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Court of Appeals
Division III
State of Washington
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37179-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

ALEX MAY, APPELLANT

v.

COUNTY OF SPOKANE and VICKY DALTON, AUDITOR, RESPONDENTS

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case involves a misguided quest to champion the revision of history by forcing a custodian of records to literally locate and redact racially restrictive provisions in previously recorded real property chain of title documents, recorded in compliance with Title 65 RCW, regardless whether the property remains subject to the provisions. The recorded documents which Mr. May requests be altered are designated in the Washington State Archivists, retention schedule which governs the destruction of public records as ARCHIVAL (Permanent Retention) ESSENTIAL.

Mr. May brought a declaratory judgment action and moved for summary judgment. Neither Spokane County nor the Spokane County Auditor have alleged the racially restrictive provisions contained in Subsection (c) of the 1953 DECLARATION OF PROTECTIVE COVENANTS which Mr. May wants stricken are valid or enforceable. Nor has the County or Auditor contested that the Subsection (c) provisions are void under RCW 49.60.224 or that RCW 49.60.227(1) requires a court issue an order striking the provisions from the public records and eliminating the void provisions for the title of the property under.

The only controversy below revolved Mr. May's request that the court order the Spokane County Auditor to locate and alter recorded documents.

II. ASSIGNMENT OF ERROR AND ISSUE PRESENTED

Assignment of Error 1: The Superior Court erred in finding that the plain language of RCW 49.60.227 does not authorize a court to enter an order striking racially restrictive covenants from the public record and eliminating it from a title or lease.

Issue 1: Did the Superior Court erroneously interpret RCW 49.60.227 when it found that this statute does not authorize courts to enter an order striking racially restrictive covenants from the public record and eliminate it from a title or lease?

III. COUNTER-STATEMENT OF THE FACTS

Alex May filed a declaratory action seeking the trial court to find racially restrictive provisions contained in Subsection (c) of the 1953 DECLARATION OF PROTECTIVE COVENANTS void under RCW 49.60.224 and issuance of an order striking the void provisions from the public records and eliminating them from the title pursuant to RCW 49.60.227. CP 34-35. Mr. May further requested the court order the Spokane County Auditor to locate and strike the void provisions from public records and eliminate them from the title. CP 84, 87.

Mr. May's initial Complaint identified Spokane County as the sole defendant. CP 3. However, actions brought under RCW 49.60.227 are i*n rem* and the only necessary party is the owner. The caption/action was later amended to reflect the action's *in rem* nature but retained the County and added the County Auditor as necessary parties.[1] CP 19-22.

Neither Spokane County nor the County Auditor have opposed Mr. May's request that the court find racially restrictive provisions contained in Subsection (c) of the 1953 DECLARATION OF PROTECTIVE COVENANTS void. Nor did the County or Auditor oppose Mr. May's request for a court order[2] striking racially restrictive provisions found void under RCW 49.60.224 from the public records and eliminating the void provisions for the title of the property pursuant to RCW 49.60.227.

At the trial court, the County and Auditor only opposed Mr. May's request that the court order the Auditor to literally locate the void provision

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[1] The County and County Auditor were identified as necessary parties as Mr. May was seeking a court order directing the County or County Auditor to effectuate the striking of void provisions from the public record and eliminating void provision from the title. RCW 49.60.227(1) creates no authority or duty on an auditor to locate and strike discriminatory provisions.

[2] The County and Auditor did bring to the trial court issues regarding Mr. May's standing under RCW 49.60.227 and presented evidence his property was not "subject to" the racially restrictive provision as they were deleted from the covenants imposed on the property during a prior conveyance.

in the public records and literally alter the documents by striking/removing the language.

Mr. May and Alexandra May purchased the property involved in this action from Aaron and Sadie Lake, under a statutory warranty deed dated September 18, 2017, which was recorded with Spokane County Auditor on September 20, 2019, under Auditor's recording number 6641545 (the "Property"). CP 38-39. The Lakes conveyed the Property by statutory warranty deed subject to the following:

> SUBJECT To: This conveyance *is subject to covenants, conditions, restrictions and easements, if any affecting title*, which may appear in the public record, including those shown on any recorded plat or survey.

CP 38 (emphasis added).

