

38941-0-II  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY *[Signature]*  
CLERK

No. 38941-0-II

**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

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**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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**RESPONDENTS' JOINT BRIEF**

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**ORIGINAL**

## TABLE OF CONTENTS

	<b>Page</b>
I. Introduction .....	1
II. Issues on Appeal.....	2
III. Statement of the Case.....	3
A. The Parties .....	3
B. The Original Golf Course Transaction .....	4
C. The Hearing on Nu-West’s Development Application.....	6
D. The Open Space Request .....	7
E. The Open Space Taxation Agreement .....	7
F. The Concomitant Zoning Agreement .....	8
G. The City’s Doubts About the Viability of the OSTA as a Perpetual Restriction on the Golf Course .....	9
H. The Golf Course Was Not Necessary To Satisfy the Open Space and Density Requirements of Country Club Estates.....	10
I. Investors’ Proposed Project and the City’s Opposition Thereto....	12
J. Procedural History .....	13
1. The City’s Declaratory Judgment Action .....	13
2. The Intervention.....	13
3. The Parties’ Cross-Motions for Summary Judgment .....	16
4. The Trial Court’s Summary Judgment Ruling.....	19
5. Intervenors’ Appeal .....	21

IV. Argument .....	22
A. Standard of Review.....	22
B. This Court Should Reject Assignment of Error No. 1 and Affirm the Finding That the City Has No Property Interest .....	23
1. Intervenors Have No Standing To Assert the City’s Property Interest or To Appeal Whether It Has One .....	23
a. Intervenors Do Not Have Standing.....	24
b. Intervenors Are Not the Real Party In Interest .....	26
2. Appeal of the Property Interest Ruling Is Moot Because Intervenors Fatally Failed to Assign Error to the Conclusion that They Have No Third Party Beneficiary Rights In It.....	27
3. This Court Should Affirm On the Merits Because the City of Tacoma Has No Property Interest Pursuant to the OSTA .....	31
a. Open Space Taxation Agreements Are Revocable Agreements Whose Purpose Is To Provide Tax Relief.....	31
b. The Fact That the OSTA Contains Language Stating That It Runs with the Land Is Irrelevant....	33
c. Intervenors’ Sole Support for Its “Runs With the Land” Argument Is the Declaration of John Weaver, To Which the Trial Court Gave No Weight.....	34
d. The OSTA Is Not in the Form Prescribed by Washington Law for a Conveyance of Real Property.....	35
e. Nothing in the Surrounding Circumstances Suggests the Parties Intended a Conveyance of Real Property by Means of the OSTA .....	37

4.	This Court Should Affirm on the Merits Because the City of Tacoma Has No Property Interest Pursuant to the CZA.....	38
C.	This Court Should Reject Assignment of Error No. 2 and Affirm Dismissal of Intervenors’ “Restrictive Covenant and Common Plan Claims.” .....	39
1.	All of Intervenors Claims Were Properly Before the Trial Court on Summary Judgment .....	41
2.	Even if the Restrictive Covenant and Common Plan Claims Were Not Before the Trial Court, This Court Should Affirm their Dismissal Because the Claims Were Not Properly Pled and Are Insupportable Under Washington Law. ....	46
3.	Intervenors’ Current Argument That Questions of Material Fact Prevented Summary Judgment Is Not Within Their Issues and Is Unsupported by Identification of What the Material Dispute Could Be .....	49
V.	Conclusion .....	50

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>1515-1519 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.</i> , 146 Wn.2d 194, 43 P.3d 1233 (2002).....	30, 31
<i>Babcock v. State</i> , 116 Wn.2d 596, 809 P.2d 143 (1991).....	22
<i>Bedford v. Sugarman</i> , 112 Wn.2d 500, 772 P.2d 486 (1989).....	24
<i>Burke &amp; Thomas v. Int'l Org. of Masters</i> , 192 Wn.2d 762, 600 P.2d 1282 (1979).....	28
<i>Chobruck v. Snohomish County</i> , 78 Wn.2d 858, 480 P.2d 489 (1971).....	29
<i>City of Lakewood v. Pierce County</i> , 144 Wn.2d 118, 30 P.3d 446 (2001).....	24
<i>City of Redmond v. Kezner</i> , 10 Wn. App. 332, 517 P.2d 625 (1973).....	29, 49
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	41
<i>Dickson v. Kates</i> , 132 Wn. App. 724, 133 P.3d 498 (2006).....	35
<i>Flast v. Cohen</i> , 392 U.S. 83, 100 (1968).....	25, 26
<i>In re Estate of Bergau</i> , 103 Wn.2d 431, 693 P.2d 703 (1985).....	31
<i>In re Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004).....	22

<i>In re Marriage of Irwin</i> , 64 Wn. App. 38, 822 P.2d 797 (1992).....	28
<i>Int'l Assoc. of Firefighters, Local 1789 v. Spokane Airports</i> , 103 Wn. App. 764, 14 P.3d 193 (2000).....	24
<i>Johnson v. Mermis</i> , 91 Wn. App. 127, 955 P.2d 826 (1998).....	27, 41
<i>Johnson v. Mt. Baker Park Presbyterian Church</i> , 113 Wash. 458, 194 P. 536 (1920).....	47, 48
<i>Joyce v. Dep't of Corr.</i> , 116 Wn. App. 569, 75 P.3d 548 (2003).....	23, 34
<i>Kinne v. Lampson</i> , 58 Wn.2d 563, 364 P.2d 510 (1961).....	29
<i>Klamath Water Users Protective Ass'n. v. Patterson, et al.</i> , 204 F.3d 1206, 1211 (9th Cir. 1999) .....	30
<i>Lonsdale v. Chesterfield</i> , 99 Wn.2d 353, 662 P.2d 385 (1983).....	28
<i>Ludwig v. Washington State Dept. of Ret. Sys.</i> , 131 Wn. App. 379, 127 P.3d 781 (2006).....	25
<i>Mains Farm Homeowners Ass'n v. Worthington</i> , 121 Wn.2d 810, 854 P.2d 1072 (1993).....	38
<i>Manufactured Hous. Communities of Wash. v. State</i> , 142 Wn.2d 347, 361, 13 P.3d 183 (2000).....	30
<i>McDonald Constr. Co. v. Murray</i> , 5 Wn. App. 68, 70, 485 P.2d 626 (1971).....	29
<i>Molloy v. Bellevue</i> , 71 Wn. App. 382, 859 P.2d 613 (1993).....	41
<i>Myhre v. City of Spokane</i> ,  70 Wn.2d 207, 422 P.2d 790 (1967).....	29

<i>Northwest Indep. Forest Mfrs. v. Dep't of Labor &amp; Industries,</i> 78 Wn. App. 707, 899 P.2d 6 (1995).....	26
<i>Orion Corp. v. State,</i> 103 Wn.2d 441, 693 P.2d 1369 (1985).....	24
<i>Pardee v. Jolly,</i> 163 Wn.2d 558, 182 P.3d 967 (2008).....	36
<i>Rutter v. Rutter's Estate,</i> 59 Wn.2d 781, 370 P.2d 862 (1962).....	22, 23, 28
<i>Sprague v. Sysco Corp.,</i> 97 Wn. App. 169, 982 P.2d 1202 (1999).....	26
<i>Tindolph v. Schoenfeld Bros. Inc.,</i> 157 Wash. 605, 289 P. 530 (1930).....	47, 48
<i>Vikingstad v. Baggott,</i> 46 Wn.2d 494, 282 P.2d 824 (1955).....	28
<i>Washington Sec. &amp; Inv. Corp. v. Horse Heaven Heights, Inc.,</i> 132 Wn. App. 188, 130 P.3d 880 (2006).....	27
<i>West Coast, Inc. v. Snohomish County,</i> 112 Wn. App. 200, 48 P.3d 997 (2002).....	22
<i>West v. Thurston County,</i> 14 Wn. App. 573, 183 P.3d 346 (2008).....	24
<i>White v. Kent Medical Center,</i> 61 Wn. App. 163, 810 P.2d 4 (1991).....	41
<i>Wilson v. Steinbach,</i> 98 Wn.2d 434, 656 P.2d 1030 (1982).....	22
<i>Zunino v. Rajewki,</i> 140 Wn. App. 215, 165 P.3d 57.....	35, 37

**Statutes**

RCW 64.04.010 ..... 35  
RCW 64.04.020 ..... 35, 38  
RCW 64.04.130 ..... 35  
RCW 84.34 ..... 29, 30, 31, 32  
RCW 84.34.010 ..... 32  
RCW 84.34.070 ..... 32, 33  
RCW 84.34.070(1)..... 32  
RCW 84.34.108(1)(c) ..... 33  
RCW 84.34.108(4)..... 32

**Other Authorities**

Wash. Const. Art. 1, § 16..... 30  
1 Restatement (3d) of Prop.: Servitudes 1.1(3) (2000)..... 38, 43, 49  
17 William B. Stoebuck & John W. Weaver, Real Estate: Property Law in  
Washington Practice, § 3.20 (2nd ed. 2004)..... 43, 47

**Rules**

CR 17(a)..... 26, 27  
RAP 2.5(a) ..... 24, 39  
RAP 3.1 ..... 27  
RAP 10.3(a)(3)..... 21, 39  
RAP 10.3(a)(4)..... 34, 50  
RAP 10.3(a)(5)–(6) ..... 40  
RAP 10.3(c) ..... 41  
RAP 10.3(g) ..... 28, 34, 49

## I. INTRODUCTION

This dispute is based on two land-use documents — an open space taxation agreement and a concomitant zoning agreement — that affect a golf course owned by Respondent North Shore Golf Associates, Inc. (“NSGA”), which is being purchased for development by Respondent Northshore Investors, LLC (“Investors”). The City of Tacoma (the “City”) brought a declaratory judgment action, asserting that these two documents created a property interest that allowed the City to restrict the golf course to open space use in perpetuity. Appellants (hereinafter, “Intervenors”) intervened in the lawsuit, filing a complaint nearly identical to the City’s complaint and asserting that the two land-use documents gave Intervenors third-party beneficiary rights that they could privately and independently enforce.

