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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 345017

COURT OF APPEALS,

DIVISION III

OF THE STATE OF WASHINGTON

KELLY S. DEAN and ANNA MARIE DEAN, husband and wife,

Respondents

v.

TIMOTHY MILLER and DIANE MILLER, husband and wife,

Appellants

BRIEF OF RESPONDENTS

September 12, 2016

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I. STATEMENT OF CASE

The material facts of this case are undisputed. Appellants ("Miller") and Respondents ("Dean") own adjacent properties, Lots 10 & 9 of the Darling Land Company's First Addition to Leavenworth. (CP 72).[1] Both Lot 9 (sometimes referred to as "the Dean Property") and Lot 10 (sometimes referred to as "the Miller Property") were commonly owned by Margaret E. Motteler until 1979. (CP 13-14, 168). In 1979, Ms. Motteler conveyed title of Lot 9 to William J. Walsdorf and Mary Anne Walsdorf ("the Walsdorfs) subject to several restrictive covenants. *Id.* The Walsdorfs obtained title to Lot 10 in January 1991. *Id.*

On September 30, 1993, the Walsdorfs conveyed title to Lot 10 to William L. Massey and Kathleen A. Massey ("the Masseys") subject to the restrictive covenants contained in the Declaration of Covenant. (CP 22). The Walsdorfs and Masseys simultaneously recorded the Declaration of Covenant placing certain restrictive covenants on Lot 10 that restricted the use and development of Lot 10, including restrictions on construction within certain distance of Lot 9. (CP 122-125). The Declaration of Covenant further prohibits any construction of a structure on Lot 10 other than one single family dwelling and a private garage. *Id.*

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[1] Appellants' Brief contains a detailed history of the title ownership of both Lot 9 and Lot 10. Dean will not repeat that history except to emphasize or elucidate important points in the historical record.

The Walsdorfs retained fee title to the adjacent Lot 9 until 2002 when the Walsdorfs sold Lot 9 to Dean. The Declaration of Covenant, which contained the legal description of Lot 10 as the burdened property, was signed by both Walsdorfs and the Masseys and noticed before a notary public prior to recording. The Declaration of Covenant expressly provided that the restrictive covenants were intended to run with the land and be binding on the grantors' and grantees' successors and assigns:

> "These covenants shall run with the land and shall be binding on all parties having or acquiring right, title, or interest in the land described herein or any part thereof, and shall inure to the benefit of each owner thereof."

Dean obtained title to Lot 9 from the Walsdorfs by recorded deed on April 24, 2002. (CP 11-12). Miller obtained title to Lot 10 on December 19, 2013. (CP 15-17). Miller's deed specifically stated that title was subject to the Declaration of Covenant recorded on September 30, 1993. In April 2015, Miller attempted, unilaterally, to revoke the Declaration of Covenant by recording a "Revocation of Covenant" with Chelan County. (CP 26-27). After discovering Miller's attempt to revoke the Declaration of Covenant and further subdivide and develop Lot 10, Dean filed a Verified Complaint against Miller in Chelan County Superior Court, seeking declaratory and injunctive relief to enforce the Declaration of Covenant on July 7, 2015. (CP 3-45).

The parties filed cross-motions for summary judgment. The trial court initially denied Dean's motion for summary judgment on December 16, 2015. Dean timely moved for reconsideration on the trial court's order denying Dean's motion for summary judgment. The trial court granted Dean's motion for reconsideration and entered an order on May 16, 2016 vacating the December 16, 2015 order denying Dean's motion for summary judgment, declaring the Declaration of Covenant valid, binding, and enforceable against Miller, declaring the Revocation of Covenant void *ab initio*, and permanently enjoining Miller from engaging in activities restricted by the Declaration of Covenant. (CP 96-111). Miller timely sought appellate review of the trial court's May 16, 2016 Order.

II. ARGUMENT

A. Standard of Review

On review of a trial court's order granting summary judgment, this Court will consider all facts and reasonable inferences drawn there from in the light most favorable to the non-moving party. All questions of law shall be reviewed de novo. *McNabb v. Department of Corrections*, 163 Wn.2d 393, 180 P.3d 1257 (2008). Summary judgment is appropriate if the moving party can demonstrate that no genuine issue of material fact exists and that the party in entitled to judgment as a matter of law.

Bremmeyer Excavating, Inc. v. McKenna, 44 Wn. App. 267, 268, 721 P.2d 567 (1986); CR 56.

