

FILED

MAY 07 2012

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____**

NO. 306810
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RIVERVIEW COMMUNITY GROUP,

Appellant,

v.

SPENCER & LIVINGSTON, a Washington Partnership, and/or its
successors in-interest, and GEORGE T. and SHEILA LIVINGSTON,
husband and wife, and the marital community composed thereof, and
S.O.S. LLC, a Washington Limited Liability Company, and/or its
successors-in-interest, et al.

Respondents.

APPELLANT'S OPENING BRIEF

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I. Introduction

This appeal presents two principal questions of law: (1) does Riverview Community Group have standing to bring this action and; (2) does Washington recognize equitable servitudes by implication, and/or by estoppel?

II. Assignments of Error

- No. 1. The trial court erred in entering its order dated January 31, 2012 conditionally granting the defendants Livingstons' motion to dismiss under CR (12)(b)(7).
- No. 2. The trial court erred in entering its order dated February 13, 2012 summarily dismissing the defendants Livingstons and defendant S.O.S. LLC.

Issues Pertaining to Assignments of Error

- No. 1. Does a lawfully formed Washington non-profit association have standing to sue on behalf of its members?
- No. 2. Are all affected landowners in the Deer Meadows community required to be joined individually in this action?
- No. 3. Does Washington recognize equitable servitudes by implication?
- No. 4. Does an equitable servitude require a writing?
- No. 5. Whether the servitude claimed by Riverview is in writing?

No. 6. Whether the plaintiff is entitled to relief under the doctrine of estoppel?

III. Statement of the Case

The Complaint alleged, and the trial court has found, that all defendants in this case, for approximately 20 years, developed and sold residential lots in what is referred to as the Deer Meadows Community in rural Lincoln County, Washington. *CP-206; CP-2-12 (Complaint)*. As part of this 20-year development of the Deer Meadows Community, the defendants built a golf-course complex, including an 18-hole golf course, a pro-shop, a lounge, bar, restaurant, and motel. *Id.* The defendants built the golf-course complex to attract buyers to the residential community, marketed the development as a golf-course community and represented to potential buyers that the golf complex would remain in continuous operation. *Id.* Over the approximately 20-year development period, about 500 lots in the Deer Meadows community were sold. *Id.* After most of the lots in the Deer Meadows Community were sold, the defendants closed

down the golf course and its facilities.¹ *Id.*

After it closed, a number of the community's residential landowners created Riverview Community Group ("Riverview") as a non-profit corporation pursuant to Chapter 24.03 RCW. *Id.* A certificate of incorporation was issued for Riverview by the Washington Secretary of State. *Id.*, CP-111. On March 3, 2011, Riverview sued the defendants seeking, cumulatively or alternatively, imposition of an equitable servitude by estoppel, by implied general plan, by implication, by necessity, as implied from a map or boundary reference, and a permanent, mandatory injunction restraining the defendants from permitting waste of the golf-course complex and compelling its restoration. CP-12-22.

In August 2011, the defendants Livingstons (represented by Attorney Kulisch) moved for dismissal under CR 12(b)(7), failure to join

¹ The trial court filed its Memorandum Decision on January 3, 2012. CP 205. Memorandum opinions that adequately cover the court's determination of facts shown by the evidence are sufficient to fulfill the requirement for finding of facts. *Veith v. Xterra Wet Suits, LLC*, 144 Wn. App. 362, 365183 P.3d 334, (Div. III 2008). The defendants have not appealed these trial court findings and, being unchallenged, they are verities on this appeal. *Id.* Very substantial evidence supports the trial court's findings, including sales brochures, showing plats with "GOLF COURSE" area designated, CP-36, CP-97, CP-98, CP-108, CP-132, CP-138, CP-140, CP-142; written representations of the defendants' golf-course development scheme on the face of recorded plats, CP-33, CP-34, and a published admission by the defendants that the golf-course complex was only being built "in hopes of luring more permanent residents to the area". CP-107.

indispensable parties, and under CR 19. *CP-154*.² Livingstons accused Riverview of seeking “to commit fraud upon the defendants and the court” because it was not formed in accordance with RCW 64.38, the homeowner’s association statute. *CP-155*. The Livingston defendants claimed that only a homeowner’s association organized pursuant to RCW 64.38, has standing. *RP(Aug.)-18*³ (“*Absent the existence of a homeowner’s association, this plaintiff entity is a fiction*”); *RP-(Aug.)-20* (*only through a homeowner’s association can equitable servitude rights be asserted*). No authority supported this contention. *RP(Aug.)-16*.