On summary judgment, the trial court ruled that the two land-use documents give the City the right to restrict the golf course to open space, but that the open-space restriction is a land-use designation, not a property interest. The trial court also dismissed all of Intervenors’ claims with prejudice. Neither NSGA and Investors nor the City appealed the ruling. Only Intervenors appealed. Their assignments of error are limited. Intervenors assert (1) that the trial court incorrectly ruled that the City does not have a property interest in the golf course, and (2) that Intervenors “common plan” and restrictive covenant claims relating to the golf course were not before the court on summary judgment and were therefore improperly dismissed.

The assignments of error are meritless. Intervenors have no standing to assert the City's purported property interests, especially having failed to appeal the trial court's ruling that they have no third-party rights. And the record belies Intervenors' claim that the "common plan" and restrictive covenant theories were not before the trial court on summary judgment. The trial court's rulings were correct on the merits. Respondents respectfully request that this Court affirm the rulings of the trial court in all respects.

## **II. ISSUES ON APPEAL**

The issues on appeal are:

1. Can Intervenors appeal the resolution of the City's alleged real property interest?
2. Where Intervenors have no third-party rights to assert in any real property interest of the City's, is their Assignment of Error #1 moot or irrelevant?
3. Were all of Intervenors' claims before the trial court on Respondents' motion for summary judgment?
4. Did Intervenors properly plead "Restrictive Covenant and Common Plan Claims"?
5. Because Washington law would not support Intervenors' "Restrictive Covenant and Common Plan Claims" based on zoning documents, should this Court affirm dismissal of those claims?

### III. STATEMENT OF THE CASE

#### A. The Parties

NSGA owns an approximately 112-acre golf course (the “Golf Course”) situated in northeast Tacoma. The principals of NSGA, a closely-held corporation, have operated the Golf Course since 1960. CP 1456, ¶ 2–3. Over the last few years, the numbers of people playing golf at the Golf Course — and along with them, NSGA’s revenues — have declined. CP 775–76. NSGA has decided to sell the Golf Course to Investors, who plans to develop a residential development on the Golf Course property. CP 776, 33:16; CP 1458.

The Golf Course is part of a planned residential development (“PRD”) called North Shore Country Club Estates (“Country Club Estates”). As discussed at more length below, the PRD was developed beginning in the early 1980s. Two of the Intervenors are residents of the PRD; however, one of them, Jonnie E. Lovelace, lives in a neighborhood — Division One of Country Club Estates — that existed in the area prior to the development of the PRD. CP 155, ¶ 155. None of the residents of Country Club Estates — thus, none of the Intervenors — have any rights or privileges with respect to the Golf Course. CP 772, 14:17–24. None of the plats of Country Club Estates have any dedication of open space or other restrictions that affect the Golf Course. CP 1974, ¶ 9.

The City is not an appellant in this proceeding. The City is a party to two agreements that are at issue in this case, the Open Space Taxation Agreement (“OSTA”) (CP 1478–86) and the Concomitant Zoning

Agreement (“CZA”) (CP 1545–60), both of which are discussed below. Intervenor’s are not parties to either agreement, and they do not have any third-party beneficiary rights with respect to either agreement. CP 1973, ¶ 4. Nevertheless, this entire appeal relates to rights purportedly springing from the two agreements.

**B. The Original Golf Course Transaction**

The original developer of Country Club Estates was Nu-West Pacific, Inc. (“Nu-West”). In 1979, Tacoma Land Company (“TLC”) owned the property (the “Property”) that would later become Country Club Estates. CP 1456, ¶ 5. Nu-West and Brownfield & Associates, Inc. (“Brownfield”) had options to purchase the Property. *Id.*

The Property included the Golf Course. At the time, the Golf Course was being leased and operated by Jim Bourne and Larry Proctor. *Id.* ¶ 4. Mr. Bourne and Mr. Proctor had been affiliated with the Golf Course since around 1960 and were interested in buying it. *Id.* ¶¶ 3–4. Nu-West and Brownfield were willing to relinquish their option to buy the Golf Course and allow Mr. Bourne and Mr. Proctor to buy it. *Id.* ¶ 5. However, as part of developing the PRD, Nu-West and Brownfield planned to rezone the Property to R2-PRD, and sought to use some of the Golf Course to meet open space and density requirements under the City’s zoning regulations.

Accordingly, on May 10, 1979, Nu-West, Brownfield, and NSGA — an entity formed by Mr. Bourne, Mr. Proctor, and their attorney, Patrick Comfort — entered into an agreement titled “Agreement

Concerning North Shore Golf Course” (the “1979 Agreement”), by which Nu-West agreed that it would relinquish its option to purchase the Golf Course, and that NSGA would have the right to purchase it directly from TLC. CP 1462–63. (By separate agreement, Nu-West had acquired all of Brownfield’s purchase rights.) *Id.*

The 1979 Agreement provided that, as a condition of NSGA being allowed to acquire the Golf Course directly from TLC, NSGA would agree to restrict the use of the Golf Course to golf course and open space until the development process was complete. CP 1463, ¶ 2. The restriction, however, was limited in time. The 1979 Agreement provided that the it was effective only “until the master planning and development process is concluded, at which time it shall terminate and any remaining restrictions in the master planning and development process are all that shall remain with regard to the [Golf Course property].” *Id.*, ¶ 3. Once the PRD was approved and the development was complete, the restriction expired, leaving only those conditions imposed by the City pursuant to its zoning authority.

As contemplated in the 1979 Agreement, NSGA purchased the Golf Course directly from TLC. On November 20, 1978, NSGA and TLC entered into a Real Estate Contract that set forth the terms of the transaction. CP 1465–76. Like the 1979 Agreement, the Real Estate Contract contemplated that NSGA would be obligated to use the Golf Course as open space, but only during the life of the contractual relationship between TLC and Nu-West. CP 1475, ¶ 1. As with the 1979

Agreement, the restrictions contained in the Real Estate Contract were temporary and expressly expired upon the sale of the Nu-West Property to Nu-West. *Id.* ¶ 6. The sale of the Nu-West Property closed as contemplated. CP 1423. Accordingly, TLC’s reversionary rights terminated, and so did any use restriction under the Real Estate Contract.

**C. The Hearing on Nu-West’s Development Application**

On February 10, 1981, the hearing on Nu-West’s application to rezone the property and develop Country Club Estates was heard by the City’s Hearings Examiner, Robert J. Backstein. CP 1502–23. Examiner Backstein was concerned that Nu-West sought to use property it did not own (*i.e.*, the Golf Course) to satisfy Country Club Estates’ open space and density requirements under the City’s land use code. CP 1510.

Examiner Backstein approved Nu-West’s development application and rezone request, but made it subject to the condition that Nu-West submit an agreement between the parties and enforceable by the City that would restrict the use of the Golf Course to open space in perpetuity to satisfy Country Club Estates’ open space and density requirements. CP 1514, ¶ 4.E. Examiner Backstein proposed that the parties execute something similar to the 1979 Agreement. *Id.* However, he also indicated that he thought “more certainty” was necessary — possibly because the 1979 Agreement expired by its own terms. *Id.* Examiner Backstein’s condition was never satisfied, as discussed below.

**D. The Open Space Request**

Because NSGA intended to operate its property as a golf course, it requested to have the Golf Course officially classified as open space under RCW Ch. 84.34, to obtain a reduction of its real property taxes. The hearing on NSGA's request was conducted concurrently with Nu-West's development application, before Examiner Backstein. CP 1525-43. Examiner Backstein also made his approval of NSGA's request for open space classification contingent upon the condition that the parties enter into a binding agreement perpetually subjecting the Golf Course to open space use. Again, Examiner Backstein conditioned approval of the open space classification on the parties' submission of an agreement "similar in form" to the 1979 Agreement. CP 1535, ¶ 2.

**E. The Open Space Taxation Agreement**

Nu-West never submitted an agreement "binding on all parties" or "similar in form" to the 1979 Agreement, subjecting the Golf Course to open space in perpetuity. Instead, NSGA entered the OSTA with the City. CP 1478-86.

The OSTA was entered into pursuant to RCW Ch. 84.34, which enables property owners to receive tax relief for agreeing to maintain their land as open space (*e.g.*, a golf course) for a certain period of time. Open space taxation agreements are unilaterally revocable by the property owner. *See* RCW 84.34.070. Under the statute, the only penalty for withdrawing property from open space classification is the payment of back taxes, penalties, and interest. *See* RCW 84.34.100.

Indeed, the OSTA itself contemplates that NSGA may breach its terms by changing the use of the Golf Course to something other than open space, and that the penalty for a breach is additional tax and penalties. CP 1478, ¶ 8. Similarly, the acknowledgement signed by Mr. Bourne on behalf of NSGA states: “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.” CP 1479 (emphasis added). When Mr. Bourne signed the OSTA on behalf of NSGA, it was never his intent to perpetually restrict the Golf Course to open space. CP 1457, ¶ 9. He believed the purpose of the OSTA was simply to reduce NSGA’s real property taxes. *Id.*

**F. The Concomitant Zoning Agreement**

Shortly after NSGA and the City of Tacoma entered into the OSTA, Nu-West and the City of Tacoma entered into the CZA, which governed the permissible uses on Nu-West’s planned residential development. CP 1545–60. NSGA was not a party to the CZA, and the CZA says nothing about restricting the use of the Golf Course to open space. *Id.* At most, the CZA states that the PRD is to be developed in accordance with the site plan. CP 1553–54, ¶ tt. The Golf Course was not part of the site plan; it was only part of the PRD. CP 1502 (site plan “bounded by [the Golf Course] to the west and north); CP 1562, 63 (same).