B. Trial Court Appropriately Concluded that the Declaration of Covenant Is A Real Covenant (Miller's Assignment of Error Nos. 4, 5, 6, 7, & 8)

Restrictive covenants limit the manner in which owners may use or develop the owner's property. *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986). Washington law distinguishes between two types of covenants: real covenants and equitable servitudes. *Dickson v. Kates*, 132 Wn. App. 724, 732, 133 P.3d 498 (2006). Different standards apply when analyzing real covenants as opposed to equitable servitudes. The trial court determined that the Declaration of Covenant was a valid, binding, enforceable covenant under either legal standard regarding real covenants or equitable servitudes. The trial court did not err in determining that the Declaration of Covenant is a real covenant, running with the land, binding and enforceable on Lot 10.

For real covenants to run with the land:

> "(1) the covenants must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds; (2) the covenant must 'touch and concern' both the land to be benefitted and the land to be burdened; (3) the covenanting parties must have intended to bind their successors in interest; (4) there must be vertical privity of estate, i.e., privity between the original parties to the

> covenant and the present disputants; and (5) there must be horizontal privity of estate, or privity between the original parties."

Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 257, 215 P.3d 990 (2009), *quoting Leighton v. Leonard*, 22 Wn. App. 136, 139 589 P.2d 279 (1978).

Miller does not dispute that vertical and horizontal privity exist, so Dean will not address those elements. Miller instead argues that the trial court erred in determining that the Declaration of Covenant is not a real covenant running with the land because: 1) the Declaration of Covenant does not comply with the statute of frauds; 2) the Declaration of Covenant does not "touch and concern" the benefited land; and 3) "Element 3 requires that the document provide notice to the person whom [sic] against the covenant is to be enforced that the covenant bound that person's property and benefited another parcel of property." (Miller's Br. pgs. 24-25). Miller is wrong. The Declaration of Covenant is a binding, enforceable covenant, running with the land.

Dean addresses Miller's arguments regarding the statute of frauds and "touch and concern" below in paragraphs C & D, but addresses Miller's argument regarding the third element of a running real covenant first. As stated above, for a real covenant to be valid and enforceable, "the covenanting parties must have intended to bind their successors in

interest." *Id.* Miller does not argue that the original covenanting parties did not intend to bind their successors in interest; instead, Miller argues that they did not have adequate notice of the benefited parcel. That is not an element of a real covenant running with the land.[2]

Contrary to Miller's assertions regarding "notice," the *Deep Water* Court did not insert an additional requirement into the real covenant analysis that "the document provide notice to the person whom [sic] against the covenant is to be enforced that the covenant bound that person's property and benefitted another." The third element of a real covenant requires only that the original covenanting parties intended to bind their successors in interest. To establish the intent to bind successors in interest, the parties need not expressly state that intent; intent "may be drawn from all the language, including the nature of the covenant. In fact it seems if a covenant is found to touch and concern, this alone may often be enough to show an intent that it should bind successors." *Deep Water Brewing, LLC*, 152 Wn. App. at 259, *quoting* 17 WILLIAM B.STOEBUCK & JOHN W.WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 3.4, at 137 (2d ed. 2004).

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[2] Moreover, Miller's bald assertion that they lacked "notice" of the restrictive covenant is demonstrably false, as the Declaration of Covenant is expressly listed upon the face of Miller's deed. (CP15-17). The Declaration of Covenant was recorded against Lot 10 in 1993 and Appellants are deemed to have notice of the covenants pursuant to the state of Washington's recording statute, RCW 65.08.030.

In this instance, it is clear from the express language of the Declaration of Covenant that the original covenanting parties, the Walsdorfs and the Masseys, intended for the covenants to run with the land and bind their successors in interest:

> "These covenants shall run with the land and shall be binding on all parties having or acquiring any right, title, or interest in the land described herein or any part thereof, and shall inure to the benefit of each owner thereof."

The Declaration of Covenant is signed by both the Walsdorfs and the Masseys whose signatures were noticed by a notary public. At the time the Declaration of Covenant was conveyed, the Walsdorfs were the common owners of Lots 9 and 10. The Walsdorfs transferred title to Lot 10 to the Masseys at the same time the Walsdorfs and Masseys executed the Declaration of Covenant restricting the use of Lot 10, but retained their interest in Lot 9. The Declaration of Covenant specifically references Lot 9 as a benefited property to the covenant regarding construction of buildings and required setbacks on Lot 10.[3] Moreover, it is undisputed (and admitted) that Miller had notice of the Declaration of Covenant restricting the use of Lot 10 because the real covenant is referenced in the deed under which Miller took title to Lot 10. (CP 15-17). Miller's

[3] The fact that the Walsdorfs retained Lot 9 while conveying Lot 10 to the Masseys subject to a restrictive covenant is sufficient to establish the Walsdorfs' and Masseys' intent to benefit Lot 9. See discussion of *Stewart v. Beghtel*, supra at paragraph D.

argument that some additional notice is required by the third element is not grounded in the well-established law of real covenants and seems to be more appropriately characterized as an argument regarding the touch and concern element. Because it is undisputed (and not raised by Miller to the trial court below or to this Court on appeal) that the original covenanting parties intended to bind their successors, this Court should decline to address any argument that the third element regarding a real covenant has not been established.

