84.34.037(4) authorizes cities to impose conditions, including the grant of easements, in return for approving open space tax agreements like the OSTA at issue here.

Easements are interests in real property. 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 2.1, p. 79 (2d ed. 2004). Thus, the plain language of RCW 84.34.037 (4) allowed the City to require the grant of a property interest in return for OSTA approval. Moreover, nothing in that language limits the interest that can be acquired to easements or licenses to use trails (as NSGA and Investors contended below). The

word “easement” encompasses far more than trails. Rights to restrict an owner’s use of property are a common form of easement, sometimes referred to as “negative easements.” *City of Olympia v. Palzer*, 107 Wn.2d 225, 230-31, 728 P.2d 135 (1986) (holding that open space restrictions in a PRD are easements and therefore, not extinguished by a tax foreclosure sale); *STOEBUCK & WEAVER*, supra, § 2.1, p. 83. Furthermore, RCW 84.34.037(4) authorizes conditions “including but not limited to” granting easements. Thus the statute did not preclude, but rather expressly permitted, the City to require, and NSGA to agree to, a condition in which NSGA granted an easement, restriction, right, or interest limiting the future use of the Golf Course property in return for City approval of NSGA’s request for open space tax classification. That is exactly what the parties did in the OSTA.

As stated in the OSTA (at p. 2), “this agreement contains the classification and conditions as provided for in RCW Ch. 84.34 and the conditions imposed by this legislative authority.” CP 657. The conditions in paragraphs 2 and 7 of the OSTA, stating that no use except golf course or open space is allowed without the City’s consent and that the OSTA shall remain in effect until nullified by the City, are conditions imposed by the legislative authority as allowed by RCW Ch. 84.34. NSGA’s decision to grant to the City the right to restrict the property to open space and golf

course use, in return for obtaining significant tax savings (not to mention the right to purchase the Golf Course pursuant to the terms of the 1979 Agreement and the related approval of R-2 PRD zoning for Country Club Estates, including the Golf Course) is precisely the type of condition that the City was authorized to require in return for approving NSGA's application for current use tax classification. RCW 84.34.037 (4).

The use restrictions set forth in the OSTA are consistent with the statutory purposes of RCW 84.34.037. Those purposes include conservation and enhancement of natural or scenic resources, enhancement of recreational opportunities and "any other factors relevant in weighing benefits to the general welfare of preserving the current use of the property." RCW 84.34.037(2)(b). In 1981, the Hearing Examiner made clear to all parties, including NSGA, that a perpetual use restriction on the Golf Course served to achieve the open space, recreation, and other public benefits that were both contemplated in the open space statute and addressed by the PRD rezone. If the owner were free to construct 860 residential units on property that had been identified as an open space and recreational area necessary for the PRD rezone, that would not "enhance recreation opportunities." Nor would the other objectives set forth in RCW 84.34.037(2) likely be achieved.

NSGA negotiated and agreed to the unique language of the OSTA based on the particular circumstances of the combined PRD rezone and open space applications. NSGA participated in a PRD rezone application in which maintenance of the Golf Course as a golf course was expressly offered to the City in exchange for the PRD rezone. CP 719, 721, 736, 1276. NSGA represented to the City, both by presenting the 1979 Agreement in conjunction with its open space application and by its representative's testimony at the combined hearing, that it was bound to operate the Golf Course as a public recreational facility. *Id.*, see *also* CP 1286, 1294-95. NSGA then proffered to the City, and later signed, an OSTA agreement containing unique provisions not found in any other identified open space taxation agreement to which the City is a party. CP 656-65, 885-94. This OSTA fulfilled and implemented the earlier offer and representations. Under these circumstances, and given NSGA's express agreement, the City clearly had authority under RCW 84.34.037(4) to require that the OSTA convey the right to limit the Golf Course to open space and golf course use.⁶

⁶Finding the creation of a real property interest in these unique circumstances does not mean that every open space tax agreement would convey a property interest. There is no merit to the argument, made by NSGA and Investors in superior court, that a city's authority under RCW 84.34.200-.250 to obtain "conservation futures" or other property interests to preserve open space means that RCW 84.34.037(4) does not also provide authority to obtain property interests. As already noted, that

And, as previously noted, that right -- to limit uses on the property in order to conserve open space -- is expressly defined as a real property interest. RCW 64.04.130. Under that statute, the instrument conveying the right must be substantially in the form required by law for the conveyance of land or other real property. As shown in the following subsection, the OSTA meets that requirement.