**G. The City's Doubts About the Viability of the OSTA as a Perpetual Restriction on the Golf Course**

Nu-West's planned residential development was permitted in various phases. In 1985, a successor in interest to Nu-West, WSLA Development Corporation ("WSLA"), sought preliminary plat approval and site plan approval for Division II of Country Club Estates. CP 1562–74. The Hearings Examiner considering WSLA's application, Gary Sullivan, expressed concern that Paragraph 4.E of the 1981 Decision may not have been satisfied. CP 1564, ¶¶ 8–9.

Examiner Sullivan sent a letter to the City's then-Land Use Administrator, Rodney Kerslake, inquiring whether the OSTA satisfied the condition imposed in Paragraph 4.E of Examiner Backstein's 1981 decision. CP 1576–77. As the letter stated: "Please advise whether the Examiner understands the facts correctly and on what basis [the OSTA], which appears to be a revocable agreement, complies with Condition 4.E. cited herein." CP 1577. As it also stated, "[t]he Examiner believes that the Concomitant Zoning Agreement . . . requires modification to delete what are now unenforceable conditions and to include maintenance of the open space referred to herein in compliance with Condition 4.E." *Id.*

Mr. Kerslake responded that, while the OSTA may have been intended to satisfy Paragraph 4.E, it did not do so, and agreed that the CZA would need to be modified to bind the Golf Course to open space use. He pointed out that "the Concomitant Zoning Agreement does not specifically include a condition which would tie the golf course into the

PRD,” and expressed the concern “that the conditions of the Open Space Taxation Agreement may be outside the scope and authority of RCW 84.34” and that it “could be unilaterally revocable by the property owner and, in any event, runs for a maximum of ten (10) years.” CP 1579–80.

Examiner Sullivan then conditioned his approval of WSLA’s application on (1) receiving assurance from the City that the OSTA met Paragraph 4.E of Examiner Backstein’s 1981 decision and (2) a modification of the CZA, ensuring the continued availability of the Golf Course to meet Country Club Estates’ open space and density requirements. As Examiner Sullivan’s decision provided, “[t]he foregoing shall be necessary to assure the continued availability of the golf course for open space density requirements in perpetuity. CP 1568, ¶ 5(u).

In response, the City’s attorney, Kyle Crews, stated in a written opinion that the OSTA and the CZA, acting together, bind the Golf Course and restrict it to open space. CP 1085. However, Mr. Crews also opined that it would be impractical to amend the CZA, and that therefore it would not be amended. *Id.* The CZA was never amended.

**H. The Golf Course Was Not Necessary To Satisfy the Open Space and Density Requirements of Country Club Estates**

The Golf Course was never in fact needed to satisfy the open space and density requirements of the Country Club Estates PRD. In his letter to Examiner Sullivan, Mr. Kerslake made this very observation: “[W]e would like to point out that Division II, which is the subject of File Nos.

125.277 and 127.238, does not require the area contained within the golf course for density consideration.” CP 1580.

According to Pete Katich, the City’s Land Use Administrator until recently, it appears that no one ever calculated the open space and density requirements applicable to the PRD at the time of Nu-West’s original application, much less whether those requirements were satisfied. Instead, as Mr. Katich testified under oath during a related land use hearing, “[w]ell, the golf course I believe was just set aside because it was an opportunity to easily address the open space requirement at the time without getting into the individual calculations that you have just gone through.” CP 1601.

Had the individual calculations been performed, it would have been clear that the Golf Course was never needed to satisfy the PRD’s open space and density requirements. Dennis Hanberg, a land planner with Apex Engineering, has provided Investors with civil engineering and land use planning services for its proposed re-development of the Golf Course. CP 1487–88, ¶¶ 1–2. Mr. Hanberg performed an exhaustive analysis regarding the amount of open space and density in the non-Golf-Course portion of Country Club Estates. CP 1488, ¶ 3. He determined that, completely leaving aside the Golf Course, Country Club Estates currently has nearly twice the amount of the open space required under the applicable R2-PRD regulations. *Id.* ¶ 8. The Golf Course is not, and has never been, needed to meet the PRD’s open space requirements.

The non-Golf-Course portion of Country Club Estates also more than satisfies the density permissible under the applicable R-2 PRD zoning. According to Mr. Katich's testimony, under those regulations, 1,978 residential units were permissible on the non-Golf-Course PRD area (*i.e.*, Country Club Estates). CP 1597. Only 1,265 units were actually built. *Id.* Even without the Golf Course, approximately 713 additional residential units could have been built in the non-Golf Course portion of the PRD without exceeding the density requirements.

**I. Investors' Proposed Project and the City's Opposition Thereto**

NSGA entered into a purchase and sale agreement with Investors in August 2006. CP 1458, ¶ 12. Investors plans to develop a single-family residential project on the Golf Course (the "Project"). *Id.*

When top City officials learned about the Project, they directed City Staff to find a means to halt it. The City's first strategy was to enact a moratorium on all planned residential developments in the City. CP 1635. Email correspondence among members of the City government demonstrate unambiguously that the purpose of the moratorium was to "affect, prevent, or delay" the sale of the Golf Course and Investors' Project. *Id.*

Investors, however, submitted its development application one day before the effective date of the moratorium and, thus, vested under the pre-moratorium ordinances. CP 1497, ¶ 13. The City was unfazed, knowing that the vesting doctrine only applies to "complete" applications. If

Investors' application happened to be incomplete for any reason, it would not be vested, and the moratorium would apply. CP 1497, ¶ 14; CP 1637. Not surprisingly, the City notified Investors that its application was incomplete. CP 1497, ¶ 16. Investors appealed the City's determination. CP 1497, ¶ 16. The Hearings Examiner who considered Investors' appeal determined that Investors' application was complete and, therefore, that Investors had vested under the pre-moratorium rules. *Id.* The City attempted to appeal the Hearings Examiner's decision by filing a petition under the Land Use Petition Act ("LUPA"). The City failed to properly serve the petition, so the Superior Court dismissed the appeal. *Id.*

**J. Procedural History**

1. The City's Declaratory Judgment Action

In January 2007, following dismissal of the LUPA appeal, the City filed a declaratory judgment action seeking a determination that the OSTA and the CZA had the effect of restricting the use of the Golf Course to open space in perpetuity. CP 1–20. The City claimed that its alleged right to perpetually restrict the use of the Golf Course to open space was an interest in real property. CP 18–19. The City asserted a quiet title claim to perfect its alleged interest. *Id.* Respondents denied the City's allegations, and NSGA filed a counterclaim for inverse condemnation. CP 143–45.

2. The Intervention

Shortly after the litigation commenced, Intervenors, along with the neighborhood association of which they are members, Save NE Tacoma,

moved to intervene. CP 80–131. The trial court allowed the individual Intervenor to intervene, because they alleged that they owned property within the Country Club Estates development and were therefore successors and assigns of Nu-West. CP 180; *see also* Report of Proceedings (“RP”) (May 16, 2008) at 6:7–8:2. However, the trial court denied intervention to Save NE Tacoma, because it does not own property within Country Club Estates. CP 180; *see also* RP (May 16, 2008) at 8:3–14. Inherent in the ruling allowing Intervenor to intervene was the concept that their rights were derived from the agreements that were intended to benefit Nu-West — namely, the 1979 Agreement and the Real Estate Contract. RP (May 16, 2008) at 6:7–8:14.

Shortly thereafter, Intervenor filed their Complaint in Intervention. Intervenor’s Complaint is nearly identical to the City’s, except that Intervenor asserted that they are third-party beneficiaries of the OSTA and CZA, and thereby have the right to enforce those agreements and restrict the Golf Course to open space use. CP 154–78.

In their first cause of action, Intervenor alleged that the OSTA was a contract between the City of Tacoma and NSGA, and that it was binding on the owners of the Golf Course “until the OSTA is nullified by the City.” CP 168, ¶ 6.3 & 170, ¶ 6.11. In seeking declaratory relief, Intervenor requested that the court declare that “the OSTA remains in effect until Tacoma agrees to its nullification.” CP 170, ¶ 6.13. Under their third cause of action, Intervenor again requested that the court enter an order precluding termination of the OSTA without “the City’s

consent.” CP 175, ¶ 8.6. This allegation is consistent with the Intervenor’s factual allegation that Respondents must obtain the Tacoma’s consent to use the Golf Course for any purpose other than golf course and open space.” CP 167, ¶ 5.15. Both causes of action on the OSTA are predicated on Intervenor’s alleged third-party rights. CP 168, ¶ 6.3 & 170, ¶ 6.11. Despite the pending land use process, Intervenor did not and have not sued the City to prevent the City from consenting to the termination or nullification of the OSTA.

With regard to the CZA, Intervenor alleged in their second and fourth causes of action that they had derivative rights via their alleged “third-party beneficiary” status. CP 171, ¶ 7.3 & 175, ¶ 9.3.

In their fifth cause of action, their claim to quiet title, Intervenor again alleged derivative rights based upon their purported status as “third-party beneficiaries of the OSTA and CZA.” CP 177, ¶ 10.4.

Finally, in their request for relief, Intervenor sought a declaration establishing their status as “third-party beneficiaries of the OSTA and CZA.” CP 177, ¶ 11.1. The remaining requests for relief mirror those in the City’s Complaint. *Compare* CP 19–20 *with* CP 177–78.

The sole reference in Intervenor’s Complaint to “common plan” appears in the Background Facts on page 5, ¶ 3.6: “The OSTA and CZA qualify as restrictive covenants and operate as a common plan. [Intervenor], as adjoining landowners, are third-party beneficiaries of the OSTA and CZA and are entitled to enforce the OSTA and CZA.” CP 158–59. There is no separate cause of action or claim for relief based on a

common plan theory; all of Intervenor's claims were asserted as derivative of the City's claims via third-party rights.