On August 29, 2011, after briefing, the court heard oral argument on defendant Livingston’s motion. *RP(Aug.)-4*. After lengthy delay, on January 31, 2012 the court issued its conditional order of dismissal. *CP-245*.

In the meantime, in late October 2011, defendant S.O.S. LLC (represented by Attorney Donckers) moved for summary judgment of dismissal. *CP-271*. It contended variously: (1) that there was no such

² The “defendants Livingstons” as used in this case, are George and Sheila Livingston, husband and wife; the Spencer-Livingston partnership, and its successors, Deer Meadows, Inc.; Deer Meadows Development, Inc.; and Deer Meadows Golf, Inc. *See Notices of Appearance* (filed of record but not made part of the Clerk’s Papers).

³ There are two Verbatim Reports on this appeal. The hearing of August 29, 2011, designated as “*RP(Aug.)-xx*”, and the hearing of December 23, 2011, designated as “*RP(Dec.)-xx*”.

thing as an equitable servitude by implication, because an “equitable servitude requires a promise in writing”, *CP-277*; (2) that an equitable servitude “requires a possessory interest in the property”, *CP-284*; and (3) that the real estate statute of frauds applies to bar equitable servitudes by implication. *CP-285*. On November 18, 2011, the defendants Livingstons served and filed a document entitled “Joinder in Defendant S.O.S.’s Motion for Summary Judgment. *CP-163*.⁴

On December 23, 2011, the trial court heard oral argument on the defendant S.O.S. LLC’s motion for summary dismissal (joined by the defendants Livingstons). *RP(Dec)-4*.

Having considered the evidence on both motions, on January 3, 2012 the court filed its Memorandum Decision on defendant Livingston’s motion to dismiss under CR 12(b)(7), *CP-205*, ultimately resulting in its order of January 31, 2012 conditionally dismissing the defendants Livingstons. *CP-245*.

And, on February 13, 2012, the trial court entered its final order dismissing the defendants Livingstons and defendant S.O.S. LLC. *CP-249*. That order contains the following:

⁴ The propriety of simply “joining” another defendant’s motion for summary judgment has not been established and is reserved.

“The court further finds that the legal issue of whether an equitable servitude can be created by implication is a question of first impression in the state of Washington, that plaintiff has a meritorious argument on this question that warrants appellate review, that there is no just reason to delay entry of a final judgment as to these defendants and that entry of judgment and termination of the claim against these defendants will allow appellate review to proceed immediately, which will be in the best interest of justice.”

*CP-248-9.*⁵

IV. Summary of the Argument

The Riverview Community Group has standing and its members are entitled by statute, court rule and decisional law to bring this action through it, and if there was any question in Washington about courts recognizing the establishment of equitable servitudes by implication or estoppel, this court should simply follow its sister courts and adopt the appropriate provisions of the Restatement (Third) of Property, Servitudes, which recognizes them (under all the theories advanced by Riverview), and illustrates their application by specific example to the precise facts of this case.

⁵ This is consistent with the statement in the trial court’s Memorandum Decision saying as a matter of law the doctrine of equitable servitude by implication has not been recognized by Washington courts and cannot afford Riverview a basis for relief in the case. *CP-211*.

V. Argument

a) The individual landowners in the Deer Meadows Community are not necessary parties; Riverview has standing.

