

NO. 39755-2-II

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

CHARLES E. WEAVER and SUSAN M. WEAVER

Appellants

vs.

RYDERWOOD IMPROVEMENT AND SERVICE ASSOCIATION

Respondent

BRIEF OF RESPONDENT
RYDERWOOD IMPROVEMENT AND SERVICE ASSOCIATION

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FILED
COURT OF APPEALS
DIVISION II
19 JAN 13 PM 4: 21
STATE OF WASHINGTON
BY
DEP. CLERK

ORIGINAL

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I. INTRODUCTION

Ryderwood was developed as a retirement community in 1953. CP 642. Prior to that time it was a company logging town. Ryderwood residents claim it to be the oldest retirement community in America. Of course no records are kept about such things but certainly it is *one* of the oldest.

Appellants Charles and Susan Weaver (the “Weavers”) moved to Ryderwood in 2005. CP 498. They did so precisely because it was a retirement community. As they state:

[W]hen we purchased our property we were led to believe that the plat of Ryderwood Number 1 was a 55+ community . . .¹

For two years the Weavers were active participants in the community. CP 484-86 & 496-98. Indeed, Mr. Weaver not only served as treasurer of Respondent Ryderwood Improvement and Service Association (“RISA”), he voluntarily filed suit to enforce RISA’s Bylaws against a fellow homeowner. CP 485-86 & 496-97. After winning that suit, he thereafter served as “legal liaison,” communicating with RISA’s counsel and helping its officers comply with State and Federal laws. AR 518.

¹ CP 485 & 498.

Notwithstanding their prior enthusiasm, the Weavers now hope to undermine RISA's authority to enforce its age restrictions. Why they do so is not clear, they did not produce any evidence showing they were harmed or damaged by Ryderwood's age restrictions. Nor is it clear why they simply do not sell their property (no evidence in the record shows they tried). But in support of their efforts they make two arguments, neither of which is tenable.

First, they argue that RISA has no right to enforce the Bylaws it adopted in 1975 because they do not comply with the Statute of Frauds. This argument misconstrues Ryderwood's history. The original deed to the Weavers' property contained covenants and conditions of use. The deed assigned the right to enforce those conditions to RISA. The deed further provided that RISA may modify the conditions by recording them as Bylaws with Cowlitz County. RISA did so in accordance with the original intent for Ryderwood to be a retirement community. They are enforceable.

Further, the Court held the Weavers were bound not only by law but equity. The Bylaws were adopted 30 years before the Weavers bought their house. The owner of the Weavers' property agreed to the Bylaws and even played a role in their adoption in 1975. And the Weavers agreed to abide by those Bylaws when they purchased their home. Thus if not

covenants, the Court held they were equitable servitudes. And if not equitable servitudes the Court held the Weavers were bound by the doctrine of laches because “since 1975 everyone has apparently understood that one of the restrictions on ownership . . . was that you must be at least 55.”

The Weavers’ first Count was properly dismissed.

Second, they argue that RISA’s efforts to enforce its age restricted status violates the Fair Housing Act (“FHA”) because RISA does not comply with the exemptions set forth in the Housing for Older Persons Act (“HOPA”). The Weavers’ arguments are vague but appear to be that RISA was required to obtain consent from each Ryderwood owner before asserting HOPA as a defense. They further argue that unproven past allegations of non-compliance block them from asserting the defense today. These arguments also fail.

As with the other conditions in the Bylaws, RISA’s right to enforce the age restrictions stems from the original deeds that created Ryderwood as a retirement community in 1953. The desire to remain a retirement community was reconfirmed when RISA’s Bylaws were adopted without objection in 1975. Under these facts no consent was required.

Nor do past violations matter. RISA is only required to prove compliance with HOPA when the alleged injury takes place. The Weavers

allege no injury, indeed their stated wish was to live in a retirement community. CP 485 & 498. And the uncontradicted evidence shows RISA was compliant with HOPA when the Trial Court issued its Order.

The Weavers' second Count was properly dismissed as well.

II. COUNTER ASSIGNMENTS OF ERROR

1. The Trial Court correctly held that the Weavers' property is subject to RISA Bylaws. Each deed makes RISA the assignee of Senior Estates' rights under that document. Each deed permits RISA to enforce and revise those covenants by recording its Bylaws with the County. The Weavers' Statute of Frauds argument does not directly challenge this conclusion and it should be upheld. Appellants Assignments of Error Nos. 1-4.

2. The Trial Court correctly held that the Bylaws reflect the Grantor's intent that Ryderwood remain a retirement community. The deed provides that Ryderwood is to be a community for "pensioners and retirees." The evidence presented shows Ryderwood was always intended to be a retirement community. RISA's Bylaws clarified those conditions in accordance with the Grantor's desire. Appellants Assignments of Error Nos. 1-4.

3. The Trial Court correctly held that the Bylaws were binding under principles of equity. The Weavers' predecessors in title

agreed to the Bylaws and the community has abided by the Bylaws for over 30 years. The Weavers' Statute of Frauds argument does not challenge this conclusion and it should be upheld. Appellants Assignments of Error Nos. 1-4.

4. The Trial Court correctly dismissed Appellants' cause of action alleging a violation of the Fair Housing Act ("FHA"). RISA presented evidence showing it met all three requirements for HOPA and the Weavers failed to present any evidence rebutting those factors. Appellants Assignment of Error No. 5.

5. It was not error for the Trial Court to allow the Weavers additional time to present evidence that RISA failed to comply with HOPA. Appellants Assignment of Error No. 5.

III. COUNTERSTATEMENT OF THE CASE

A. Ryderwood's History As A Retirement Community

Ryderwood began as a logging town. In 1953, Senior Estates purchased the property, then platted and recorded "Ryderwood No.1." CP 642. Senior Estates incorporated the town in 1953. CP 466-67.

The evidence shows Ryderwood was developed to be a retirement community. From the outset, residency in Ryderwood was restricted to "bona fide recipients of a pension or retirement annuity." CP 466-67 & CP 1235. In a letter sent in 1972, Harry Kem, Jr. (son of the original

Senior Estates owner Harry Kem, Sr.) described the community as a “self-sufficient, healthy and happy retirement community.” CP 466-67.

Ryderwood is believed to be one of the oldest retirement communities in the United States.

All properties in Ryderwood were devised by deed. Each deed contained conditions and covenants. This includes the property that later came to be owned by the Weavers. Their deed states:

WHEREAS, in order to protect and preserve the community for said purposes, it is the intent and purpose of the Grantor and the Grantee herein named to impose and enforce certain covenants and conditions hereinafter in this deed set forth, for the benefit of Grantor and Grantor’s assignee.²

The conditions and covenants referenced were designed to ensure that Ryderwood remained a retirement community. In keeping with Senior Estates’ desire, the first full paragraph of every Ryderwood deed devised by Senior Estates recites:

[Senior Estates] has acquired and developed the real property known and platted as Ryderwood No. 1 . . . as a community to be occupied by and for the *use and benefit of persons who are bona fide recipients of a pension or retirement annuity . . .*³

² CP 1235-38.

