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No. 88575-3

THE SUPREME COURT
OF
THE STATE OF WASHINGTON

RIVERVIEW COMMUNITY GROUP,

Appellant,

v.

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

Respondents.

RESPONDENT GEORGE T. AND SHEILA LIVINGSTON'S ANSWER
TO APPELLANT'S PETITION FOR REVIEW AND
CROSS PETITION FOR REVIEW

Dave Kulisch, WSBA #18313
Michael Grover, WSBA #44270
Attorneys for Respondents
George T. and Sheila Livingston

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¹ Respondents incorporate by reference herein the Court of Appeals 26 page decision, which was already filed with Appellant’s petition. If the Court would prefer Respondents file the same document, the Respondent will do so in a supplementary filing upon request.

TABLE OF CASE LAW AUTHORITIES

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I. Identity of Respondent

George T. and Sheila Livingston, husband and wife, are the Respondents filing this Answer/Cross-Petition, and they are represented by their attorneys Randall | Danskin, P.S., David A. Kulisch, WSBA # 18313, and Michael R. Grover, WSBA # 44270.

II. Citation to Court of Appeals Decision

Respondents answer the petition of the Appellant and conditionally seek review of additional issues decided in the Court of Appeals Decision filed February 14, 2013 under Cause No. 30681-0-III.

III. Issues Conditionally Presented for Review in Cross-Petition

No. 1: Whether or not Riverview Community Group has standing to bring suit on behalf of individual property owners in the Deer Meadows and Deer Heights communities.

No. 2: Whether or not the individual property owners in the Deer Meadows and Deer Heights communities are indispensable parties pursuant to CR 19.

IV. STATEMENT OF THE CASE

The Appellant, Riverview Community Group (hereinafter "Riverview"), is a "non-profit" organization that was created on September 20, 2010 for the purpose of investigating and filing this

lawsuit. CP 87, 103, 104, 114, 130, 148. Riverview is not a homeowner's association and does not own any land in Lincoln County, Washington. CP 1-12. Every statement of fact contained in the Complaint is alleged to have occurred prior to Riverview's existence as an organization. *Id.*

Riverview filed a Complaint on March 1, 2011, in Lincoln County Superior Court, alleging that multiple defendants were part of a joint venture that promised to operate an 18-hole golf course in perpetuity if individuals unnamed in this lawsuit would agree to purchase adjacent residential lots.¹ CP 5. The legal theory proposed by Riverview asserts that the Respondents, George T. and Sheila Livingston (hereinafter "GSL"), Spencer-Livingston, and S.O.S. LLC (hereinafter "S.O.S."), as well as other named defendants, were obligated to operate the golf course, at any financial cost/loss, in order to remain compliant with the Appellant's asserted implied equitable servitudes which Appellant claims would benefit the owners of land in the Deer Meadows Community and other communities located in the vicinity of the golf course. CP 12-20.

In August 2011, the defendants GSL moved the trial court for dismissal pursuant to CR 12(b)(7) for failure to join indispensable parties.

¹ The Complaint does not provide specific facts or circumstances regarding which defendants and/or agents of defendants allegedly made promises to landowners in the Deer Meadows Community or any other adjacent community. CP 1-20.

CP 154. GSL argued that CR 19 required Riverview to add the pertinent landowners who claim rights under the theory of implied equitable servitude. CP 157-58.

The trial court granted the motion to dismiss and entered its conditional order of dismissal on January 31, 2012. CP 245-46. The order stated that “the Deer Meadows landowners are necessary parties for a just adjudication of this action” and the landowners “shall be joined or assignments shall be obtained and filed with the Court within a reasonable period of time.” CP 246. Riverview failed to join the necessary parties and failed to obtain any assignments of interest, as required by the trial court’s order. Instead, Riverview decided to appeal the order.

In October 2011, S.O.S. moved the trial court for summary judgment dismissal pursuant to CR 56. CP 271. GSL joined the motion. CP 163-66. S.O.S. primarily argued that: 1) Washington law does not recognize implied equitable servitudes; and 2) equitable servitudes require a promise *in writing*. CP 277. The trial court granted the motions of S.O.S and GSL for summary judgment at the time of oral argument, on December 23, 2011, and subsequently entered its order of dismissal on February 13, 2012. CP 249.