After closing down and wasting the golf course complex, the aggrieved landowners in this case banded together and formed a non-profit association to seek relief. *CP-206*. They did so pursuant to statute, RCW 24.03 *et seq.*, *Id.* They have a certificate of incorporation from the Washington Secretary of State. *Id.*; *CP-111*. Under the statute, corporations may be organized “for any lawful purpose or purposes”. *RCW 24.03.015*. Under the statute, each non-profit corporation also has the express power “to sue and be sued, complain and defend in its corporate name”. *RCW 24.03.035(2)*. Riverview’s members had statutory authority to organize themselves into a non-profit Washington corporation and in its corporate name to sue and to complain. Riverview has standing under the statute.

Consistent with this statute, a party so authorized (by statute) may sue in his own name “without joining with him the party for whose benefit the action is brought.” *CR 17(a)*. Riverview has standing to bring this action under court rule.

And, consistent with statutorily-created standing and court rule, our state Supreme Court, following this court's reasoning, confers standing for organized members of groups, like the Riverview Community Group.

The case is *Firefighters v. Spokane Airports*, 146 Wn.2d 207, 45 P.186 (En Banc, 2002) which followed the U.S. Supreme Court's test established in *Hunt v. Washington State Apple Adver. Commission*, 432 U.S. 333, 343, 97 S. C.T. 2434, 53 L. Ed. 2nd 383 (1997). The *Firefighter's* court said:

“An association has standing to bring suit on behalf of its members when the following criteria are satisfied: (1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the organization's individual members.”

Firefighters, supra @ 213-214.

Here, Riverview is not seeking monetary damages. This is undisputed. The trial court properly concluded so. *CP-208*. An association's standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. *Hunt, supra @ 343*. So long as the nature of the claim and the relief sought does not make the individual participation of each injured

party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members. *Id.*

The *Firefighter's* court also recognized that monetary damages are distinguishable from injunctive relief in that injunctive relief generally benefits every member of an association equally, whereas, the amount of monetary damages [any individual member] suffers may vary.

Firefighters, supra, @ 214. If an organization seeks an injunction or some other form of prospective relief, it can be reasonably supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. *Hunt, supra @ 343.* Money damages may require individualized proof, and thus, individual participation of association members. *Firefighters @ 215.* But, even then, such a plaintiff as the Riverview Community Group would be entitled to sue for both monetary damages and injunctive relief if it received assignments from its members for their damages claims. *Firefighters @ 214.*

There can be no dispute in this case that Riverview's individual members would have standing to sue in their own rights. *CP-127 (Declaration of Howard Walker); CP-146 (Declaration of James Kerlee); CP-112 (Declaration of James Linville); CP-100 (Declaration of Ken Sweeney); CP-85 (Declaration of Mark Jensen).* All these affiants are

buyers of residential lots in these defendants' golf-course community and are members of Riverview. *Id.*

And surely, the defendants in this case do not contest that the interests Riverview seeks to protect are germane to its purpose, i.e., preventing these defendants from "luring them into permanent residences" in the golf-course community by false representations of the continuous existence and operation of the golf-course complex and, once so lured and the lots sold, shutting it down, allowing it to go to waste and weeds, auctioning off its assets, and attempting to sell it. *CP-206 (development marketed as golf-course community and represented to potential buyers that the golf complex would remain in continuous operation).*

And because Riverview's members do not seek monetary damages, the participation of its individual members is not required.

The test established in *Hunt* and *Firefighters* is met.

The trial court erred in determining that Riverview's members had either to be joined individually or issue assignments to the corporation.

Riverview has standing.

b) Equitable servitudes are recognized in Washington.

Before later granting summary judgment of dismissal to the defendants, the trial court stated that "as a matter of law, the doctrine of

equitable servitudes by implication has not been recognized by Washington courts and that the doctrine does not afford Riverview a basis for relief in this case.” *CP-211. (Memorandum Decision @ p. 7).*⁶ The trial court declined to adopt the Restatement (Third) Property, Servitudes, *RP (Dec)-22*, ruling that equitable servitudes require a writing and Riverview couldn’t show one. *Id.* Nevertheless, the trial court found that Riverview has a “meritorious argument on this question that warrants appellate review”. *CP-248. Id.*

The defendants argue equitable servitudes always require a writing; Riverview disagrees, but says one exists anyway. The question now is, as a matter of law, does Washington recognize that rights or interests in land (like servitudes) can be created in equity, without a writing, by implication or estoppel?