³ CP 1235.

Each deed also contained specially numbered conditions ordered as A-1 through A-11 and B-1 through B-4. CP 1235-38. Items A-1 through A-11 prescribe and permit specific restrictions and uses of the properties, such as the use of properties as shops or as farm land. CP 1235-36. Items B-1 through B-3 provided Senior Estates with rights of first refusal for subsequent sales of the property. CP 1236-37. These conditions are not at issue.

Condition B-4 *is*. B-4 provides the Grantor – Senior Estates – as well as its assigns, with two rights relevant to this appeal. CP 1237-38. The first is the duty of the Grantee to pay an annual charge or assessment to the Grantor for municipal services provided to the property holder:

Grantee, for himself and his assignee,
covenants and agrees with Grantor and its
assignee, as follows:

B-4. The Grantee for himself, his heirs,
successors and assigns, covenants that the
property conveyed under this Deed shall be
subject to an annual charge in such amount
as will be fixed by the Grantor, its
successors or assigns . . .⁴

The second is the right of Senior Estates to assign all rights and restrictions under the deeds to a subsequent entity, RISA:

⁴ CP 1237-38.

The Grantor, or Grantor's assigns, may at any time transfer and assign their rights to enforce the covenant and conditions contained in the deed to RYDERWOOD IMPROVEMENT AND SERVICE ASSOCIATION, or to any other person, firm, association or corporation which thereupon shall have the right to enforce the covenants and condition herein contained in the same manner and to the same extent as if enforcement thereof was being initiated by Grantor.⁵

Each of the relevant deed conditions remains in force and effect.

Although appellant contends that RISA's Bylaws were adopted after the original covenants and conditions expired, this is not accurate. The deed states that "[e]ach of the foregoing conditions contained in paragraphs A-1 to A-11 inclusive shall in all respects terminate and end upon July 1, 1975." CP 1236. There are no expiration dates for the remaining terms or conditions, including those relied upon by RISA. *See* CP 1235-38.

B. RISA's History

Ryderwood is managed by respondent RISA, the Ryderwood Improvement and Service District. Senior Estates incorporated RISA in 1953, shortly after platting Ryderwood. CP 469-72. The purpose of RISA is to act as the community association for Ryderwood and enforce community covenants. CP 469-72.

⁵ CP 1238.

RISA is governed by the residents of Ryderwood. CP 1239. RISA's Bylaws limit membership to owners and residents of Ryderwood. CP 1239. While ownership of property in Ryderwood is a necessary precondition to membership in RISA, membership is not a necessary precondition to RISA's right to enforce Ryderwood deed restrictions. CP 1239.

Those powers stem from the original deed rights granted to RISA by Senior Estates via condition B-4. CP 1237-38. This includes the right to collect dues as well as the right to enforce and enact covenants to maintain the character of the community. CP 1237-38. The deeds grant RISA, as the successor to Senior Estates, with the right to modify the covenants by recording an instrument in the office of the County Recorder of Cowlitz County, Washington. CP 1237. The Weavers' deed, for example, states:

Grantor, on behalf of Grantor and its assigns, hereby reserves the right, at its discretion, to modify or terminate any or all of the foregoing conditions by recording an instrument in the office of the County Recorder of Cowlitz County, Washington.⁶

In 1975, RISA utilized this authority by recording its Bylaws with the Cowlitz County Recorders' Office. CP 1239-47. The amended

⁶ CP 1237.

Bylaws contained restrictions similar to those of the original deeds as well as language clarifying that Ryderwood was a retirement community for persons 55 and older. CP 1239. No evidence has been presented showing any objection by the members or residents when the Bylaws were recorded in 1975.

C. Challenges To RISA's Authority

Although no challenge was brought to the 55 and older condition, at least three lawsuits have challenged RISA's right to enforce the conditions of the deed and its Bylaws. Three specific challenges are worthy of note:

The Forum Litigation. The Forum matter was a suit brought in 1975 by RISA. CP 1254. Defendant was Forum Investment Corporation, a subsequent developer of properties in Ryderwood who purchased land from Senior Estates. CP 1253. Forum challenged RISA's authority to manage the Ryderwood community and contested RISA's right to enforce the terms of the deeds by purporting to cancel its agreement with Senior Estates. CP 1255. RISA sought a declaratory judgment to determine that it was the assignee of the right to enforce the deed conditions. CP 1254.

In February, 1976 the parties settled the claim. CP 1263. By stipulation the parties agreed that RISA was the successor and assignee of the rights retained in the deeds by Senior Estates. CP 1263. Forum

further conceded that, according to those rights, RISA had the power and authority to collect and levy reasonable charges for the maintenance of the community. CP 1264. Forum also agreed that RISA had the “legal obligation to continue the maintenance of the town of Ryderwood as a *restricted retirement community . . .*”. CP 1264.

The Allison Matter. In 1985, 21 owners in Ryderwood challenged RISA’s authority to purchase a community hall, a lake, a gas station and other community amenities. CP 1275-78. The Allison group asserted that RISA was not authorized to buy these properties because such a power was not specified in the original Ryderwood deeds. CP 1275. The trial court’s decision turned on the same clause B-4 at issue here. The court held that Senior Estates and the original Ryderwood purchasers intended for Ryderwood to be a restricted retirement community and intended for RISA to provide services “equivalent to those supplied by municipal corporations.” CP 1269-70. Relying on clause B-4, the court held that the deeds “authorize[] the defendant to assess” charges against residents, as well as “any and all similar services which may be deemed advantageous to the land herein conveyed.” CP 1270-71. Per that language, the court found that RISA was authorized to purchase property on behalf of the residents as “within the scope of the authority held by defendants [RISA]

under the restrictive covenants binding property owned by Plaintiffs.”

CP 1271.

This Court of Appeals upheld the decision. CP 1275; *see Allison v. Ryderwood Improvement & Service Ass’n, Inc.*, No. 9269-7-II (1987) (unpublished). The Court upheld the authority of RISA to purchase property notwithstanding that this power was not specified in the deed. *Id.*, pp. 4-5. As support, the Court cited the evidence presented showing that “both the original developer, the deed’s original grantor, and the plaintiffs’ predecessors in interest, the original grantees, *intended that [RISA] provide such services.*” *Id.* (emphasis added).

The Weaver Matter. The final suit litigating RISA’s rights was the matter of *Weaver v. Bichler*. *See Weaver v. Goro*, 145 Wn. App. 1014, 2008 WL 2428446 (2008). That matter was initiated by the appellant here, Charles Weaver, to enforce RISA’s Bylaws against John Bichler, a fellow Ryderwood resident. Mr. Weaver alleged that Mr. Bichler violated RISA’s Bylaws by establishing a hunting camp and storing multiple RVs on his grounds. *Weaver*, 145 Wn. App. p. 2.

