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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 345696-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

LYNN BREWER and DOUGLAS BREWER, a married couple
Appellants / Plaintiffs

v.

LAKE EASTON ESTATES HOMEOWNERS ASSOCIATION,
a Washington corporation and
MICHAEL D. PECKMAN, an individual

Respondents / Defendants

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Appellants (“Brewers”) bring their appeal before this Court to reverse the granting of Respondents’ (“Lake Easton Estates Homeowners Association” / “LEEHOA”) Motion for Summary Judgment and the denial of Brewers’ Motion for Reconsideration.

In their reply, Brewers will focus on four key areas presented in Respondents’ Brief:

- 1) **LEEHOA’s Authority.** LEEHOA does not have authority to manage Brewers’ privately owned Well.
- 2) **Estoppel.** Brewers cannot be estopped from asserting their deeded property rights.
- 3) **Controlling Instrument.** The controlling instrument for the management of their privately-owned Well is the 1995 Water User’s Declaration, which is the recorded deed to the private Well.
- 4) **Dismissal of Claims.** The trial court erred in dismissing Brewers’ claims of negligence, nuisance and conversion.

1) LEEHOA’s Authority

The trial court opined two documents grant LEEHOA authority to manage Brewers’ privately-owned Well. The first was the recorded 1992 Covenants, Conditions & Restrictions (“1992 CC&Rs”) (CP 52). The second was LEEHOA’s 2001 unrecorded bylaws (“Bylaws”). (CP 910) The trial court was clear, however, that LEEHOA – and, by extension, the community-at-large – is not a party to the deed to Brewers’ Well.

LEEHOA asserts its authority to manage Brewers' private Well can be established in the following:

- RCW 64.38.010(11)
- *Halme v. Walsh*, 192 Wn.App. 893; 370 P.3d 42 (2016)
- 1992 CC&Rs
- 1995 Water User's Declarations (1995 WUDs)
- LEEHOA's unrecorded 2001 Bylaws.

Brewers reply to these five assertions as they relate to LEEHOA's authority.

RCW 64.38.010(11) does not grant LEEHOA authority.

This Court must first examine LEEHOA's status as a lawful homeowners association, under RCW 64.38.010(11), as affirmed by *Halme v. Walsh, supra*, from which all of LEEHOA's arguments will either proceed or fail.

The Legislature's intent in passing RCW 64.38 was "to provide consistent laws regarding the formation and administration of homeowners' associations."¹ LEEHOA acknowledges the definition of a lawful homeowners' association requires that all three of the following elements must be present to qualify as a lawful homeowners association under RCW 64.38.010(11):

¹ RCW 64.38.005

[1] a corporation, unincorporated association, or other legal entity, [2] each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and [3] by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property, other than that which is owned by the member." RCW 64.38.010(11) *emphasis added* (RB 14)

Brewers do not dispute LEEHOA is a non-profit corporation under the laws of Washington (RCW 24.03) (RB16). However, Brewers also assert in their amended complaint (CP16), LEEHOA is "subject to and bound by . . . the terms of RCW 64.38, *et seq.*"

Respondents acknowledge RCW 64.38.010(11) states specifically that a lawful homeowners association must be "a corporation, unincorporated association, or other legal entity," (RB14). Prior to 2000, there was not "a corporation, unincorporated association or other legal entity in Lake Easton Estates. Lake Easton Estates Homeowners Association was incorporated in June 2000 by Mr. Jarvis. Respondents do not dispute that Mr. Jarvis, who served as an initial board member, did not own property in Lake Easton Estates thus LEEHOA did not meet the second requirement to be a lawful homeowners association. (AB Appendix).

However, for purposes of their appeal, Brewers' argument remains focused on the last provision of RCW 64.38.010(11) and the requirement

that there must be real property “other than that which is owned by the member” by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvements. Respondents concede, and Brewers concur, “The last provision [of RCW 64.38.010(11)] is not ambiguous.” (RB17).

RCW 64.38 sets forth the powers of a homeowners association to regulate the use, maintenance, repair, replacement, and modification of common areas. The Legislature’s intent thus in the “last provision” of (RCW 64.38.010(11)) is clear and concise. Lake Easton Estates has no private roads or common areas, whether owned by LEEHOA or by extension owned collectively by the Lake Easton Estates community-at-large.