It cannot be seriously disputed, Riverview submits, that rights or interests in real property can be (and have long been) created by implication and estoppel by Washington courts exercising equitable powers. To the defendants, however, equitable servitudes are an exception; they always require a writing. *CP-277, CP-195; RP(Dec)-7.* They arrive at this

⁶ Both the trial court and the defendants seem to have considered servitudes created by estoppel as being in the same category as servitudes created by implication. There is a distinction, but neither requires a writing, as argued by the defendants.

immutable principle of real property law by construing one case that says nothing conclusively of the strict requirement and exception they urge. To get there, it's apparent, the defendants got entangled in the well-known confusion over nomenclature -- or are trying to exploit it. They throw at the court historical words and terms such as "restrictive covenant", "equitable easement", "real covenant", "equitable restriction", "equitable covenant", and the like, but miss the rationales entirely. *CP-193-4*. Modern law has recognized this confusion and rejects these historical terminologies.⁷ Further, they conveniently ignore the cases' clear acknowledgement that our Supreme Court has articulated and approved various formulations for establishing the servitude Riverview seeks here. And although the trial court dismissed these defendants (perhaps laboring

⁷ *The Restatement (Third) Property, Servitudes* has not only criticized the historical use of these words and terms, but has largely dropped them because they "perpetuate the idea that there is a difference between covenants at law and in equity, which at best, generate confusion, and at worst, may leave lawyers and judges to focus on irrelevant questions or reach erroneous results." *Restatement (Third) Property, Servitudes § 1.4, Comment a*. Division II calls this "sensible" and, following the Restatement, recognizes that modern law does not employ such terminologies or distinguish between historical servitude categories. It also recognizes at least two formulations of how servitudes become created in Washington. *Country Club v. Hunt, Mfd. Homes*, 120 246, 253, 84 P.3rd 295 (2004). *And see, Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 688 P.2d 682, 689 (Ariz. App. 1984) (*In a case imposing a servitude by implication against a golf-course developer, the court recognized "problem of terminology"; nomenclature used in the reported decisions is not consistent.*); *and, Ute Park Summer Homes Ass'n v. Maxwell Land Co.*, 427 P.2d 249 (1967) (*private rights created by implied grant, implied covenant, or estoppel; makes very little difference upon which of these above theories the holding is based*); *Leighton v. Leonard*, 22 Wn. App. 136, 138, 589 P.2d 279 (1978) (*consistent explication of Washington law regarding covenants "extremely difficult"*).

under the same confusion), it correctly recognized Riverview's claims as "meritorious". Apparently, it just didn't want to plow what it thought was a new furrow in Washington's jurisprudence itself, it was "struggling with it"; it was, admittedly, "lazy". *RP(Dec)-27, RP(Dec)-31*. It wants this court to decide. So does Riverview.

A servitude is a legal device which creates a right or interest in land. *Restatement (Third) Property, Servitudes § 1.1; Country Club v. Hunt Mfd Homes, 120 Wn. App. 246, 253, 84 P.3rd 295 (2004), citing the Restatement.*

Washington has long recognized the power of courts of equity to create rights or interests in land without a writing. As a starting point, this may be discerned by the state's quiet title statute which pre-dates the state's first constitutional convention in 1878 and was codified as territorial law in 1881. Any plaintiff or defendant may set out the nature of an estate, a claim or title to property, whether legal or equitable, and "the superior title, whether legal or equitable, shall prevail." *RCW 7.28.120*. A court having equity powers has inherent jurisdiction to quiet title to land. *Finch v. City of Seattle, 74 Wn.2d 161, 443 P.2d 833 (1968)*. *Rhoades v. Barnes, 54 Wash. 145, 150, 102 Pac. 884 (1909)* ("rights in real estate may be obtained and irrevocably fixed and determined by matters in pais"); *Mains Farms*

Homeowners v. Worthington, 121 Wn.2d 810, 815, 854 P.2d 1072 (1997)
(*property owners have an equitable right to enforce covenants*).