RISA’s right to enforce the conditions against Bichler differed from here because the Bichler property was not part of the original Senior Estates’ plat of Ryderwood No. 1. *Weaver*, p. 1. Bichler’s property was part of an adjacent parcel purchased by Wildwood International in the

1980's subject to CC&R's that "mirrored" the RISA Bylaws. *Id.*

Nevertheless, the Court held that the Bichler's predecessor, Gabriel Goro, accepted an offer to join RISA in 1993 under the condition that RISA's bylaws would be a "permanent encumbrance" on his deed. *Id.*

The Trial Court found that because the Goro agreement was made outside of the deed transfer, it was not a real covenant. That said, the Court held that the Bylaws were enforceable as equitable servitudes because Mr. Goro agreed to be bound by the Bylaws and to bind future owners. *See Weaver*, p. 2, fn. 8 & p. 4, fn. 12. In reaching its decision, the Court relied upon the Declaration of Charles Weaver, who attested:

1. Ryderwood has always been a residential area for retirees, fifty-five years and older.
2. Central to the maintenance of the character of this area has been the legally imposed requirements regarding the use of the property under RISA's jurisdiction.
3. These requirements have been spelled out in [CC&Rs] . . .
4. In addition, these requirements have been spelled out in the RISA By-Laws.

CP 627, ¶ 4.

D. The Weavers History At Ryderwood

Susan Weaver acquired the home in question in 2005. CP 199-200. The Weavers admit that RISA's by-laws were listed as an exception

to title in their title report. CP 79. The Weavers further admit that they took title under the original grant from Senior Estates, including all respective conditions and covenants thereto. CP 78-79.

The first deed on title was the original devise to Lois E. Barney dated January 18, 1967 from Senior Estates. CP 79 & 136-39.⁷ That deed included the covenants and conditions cited above. Compare CP 136-39 with CP 1236-39.

On August 26, 1972, Ms. Barney sold the property to Arthur and Lela Daley. CP 79 & 141-43. That document of conveyance included a covenant subjecting the property to all of the conditions of the original deed from Senior Estates. CP 141-43. It also included the following additional deed restriction:

The Grantee for himself, his heirs, successors and assigns, covenants that the property conveyed under this Deed shall be subject to an annual charge in such amount as will be fixed to Ryderwood Improvement and Services Association, its successors or assigns, not, however, exceeding Grantee's pro-rata share of the actual cost thereof as to the property herein conveyed . . .

The Grantee agrees that this charge shall be paid to the Ryderwood Improvement and Services Association, its successors or assigns, on the first day of each and every

⁷ This is the same deed located at CP 1236-39.

month, and further covenants that such charge shall on each such due date become a lien upon the land and shall be payable to the Ryderwood Improvement and Service Association....⁸

On June 10, 1977, the property was devised by statutory warranty deed from the Daleys to a Ms. Dorothy Weaver.⁹ CP 79 & CP 201-04. That deed states that the property is taken subject to “reservations, restrictions, and easements of record.” CP 201.

On March 24, 2005, the Property was transferred from James C. Hanson, as personal representative of the estate of Dorothy Weaver, to Appellant Susan Weaver via statutory warranty deed. CP 200. The property was taken by her as her “sole and separate property” notwithstanding that she was married to Appellant Weaver at the time. CP 200. On March 14, 2008, Ms. Weaver transferred her interest in the property to the marital community via quit claim deed. CP 199.

These restrictions were no surprise to the Weavers. When they moved to Ryderwood they signed a certificate of membership in RISA, stating their intent to join and agreement to be “subject to all terms and provisions set forth in the Articles of Incorporation and By-Laws of said

⁸ CP 142-43.

⁹ Ms. Dorothy Weaver is not related to either of the Appellants.

Corporation . . .” CP 506-07. Moreover, their discovery responses reveal they bought the property not just with knowledge of the restrictions, but *because* of those restrictions. CP 498.

E. Weaver’s Involvement With RISA

From 2005 until August, 2007, the Weavers were active participants in RISA. They paid dues and Mr. Weaver served in two different officer positions with RISA, first as treasurer than as “legal liaison” to RISA. CP 518. As discussed above, he also actively defended RISA’s rights by filing suit against Mr. Bichler.

In the course of the *Weaver* suit, Bichlers’ counsel notified RISA of his belief that Ryderwood’s age restrictions violated the FHA. CP 156. In that letter, Bichler’s counsel said:

Our initial investigation has revealed that Ryderwood has utterly failed to comply with [HOPA].

After the Bichler suit was over, Mr. Weaver voluntarily assumed the task of ensuring that RISA complied with HOPA in the guise of “legal liaison,” a role he held until August, 2007. CP 508. On July 17, 2007, Mr. Weaver addressed RISA’s Board to discuss various issues, including HOPA and the Board’s authority to enforce covenants. CP 518-21. At that meeting, Mr. Weaver informed that Board that: (1) RISA *was* HOPA

compliant. CP 519. And (2) that RISA had the authority to amend its Bylaws in order to enforce compliance. CP 519-27.

F. The Weavers' Challenge To RISA's Authority

As late as September 6, 2007, Mr. Weaver was still involved with RISA's Board and providing his legal advice on issues relating to HOPA. CP 565. On November, 2007, a mere three months after Mr. Weaver informed that Board that its actions were lawful, the Weavers filed the instant suit.

The Weavers' First Cause of Action alleged that RISA's efforts to enforce HOPA were *ultra vires* because RISA was not the successor in interest to Senior Estates' rights under the deeds. The Weavers further alleged that the Bylaws were adopted after the deed provisions terminated, thus they did not meet the Statute of Frauds.

The Weavers' Second Cause of Action alleged that RISA's efforts to maintain the character of the retirement community violated the Fair Housing Act's ("FHA") proscriptions against "familial status" discrimination and that RISA was not exempt under HOPA.

Pertinently, the Weavers did not claim they were injured by any act of discrimination.¹⁰ Instead, they alleged they were damaged because

¹⁰ Nor could they. Both are over 55 years of age. CP 1284. They admit in discovery that they made no attempt to sell their home. CP 501

RISA misled them about its authority to lawfully discriminate against

others. To wit:

The act of filing the RISA bylaws, which prohibit purchase and occupancies based on age and family status, on our property, without the right to do so, is a discriminatory act. Our injury is the result of RISA[‘s] [sic] claim that it has such a right when in fact it did not. Because RISA claimed this was a 55+ community and because they claimed they had a right to file their bylaws on property, which would maintain 55+ status, we invested our life savings in purchasing our home in the plat of Ryderwood No. 1.¹¹

G. RISA’s Motion for Summary Judgment

On December 16, 2008, RISA moved for summary judgment.