3. The Parties' Cross-Motions for Summary Judgment

In November 2008, Respondents filed a joint motion for summary judgment. CP 1420–54. The City filed a cross-motion for summary judgment. CP 223–78. In their motion, Respondents asserted that (1) none of the agreements at issue in the case — including the 1979 Agreement, the Real Estate Contract, the OSTA, and the CZA — restrict the Golf Course to open space use in perpetuity; (2) the City of Tacoma did not acquire a property interest by virtue of the OSTA or the CZA; (3) to the extent the OSTA and CZA perpetually restrict the Golf Course to open space use, they effect an unconstitutional taking of real property, because they go beyond what was reasonably necessary to mitigate the impacts of the original development; and (4) Intervenor's are not third-party beneficiaries of any of the agreements at issue, and have no claims, legal or equitable, to enforce the OSTA or CZA or otherwise restrict the use of the Golf Course. CP 1420–54.

In its summary judgment motion, the City made essentially the opposite arguments. The City argued: (1) the OSTA and the CZA restrict the Golf Course to open space use in perpetuity; (2) the City's right to restrict the Golf Course to open space use constitutes a non-possessory property interest; (3) NSGA's inverse condemnation claim is barred by the statute of limitations to the extent it asserted a taking of real property by virtue of the OSTA and the CZA, and (4) the inverse condemnation claim

is not ripe to the extent it asserted a taking of real property by virtue of the ongoing land use process. CP 223–78. The City took no position on the motion to dismiss Intervenors’ claims.

Intervenors joined in the City’s summary judgment motion, CP 1651–52, and filed an opposition to NSGA and Investors’ joint summary judgment motion to preserve their claims. CP 1683–98. In their opposition, Intervenors contended that they were third-party beneficiaries of the OSTA and CZA. CP 1689–95. Intervenors further asserted “[t]he common plan theory is related to the third party beneficiary doctrine of contract law,” and argued that the purported restrictions imposed by the OSTA and CZA resulted in a common plan or scheme of development with respect to the Golf Course and the adjacent residences in North Shore Country Club Estates. CP 1696–98.

NSGA and Investors, in their reply in support of their summary judgment motion, directly addressed Intervenors’ arguments concerning a common plan or common scheme of development. CP 1886–87. Similarly, at the summary judgment hearing, Intervenors’ counsel had the opportunity to argue, and did argue, the common plan or common scheme of development theories. RP (December 19, 2008) at 65:11–66:8, 71:1–18. The trial court considered these arguments and the evidence and briefing related to them. *Id.* Indeed, the trial court expressly solicited argument from counsel regarding the common plan theory. For example, as the court stated to Investors’ counsel: “Why don’t you go onto the common plan argument.” RP (December 19, 2008) at 65:8–10. As

Investors' counsel explained, "Washington [law] says you can only impose an equitable servitude or find a common plan and scheme if you have — a substantial number of the properties have these restricted (sic) covenants recorded, they're allowed to enforce them. In this case we have none." *Id.* at 65:23–66:3. The trial court invited Intervenors' counsel to offer argument on the common plan theory. As the court stated:

Well, I've not taken a look at the sections of the restatement or the case law that you cited about your common plan argument. Mr. Laing seems to be saying you only get into this argument if, in effect, at least at some point in time a covenant was properly documented, but you've got people who didn't get the right documents in their documents of title, and they basically get to piggyback on to the other established rights.

*Id.* at 71:1–9.

Given the opportunity to provide argument on the theory, Intervenors' counsel argued only that the state of the law in Washington was "not resolved."

I think that's a mischaracterization of the state of the law with regard to common plan in this state. This is an evolving doctrine that's set out in the third restatement. I will agree that there are no Washington cases that expressly address this issue of common plan. There are cases that suggest what Washington's position on that would be. But it is not resolved.

*Id.* at 71:10–18. Intervenors' presented no evidence of a covenant, nor did they provide additional legal argument to support their claims that a common scheme of development exists under the facts of this case. They did not seek reconsideration of the trial court's ruling, either.

4. The Trial Court's Summary Judgment Ruling

The trial court granted in part and denied in part the cross-motions for summary judgment. CP 1957–66. The court ruled that the OSTA and the CZA give the City the authority to restrict the use of the Golf Course to open space through its zoning authority. CP 1963, ¶ 4(b); CP 1964–65, ¶ 2. The court also ruled that the City's authority to do so amounts to a land use restriction — not a real property interest. CP 1965, ¶ 3. The court ruled that the owner of the Golf Course, just like any property owner within the PRD, was entitled to seek to have those land use restrictions changed through the ordinary land use process. CP 1965, ¶ 2(g). The court therefore dismissed the City's quiet title claim. CP 1966, ¶ 6.

The trial court dismissed all of Intervenors' claims with prejudice, including their claims that they have any third-party beneficiary rights under the OSTA and CZA, and the claim that the restrictions imposed by the OSTA and CZA operated to create a common plan or scheme of development. CP 1971–75. The trial court specifically found that “[n]one of the plats which were approved within the Country Club Estates PRD contains any dedication of open space or other restrictions that affect the Golf Course property owned by North Shore Golf Associates, Inc. that is the subject of this action.” CP 1974, ¶ 9. In dismissing the Intervenors' claims, the trial court stated that it gave no weight to the opinion evidence contained in the paragraphs 9–12 of the Declaration of Professor John Weaver, which Intervenors submitted in support of their summary judgment opposition for their common plan theory. CP 1973, ¶ 3.

Before reducing them to written orders, the trial court announced its rulings in a transcribed proceeding. RP (January 9, 2009). As the court stated, “[w]hat came out of the planning process in 1981 was an open space land use designation, not a covenant.” RP (January 9, 2009) at 13:22–23. The trial court then observed, “I think it’s also notable that as the PRD property was developed over the years after 1981 none of the plats which were approved within the PRD contain any dedications that affect or include the golf course whatsoever.” *Id.* at 14:2–6.

After the court announced its rulings, Intervenors’ attorney objected that the common plan or scheme claims had not been before the court. *Id.* at 15. The trial court rejected this notion, stating:

There was an argument — there was authority presented and argument made about the common plan part, as I recall. And then as I recall asking you a question with the two common plan cases are rather old decisions, and there was an indication that the common plan — I think you acknowledged that the common plan theory had never been applied in a circumstance where at least one of the property owners didn’t have an expressed grant. And in my view, if I was not express in my decision, I would rule against you under the common plan theory on summary judgment.

*Id.* at 15–16. The court acknowledged not recalling argument regarding equitable servitudes. *Id.* at 16. However, as Investors’ counsel pointed out, “the common plan and equitable servitude claims are essentially the same claim.” *Id.* Indeed, Intervenors treat them as one and the same in their briefing to this Court. *See* Corrected Brief of Appellants (“Corrected

Brief”) at 17–18 (referring to an “equitable servitude created by a common plan theory”).

5. Intervenors’ Appeal

Neither the City nor NSGA and Investors appealed the trial court’s ruling. Intervenors timely appealed on March 4, 2009. The Clerk rejected Intervenors’ first Opening Brief filed on August 24, 2009, because the brief failed to include issue statements in violation of RAP 10.3(a)(3). *See* Clerk’s Letter, 8/25/09. When the brief was rejected, Intervenors had the opportunity to revisit the issues they wished to bring before this Court. When they filed their Corrected Brief on September 14, 2009, Intervenors stated only two issues. The first relates to whether the OSTA created a property interest in the City of Tacoma. Corrected Brief at 1 (Issue A). The second relates to whether Intervenors’ restrictive covenant and “common plan” theories were before the Court on summary judgment. Corrected Brief at 1–2 (Issue B).

Intervenors’ assignments of error and issue statements are narrow. *See* Corrected Brief at 1–2. Intervenors did not assign error to the court’s ruling that they have no third-party beneficiary rights in any of the agreements at issue. They did not assign error to the trial court’s finding that none of the plats in the PRD contain any dedications or other restrictions that affect the Golf Course. *Id.* Nor did they assign error to the court’s decision not to give any weight to the opinion evidence contained in Professor Weaver’s declaration. *Id.* And, they failed to assign error to the ruling that the CZA did not create a covenant or other

real property interest on the part of the City or anyone else. *Id.*  
Intervenors' discussion of the court's supposed error is limited to the  
assertion that the trial court incorrectly ruled that the OSTA does not  
create a real property interest. *Id.*

#### IV. ARGUMENT

##### A. Standard of Review.

In reviewing a summary judgment order, this Court undertakes the  
same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437,  
656 P.2d 1030 (1982). The Court is to consider all evidence in the light  
most favorable to the non-moving party, and "the motion should be  
granted only if, from all the evidence, reasonable persons could reach but  
one conclusion." *Id.* Review is confined to the issues the parties raised  
and the trial court considered. *Babcock v. State*, 116 Wn.2d 596, 606,  
809 P.2d 143 (1991).

Summary judgment is appropriate if there are no issues of material  
fact, such that the moving party is entitled to judgment as a matter of law.  
*Wilson*, 98 Wn.2d at 437. "A material fact is one upon which the outcome  
of the litigation depends." *In re Estate of Black*, 153 Wn.2d 152, 160,  
102 P.3d 796 (2004) (quotations omitted).

Unchallenged findings are verities on appeal. *West Coast, Inc. v.*  
*Snohomish County*, 112 Wn. App. 200, 207, 48 P.3d 997 (2002).  
Argument unsupported by an assignment of error does not present an issue  
for review. *Rutter v. Rutter's Estate*, 59 Wn.2d 781, 787, 370 P.2d 862  
(1962).

Review of a trial court's evidentiary rulings is for abuse of discretion. *Joyce v. Dep't of Corr.*, 116 Wn. App. 569, 601, 75 P.3d 548 (2003).