The Lakes acquired the Property from Katherine Gregory in 2013, conveyed by a statutory warranty deed, recorded with the Spokane County Auditor, under recording number 6174642. CP 63-64. Ms. Gregory conveyed the Property to the Lakes by statutory warranty deed subject to eight bulleted items, the fourth bullet item follows:

> SUBJECT TO: …
>
> - Covenants, conditions, restrictions and/or easements; *but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, family status, or national origin* to the extent such covenants, condition or restrictions violate Title, 42, Section 3604(c), of the United

> States Codes: Recorded: August 14, 1953. Recording Information: 189339B;

CP 63 (emphasis added).

The property owned by Mr. May is not subject to the racially restrictive provisions contained in Subsection (c) of the 1953 DECLARATION OF PROTECTIVE COVENANTS. CP 34. Ms. Gregory removed the covenant provisions from the Property title in the statutory warranty deed used to convey the Property to the Lakes in 2013. CP 38. In 2017, when the Lakes transferred the Property to the Mays, the racially restrictive provisions had already been stricken and the Property was no longer subject to the racially restrictive provisions contained in Subsection (c) of the 1953 DECLARATION OF PROTECTIVE COVENANTS statutory warranty deed the Lakes conveyed by Ms. Gregory in the 2013. CP 63.

Mr. May sought redress beyond what the statute authorizes. He sought a court order directing the Spokane County Auditor to act outside her statutory duties and authority and force her to literally strike the void provisions from the public records and eliminate the void provisions from the Property title. CP 86-88. Mr. May's request was akin to requesting a writ of mandamus, while ignoring the requirements of Chapter 7.16 RCW.

The trial court heard oral argument on Mr. May's actions and rendered a written Order which included findings of fact, conclusions of law

and orders. CP 83-85. To summarize the trial court, the court found the Subsection (c) language was void and ordered the language be struck as provided for in RCW 49.60.227. The trial court denied Mr. May's request to order the Spokane County Auditor to locate and strike/eliminate the void language from recorded documents.

IV. ARGUMENT

A. STANDARD OF REVIEW

Mr. May's alleged error and issue involves the trial court's interpretation and application of RCW 49.60.227. The meaning of a statute is a question of law and reviewed de novo. *City of Spokane v. Cty. of Spokane*, 158 Wn.2d 661, 681, 146 P.3d 893 (2006).

Mr. May sought resolution of his declaratory judgment action through a summary judgment motion. Summary judgments are also reviewed de novo, engaging in the same inquiry as the trial court. *Washington Fed. v. Harvey*, 182 Wn.2d 335, 339, 340 P.3d 846 (2015).

Appellate courts may uphold a court's decision on any basis supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

B. DECLARATORY JUDGMENT – CHAPTER 7.24 RCW

The Uniform Declaratory Judgments Act, Chapter 7.24 RCW, is designed "to settle and to afford relief from uncertainty and insecurity with

respect to rights, status and other legal relations; and is to be liberally construed and administered." RCW 7.24.120. "A declaratory judgment is used to determine questions of construction or validity of a statute or ordinance." *City of Fed. Way v. King Cty.*, 62 Wn. App. 530, 534-35, 815 P.2d 790 (1991); *Seattle-King Cty. Council of Camp Fire v. State Dep't of Revenue*, 105 Wn.2d 55, 711 P.2d 300 (1985); *Ayers v. City of Tacoma*, 6 Wn.2d 545, 108 P.2d 348 (1940). When a justiciable controversy exists and plaintiffs have standing, declaratory relief is proper. *Am. Traffic Sols., Inc. v. City of Bellingham*, 163 Wn. App. 427, 432-33, 260 P.3d 245 (2011).

Declaratory judgment relief is improper if it does not relate to a justiciable controversy. *Walker v. Monro*, 124 Wn.2d 402, 879 P.2d 920 (1994). For declaratory judgment purposes, a justiciable controversy is: (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990).

Here, the Subsection (c) provisions contained in the DECLARATION OF PROTECTIVE COVENANTS recorded under Auditor's Recording

No. Book 46 page 376 are clearly racially restrictive and void under RCW 49.60.224. There was no controversy or dispute between the parties that the provisions are void and unenforceable.

Since Mr. May has failed to address whether his property remains subject to the Subsection (c) provisions in the DECLARATION OF PROTECTIVE COVENANTS recorded under Auditor's Recording No. Book 46 page 376, after Ms. Gregory deleted them, it's not clear whether there is a controversy or dispute over the impact. The Lakes could only convey property interests that they acquired from Ms. Gregory. The Statutory Warranty Deed between Gregory and Lake is clear that the Subsection (c) restrictions were deleted and not included in the conveyance. If Mr. May is alleging the Lakes reinserted them, the reinserting would be actionable as an unfair practice under Chapter 49.60 RCW between Mr. May and the Lakes.