Although no writing may exist, Washington courts exercising equity jurisdiction routinely create, establish and transfer rights and interests in land, including fee interests. Like easements, liens and profits, servitudes are encumbrances. *Merlin v. Rodine*, 32 Wn.2d 757, 760, 203 P.2d 683 (1949), citing *Hebb v. Severson*, 32 Wn.2d 159, 201 P.2d 156 (*defining encumbrance is any right or interest in land which subsists in third persons such as liens, easements and servitudes*).

An easement is a servitude. *Country Club*, *supra* @ 253. It's an interest in real property. *Crisp v. VanLaeken*, 130 Wn. App. 320, 323, 122 P.3d 296 (2005). It's a use interest. *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 339, f.n. 3, 753 P.2d 555 (1988).

The number of cases in Washington holding that easements may arise by implication are too numerous to cite, but the following should suffice to illustrate the point that they can and do, without a writing -- including by estoppel. *Visser v. Craig*, 139 Wn. App. 152, 163, 159 P.3d 453 (2007) (*discussing easements that arise by implication*); *Hellberg v. Coffin Sheep Company*, 66 Wn.2d 664, 668 44 P.2d 770 (1965)(*discussing easements by implication as appurtenances to land*); *Chester v. Adams*, 44

Wn.2d 502, 268 P.2d451 (1954); Berlin v. Robbins, 180 Wash. 176, 188, 38 P.2d 1047 (1934) (discussing easements by implied grant); Fossum Orchards v. Pugsley, 77 Wn. App. 447, 892 P.2d 1095; Crescent Harbor Water Company v. Lyseng, 51 Wn. App. 337, 753 P.2d 555 (easements arising by prescription); McMeeken v. Low Income Housing Inst., Inc., 111 Wn. App. 188, 45, P.3d 570 (2002); Evich v. Kovacevich, 33 Wn.2d 151, 157, 204 P.2d 839 (“the cardinal consideration upon the question of an easement by implication is the presumed intention of the parties concerned”).

Moreover, not just use interests, but title to real property can be created and transferred without a writing through the doctrine of adverse possession. Boundaries can be moved and relocated without a writing through the doctrine of mutual recognition and acquiescence. Our state courts sitting in equity recognize the creation of rights and interests in lands without writings under the doctrines of common grantor, parol agreement and estoppel. *See, Chaplin v. Sanders, 100 Wn.2d 85, 676 P.2d 431 (1984); Metropolitan Bldg. v. Fitzgerald, 122 Wash. 514, 210 Pac. 770 (1922); Lamm v. McTighe, 72 Wn.2d 587, 434 P.2d 565 (1967) (discussing the doctrines of mutual recognition and acquiescence, estoppel in pais, parol agreement); Winan v. Ross, 35 Wn. App. 238, 666 P.2d 908 (1983)*

(discussing boundary adjustment by the doctrine of common grantor); Johnston v. Monahan, 2 Wn. App. 452, 469 P.2d 930 (1970) (discussing the boundary adjustment doctrine of parol agreement); Thomas v. Harlan, 27 Wn.2d 512, 178 P.2d 965 (1947) (discussing application of boundary adjustment by estoppel)

Our courts in equity also recognize rights and interests in real property arising from part performance of oral contracts or implied contracts – without a writing. *Kirk v. Tomulty, 66 Wn. App. 231, 831 P.2d 792 (1992) (quieting title to an easement by part performance). Canterbury Shores v. Lakeshore, 18 Wn. App. 825, 572 P.2d 742 (1977) (court may employ equitable powers to enforce parol contract to convey interest in real property).*

All these doctrines are employed by Washington courts to create rights or interests in land without a writing. These are all parallel lines of reasoning supporting courts' equitable powers to create and establish rights or interests in land by implication or estoppel. Equitable servitudes are no exception.