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FOR REVIEW - 5

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Riverview filed a notice of appeal for both orders of the trial court on February 24, 2012. All parties to the appeal had the opportunity to present written and oral arguments, and on February 14, 2013, the Court of Appeals affirmed the trial court's dismissal of Riverview's case and, in doing so, stated that "[i]t is irrational to require the [Respondents] to rebuild and operate a failing business." *Court of Appeals Decision*, p. 27.

V. ANSWER TO APPELLANT'S PETITION FOR REVIEW

Riverview's petition for review filed with this Court on March 13, 2013 should be denied because it does not present any unique issues of law. The Court of Appeals determined that the equitable relief requested in this case was not equitable. The case law pertaining to equitable servitudes in the state of Washington is consistent. Furthermore, there are no constitutional issues and no substantial public policy concerns associated with this case.

A. There is no conflict with prior Supreme Court case law.

The Court of Appeals' decision to dismiss this case is not in conflict with prior decisions of the Washington State Supreme Court.

Riverview's petition declares that prior Supreme Court cases have afforded claimants "equitable relief in real property by estoppel or implication," but conveniently fails to point out that the forms of relief

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requested were dramatically different from what Riverview is asking from the court here. Riverview's request for the enforcement of an implied affirmative "operation and maintenance" servitude to be imposed in perpetuity upon the Respondents is far-removed from an action simply attempting to enjoin activity or quiet title to land. In its analysis, the Court of Appeals weighed the equities involved and determined that the relief sought was "irrational." *See Court of Appeals Decision*, pg. 27.

The methods of relief sought in the prior Washington Supreme Court decisions cited by Riverview are inapposite to the relief sought in this case. *See Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P.536 (1920) (plaintiff homeowners sought to enjoin an adjacent property owner in a subdivision from erecting a building violative of property-use restrictions that were contained in the plaintiffs' deeds); *Shertzer v. Hillman, Inc.*, 52 Wash. 492, 100 P. 982 (1909) (plaintiff homeowners sought to enjoin defendant from subdividing and selling more property within an existing subdivision); *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968) (plaintiffs sought to quiet title to a tract of land which provided an easement); *Nugget Prop. V. Golden Thunderbird*, 71 Wn.2d 760, 431 P.2d 850 (1967) (plaintiff sought to quiet title to land).

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None of the forms of equitable relief sought in the cases cited by Riverview would require the court to impose an *affirmative* obligation on the defendant. Additionally, none of these prior cases establish any precedent for imposing *perpetual* obligations upon a landowner and his or her successors to operate a failing business at a loss in perpetuity based upon an implied servitude.

Furthermore, the forms of equitable relief requested in the prior Supreme Court cases cited were not based upon the legal theory at issue in this case – that being, whether an affirmative “operation and maintenance” servitude may be implied, and then subsequently enforced upon a landowner in the absence of a written document memorializing the obligation, and that the obligation was intended to run with the land in perpetuity.

The Court of Appeals did determine that the Washington Supreme Court case of *Johnston v. Mt. Baker Park Church* recognized some form of implied servitude in property. *See Court of Appeals Decision*, pg. 24. However, the Court of Appeals also noted that, unlike the case before this Court, there existed several writings in *Johnston* referencing a property-use restriction in the subdivision. *Id*; *see also Johnston v. Mt. Baker Park Church*, 113 Wash. 458, 194 P. 536 (1920) (court enforced a residential

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use restriction in a written agreement between grantor and grantee, and in deeds to 645 of 650 lots).

The Court of Appeals acknowledged that requiring a writing to enforce servitudes may undercut the court's equitable powers, but the requirement is "consistent with the language of [Washington's] statute of frauds." *See Court of Appeals Decision*, pg. 24-25. Ultimately, the issue of whether a writing was required to enforce a real property servitude was not addressed by the Court of Appeals because the relief sought by Appellant was not equitable when compared to prior case law on the subject. *Id.* at 25.

B. This is not an issue of substantial public interest.

Riverview also claims that the issue before this Court is of substantial public interest because Washington landowners, such as the members of Riverview, should be protected. However, Riverview fails to support this claim with compelling evidence.