Assuming the discriminatory provisions were removed by Ms. Gregory, the Property is no longer subject to them and the action is arguably moot. There is nothing to be stricken from public records or property title documents when Mr. May acquired the Property. Nor would Mr. May meet the standing requirement to seek declaratory relief under RCW 49.60.227, which requires the property be subject to provisions that are void by reason of RCW 49.60.224. Here the Property was not subject to

the provisions because the provisions were deleted during the conveyance from Gregory to Lake. CP 63.

C. PLAIN LANGUAGE OF THE STATUTE

Mr. May asserts the trial court refused to issue an order striking the void provisions from the public record. A literal reading of RCW 49.60.227(1)(b) requires the court issue "… an order striking the void provisions from the public records and eliminating the void provisions from the title or lease of the property described in the complaint."

Statutes must be read to give effect to each word so no portion of the statute is rendered meaningless or superfluous. *Whatcom Cty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Yet statutes must also be construed to avoid absurd results. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003)).

Here, the trial court's Amended Order Denying in Part and Granting in Part Plaintiff's Motion for Summary Judgment: "**ORDERED:** … [#]2. Subsection (c) of the 1953 DECLARATION OF PROTECTIVE COVENANTS effecting the above referenced property *is hereby struck pursuant to RCW 49.60.227*." CP 84 (emphasis added).

The trial court ordered the striking of the provisions pursuant to the statute. A literal reading of the statute requires one order striking the

provisions from the public records and title documents. Granted the trial court could have delineated the parameters of the order differently. The trial court could have recited the specific language of the statute in the order but chose to define the striking as "pursuant to RCW 49.60.227." There is no indication in the order the trial court considered the excluded stator provisions. If Mr. May believed the order omitted public records, he could have easily requested clarification.

There is nothing in the record indicating Mr. May sought clarification from the court. Nor does the record reveal any order submitted by Mr. May to implement the court's order striking the provisions.

Mr. May's appeal based on the trial courts failure to follow the plain language of the statute and alleged denial of an order striking the void provisions of the covenant must fail. The trial court followed the statute and ordered the void provisions be struck in accordance with the statute.

D. REMEDIES AVAILABLE AT LAW

Historically, the Washington Supreme Court has "limited the operation of the uniform declaratory judgment act to cases where there is no satisfactory remedy at law available." *Thompson v. Wilson*, 142 Wn. App. 803, 818-19, 175 P.3d 1149 (2008) (quoting *Hawk v. Mayer*, 36 Wn.2d 858, 866, 220 P.2d 885 (1950)); s*ee also Kahin v. Lewis*, 42 Wn.2d 897, 902, 259 P.2d 420 (1953) ("the rule is that declaratory

judgment actions are limited to situations where there is no adequate remedy at law").

Here an alternative remedy was created by the legislature under RCW 49.60.227(2), which allows removal of racially restrictive provisions without judicial procedure through execution and recordation of a "restrictive covenant modification document." Laws of 2018, ch. 65, § 1. The amendment also added Subsection (3) which requires the Washington State Association of County Auditors to prepare the modification document, a copy of the modification document language prepared by the auditors is located at CP 66-68. Vicky Dalton, the Spokane County Auditor, a member of the Washington State Association of County Auditors, was actively involved in the design of the Covenant Modification Document. CP 55-56.

Mr. May argues the modification document is not an alternative remedy at law because it doesn't authorize expungement of all references from the public record and from the chain of title. As explained in the Spokane County Auditor Affidavit, real property chain of title recorded documents are altered and removed not by literal destruction, redaction or alteration but through recording superseding documents which preserves the chain of title. CP 52-59. RCW 65.04.110 prohibits alteration and destruction of chain of title recorded documents and imposes liability if done. CP 54.

The alternative under RCW 49.60.227(2) results in the same alterations striking the void provisions from recorded documents and public records as the court action under Subsection (1).

E. REMEDIES UNDER RCW 49.60 ARE REMEDIAL

Neither the trial court, the County, nor the County Auditor have asserted the provisions of RCW 49.60.224 and .227 do not apply to preexisting written documents. It's interesting that only the alternative "modification document" provisions under RCW 49.60.227(2)(d) identify "The effective date shall be the same as the effective date of the original written document."

F. THE TRIAL COURT'S ACTIONS WERE NOT AN ABUSE OF DISCRETION

Clearly Mr. May misapprehends the meaning of striking from the public records and elimination from the title referenced in RCW 49.60.227, and the protective provisions relating to the preservation of real property chain of title documents recorded with county auditors.