CP 419. Regarding the First Cause of Action (Covenants), RISA argued they were unenforceable under three theories: (1) that RISA was authorized to enforce covenants pursuant to the deed; (2) that RISA was authorized to modify covenants per authority of the deed; and (3) that the Bylaws were enforceable as equitable restrictions. CP 440.

(continued . . .)

(“our decision was not to pass this fraud on to another unsuspecting couple”). While the Weavers later claimed they were denied the right to have Mr. Weaver’s son live with them, this claim was not made in their Complaint, was never addressed in their discovery, and was discussed in this appeal.

¹¹ CP 500 (Response to Interrogatory No. 22).

Regarding the Second Cause of Action (HOPA), RISA presented evidence showing it complied with the HOPA exemption and argued the Weavers were estoppel from contending otherwise as the Weavers admitted they moved to Ryderwood expressly because they wished to live in a retirement community. In addition, Mr. Weaver previously advised RISA about HOPA compliance in his role as legal liaison and coordinated RISA efforts to demonstrate intent, a factor under HOPA. CP 425.

In opposition, the Weavers argued that RISA had no right to enforce the covenants because the deed restrictions expired two months before RISA adopted its Bylaws and that the Bylaws failed to comply with the Statute of Frauds. CP 49-53. The Weavers further argued that HOPA was not met because the community did not vote to become a “HOPA community.” Finally, they alleged RISA’s survey was insufficient to show it was compliant. CP 54-60.

On March 11, 2009, the Trial Court heard RISA’s motion for summary judgment.¹² After a protracted oral hearing, the Court held:

1. There was apparently always a requirement, which no one disputes, that in order to have ownership, you must be a bona fide recipient of an annuity or pension, which I think it another way of saying the same sort of thing

¹² All references herein are to the transcript of the summary judgment hearing of March 11, 2009 (hereafter RP).

that was intended by the 55 year restriction.¹³

2. [T]he courts seem to accept that for the purpose of enforcing these restrictions, if they're not in the chain of title, they'll nevertheless be enforced if the purchaser had notice that everyone intended it to be a covenant and restriction, that it was intended to run with the land by predecessors in interest. I think that's clearly the case here.¹⁴
3. This is, more than anything, it's a case of laches. For the non-lawyers here, laches means it's too late. It's an equitable doctrine that says it's too late to complain about it.¹⁵
4. Since 1975 everyone has apparently understood that one of the restrictions on ownership or the ability to purchase . . . was that you must be at least 55.¹⁶

Regarding the Weavers' Fair Housing Act claim, the Court held:

5. I don't think there's any question about the intent of forming the community was to have this restriction [of] 55 years of age or older.¹⁷

¹³ RP 148:7-15.

¹⁴ RP 149:5-11.

¹⁵ RP 149:12-15.

¹⁶ RP 149:19-23.

¹⁷ RP 151:8-15.

6. However I do think that the Plaintiff in this case has addressed and presented an issue about the reliability of the survey and has asked for additional time.¹⁸

The Court's Order was entered on March 26, 2009 and reiterated the same ruling indicated at the oral argument. CP 1602-03. All told, the Weavers were granted an additional 90 days to provide evidence showing the survey was not accurate. RP 153.

The Weavers did not do so. CP 1585-86. Instead, they first moved for reconsideration. CP 209. In response, the Court issued an Order on April 20, 2009 clarifying its holding and reasoning. CP 1561-62. The Court held:

The 1975 adoption of the By-law which created the restriction on ownership was an agreement of all the members of RISA as to the future of Ryderwood. It was recorded with the county Auditor and became a matter of public record. It was an agreement which was intended to run with the land.¹⁹

The fact that it was denominated a "By-law" rather than a "covenant," "Agreement" or other word is not controlling. It was in fact an agreement.

Because it was an agreement, withdrawing from [] RISA or being a member of RISA is

¹⁸ RP 151:16-19.

¹⁹ CP 1561-62.

of no consequence now. The restriction was to run with the land and was not personal to any member.

The fact that the restriction is not incorporated into any deed is not controlling. A duly recorded agreement among all property owners does not have to be incorporated into a deed to be effective. Effective notice of the agreement is given by recording the agreement.

Regarding HOPA, the Court held:

The question of whether [Ryderwood] is in violation of the Fair Housing Act or is allowed by the Housing for Older Pe[rsons] Act depends upon compliance with that act. The plaintiffs may show that Ryderwood is not in compliance with HOPA by conducting their own survey.²⁰

The Weavers never conducted their own survey. CP 1593. Nor did they present evidence showing that RISA's survey was flawed. CP 1593. Thus, on June 29, 2009, RISA moved for entry of Final Judgment. CP 1585. The hearing was set for July 20, 2009. The Weavers opposed the motion but did not appear for the hearing. CP 272, *et. seq.* & CP 1593. Final judgment was entered on CP 1589-90.

²⁰ CP 1562.

IV. ARGUMENT

A. Standard of Review on Appeal

De novo review is appropriate for questions of law. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2006). Questions of fact, on the other hand, are subject to the “substantial evidence” standard. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Provided this Court believes the record contains “evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise,” judgment should be sustained. *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993).

Where a plaintiff fails to come forward with facts sufficient to establish the existence of elements essential to his or her claim, “there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). Similarly, where a party fails to assign error to factual findings that were contested, they should be deemed verities on appeal. *Rivers v. Washington State*

Conference of Mason Contractors, 145 Wn.2d 674, 692, 41 P.3d 1175, 1184 (2002).

B. RISA Is Authorized To Enforce The Deed.

1. The Covenants and Bylaws Flow From the Deeds.

Assignment of Error Nos. 1-4 contend that RISA failed to comply with various technical aspects of the Statute of Frauds when it recorded its Bylaws with Cowlitz County.²¹ Consequently, they contend that RISA cannot enforce the “55 and older” provision at issue. This argument is flawed. RISA’s rights to enforce and modify covenants at Ryderwood flow from the deeds. Compliance with the Statute of Frauds is necessary only for that document, there is no precedent for their position that the Statute of Frauds must be satisfied for the Bylaws. The deeds require only that RISA file its Bylaws with Cowlitz County. It did so. No other act is necessary to make them enforceable.

a. Substantial Evidence Supports the Court’s Ruling That the Deeds Authorize RISA to Amend and Enforce The Bylaws.

RISA is the assignee of the rights retained by Senior Estates.

Pursuant to the deeds, RISA has the right to amend the covenants and

²¹ These include the arguments that the Bylaws do not recite who is to be bound, that the Bylaws include no legal description, that there was horizontal or vertical privity, and that RISA the deed restrictions had expired by the time the Bylaws were adopted. App., pp. 4-7.

restrictions. RISA's Bylaws comport with the intent of the Senior Estates developers to operate as a retirement community. These facts are sufficient to demonstrate that the Court's ruling that the Bylaws created an "enforceable covenant" was correct. CP 1561.