**B. This Court Should Reject Assignment of Error No. 1 and Affirm the Finding That the City Has No Property Interest**

1. Intervenors Have No Standing To Assert the City's Property Interest or To Appeal Whether It Has One

Intervenors' first assignment of error is that the trial court incorrectly ruled that the City does not have a property interest in the Golf Course and in dismissing its quiet title claim. Significantly, Intervenors do not claim that they have a property interest in the Golf Course. They claim that the City does and that the trial court should have recognized it. But the City did not appeal the trial court's ruling. Only the City has standing to enforce its own purported property rights; Intervenors do not. Alternatively, only the City is the real party in interest to enforce its property rights; Intervenors are not. Intervenors conceded this repeatedly in their complaint by affirmatively alleging that the OSTA could be nullified or removed with the City's consent. CP 167, ¶ 5.15; 168, ¶ 6.3; 170, ¶¶ 6.11 & 6.13; 175, ¶ 8.6.

Intervenors' only possible source of standing would have been a determination that they are third-party beneficiaries of the OSTA or the CZA. But the trial court correctly ruled that Intervenors are not third-party beneficiaries, and Intervenors have not assigned error to that ruling. The issue is therefore moot. *Rutter*, 59 Wn.2d at 787.

Thus, whether viewed as a standing issue or a real-party-in-interest issue, Intervenor's do not have the right to stand in the City's shoes and attempt to assert the City's rights. This entire appeal should be denied on this basis alone.

a. Intervenor's Do Not Have Standing

First, Intervenor's do not have standing to enforce the City's purported real property rights. Standing is at issue "when the question is whether the person whose standing is challenged is the proper party to request adjudication" of a matter. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 129, 30 P.3d 446 (2001). "The doctrine of standing prohibits a litigant from asserting another's legal right." *West v. Thurston County*, 14 Wn. App. 573, 183 P.3d 346 (2008). Standing is a question of law. *Id.* It is also a jurisdictional issue, which a party may raise for the first time on appeal. *Int'l Assoc. of Firefighters, Local 1789 v. Spokane Airports*, 103 Wn. App. 764, 768, 14 P.3d 193 (2000) (citing RAP 2.5(a)).<sup>1</sup>

To have standing, a party "must have some protectable interest that has been invaded or is about to be invaded." *Orion Corp. v. State*, 103 Wn.2d 441, 455, 693 P.2d 1369 (1985). The party must have a "personal stake in the outcome of controversy" in order to request adjudication on the merits. *Bedford v. Sugarman*, 112 Wn.2d 500, 505–06, 772 P.2d 486 (1989) (quotations omitted). A proper party is required so that courts are

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<sup>1</sup> In this case, Respondents have no choice but to raise the issue for the first time on appeal, because this appeal constitutes the first time Intervenor's have attempted to assert the City's rights.

not asked to decide cases that are of “a hypothetical or abstract character.”  
*Flast v. Cohen*, 392 U.S. 83, 100 (1968) (quotations omitted).

Washington courts have developed a three-part analysis for determining whether a party has standing. A litigant only has standing if “(1) the litigant has suffered an injury-in-fact, giving him a sufficiently concrete interest in the outcome of the disputed issue; (2) the litigant has a close relationship to the third party; *and* (3) there exists some hindrance to the third party’s ability to protect his or her own interests.” *Ludwig v. Washington State Dept. of Ret. Sys.*, 131 Wn. App. 379, 385, 127 P.3d 781 (2006) (emphasis in original). Because the foregoing elements are stated in the conjunctive, they must all be resolved in Intervenors’ favor to establish standing.

In this case, Intervenors are not the proper parties to request adjudication of the City’s purported property rights. Intervenors do not claim that they have a property interest in the Golf Course. Intervenors have suffered no injury in fact as a result of the trial court’s ruling. They have no legal stake in the outcome of a determination relating to the City’s purported property interest in the Golf Course. Intervenors fail to meet the first element set forth by the court in *Ludwig*. The Court can and should determine that Intervenors lack standing on this basis alone.

Intervenors fail to meet the other two elements as well. Intervenors do not have a particularly close relationship to the City — at least, no closer than any other Tacoma resident. Moreover, the City is not

hindered in any way from protecting its own rights. The City could have appealed the trial court's ruling; it did not.

Intervenors are asking the Court to resolve an issue of "a hypothetical or abstract character." *Flast*, 392 U.S. at 100. This Court should dismiss for lack of standing the appeal as to the City's property interest. The finding that the City has no property interest must stand.

b. Intervenors Are Not the Real Party In Interest

Intervenors are also not the real party in interest for purposes of asserting the City's rights. Washington Civil Rule 17(a) provides that "[e]very action shall be prosecuted in the name of the real party of interest." The real party in interest is "the person who, if successful, will be entitled to the fruits of the action." *Northwest Indep. Forest Mfrs. v. Dep't of Labor & Industries*, 78 Wn. App. 707, 716, 899 P.2d 6 (1995). The purpose of CR 17(a) is "to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 172, 982 P.2d 1202 (1999) (quotations omitted).

Here, Intervenors are not the real party in interest for purposes of determining whether the City has a property interest in the Golf Course. The City is the only party that would be entitled to the "fruits" of a determination that it such an interest. As noted, any such determination would have no impact on the legal rights of Intervenors. This is especially true, given Intervenors' admission that the OSTA can be nullified or revoked by the City.

There is no question that only a person who asserts a valid interest in property is the real party in interest for purposes of an adjudication affecting rights related to the property. *See Washington Sec. & Inv. Corp. v. Horse Heaven Heights, Inc.*, 132 Wn. App. 188, 196, 130 P.3d 880 (2006) (stating that a claim of ownership “is necessary under CR 17(a) in order to establish standing as a real party in interest” for a quiet title claim). Here, because Intervenor asserts no property interest in the Golf Course, much less a valid one, they are not the real parties in interest in an adjudication affecting the rights of any other party. This is even more the case for Intervenor Lovelace, who does not own property in the PRD.

Intervenor’s appeal is also impermissible under the appellate rules. “Only an aggrieved party may seek review by the appellate court.” RAP 3.1. An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. *Johnson v. Mermis*, 91 Wn. App. 127, 137, 955 P.2d 826 (1998). Intervenor has no such rights in the City’s purported property interest. Intervenor is not aggrieved, and is not the proper party to appeal the trial court’s decision.

2. Appeal of the Property Interest Ruling Is Moot Because Intervenor Fatally Failed to Assign Error to the Conclusion that They Have No Third Party Beneficiary Rights In It

Intervenor fatally failed to assign error to the trial court’s ruling that they have no third party beneficiary rights in any potential property interest of the City. *See* CP 1973, ¶¶ 4–6. To the extent that third party beneficiary rights might change the standing or real party in interest

analysis, Intervenor's are not entitled to assert such rights. RAP 10.3(g) (stating "the appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto"); *Rutter*, 59 Wn.2d at 787 (stating argument unsupported by an assignment of error does not present an issue for review). Therefore, review of the ruling on the City's property interest can have no practical impact on Intervenor's. Further litigation of the property interest is moot. *See In re Marriage of Irwin*, 64 Wn. App. 38, 58, 822 P.2d 797 (1992) ("A case becomes moot if it is deprived of its practical significance or becomes purely academic.").

Should this Court choose to examine the trial court's third-party beneficiary ruling, it should affirm the ruling. It is clear that Intervenor's are not third-party beneficiaries of either agreement, which probably explains why they did not appeal the ruling. In order to have third-party beneficiary rights, all parties must intend for the promisor to assume a direct obligation to an intended beneficiary. *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983); *see also Vikingstad v. Baggott*, 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955). This intent must be present at the time of the contract, and "[i]n the absence of such an intent, no third-party beneficiary contract exists." *Burke & Thomas v. Int'l Org. of Masters*, 92 Wn.2d 762, 768, 600 P.2d 1282 (1979).

In determining whether third-party beneficiary status is created by a contract, the critical question is whether the benefits are intended to flow directly from the contract or whether they are merely incidental, indirect

or consequential. *McDonald Constr. Co. v. Murray*, 5 Wn. App. 68, 70, 485 P.2d 626 (1971). An incidental beneficiary — a party who benefits from a contract, but to whom the promisor has accepted no obligation — cannot enforce the contract. *Id.* Where third-party rights exist, a third-party beneficiary may enforce a contract only to the extent that it is enforceable by a party-promisee. *See Kinne v. Lampson*, 58 Wn.2d 563, 567, 364 P.2d 510 (1961).

Neither the OSTA nor the CZA contain any indication that Intervenor is intended third-party beneficiary of the agreements. That Intervenor may derive some incidental benefit from the two agreements is of no consequence: such benefits do not create enforceable contractual rights. *See McDonald Constr.*, 5 Wn. App. at 70.

Further, the City could not legally have intended that Intervenor be third-party beneficiary under the OSTA or CZA. The OSTA is a statutorily-created taxation agreement. *See RCW Ch. 84.34.* A concomitant zoning agreement such as the CZA is, essentially, a mitigation agreement that cannot be used “to extract a collateral benefit from the property owner.” *City of Redmond v. Kezner*, 10 Wn. App. 332, 339–40, 517 P.2d 625 (1973) (citing *Chobruck v. Snohomish County*, 78 Wn.2d 858, 889, 480 P.2d 489 (1971) and *Myhre v. City of Spokane*, 70 Wn.2d 207, 216, 422 P.2d 790 (1967)). A municipal government may enter into a concomitant zoning agreement pursuant to its zoning authority. *See generally id.*

The Washington State Constitution provides that “[p]rivate property shall not be taken for private use.” Wash. Const. Art. 1, § 16. “Private use” under this section is defined literally. *Manufactured Hous. Communities of Wash. v. State*, 142 Wn.2d 347, 361, 13 P.3d 183 (2000). Given this constitutional prohibition, the City did not have the authority under RCW Ch. 84.34 or its zoning authority — or any authority — to contract away NSGA’s development rights on the behalf of any private third-party beneficiary. That is why “[p]arties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary.” *Klamath Water Users Protective Ass’n. v. Patterson, et al.*, 204 F.3d 1206, 1211 (9th Cir. 1999) (emphasis added). Because the City had no legal authority to intentionally confer rights on Intervenors through these agreements, Intervenors’ third-party beneficiary claims failed as a matter of law, and the trial court was correct in dismissing them.