C. The Declaration of Covenant Complies with the Statute of Frauds (Miller's Assignment of Error Nos. 1, 5, 6)

Miller seems to misunderstand the application of the statute of frauds to the conveyance of a real covenant running with the land.[4] To satisfy the statute of frauds, "every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed."[5] RCW 64.04.010. "A

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[4] Unlike real covenants, equitable servitudes do not have to satisfy the statute of frauds to be enforceable. *See Riverview Cmt. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 898, 337 P.3d 1076 (2014)(the statue of frauds is no barrier to an action to impose an implied equitable servitude where some writing supports the imposition of the burden), *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 464, 194 P. 536 (1920).

[5] Appellants seem to conflate compliance with the statute of frauds to the conferral of standing to enforce a real covenant. (Miller's Br. pg. 14). Standing to enforce a real covenant has no bearing on the analysis of whether a deed or contract satisfies the requirements of the statute of frauds. Whether Dean has standing to enforce the real covenant (they do) is more appropriately analyzed under the "touch and concern" and privity elements of real covenants.

deed concerning an interest in land must contain a description of *the property conveyed*." *Dickson*, 132 Wn. App. at 733 (Emphasis Added). At issue here is whether the conveyance of an interest in real property--a real covenant--satisfies the statute of frauds when the restricted (or burdened) property, but not the benefited property, is legally described in both the Declaration of Covenant and by recorded deed; it does.

It is clear, that under Washington law governing real covenants, the property *burdened* by the restrictive covenant must be adequately identified and legally described to satisfy the statute of frauds because the property interest that is being conveyed is the restriction on the burdened property. *See Dickson*, 132 Wn. App. at 733 (restrictive covenants comply with the statute of frauds when the burdened property is sufficiently described); *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995)(to comply with the statute of frauds, in a deed or contract conveying an easement interest, "*the servient estate* must be sufficiently described")(Emphasis added). However, Dean can locate no Washington court decision requiring that *the benefited property* must also be legally described in a deed imposing a restrictive real covenant on a parcel of land in order to satisfy the statute of frauds, and Miller fails to cite any

authority supporting that proposition.[6] Though Respondent could locate no Washington case directly on point, the Oregon Supreme Court has directly addressed the issue, finding that the law does not require that the benefited parcel be expressly identified in the contract or deed creating an enforceable covenant. *See Rodgers v. Reimann*, 227 Or. 62, 66, 361 P.2d 101, 103 (1961)(the intention to benefit a particular parcel of land through the imposition of a restrictive covenant on a separate parcel of land conveyed need not be expressly recited in the contract or deed) (Citations below).[7]

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[6] Appellants rely on *Martin v. Siegel*, to support the position that the benefited property must be described by the "correct lot number, block number, addition, county and state." 35 Wn.2d 223, 229, 212 P.2d 107 (1948). That reliance is misplaced; *Martin* involved a contract for the sale of land, not the imposition of a restrictive covenant. In Martin, the property that was the subject of the sale was not sufficiently described to satisfy the statute of frauds. Logically, any sale of real property must identify the actual parcel to be sold. Likewise, when dealing with a real covenant, the parcel that must be adequately described is the property that will be restricted, not the property that will be benefited, as is the case here.

[7] *Herb v. Gerstein*, D.C.1941, 41 F.Supp. 634, 635; *Wardlaw v. Southern R. Co.*, 199 Ga. 97, 33 S.E.2d 304, 305–306; *Waterhouse v. Capital Investment Co.*, 1960, 44 Haw. 235, 289, 311, 353 P.2d 1007, 1009, 1013; *Wischmeyer v. Finch*, 1952, 231 Ind. 282, 107 N.E.2d 661, 665; *Rieger v. Wessel*, Ky.1958, 319 S.W.2d 855, 857–858; *Scholtes v. McColgan*, 1945, 184 Md. 480, 41 A.2d 479, 483–484; *Clem v. Valentine*, 1928, 155 Md. 19, 141 A. 710, 712; *Baker v. Seneca*, 1953, 329 Mass. 736, 110 N.E.2d 325, 327; *Snow v. Van Dam*, 1935, 291 Mass. 477, 197 N.E. 224, 226–228; *Lowell Institution for Savings v. City of Lowell,* 1891, 153 Mass. 530, 27 N.E. 518, 519; *Doerr v. Cobbs*, 1909, 146 Mo.App. 342, 123 S.W. 547, 550; *Anderson v. Marshall-Malaise Lumber Co.*, 1935, 66 N.D. 216, 263 N.W. 721, 723; *Johnson v. Shaw*, 1957, 101 N.H. 182, 137 A.2d 399, 402; *Semple v. Clark*, 1928, 132 Misc. 903, 230 N.Y.S. 738, 740–741; *Ridley v. Haiman*, 1932, 164 Tenn. 239, 47 S.W.2d 750, 753.