B. The OSTA is in the form required for the conveyance of real property.

The form required by law for the conveyance of real property is minimal. That minimal form is set forth in RCW 64.04.010, which requires that conveyances be by deed, and RCW 64.04.020, which specifies that a deed must be in writing, signed and acknowledged by the party bound. There is no dispute that the OSTA meets these requirements. It is written and is signed and acknowledged by James Bourne and Patrick

argument is contrary to the plain language of RCW 84.34.037(4), which clearly does allow open space tax agreements to be conditioned on the grant of a property interest. However, this does not render the conservation futures program established by RCW 84.34.200-.250 meaningless. Not all open space applications will have the facts here that led to NSGA's voluntary decision to grant the rights contained in paragraphs 2 and 7 of the OSTA. In those more common situations that lack a basis for requiring the unique restrictions contained in this OSTA, the conservation futures program provides an alternative means for acquisition of property interests that protect and preserve open space.

C. Comfort, then respectively the president and secretary of NSGA. OSTA, p. 2 at CP 657.⁷

That is all that the law requires. A deed conveying limited property interests such as those authorized and recognized by RCW 84.34.037(4) and RCW 64.04.130 does not need to be in any particular form, much less the form set forth in RCW 64.04.030-.050. Those statutes provide suggested forms in which warranty, bargain and sale, and quitclaim deeds “may be” (but are not required to be) prepared. As a leading treatise on Washington law makes clear, such forms are not only not required, but are not appropriate, for the type of interest authorized by the open space statutes and included in the OSTA.

Washington's three special statutory forms of deeds . . . are, by their wording, suitable for the conveyance of only possessory interests, *i.e.*, estates in land. They are not suitable for the creation of nonpossessory interests, such as easements, profits a pendre, and restrictive covenants.

STOEBUCK & WEAVER, *supra*, § 7.3, p. 473. The right granted to the City in the OSTA is not a possessory interest, therefore, no special statutory form of deed was required for the OSTA.

Because the OSTA expressly transfers the right to restrict uses on the Golf Course property from NSGA to the City and is written and signed

⁷ Case law further suggests that an adequate legal description of the property burdened by a restriction is also required to meet the deed requirement. The OSTA contains a full and complete legal description of the Golf Course property. CP 660-64.

and acknowledged by NSGA, it meets all the requirements imposed by law to create a property right in the City. The law is clear:

No particular words are necessary to constitute a grant and any words which clearly show the intention to give an easement are sufficient . . . In general, deeds are construed to give effect to the intentions of the parties, and particular attention is given to the intent of the grantor when discerning the meaning of the entire document. . . . However, any doubt as to words used in a deed will be construed against the grantor and in favor of the grantee.

Zunino v. Rajewski, 140 Wn. App. 215, 222, 165 P.3d 57 (2007) (citations omitted).

Moreover, “any written instrument that is signed, sealed, and delivered and that conveys some interest in property” meets the requirements for a deed set forth in RCW 64.04.020. *Zunino*, 140 Wn. App. at 223 (emphasis added; quoting *Black’s Law Dictionary* 444).

In *Zunino* the Court concluded that the documents at issue were not deeds because they did not demonstrate a present intent to convey an easement. The facts there, which are completely unlike those here, provided ample support for that conclusion. There, the grantor of the purported easements sold property without reserving any easements in the deeds. *Zunino*, 140 Wn. App. at 216 and 220. Instead, the grantor recorded separate documents, in some instances after conveying the purportedly burdened property to purchasers. *Id.* at 218. Those

documents asserted that “this easement *was created*” sometime in the past. *Id.* at 222 (quoting documents with italic emphasis added by Court). Not surprisingly, when reviewing documents in which the grantor, who did not even own all the allegedly burdened property, stated that an easement “was created” at some other time, the Court concluded that “the documents are not deeds because they do not convey an interest in property.” *Id.* at 223.