Riverview falsely claims that the trial court entered findings of fact. The petition filed by Riverview claims that the trial court determined that the "conduct of which Riverview's members complained had, in fact, been committed." The trial court never entered findings of fact in this case. The Respondents have not even answered the complaint because the

case was dismissed. The Honorable Judge Frasier stated his intention not to enter findings of fact in the presentment hearing which took place on January 30, 2012. *See Appendix: Declaration of David A. Kulisch In Support of Respondent George T. and Sheila Livingston's Brief*, ¶ 3-5.

Riverview also incorrectly claims that the Court of Appeals found for Riverview on each of the legal questions on appeal. The Court of Appeals refused to adopt the current section of the Restatement (Third) of Property which addresses the creation of servitudes. *See Court of Appeals Decision*, pg. 19. More importantly, the Court of Appeals acknowledged that long-standing Washington case law requires a written instrument to create equitable servitudes, *see Court of Appeals Decision*, pg. 20, but did not address Washington's statute of frauds which requires real property servitudes to be in writing for the reasons stated above. *See Court of Appeals Decision*, pg. 24-25. Therefore, Riverview's claim that there is no remedy for the alleged wrongs against their members grossly mischaracterizes the Court of Appeals' decision. The court simply ruled that because the requested relief was "irrational," they did not need to "address the issue further." *See Court of Appeals Decision*, pg. 25.

There are no issues of substantial public interest in this case. Riverview's petition fails to explain or provide data supporting how the

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discontinuation of a golf course adjacent to a subdivision is a matter of concern worthy of the time and attention of this Court.

VI. LEGAL ARGUMENT:

RESPONDENTS' CONDITIONALLY RAISED

CROSS-PETITION FOR REVIEW

Riverview's petition for review should be denied. However, in the event this Court grants Riverview's petition, Respondents GSL would respectfully request review of two additional issues decided by the Court of Appeals: 1) Riverview's standing to bring suit; and 2) the indispensability of the Deer Meadows landowners in this case, pursuant to CR 19.

The issues contained in GSL's cross-petition are raised conditionally. If this Court denies Riverview's petition, GSL does not petition this court for review of any additional issues pertaining to this case.

A. The Court of Appeals erred in concluding that Riverview has standing to bring suit.

1. WA Supreme Court case conflict

The Court of Appeals decision is in conflict with established Washington Supreme Court case law regarding organizational standing.

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The Supreme Court case of *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002), states a three prong test which must be satisfied to establish organizational standing: 1) the members of the organization would otherwise have standing to sue in their own right; 2) the interests that the organization seeks to protect are germane to its purpose; and 3) neither claim asserted nor relief requested requires the participation of individual members. The Court of Appeals relied upon *Firefighters* in its analysis. *See Court of Appeals Decision*, pgs. 7-11. However, the case itself does not provide strong precedent because its subject-matter does not concern the enforcement of property rights. More importantly, Riverview cannot satisfy the three-prong test due to important distinctions between *Firefighters* and the case before this Court.

First, in *Firefighters*, this Court determined that the union's individual members all had standing because they were all union employees with identical claims. *See Firefighters*, 146 Wn.2d at 214. Here, Riverview has not disclosed who all of their members are, where their individual property is located, and which of the multiple defendants they have standing to sue.

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Second, in *Firefighters*, the union's organizational purpose stated in the collective bargaining agreement was consistent with the interests pursued in the lawsuit. *Id.* However, here Riverview's members have stated that the organization was created for the purpose of investigating and bringing this lawsuit. CP 87, 104, 114, 130, 148. If this were a legitimate organizational purpose, this prong would never go unsatisfied.

Additionally, Riverview claims to be a "non-profit" organization, but if the organizational purpose is to pursue the alleged property rights of its members, then that would make Riverview a for-profit organization. Property rights effect the value of property, and if Riverview solely seeks to enforce property rights for the benefit of their members' property values, it is not a legitimate non-profit organization and has no standing to bring this lawsuit as such. Surely, the *Firefighter* case did not intend to open the door to this type of "gaming of the system."

Third, in *Firefighters*, this Court determined that the union's members' participation was not necessary because the monetary damages were readily identifiable and could be proven without the members. *Firefighters*, 146 Wn.2d at 216. Riverview, on the other hand, did not exist as an organization at the time of the alleged wrongdoing. CP 1-12. Riverview cannot testify as to business interactions its members had with

one or more of the multiple named defendants in this lawsuit without participation from its members. As a result, it is unclear which of Riverview's members have identifiable claims or remedies available to them in this case, or if they have any claims to begin with.