In this matter, it is undisputed that Miller's predecessors in interest, the Masseys, obtained title to Lot 10 by recorded deed from the Walsdorfs. That deed transferred Lot 10 to the Masseys "Subject to: Easements, Restrictions, Reservations, and Provisions of Record if any." (CP 22). At the same time the Walsdorfs transferred title of Lot 10 to the Masseys, the Walsdorfs and Masseys executed, notarized, and recorded the Declaration of Covenant restricting certain uses of Lot 10. (CP 23-25). The Declaration of Covenant contained the full legal description of the restricted property, Lot 10. (CP 23-25). Both the deed transferring Lot 10 to the Masseys and the Declaration of Covenant identify with specificity the property to be burdened by the real covenant: Lot 10 of Darling Land Company's First Addition to Leavenworth. Thus, the statute of frauds was satisfied by the execution, notarization, and recording of the Declaration of Covenant which fully described the property interest conveyed and the subject property of the burden (or restriction).

Alternatively, the Court did not err in determining that the statute of frauds was satisfied by the reference in the Declaration of Covenant to Lot 9 in paragraph B. To satisfy the statute of frauds, "a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a

sufficient description." *Berg*, 125 Wn.2d at 551, *quoting Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960). As indicated by the trial court, because the legal description of Lot 10 (included in both the Declaration of Covenant and the Massey Deed) references the Darling Land Company's First Addition to Leavenworth and the Walsdorfs (and Motteler before the Walsdorfs) were the record title owners of Lots 9 and 10 of the Darling Land Company's First Addition to Leavenworth, no oral testimony was required for the trial court to conclude that Lot 9 of the Darling Land Company's First Addition to Leavenworth (the Dean Property) is the benefited parcel intended by the Declaration of Covenant. Therefore, the Declaration of Covenant satisfies the statute of frauds.

D. The Declaration of Covenant Touches and Concerns Dean's Property (Miller's Assignments of Error Nos. 3, 5, 6, & 8)

Miller challenges the trial court's finding that the Declaration of Covenant touches and concerns both Lot 9 and Lot 10, arguing that because the Declaration of Covenant does not provide the legal description of Lot 9 the covenants cannot touch and concern Lot 9. That conclusion is not supported by the undisputed facts or the law.

The court in *Deep Water* provided a comprehensive summary on the appropriate legal analysis to determine if a covenant touches and concerns real property:

> "A covenant touches and concerns the land if it is connected with the use and enjoyment of the land. *Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 574-76, 295 P.2d 714 (1956)(promise to pay assessment for maintenance was a running covenant). The covenant must be so related to the land as to enhance its value and confer a benefit upon it. A covenant touches a concerns the land when, by restricting the use of one parcel, it enhances the value of another. *Mountain Park Homeowners Ass'n v. Tydings*, 72 Wn. App. 139, 145, 864 P.2d 392 (1993) aff'd, 125 Wn.2d 337, 883 P.2d 1383 (1994). A promise to do or refrain from doing a physical act upon the land, such as restricting the height, size, or location of structures is an example of a covenant that touches and concerns the land."

Deep Water Brewing, LLC, 152 Wn. App at 258-59 (Some citations omitted). Miller does not challenge the undisputed facts that the restrictive covenants contained in the Declaration of Covenant provide benefit to Lot 9 if valid and enforceable. Miller does not challenge the undisputed fact that the setback requirement for construction on Lot 10 enhances the value of Lot 9, or that the restrictions regarding cleanliness, use, and prohibition of livestock make Lot 9 a more desirable property. Instead, Miller argues only that, because Lot 9 was not legally described in the Declaration of Covenant as a benefited parcel, no reasonable person could conclude that the covenants were intended to benefit Lot 9. Miller is incorrect.

Here there is no dispute that the covenants touch and concern Lot 10, as the covenants restrict the use and enjoyment of Lot 10. Miller's only dispute upon appeal is that the trial court incorrectly concluded that

the covenants touch and concern Lot 9 as a benefited parcel because Lot 9 is not legally described in the Declaration of Covenant. But, the law does not require that every property that is benefited by a restrictive covenant be legally described in the written instrument;[8] Miller cites to no authority for that position. In fact, the case law supports an opposite conclusion:

> "Where the owner sells a part of his premises, and imposes a restriction on the purchaser, by which the lands retained will be benefited, *the transaction* is sufficient to show an intention that the restriction is for the benefit of the lands retained, and the grantor or his subsequent grantee can enforce it."

