

65577-9

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

NO. 65577-9

SEAWEST SERVICES ASSOCIATION,

Respondent/Plaintiff,

v.

JIM COPENHAVER AND SUZANNE COPENHAVER,

Appellants/Defendants.

OPENING BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

1. The Island County Superior Court (Churchill, J.) erred in finding that the Copenhaver property is a "limited member" of plaintiff/respondent Seawest Services Association ("Seawest") and in issuing a declaratory judgment obligating defendants/appellants Copenhaver to pay "assessments" and attorneys' fees. CP 124 (¶ 1).

2. The trial court erred in granting dollar damages to Seawest of \$4,257.26, interest of \$141.90, and awarding attorneys' fees of \$91,567.05. CP 124-25 (¶ ¶ 2-3).

3. The trial court erred in issuing an injunctive order requiring the Copenhavers to pay "any and all future amounts" levied by Seawest for "water, excess water, and assessments." CP 125 (¶ 5).

4. The trial court erred in finding that Seawest can pollute the Copenhavers' land within an easement established expressly as a "pollution control setback." CP 151-53.

5. The trial court erred in declaring that Seawest can install additional buildings, facilities, and a fence within its easement areas, despite express identification in the easements specifying what could be installed. CP 151-52.

6. The trial court erred in entering its "Final Order as per CR 54(b) Granting Plaintiff's Motion for Partial Summary Judgment on Membership and Assessment Issues and Monetary Judgment in Favor of Plaintiff Against Defendants Copenhaver" (May 18, 2010). CP 111-41.

7. The trial court erred in entering its "Final Judgment as per CR 54(b) Granting Plaintiff's Motion for Partial Summary Judgment on Validity and Scope of Express Easements, and Declaratory Order Under RCW 7.24 Declaring the Rights of the Parties Under the Express Easements" (May 18, 2010). CP 142-63.

II. ISSUES PRESENTED

1. Is Seawest estopped from alleging that the Copenhavers are "members" subject to assessments where Seawest's president stated that the owners of the property were not "members" of Seawest? (Assignments of Error Nos. 1, 2, 6)

2. Did the trial court err in finding that the Copenhavers are "limited members" of Seawest, where it is undisputed that there was no covenant, restriction, or other encumbrance against the Copenhaver property providing for membership, where the Copenhavers never agreed to become members, and where the Seawest articles of incorporation on

which Seawest and the court relied were recorded after the Copenhavers purchased their property which is located outside the Seawest development? CP 124. (Assignments of Error Nos. 1, 2, 6)

3. Did the trial court err in awarding Seawest attorneys' fees based on Seawest's bylaws, where the bylaws' fee provision applies exclusively to owners of tracts within Seawest and the Copenhaver property is outside the Seawest subdivision? CP 124-25. (Assignment of Error Nos. 2, 6)

4. Did the trial court err in issuing an injunction requiring the Copenhavers to pay any and all future amounts levied by Seawest? CP 125. (Assignments of Error Nos. 3, 6)

5. Can Seawest discharge its backwash effluent to pollute the Copenhavers' property within the boundaries of a setback established expressly to *prevent* pollution? (Assignments of Error Nos. 4, 7)

6. Did the trial court err in expanding Seawest's easement rights to allow buildings, facilities, and structures not identified in the easements? CP 151-52. (Assignments of Error Nos. 5, 7)

III. STATEMENT OF THE CASE

A. The Copenhavers Are Not "Members" of Seawest

In 2001, Dr. Jim and Suzanne Copenhaver purchased a home situated on a five acre parcel of land near Coupeville. CP 4139 (2/19/10 Declaration of Jim Copenhaver ... in Opp. to Plaintiff's Motion for Partial Summary Judgment Re: Membership ("Copenhaver Dec.") at ¶ 2).¹ Seawest is a nonprofit corporation formed by a real estate developer² to function as a homeowners' association, including operating a well to provide water for houses in the developer's subdivision adjacent to the land later purchased by the Copenhavers. CP 3368-77 (2/4/10 Dec. of Zosia Stanley in Support of Plaintiff's Motion for Partial Summary Judgment Regarding Defendants' Status as Limited Members of Seawest Services Association ("Stanley Dec.") at Ex. AH) (1983 Seawest Articles of Incorpor.).

¹ Because there were problems in assembling the clerk's papers, appellants will provide descriptions of the documents cited throughout this brief in addition to the CP cites.

² The real estate developer is John Grady, Jr. and John Grady III, and various corporate entities owned and controlled by the Gradys. For ease of reference, all are referred to as the "real estate developer" here.

As part of their 2001 purchase, the Copenhavers had a title search completed by Island Title Company. CP 4140 (Copenhaver Dec. at ¶ 4). Island Title wrote to Seawest president Marvin Ford to find out whether there were any "dues/assessments" or "additional charges" the Copenhavers would be required to pay to Seawest. CP 848 (2/18/10 Dec. of Kenneth C. Pickard in ... Opp. to Plaintiff Seawest's Motion for Partial Summary Judgment Re: Question of Membership ("2/18/10 Pickard Dec.") at Ex. 2) (letter dated 1/16/01 from Edie Silvey, escrow assistant at Island Title to Marvin Ford, president of Seawest Services Association).³

Seawest President Ford responded by handwriting his answers to the title company's questions on the letter he received from Island Title. *Id.* On the line asking whether there are "annual dues/assessments," Ford wrote that the Copenhaver property "is not a member of Seawest Home Assn". On the second line asking, "Delinquent dues/assessments not included in annual amount above," Ford wrote "no annual dues has a water share – Min. 25.00 month billed quarterly." On the last line asking "Any additional charges," Ford wrote "owes 75.00 for 4th qt. ending

³ A copy of this letter is attached as Appendix 1 to this brief.

12/31/2000, please inform new owner." *Id.*; *see also* CP 4140 (2/19/10 Copenhaver Dec at ¶ 4).

Lots within the Seawest real estate development are encumbered by two covenants filed by the developer in 1984 and 1985. These covenants restrict the subdivision of lots, establish building setbacks, and restrict use to single family residences (among other things). CP 3209-13 (Stanley Dec. at Exs. M and N) (recorded under Auditor's File Nos. 84003381 and 85014240). These two covenants explicitly list the lots they restrict. The first lists 11 parcels by lot number, lot 1A, 1B, etc. (Stanley Ex. M) and the second identifies four additional lots (Stanley Ex. N). Neither document listed the Copenhaver property, nor appeared as encumbrances against the property in title reports. CP 4073-85, 4086-92 (3/29/10 Declaration of Kenneth C. Pickard in Support of ... Defendants Motion for Partial Summary Judgment Determination that Plaintiff Lacks Authority to Impose Assessments ("3/29/10 Pickard Dec.") at Exs. A-B) (preliminary and final title commitments). Seawest admitted that:

Neither Auditor's File No. 84003381 nor AFN 85014240 [the two recorded Seawest covenants] are in the [Copenhaver] title report. The title report clearly demonstrates that [the Seawest Covenants] are not applicable to the [Copenhavers'] real

property.

CP 4100 (3/29/10 Pickard Dec. at Ex. D) (Letter dated Mar. 26, 2010 from plaintiff's attorney Jacob Cohen to defendants' attorney Kenneth C. Pickard) (emphasis added).

Had the Copenhavers been informed that the property was a "member" of Seawest, they would not have purchased the property because they were not willing to purchase a property controlled financially in any way by a homeowner's association. CP 4140 (2/19/10 Copenhaver Dec. at ¶ 4). After purchasing the property, the Copenhavers began receiving bills from Seawest for small amounts of money for water, consistent with Seawest President Ford's letter to the title company that the Copenhavers' "water share" would be \$25 or more monthly and billed quarterly. CP 4140 (2/19/10 Copenhaver Dec. at ¶ 5).

The Copenhavers were billed between \$75.00 and \$105.00 every third month beginning in 2001. CP 3458-3527 (Stanley Dec. at Ex. AU) (Seawest billing records). The Copenhavers paid those bills. CP 4140 (2/19/10 Copenhaver Dec. at ¶ 5). Seawest sent the Copenhavers water bills, but it did not treat them as members. Seawest never sent the Copenhavers notices of meetings or votes. CP 4142 (2/19/10 Copenhaver

Dec. at ¶ 9). In 2002, Jim Copenhaver met with Seawest president Ford to discuss the damage being caused his property by Seawest's backwash effluent. CP 4141 (2/19/10 Copenhaver Dec. at ¶ 6). Ford was irate and hostile, and stated that since Copenhaver was not a member of Seawest it had no duty to protect the Copenhavers. CP 4141 (2/19/10 Copenhaver Dec. at ¶6). Copenhaver subsequently had conversations with other directors of Seawest. None contradicted Mr. Ford's statements or asserted that the Copenhavers were members prior to this action. CP 4141 (2/19/10 Copenhaver Dec. at ¶ 6).

Seawest's easements for a well, water line, and pollution control setback on the Copenhaver property likewise did not create membership. Seawest's two easements were first recorded in 1979, and then re-executed and recorded in 1983. CP 3238-39, 3242-44 (Stanley Dec. at Exs. R, S, U, V).⁴ Each easement provides that the owner of the Copenhaver property was to receive, in exchange for the easement:

[G]ood and valuable consideration,
including the right to six (6) water hook-ups
or shares for six (6) individual dwellings

⁴ The 1983 easements clarify the legal description of the easement location.

from the below-referenced well[.]

Id. The easements do not mention membership in any association, or contain any provision for payment for water service or assessments. (Attached as Appendix 2 and included in the record at CP 3607 is a survey created by Thatcher and Morrison, Inc. illustrating the easements on the Copenhaver property).⁵

Subsequent transfers of the Copenhaver property do not include any provision for membership in Seawest. In 1987, the grantors of the two easements sold the property, including:

[O]ne water hookup right in the well and water system of SeaWest Services Association, a Washington non-profit corporation. Purchaser acknowledges that said corporation and/or John Grady, III, and his wife and John Grady Jr. and his wife, are solely responsible for the construction

⁵ A separate covenant, recorded in 1979, limits what the owners of what became the Copenhavers' property can do within 100 feet of the well: they are prohibited from constructing "cesspools, sewers, privies, septic tanks, drainfields, manure piles, garbage of any kind or description, barns, chicken houses, rabbit hutches, pigeons, or other enclosures or structures for the keeping or maintenance of fowls or animals, or storage of liquid or dry chemicals, herbicides, or insecticides." CP 3240-41 (Stanley Dec at Ex. T) (Recorded under Auditor's File Number 359806). This covenant makes no mention of membership in Seawest.

maintenance, financing and repair of said well and water system[.]