There are nine privately-owned Wells and nine recorded deeds the trial court affirmed are the valid deeds to the nine Wells. Ownership and beneficial use is limited to the 4-6 lots connected to each Well. In 1990, the developer recorded a water systems agreement that specifically stated **“Lot owners are responsible only for the well and water system serving their lot.”** (CP24) This recorded document limits Brewers obligations to maintain or improve any other Well other than the one serving their lot.

In 1992, the developer recorded the 1992 CC&Rs (CP52). At the time of the recording of the 1992 CC&Rs, there was a lot which the Developer intended to dedicate as a common area (CP29). The language in the CC&Rs clearly indicates that the assessments are intended for those items that benefit the community. These items are designed to “promote the recreation, health, safety and welfare of the Owners” and include such instruments as “lighting” for streets and community areas; “landscaping” to beautify the community; “signage” to caution residents of danger or instruct them of community rules and “water” for recreation (*e.g.*, pools) and irrigation of community areas such as Lot 18.

In 1995, the developer recorded the 1995 WUDs which deeded ownership in the nine Wells to the individual lot owners. In 1999, the developer sold Lot 18 leaving Lake however, once Lot 18 was sold Lake Easton Estates was void of any “property other than that which is owned by the members.

In June 2000, Lake Easton Estates Homeowners Association was incorporated and in 2001 the nine board members (including Mr. Jarvis) adopted bylaws (AB-Appendix). These bylaws, which remained unrecorded, were clear and concise that assessments shall be limited to property owned or purchased by LEEHOA but granted it the right to

appoint a well master for the Wells. These bylaws were unrecorded and Brewers never saw these prior to discovery in this lawsuit.

Under the “last provision” of RCW 64.38.010(11) Lake Easton Estates would have to have property “other than that which is owned by the members.” Because it cannot achieve this, LEEHOA falsely presents the facts and the nature of the real property in Lake Easton Estates. LEEHOA portrays Lake Easton Estates as being a development served by a “network of Wells (also known as a Group B Water System)” (RB p. 3). Lake Easton Estates is not served by a “network” of Wells. There is not a “Group B Water System” and there is no community-owned property, other than private property owned by the Lot owners. There are nine individual privately-owned Wells that cannot be interconnected. It is not a single network of Wells owned by the community. These are nine separate, privately owned Wells, governed by nine separate recorded Water User’s Declarations. “The 1995 WUDs require mutual assent to manage the water system serving their lots. Mutual assent means all owners must agree.” (CP 938). The trial court’s error was founded in LEEHOA argument that the unrecorded bylaws grant LEEHOA power. Power and dominion over the private Wells cannot be granted by bylaws enacted six years after the Wells were conveyed by deed to private

ownership or frustrated by a majority or percentage of owners at an annual meeting or by proxy; all owners must agree.

The last provision of RCW 64.38.010(11) could not be more clear and unambiguous. In order to be a lawful homeowners association, there must be “real property” other than that which is owned by the member that by virtue of ownership in the development, the member is required to pay property taxes, insurance, maintenance and for improvements on that “real property” which the member does not own. No such property exists in Lake Easton Estates and thus LEEHOA’s argument that RCW 64.38.010(11) grants it authority fails because Lake Easton Estates does not meet the third required element to qualify as a lawful homeowners association.

Halme v. Walsh, supra does not grant LEEHOA authority

RCW 64.38.010(11), was affirmed in *Halme v. Walsh, supra*. This Court recognized and LEEHOA acknowledges that *Halme, supra*, set forth that **all** three elements must be present in order to meet the statutory requirements for a lawful HOA under RCW 64.38.010(11). Specifically LEEHO stated “The court in *Halme* stated that this definition contains three separate requirements.” (RB 14)

Unfortunately, LEEHOA attempts to undermine the facts of *Halme* and imply the design of the Lake Easton Estates development is the same

as the platted development in the case of *Halme*. The facts and the design of the development in *Halme* and Lake Easton Estates are not the same. There is no property owned by the community-at-large. There is no property which all members beneficially use and as a consequence are required to maintain the mutually beneficial property. In fact, the recorded 1990 Water Systems Agreement and the 1995 WUD both limit maintenance and use only to the (4-6) lots serviced by each Well and the Wells cannot be interconnected.