The Restatement also recognizes that rights or interests in land (servitudes) can be created by implication or estoppel. *Restatement (Third) of Property, Servitudes § 2.10, § 2.11.* As it explains, in most cases

servitudes are implied on the basis of the inferred intent of the parties to the conveyance. The inference may be based on language used in the conveyance, the object of the transaction, a use of the property made prior to severance, the language used in referring to maps or boundaries or restrictions imposed on the conveyed land. *Id.* @ § 2.11, comment (e).

Those rights and interests (servitudes) created by implication recognized in the Restatement are: (1) implied from prior use; (2) implied from map or boundary reference; and (3) servitudes implied from general plan.

Restatement (Third) of Property, Servitudes § 2.12, 2.13, 2.14. Washington has long recognized each of these. *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954) (implied easement from prior use); *Shertzer v. Hillman Inc.*, 52 Wash. 492, 100 Pac. 982 (1909) (plat map displaying existence of park sufficient to imply dedication of same); *Johnston v. Mt. Baker Park Church*, 113 Wash. 458, 194 Pac. 536 (1920) (notice of general plan of development sufficient to preclude its violation even though no written deed restriction). And see, *Stoebuch, W.*; *Washington Practice, Vol. 17, §2.4* (1995 Ed.), p. 89 (three judicial doctrines by which easements arise by implication; not created by grant in a written instrument). All of these theories of servitude by implication exist in this case.

Washington courts exercising equity jurisdiction also create, establish and transfer rights and interests in lands by estoppel. *Finch v. Matthews*, 74 Wn.2d 161, 169, 443 P.2d 833 (1968) (quieting title by estoppel); *Burkey v. Baker*, 6 Wn. App. 243, 492 P.2d 563 (1971) (estoppel applied to alteration of record titles to land). The *Burkey* court set out the elements of equitable estoppel: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the face of such admission, statement, or act; (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. *Burkey supra @ 248.*⁸

In those cases where courts acting in equity create and establish rights or interests in land by estoppel, the overarching purpose is to prevent or avoid an injustice when a party has changed his position in reliance on another's admissions, acts, statements, etc. *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 904, 691 P.2d 524 (1984) ("to prevent injustice then, the court has evoked estoppel in pais, estoppel by misrepresentation").

⁸ For other examples of Washington courts exercising equity jurisdiction to create, establish or transfer rights or interests in land by estoppel, see *Transwest v. Boise Cascade*, 14 Wn. App. 520, 544 P.2d 43 (Div. III 1975) (quieting title to standing timber by estoppel); *Nugget Prop. v. Golden Thunderbird*, 71 Wn.2d 760, 431 P.2d 850 (1967) (quieting title by estoppel to mining claims); *Hagg v. Alldredge*, 124 Wn. App. 297, 99 P.3d 914 (2004) (discussing estoppel to an easement and recognizing the principle that a person will not be permitted to deny what he or she has once solemnly acknowledged, which need not have been express or intentional.)

Like Washington, the Restatement (Third) of Property, Servitudes, recognizes the creation of servitudes by estoppel. No writing is required.

The Restatement reads:

“If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when: . . . (2) the owner or occupier represented that the land was burdened by a servitude under circumstances in which it was reasonable to foresee that the person to whom the representation was made would substantially change position on the basis of that representation, and the person did substantially change position in reasonable reliance on that representation.”

This restatement discusses its relation to other rules, its rationale (founded on the policy of preventing injustice) and provides illustrations of the circumstances under which it is applied. Illustration No. 9 to § 2.10 of the Restatement (Third) of Property, Servitudes reads:

“D, the developer of a residential subdivision adjacent to a golf course owned by D, represented to purchasers of lots that the golf-course land was subject to restrictions that would ensure its existence as a golf course for 50 years. Sales brochures stated that golf-club memberships would be available to all residents in the subdivision, and premium prices were charged for lots abutting the golf course. Restrictions on residential lots provided special building setbacks from the boundaries of the golf course. However, no restrictions were ever expressly imposed on the golf-course parcel. The developer operated the golf course for 20 years before deciding to subdivide the land and sell it for residential lots. The subdivision lot owners sued to enjoin D from using the property for anything other than a golf course. The conclusion is justified that D is

estopped to deny the existence of a servitude on the golf-course parcel.”