CP 3412_(Stanley Dec. at Ex. AP) (Statutory Warranty Deed by Grantor Gaudin to Grantee Shelley at Ex. A). The Gaudins apparently reserved the remaining five hook up rights. There was no mention of membership in Seawest in this deed.

In 1983, Seawest filed articles of incorporation purporting to establish two classes of members: "full" members who are owners of lots in the Seawest development, and "limited" members that are "each person who contracts with and receives from the Association utility services who does not otherwise qualify as a full member." CP 3370 (Stanley Dec. at Ex. AH) (1983 Seawest Articles of Incorporation, p. 3). All members are required to pay "assessments." CP 3368. Although Seawest's articles appear to have been properly filed with the secretary of state, they were not recorded with the Island County auditor.

The Copenhaver property is not on the list of full members and there is no listing of limited members. CP 3382, 3386 (1987 Seawest Articles of Incorporation, p. 3 and Exhibit A). Seawest produced no evidence that the Copenhavers or any prior owner of their property had actual or constructive notice of Seawest's articles of incorporation or of any

purported application of those articles to the Copenhaver property. While the 15 enumerated lots in the Seawest development are subject to the articles through the prior recording of the Seawest covenants, the Copenhaver property is not.

Seawest did not adopt bylaws until after the Copenhavers purchased their property in 2001 and did not record these bylaws until 2009, one week after filing this lawsuit. CP 4113-21 (3/29/10 Pickard Dec. at Ex. E) (Seawest Bylaws recorded on April 15, 2009 under Auditor's File Number 4248920); CP 2901-94 (complaint filed April 8, 2009). As with its articles of incorporation, Seawest produced no evidence that the Copenhavers or any prior owner had actual or constructive notice of the bylaws or of any purported application of them to the property. The bylaws include a provision establishing a continuing lien to enforce payment of dues and assessments. This provision is limited explicitly to "owner[s] of a tract within SEAWEST:"

5.2 Duration of Lien and Personal Obligation of Assessment. Pursuant to recorded covenants, **each owner of a tract within SEAWEST**, by acceptance of a deed therefor or execution of a contract to purchase, relating to a tract within SEAWEST, whether or not it shall be so expressed in such document, is deemed to

covenant and agree to pay to the Association, annual dues and assessments, which may be a charge upon such tract. Each assessment together with interest, and any costs and attorney's fees which may be reasonable (sic) incurred to collect said assessments, shall be a continuing lien against the tract assessed and shall also be the personal obligation of the person who is the owner of such property at the time when the assessment fell due.

CP 4118 (3/29/10 Pickard Dec. at Ex. E) (Bylaws for Seawest Services Association at p. 6) (emphasis added). Moreover, this provision cites as its authority the recorded covenants that Seawest has admitted do not apply to the Copenhagen property. *Id.* ("Pursuant to recorded covenants,..."). This section is the only provision in the bylaws providing for recovery of attorneys' fees, and it is the only provision relied upon by Seawest and the trial court for the award of over \$91,000 against the Copenhavers.⁶

⁶ In December, 2009 (eight months after Seawest filed its complaint), Seawest amended the bylaws to include a fee provision explicitly applicable to "limited members" and a separate article providing for indemnification. CP 3403-08 (Stanley Dec. at Ex. AN) (Seawest bylaws and "Bylaws Change Record").

B. Seawest has One Easement for a Well and Water Line, and a Second, Larger Easement for a Pollution Control Setback

Seawest has two easements on the Copenhavers' land. CP 3238-39; 3242-44 (Stanley Dec. at Exs. R, S, U, V). The first describes a keyhole-shaped area, and was first executed and recorded in 1979 and then again in 1983. CP 3238, 3242-43 (Stanley Dec. at Exs. R, U). The keyhole-shaped easement grants Seawest:

A utility easement for the installation, operation and maintenance of a well and water line over, across and under a strip of land 20.00 feet in width . . . ALSO a utility easement for the installation, operation and maintenance of a well and water line over, across and under a parcel of land 50.00 feet in width . . .

CP 3238, 3242-43 (Stanley Dec. at Exs. R, U).

The second easement is to a circle-shaped area with a 100 foot radius, which provides for:

An easement establishing a well pollution control setback consisting of a circular portion of land having a radius of 100 feet . . . [t]he easement hereby conveyed is for the purpose of constructing and maintaining a well, pump, treatment facility and storage tank and for the purpose of establishing a well pollution control setback.

CP 3239, 3244 (Stanley Dec. at Exs. S, V). In both 1979 and 1983, the two easements were executed on the same day.

C. Seawest's Backwash Effluent is Polluting the Copenhavers' land

After closing and moving onto the property, Jim Copenhaver discovered that Seawest was discharging effluent into an area of dense brush from a pipe that he later learned was flushing backwash water from Seawest's filtration system and that the effluent was causing flooding and chemical damage to trees and vegetation on his property. CP 4141 (2/19/10 Copenhaver Dec. at ¶ 6). Seawest admits that the outflow pipe was obscured by "scrub brush and hedgegrow." CP 4388-89 (4/14/10 Pickard Dec. in Support of Defendants' Motion for Summary Judgment Re: Prescriptive Easement Issues (4/14/10 Pickard Dec.) at Ex. H) (4/3/03 Letter from Seawest V.P. Cameron Chandler to Jacob Cohen).

The backwash water is a rusty, purplish-brown color, and created approximately one acre of "boggy, swamp like land[,]" an area far larger than that covered by Seawest's easements. CP 3598 (Stanley Dec. at Ex. AY) (10/21/02 Letter from Jim Copenhaver to Island County Public Works).

Seawest was aware that the discharge “contains minerals that would discolor and accumulate in their drainage over time.” CP 4389 (4/14/10 Pickard Dec. at Ex. H) (4/3/03 Letter from Seawest V.P. Cameron Chandler to Jacob Cohen). Seawest admitted that its backwash effluent deposits potassium permanganate on the Copenhavers’ property. CP 4377 (4/14/10 Pickard Dec. at Ex. G) (Defendants’ Fifth Request for Admission at No. 7).

D. Proceedings Below

After disputes arose between the Copenhavers and Seawest as to whether Seawest was entitled to enter the Copenhavers’ property at any time, about the use of an access road that might or might not be on the easement, on whether Seawest could install new machinery in the pollution control setback, and over Seawest’s authority to impose assessments on the Copenhaver property, Seawest commenced this suit.

Seawest asked for access rights, that the Copenhavers be declared members of the Association and forced to pay assessments, and that an express or prescriptive easement be recognized for not only the water system, backwash pipe, and a 100’ “pollution control” setback, but also any portion of the Copenhavers’ property polluted by Seawest’s backwash

water. CP 2901-94 (Complaint for Declaratory Judgment, Injunctive Relief and Prescriptive Easement). Seawest's complaint cited its articles of incorporation and its bylaws as the bases for its claim of a "contractual duty" owed by the Copenhavers to pay Seawest's monetary claims. CP 2910.

Seawest filed two motions for partial summary judgment. CP 1902-19 (Plaintiff's Motion for Partial Summary Judgment on Validity and Scope of Express Easements); CP 1957-82 (Plaintiff's Motion for Partial Summary Judgment Regarding Defendants' Status as Limited Members of Seawest Services Association). The court granted Seawest's motions, including its request for certification of the court's orders as final orders pursuant to CR 54(b). CP 142-63 (Final Judgment as per CR 54(b) Granting Plaintiff's Motion for Partial Summary Judgment on Validity and Scope of Express Easements and Declaratory Order Under RCW 7.24 Declaring the Rights of the Parties Under the Express Easements ("Summary Judgment on Easements")); CP 111-41 (Final Order as per CR 54(b) Granting Plaintiff's Motion for Partial Summary Judgment on Membership and Assessment Issues and Monetary Judgment in Favor of

Plaintiff Against Defendants Copenhaver (“Summary Judgment on Membership”).

Seawest requested attorneys’ fees based on the provision in Seawest’s bylaws applicable to Seawest “tract owners.” CP 453 (Plaintiff’s Motion for Attorney’s Fees etc.).

The court’s judgment granted declaratory relief, and ordered payment of \$4,257.26 in principal judgment, \$141.90 in interest, and \$91,567.05 in attorneys’ fees. Still remaining for trial is plaintiff’s claim for a prescriptive easement for an area on the Copenhavers’ property larger than the areas described in the two written easements. Defendants Copenhaver filed a timely notice of appeal. CP 50-110.

IV. ARGUMENT

A. Standard of Review

This court reviews the trial court’s decision on summary judgment *de novo*. *Campbell v. Reed*, 134 Wn. App. 349, 356, 139 P.3d 419 (2006); *Ret. Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 612, 62 P.3d 470 (2003). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions before the court demonstrate the absence of any genuine issues of material fact and that the moving party is

entitled to judgment as a matter of law. CR 56(c); *Id.* In considering a summary judgment motion, the court must view all of the facts in the light most favorable to the Copenhavers, the nonmoving party. *Id.* The burden is on the moving party to properly establish the material facts necessary to support the requested judgment, and to demonstrate the absence of a genuine dispute of material fact. *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Here, the court erred on the law in rulings such as saddling the Copenhaver property with membership absent a recorded covenant or an agreement. It erred on both law and summary judgment practice in the inferences it drew ascribing intent favorably to the wrong party (the moving party) such as failing to credit statements by both sides indicating a common understanding that the owners of the Copenhaver property would be billed only for water service and had no ongoing membership relationship. The court again drew unwarranted inferences favorable to the moving party of an unspoken intent for a flexible easement to increase the burden on the Copenhaver property to accommodate "consumer expectations."