In the case of *Halme*, there was a private road that all homeowners benefited in the use of and for which there was a recorded road maintenance agreement (RMA) requiring all homeowners to participate in the maintenance of the road. In *Halme*, a majority of homeowners attempted to assert the recorded RMA provided for the creation of a lawful HOA under RCW 64.38 *et. seq.* This Court rejected that argument and affirmed in *Halme*, even a private road, used and maintained by all landowners, was not sufficient to create a lawful HOA under RCW 64.38.010(11). Despite a majority of homeowners seeking to create an HOA in *Halme*, this Court, said “NO” because one of the three elements under RCW 64.38.010(11) was missing.

In Lake Easton Estates, all property is privately deeded to the individual lot owners and no lot owner receives beneficial use from any

property other than that which they own. Thus, there is no property in Lake Easton Estates “other than that which is owned by the members.”

Each recorded WUD, as the deed to the real property / privately-owned Wells, specifically limits items such as real property taxes, insurance premiums, maintenance costs or improvement to the lot owners of the privately-owned Well appurtenant to their Lot ownership. Thus, the nature of the real property in Lake Easton Estates makes achieving the requirements of RCW 64.38.010(11) impossible.

Incorporation or not and unrecorded bylaws attempting to grant LEEHOA powers reforms both the terms of the recorded 1990 Water Systems Agreement and 1995 WUDs. The trial court erred when ruling that somehow LEEHOA’s bylaws established rights for LEEHOA to manage the Wells.

Respondents actually concur with Brewers’ argument and repeat several times in their brief that managing property “other than that which is owned by the member” is a requirement under RCW 64.38.010(11). To bolster its argument however, LEEHOA presents a superfluous argument by stating “If the real property is owned by ‘multiple’ members, then by virtue of membership, the homeowners’ association is *responsible* for managing that property.” (AB17-18). The key word in LEEHOA’s argument is “multiple members” vs. “all” members. In this case each Well

limits benefits to 4-6 lot owners and limits responsibility to those owners which mean 46-48 lots receive no benefit and have no responsibilities.

To follow LEEHOA's reasoning, would mean that all private property in Lake Easton Estates (including houses) would be subject to LEEHOA's management, simply by the fact that the private property is located in Lake Easton Estates. LEEHOA misleads this Court by implying *Halme's* private road was owned by multiple owners. The private road was owned and used by all the members. That is not the case with the private wells in Lake Easton Estates.

Allowing LEEHOA to manage the Brewers' private property or require the Brewers to pay for the maintenance of private property in which they do not hold any right, title or interest and from which they do not benefit, creates inconsistencies in the law and violates both the 1990 Water Systems Agreement and 1995 WUDs. *Halme v. Walsh, supra* does not grant LEEHOA authority and actually affirms LEEHOA does not have authority to be a lawful homeowners association under RCW 64.38.010(11).

LEEHOA's interpretation of *Halme* actually points us directly to the elements of *Halme* that this Court should consider. Specifically LEEHOA states "Because all of the owners owned the property, not just one, 'the parties to the HOA were obligated to pay maintenance costs on

property they apparently did not own.” LEEHOA points out, “Indeed, *Halme* supports the reading of the statute.” (RB18) Brewers concur with LEEHOA on this point which is why *Halme* establishes that LEEHOA does not qualify as a lawful homeowners association. LEEHOA states in *Halme*, “In 1990, the owners of all the lots signed a Road Maintenance Agreement to build and maintain a private road servicing [all] the lots. (*emphasis added*) (RB18) The “Walshes and the Hasselbachs claimed the RMA resulted in the formation of a homeowners’ association when Chap. 64.38 RCW became effective in 1995. *Id.* at 900.” (RB18) What LEEHOA fails to recognize, this Court rejected this very argument because a single element of the requirements of RCW 64.38.010(11) was missing in *Halme* and thus no homeowners association could be formed.

Clearly LEEHOA doesn’t understand this Court’s ruling in *Halme*. In this case, we have no property other than that is owned by a handful of owners which has recorded deeds that specifically limits maintenance, operation, and beneficial use to the 4-6 deeded owners – meaning 46-48 Lot owners receive no beneficial use from the other eight Wells. If a private road used by all owners and maintained by all owners in *Halme* did not meet the test to form an HOA, then most certainly privately-owned Wells beneficially used by a limited number (4-6 deeded owners of the Well) does not meet the test. Simply put, without “property other than

that which is owned by the members,” Lake Easton Estates does not meet the test and LEEHOA cannot qualify as a lawful homeowners’ association under *Halme*.