Finally, Intervenors’ reliance on *1515-1519 Lakeview Blvd. Condo. Ass’n v. Apartment Sales Corp.*, 146 Wn.2d 194, 43 P.3d 1233 (2002), for the proposition that municipalities can use their zoning authority to create restrictive covenants enforceable by third-parties is misplaced and misconstrues the case. In fact, our Supreme Court stated in a footnote “No argument about the constitutionality or legality of this rule was made at any level; nor was any argument made about the appropriateness of covenants in the land use planning.” *Id.* at 198 n.1 (emphasis added). The very proposition that Intervenors rely upon was not before the *Lakeview*

*Blvd. Condo.* Court. And even were the OSTA a covenant, Intervenor's concede—affirmatively allege—the City has the authority to nullify it.

3. This Court Should Affirm On the Merits Because the City of Tacoma Has No Property Interest Pursuant to the OSTA

If Intervenor's had standing to protect the City's purported property interest in the Golf Course, this Court should affirm on the merits the correct ruling that the City has no such property interest. The trial court correctly concluded that neither the OSTA nor the CZA had the effect of creating a real property interest.<sup>2</sup>

a. Open Space Taxation Agreements Are Revocable Agreements Whose Purpose Is To Provide Tax Relief

The OSTA is governed by RCW Ch. 84.34, which enables property owners to receive tax relief upon agreeing to not develop their property for a certain period of time. The purpose of RCW Ch. 84.34 is to “encourage the maintenance and preservation of open space lands for the production of food, fiber and forest crops and to assure the use and enjoyment of natural resources and scenic beauty.” *In re Estate of Bergau*, 103 Wn.2d 431, 434–35, 693 P.2d 703 (1985). The statute provides property owners with a financial incentive to resist the pull to develop their property, by designing tax assessment practices that permit

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<sup>2</sup> Intervenor's do not claim that the City or anyone else acquired a property interest in the Golf Course pursuant to the 1979 Agreement (CP 1462–63) or the Real Estate Contract (CP 1465–76). In their summary judgment motion, NSGA and Investors pointed out that each of those agreements expired by their own terms, to be supplanted by the City's land use restrictions. CP 1435–37. Neither the City nor Intervenor's contested this assertion.

the continued availability of open spaces. *See* RCW 84.34.010. It contemplates that a property owner may enter into an agreement with a governing authority to accomplish this by taxing according to the property's current use instead of its highest and best use. *See* RCW 84.34.070. An open space taxation agreement is not a "contract" and can be abrogated by the state legislature at any time. *See* RCW 84.34.070.

In general, open space taxation agreements are unilaterally revocable by the property owner. *See* RCW 84.34.070(1). When property that has been classified as open space is removed from the classification, the property is subject to back taxes, interest and, under certain circumstances, an additional penalty of 20% of the amount owing. *See* RCW 84.34.108(4). Likewise, the OSTA itself contemplates that it may be revoked unilaterally or breached through early withdrawal by NSGA, and that the only consequence of such untimely revocation or breach is the imposition of back taxes, interest, and penalties. CP 1478, ¶ 8.

In this case, the OSTA contains an unusual provision, which goes beyond the scope of RCW Ch. 84.34. It provides that the agreement "shall remain in effect until such time as nullified by the City of Tacoma." CP 1478, ¶ 7. Based on this provision, the trial court concluded that the OSTA was not unilaterally revocable by NSGA but, instead, could only be revoked by the City. RP (January 9, 2009) at 11:22–12:18. Intervenors affirmatively alleged that the City has the right to nullify the OSTA. CP 167, ¶ 5.15; 168, ¶ 6.3; 170, ¶¶ 6.11 & 6.13; 175, ¶ 8.6. Intervenors have yet to sue the City to prevent it from exercising this right. Significantly,

and consistent with Intervenor's claims, the trial court concluded that the restriction contained in the OSTA is a land use restriction, not a real property interest. RP (January 9, 2009) at 12:4–10, 13:22–23, 18:3–6.

b. The Fact That the OSTA Contains Language Stating That It Runs with the Land Is Irrelevant

Intervenor's primary argument in support of the assertion that the OSTA conveyed a property interest to the City is that the agreement expressly "runs with the land." This language, however, is not determinative and does not support Intervenor's argument. The City produced a number of open space taxation agreements in response to discovery requests. Each and every one of the agreements produced by the City state either that they run with the land or are binding on successors of the property owners. CP 1838–53. But the City admitted that none of these perpetually restrict the use of the subject property to open space. CP 1835. The mere fact that an open space taxation agreement "runs with the land," therefore, does not mean it creates a property interest. The provision simply means that the property owner's successors in interest are also bound by the terms of the agreement, including liability for back taxes, penalties, and interest in the event the property is prematurely removed from open space. This is consistent with RCW 84.34.108(1)(c), which contemplates the sale of a property subject to an open space taxation agreement but does not extinguish the potential tax liability for early withdrawal. *Accord* RCW 84.34.070.

c. Intervenor's Sole Support for Its "Runs With the Land" Argument Is the Declaration of John Weaver, To Which the Trial Court Gave No Weight

Furthermore, Intervenor's sole support for this argument is the Declaration of John Weaver, a law professor, who opined that "the language referenced above that the OSTA shall 'run with the land' is unique to the conveyance of running covenants; there is no other conceivable purpose for its inclusion in the OSTA." Corrected Brief at 13. The trial court denied NSGA and Investors' motion to strike the Weaver declaration, but appropriately gave it no weight, as he was offering legal opinion on the ultimate issue and had not reviewed all of the relevant documents. CP 1974.

Intervenor failed to assign error to that ruling, or to state any issue concerning it. *See* Corrected Brief at 1–2. Notwithstanding these critical failures, in the body of their brief Intervenor state, "Professor Weaver's declaration should have been considered to illuminate the intent and effect of the conveyance language in the OSTA." Corrected Brief at 13–14. Failure to assign error to, or state an issue concerning, the evidentiary ruling violates RAP 10.3(a)(4). *See also* RAP 10.3(g) ("The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto."). Review of a trial court's evidentiary rulings is for abuse of discretion. *Joyce v. Dep't of Corr.*, 116 Wn. App. 569, 601, 75 P.3d 548 (2003). This Court should not review the evidentiary ruling and should not consider paragraphs 9 through 12 of the declaration. If this Court reviews the

ruling notwithstanding these violations of the appellate rules, it should conclude there was no abuse of discretion due to the tenable bases of the trial court's ruling. Even if this court considered the full declaration, it is not determinative in this appeal.

d. The OSTA Is Not in the Form Prescribed by Washington Law for a Conveyance of Real Property

Intervenors also contend that the language of the OSTA “is in the form prescribed by RCW 64.04.130 for conveyance of an interest in land to a governmental entity for conservation, protection or preservation purposes.” Corrected Brief at 13. That statute provides that “[a]ll instruments for the conveyance thereof shall be substantially in the form required by law for the conveyance of any land or other real property.” RCW 64.04.130.

Intervenors' argument is meritless. Under RCW 64.04.010, “[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.” *Id.* Deeds must be (a) in writing, (b) signed and acknowledged by the party bound thereby, and (c) sufficiently descriptive of the burdened property. *See* RCW 64.04.020; *Dickson v. Kates*, 132 Wn. App. 724, 733–34, 133 P.3d 498 (2006). Deeds must also contain clear language demonstrating the intent to convey real property. *See, e.g.*, RCW 64.04.030–.050 (providing clear language of conveyance in statutory forms for warranty, bargain and sale, and quitclaim deeds); *Zunino v. Rajewki*, 140 Wn. App. 215, 216, 165 P.3d 57 (holding documents did not

convey real property because “they lack the required statement of intent to transfer property”).

The OSTA is not “substantially in the form required by law for the conveyance of real property.” On the contrary, it is substantially in the form of a revocable current use taxation agreement whose sole purpose is to reduce real property taxes in exchange for the owner’s agreement to limit the property to open space use for a given time period. It contains no language whatsoever indicating that a conveyance of a property interest was being made. The only thing NSGA’s signature on the documents acknowledges is that NSGA was aware of the tax consequences that would follow if it took the Golf Course out of open space.

If the OSTA purported to be a conveyance of a property interest restricting the use of the Golf Course to open space, it would be nonsensical for it to contain provisions contemplating that NSGA may breach the agreement by changing the use of the property to something other than open space, provided it is willing to accept the financial consequences. The very nature of a property interest is that damages are not sufficient if the purported grantor fails to perform, due to the unique nature of property. *See, e.g., Pardee v. Jolly*, 163 Wn.2d 558, 568–69, 182 P.3d 967 (2008) (“Specific performance is frequently the only adequate remedy for a breach of a contract regarding real property because land is unique and difficult to value.”). Here, remedy for breach, *i.e.*, financial penalties, was agreed upon in advance by the parties. No property interest was conveyed to the City.

e. Nothing in the Surrounding Circumstances Suggests the Parties Intended a Conveyance of Real Property by Means of the OSTA

Nothing in the surrounding circumstances suggests that the purpose of the agreement was to convey a property interest. In order to convey real property, mutual intent is required. NSGA never had any intention of conveying a real property interest in connection with the OSTA. On the contrary, NSGA's principals believed that the purpose of the OSTA was simply to get a reduction in property taxes in exchange for devoting the Golf Course to open space use. CP 1457, ¶ 9. As the court stated in *Zunino*, "particular attention is given to the intent of the grantor when discerning the meaning of the entire document." *Zunino*, 140 Wn. App. at 222.

Likewise, contrary to Intervenors' contention that Examiner Backstein's 1981 decision contained an "express requirement" that NSGA and Tacoma "execute a document to ensure Tacoma's permanent non-possessory property interest in the Golf Course," nothing in the decision says anything about a requirement that NSGA was to convey a real property interest to the City. CP 1502-23. And nothing in either the ordinance approving the rezone to PRD or the ordinance approving NSGA's open space request indicate that NSGA was doing so. CP 328-33; 875-83.