B. The Copenhavers Are Not Members of Seawest

1. Seawest is estopped from arguing that the Copenhavers are members

When the Copenhavers purchased their property, they relied on a direct and unequivocal representation by Seawest's president that the owners of the property were "not a member" of Seawest. CP 4140 (2/19/10 Copenhaver Dec. at ¶ 4) (referring to CP 848 (written exchange between Seawest president Marvin Ford and Edie Silvey, escrow assistant at Island Title)). The Copenhavers would not have purchased the property had this representation not been made. *Id.* Seawest is therefore equitably estopped from asserting claims against the Copenhavers based on their alleged membership.

Equitable estoppel holds that "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." *Kramarevsky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). The elements of equitable estoppel are:

- (1) a party's admission, statement or act inconsistent with its later claim;
- (2) action by another party in reliance on the first

party's act, statement or admission; and
(3) injury that would result to the relying
party from allowing the first party to
contradict or repudiate the prior act,
statement or admission.

Id. All of these elements are met here.

When the Copenhavers were in the process of purchasing their property in 2001, Island Title wrote to Seawest's president Marvin Ford requesting disclosure of any "annual dues/assessments." CP 848_(Pickard Dec., Ex. 2). Ford responded, "[Copenhavers' seller] is **not a member** of Seawest Home Assn... no annual dues." *Id.* (emphasis added). On the second line asking, "Delinquent dues/assessments not included in annual amount above," Ford wrote "no annual dues has a water share – Min. 25.00 month billed quarterly." On the last line asking "Any additional charges," Ford wrote "owes 75.00 for 4th qt. ending 12/31/2000, please inform new owner." *Id.*

Not only did Seawest's president volunteer that this property was "not a member," he also made clear that Seawest did not view Gaudin's reservation of "water shares" in the 1979/1983 easements as creating a membership relationship. The title company's questions gave Ford three separate opportunities to identify any obligations other than payment of

relatively nominal amounts for water service. His additional statements plainly communicated that these small quarterly payments were all that Seawest asserted the right to receive.

Ford's statements are inconsistent on their face with Seawest's claim made eight years later that the Copenhavers are "members." *Kramarevsky, supra* (first element of equitable estoppel). Judge Churchill blithely dismissed Seawest president Ford's statements that the Copenhavers' predecessors in interest were "not members of Seawest Home Assn" and "no annual dues" because there "is no homeowners association" and there are "no annual dues." RP 3/19/10 at 11, *citing* CP 848. In essence, the court inferred that Ford intentionally was misleading the Copenhavers by misstating the Association's name and by not using the word "assessments" when answering questions about "dues/assessments" unequivocally in the negative.

Such inferences may be even too far a stretch for the *nonmoving* party in summary judgment to create a genuine fact issue. Surely as the nonmoving party the Copenhavers were entitled to the much more reasonable (indeed inescapable) inferences that Seawest's president properly understood the title company's inquiry and answered it

accurately, honestly, and without deceptive intent. The Copenhavers were entitled to take these statements at face value and they justifiably relied upon them. *Kramarevcky, supra* (second element of equitable estoppel).

Ford's description of the billing for water service that Seawest provided to the property (minimum of \$25 per month, billed quarterly) demonstrates that he understood that the title company was asking about water service, not homeowner association issues. CP 848. Island Title wrote to Ford at "Sea West Services Association." *Id.* Mr. Ford signed his response as "Marvin Ford Seawest President." *Id.* No evidence or even inference supports the trial court's attempt to explain away Ford's straightforward statements as an artifice.

The Copenhavers have suffered injury and inequitable consequences from the trial court's decision allowing Seawest to repudiate its president's statements. *Kramarevcky, supra* (third element for equitable estoppel). The court has ruled them liable for all future assessments Seawest might deem to impose on them as "members," in addition to the past assessments and attorneys' fees, rather than the small quarterly water payments described by Ford. The Copenhavers established all of the elements for equitable estoppel to prevent Seawest

from asserting membership obligations over them.

2. Even if Seawest was not estopped, the Copenhavers are not members of Seawest because there are no covenants or other agreements establishing membership

There are no covenants obligating the Copenhavers to be members of Seawest, nor do the easements or any other document binding the Copenhavers provide for membership. Seawest relied on its articles of incorporation for its argument that the Copenhavers are "limited members." But this argument fails, because the articles are not an encumbrance on the Copenhaver property.

In 1983, Seawest filed articles of incorporation with the Secretary of State purporting to establish two classes of members, "full" members who are owners of lots in the Seawest development, and "limited" members that are "each person who contracts with and receives from the Association utility services who does not otherwise qualify as a full member." CP 3370 (1983 Seawest Articles of Incorp.).

Seawest previously recorded covenants encumbering all of the lots identified individually in its articles of incorporation, CP 3209-13 (Stanley Dec. at Exs. M and N), but Seawest has admitted that the Copenhaver property is not subject to its covenants. CP 4100 (3/29/10

Pickard Dec. at Ex. D).

Where a covenant or encumbrance is not incorporated into a deed, the covenant is generally considered an equitable restriction requiring actual or constructive notice. *Hollis v. Garwall, Inc*, 137 Wn.2d 683, 691, 974 P.2d 836 (1999); *see also Pioneer Sand & Gravel Co. v. Seattle Const. & Dry Dock Co.*, 102 Wash. 608, 618, 173 P. 508 (1918) (Covenant regulating or restricting the use of land will be enforced when the party acquiring title took with notice). The recording statutes provide constructive notice to land possessors who have restrictions burdening their land. *Dickson v. Kates*, 132 Wn. App. 724, 737, 133 P.3d 498 (2006), *citing Pioneer Sand & Gravel*, 102 Wash. at 619.

The articles relied upon by Seawest were not recorded.⁷ The title search conducted by Island Title unveiled no other documents suggesting any encumbrances upon the Copenhaver property that would support Seawest's claim of membership. Prospective purchasers may rely on recorded documents affecting the subject parcel and are “not bound to

⁷ Articles of incorporation were filed with The Secretary of State on February 18, 1983, December 15, 1987, and in February of 1991. None of the three versions of Seawest's articles were recorded with the Island County Auditor.

search the record outside the chain of title of the property presently being conveyed.” *Koch v. Swanson*, 4 Wn. App. 456, 459, 481 P.2d 915 (1971). Thus, there was no constructive notice to the Copenhavers of a membership obligation. And there is no evidence of actual notice of Seawest's articles of incorporation to the Copenhavers.

In the absence of a covenant or other recorded document requiring membership, any claim of a member relationship including an unlimited power to impose assessments must be made under contract law. There is no agreement between Seawest and the Copenhavers (including the predecessors of each) that would support the trial court's finding of a limited membership. Washington follows an objective manifestation test for contracts, looking to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 570, 919 P.2d 594 (1996); *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982); *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981).

Here, the easement agreements formed by the Copenhavers' predecessor and the real estate developer establish that the Copenhavers'

property was entitled to receive water as consideration for the easement, but did not provide that the owners would be "members" of Seawest. The 1979 and 1983 easements granted to the developer for construction of the well provide the easement was granted in exchange for:

[G]ood and valuable consideration, including the right to six (6) water hook-ups or shares for six (6) individual dwellings from the below-referenced well[.]

CP 3238-39, 3242-44 (Stanley Dec. at Exs. R, S, U, V).

There are no subsequent contract documents or agreements between the owners of the Copenhaver property and Seawest or its predecessors establishing that the Articles of Incorporation now relied upon by Seawest apply to the Copenhavers or otherwise providing for membership.

Extrinsic evidence (if considered) shows that both sides did not understand the easements to provide or require membership. When the grantors of the easements, Frank and Mary Gaudin, sold the property, the deed of sale emphasized that Seawest, not the purchasers, were "solely responsible for the construction, maintenance, financing and repair of the water system:"

[O]ne water hookup right in the well and

water system of SeaWest Services Association, a Washington non-profit corporation. Purchaser acknowledges that said corporation and/or John Grady, III, and his wife and John Grady Jr. and his wife, are solely responsible for the construction, maintenance, financing and repair of said well and water system[.]

CP 3412 (Stanley Dec. at Ex. AP) (Statutory Warranty Deed from Grantor Gaudin to Grantee Shelley at Exhibit A) (emphasis added).⁸ As detailed in the preceding section, Seawest president Ford expressed the same understanding in response to the title company's inquiry. CP 848.

Absent any evidence of a contractual agreement, there is simply no basis for the trial court to have found that these Seawest documents apply to the Copenhavers. CP 124-25 (Summary Judgment on Membership). Seawest's unilateral announcement in its articles that the Copenhavers are limited members does not make it so. Courts may not "foist upon the

⁸ Subsequent property transfers also mentioned that any outstanding "assessments" from Seawest must be paid as part of closing. Given the language quoted above, the reference probably was to any unpaid water bills consistent with the 2001 statement by Seawest President Ford describing quarterly billing for modest amounts. The language was not in the deed to the Copenhavers, although their title insurance report contained similar language commonly used as boilerplate to ensure transfer of a clean title. None of these statements made any reference to membership.

parties a contract they never made.” *Seattle Prof’l Eng’g Employees Ass’n v. Boeing Co.*, 139 Wn.2d 824, 833, 991 P.2d 1126 (2000).

3. There was no implied contract between the Copenhavers and Seawest

Seawest’s claim that there was an “implied contract” of membership created by the acceptance of water by the Copenhavers also fails. CP 810 (Plaintiff’s Reply in Support of Motion for Partial Summary Judgment Regarding Defendants’ Status as Limited Members of Seawest Association at p. 7).⁹ A contract is implied by actions which evidence a mutual intention to contract when viewed from the perspective of the ordinary course of dealing and common understanding. *Kilthau v. Covelli*, 17 Wn. App. 460, 563 P.2d 1305 (1977). Whether the parties’ actions in a particular case establish such mutual intent is a question of fact. *Id.*

⁹ The claim of an implied contract was first raised in Seawest’s reply, which is improper. *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991) (Stating that the “rule is well settled that the court will not consider issues raised for the first time in a reply brief”). The court did not find expressly that there was an implied contract, but it did so implicitly in ruling in its oral ruling that a “common scheme of development” made the Copenhaver property a “limited member” of Seawest. CP 136.