1992 CC&Rs does not grant LEEHOA authority

Next, LEEHOA attempts to rely on Section 3.2 of the 1992 CC&Rs, which states the purpose of the assessments “shall be used exclusively to promote the recreation, health, safety and welfare of the Owners, and to pay costs associated with any signage, landscaping and *water* thereof.” LEEHOA attempts to argue the term “water thereof” implies all water should be maintained and improved by the community at large, with LEEHOA being its representative. However, we know this is not the case specifically because the 1990 Water Systems Agreement, recorded two years before the 1992 CC&Rs specifically limited that “Lot owners are responsible **only** for the well and water system serving their lot.” This was then followed by the 1995 WUDs which the trial court agreed are the valid deeds to the private Wells and LEEHOA is not a party to the 1995 WUDs.

The fact remains that whatever authority may have been granted in the 1992 CC&Rs to create a homeowners’ association, by the time of its creation in 2000, LEEHOA did not meet the statutory requirements of

RCW 64.38.010(11). LEEHOA has violated RCW 64.38 as the Brewers' pled in their complaint.

1995 WUDs do not grant LEEHOA authority

Next, we examine the 1995 WUD (CP186), which is the recorded deed to the Brewers' real property and specifically sets for the beneficial use of the real property is limited to the 4-6 Lots identified on the first page of the recorded WUD. In the case of the Brewers, their WUD identifies the location of the Wells, as required under the statute of frauds, and identifies the six specific lots that have a deed right to receive beneficial use from the Brewers' Well. In fact, it limits authority and writes that decisions on the management must be "mutually" agreed upon by all owners.

Like the 1990 Water Systems Agreement, the 1995 WUD does not grant LEEHOA or the Lake Easton Estates community-at-large the authority to manage the Wells and limits responsibility for maintaining any of the Wells to the lot owners benefitting from the Well serving their lot. LEEHOA argues the Lake Easton Estates community-at-large/members have "voted" each year to appoint a Well master.. The deed to the Well does not afford any party other than the owners of the Well to maintain or operate the Well. The WUDs divest all lots except

those grantees identified therein of any rights, control, or interest in the Wells.

Brewers appreciate LEEHOA pointing out “None of the 1995 WUDs superseded the 1990 Water [Systems] Agreement” (RB6) because the 1990 Water Systems Agreement (CP24) is very clear and concise. “Lot owners are responsible only for the well and water system serving their lot.” (CP24) The 1995 WUDs specifically follow this premise.

The developer’s intention is clear in the 1990 Water Systems Agreement, recorded two years before the recording of the 1992 CC&Rs. The developer further clarified his intention by recording the 1995 WUDs three years after the 1992 CC&Rs. Were it the developer’s intention to grant LEEHOA any authority under the 1990 Water Systems Agreement or the 1995 WUD, then the developer would not have limited responsibility for the water systems (in both the 1990 Water Systems Agreement and 1995 WUDs) specifically to the Lot owners drawing water from the Well serving their lot. The developer’s intent was clear to put all control of each Well into the hands of the identified grantees, not any other person, group, or association.

Each Well has a separate and distinct deed recorded as a Water User’s Declaration in 1995 (WUD) which limits repair costs, maintenance, management, insurance, operations and beneficial use to the 4-6 owners.

The trial court properly deemed these recorded WUDs to be valid deeds to the nine water Wells. Lot owners receive no beneficial use from any Well other than the one appurtenant to their Lot, which serves their property.

In fact, LEEHOA in its own “annual meeting” on December 2, 2012 acknowledged “it was determined well management is a private issue to be decided only amongst the owners of the individual wells.” (CP292). Thus, LEEHOA’s argument that the 1995 WUD grants LEEHOA any authority fails.