Restatement (Third) Property, Servitudes § 2.10.

This particular provision of the Restatement was recently applied by this court’s sister court in Oregon. Under facts and circumstances identical to those in this case, the Oregon appellate court, in *Mountain High Homeowner’s Assn. v. J.L. Ward*, 209 P.3d 347 (Or. App. 2009), affirmed the trial court’s judgment for the same injunctive relief sought by the plaintiffs here and recognized that an equitable servitude by estoppel may be created by a representation either “expressly or impliedly”. *Mountain High, supra* @ 355. Said the court:

“Thus, an equitable servitude by estoppel may be created as the result of (1) either an express or implied representation made under circumstances where (2) it is reasonably foreseeable that the person to whom the representation is made will rely on it, (3) that person does so rely, (4) such reliance is reasonable, and (5) the establishment of a servitude is necessary to avoid injustice. Our review of the record convinces us that the elements set forth above are satisfied in this case. Defendant represented to buyers that Mountain High was and would continue to be a golf-course community. That representation was made both expressly and impliedly. It was reasonably foreseeable that, in deciding whether to purchase land within Mountain High, a prospective buyer would rely on those representations and substantially change position as a result of that reliance. The owners, did, in fact, purchase property in Mountain High, substantially changing their positions as a result of the defendant’s representations. It was reasonable for buyers to rely on the representations of the developer of

Mountain High and the owner of the Mountain High golf course in making their decisions to purchase in the community. Under all the circumstances... it would be unjust for defendant to benefit from the successful of marketing Mountain High as a 'golf-course community' without the imposition of the servitude."

Mountain High, supra @ 355.

Even though the Restatement's rule and illustrations are relatively recent (2000), the principles of law at work in this case are not. As far back as the 1960's, courts of equity have reprehended conduct in cases specifically like this one.

In Ute Park Summer Homes v. Maxwell, 427 E.2d 249, (N.M. 1967)

the Supreme Court of New Mexico held:

"The proper rule is that private rights for the use of a [golf course] are created by implied grant, implied covenant or estoppel. It makes very little difference upon which of the above theories the holding is based... The rationale of the rule is that a grantor, who induces purchasers... by use of a plat, to believe that open areas [and golf courses] shown on the plat will be kept open for their use and benefit, and the purchasers have acted upon such inducement, is required by common honesty to do that which he represented he would do."

Ute Park, supra @253. And see, Shalimar Ass'n v. D.O.C. Enterprises Ltd., 688 P.2d 682 (Ariz. App. 1984).

Significantly, as in this case and in *Shertzer, supra*, in *Ute Park* the developers used representations from plat maps showing an open area of land labeled "golf course". Although the plats in

Ute were never recorded, copies were distributed and used in connection with the sale of the lots. It made no difference that the deed to each individual lot sale made no reference to the plat or to any interest in the golf course. *Ute Park, supra @ 251*. Here, not only were Riverviews' members (purchasing in the golf-course community) inundated with sales brochures showing platted lots around the golf course, but the defendants' recorded plat showed it as well. *CP-33, 34, CP-133, CP-137, CP-139*. And in *Shalimar, supra*, this court's sister court in Arizona upheld the trial court's determination that an implied covenant restricting the use of golf-course property existed when an association of homeowners surrounding the golf course brought an action against its new owner who wanted to cease its operations. No writing was required.

In this case, the trial court declined to apply the Restatement's provisions – although recognizing that Riverview's claims were “meritorious”. It seeks this court's resolution of the issue. Again, so does Riverview.

c) In any event, there was a writing in this case.