To constitute a contract implied in fact, there must be an offer and an acceptance, the acceptance must be in the terms of the offer and communicated to the offeror, and there must be a mutual intention to contract and a meeting of the minds of the parties. *Milone Etc. v. Bona Fide Builders*, 49 Wn.2d 363, 368, 301 P.2d 759 (1956). The burden of proving an implied contract is on the party asserting it, who must prove “each essential fact, including the existence of a mutual intention; and where circumstantial evidence is relied on, the circumstances must be such as to make it reasonably certain that the parties intended to and did enter into the alleged contract.” *Kellogg v. Gleeson*, 27 Wn.2d 501, 505, 178 P.2d 969 (1947).

In this case, there is a valid express contract, the easement agreements in which the Copenhavers’ predecessor reserved six hookups or water shares for six potential residences. The easements are the only pertinent agreements between the parties. Seawest did not produce evidence of an agreement for the owners of the Copenhaver property to be “limited members” of Seawest. Nothing in these easements implied any kind of “membership” in an Association. There is a total failure of proof that “limited member[ship]” ever was communicated, let alone agreed to

by any owner of the Copenhaver property. *Milone, supra* (communication of acceptance is an essential element of an implied contract).

The Copenhavers regularly paid small amounts of money for water after purchasing their home in 2001, consistent with Seawest's then-President Ford's statements to the title company "no annual dues" and of minimum \$25 monthly water charges to be billed quarterly. CP 3458-3527 (Stanley Dec. at Ex. AU) (Seawest billing records); CP 848 (2/18/10 Pickard Dec. at Ex. 2). On one occasion in 2007 Suzanne Copenhaver paid a larger invoice of \$3,950. CP 729 (Declaration of Jeana Walker in Response to Copenhaver Declaration of February 18, 2010 ... Re: Membership at p. 4). There is no evidence regarding Ms. Copenhaver's understanding or intent in making this one isolated larger payment. As the party moving for summary judgment, Seawest had the burden to produce such evidence if it is arguing that any purported understanding or intent based on this payment constituted an implied agreement for membership or to pay further assessments.

The easements do not provide for any payment for the water rights reserved in exchange for allowing the well to be built on the property. Even if this court were to conclude that an implied contract was created to

pay for water, it would be a giant leap (and one contrary to the subsequently stated understanding by both sides) to extend such an implied agreement to membership or to assessments for maintenance and repairs (and payment of attorneys' fees).¹⁰ CP 3412 (Stanley Dec. at Ex. AP) (Statutory Warranty Deed by Grantor Gaudin to Grantee Shelley at Exhibit A) (Seawest is "solely responsible for construction, maintenance, financing and repairs" of its water system); CP 848.

4. Seawest did not establish that the Copenhavers were part of a common development scheme

Perhaps in response to Seawest's reply argument of an implied contract, the trial court concluded that "there was a common scheme of development by which owners of water shares in what would become Seawest would be members, either limited or full." CP 137. The court relied upon developer Grady's assignment of interest in the water system easements to Seawest, explicit references to Seawest and assessments in

¹⁰ After this dispute arose Seawest imposed special assessments on its members to pay for its legal expenses in this litigation. CP 1967 (Plaintiff's Motion for Partial Summary Judgment Regarding Defendants' Status as Limited Members at p. 11). The Copenhavers have not paid these assessments. CP 729 (Declaration of Jeana Walker ... Re: Membership at p. 4).

subsequent deeds by the Copenhavers' predecessors in interest (but not in the Copenhavers' deed), and that the Copenhavers paid one assessment in 2007. *Id.*

A common scheme refers to a group of covenants that are included in the deeds to subdivision lots within a development. *See Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920). To be binding, a “comprehensive plan or scheme must have been adopted by the original vendor of the property, and that at least substantially all of the property sold must be subject to the covenants sought to be enforced.” *Tindolph v. Schoenfeld Bros.*, 157 Wash. 605, 610, 289 P. 530 (1930).

The requirements for a covenant to run in law are well established:

1) a promise which is enforceable between the original parties; 2) which touches and concerns; 3) which the parties intended to bind successors; and 4) which is sought to be enforced by an original party or a successor against an original party or a successor in possession; 5) who has notice of the covenant or has not given value.

Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp., 146 Wn.2d 194, 203, 43 P.3d 1233 (2002). Contrary to the court's conclusion, evidence in the record shows neither that the elements required for a covenant to run at law are present nor that the common development cases construing these factors are at all applicable.

For covenants to run at law, the restriction must derive from an enforceable promise between the original parties. *Lakeview*, 146 Wn.2d at 203. But there is no promise between the original grantors and grantees which can be construed as an agreement to bind the Copenhaver property as a member of the Seawest development.

The third required element also is missing. Seawest provided no evidence that the original parties intended the Copenhavers' property to be members of the Association. Seawest also cannot meet the requirement of notice. There is the too thin reed of a reference to "assessments" in the Copenhavers' title report, but in light of Ford's statements that reference cannot be extended beyond the modest quarterly payments described by Ford.

Moreover, the Copenhaver property is not within the Seawest development. This is undisputed and conflicts sharply with the case law applying an agreement implied from a common scheme of development only to properties *within* the subject development. *Tindolph v. Schoenfeld Bros.*, 157 Wash. 605, 607, 289 P. 530 (1930) (to have a common scheme, the covenants must "apply substantially to the entire tract sold"). There is

no authority that supports extending the law applying to a common development scheme to a property that is not within the development.¹¹

5. Even if the Copenhavers were “limited members” of Seawest, Seawest is not entitled to attorneys’ fees because the fee provision in its bylaws applies only to “each owner of a tract within SEAWEST”

Washington follows the “American rule” on attorneys’ fees, which provides that “attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery is permitted by contract, statute, or some recognized ground in equity.” *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 143, 930 P.2d 288 (1997).

Seawest and the trial court based purported entitlement to \$91,567 in attorneys’ fees exclusively on section 5.2 of Seawest's bylaws. CP 453 (Plaintiff’s Motion for Attorney’s Fees, etc.); CP 121-25 (Summary Judgment on Membership). But even if the Copenhavers were limited

¹¹ The ambiguous use of “assessments” further demonstrates how improper it would be to base the Copenhavers’ membership in Seawest on the inclusion of “assessment” in previous owners’ deeds (but not in the Copenhavers’ deed). The court states the Copenhavers paid “all assessments” until litigation began, including the nominal quarterly billings within that term. CP 135. The court’s use of the term is quite different from Seawest President Ford’s negative responses to questions whether there were “assessments” or “any other charges.” CP 848.

members as claimed by Seawest, the fee provision in Seawest's bylaws does not apply to the Copenhavers on its face. Section 5.2 allows Seawest to levy assessments, lien property, and collect attorneys' fees only on owners of tracts within the Seawest development – which does not include the Copenhavers:

5.2 Duration of Lien and Personal Obligation of Assessment. Pursuant to recorded covenants, **each owner of a tract within SEAWEST**, by acceptance of a deed therefor or execution of a contract to purchase, relating to a tract within SEAWEST, whether or not it shall be so expressed in such document, is deemed to covenant and agree to pay to the Association, annual dues and assessments, which may be a charge upon such tract. Each assessment together with interest, and any costs and attorney's fees which may be reasonable (sic) incurred to collect said assessments, shall be a continuing lien against the tract assessed and shall also be the personal obligation of the person who is the owner of such property at the time when the assessment fell due.

CP 4118 (3/29/10 Pickard Dec. at Ex. E) (Bylaws at p. 6) (emphasis added). The Copenhavers are not an "owner of a tract within Seawest," thus this provision thus does not apply to them. There is no provision for attorneys' fees against limited members, who are not owners of tracts

within the Seawest development.

A further indication that this bylaw provision does not apply to the Copenhavers is its recitation of the authority for the provision, "Pursuant to recorded covenants, ..." The owners of tracts within Seawest are encumbered by the two covenants Seawest recorded in 1984 and 1985, Stanley Dec. at Exs. M and N, the Copenhaver property is not.

The absence of a provision for fees in the bylaws applicable to Copenhavers is dispositive. There is no separate contract agreed to by the Copenhavers providing for attorneys' fees in litigation. Even if this court were to affirm the trial court's erroneous determination that the Copenhavers are members, they are not covered by the attorneys' fees provisions of the bylaws for "each owner of a tract within SEAWEST."

Should the Copenhavers prevail, they will become entitled to attorneys fees pursuant to RCW 4.84.330, which provides for the recovery of costs and fees "incurred to enforce the provisions of [a] contract or lease...to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not[.]" This provision applies where a party pursues a contract action against a nonsignatory (as Seawest has done here to the Copenhavers) forcing the nonsignatory to defend the

action, and holds that the party initiating the action should be estopped from later denying that the nonsignatory is a party to the contract for the purposes of an award of attorney's fees. *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984) *cited with approval in Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003).

6. The court improperly issued a preliminary injunction in a summary judgment order requiring the Copenhavers to pay future water excess water and assessments

In issuing a final order granting Seawest's motion for summary judgment on membership, the trial court also ordered the Copenhavers to pay "any and all future amounts levied by plaintiff in the ordinary course of business for water, excess water, and assessments." CP 125 (Summary Judgment on Membership). Although not explicitly labeled an injunction, the court's citation to RCW 4.44.470 makes plain its intent to invoke its contempt powers to enforce the provision. *Id.* (deciding that no security would be required).¹²

¹² The court's reliance on RCW 4.44.470 to support issuing an injunction without bond is misplaced in any event. The statute states

Courts restrict the scope of injunction orders to the harms demonstrated in the record by the moving party: “[i]njunctions must be tailored to remedy the specific harms *shown* rather than to enjoin all possible breaches of the law.” *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 143, 720 P.2d 818 (1986) (rejecting portion of order prohibiting operation of future potentially lawful business) (emphasis added). There is no present controversy over potential future assessments. The court abused its discretion by issuing an unnecessary injunctive order.