2001 Bylaws do not grant LEEHOA authority

Next, LEEHOA argues that based upon its unrecorded “bylaws” which provided for the appointment of a Well Manager provides LEEHOA proper authority to do so. This argument is fundamentally flawed. First, because both the 1990 Water Systems Agreement and 1995 WUDs both specifically limit responsibility for the private Wells to the Lot owners served by the Wells. Bylaws are the governing rules for the conduct of corporation’s internal business and affairs (RCW 24.03.070). The Bylaws in question were adopted six years after the recording of the WUD’s.

The Bylaws in question were adopted by the nine board members in 2001—six years after title to the Wells was transferred to the private parties. Thus, no water belonging to or owned by LEEHOA at the time of

the adoption of Bylaws was present. And furthermore, the recorded 1990 Water Systems Agreement limited responsibility to the individual Lot Owners and thus LEEHOA's initial board were put on record as to limited responsibility for the Wells. Secondly, a WUD recorded in 1995 appeared on the title of every lot owner. The problem in this case, Mr. Jarvis (the incorporator) did not own a lot in Lake Easton Estates and thus could assert he did not have knowledge of recorded documents; however, most certainly the other board members, who did own property had constructive knowledge of the contents of the 1990 Water Systems Agreement and 1995 WUDs.

The trial court's reliance on the 2001 Bylaws to establish LEEHOA's authority overrode the controlling deed to the Brewers' property. Furthermore, LEEHOA's Bylaws limits assessment to property owned or purchased by LEEHOA and the 1995 WUDs specifically state that selection of a Well manager shall be by mutual agreement – not by a “vote” of the community-at-large.

Specifically, the WUD (CP187) says:

“Appurtenant to each parcel above described shall be the obligation to participate in the maintenance and operational costs of the Well and water system described.”
(Brewers' recorded deed to their Well – 1995 WUD, page 2, *emphasis added*)

Each parcel is specifically described as “Lots 22, 23, 24, 25, 26 and 27.” The Well and water system described is “located upon the following described real property: Lot 27 of Lake Easton Estates” which is the Brewers’ property. Meaning only Lots 22, 23, 24, 25, 26 and 27 in Lake Easton Estates has any obligation to participate in the maintenance and operational costs of the Well located on Brewers’ Lot 27. Likewise, Brewers have no obligation to participate in the maintenance and operational costs of any other Well in Lake Easton Estates because neither the deed to the other eight Wells is recorded on the Brewers’ title and each deed limits the participation to the Lots described within the four corners of each deed.

Furthermore, the 1995 WUD states specifically:

“[t]he cost of providing power, chemicals, repairs and replacement of any of common pipeline shall be a **fractional** amount. The numerator of such fraction shall be the water used by each particular parcel and the denominator of said fraction shall be the total amount of water used by all parcels **subject to this Declaration.** (Brewers’ recorded deed to their Well – 1995 WUD, page 3-4, *emphasis added*)

LEEHOA admits to violating the tenants of its own Bylaws, the 1990 Water Systems Agreement and 1995 WUDs by sharing costs of maintaining all Wells across the entire community (RP7). This admitted practice specifically violates Brewers’ deeded rights and creates liability

for the Brewers as to the maintenance of private deeded Wells in which they hold no right, title or interest or obligation to maintain.

The recorded 1990 Water User's Agreement (CP24, CP785) recorded prior to the 1992 CC&Rs and the subsequent recorded 1995 WUD do not afford LEEHOA the right to simply have a group of homeowners, who are not a party to Brewers' WUD, to gather together and decide how to manage Brewers' private Well. Furthermore, as noted above, the WUD does not grant a "percentage" of lot owners in Lake Easton Estates the right to manage the Brewers' private property.

And finally, LEEHOA's unrecorded bylaws are very specific and unambiguous. The collection of assessments are limited to "maintenance and administration of any and all [of the (sic)] properties **owned or as may be acquired by the Homeowners' association.**" Thus LEEHOA's claim, and the trial court's ruling, that the 2001 Bylaws afford LEEHOA the authority fails.

2. Estoppel

Next LEEHOA attempts to claim Brewers are "now estopped from challenging LEEHOA's authority to manage the Water Systems." (RB 2) This claim is preposterous. First, Brewers' management of their Well is established by the deed to their private property. The Brewers have the right to enforce the terms of the deed to their real property. LEEHOA has

no authority to challenge Brewers' deeded rights—particularly in light of the fact that LEEHOA is not a party to the deed and thus has no standing to challenge Brewers' rights under the deed.