Here, unlike in *Zunino*, there is no dispute that NSGA owned the Golf Course at the time it executed the OSTA conveying to the City the right to restrict use of the property. Moreover, in direct contrast to documents at issue in *Zunino*, the OSTA clearly states NSGA's present intent to grant a right to the City to restrict, from that time forward, the use of the Golf Course property. The OSTA is written in the present tense and it recites that “both the Owner [NSGA] and the legislative authority [the City] desire to limit the use of said property ...” CP 656. It further provides that “[n]o use of such land other than as specifically provided hereunder shall be authorized or allowed without the express consent of the City of Tacoma,” and that the “agreement shall be effective commencing on the date the legislative body receives the signed agreement from the Owner and shall remain in effect until such time as nullified by the City of Tacoma.” *Id.*, ¶¶ 2 & 7. It is hard to imagine

words that could better express a present intent to grant to the City the right to limit uses on the Golf Course property to those set forth in the OSTA. Because the OSTA demonstrates this intent and is in the form required by RCW 64.04.020 it is a deed that transferred a limited right in the Golf Course property from NSGA to the City. *Zunino*, 140 Wn. App. at 222-23; RCW 64.04.130.

Moreover, the objective extrinsic evidence, including NSGA's representations and testimony at the time of the open space and PRD applications, confirms the plain and unambiguous language of the OSTA setting forth NSGA's intent to transfer to the City the right to restrict uses on the Golf Course. The 1981 Hearing Examiner decision clearly indicates that NSGA was to convey a property interest to the City, specifically "a use in perpetuity of this property" for open space. CP 868.

Because both the OSTA itself and the objective extrinsic evidence plainly express the intent to transfer to the City the ability to limit uses on the Golf Course to open space and golf course until the City determines otherwise, NSGA's after-the-fact allegations raised in superior court that it did not intend to convey a property interest are irrelevant. NSGA undeniably intended to, and did, give to the City the rights set forth in paragraphs 2 and 7 of the OSTA. Whether or not NSGA's president subjectively understood that the rights NSGA chose to transfer are

interests in property does not change the fact that he agreed to transfer them, and it does not change the law that such rights shall constitute real property. RCW 64.04.130.⁸ Because the OSTA gives the City rights defined by law as real property and is substantially in the form required by law to convey real property, it conveyed a real property interest in the Golf Course to the City.

V. CONCLUSION

For the foregoing reasons, Respondent City of Tacoma concurs with Appellants that the OSTA conveyed a non-possessory property interest in the Golf Course to the City and that the superior court erred in concluding that the OSTA did not give the City a property interest.

RESPECTFULLY SUBMITTED this 14th day of October, 2009.

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⁸ NSGA's unexpressed subjective beliefs that are in any event not admissible evidence. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 84-85, 60 P.3d 1245 (2003).

VOL 060 PAGE 1034
9153C-003181SRJC

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OPEN SPACE TAXATION AGREEMENT

THIS AGREEMENT between NORTH SHORE GOLF ASSOCIATES, INC., hereinafter called the "Owner", and the CITY OF TACOMA is entered into this 27th day of September, 1981.

WHEREAS the Owner of the real property described in the attached Exhibit "A" having made application for classification of that property under the provisions of RCW 84.34, and

WHEREAS both the Owner and the legislative authority desire to limit the use of said property, recognizing that such land has substantial public value as open space and that the preservation of such land constitutes an important physical, social, esthetic and economic asset to the public, and both parties agree that the classification of the property during the life of this agreement shall be for Open Space;

NOW, THEREFORE, the parties, in consideration of the mutual covenants and conditions set forth herein, do agree as follows:

1. The land use classification under RCW 84.34 (current use taxation) may not change on any portion of the subject property. Any partial change in land use will subject the entire property covered under this agreement to a rollback and penalty.
2. The use of such land shall be restricted solely to golf course and open space use. No use of such land other than as specifically provided hereunder shall be authorized or allowed without the express consent of the City of Tacoma.
3. A fence shall be placed in proximity to the seventh tee in such fashion as to assure protection to traffic on 33rd Street; the exact location of which fence and length thereof to be determined by North Shore Golf Associates, Inc. in consultation with the City of Tacoma.
4. No structures shall be erected upon such land except those directly related to and compatible with the classified use of the land or except those residence buildings for such individuals as are engaged in the care, use, operation or management of such land.
5. This agreement shall run with the land described herein and shall be binding upon the heirs, successors and assigns of the parties hereto.
6. When any permissible action in eminent domain for the condemnation of the fee title of the land under this agreement is filed or when such land is acquired as a result of a sale to a public body, this agreement shall be null and void as of the date the action is filed, and thereafter this agreement shall not be binding on any party to it.
7. This agreement shall be effective commencing on the date the legislative body receives the signed agreement from the Owner and shall remain in effect until such time as nullified by the City of Tacoma.
8. After the land has been classified and an agreement executed, any change of the use of the land, except through compliance with subparagraphs 7 and 9 of this agreement, shall be considered a breach of this agreement and subject to applicable taxes, penalties and interest as provided in Sections 9 and 12, Chapter 212, Laws of 1973, 1st Ex. Sess.
9. A breach of agreement shall not occur and the additional tax shall not be imposed if the removal of designation resulted solely from:
 - a. Transfer to a government entity in exchange for other land located within the State of Washington;

RETURN TO: Pierce County Forester.

no fee

VOL 060 PAGE 1035

b. A taking through exercise of the power of eminent domain, or sale or transfer to an entity having the power of eminent domain in anticipation of the exercise of such power;

c. A natural disaster such as a flood, windstorm, earthquake or other such calamity rather than by virtue of the act of the landowner changing the use of such property;

d. Official action by an agency of the State of Washington or by the County or City within which the land is located which disallows the present use of such land.

It is declared that this agreement contains the classification and conditions as provided for in RCM 84.34 and the conditions imposed by this legislative authority.

The legal description of the classified land is attached hereto, designated Exhibit "A" and by this reference made a part hereof.

Assessor's Parcel No. 03-21-23-2-016.

DATED this ____ day of September, 1981.

CITY OF TACOMA

By [Signature]
Mayor

Attest
[Signature]
City Clerk
Legal Description Approved:
[Signature]
Director of Planning

Approved as to form:
[Signature]
Assistant City Attorney
Approved:
[Signature]
County Executive

Approved as to form only:
[Signature]
ROGER J. KUENER, Acting
Chief Civil Deputy Prosecuting
Attorney

As Owner of the property above described, I indicate by my signature that I am aware of the potential tax liability which may arise upon breach hereof and I hereby accept the classification and conditions of this agreement.

NORTH SHORE GOLF ASSOCIATES, INC.

By [Signature]
President
By [Signature]
Secretary

RECORDED

81 OCT 30 PM 2:40

CLERK OF COUNTY CLERK
TACOMA COUNTY WASH
DEPUTY

Open Space Taxation Agreement - 2

VOL 060 PAGE 1036

STATE OF WASHINGTON }
County of Pierce } ss

I, THE UNDERSIGNED, a Notary Public in and for the State of Washington, do hereby certify that on this 21 day of September, 1981, personally appeared before me James Bourne and Patrick C. Comfort to me known to be the President and Secretary, respectively, of the corporation which executed the above instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes above mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.



Under my hand and official seal the day and year last above

Francis Anderson
Notary Public in and for the
State of Washington, residing
at Tacoma

Open Space Taxation Agreement - 3



LEGAL DESCRIPTION
NORTH SHORE GOLF COURSE

That portion of Section 23, T21N. R3E, W.M., City of Tacoma, Pierce County, Washington, more particularly described as follows:

COMMENCING at the Southeast corner of the SW 1/4 of the SW 1/4 of said Section 23;

THENCE N 01°47'01" E, 30.00 feet along the East line of said SW 1/4 of the SW 1/4 to a point on the Northerly margin of 33rd Street N.E. and the TRUT POINT OF BEGINNING;

THENCE S 88°38'30" E, 203.28 feet along said Northerly margin;

THENCE N 01°21'30" E, 46.37 feet;

THENCE N 09°43'22" W, 144.24 feet;

THENCE N 70°01'17" W, 149.44 feet;

THENCE N 14°17'48" W, 341.98 feet;

THENCE N 12°25'18" W, 446.76 feet;

THENCE N 05°15'59" W, 289.83 feet;

THENCE N 05°45'09" E, 381.21 feet;

THENCE N 05°56'49" E, 296.60 feet;

THENCE N 48°02'03" E, 249.67 feet;

THENCE N 31°03'06" E, 380.68 feet;