C. The court improperly expanded Seawest’s use of the easements

The trial court granted Seawest a range of easement rights not provided for in the easements themselves, including the right to build additional structures anywhere in its two separate easement areas. The court’s final order essentially rewrote the language of the easement, giving Seawest broad authority to:

“courts shall exercise care to require adequate though not excessive security *in every instance*.” RCW 4.44.470 (emphasis added).

build, repair, maintain and/or install additional wells, buildings, facilities (including without limitation storage tanks and accessory equipment) within the two easement areas, including, without limitation, the right to have an electrical generator and propane tank on the Copenhaver real property within the two recorded easements.

CP 151 (Summary Judgment on Easements). It also authorized Seawest to build fences anywhere within the easement area. CP 152 (¶ F).

The court's broad grant of authority responds to Seawest's claim that the scope of these easements was intended to change over time, adapting for "modernization" and "natural development," as well as meeting "consumer expectations." RP 3/4/2010, at 17-18.¹³ As discussed below, the court's acceptance of this argument does not account for the plain import of a "setback." Moreover, while the court concluded that extrinsic evidence was not needed to interpret the setback, the court nonetheless relied upon the subsequent conduct of the property owners to glean the grantor's original intent that "the water system would be upgraded over time to meet changing circumstances." RP 3/4/10, at 42.

¹³ The court's oral ruling was incorporated by reference into the written order, although the rationale was not in the body of the written order.

But the easements do not allow Seawest unlimited rights to each area. Instead, the keyhole-shaped easement allows Seawest to build and maintain a “well and water line[.]”. CP 3238, 4242-43 (Stanley Dec. at Exs. R, U). The circle easement was created as a "pollution control setback." CP 3239, 3244 (Stanley Dec., Exs. S, V). A "purpose" statement in this easement specifies explicitly four things in addition to the setback: “a well, pump, treatment facility and storage tank[.]” *Id.*

An easement is a grant of some of the property rights held within the “bundle of rights” comprising fee ownership of property. The extent of an easement is determined by considering the intent of the parties to the original grant, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied, considering the instrument as a whole. *Sunnyside Valley Irrig. Dist. v. Dickey*, 149 Wn.2d 872, 880, 73 P.3d 369 (2003). An easement should not be construed expansively and instead “must be construed strictly in accordance with its terms in an effort to give effect to the intention of the parties.” *Sanders v. City of Seattle*, 160 Wn.2d 198, 214-15, 156 P.3d 874 (2007). Instruments which are “part of the same transaction, relate to the same subject matter and are executed at the same

time” should be construed together, even if they were recorded separately. *Turner v. Wexler*, 14 Wn. App. 143, 146, 538 P.2d 877 (1975).

If the plain language of the instrument is unambiguous, the inquiry stops there. *Id.* Only if an ambiguity exists may a court review extrinsic evidence to show the original parties' intent, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions. *Id.* “A written instrument is ambiguous when its terms are uncertain or capable of being understood as having more than one meaning.” *Murray v. W. Pac. Ins. Co.*, 2 Wn. App. 985, 989, 472 P.2d 611 (1970).

Reading the easements together, there can be little doubt as to what the plain language provided: a keyhole-shaped easement “for the installation, operation and maintenance of a well and water line” and a separate, larger “well pollution control setback consisting of a circular portion of land.” The court relied upon the purpose statement in the pollution control setback easement to conclude that Seawest can place equipment within the easements “without limitation.” CP 151 (Summary Judgment on Easements). But *if* the purpose statement in the second easement was intended to expand what structures could be placed within

the easement beyond the "well and water line" specified in the keyhole shaped easement, it did not do so "without limitation." Instead, it specified "a well, pump, treatment facility and storage tank." CP 3239, 3244 (Stanley dec. at Exs. S, V).

There is no language in either easement authorizing an electrical generator, propane tank, or fences. Seawest made no argument to the trial court that an electrical generator or a propane tank is a "treatment facility" or "storage tank" within the plain meaning of the grant. The grantor *could* have authorized other facilities or structures. For example, the second easement could have alluded to facilities "such as" a "storage tank." Or it could have added (after listing the specified items) language such as "and any other facilities that Seawest desires to construct." But no such language was included, and the court erred in rewriting the easement to expand the grantor's otherwise plain intent.

Seawest did not meet the initial burden of the moving party to show that the grantor intended this, let alone that there was no factual dispute. The court's ruling that an easement is a malleable intrusion burdening property owners' use and enjoyment of their property violated the familiar rules governing summary judgment and also was wrong

legally. Seawest argued that the state administrative code “require[s] Seawest to be prepared for abnormal operating conditions in accord with consumer expectations” and stated that consumers were concerned about damage to the system if the power goes out. RP 3/4/10 at pp. 16-17. However, WAC 246-290-200(2) recommends, but does not, as Seawest claims, *require* that community expectations be considered in designing a system. Neither easement’s plain language provides for “community expectations” or any other open-ended grant.¹⁴

The court relied upon extrinsic evidence that the system was expanded to serve 28 connections in 1986 and that a storage tank, booster pumps, and water filters were added thereafter. CP 160 (Summary

¹⁴ In its oral ruling, the court held that a previous ruling denying the Copenhavers’ request for a preliminary injunction pertaining to the scope of the pollution control setback easement somehow was dispositive on the merits, and precluded the Copenhavers from opposing Seawest’s summary judgment motion on that issue. CP 157. But it is basic law that a ruling granting or denying a motion for preliminary injunction is not determinative of the ultimate outcome on the merits and does not preclude any party’s arguments on the merits. *See Rabon v. City of Seattle*, 135 Wn.2d 278, 286, 957 P.2d 621 (1998) (“in accord with well-settled principles, a court is *not* to adjudicate the ultimate merits of the case”) (emphasis added). Also, while CR 65(a)(2) vests the court with authority to consolidate a preliminary injunction hearing with trial on the merits, no such order was entered here.

Judgment on Easements) (Excerpted Verbatim Report of Proceedings Attached to Order as Exhibit A). This was error for two reasons. First, courts cannot rely upon extrinsic evidence where the meaning of an instrument is clear. *Turner*, 14 Wn. App. at 146.

Second, this evidence simply does not support the court's ruling of a flexible and malleable easement that allowed structures not enumerated in the easements because of 'consumer expectations' or 'modernization,' but instead is consistent with the express language in the easements. A storage tank is specifically enumerated in the second easement, CP 3239, 3244 (Stanley Dec. at Exs. S, V), and the "booster pumps" referred to by the court serve the storage tank. The filters cited by the court are accurately described by and included within the easement's provision for "treatment facilities." CP 3239, 3244. The "new" water pump cited in the court's decision is consistent with the easement's plain provision for a "pump." *Id.*

It may be curious that the parties executing these easements chose to refer to a storage tank and treatment facility in the purpose statement rather than in the grant, and that they referenced them in the pollution control setback easement instead of listing them along with the well and

water line in the keyhole shaped easement. Whatever reason for these oddities, the court's holding that the purpose statement expanded the uses ultimately defeats Seawest's claim of right to install unspecified and unlimited structures. The better inference is that the parties intended that anything not identified would have to be established explicitly in a new easement agreement.

D. Seawest may not Pollute the Copenhavers' Land

There is no basis to support the trial court's conclusion that Seawest may discharge its backwash effluent within the pollution control setback. CP 151-52 (Summary Judgment on Easements, at pp. 10-11, ¶¶ C, D, and E). "Setback" is a common and familiar term prohibiting or restricting what can be done in a specified area, usually defined as a distance from a particular point or line. For example, Island County's code provides that setbacks are areas in which certain types of construction and other activities cannot occur. ICC 17.02.050. Accordingly, a "pollution control setback" establishes an area in which construction or activities which could cause pollution cannot occur to prevent pollution of the groundwater supplying the well.

The pollution control setback easement was intended to ensure

compliance with state rules. The regulations governing source protection around wells in effect in 1979 similarly restricted pollutants within a 100 foot setback area: “[g]round water sources shall be located, constructed, and maintained in a manner which will assure the minimum possibility of contamination[.]” (Attached to Appellants’ Brief as Appendix 3).¹⁵ These regulations required the purveyor to file a covenant with the county auditor stating that “no source of contamination will be constructed, stored, disposed of, or applied, in the control area without the written permission of the [health] department.”¹⁶

The trial court issued a series of provisions authorizing Seawest to discharge its backwash effluent anywhere within the pollution control setback. CP 151-53 (Summary Judgment on Easements at pp. 10-11 (¶¶ C, D, and E)). Worse yet, the court ordered the Copenhavers to disconnect

¹⁵ WAC 248-54-350(2)(a) (repealed 1979); WAC 248-54-660(2)(a) (repealed 1983). The regulations in effect when the parties executed the easements in 1983 were similar. WAC 248-54-125(1) (repealed 1991). Current state regulations governing small community water systems provide for a sanitary control area (SCA) restricting the presence of potential pollutants within a 100 foot setback area. WAC 246-290-135(d).

¹⁶ WAC 248-54-660(2)(b) (repealed 1983). *See also* WAC 248-54-125(1) (repealed 1991).

the system they implemented to divert the effluent to a retention pond rather than allow it to pollute the groundwater. *Id.*, ¶ E.

The purpose of Seawest's circle shaped easement is to prevent pollution, not to facilitate it. Nothing in its plain language provides for the introduction of the polluted, rusty, purplish-brown backwash effluent water which contains the pollutants filtered out of Seawest's well. CP 3598 (Stanley Dec. at Ex. AY) (10/21/02 Letter from Jim Copenhaver to Island County Public Works). Seawest has already acknowledged that that is was aware that the discharge contained potassium permanganate that would “discolor and accumulate in [the Copenhavers’] drainage over time.” CP 4389 (4/14/10 Pickard Dec. at Ex. H); CP 4377 (4/14/10 Picard Dec. at Ex. G).