2. *Court of Appeals case conflict*

The Court of Appeals decision is in conflict with another decision of the Court of Appeals: *Timberlane Homeowners Ass'n, Inc. v. Brame*, 79 Wn. App. 303, 901 p.2d 1074 (1995). Unlike the above-referenced *Firefighters* case relied upon by the Court of Appeals, *Timberlane* does concern the enforcement of property rights by an organization on behalf of its members.

Timberlane held that absent "express authority from its members," an organization does not have standing to enforce its members' property rights. *Id.* at 308-09. However, the Court of Appeals decision in this case determined that Riverview has standing to enforce its members' alleged property rights, despite Riverview not owning any interest in property or obtaining assignments of interest from the pertinent landowners. The contradiction between the Court of Appeals Divisions should be resolved by the Supreme Court to avoid the confusion these holdings will create.

3. *Constitutional Issue*

The first two prongs of the three-prong test for determining organizational standing are “constitutional in that they ensure that *article III, section 2*’s ‘case or controversy’ requirements are satisfied.” *Firefighters*, 146 Wn.2d at 215. The Supreme Court should determine whether Riverview has standing under this three-prong analysis to clarify whether an organization such as Riverview has met the “case or controversy” standard.

4. *Issue of Substantial Public Interest*

The issue of whether Riverview has standing in this case is of substantial public interest due to the potential ramifications for future land-use cases. If the Court of Appeals decision stands, there is nothing to prevent parties from manufacturing standing out of thin air by simply creating a “non-profit” organization for the sole purpose of bringing a lawsuit.

Moreover, if the Supreme Court does not provide clarification on this subject-matter, Washington state land-use jurisprudence will change dramatically. Parties will be able to pursue the enforcement of property rights, with the underlying motive of increasing their property values, by simply creating a “non-profit” organization and filing suit.

B. The Court of Appeals erred in concluding that the pertinent Deer Meadows landowners were not indispensable parties pursuant to CR 19.

1. *WA Supreme Court and Court of Appeals case conflicts*

The Court of Appeals decision is in conflict with Supreme Court case law and other Court of Appeals case law regarding CR 19.

Washington courts have consistently held that property owners are necessary and indispensable parties in land-use cases. *See, e.g., Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*, 96 Wn.2d 201, 206-07, 634 P.2d 853 (1981) (the landowners in an area affected by a rezone were indispensable parties pursuant to CR 19); *National Home Owners Ass'n v. City of Seattle*, 82 Wn. App. 640, 643-44, 919 P.2d 615 (1996) (an association's failure to add the actual landowner/developer of the property affected by the land-use decision warranted dismissal pursuant to CR 19); *Waterford Place Condominium Ass'n v. City of Seattle*, 58 Wn. App. 39, 42, 791 P.2d 908 (1990) (the owner of the property was deemed an indispensable party in a land use action); *Veradale Valley Citizens' Planning Committee v. Board of County Com'rs of Spokane County*, 22 Wn. App. 229, 234, 588 P.2d 750 (1978) (the owners of property affected by a land use ruling are necessary parties

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pursuant to CR 19); *Andrus v. County of Snohomish*, 8 Wn. App. 502, 509, 507 P.2d 898 (1973) (the landowners were indispensable to a land-use dispute pursuant to CR 19 because the decision could not be rendered without having an impact on landowners' property).

The landowner is an indispensable party in land use cases as the person "most affected" in any review proceeding. *Nolan v. Snohomish County*, 59 Wn. App. 876, 880, 802 P.2d 792 (1990), *review denied*, 116 Wn.2d 1020, 811 P.2d 219 (1991).

The Court of Appeals decision in this case stated that the Deer Meadows and Deer Heights property owners were not indispensable pursuant to CR 19, despite the fact that their purchase of property in the community is the focus of the case. *See Court of Appeals Decision*, pg. 12. This ruling is in conflict with a long line of cases in Washington state establishing that landowners are indispensable and necessary parties in a dispute that affects their land.

2. *Issue of Substantial Public Interest*

The issue of whether the pertinent landowners are indispensable parties to this case is of substantial public interest. The state of Washington should ensure that landowners have the opportunity to participate in adjudication that will affect their land rights, and defendants

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in these cases have the right to know that the tribunal's decision will be final for purposes of res judicata and collateral estoppel.