RISA is the successor in interest to Senior Estates' rights reserved under the deeds.²² CP 440 *et. seq.*; *see also Weaver v. Goro*, 145 Wn. App. 1014, p. 1 (2008) ("[i]n 1953, Ryderwood homeowners formed RISA to provide public services to residents and to act as a homeowners' association for its members."). The deed set forth conditions and restrictions on the use of properties at Ryderwood. It further provided that Senior Estates (and, ipso facto, its assignee RISA) had the right to amend those conditions. As the Weavers' original deed states:

Grantor, on behalf of Grantor and its assigns, hereby reserves the right, at its discretion, to modify or terminate any or all of the foregoing conditions by recording an instrument in the office of the County Recorder of Cowlitz County, Washington.²³

²² Among the evidence submitted was: deed language providing that rights will be assigned to RISA (CP 1237-38); RISA's original Articles of Incorporation (CP 469); 1973 letter from Senior Estates attorney stating "no objection" to request for assignment of rights (CP 1250-51).

²³ CP 1238.

Neither the factual predicates for these conclusions nor the legal findings delineating RISA's authority are challenged here and should be deemed verities. RAP 10.3(a)(5); *Detonics ".45" Assocs. v. Bank of Cal.*, 97 Wn.2d 351, 353, 644 P.2d 1170 (1982); *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 692, 41 P.3d 1175, 1184 (2002) (failure to assign error to factual findings renders them verities on appeal); *see also Metropolitan Park Dist. v. Griffith*, 106 Wn.2d 425, 433, 723 P.2d 1093 (1986) (“[a]n unchallenged finding of fact is a verity on appeal.”).

The only aspect contested by the Weavers is whether the property owners intended for RISA to be a “55 and older” retirement community. *See App. pp. 8-10.* But to support this argument, the Weavers do not rely upon evidence, they rely upon their unilateral and unsubstantiated assertion that RISA does not have the right to “unilaterally impose[] an age restriction on owners and residents in Ryderwood, requiring that they be over 55 years of age.” *App. p. 8.* This argument is not supported with facts.

The evidence RISA presented shows that the Bylaws comport with the original intent of Senior Estates to be a “retirement community.” Among the items of evidence presented were: (1) documents contemporaneous to 1975 showing the intent to be a retirement

community (*see* CP 466), the Declaration of the Appellant, Mr. Weaver, filed in the matter of *Weaver v. Goro*, 2008 WL 2428446 (2008), where he stated “Ryderwood has always been a residential area for retirees, fifty-five years and older” (CP 627), and, finally, the deed itself, which states:

[Senior Estates] has acquired and developed the real property known and platted as Ryderwood No. 1 . . . as a community to be occupied by and for the *use and benefit of persons who are bona fide recipients of a pension or retirement annuity . . .*²⁴

The evidence supports the Trial Court’s findings. Moreover, none of these findings are directly challenged on appeal. The Court’s reliance on these facts was not an abuse of discretion.

b. RISA Is Authorized to Modify the Covenants By Recording Its Bylaws With Cowlitz County.

The Weavers argue that RISA’s rights under the deed are irrelevant and that RISA was required to obtain consent and abide by the various elements of the Statute of Frauds when it recorded its Bylaws. There is no support for this position. Indeed, Washington courts make clear that real covenants and equitable servitudes are enforceable provided they “*originate* in a covenant that is enforceable between the original parties under the law of contract.” 17 William B. Stoebuck & John W. Weaver,

²⁴ CP 1256.

Washington Practice: Real Estate: Property Law § 3.11, at 149 (2d. ed.2004). Here the originating document is the deed.

The right of a homeowner's association to modify and amend restrictions originally set forth by deed is well established. *See Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 273-74, 883 P.2d 1387 (1994) ("*Sandy Hook*"); *see Lakes at Mercer Island Homeowners Ass'n*, 61 Wn. App. 177, 179, 810 P.2d 27 (1991) (modern courts recognize the necessity of enforcing covenants and restrictions). As the Court in *Riss v. Angel* held:

The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable.

The court's goal is to ascertain and give effect to those purposes intended by the covenants. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances.

The court will place 'special emphasis on arriving at an interpretation that protects the homeowners' collective interests.'

Riss v. Angel, 131 Wn. 2d 612, 623-624, 934 P.2d 669 (1997) (citations omitted).

The *Sandy Hook* decision presents the precise issue confronted here. There, the homeowners' association "consist[ed] of all property owners within the Sandy Hook plat" formed for the purpose of enforcing the restrictions, conditions and covenants "existing upon and/or created for the benefit of parcels [in the Sandy Hook development]." *Sandy Hook*, 76 Wn. App. at 270. In 1991, a special meeting of Sandy Hook's members was held and new restrictions on the use of properties were adopted, including a provision that restricted the right of owners to store vehicles on their properties. *Id.*, at 270-71 As here, the revised conditions were not recorded on each owner's title, nor was there unanimous consent by the property owners. *Id.*, at 271-72 ("[i]t is undisputed that none of the covenant changes were approved by all of Sandy Hook's members. All covenant changes were duly filed and recorded with the Island County Auditor.").

Appellant Shafer was cited for violating one of the newly enacted provisions. He challenged Sandy Hook's right to modify the conditions of the original deed "without the agreement of all affected property owners." *Id.*, at 272. The Court of Appeals, noting the "overwhelming, albeit out-of-state, authority" upholding the right of an association to adopt new restrictions on property use without unanimous consent, held:

[A]n express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions respecting the use of privately owned property is valid, provided that such power is exercised in a reasonable manner

consistent with the general plan of the development.

Sandy Hook, at 273 (citing *Lakemoor Comm'ty Club, Inc. v. Swanson*, 24 Wn. App. 10, 15, 600 P.2d 1022).

That rule was subsequently extended by *Meresse v. Stelma*, where that Court held that the deed modifications may not “differ in nature from those already in existence.” *Meresse*, 100 Wn. App. 857, 866, 999 P.2d 1267 (2000).