Stewart v. Beghtel, 38 Wn.2d 870, 874-75, 234 P.2d 484 (1951)(*quoting* 21 A.L.R. 1288) (Emphasis added.). Because the Walsdorfs, as the common owners of Lot 9 and Lot 10, imposed restrictions on Lot 10 at the time of the sale of Lot 10 and retained their interest in Lot 9, the transaction to the Masseys is sufficient to establish that the covenants were for the benefit of Lot 9.

It is undisputed that, at the time the covenants were imposed, the Walsdorfs were the common owners of Lot 9 and Lot 10 of the Darling Land Company First Addition to Leavenworth. It is further undisputed that, at the same time the Walsdorfs conveyed Lot 10 to the Masseys, the

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[8] And, as established above, the statute of frauds does not require that the benefited property be legally described in the document conveying a property interest such as a real covenant.

Walsdorfs sought to place restrictive covenants on Lot 10 that benefited the Walsdorfs' retained property, Lot 9. Paragraph B of the Declaration of Covenant states:

> "No structure shall be erected, placed or be permitted on the Lot other than one single family dwelling of at least 1,000 square feet and a private garage. No part of any structure shall be over two stories high above the ground, and no closer than 15 feet from the boundary *of Lot 9*."

(Emphasis added.) There is no reasonable argument that the building restrictions imposed on Lot 10 did not enhance the value of and confer a benefit upon Lot 9 by protecting the privacy and quiet nature of Lot 9. Miller provides none. The Declaration of Covenant further imposed restrictions on Lot 10 regarding aesthetic controls (no metal-sided buildings, no "dumping ground for rubbish," no excess motor vehicles or trucks shall be stored on the property, limitations on fence and landscape height, etc.) that would benefit the adjacent parcel (Lot 9) owned by the grantors, the Walsdorfs. Based on the undisputed facts and the law, no reasonable person could determine that the Declaration of Covenant was not intended to benefit Lot 9. Because the benefits conferred by the Declaration of Covenant touch and concern Lot 9, summary judgment in favor of Dean was appropriate.

E. **Dean Has Standing to Enforce the Covenants (No Assignment of Error)**

In a passing comment on page 14 of their opening brief, Miller asserts that Dean lacks standing to enforce the covenants because the complete legal description of Lot 9 is not included in the Declaration of Covenant. As a threshold matter, the Appellate Court should not entertain this passing assertion as an argument properly before the Court. Miller has not assigned error to any trial court decision regarding a determination of "standing."

Moreover, as described in detail above, there is no requirement under Washington law that a document conveying a real covenant contain the full legal description of a benefited parcel. None of the cases cited by Miller supports that proposition. In fact, the relevant case law requires the opposite conclusion. Because the original grantors of Lot 10 (the Walsdorfs) conveyed the deed to Lot 10 to the Masseys concurrently with and subject to the real covenants contained in the Declaration of Covenant while retaining the adjacent parcel (Lot 9) for themselves, the transaction alone is sufficient to establish the intention that the restrictive covenant is for the benefit of the retained lands (Lot 9). *Stewart*, 38 Wn.2d at 874-75 ("A common purpose of restrictions as to the use of property conveyed is to benefit the land retained by the grantor.")

Moreover, the Declaration of Covenant expressly stated the intentions of the original covenantors to bind all successors and assigns: "These covenants shall run with the land and shall be binding on all parties having or acquiring any right, title, or interest in the land described herein or any part thereof, and shall inure to the benefit of each owner thereof." Dean is the successor in interest to the Walsdorfs as the current owner of the benefited property, Lot 9, with standing to enforce the restrictive covenant that confers benefit upon Lot 9. *See Deep Water Brewing, LLC,* 152 Wn. App. at 258 ("the law of running covenants imposes a duty or confers a benefit upon remote parties, not because they consensually agree, but because the covenant bore a certain relationship to parcels of land and because they stepped into a certain relationship with the same parcels.")(Citation omitted); *Stewart*, 38 Wn.2d at 874 ("the rule is that the restriction may be enforced by either the grantor [of the restrictive covenant] or any person whose hands the land retained may pass.")

Finally, Miller's reliance on *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wn. App. 411, 166 P.3d 770 (2007), is misplaced. *Mercer* does not stand for the proposition that standing to enforce a restrictive covenant is conferred only in instances where the covenant legally describes the benefited property. The *Mercer* court simply held that the owners of

property located in a separate (second) plat could not enforce the restricted covenants contained on the face of a *separate (first) plat* for *a separate subdivision* because the restrictions in the plat *expressly limited* enforcement of the restrictions to "owner[s] of any lot in *said* plat." *Mercer*, 140 Wn. App. at 413, 416 (Emphasis Added). Here, the Declaration of Covenant contained no such express limitation on enforcement; the Declaration of Covenant expressly stated an intent for the covenants to run with the land and bind and benefit the original covenanters' successors in interest. Dean is the appropriate successor in interest to the Walsdorfs with standing to bring an enforcement action.