THENCE N 26°53'30" E, 418.92 feet;

THENCE N 51°49'18" E, 244.02 feet;

THENCE N 60°28'30" E, 318.55 feet;

THENCE N 30°03'06" E, 158.39 feet;

THENCE N 07°26'13" W, 489.21 feet;

THENCE N 51°40'00" E, 274.09 feet;

THENCE N 22°28'46" E, 156.92 feet;

APPROXIMATE AREA
FOR THE WEST QUARTER SECTION
OF SAID SECTION 23

PLANNERS
AND ARCHITECTS
ENGINEERS
AND SURVEYORS
1000 1ST AVENUE S.W.
TACOMA, WASHINGTON 98402
TELEPHONE 325-1111

EXHIBIT A.

VOL 060 PAGE 1038

LEGAL DESCRIPTION
North Shore Golf Course
Page 2

THENCE N 01°52'40" E, 305.16 feet;
 THENCE N 21°58'28" W, 307.33 feet;
 THENCE N 14°37'15" E, 118.85 feet;
 THENCE N 57°01'50" W, 220.51 feet;
 THENCE N 68°11'55" W, 269.26 feet;
 THENCE N 84°33'35" W, 316.43 feet;
 THENCE S 83°26'35" W, 437.86 feet;
 THENCE N 80°57'39" W, 222.77 feet;
 THENCE S 53°54'59" W, 116.88 feet;
 THENCE S 51°25'38" W, 292.47 feet;
 THENCE S 45°55'31" W, 134.85 feet;
 THENCE S 04°06'24" W, 164.77 feet;
 THENCE S 04°11'10" E, 292.21 feet;
 THENCE S 30°29'12" E, 109.34 feet;
 THENCE S 06°43'59" W, 725.00 feet;
 THENCE S 26°33'54" W, 447.21 feet;

THENCE S 28°52'25" W, 419.87 feet to a point on the Northerly line of the plat of "North Shore Country Club Estates, Div. 1" as recorded in Volume 58, Pages 1 through 7, Pierce County;

THENCE S 88°43'58" E, 31.48 feet along said Northerly line;

THENCE along said Northerly line S 71°18'36" E, 154.93 feet;

THENCE along the Easterly line of said plat, S 18°54'24" W, 36.94 feet to a point of curvature;

THENCE Southerly along said Easterly line 186.07 feet along the arc of a non-tangent curve to the left, having a radius of 645.00 feet, the radius point of which bears S 71°13'55" E, through a central angle of 16°31'44" to the end of said curve;

, 1979

VOL 060 PAGE 1039

SEA

Legal Description
North Shore Golf Course
Page 3

THENCE along said Easterly line, S 02°14'23" W, 1170.50 feet to a point of curvature;

THENCE Southerly along said Easterly line 447.56 feet along the arc of a non-tangent curve to the right, having a radius of 1085.28 feet, the radius point of which bears N 87°45'06" W, through a central angle of 23°37'42", to the end of said curve;

THENCE along said Easterly line, S 61°04'10" E, 104.28 feet to a point of curvature;

THENCE Southeasterly along said Easterly line, 374.08 feet along the arc of a non-tangent curve to the right, having a radius of 270.00 feet, the radius point of which bears S 44°23'48" W, through a central angle of 66°39'02", to the end of said curve;

THENCE S 10°18'41" W, 400.00 feet to a point on the Northerly margin of 33rd Street N.E.;

THENCE along said Northerly margin S 88°30'26" E, 1039.39 feet to the TRUE POINT OF BEGINNING.

EXCEPT that portion situate in said Section 23, more particularly described as follows:

Commencing at the NW corner of said Section 23:

THENCE S 88°37'51" E, 1158.44 feet along the North line of the NW 1/4 of the NW 1/4 of said section;

THENCE S 01°22'09" W, 444.15 feet to the TRUE POINT OF BEGINNING;

THENCE N 85°42'38" E, 401.12 feet;

THENCE S 78°32'28" E, 377.53 feet;

THENCE S 50°18'15" E, 305.13 feet;

THENCE S 01°21'02" E, 458.69 feet;

THENCE S 07°18'32" W, 122.55 feet;

THENCE S 43°12'36" W, 452.77 feet;



Legal Description
North Shore Golf Course
Page 5

THENCE N 30°51'15" W, 448.47 feet;

THENCE N 14°55'53" E, 77.62 feet to the TRUE POINT OF BEGINNING.