In derogation of these cases, the Weavers argue that compliance with the Statute of Frauds is required for every document adopted by a community association. Their argument is not only without cited precedent, it runs directly counter to the holdings in *Sandy Hook* and *Meresse*, among others.²⁵

The closest decision relying on the Statute of Frauds is *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 84 P.3d 295 (2004). In *Lake Limerick*, a purchaser argued that the bylaws of a homeowners' association were unenforceable because they failed to satisfy the Statute of Frauds. *See Lake Limerick*, 120 Wn. App. at 254-55 (“Hunt argues that the ‘[b]ylaws of a homeowners' association do not by

²⁵ The point is stated in the case of *Ardmore Park Subdivision, Ass'n, Inc. v. Simon*, 117 Mich. App. 57, 61, 323 N.W.2d 591 (1982) where the court held “the right to change the restrictions embodied in the original covenant means nothing whatsoever unless the right to change, plainly and unambiguously found in the original deed covenant, includes the right to bind all owners to the will of the majority.”

virtue of their recordation become a covenant ...”). Citing the holding of *Rodruck* that “articles of incorporation, bylaws, and deeds are correlated documents,” the Court restricted its analysis to the original declaration of restrictions and rejected the argument that every revised operative document must meet the Statute. *Id.* at 258 (citing *Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 577, 295 P.2d 714 (1956)).

The same is true here. The Weavers’ position lacks precedent not because the question has never been raised but because it is predicated on a fundamental flaw. If it were right, and covenants could never be modified without unanimous consent, the holding of *Sandy Hook* is simply wrong: “[A]n express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions respecting the use of privately-owned property is valid, provided that such power is exercised in a reasonable manner consistent with the general plan of the development.” *Sandy Hook*, 76 Wn. App. at 273-74. It is not.

In sum, the deeds authorize RISA to modify its covenants by adopting and recording its Bylaws. Those modifications are in character with the Grantor’s original expectations and further the intent to make Ryderwood a retirement community. No other act was required.

2. The Court’s Decision Was Premised On Principles of Equity.

The Weavers’ assignments of error relate to RISA’s purported failure to comply with the Statutes of Frauds when it recorded its Bylaws. *See App.*, pp. 4-6 (Assignments of Error 1-4). But the Statute of Frauds

elements are relevant only to covenants and conditions, not equitable estoppel or laches. Here, the Trial Court based its decision on all three theories.

Regarding equitable covenants, the Court held:

[I]f [the fifty-five and older restriction] is not a covenant and restriction that runs with the land, it's an agreement by all the parties. It's an agreement that they were going to do this, and think after this many years, it becomes established as a covenant.

Regarding laches, the Court held:

This is, more than anything, it's a case of laches. For the non-lawyers here, 'laches' means it's too late. It's an equitable doctrine that says its too late to complain about it, and I think that's really what applies here . . .

Based upon this finding, the Court's grant of summary judgment should be upheld notwithstanding the merit of any argument vis-à-vis the Statute of Frauds.

a. The Weavers Failed to Challenge the Equitable Grounds For Relief.

The Weavers did not assign error to either of the two equitable bases for the Court's dismissal; they challenge only the finding that the Bylaws act as covenants. Both equitable restrictions and laches are themselves sufficient to deny the relief sought and are wholly independent from compliance with the Statute. Because the Weavers failed to assign error to these alternative grounds for relief, the Court's ruling should be sustained. *See also LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d

1027 (“[A]n appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it.”), *cert. denied*, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989); *see Gross v. Lynnwood*, 90 Wn.2d 395, 583 P.2d 1197 (1978) (“We are committed to the rule that we will sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof.”).

b. The Bylaws Are Enforceable As Equitable Restrictions.

In the Written Order, the Court stated that, even if the Bylaws are not covenants, they are enforceable as equitable restrictions. CP 1583-84 (the Bylaws are “express agreements of all the members” intended to “run with the land.”). The uncontradicted evidence submitted by RISA establishes this ruling was correct.

The required elements of an equitable servitude are:

- (1) a promise, in writing, which is enforceable between the original parties;
- (2) which touches and concerns the land or which the parties intend to bind successors;
- and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession;
- (4) who has notice of the covenant.

Lake Limerick, 120 Wn. App. at 254.

First, the Weavers’ predecessor in interest at the time the Bylaws were adopted was a member of RISA. CP 1296 & 1297. Both he and his

successor – Dorothy Weaver – agreed to reside in Ryderwood subject to the Bylaws:

Subject to all terms and provisions set forth in these articles of incorporation and attached By-Laws of said corporation, which said member hereby accepts.²⁶

Moreover, Ms. Dorothy Weaver took title from Mr. Daley under the terms of the original deed, including the promise to pay dues and abide by RISA Bylaws. CP 203-04.

Second, the promise from Dorothy Weaver to Mr. Daley touched and concerned the land. RISA’s actions were taken to uphold the expectations of residents in Ryderwood. Any burden that enhances the value or desirability of a property “touches and concerns the land.” *See Rodruck v. Sand Point Maint. Comm’n*, 48 Wn. 2d 565, 576, 295 P.2d 714 (1956) (A covenant to pay homeowners’ dues for maintenance and repair of common facilities is said to “touch[] and concern[]” the land.); *see also Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 691, 974 P.2d 836 (1999) (covenant restricting property use for residential purposes touched and concerned the land).

Third, Mr. Daley and Dorothy Weaver were in vertical privity, as was Dorothy Weaver and the Appellants. CP 199, 200, 201, 202-204.

Finally, the Weavers do not (and cannot) dispute that they had notice of the Bylaws, of RISA, of the nature of the community or of the

²⁶ CP 1286.

restrictions at issue. CP 78 & 498. Indeed, as noted, they fought to uphold RISA's rights.

The evidence in the record show Ryderwood has served as a retirement community for over 50 years. The evidence further shows that the Bylaws have stood unchallenged for over 35 years. It is not an abuse of discretion to hold that the Weavers are barred from disputing RISA's right to enforce those Bylaws. *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) ("Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.").

c. The Weavers Are Barred Under Laches.

Finally, the Trial Court held that the Weavers were barred under the principle of laches because they "understood that one of the restrictions on ownership . . . was that you must be at least 55." RP 149:12-15. The uncontroverted evidence shows this ruling was correct as well.

Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them. *Pierce v. King County*, 62 Wn.2d 324, 382 P.2d 628 (1963); *Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616, 157 P.2d 302 (1945). The elements of laches are: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an

unreasonable delay by the plaintiff in commencing that cause of action;
(3) damage to defendant resulting from the unreasonable delay.

Here each element is implicated if the Weavers' challenge is allowed to move forward.

One, the Weavers suit challenges acts that took place 35 to 50 years ago. Those acts were done openly and no challenge was made at the time. *Two*, there is no evidence showing any of the acts complained of were done in secret or without the knowledge of all Ryderwood residents. In the absence of such evidence, it is proper to infer that RISA's adoption was in accord with Ryderwood's intent. And *three*, the harm from allowing the Weavers to challenge RISA's authority would be substantial. Since 1975, the residents of Ryderwood all bought into this community with full knowledge that it was a "55 and over" community. To overturn that expectation based on allegations made by residents who themselves sought to live in a retirement community is not warranted.

This finding should be upheld.