F. Trial Court Appropriately Concluded that the Declaration of Covenant Is Enforceable as an Equitable Servitude (Miller's Assignments of Error Nos. 2, 5, 6, & 8)

The trial court alternatively analyzed the Declaration of Covenant as an equitable servitude and determined that the Declaration of Covenant was binding and enforceable as an equitable servitude as a matter of law. Miller appeals the trial court's determination, arguing that the trial court improperly "mixed the equitable servitude cases with the running real covenant cases" and that "the equitable servitude cases and law clearly require a showing that the party seeking to enforce was induced to buy or sell in reliance on the covenant." (Miller Br. pg. 19). Miller seems to

misunderstand the elements establishing an equitable servitude. No case cited by Miller requires a showing that a party seeking to enforce an equitable servitude relied on such covenant when purchasing property. In applying the correct standard to the undisputed facts, the trial court correctly determined that the Declaration of Covenant constituted an equitable servitude upon Lot 10.

An equitable servitude is a legal device that creates a right or obligation that runs with the land. *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 253, 84 P.3d 295 (2004). An equitable servitude runs with the land if the following elements are met:

> "(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 successor, against an original party or successor in possession; (4) who has notice of the covenant."

Hollis v. Garwall, Inc., 137 Wn.2d 683, 691, 974 P.2d 836 (1999). Equitable servitudes need not comply with the statute of frauds to be binding and enforceable. *Riverview Community Group v. Spencer & Livingston*, 181 Wn.2d 888, 898, 337 P.3d 1076 (2014) (the statute of frauds is no barrier, at least when there is some writing, that supports the imposition of the burden of an equitable servitude) *citing Johnson v. Mt. Baker Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920).

In this case, the Declaration of Covenant clearly meets the four elements necessary to establish an equitable servitude. First, the Declaration of Covenant was a promise, in writing, that was signed, noticed, and recorded by the original parties, the Walsdorfs and the Masseys.[9] There is no argument that the Walsdorfs could not seek to enforce the covenants against the Masseys. Any conclusion to the contrary would yield an absurd result. The bargained-for covenants were executed and recorded in a document signed by both parties in conjunction with the sale of Lot 10 from the Walsdorfs to the Masseys. At the same time that title to Lot 10 transferred to the Masseys, the Walsdorfs retained ownership of the adjacent Lot 9, which is referenced as a benefited property in the agreement. The parties are identified (the Walsdorfs and Masseys), the terms and subject matter are clear, and there is mutual agreement and consideration. *See Family Med. Bldg., Inc. v. State, Dep't of Soc. & Health Servs.*, 104 Wn.2d 105, 109, 702 P.2d 459 (1985). The Declaration of Covenant was an enforceable written promise between the original parties.

It is undisputed that the Walsdorfs retained the adjacent Lot 9; it is further undisputed that the Declaration of Covenant legally describes the

[9] As noted by the Court in Hollis, equitable servitudes are often recorded as declarations of covenants. *Hollis*, 137 Wn.2d at 691.

entirety of Lot 10. The covenants are clear that only "one single family dwelling" and "a private garage" is permitted on Lot 10 and that no structure shall be located closer than 15 feet from the boundary of Lot 9. Thus, the original parties entered into an enforceable promise, in writing, to limit construction on Lot 10 to one single dwelling and one garage no closer than 15 from the boundary of the Walsdorfs' Lot 9.

Second, the Declaration of Covenant touches and concerns both Lot 9, the benefited property, and Lot 10, the burdened property. As discussed in detail above, in paragraph D, the intent to confer a benefit on Lot 9 is evidenced by the Walsdorfs' simultaneous transfer of Lot 10 to the Masseys and imposition of restrictive covenants on Lot 10, while retaining fee title interest to the adjacent parcel, Lot 9. *See Stewart*, 38 Wn.2d at 874-75. Further, the covenant regarding the character of the allowable structures on Lot 10 and the location of said structures relative to Lot 9, touches and concerns both Lot 9 and Lot 10 because the covenant limits the unfettered use and enjoyment of Lot 10 while conferring a benefit on Lot 9. The Declaration of Covenant expressly states the original covenanters' intention to bind their respective successors in interest and to have the covenants "run with the land."

Third, Dean is seeking enforcement of the covenant as the owner of Lot 9. Dean is the direct successor in interest of the Walsdorfs.

Enforcement of the covenant is sought against the Millers, the successors in interest to the Masseys. The third element has been met.