AND EXCEPT a 60.00 foot strip in the ownership of Pierce County, more particularly described as follows:

Commencing at the NW corner of said Section 23:

THENCE S 88°37'51" E, 630.08 feet along the North line of the NW 1/4 of the NW 1/4 of said Section 23 to the True Point of Beginning;

THENCE S 01°20'27" W, 1332.90 feet to a point on the South line of said NW 1/4 of the NW 1/4;

THENCE S 88°19'37" E, 60.00 feet along said South line;

THENCE N 01°20'27" E, 1333.22 feet to a point on said North line of the NW 1/4 of the NW 1/4;

THENCE N 88°37'51" W, 60.00 feet along said North line to the True Point of Beginning.

North Shore Golf Course, less exceptions, containing 114.16 acres, more or less.

Entire parcel to be subject to easements for public utilities of all types and ingress-egress easements or dedications.

1.2 acres added for right away -

1979

VOL 060 PAGE 1041

Legal Description
North Shore Golf Course
Page 4

THENCE N 08°40'23" W, 596.83 feet;
THENCE N 39°48'20" W, 468.62 feet;
THENCE N 61°11'21" W, 342.38 feet;
THENCE N 00°00'00" E, 35.00 feet to the TRUE POINT OF
BEGINNING.

AND EXCEPT that portion situate in said Section 23, more
particularly described as follows:

Commencing at the NW corner of said Section 23;

THENCE S 88°37'51" E, 874.37 feet along the North line of
said NW 1/4 of the NW 1/4;

THENCE S 01°22'09" W, 696.01 feet to the TRUE POINT OF
BEGINNING:

THENCE N 86°03'17" E, 290.69 feet;
THENCE S 64°17'24" E, 449.50 feet;
THENCE S 05°33'11" E, 361.70 feet;
THENCE S 80°32'16" E, 60.83 feet;
THENCE S 19°39'14" E, 74.33 feet;
THENCE S 04°36'38" W, 311.01 feet;
THENCE S 22°04'04" W, 399.25 feet;
THENCE S 31°22'23" W, 480.21 feet;
THENCE S 25°12'04" W, 187.88 feet;
THENCE N 61°41'57" W, 147.65 feet;
THENCE N 06°20'25" W, 90.55 feet;
THENCE N 50°18'35" W, 302.58 feet;
THENCE N 12°12'09" E, 723.10 feet;
THENCE N 18°40'36" E, 374.73 feet;

STATE OF WASHINGTON, County of Pierce
ss: I, Pat McCarthy, Auditor, of the above
entitled county, do hereby certify that this
foregoing instrument is a true and correct copy
of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of Said County.



PAT McCARTHY Auditor

By: [Signature] Deputy

Date: NOV 18 2008

8110300211

COURT OF APPEALS
DIVISION II

FILED OCT 16 PM 04:14

STATE OF WASHINGTON

BY _____
DEPUTY

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,

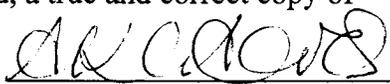
v.

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

Defendants/Respondents.

DECLARATION OF DELIVERY

I declare under penalty of perjury of the laws of the state of Washington that I am over the age of 18 and not a party to the above-captioned action. On October 14th, 2009, I caused to be served upon counsel listed below, in the manner indicated, a true and correct copy of the foregoing and attached documents.



Amanda Kleiss-Acres

ORIGINAL

Matthew Turetsky
Aaron M. Laing
SCHWABE, WILLIAMSON & WYATT, PC
1420 Fifth Avenue, Suite 3010
Seattle, WA 98101
Attorney for Northshore Investors, LLC

By U.S. Mail
✓ By Legal Messenger
By Facsimile
By Email

Mark A. Hood
VANDENBERG, JOHNSON & GANDARA, LLP
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Tacoma, WA 98401-1315
Attorney for Heritage Savings Bank

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Christopher I. Brain
Paul W. Moomaw
TOUSLEY BRAIN STEPHENS PLLC
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Attorney for North Shore Golf Associates Inc.

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By Facsimile
By Email

Gary Dennis Huff
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