The 1979 covenant restricting the Copenhavers’ activities in the easement area supports this interpretation. The purpose of that covenant is to “prevent certain practices hereinafter enumerated in the use of said grantors land which might contaminate said water supply” and accordingly the covenant prohibits “cesspools, sewers, privies, septic tanks, drainfields, manure piles, garbage of any kind or description, barns, chicken houses, rabbit hutches, pigeons, or other enclosures or structures

for the keeping or maintenance of fowls or animals, or storage of liquid or dry chemicals, herbicides or insecticides." CP 3240 (Stanley Dec. at Ex. T) (Recorded under Auditor's File Number # 359806).

Seawest's discharge of its backwash effluent is comparable to a "drainfield ... which might contaminate said water supply." Read together, the circle-shaped easement and covenant establish that the purpose of the circle was to keep pollution out of the area near the well – not to allow Seawest to pump polluted backwash water into the area. Yet this is what Seawest has been doing and what the trial court's summary judgment order allows it to continue. CP 151-53.

V. CONCLUSION

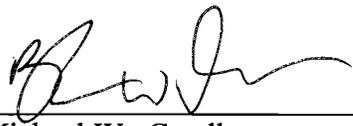
The Court of Appeals should reverse the trial court's summary judgment rulings. The court should reverse the judgment for assessments (including its purported injunction to pay without limitation all future assessments), interest, and attorneys' fees and costs. The court should hold that the Copenhavers are not "members" of Seawest and are not subject to charges including special assessments other than for the quarterly billings for water service. It should hold that Seawest cannot discharge polluted backwash effluent within the "pollution control

setback." The court should reverse the trial court's expansion of Seawest's easement rights beyond the structures and facilities specifically enumerated in the easements which did not include propane tanks, generators, or fences. Appellants are entitled to attorneys' fees.

DATED this 27th day of January, 2011.

Respectfully submitted,

GENDLER & MANN, LLP

By: 

Michael W. Gendler
WSBA No. 8429
Brendan W. Donckers
WSBA No. 39406
Attorneys for Appellants

APPENDIX 1

Coupeville



Island Title Company

RECEIVED

JAN 22

January 16, 2001

Marvin Ford
Sea West Services Association
874 Ocean Bluff Ln.
Coupeville WA 98239

Re: Escrow No.: S76893
Property Address: 951 N. West Beach Road Oak Harbor WA 98277

We are in the process of closing a transaction for ELDON M. SMITH on the above-described property.

We need the following information to complete our closing:

Annual dues/assessments are: 15 NOT A MEMBER OF SEAWEST HOME ASSN.
And are presently paid () unpaid ()

Delinquent dues/assessments not included in annual amount above: NO ANNUAL DUES
HAS A WATER SHARE - MIN. 25.00 MONTH BILLED QUARTLY

Any additional charges: DUES 75.00 FOR 4TH QT. ENDING 12/31/2000
PLEASE INFORM INFORMATION ON NEW OWNER

Our fiscal year runs from 1/1/2000 to 12/31/2001

Please provide the requested information, sign below, and return this letter as soon as possible.

Thank you for your prompt attention to this request.

Sincerely,

ISLAND TITLE COMPANY

Edie Silvey
Escrow Assistant

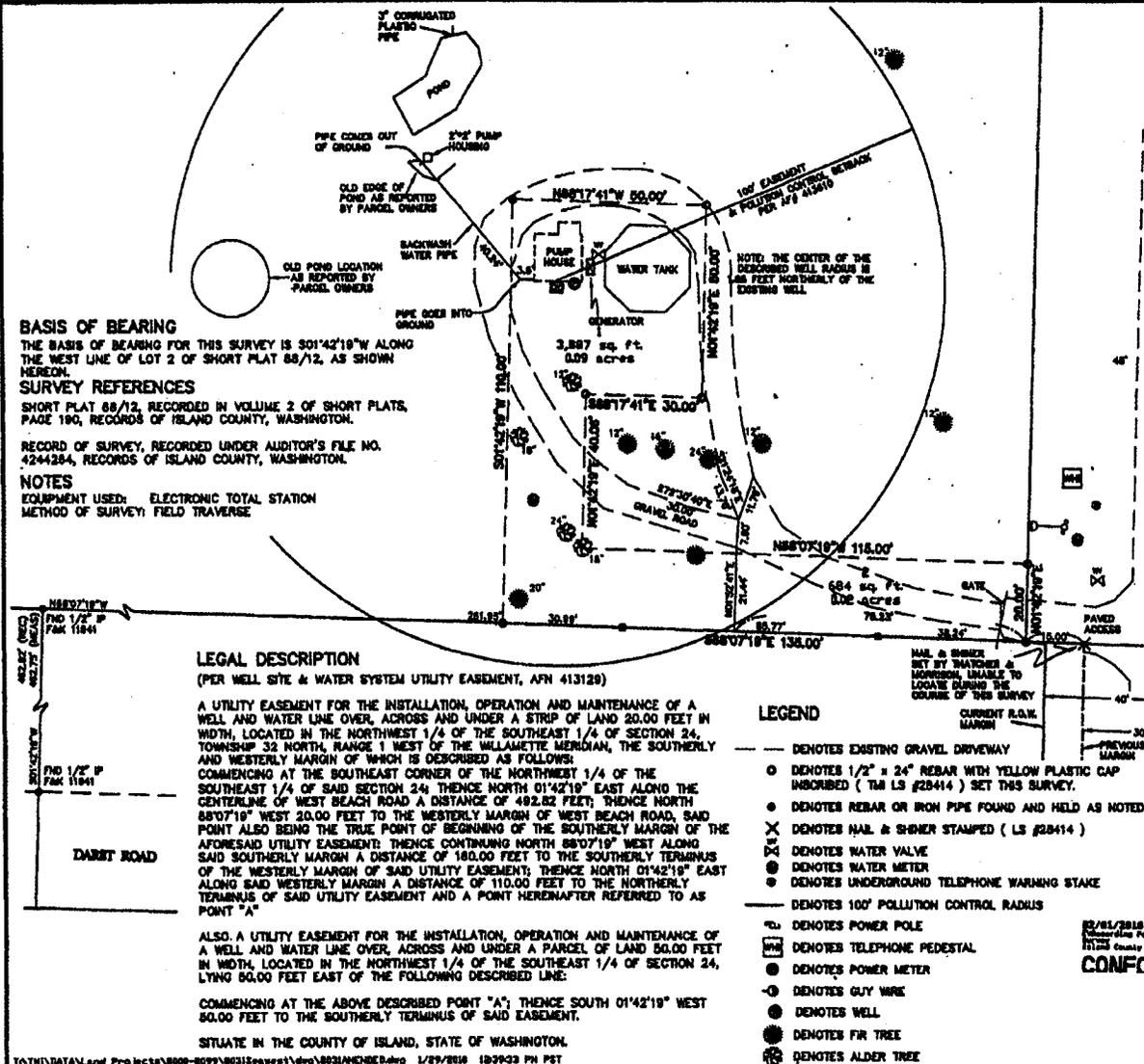
INFORMATION PROVIDED BY:

MARVIN FORD SEAWEST PRESIDENT
Name/Title
Phone No. 360-678-3874

EXHIBIT 2

770 N.E. Midway Blvd. P.O. Box 1050 Oak Harbor, WA 98277
360-675-0733 360-321-1311 Fax 360-675-5143 Escrow Fax 360-679-9356

APPENDIX 2



EASEMENT FOR CONSTRUCTION AND MAINTENANCE OF WELL, AND ESTABLISHMENT OF POLLUTION CONTROL SETBACK PER AF #413810

LEGAL DESCRIPTION
 A CIRCULAR PORTION OF LAND HAVING A RADIUS OF 100 FEET SITUATED IN THE NORTHWEST 1/4 OF THE SOUTHEAST 1/4 OF SECTION 24, TOWNSHIP 32 NORTH, RANGE 1 WEST OF THE WILLAMETTE MERIDIAN, THE CENTER OF WHICH IS DESCRIBED AS FOLLOWS:
 COMMENCING AT THE SOUTHEAST CORNER OF THE NORTHWEST 1/4 OF THE SOUTHEAST 1/4 OF SAID SECTION 24;
 THENCE NORTH ALONG THE CENTER LINE OF RACE ROAD (WEST BEACH ROAD PER DECLARATION OF ROBERT CRAY, SUPERIOR COURT NO. 09-2-00290-2) A DISTANCE OF 492.82 FEET;
 THENCE WEST 188 FEET;
 THENCE NORTH 90 FEET TO THE CENTER OF SAID POLLUTION CONTROL SETBACK.
 SITUATE IN THE COUNTY OF ISLAND, STATE OF WASHINGTON.

BASIS OF BEARING
 THE BASIS OF BEARING FOR THIS SURVEY IS S01°42'19"W ALONG THE WEST LINE OF LOT 2 OF SHORT PLAT 88/12, AS SHOWN HEREON.

SURVEY REFERENCES
 SHORT PLAT 88/12, RECORDED IN VOLUME 2 OF SHORT PLATS, PAGE 190, RECORDS OF ISLAND COUNTY, WASHINGTON.

RECORD OF SURVEY, RECORDED UNDER AUDITOR'S FILE NO. 4244284, RECORDS OF ISLAND COUNTY, WASHINGTON.