VII. CONCLUSION

For the foregoing reasons, Riverview's petition for review should be denied. The issues in this case are not unique and the relief requested is not equitable.

In the event this Court grants Riverview's petition for review, this Court should also grant review of the above-described issues contained in GSL's cross-petition.

DATED this 11th day of April, 2013.

RANDALL | DANSKIN, P.S.

By: 

David A. Kulisch, WSBA #18313
Michael R. Grover, WSBA #44270
Attorneys for Respondent
George T. and Sheila Livingston

RESPONDENT GEORGE T. AND SHEILA
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APPENDIX

A:

**COURT OF APPEALS DECISION
(INCORPORATED BY REFERENCE TO
APPELLANT'S PETITION)**

B:

**DECLARATION OF DAVID A. KULISCH
IN SUPPORT OF RESPONDENT GEORGE
T. AND SHEILA LIVINGSTON'S BRIEF
(SEE ATTACHED)**

RESPONDENT GEORGE T. AND SHEILA
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COURT OF APPEALS
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COURT OF APPEALS,
DIVISION THREE
OF THE STATE OF WASHINGTON

RIVERVIEW COMMUNITY GROUP,)	
a non-profit Washington corporation,)	
)	
Appellant,)	DECLARATION OF
)	DAVID A. KULISCH
vs.)	IN SUPPORT OF RESPONDENT
)	GEORGE T. AND SHEILA
SPENCER - LIVINGSTON, a)	LIVINGSTON'S BRIEF
Washington Partnership, <i>et al.</i>)	
)	
Respondents.)	
)	

DAVID A. KULISCH, hereby states as follows:

1. I am a resident of the County of Spokane, State of Washington and I am over the age of eighteen years. I am competent to testify to the facts stated herein of my own personal knowledge.

2. I am the attorney for Respondent George T. and Sheila Livingston in the above-referenced matter.

3. On January 30, 2012, I appeared at a telephonic Presentment Hearing before the Honorable David Frazier regarding Lincoln County Superior Court case number 11-2-00031-2.

DECLARATION OF DAVID A. KULISCH
IN SUPPORT OF RESPONDENT
GEORGE T.
AND SHEILA LIVINGSTON'S BRIEF - 1

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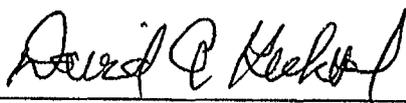
4. The Presentment Hearing addressed the two orders that are now on appeal, which were entered on January 31, 2012 and February 13, 2012.

5. During the Presentment Hearing, Judge Frazier stated clearly and unequivocally that he had no intention of entering formal findings of fact with regard to the Court's decisions on the motions before the Court.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 16th day of June, 2012.

RANDALL | DANSKIN



David A. Kulisch, WSBA #18313
Attorney for Respondent George T. and
Sheila Livingston

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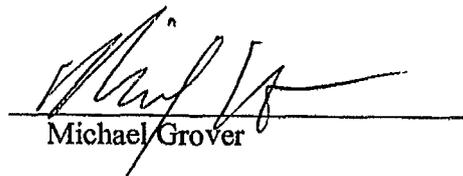
CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of Declaration of David A. Kulisch In Support of Respondent George T. and Sheila Livingston's Brief on the 15th day of June, 2012, addressed to the following:

David P. Boswell _____ Hand Delivered
Boswell Law Firm, P.S. U.S. Mail
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Michael Grover

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DECLARATION OF DAVID A. KULISCH
IN SUPPORT OF RESPONDENT
GEORGE T.
AND SHEILA LIVINGSTON'S BRIEF - 3

RANDALL | DANSKIN, P.S.
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Case name: Riverview Community Group v. Spencer & Livingston, et al.
Case number: Supreme Court Case No. 88575-3; Court of Appeals No. 30681-0-III
Party filing: Respondents George T. and Sheila Livingston
Party's counsel: Michael R. Grover (WSBA 44270) and David A. Kulisch (WSBA 18313)

Attached are two pleadings to be filed:

- 1) Respondent Answer to Petition / Cross-Petition
- 2) Certificate of Service

Please confirm receipt.



Michael R. Grover

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