C. The Weavers Present No Proof that Ryderwood's Age Restrictions Violate the FHA.

The Weavers argue vague errors of law in the appeal of their dismissal of their Fair Housing Act ("FHA") cause of action. App., pp. 8-10. The basis of their claim is that Ryderwood's "55 and older" requirement is "Familial Status" discrimination, a category defined as homes that contain a child aged 18 years or younger. 42 U.S.C. § 3607(b)(2)(C). RISA's defense to the claim is that it is exempt from that

Statute under the Housing for Older Persons Act (“HOPA”). To support this defense, RISA provided ample proof showing each element was met.

In opposition, the Weavers’ raise three primary arguments(1) That the trial court erred in “order[ing]” the Weavers to present evidence rebutting RISA’s prima facie show of proof that it complies with HOPA; (2) That RISA cannot seek the HOPA exemption without a unanimous vote of the community; and (3) That RISA’s past non-compliance voids its right to rely on HOPA. Each is considered below.

1. The Weavers Did Not Present Evidence Rebutting RISA’s Showing Of Compliance With the Housing for Older Persons Act Exemption.
 - a. The Evidence In the Record Shows RISA Complied With HOPA.

An organization is exempt under HOPA if it meets the following three factors set forth by the Department of Housing and Urban Development (HUD):

- 1) At least 80% of the occupied units are occupied by at least one person 55 or older;
- 2) There are policies and procedure that demonstrate an intent to provide housing to those 55 and older; and
- 3) The organization can verify compliance via surveys or affidavit.

42 U.S.C. § 607(b)(2)(C)(i)-(iii); *see also* 24 C.F.R. §§ 100.305-307.

RISA’s evidence substantially supports the Trial Court’s finding that these elements were shown.

Factor No. 1: RISA completed a survey of its units on September 27, 2007. CP 642-1233.²⁷ The survey was conducted by checking every resident and ensuring that each had either a drivers' license, birth certificate, identification car, or passport and to sign a statement attesting to their age. See, e.g., CP 644 (index of all homes in Ryderwood); CP 662 (signature page for each resident contacted); CP 687 (signed Certificate of Membership in RISA); & CP 685 (Sample identification required).

All told, the survey found 273 available total housing units in Ryderwood. CP 577. It found that 25 of those units were vacant. *Id.* Of the remaining 248 housing units where a resident was located, *all* were occupied by at least one person aged 55 years or older. *Id.* When the vacant and unverified units were taken into account, the survey showed at least 92% of the available units were occupied by persons 55 years of age and older. *Id.*

Factor No. 2: HUD regulation 100.306 lists factors considered relevant to determine whether a community has the requisite intent to operate as housing for older persons. 24 C.F.R. §§ 100.305-307; *see Simovits v. Chanticleer Condo. Ass'n*, 933 F.Supp. 1394, 1402 (N.D. Ill. 1996) (“HUD provides a list of six nonexclusive factors for determine whether a facility is in compliance with this test.”). RISA submitted evidence showing the requisite intent to operate as housing for older

²⁷ The number of documents is, unfortunately, voluminous. The size reflects the comprehensive nature of the survey.

persons. This included recording its Bylaws with the County (CP 583); disseminating age-restrictions to real estate agents (CP 499 [Answer to #18]); voluminous signage and photos posted on the property (CP 599-608); and noting Ryderwood's status in advertisements. These actions met HUD guidelines showing the requisite intent. *See* CP 636.

Factor Three: HUD's final factor requires documentation to show the survey is reliable. 24 C.F.R. § 100.307(d). The regulations require that proof of age be verified by one of the following documents: (1) Drivers license; (2) Birth Certificate; (3) Passport; (4) Immigration Card; (5) Military Identification; (6) Any other government issued identification card; or (7) a Certification in a lease, application, affidavit or other document. 24 C.F.R. § 100.307(d). In support of this element, RISA presented its survey, which included a checklist to ensure one of the various types of identification were shown as well as the signature of a resident of each home asking them to verify that at least one person aged 55 and older lived in the home. *See* CP 685.

The Weavers challenged items (2) and (3).

Weavers Opposition to Factor No. 2: The Weavers argued the intent element was not met because the community did not unanimously chose to pursue the exemption. This is an argument of law, not fact. The merits of this argument are addressed below in Subsection "b," below.

Weavers Opposition to Factor No. 3: The Weavers identified various problems and deficiencies in data points of the survey. For example, they contested whether all signatures were current. CP 656.

They argued that RISA relied upon the age of the owners, not the residents. CP 656-57. At oral argument, Weavers' counsel noted a number of discrepancies, such as the fact that, by the date of oral argument, one of the persons surveyed was dead. RP 112-13. He also argued that one resident provided an expired drivers' license. RP 114.²⁸ Other discrepancies of this ilk were noted.

Ultimately, the Court held that RISA's evidence demonstrated compliance but in light of "anecdotal evidence" discussed by Weavers' counsel, it gave them a 90 day extension to rebut the survey conducted by RISA. RP 151.

The Weavers failed to do so.

- b. It Was Not Error For the Court to Grant the Weavers Additional Time to Rebut RISA's Evidence.

Under these facts, RISA's showing of compliance with HOPA and the subsequent dismissal should be upheld. The above narrative is necessary because the Weavers' brief does not discuss or describe what error is alleged by the Court's findings of fact. The only factual challenge they present is an unspecified challenge to the 90 day extension granted so they could "conduct[] their own survey." This is not error.

The Court found that the Weavers' evidence amounted to nothing more than "anecdotal evidence" of issues with RISA's survey.

²⁸ As the Court noted at the time, the fact that a license expires would not appear to be evidence that the date of birth was inaccurate.

RP 151:16-25. They did not present evidence quantifying the alleged errors nor was there any effort made to show that Ryderwood's percentage was lower than the 93% rate claimed. RP 152:22-153:7. As RISA argued on rebuttal:

The 2007 HOPA survey surveyed all occupants. RISA's survey affidavit plainly states that 'there are 248 housing units occupied by 1 person who is at least 55 years of age.' The survey is not limited to owners, it was a survey of occupants as required under HOPA. For example, 114 W. 6th Street and 501 Jackson both demonstrate instances in which the survey reflected the occupants (who were leasers) rather than the owners.

CP 1323-1324 (citing CP 1215 & CP 1233).

By granting the Weavers a 90 day extension, the Court was merely allowing them more time to present proof of their claim. When they failed to provide it, dismissal was appropriate. Where a plaintiff fails to come forward with facts sufficient to establish the existence of elements essential to his or her claim, "there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

In short, it is not error for the Court to grant the Weavers additional time to rebut the evidence presented by RISA. With not additional

evidence given, the Court's ruling was based on the evidence previously presented, which was sufficient to show compliance with HOPA.