4. This Court Should Affirm on the Merits Because the City of Tacoma Has No Property Interest Pursuant to the CZA

Similarly, nothing in the CZA constitutes a conveyance of real property. NSGA was not even a party to the CZA. *See* CP 1545–60. Again, a conveyance of real property must be “in writing” and “signed and acknowledged by the party bound thereby.” RCW 64.04.020.

The CZA does not even specifically mention the Golf Course or contain an express use restriction relating to the Golf Course, much less contain a legal description. All the CZA says is that the PRD is to be developed in accordance with the site plan; the Golf Course is not part of the site plan. Under RCW 64.04.020, deeds must contain a sufficient description of the property being conveyed. Thus, even if the CZA could somehow be construed as an instrument conveying real property, it fails to satisfy even the most fundamental elements of the real estate statute of frauds.

Moreover, the CZA is zoning document, not a real covenant. “Zoning and other public land-use regulations...are not servitudes.” 1 Restatement (3d) of Prop.: Servitudes 1.1(3) (2000) (hereinafter, “Restatement”); *see also Mains Farm Homeowners Ass’n v. Worthington*, 121 Wn.2d 810, 823, 854 P.2d 1072 (1993) (“When the Legislature intends to affect a *private land use restriction (i.e., a covenant)* as compared to zoning, it does so explicitly”) (emphasis in original).

Finally, again, Intervenors did not specifically assign error to the trial court’s ruling that the CZA did not convey a property interest. *See*

Corrected Brief at 1–2. This Court should therefore affirm the trial court’s ruling that neither the OSTA nor the CZA conveyed a real property interest.

**C. This Court Should Reject Assignment of Error No. 2 and Affirm Dismissal of Intervenors’ “Restrictive Covenant and Common Plan Claims.”**

Intervenors incorrectly argue that their restrictive covenant and common plan theories were not before the Court on summary judgment. Corrected Brief at 17–19. This is the single issue they raise to support reversal of the summary judgment dismissal of their claims. *See* Corrected Brief at 1–2 (Issue B). The record dispels the argument. In addition, this Court can affirm on any ground that was fairly developed before the trial court. *See* RAP 2.5(a). The restrictive covenant and common plan claims, fairly developed based on the extensive briefing and argument of the parties, were not properly pled and cannot be maintained under Washington law, especially in light of key findings of the trial court that Intervenors did not appeal.

Intervenors raise only one narrow issue related to the dismissal of their claims. Rather than raise substantive objections to dismissal, Intervenors raise the procedural issue whether the full scope of their claims was before the trial court. Intervenors had ample opportunity to properly frame any issues they wished to put before this Court. The Clerk rejected Intervenors’ first brief filed on August 24, 2009, because the brief failed to include issue statements in violation of RAP 10.3(a)(3). *See* Clerk’s Letter, 8/25/09. When Intervenors filed their Corrected Brief on

September 14, 2009, Intervenors stated only two issues. The second (Issue B) relates to whether Intervenors' restrictive covenant and "common plan" theories were before the trial court on summary judgment. If this Court decides that the theories were properly considered by the trial court, or that alternative grounds support their dismissal, this ends the inquiry. The Court should not entertain other issues, such as whether questions of fact prevented summary judgment.

This Court also should not consider the assignment of error and issue because Intervenors include insufficient authority and citations to the record. CP 17–19. Intervenors fail to cite authority or rules regarding when an issue is properly before the court. Intervenors discuss what they pled without citing to their Complaint. Their three-paragraph treatment of the issue for review (before going into the merits of the underlying claims) is "passing treatment." Intervenors state within these three paragraphs that they responded to the summary judgment motion "by showing that under a 'common plan' theory, a property owner in a development may enforce a restriction against another property owner." Corrected Brief at 17. Intervenors raised these claims in their brief to defeat summary judgment without any reservation of rights or objection that these theories were not at issue. Intervenors fail to explain the inconsistency of this response to the motion with their current argument that these theories were not raised by the motion.

"Failure to provide argument or authority in support of an assignment of error precludes review." *See* RAP 10.3(a)(5)–(6); *Cowiche*

*Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). “The law is well established that ‘[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.’” *Johnson v. Mermis*, 91 Wn. App. 127, 136, 955 P.2d 826 (1998). The Court should not entertain the issue.

1. All of Intervenors Claims Were Properly Before the Trial Court on Summary Judgment

All of Intervenors’ claims were before the trial court for summary judgment of dismissal. Intervenors mistakenly argue that only their derivative third-party beneficiary claims were before the trial court, but that restrictive covenant and common plan claims were not. *See Corrected Brief at 17*. This is nonsense. Intervenors never articulated the distinctness of those claims, but NSGA clearly moved for global relief from all claims against it, as evidenced by the briefing.

Regarding whether Intervenors’ claims were put at issue on summary judgment, both *White v. Kent Medical Center*, 61 Wn. App. 163, 810 P.2d 4 (1991) and *Molloy v. Bellevue*, 71 Wn. App. 382, 859 P.2d 613 (1993), are instructive. “It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment.” *White*, 61 Wn. App. at 168. The appellate court will not consider an issue raised for the first time in reply. *Id.* citing RAP 10.3(c). But, a plaintiff cannot oppose summary judgment by asserting a claim that was not fairly disclosed in their complaint. *Molloy*, 71 Wn. App. at 385–87.

Respondents' moved against Intervenor's claims in total. CP 1420–58. They sought the global, dispositive conclusion that nothing restricted its golf course to open space, stating, “NSGA respectfully requests that the Court enter summary judgment in NSGA’s favor, finding and concluding that NSGA’s golf course is not restricted to open space or golf course use in perpetuity.” CP 1421. In its opening paragraphs, the motion stated that “Plaintiffs,” *i.e.*, the City and the Intervenor, “assert that . . . NSGA should be required to perpetually restrict its property for the benefit of the City and surrounding property owners.” CP 1421. Respondents then argued against these assertions, stating, “None of the agreements Plaintiffs rely upon imposes a perpetual, irrevocable restriction on the golf course.” CP 1421. In the conclusion of their joint-motion, Respondents argued that “None of the agreements relied upon by Plaintiffs in this case perpetually restrict the Golf Course to open space use.” CP 1453. They asked the trial court for a finding and conclusion that “NSGA’s golf course is not restricted to open space use.” CP 1454. This requested relief clearly contemplates the resolution of all of Intervenor's claims. The summary judgment motion (hereinafter, the “Motion”) put at issue all of the relevant documents, the history of the PRD approval, the OSTA and the CZA, and whether the latter documents could create perpetual, restrictive covenants on the Golf Course. These issues were fairly raised in the Motion.<sup>3</sup>

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<sup>3</sup> Where the motion is referred to as “partial,” that is because Respondents did not move against the City’s estoppel claims. RP (December 19, 2008) at 27: 15-24.

Intervenors cite to CP 1450 to characterize Respondents' Motion as only moving against Intervenors' third-party beneficiary claims. *See* Corrected Brief at 7. This is a section in the brief where the Motion directly addresses the third-party theory. Intervenors never distinguished their common plan or restrictive covenant theories from their general third-party beneficiary claims. In their Complaint they do not delineate these claims, which were all expressly based on allegations of third-party rights. CP 168–77 (Intervenors' causes of action).<sup>4</sup> They seem confused even today as to distinctions, arguing again that their restrictive covenant and common plan theories are “third-party-like,” stating, “Under the common plan theory, Intervenors have third-party-like status as explicated by the Restatement and Stoebuck and Weaver in Washington Practice.” Corrected Brief at 19.

By focusing on CP 1450 in the Motion, Intervenors ignore the other parts of that brief that fairly apply to both the City and the Intervenors in which Respondents requested dispositive rulings that the Golf Course is not subject to permanent open space restriction. If this Court examines Respondents' “Statement of Issues” in the Motion, it will find that issues 1–4 and issue 6 all apply to Intervenors. CP 1435. Throughout the discussion of these issues, Respondents continually refer

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<sup>4</sup> Intervenors' Complaint states the following five causes of action, never articulating any cause of action as “common plan” or “restrictive covenant”: “First Claim For Declaratory Judgment: Open Space Taxation Agreement”; “Second Claim For Declaratory Judgment: Concomitant Zoning Agreement”; “Third Claim For Specific Enforcement of Open Space Taxation Agreement”; “Fourth Claim For Specific Performance of Concomitant Zoning Agreement;” and “Fifth Claim To Quiet Title.” CP 168, 171, 174, 175, 176.

to “the City and the Intervenor,” not simply the City. Intervenor selectively view the Motion as if only issue 6 applied to them.

In the Motion, Respondents’ specifically argued that the CZA cannot be a perpetual restriction on the property because it is “a zoning document, not a real covenant.” CP 1447, lines 1–4. The Motion quoted authority that “Zoning and other public land-use regulations . . . are not servitudes.” *Id.* Respondents argued to the trial court in their opening that the distinction between a land use restriction and a covenant is crucial. CP 1447. This argument goes to the heart of the restrictive covenant and common plan theories and Respondents’ successful defeat of those theories. Respondents also argued that the OSTA was a revocable agreement “which NSGA now plans to revoke.” CP 1445. All of these arguments necessarily put at issue Intervenor’s right to enforce any alleged open space restriction.