To support its argument, LEEHOA relies on *Ebel v. Fairwood Homeowners' Association*, 136 Wn.App. 787; 150 P.3d 1163. However, *Ebel, supra* focuses on beneficial use under “covenants” in which one party claimed a ‘party ratifies an otherwise voidable contract, if after discovering facts warrant rescission, [the party] remains silent or continues to accept the contract’s benefits. *Id.* at 1167.’

First of all, LEEHOA cannot argue Brewers are estopped from enforcing the terms of the 1995 WUD because LEEHOA is not a party to the deed. In this case, as agreed by all of the parties, LEEHOA is not a party to any of the nine 1995 WUDs. And furthermore, this matter relates to deeds / titles to real property and not covenants. Brewers cannot be “estopped” from asserting their deeded rights under the title to their real property.

Furthermore, the court in *Ebel*, citing *Snohomish County v. Hawkins*, 121 Wash.App. 505, 510-11, 89 P.3d 713 (2004), pointed out “The party must act voluntarily and with full knowledge of the facts.” *Id.* at 1167. Brewers did not have full knowledge of the facts until they consulted a lawyer in 2012 and have never acquiesced to LEEHOA’s

management of their private Well (CP885). Secondly, LEEHOA is not a party to the Brewers' 1995 WUD and thus cannot argue Brewers' are estopped under the 1995 WUD.

The 1995 WUD was recorded as an "easement" on Brewers' title and until 2012 and the subsequent filing of the Brewers complaint, LEEHOA asserted itself the owner of all nine Wells in Lake Easton Estates. LEEHOA claims the State, (not LEEHOA), prepared the Water Facilities Inventories (WFIs) in the name of LEEHOA (RB 8, fn 5). However, upon filing this lawsuit, LEEHOA suddenly, of its own accord, corrected the WFIs (CP390-427) filed with the State to accurately reflect the proper ownership as the individual Lots drawing water from each Well. LEEHOA continues to assert dominion over Brewers' Well, obtaining insurance, not in the name of the individual owners of the Well but in the name of LEEHOA, giving the appearance that LEEHOA owns the Wells (CP 457-545). These facts only came to light as a result of this case and thus *Ebel* cannot be applied.

3. Controlling Instrument

Although LEEHOA contends the trial court did not err in ruling the 1992 CC&Rs are the controlling instrument for management of the privately-owned Wells of Lake Easton Estates, it provides no argument to

support this contention. Rather, Respondents use three pages to present the trial court's order in single spaced type (RB 10-13).

When we take a closer look at the recorded instruments, we can see what the developer's intention was when he recorded the 1992 CC&Rs. We do this by examining the 1990 Water Systems Agreement. LEEHOA actually support Brewers' argument when it states "None of the 1995 WUDs superseded the 1990 Water Agreement, rather they were in addition to the 1990 Water Agreement." (RB 6). Respondents of course fail to point out, the 1990 Water Agreement specifically states "**Lot owners are responsible only for the Well and water system serving their Lot.**" (*emphasis added*) (CP24 ¶ 4, CP785). Furthermore, not all Wells were drilled in 1992, thus the 1992 CC&Rs could not be deemed to be the controlling instrument for the Wells. This means when the 1990 Water Agreement (recorded prior to the 1992 CC&Rs) and 1995 WUD (recorded after the 1992 CC&Rs) are read together as LEEHOA suggests, we have a clear understand of the developer's intent that Lot owners would be responsible for the management of their private property and they would be responsible **only** for the maintenance of their private Well and no other Well in the development. Thus, the 1992 CC&Rs cannot be deemed to be the controlling instrument for the management of the Wells as both the 1990 Water Agreement and the 1995 WUD are consistent on

this fact – lot owners are to manage their own private Wells and no other Well in the sub-division. Furthermore, nowhere within the four corners of each of the 1990 Water Systems Agreement or 1995 WUD is the HOA ever mentioned. Thus, the 1992 CC&Rs, when read in conjunction with the other recorded instruments, are clear—the 1995 WUD is the valid deed to the Brewers' Well and is intended to be the controlling instrument – not the 1992 CC&Rs.