County auditors' statutory duties include recording of deeds and other instruments required by law to be filed and recorded. RCW 36.22.010(1). The entirety of Chapter 65.04 RCW further imposes duties on county auditors, related to recorded and filed documents. The entirety of Chapter 65.08 RCW is dedicated to recording. RCW 65.08.150

mandates the recording officer (here auditor) "… shall record in his or her office any instrument authorized or permitted to be so recorded by the laws of this state or by the laws of the United States." The importance of recording conveyances of real property and establishing rights to the property through a chain of title is addressed under RCW 65.08.070 which holds: "Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith … is first duly recorded."

"The integrity of the chain of title is based on the indestructibility of recorded documents in the custody of the recording office. The County Auditors and recording staff are specifically prohibited from altering or destroying documents in their custody. (RCW 65.04.110)." CP 54.

County auditors are the custodian of recorded documents relating to real property conveyances and transactions pursuant to RCW 65.04.140, which are identified as matters of public information. The auditor's duties include making the records accessible to the public for inspection, examination, and search. The records were considered public records long before Chapter 42.56 RCW was enacted.

RCW 65.04.110 prohibits alteration and destruction of chain of title recorded documents and imposes liability if done. CP 54. The entirety of Title 40 RCW deals with public documents, records, and publications. Chapter 40.14 RCW governs the preservation and destruction of public

records and provides for the classification of record types and creation of retention scheduled by the Washington State Archives, Office of the Secretary of State. The retention schedule governing county auditors may be accessed electronically at https://www.sos.wa.gov/_assets/archives/county-auditor-rrs-ver-5.0.pdf. The retention schedule for County Auditors Table of Contents on page 3, Item No. 3 RECORDINGS AND FILINGS, is located on pages 13-14. Snips of the retention schedule, Item No. 3 RECORDINGS AND FILINGS follows:

Washington State Archives
Office of the Secretary of State

County Auditor Records Retention Schedule
Version 5.0 (September 2010)

3. RECORDINGS AND FILINGS

The activity of recording and filing documents in accordance with Chapter 36.22 RCW. Includes maintaining the county's real property records (deeds, real estate, contracts, liens, etc.), oaths of office, and other official public records.

ITEM NO.	DESCRIPTION OF RECORDS	DISPOSITION AUTHORITY NUMBER (DAN)	RETENTION AND DISPOSITION ACTION	DESIGNATION
3.1.1	***Filed Documents*** All documents filed with the County Auditor, but not recorded. Excludes oaths of office covered by DANs AU50-05A-15 or AU52-03B-01.	AU2010-087 Rev. 0	**Retain** until no longer needed for agency business then **Arrange** for appraisal by Washington State Archives.	**ARCHIVAL** (Appraisal Required) **ESSENTIAL** OPR
3.1.2	***Oaths of Office and Bonds of Elected Officials – Filed (Not Recorded)*** All oaths of office, and all bonds of elected officials, filed with the County Auditor, but not recorded. Includes oaths of office of non-elected officials. Excludes bonds of non-elected officials covered by AU2010-087. Excludes *recorded* oaths of office and bonds covered by DAN AU52-03B-01.	AU50-05A-15 Rev. 1	**Retain** until no longer needed for agency business *then* **Transfer** to Washington State Archives.	**ARCHIVAL** (Permanent Retention) **ESSENTIAL** OPR

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Washington State Archives
Office of the Secretary of State

County Auditor Records Retention Schedule
Version 5.0 (September 2010)

ITEM NO.	DESCRIPTION OF RECORDS	DISPOSITION AUTHORITY NUMBER (DAN)	RETENTION AND DISPOSITION ACTION	DESIGNATION
3.1.3	***Recorded Documents*** The **primary record copy** of all County Auditor recordings. Includes, but is not limited to: • Original paper documents (land corner records, drawings, maps, plans, surveys, Torrens title records, etc.); • Books and volumes (deed, mortgage, lien, right-of-way, photo static volumes, "little red books", etc.); • Microfilm (if primary record); • Digital images (from recording imaging system). Includes all indexes to recorded documents. Excludes security microfilm back-up of primary records created in accordance with RCW 40.10.	AU52-03B-01 Rev. 1	**Retain** until no longer needed for agency business *then* **Transfer to** Washington State Archives.	**ARCHIVAL** (Permanent Retention) **ESSENTIAL** OPR
3.1.4	***Uniform Commercial Code (UCC) – Bulk Sales and Terminations*** Records relating to Uniform Commercial Code (UCC) bulk sales and terminations. Excludes UCC records covered by AU52-03B-01 or AU2010-087.	AU52-03B-06 Rev. 1	**Retain** for 6 years from date of transaction *then* **Destroy.**	NON-ARCHIVAL NON-ESSENTIAL OPR

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Under Item No. 3.1.3 of the Washington State Archives retention schedule for County Auditors, designates recorded documents as "ARCHIVAL" and "ESSENTIAL" and are to be permanently retained.