As Intervenor readily admit, they opposed the global relief sought in the Motion by fully briefing their restrictive covenant and common plan theories with no reservations or objections that these claims had not been moved against. CP 1683–98.<sup>5</sup> They expressly linked their common plan

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<sup>5</sup> In their response, Intervenor argued that the OSTA and CZA create a perpetual restrictive covenant within their argument entitled, “The Intervenor-Plaintiffs are Third-Party Beneficiaries of the OSTA and CZA.” CP 1692 (“Though not in the classic form of a restrictive covenant (as in a deed), there is no legal prohibition against using a taxation agreement to create a covenant.”) Intervenor next argued that “The OSTA Operates as a Running Covenant,” CP 1694–95, arguing that the covenants in the OSTA “run with the land are enforceable against successive owners.” CP 1694, lines 16-17. Intervenor argued that “A Servitude Restricting the Golf Course to Golf Course and Open Space Use is Implied by Reference to the Golf Course in Development Plans and Maps.” CP 1695. Intervenor defined a servitude as “a covenant running with the land.”

and restrictive covenant theories to their asserted third-party beneficiary status.<sup>6</sup> In their briefing, Intervenors never distinguished these theories for the trial court or advised the trial court that the theories they were arguing were not before the court.

Respondents addressed the specifics of those arguments in reply. CP 1883–87. The parties argued the theories to the trial court at oral argument of the motion to dismiss. RP (December 19, 2009). The trial court specifically led the order of argument, asking Investors’ counsel to address “the common plan argument.” RP (December 19, 2009) at 65:8–10. When Intervenors’ counsel argued, he commented that the scope of the motion was narrow. *Id.* at 67:13–24. Investors’ counsel refuted that the motion did not include all Intervenors’ claims. *Id.* at 72:4 to 75:19. The trial court correctly characterized the motion as one “to dismiss the intervenor plaintiffs’ claims.” RP (January 9, 2009) at 12:22–25. The trial court rejected Intervenors’ comment at the announcement of the decision that all of its claims were not before the court. *Id.* at 15:8–17:9. The trial court stated, “I understood the motion by defendants against the

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CP 1696, lines 1-2. Finally, Intervenors argued “The Intervenor-Plaintiffs May Enforce the OSTA and CZA Because of the Existence of a ‘Common Plan.’” CP 1696.

<sup>6</sup> In their response, Intervenors stated to the trial court, “The common plan theory is related to the third party beneficiary of contract law.” CP 1696, lines 17–18. Intervenors insisted on the inter-relationship of their common plan theory to their third-party beneficiary status, stating, “Under a common plan theory, the Intervenor-Plaintiffs have third-party status as explicated by the Restatement.” CP 1697, lines 20–21.

intervenor plaintiffs to be a motion to dismiss all of their claims with prejudice. . . . I am prepared to grant that relief.” *Id.* at 17:4–9.

Regardless of how interrelated or distinct the restrictive covenant and common plan theories are to the third-party beneficiary claims, Respondents moved against all of Intervenor’s claims that would have created a right in the Intervenor to keep NSGA’s property as open space. Respondents explained that the OSTA and CZA, which are zoning documents, do not confer any enforceable right on Intervenor. The trial court fairly addressed that issue in dismissing all of the Intervenor’s claims.

2. Even if the Restrictive Covenant and Common Plan Claims Were Not Before the Trial Court, This Court Should Affirm their Dismissal Because the Claims Were Not Properly Pled and Are Insupportable Under Washington Law.

Alternatively, if those claims were not before the trial court, this Court should affirm on the basis that those claims were inadequately pled and amendment would be futile.

Intervenor’s Complaint does not specify separate claims based on restrictive covenant or common plan theories. CP 168-77. More critical than the titles of their claims, Intervenor failed to allege that any property within their development was sold subject to deeds containing covenants restricting the Golf Course to open space. Intervenor failed to allege the existence of any obligation that could create restrictive covenants or a common plan to their benefit. Intervenor merely allege the existence of the OSTA and the CZA — which are zoning documents — the former of

which they admit is revocable without their consent. See CP 158, ¶ 3.6; 168, ¶ 6.3; 170, ¶ 6.11. Intervenors allege that the OSTA and the CZA “qualify as restrictive covenants and operate as a common plan.” *Id.* These allegations, the latter of which is more legal conclusion than factual allegation, are insufficient as a matter of law to support claims based on restrictive covenant or common plan theories.

To assert such claims, according to Intervenors’ own briefing, Intervenors would have to allege and assert that “at least substantially all of the property sold [is] subject to the covenants sought to be enforced.” CP 1697 (Intervenors’ Opposition to Summary Judgment) (citing *Tindolph v. Schoenfeld Bros. Inc.*, 157 Wash. 605, 610, 289 P. 530 (1930)). As Intervenors concede, in Washington a common plan or common scheme of development may be found when some but not all of the lots in a development have express, recorded covenants imposed on them whereas others inexplicably lack such covenants. See, e.g., *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 463–64, 194 P. 536 (1920). As one commentator has explained:

“Common scheme” means that a covenant or group of covenants, usually in the form of building restrictions, is included in the deeds to the subdivision lots. The covenants need not be included in every deed, as long as they are “generally” included. A Washington Supreme Court decision says that, to have a common scheme, the covenants must “apply substantially to the entire tract sold.”

17 William B. Stoebuck & John W. Weaver, Real Estate: Property Law in Washington Practice, § 3.20 (2nd ed. 2004) (quoting *Johnson*, 113 Wash.

458; *Tindolph*, 157 Wash. 605 at 607). *See also Johnson*, 113 Wash. at 459–64 (finding equitable servitude when “more than three-fourths of the lots [in an 800-lot subdivision] had been conveyed by deeds” containing an express use restriction).

In this case, as Intervenors have never disputed, none of the lots in the PRD have a restrictive covenant burdening the Golf Course and benefiting the residential lot. There are over 1,200 residential units in the PRD. Not one of them has any language on its deed restricting the Golf Course to its benefit. CP 1974, ¶ 9. Thus, this situation is distinguishable from the cases in which Washington courts have imposed equitable covenants based on a common plan or scheme of development.

Significantly, this very finding was contained in the trial court’s order dismissing Intervenors’ claims. *See* CP 1974, ¶ 9 (finding that “[n]one of the plats which were approved within the Country Club Estates PRD contains any dedication of open space or other use restrictions that affect the Golf Course”). Intervenors never assigned error to that finding, because they could not. Again, it is indisputable that there are no such covenants or restrictions.

Indeed, apart from the Declaration of Professor John Weaver, Intervenors offered no evidence whatsoever for the proposition that a common scheme was created as part of the development of Country Club Estates that would have the effect of perpetually restricting the Golf Course to open space use. Professor Weaver’s declarations, which contained legal conclusions on the ultimate issue, was given no weight.

CP 1973, ¶ 3. Again, as discussed in Section IV.B.3.a, *supra*, Intervenor did not assign error to the trial court’s decision not to give Professor Weaver’s legal conclusions any weight. *See* Corrected Brief at 1–2. This Court should follow suit.

Moreover, Intervenor is relying on zoning documents — the OSTA and the CZA — for the proposition that a common scheme was created. But, again, zoning documents cannot create a restrictive covenant, under a common plan theory or any other theory, because “[z]oning and other public land-use regulations...are not servitudes.” Restatement § 1.1(3). In fact, it would have been illegal for the City to create a restrictive covenant under its land use authority, as this would have resulted in the City unlawfully extracting a “collateral benefit” from NSGA on Intervenor’s behalf. *See, e.g., City of Redmond v. Kezner*, 10 Wn. App. 332, 339–40, 517 P.2d 625 (1973).

3. Intervenor’s Current Argument That Questions of Material Fact Prevented Summary Judgment Is Not Within Their Issues and Is Unsupported by Identification of What the Material Dispute Could Be

The Court should not consider the argument made in the body of Intervenor’s Corrected Brief that “at the very least” questions of material fact should have prevented summary judgment on their common plan claim. Corrected Brief at 19. First, Intervenor failed to identify it as an issue for review. *See* Corrected Brief at 1–2. “The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” RAP 10.3(g).

*See also* RAP 10.3(a)(4) (requiring issues pertaining to assignments of error). As noted earlier, the Clerk brought Intervenors' attention to RAP 10.3(a)(4) in its letter of August 26, 2009, affording Intervenors additional time to specify issues for review. They never specified this issue.

Second, Intervenors failed to identify what the "questions of material fact" are or to identify the dueling evidence in the record that would require a trial. NSGA and Investors cannot respond to this undeveloped argument.

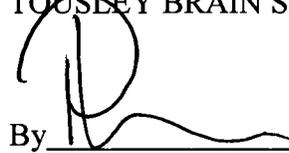
Third, the argument is meritless because, as argued above, Washington law does not recognize restrictive covenant or common plan claims based on zoning documents. Intervenors never presented evidence that any properties within their development (let alone the majority of the properties) were conveyed with any benefit from a restriction on the Golf Course. No factual dispute is material to the conclusion that the CZA and the OSTA cannot support Intervenors claims.

## **V. CONCLUSION**

For the foregoing reasons, Respondents NSGA and Investors respectfully request that this Court affirm the trial court's rulings in all respects.

RESPECTFULLY submitted this 14<sup>th</sup> day of October, 2009.

TOUSLEY BRAIN STEPHENS PLLC

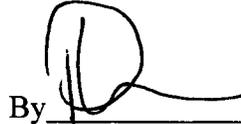


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COURT OF APPEALS  
STATE OF WASHINGTON  
OCT 14 11:15 AM '09

**CERTIFICATE OF SERVICE**

I, Betty Lou Taylor, hereby certify that on the 14th day of October, 2009, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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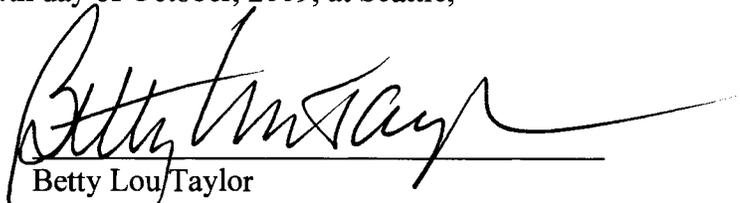
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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 14th day of October, 2009, at Seattle,  
Washington.

  
Betty Lou Taylor