Finally, Miller had actual and constructive notice of the Declaration of Covenant. *See* RCW 65.08.030, 65.08.070. Miller's deed clearly states that title to Lot 10 is subject to the recorded covenants contained in the Declaration of Covenant. *See Olson v. Trippel*, 77 Wn. App. 545, 550-51, 893 P.2d 634 (1995). There can be no argument that Miller did not have notice of the restrictive covenant, especially in light of their unsuccessful attempt in April of 2015 to record a "Revocation of Covenant."

Notice of the restrictions on the part of the party to be bound by the covenant is the key element in determining whether an equitable servitude runs with the land. *See Dickson*, 132 Wn. App at 735; *see also Johnson*, 113 Wash. at 465-66 ("[E]quity here will say to the appellant that, having bought its property with full knowledge of the rights and privileges of others, it may not now claim the right to use the property in any way it may see fit."). In *Johnson*, the defendant's prior knowledge of the restrictive covenant was key to the court's determination to intervene in equity and enforce the covenant; the plaintiffs' reliance on the benefit of the covenant had naught to do with the court's decision. *Id.*

Here, Miller purchased Lot 10 with full knowledge of the Declaration of Covenant that burdened the property. Miller cannot now claim the right to unilaterally revoke the covenant and use Lot 10 in a manner that directly contravenes the restrictions contained in the Declaration of Covenant, because Miller took the property with the full knowledge of the restrictions that benefit Lot 9.

To the extent Miller is now arguing that Respondent is required to prove that Miller had actual or constructive notice of the property benefited by the Declaration of Covenant, Respondent has met that (unnecessary) burden.[10] Lot 9 is the only property identified in the Declaration of Covenant other than Lot 10. The reference to Lot 9 in the covenant clearly establishes that Lot 9 benefits from the restriction of the location of the erection of the single dwelling allowed on Lot 10. That reference alone is sufficient to provide Miller actual and constructive notice that Lot 9 was an intended beneficiary of the restrictive covenant.

Reliance on the benefit of the restrictive covenant is not a required element to establish an equitable servitude. *See Hollis*, 137 Wn.2d at, 691 (setting forth the elements of an equitable servitude); *see also Dickson*, 132 Wn. App. at 731 (same); *and Lake Limerick Country Club*, 120 Wn.

[10] Appellants have failed to provide citation to a single source that requires such proof; the totality of the cases cited by both parties establish that the required element is notice of the restriction or covenant, not of the particular benefited parties or properties.

App. at 254 (same). Miller reads too much into *Riverview Community Group* v. *Spencer & Livingston*. *Riverview Community Group* is distinguishable because it dealt with a matter of first impression in Washington, whether an equitable servitude limiting the use of land may be *implied* where the first element of an equitable servitude, a written, enforceable promise cannot be met. 181 Wn.2d at 1080. The court determined that an equitable servitude could be implied, even where no written promise exists, where evidence exists that a promise was implied through oral communications and a drawing depicting a golf course next to a subdivision plat. *Id.* at 899-900. In the case at hand, regarding an express equitable servitude, the first element of an equitable servitude is met because of the written Declaration of Covenant executed and recorded by the original parties in interest. Thus, the trial court did not err in granting Respondent's motion for summary judgment finding that the Declaration of Covenant is a binding, enforceable, equitable servitude.

G. Trial Court Appropriately Ordered that the Revocation of the Declaration of Covenant Is Void *Ab Initio* (Miller's Assignments of Error Nos. 5, 6, 7, & 8)

Miller's argument that the Declaration of Covenant was extinguished by merger of title because Miller (or Miller's predecessors in interest) owned both the benefited and burdened estates is without merit

because the Miller predecessors in interest did not hold unified ownership of the benefited and burdened estates. Miller's reliance on *Schlager v. Bellport*, 188 Wn. App. 536, 76 P.3d. 778 (2003) to support this theory is misplaced. In *Schlager*, the parties owned adjacent lots, Lot 1 (the defendant) & Lot 5 (the plaintiff). Lots 1 & 5 were commonly-owned by Robbins in 1971. Robbins sold Lots 1 & 5 to another common-owner, Alder, in 1971. At the time of the transfer to Alder, Robbins imposed a restriction upon Lot 1; the restriction expressly benefited Lot 5 and Lot 2. At some point, ownership of Lots 1 & 5 separated and the plaintiff (owner of Lot 5) brought an action to enforce the restrictive covenant against the defendant, owner of Lot 1. The court found that because ownership of Lot 1 and Lot 5 was previously unified in Alder, the servitude imposed by Robbins merged into the deed and the servitude terminated. *Id.* at 538-40.