NOTES
 EQUIPMENT USED: ELECTRONIC TOTAL STATION
 METHOD OF SURVEY: FIELD TRAVERSE

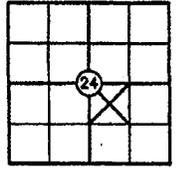
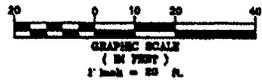
LEGAL DESCRIPTION
 (PER WELL SITE & WATER SYSTEM UTILITY EASEMENT, APN 413129)

A UTILITY EASEMENT FOR THE INSTALLATION, OPERATION AND MAINTENANCE OF A WELL AND WATER LINE OVER, ACROSS AND UNDER A STRIP OF LAND 20.00 FEET IN WIDTH, LOCATED IN THE NORTHWEST 1/4 OF THE SOUTHEAST 1/4 OF SECTION 24, TOWNSHIP 32 NORTH, RANGE 1 WEST OF THE WILLAMETTE MERIDIAN, THE SOUTHERLY AND WESTERLY MARGIN OF WHICH IS DESCRIBED AS FOLLOWS:
 COMMENCING AT THE SOUTHEAST CORNER OF THE NORTHWEST 1/4 OF THE SOUTHEAST 1/4 OF SAID SECTION 24 THENCE NORTH 01°42'19" EAST ALONG THE CENTERLINE OF WEST BEACH ROAD A DISTANCE OF 492.82 FEET; THENCE NORTH 88°07'19" WEST 20.00 FEET TO THE WESTERLY MARGIN OF WEST BEACH ROAD, SAID POINT ALSO BEING THE TRUE POINT OF BEGINNING OF THE SOUTHERLY MARGIN OF THE AFORESAID UTILITY EASEMENT; THENCE CONTINUING NORTH 88°07'19" WEST ALONG SAID SOUTHERLY MARGIN A DISTANCE OF 180.00 FEET TO THE SOUTHERLY TERMINUS OF THE WESTERLY MARGIN OF SAID UTILITY EASEMENT; THENCE NORTH 01°42'19" EAST ALONG SAID WESTERLY MARGIN A DISTANCE OF 110.00 FEET TO THE NORTHERLY TERMINUS OF SAID UTILITY EASEMENT AND A POINT HERENAFTER REFERRED TO AS POINT "A"

ALSO, A UTILITY EASEMENT FOR THE INSTALLATION, OPERATION AND MAINTENANCE OF A WELL AND WATER LINE OVER, ACROSS AND UNDER A PARCEL OF LAND 50.00 FEET IN WIDTH, LOCATED IN THE NORTHWEST 1/4 OF THE SOUTHEAST 1/4 OF SECTION 24, LYING 50.00 FEET EAST OF THE FOLLOWING DESCRIBED LINE:
 COMMENCING AT THE ABOVE DESCRIBED POINT "A"; THENCE SOUTH 01°42'19" WEST 50.00 FEET TO THE SOUTHERLY TERMINUS OF SAID EASEMENT.

SITUATE IN THE COUNTY OF ISLAND, STATE OF WASHINGTON.

- LEGEND**
- DENOTES EXISTING GRAVEL DRIVEWAY
 - DENOTES 1/2" x 24" REBAR WITH YELLOW PLASTIC CAP INSCRIBED (TM LS #28414) SET THIS SURVEY.
 - DENOTES REBAR OR IRON PIPE FOUND AND HELD AS NOTED.
 - ✕ DENOTES NAIL & SHIMMER STAMPED (LS #28414)
 - ⊗ DENOTES WATER VALVE
 - ⊙ DENOTES WATER METER
 - ⊙ DENOTES UNDERGROUND TELEPHONE WARNING STAKE
 - DENOTES 100' POLLUTION CONTROL RADIUS
 - ⊕ DENOTES POWER POLE
 - ⊕ DENOTES TELEPHONE PEDESTAL
 - ⊕ DENOTES POWER METER
 - DENOTES GUY WIRE
 - DENOTES WELL
 - DENOTES FIR TREE
 - DENOTES ALDER TREE



02/01/2010 10:34:53 AM
 Recording Fee \$425.00 Page 1 of 1
 TMI County Information

CONFIRMED COPY

THIS DOCUMENT IS TO AMEND RECORD OF SURVEY IN AF #4128236 TO ADD THE EASEMENT FOR CONSTRUCTION AND MAINTENANCE OF WELL, AND ESTABLISHMENT OF POLLUTION CONTROL SETBACK.

SURVEYOR'S CERTIFICATE
 THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORING ACT, IN JANUARY 2010, AT THE REQUEST OF SEAMEST WATER.

L. SHAYNE THATCHER CERT. No. 28474
 DATE: 1-21-10



AUDITOR'S CERTIFICATE
 FILED FOR RECORD THIS _____ DAY OF _____ 2010 AT _____ M. IN BOOK _____ OF SURVEYS, AT PAGE _____ AT THE REQUEST OF L. SHAYNE THATCHER, UNDER AUDITOR'S FILE NO. _____

L. Shyne Thatcher
 COUNTY AUDITOR

ISLAND COUNTY
 COUNTY AUDITOR
 STATE OF WASHINGTON



AMENDED RECORD OF SURVEY OF A PORTION OF THE NW 1/4 OF THE SE 1/4 OF
 SEC. 24, TWP. 32 N., RNG. 1 W., W.M.
 Island County Washington

Thatcher & Morrison, Inc.
 200, Inc 1961
 1264 14th Street, Suite 104
 Pasco, Washington 99301
 509-337-2100 Fax 509-337-7004

APPENDIX 3

submitted to the secretary for review. [Order 49, § 248-54-320, filed 12/17/70.]

WAC 248-54-330 Approval by health officer. For those water supplies where the health officer has assumed primary responsibility under WAC 248-54-270, the health officer may approve preliminary reports, plans and specifications in accordance with engineering criteria prepared by the secretary and he may waive sections WAC 248-54-320 and 248-54-340. [Order 49, § 248-54-330, filed 12/17/70.]

WAC 248-54-340 Inspection and certification by a professional engineer. Within sixty days following the completion of and prior to the use of any project or portions thereof for which plans and specifications have received the approval of the secretary, a certification shall be made to the secretary and signed by a professional engineer that the project was inspected by him or his authorized agent and that it was constructed in accordance with the plans and specifications approved by the secretary. [Order 49, § 248-54-340, filed 12/17/70.]

WAC 248-54-350 Source protection. (1) All public water supplies shall be obtained from the highest quality source which is feasible, and attention should be given to minimize contamination of the source.

(2)(a) Ground water sources shall be located, constructed and maintained in a manner which will assure the minimum possibility of contamination and be so situated and developed as to prevent surface water from entering the well or spring. To assure adequate sanitary control in the vicinity of the source, the purveyor shall control all land within a radius of one hundred feet of the well or spring and any additional land as may be determined necessary by the secretary. The total required control area shall be based upon an evaluation of well construction details; and geological, hydrological, and other relevant factors.

(b) The control area required in subsection (a) must be owned by the purveyor in fee simple absolute, or he must have the right to exercise complete sanitary control of the land through the provisions of a long-term renewable lease or a restrictive easement or a restrictive covenant or some combination of these. If control is by easement or covenant the rights granted the purveyor must run with the land so long as it is used as a source of public water supply. Fee titles, lease agreements, easements and covenants shall be recorded with the appropriate county auditor, and a copy of each document shall be filed with the secretary. [Order 49, § 248-54-350, filed 12/17/70.]

WAC 248-54-360 Water treatment. (1)(a) The minimum degree of treatment for public water supplies shall be continuous and effective disinfection, except as provided in WAC 248-54-360(2) and 248-54-360(3).

(b)(i) When chlorine or a chlorine compound is used as the disinfecting agent, and where the pH does not exceed 8.0, a minimum free chlorine residual of 0.2 mg/L shall be maintained following a contact period of thirty minutes, or 0.6 mg/L after ten minutes. A minimum of

ten minutes of contact shall be provided ahead of the first point of domestic use at peak flow conditions except as otherwise approved by the secretary.

(ii) If the pH exceeds 8.0, or unusual conditions of raw water contamination exist or are suspected or anticipated, or bacteriological results indicate that chlorination may be ineffective, a higher free chlorine residual shall be maintained, as required by the secretary.

(iii) A test for chlorine residual shall be made daily or at an interval necessary to assure effective operation as determined by the secretary. The tests shall be measured by any method listed in "Standard Methods". The results shall be recorded and submitted to the secretary in accordance with WAC 248-54-440.

(iv) Continuous chlorine analysers are recommended.

(2) Wells - At the discretion of the secretary, disinfection will not be required for well water sources when a consideration of the depth and geologic setting of the aquifer, well construction, the extent of the sanitary control area surrounding the site, existing or potential sources of contamination, and the bacteriological quality indicate disinfection is not necessary for public health protection.

(3) Springs - The minimum treatment for springs shall be disinfection unless in the judgment of the secretary sufficient evidence is submitted to show that the spring originates in a stratum not subject to contamination. All springs shall be collected in a structure not subject to contamination by surface water.

(4) The presence of iron or sulfur bacteria or other conditions that affect the quality of the water supply may also necessitate chlorination or other methods of quality control.

(5) Surface water supplies—

(a) All surface water supplies shall be treated by a process which has a demonstrated capability to produce water in compliance with the quality standards in WAC 248-54-430. Consideration will be given to the physical, chemical and bacteriological quality of the source, and the presence, type and degree of facilities or activities having an effect on water quality. Methods of treatment may include coagulation, sedimentation, filtration, disinfection or combinations of these.

(b) Disinfection shall be the minimum treatment acceptable for surface water supplies. Additional treatment will be required if in the opinion of the secretary certain conditions are not met. These shall include but not be limited to:

(i) All facilities and activities in the watershed which may affect public health are under the surveillance of the purveyor and are satisfactorily limited and controlled so as to preclude degradation of the physical, chemical, biological or radiological quality of the source of supply.

(ii) The purveyor, as part of the comprehensive plan required in WAC 248-54-280 or independently for those systems not required to prepare such a plan, shall develop and submit to the secretary for approval a report identifying all facilities, conditions and activities within its watershed, together with a proposed program for necessary surveillance, limitation and control.

(iii) Coliform bacteria do not exceed 100 MPN in raw water as measured by a monthly arithmetic mean and at

(4) The operations program shall be reviewed and updated as necessary to assure adequate water service at all times, and shall be located and maintained in such a manner as to be usable by personnel of the public water system. [Order 153, § 248-54-610, filed 12/5/77.]

WAC 248-54-620 Approval of water systems existing prior to August 1, 1977. (1) In order to consider any public water system in existence prior to August 1, 1977, for approval, the department may require the purveyor to provide any or all of the following information:

(a) As-built plans of the water system, size of the water system, estimate of water consumption, results of sanitary survey, source capacity, and water right status;

(b) Specific data on chemical, bacteriological, physical, and radiological water quality for both the raw and drinking water;

(c) An operations program in accordance with WAC 248-54-610; and

(d) Other data as required by the department. This may include, but not be limited to full compliance with WAC 248-54-580, 248-54-590, and/or 248-54-600.