The 1992 CC&Rs existence prior to the recording of the WUDs precludes their contemplation as private Wells and the recording of the 1995 WUDs transferring ownership as private property that limits ownership to the 4-6 lot owners. However it is very clear the 1990 Water Systems Agreement and 1995 WUDs are consistent in management of the Wells. Further, the Wells were dug with the intention of benefiting the private land of which they are a part and the subsequent owners of those plots on which the Wells are located. There is neither any language in the property deeds that indicates they were intended to benefit the subdivision nor any obligation on the part of the landowners to do so. In fact, quite the contrary, the language contained therein limits participation in the private property to the lot owners connected to the Wells.

Even if the 1992 CC&Rs were the controlling instrument, the language therein does not apply to the privately owned Well at issue.

The language in the 1992 CC&Rs as to the purpose of assessments clearly indicates that the assessments are intended for those items that benefit the community. The 2001 Bylaws align with this in it limits assessments to property owned or purchased by LEEHOA. The Wells are neither owned by nor have they been purchased from the lot owners.

Because it is important that property deeds convey clean and unambiguous title, the courts have long held that the language in instruments conveying title be interpreted by their plain meaning. Here, these conveyances plainly deed complete control of the property and Wells are appurtenant to the ownership and deeds to their property and not to LEEHOA or any other residents of the subdivision.

4. Dismissal of Brewers' Claims

Negligence. LEEHOA falsely claims that “Well I has indeed been tested as evidenced by the Well identification number not on the test results, ID #02260X” and LEEHOA falsely states that “Well I has passed water quality tests every year for the past fifteen years.” These are blatantly false statements that LEEHOA knows are false. (RB 9) As Brewers clearly point out, the reports filed are erroneous. The specific location of the water sample is noted (CP 862-868). Not a single sample was actually taken from Well #02260X. This alone establishes the basis for Brewers’ negligence claim. The reports filed with the Department of

Health are false. Brewers' Well was NOT properly tested. A sample of water may very well been taken but those samples were taken from properties NOT connected to Brewers' Well which means that Brewers' Well was not properly tested and LEEHOA was negligent.

Nuisance. LEEHOA falsely states "there is no evidence in the record and no inference from any evidence that any building within 100' of any Wellhead, or any within the Development for that matter is a source of contamination. This is again a false statement leading the Brewers to contend that LEEHOA's legal counsel did not review the record in this case. *See exhibits* to CP 792. In each case, the exhibits show plans with bathrooms and in some cases septic systems in the 100' sanitary setback. Bathrooms and septic systems are most definitely sources of contamination. Furthermore, LEEHOA has never presented any evidence that a single variance was obtained that would allow such building to occur.

Conversion. LEEHOA contradicts itself when it improperly states the 1995 WUDs "require all lot owners to be responsible for the Water Systems." The 1990 Water Systems Agreement clearly states that lot owners are responsible only for the well and water system serving their lot. The WUD then specifically limits management and maintenance to the Well owners. LEEHOA states that "in or about 2000, the lot owners

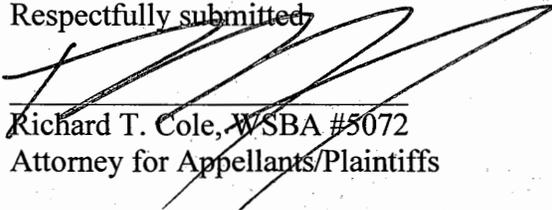
appointed LEEHOA to manage the Water Systems” yet LEEHOA has presented no evidence that all lot owners mutually agreed as required by the deeds to the private property. Furthermore, LEEHOA states there was no ‘transfer of ownership’ of the Wells. This too is a false statement by LEEHOA. Brewers’ 1995 WUD was identified as the valid deed transferring ownership of the Well to the Brewers (RB26). The 1990 Water Systems Agreement, 1995 WUD, and the 2001 unrecorded Bylaws, are clear, the Brewers funds are not to be used to maintain the other Wells and thus Brewers monetary resources have been converted for unlawful purposes.

5. **Conclusion**

For all of the reasons stated above, Brewers ask this Court to reverse the trial court’s decision granting summary judgment to LEEHOA on the basis that genuine issues of material fact existed. Brewers ask this Court to find error in the trial court’s orders denying Brewers’ Motion for Partial Summary Judgment and Motion for Reconsideration and award attorney fees.

DATED this 27 th day of September, 2017.

Respectfully submitted,


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