Principally, the defendants here rely on the Supreme Court's decision in the case of *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999) for the proposition that all servitudes (by whatever name) require a writing. Although that reliance is misplaced for a number of reasons, one of the formulations our Supreme Court has set forth for establishment of an "equitable restriction" in the subdivision setting was a promise in writing enforceable between original parties. *Hollis, supra @ 691.* Although the defendants here assert emphatically that no such writing exists in this case, they recorded a plat in the auditor's offices of Lincoln County, upon their signatures, depicting the residential lots they were selling in the golf-course community, and which contains, on its face, an open area adjacent to the lots clearly designated in upper case letters as a "GOLF COURSE", and identifying and depicting the location of the first nine holes.⁹ The *Hollis* court commented that the writing it required under this one formulation for the establishment of an equitable restriction is often recorded as a declaration of covenants or set forth as a

⁹ A copy of this recorded plat is attached for the court's convenience.

restriction contained in the deed transferring an interest. *Hollis, supra @691*. However, the court said, a restriction may also be contained on the face of the subdivision plat. *Id., citing Thorstad v. Federal Way Water and Sewer, 73 Wn. App. 638, 870 P.2d 1046 1994; Hagemann v. Worth, 56 Wn. App. 85, 782 P.2d 1072 (1989)*. From the face of the plat in the *Hollis* case, our Supreme Court recognized “an apparent intent on the part of the developers” and ruled it was an equitable covenant. *Hollis, supra @ 692, 693*. (underlining added).

In construing a plat, the intention of the dedicator controls. *Roeder Co. v. Burlington Northern, 105 Wn.2d 269, 273, 714 P.2d 1170 (1986), citing Frye v. King Cy., 151 Wash. 179, 182, 275 P. 547 (1929)*. That intention is to be determined from all the marks and lines appearing on the plat. *Id.* This court in *Deaver v. Walla Walla County, 30 Wn. App. 97, 633 P.2d 90 (1981)*, following *Frye, supra*, recognized that the plat’s intentions “must be adduced from the plat itself, where possible, as that furnishes the best evidence thereof.” *Deaver, supra @ 99*. The intention of the owner in making the plat is to be ascertained from all the marks

and lines appearing thereon. *Id.* Such an interpretation should be followed as will give effect to all lines and statement. *Id.*

Despite what these defendants may say now, the intent of the dedicator of a plat is ascertained from the plat itself. There is a writing in this case, a writing that supports imposition of the servitude Riverview seeks by implication, by estoppel and by reference to map or plat. *And see, Selby v. Knudson, 77 App. 189; 194, 890 P.2d 514 (Div. III, 1995) (adduce intent from plat itself).* The court should also bear in mind the settled rule that the intent of a person at a particular time is better made known by his conduct at that time rather than by his subsequent declarations as to what his intent was then. *Wasmund v. Harm, 36 Wash. 170, 178; Dunbars v. Heinrich, 95 Wn2d 20, 25, 622 P.2d 812 (1980).*

If equitable servitudes needed to be in writing, this writing satisfies.

VI. Conclusion

Riverview doesn't have to be organized through the homeowner's association statute to complain about the misconduct of these defendants and they have no authority to support that contention. Riverview has

standing by statute, by court rule, and by mandatory authority directly on point.

And, because equitable servitudes by estoppel or implication do not require a writing and do not offend the real estate statute of frauds, a formal adoption of the Restatement's provisions for the establishment of equitable servitudes by estoppel, by implication, by general plan, and by reference to map, as set out in Riverview's complaint, offends no authority in Washington. It brings it into direct alignment with modern law and modern decisions.

In this case injustice cannot be avoided without creation of the servitude and the equitable relief prayed for by Riverview. The trial court's findings of fact are verities on this appeal and in this case. They establish an estoppel and/or an implication. This court's decision on accelerated review would promote an efficient and just determination of the case, as the trial judge hoped. Riverview requests this court accept the trial court's findings of fact, reverse the summary judgment of dismissal, remand to the trial court with instruction to enter judgment in Riverview's favor by estoppel and/or implication (based on the verities), instructing the court to enter an order of injunctive relief, as prayed in Riverview's complaint, and

instructing the trial court to appoint a receiver and to proceed from there in the orderly course of receivership administration, as prayed.

RESPECTFULLY SUBMITTED this 7th day of May 2012.

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