Chapter 40.16 RCW provides penal provisions relating to public documents, records, and publications. Under RCW 40.16.010 it is a class C felony to injure a public record.

Mr. May's [Proposed] Order Granting Plaintiff's Motion for Summary Judgment the following: "The trial court orders the Spokane County Auditor to strike and remove from the public record Subsection C of the restrictive covenant." CP 87.

The Order the trial court issued correctly identified the nature of Mr. May's actions. CP 83-85. The trial court noted "Mr. May seeks to have a racially discriminatory provision in a property covenant recorded in 1953 removed from the covenant and all title records" CP 84. The trial court granted Mr. May's request for an order striking the provisions. The Order further notes: "Mr. May further seeks this Court order the Spokane County Auditor as custodian of recorded documents in Spokane County to remove from the property's recorded chain of title records any and all references to and records of discriminatory provisions." CP 87. The trial court denied

Mr. May's request for an order directing the Auditor physically locate and strike the provisions from recorded documents.

It appears Mr. May has abandoned any contention the trial court's denial of an order directing the County Auditor was error as it is not argued in his opening brief. In any event, the request for an order directing the County Auditor to strike provisions from recorded documents was akin to requesting the court issue a writ of mandamus compelling the Auditor to act in a manner the law clearly does not enjoin.

The appropriate action to compel an elected officer to act is through a mandamus action under Chapter 7.16 RCW. The grounds for issuing a Writs of Mandamus are identified in RCW 7.16.160. Mandamus will issue *only* against a public officer in his official capacity to compel a *duty imposed by law*. *Adams v. City of Seattle*, 31 Wn.2d 147, 151, 195 P.2d 634 (1948). Here, Mr. May did not seek a writ, did not establish county auditors were enjoined by law to locate and strike provisions from recorded documents, and did not establish auditors were necessary parties to actions under RCW 49.60.227(1), nor that the section imposes any duties on auditors.

Mandamus will not lie to compel the performance of acts or duties that call for the exercise of discretion on the part of public officers. *Lillions v. Gibbs*, 47 Wn.2d 629, 633, 289 P.2d 203 (1955), *overruled on other grounds by Fleming v. City of Tacoma*, 81 Wn.2d 292, 502 P.2d 327 (1972);

O'Connor v. Matzdorff, 76 Wn.2d 589, 458 P.2d 154 (1969). A Writ of Mandamus is issued only when there is no plain, speedy and adequate remedy at law. *Staples v. Benton Cty. ex rel. Bd. of Comm'rs*, 151 Wn.2d 460, 89 P.3d 706 (2004); *see* RCW 7.16.170.

The applicant bears the burden of proving all elements to justify mandamus. *Eugster v. City of Spokane*, 118 Wn. App. 383, 403, 76 P.3d 741 (2003) (citing, *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 309, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989)). Mr. May did not seek mandamus nor established a basis to issue a writ of mandamus. Here, Mr. May bypassed the requirements imposed under Chapter 7.16 RCW and merely sought an order compelling an elected official to act.

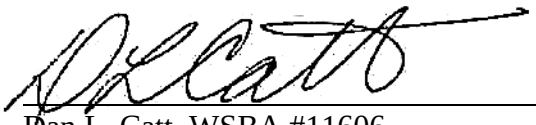
Had the trial court granted Mr. May's request for an order directing the Auditor to locate and strike provisions from previously recorded real property documents, it would have been an abuse of discretion. The fact the trial court denied the requested order when Mr. May failed to establish any nexus between the action under RCW 49.60.227(1) and the auditor is not an abuse of discretion.

V. CONCLUSION

For the reasons presented and in the interest of justice, Mr. May's appeal should be denied and the trial court's order affirmed.

Dated this 31 day of March, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

ALEX MAY, Appellant, v. COUNTY OF SPOKANE and VICKY DALTON, Auditor, Respondents	NO. 37179-4-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on March 31, 2020, I served a copy of the Brief of Respondent through the electronic filing portal to:

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SPOKANE COUNTY PROSECUTOR

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