2. The Election to Be a Retirement Community Was Made When Ryderwood Was Formed.

Next, the Weavers contend that "HOPA cannot be unilaterally imposed in the absence of contractual authority." Opp., p. 10. This argument is wrong for the same reason their argument regarding the Statute of Frauds is wrong: it presupposes that the restrictions flow from the Bylaws. They do not. They flow from the deeds. Thus the only "decision" was that made when the Weavers' predecessors in title accepted the restricted deed. That decision was reiterated when no challenge was made to the 1975 Bylaw amendments. *See Wertz v. Kane*, 2002 WL 31814978 (Del. Super. 2002) (holding that modification of covenants is done consistent with modification clause in deed where no challenge raised).

Ryderwood has always been a retirement community. While that term is susceptible to interpretation, the trial court, like other courts before it, held that RISA's Bylaws were an accurate reflection of that original intent. This finding is supported by substantial evidence, as discussed above.

The Weavers' cite the case of *Wilson v. Playa de Serrano*, 123 P.3d 1148 (Ariz. App. 2006) in support. It is anything but. *Wilson* involved a community of townhomes originally formed as an "adult community" formed in 1969. *Wilson*, 123 P.3d at 1149. Plaintiff, a

minor, and his mother, purchased a home in the subdivision in 1995. *Id.* In 2002, the community voted to amend its bylaws to comply with HOPA, including passing a revised restriction changing the permitted residents from everyone over the age of 21 (e.g., “adults”) to a requirement that residents be 55 and older. *Id.* Wilson challenged the decision and lost. The Arizona Court of Appeals reversed, holding that the amendment was insufficient to create an “enforceable deed restriction limiting the age of the communities residents to fifty-five and older.” *Id.*, at 1150.

First, the court held that the community “lacked the contractual right to impose” a fifty-five age restriction. *Id.*, at 1149. Of note, the powers vested to the community association when Playa was established in 1969 related only to “own and control the common areas.” *Id.*, at 1149. Consequently, although the association had the right to modify elements and costs relating to the “common [area] elements and housekeeping requirements” of the subdivision, it was not delegated any authority to “restrict[] ... the occupancy of units.” *Id.*

Second, Playa argued that the “adult townhouse community” verbiage in the deeds was sufficient to show it was an age restricted community. *Id.*, at 1152. This argument was rejected as well. The Court noted that although the language may have allowed a restriction below the age of 21, “it still would have allowed persons less than fifty-five years of age” to live in the community. *Id.* Thus:

[T]he Declaration’s language does not infer an intent to restrict occupancy to those over fifty-years of age.

Id., at 1152.

If anything, the discrepancies between this case and the *Playa* decision show why RISA's right is sanctioned. Unlike the *Playa* decision, RISA does have the "contractual right to impose" modifications to terms of use and covenants in Ryderwood. As demonstrated throughout this brief, the deed restrictions have always included age related residency restrictions. While the original requirements included "pensioners" as well as "retirees," those terms clearly evinced "an intent to restrict occupancy" to persons within the demographic. *Id.* at 1152.

Furthermore, Ryderwood was compliant with the 55 and older qualification well before Congress amended the FHA in 1988 to prohibit familial status discrimination. Thus there can be no suggestion that its rules were changed to avoid the law, as in *Playa*. Indeed, the reason why Congress passed the HOPA exemption was specifically to protect previously existing 55 and older communities like Ryderwood.

Discussing Congressional intent on this point, the case of *Massaro* noted:

Some members, however, expressed misgivings regarding the impact of the amendments on retirement communities, where elderly residents had bought or rented homes with the expectation that they would be able to live without the noise and hazards of children.

Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc., 3 F.3d 1472, 1476 (11th Cir. 1993) (citing 134 Cong.Rec. H6499 (daily ed. Aug. 8, 1988) (statement of Rep. Fish)).

Finally, the Weavers appear to argue a slightly different tack by stating that RISA does not have the right to “unilaterally impose[] [HOPA] in the absence of contractual authority.” App, p. 9. This is spurious. Nothing requires Ryderwood to designate itself as a *HOPA community*, HOPA only requires that Ryderwood have the intent to be a *retirement community*. See 24 CFR Part 100; see also CP 624 (Copy of HUD Regulation No. 42 stating that Fair Housing Act does not require a resident of a 55 or older housing community to join the homeowners’ association). That intent was shown when Senior Estates devised the Ryderwood properties to the grantees for occupancy by “pensioners” and confirmed when RISA adopted its Bylaws in 1975 without challenge.²⁹ No other requirements or elections are known.

In short, HOPA is not something that is “imposed.” It is a defense available to communities facing the precise allegations rendered here.

3. Past Non-Compliance Is Irrelevant.

Finally, the Weavers vaguely suggest some error because RISA may not have been HOPA compliant in the 1990s. There is no factual support for this position. Nor is there legal support for the argument that a non-compliant community cannot later become compliant. See CP 621

²⁹ Further, the language appears to be borrowed from Playa’s holding that the community did not have the right to “impose that requirement on its members . . .”. *Playa*, at 1152. The “requirement” mentioned was not compliance with HOPA, it was the age restrictions discussed. *Id.*

(HUD Regulation Question 31 [compliance with HOPA is judged on the date of the alleged act or incident of discrimination]).

V. CONCLUSION

Senior Estates established Ryderwood as a retirement community in 1953. While the laws have changed since that time, RISA protected that original intent by recording its Bylaws with the County, as it was authorized to do. No additional act is necessary.

Nor has RISA violated any term of the Fair Housing Act. The HOPA exemption was passed specifically to protect communities like Ryderwood and RISA has engaged in the steps necessary to ensure that defense is perfected. Again, nothing alleged is error.

Respectfully submitted this 13th day of January, 2010.

BETTS, PATTERSON & MINES, P.S.



By
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Richard D. Ross, WSBA #34502

Attorneys for Respondent Ryderwood Improvement
and Service Association

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

CHARLES E. WEAVER and SUSAN M.
WEAVER,

Plaintiffs/Appellants,

vs.

RYDERWOOD IMPROVEMENT AND
SERVICE ASSOCIATION, INC., a
Washington non-profit corporation,

Defendant/Appellee.

NO. 39755-2-II

DECLARATION OF SERVICE

10 JAN 13 PM 4:21
STATE OF WASHINGTON
BY _____
DEPUTY
COURT OF APPEALS
DIVISION II

I, Gayle Neligan, am competent to testify to the matters set forth herein and make this declaration of my own personal knowledge and belief.

1. On Wednesday, January 13, 2010, I filed with the Court of Appeals – Division II the following: **(1) Brief of Respondent Ryderwood Improvement and Service Association;** and **(2) this Declaration of Service.**

DECLARATION OF SERVICE

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ORIGINAL

2. A copy of the above-referenced documents were sent via electronic mail and U.S. Mail Postage Pre-Paid directed to: **Charles E. and Susan M. Weaver, 2100 West Bay Drive, M/S 16, Olympia, WA 98502.**


Gayle Neligan

Executed this 13th day of January, 2010.