As discussed in detail above, the Declaration of Covenant burdening Lot 10 was created when the common owner of Lot 9 and Lot 10 transferred ownership of Lot 10 to the Masseys. Simultaneous with the transfer of ownership, the Walsdorfs and Masseys recorded the Declaration of Covenant, restricting the use of Lot 10 for the benefit of Lot 9, which the Walsdorfs retained. *Stewart v. Beghtel* is dispositive -- when an owner sells a part of his land and imposes a restriction on the purchaser, the transaction itself is sufficient to establish an intention that

the restriction is for the benefit of the retained parcel. 38 Wn.2d at 874-75. It is undisputed that the Walsdorfs retained Lot 9. Because the Walsdorfs retained Lot 9, which is referenced in the Declaration of Covenant, the sale of Lot 10 with the restrictive covenants imposed is sufficient to establish that the restriction is for the benefit of Lot 9. Subsequent to the transfer of Lot 10 to the Masseys, Lot 9 and Lot 10 have not been under common, or unified, ownership. Because the benefited and burdened parcels do not have a unified ownership, the equitable servitude has not extinguished, or merged, with Miller, or any other, deed.

Likewise, Miller's attempt to revoke the Declaration of Covenant is void, *ab initio*. Covenants are agreements based in the law of contracts. One party to an agreement cannot unilaterally decide to terminate it. The attempt to do so is a breach of the covenant or agreement. Again, Miller's reliance on *Mercer* is misplaced. In *Mercer*, the majority of the owners of parcels in a short plat voted to revoke the restrictive covenants imposed upon the short plat consistent with the provision on the face of the plat for revocation of the covenants. 140 Wn. App. at 413-14. The owners in *Mercer* did not act unilaterally; they revoked the covenants pursuant to the conditions stated in the covenant upon a vote of the majority of the owners. Here, Miller attempted a unilateral action to revoke the Declaration of Covenant. The Declaration of Covenant did not provide a

process for revocation, nor does it provide that the burdened property owner has the unilateral right to revoke the covenants. Finally, the Declaration of Covenant contains clear language that the covenant is to run with the land and bind the original covenanters' successors in interest. Miller did not have the power or authority to unilaterally revoke the Declaration of Covenant. Thus, the Revocation was void *ab initio*.

H. Trial Court Appropriately Awarded a Permanent Injunction Enforcing the Declaration of Covenant (Miller's Assignment of Error No. 8)

Miller challenges the trial court's order permanently enjoining Miller from engaging in the activities restricted in the Declaration of Covenant other than short term rentals, arguing only that the trial court improperly determined that Dean have a clear legal and equitable right to an injunction. Miller argues that the trial court erred in finding that the Declaration of Covenant was a valid, enforceable covenant as a real covenant or an equitable servitude. For the reasons stated above, the trial court did not err in finding the Declaration of Covenant was valid and enforceable either as a real covenant or an equitable servitude. Real covenants and/or equitable servitudes are enforceable by injunctive relief. *Hollis*, 137 Wn.2d at 683. Because a real covenant is a clear legal right, permanent injunction is appropriate; likewise, because an equitable

servitude is a clear equitable right, permanent injunction is appropriate. *Id.* The trial court's issuance of injunctive relief was not in error.

III. CONCLUSION

Based on the foregoing, Dean respectfully requests this Court affirm Chelan County Superior Court's Order Granting Plaintiffs' Motion for Reconsideration.

Alternatively, if this Court finds that the trial court granted Dean's (Plaintiffs') motion for reconsideration in error and that judgment as a matter of law was not appropriate, then Dean requests that this Court remand the case to the trial court for a trial on the merits of the case.

RESPECTFULLY SUBMITTED this 12th day of September, 2016.

OGDEN MURPHY WALLACE, P.L.L.C.

By:_____
Erin C. McCool, WSBA #45945
Attorneys for Kelly and Anna Dean

CERTIFICATE OF MAILING

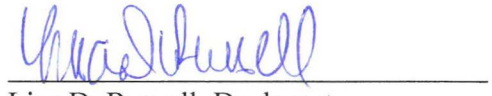
I, LISA D. RUSSELL, hereby certify and declare under penalty of perjury under the laws of the state of Washington as follows:

1. That I am an employee of the law firm of OGDEN MURPHY WALLACE, P.L.L.C., over the age of eighteen (18), and competent to be a witness herein.

2. That on the 12th day of September 2016, the foregoing **BRIEF OF RESPONDENTS** was served on the following as follows:

☐ First Class U.S. Mail	Attorney for Appellants
☐ UPS Overnight Mail	Chancey C. Crowell
☐ E-Mail	224 S. Mission Street
☐ Facsimile	Wenatchee, WA 98801
☐ Messenger	
☒ Hand delivered	

DATED this 12th day of September, 2016, at Wenatchee, Washington.



Lisa D. Russell, Declarant