(2) The department may take one of the following actions based upon review of the data submitted by the purveyor:

(a) Not approve the system, in which case a compliance program may be required;

(b) Grant limited or provisional approval based on a program to bring the system into full compliance; or

(c) Grant full approval. [Order 153, § 248-54-620, filed 12/5/77.]

WAC 248-54-630 Requirements for engineers. All water system plans and engineering documents or final plans and specifications for new public water systems, extensions or alterations as required in WAC 248-54-580, 248-54-590, and 248-54-600, except minor pipeline extensions and replacement or other minor projects not requiring engineering expertise, shall be prepared by a professional engineer licensed in the State of Washington in accordance with chapter 18.43 RCW and shall bear his seal on all copies of plans and specifications, engineering reports, or water system plans submitted to the department for review. [Order 153, § 248-54-630, filed 12/5/77.]

WAC 248-54-640 Approval by health officer. For those public water systems where the health officer has assumed primary responsibility under WAC 248-54-570, the health officer may approve preliminary reports, plans and specifications in accordance with engineering criteria prepared by the department. [Order 153, § 248-54-640, filed 12/5/77.]

WAC 248-54-650 Inspection and certification by a professional engineer. Within sixty days following the completion of and prior to the use of any project or portion thereof for which plans and specifications have received the approval of the department, a certification shall be made to the department and signed by a professional engineer that the engineer or his authorized agent

has inspected the physical facilities of the project; which as to layout, size and type of pipe, valves and materials, reservoirs and other designed physical facilities has been constructed in accordance with the plans and specifications approved by the department, and in the opinion of the engineer, the installation, testing and disinfection of the system was carried out in accordance with the specifications approved by the department for the project. It shall be the responsibility of the purveyor to assure that the requirements of this section have been fulfilled prior to the use of any completed project or portion thereof. [Order 153, § 248-54-650, filed 12/5/77.]

WAC 248-54-660 Source protection and treatment.

(1) General - All public water systems shall be obtained from the highest quality source which is feasible, and attention must be given to minimize contamination of the source. The minimum degree of treatment for all public water systems shall be continuous and effective disinfection except as provided in WAC 248-54-660(2)(d).

(a) Chlorination

(i) When chlorine or a chlorine compound is used as the disinfecting agent, and where the pH does not exceed 8.0, a minimum free chlorine residual of 0.2 milligrams per liter (mg/l) shall be maintained following a contact period of thirty minutes or 0.6 mg/l after ten minutes. A minimum of ten minutes of contact shall be provided ahead of the first point of domestic use at peak flow conditions except as otherwise approved by the department. Longer contact times and higher chlorine residuals shall be required for sources more susceptible to contamination such as shallow wells and infiltration galleries, and for sources with quality factors such as pH and turbidity that interfere with disinfection efficiency.

(ii) Chlorine residual shall be measured at least daily or at an interval necessary to assure effective operation as determined by the department. The analysis shall be conducted in accordance with "Standard Methods".

(b) Disinfection methods, other than chlorine, may be approved by the department under special circumstances.

(2) Wells

(a) Ground water sources shall be located, constructed, and maintained in a manner which will assure the minimum possibility of contamination, and be so situated and developed as to prevent surface water from entering the well or spring. To assure adequate sanitary control in the vicinity of the source, the water purveyor shall control all land within a radius of 100 feet (30 meters) of the well; except that the water purveyor shall control land of a greater or lesser size or of a different shape than is defined by a 100 foot radius where an evaluation of geological and hydrological data, well construction details, and other relevant factors indicates that a control area of different size or shape will assure adequate sanitary control in the vicinity of the source.

(b) The control area must be owned by the water purveyor in fee simple, or he must have the right to exercise complete sanitary control of the land through the provisions of a long term renewable lease or a restrictive

easement or a restrictive covenant or some combination of these. In any event, continuity of the control area must be assured by a covenant filed with the county auditor to run with the land as long as it is used as a source of public water supply. The document shall contain a statement to the effect that no source of contamination will be constructed, stored, disposed of, or applied, in the control area without the written permission of the department. Fee titles, lease agreements, easements and covenants shall be recorded with the appropriate county auditor, and a copy of each document shall be filed with the department.

(c) The construction of all groundwater supplies shall be in accordance with the *Minimum Standards for Construction and Maintenance of Water Wells*, as adopted by the Department of Ecology pursuant to chapter 18.104 RCW.

(d) At the discretion of the department, disinfection will not be required for well water sources when a consideration of the depth and geologic setting of the aquifer, well construction, the extent of the sanitary control area surrounding the site, existing or potential sources of contamination, and the bacteriological quality indicate disinfection is not necessary for public health protection.

(3) Springs - The minimum treatment for springs shall be disinfection unless sufficient evidence is submitted to the department showing that the spring originates in a stratum not subject to contamination. All springs shall collect in a covered structure not subject to contamination by surface water.

(4) Surface Water Supplies

(a) All surface water supplies shall be treated by a process which has a demonstrated capability to produce water in compliance with the quality standards in WAC 248-54-740. Consideration will be given to the physical, chemical, radiological, and microbiological quality of the source, and the presence, type and degree of facilities or activities having an actual or potential effect on water quality.

(b) Treatment including at least coagulation, filtration, and disinfection shall be the minimum required for surface supplies unless certain conditions regarding watershed control, raw water quality, and system operation are met; in which case, disinfection as the sole means of treatment shall be allowed. These conditions shall include but not be limited to:

(i) Watershed Control

(A) All facilities and activities in the watershed which may affect public health shall be under the surveillance of the water purveyor and shall be satisfactorily limited and controlled so as to preclude degradation of the physical, chemical, microbiological, viral, or radiological quality of the source of supply.

(B) The water purveyor shall submit to the department for approval a report identifying all conditions, activities, and facilities within its watershed, together with an acceptable program for necessary surveillance, limitation, and control. This report shall be part of the water system plan required in WAC 248-54-580, or prepared

independently for those systems not required to have such a plan. The report shall be reviewed, updated as necessary, and submitted to the department annually.

(ii) Raw Water Quality - The physical, chemical and radiological water quality of the source shall conform to the requirements of WAC 248-54-740. Coliform bacteria shall not exceed 100 MPN or 100 organisms per 100 milliliters when using the membrane filter method as measured by a monthly arithmetic mean and at the frequency required in WAC 248-54-740. If fecal coliform bacteria are measured, results shall not exceed 20 MPN or 20 organism per 100 milliliters when using the membrane filter method.

(iii) System Operation

(A) A continuous free chlorine residual of 0.2 mg/l shall be maintained in all active parts of the system. Booster chlorination may be necessary to meet this requirement. Dead-end mains and other locations where it is not possible to maintain a chlorine residual shall be flushed on a routine basis.

(B) The purveyor shall monitor and record turbidity on a continuous basis at the point where the water enters the distribution system. Monthly reports shall be made to the department on forms provided by the department.

(C) The water purveyor shall monitor chlorine residual at a representative number of points in the system on at least a daily basis. Reports shall be made to the department on forms provided by the department. In order to assure adequate monitoring of chlorine residual, the department may require the use of continuous chlorine residual analyzers and recorders. [Order 153, § 248-54-660, filed 12/5/77.]

WAC 248-54-670 Fluoridation. (1) Where fluoridation is practiced, the concentration of fluoride shall be maintained in the range 0.8 - 1.3 mg/l or as required by the department. Determination of fluoride concentration shall be made daily, or as required by the department, and reports of such analyses submitted to the department monthly on forms provided by the department. Such analyses shall be made in accordance with procedures listed in "Standard Methods". Check samples shall be submitted monthly or as required by the department to the state public health laboratory.

(2) Plans, specifications and an operations manual discussing testing, sampling and maintenance for any fluoridation installation shall be submitted to the department for approval prior to construction, as required by WAC 248-54-600. [Order 153, § 248-54-670, filed 12/5/77.]

WAC 248-54-680 Design of public water system facilities. (1) Public water system facilities shall be designed so as to provide an adequate quantity and quality of water in a reliable manner. Good engineering practice, such as the *Recommended Standards for Water Works, A Committee Report of the Great Lakes - Upper Mississippi River Board of State Sanitary Engineers, 1976 Edition** or any superceding edition or other design criteria and standards acceptable to the department, shall be used.

unless the purveyor requests an extension of the approval period. Extension of the approval may be obtained by submitting a status report with a written schedule for completion of the work to the department for approval.

(10) Plans and specifications for existing systems may be approved retroactively subject to a satisfactory review of the following:

- (a) As-built plans of the subject area;
- (b) An engineering report in conformance with 248-54-085; and
- (c) Other data defined by the department, i.e., well data, water quality information, and sanitary protection of source.

(11) After review of plans and specifications packages, the department shall take any of the following actions:

- (a) Approve the plans and specifications for the system.
- (b) Issue a limited or provisional approval based upon a defined program for the system to achieve complete approval.
- (c) Disapprove and issue a list of items required for approval. [Statutory Authority: RCW 43.20.050. 83-19-002 (Order 266), § 248-54-095, filed 9/8/83.]

PART 3. DESIGN OF PUBLIC WATER SYSTEMS

WAC 248-54-105 Design standards. Good engineering practice, such as the current edition of Recommended Standards for Water Works, a Committee Report of the Great Lakes - Upper Mississippi River Board of State Sanitary Engineers, department guidelines - Sizing Guidelines for Public Water Supplies, American Public Works Association (APWA), American Water Works Association (AWWA) standard specifications or other design criteria and standards acceptable to the department, shall be used in the design of all public water systems. [Statutory Authority: RCW 43.20.050. 83-19-002 (Order 266), § 248-54-105, filed 9/8/83.]

WAC 248-54-115 Location. New public water systems or additions to existing systems which in the judgment of the department are within an area subject to significant risk from earthquakes, floods, fires, or other disasters causing a breakdown to any portion of the public water system shall not be allowed. [Statutory Authority: RCW 43.20.050. 83-19-002 (Order 266), § 248-54-115, filed 9/8/83.]

WAC 248-54-125 Source protection. Public drinking water shall be obtained from the highest quality source feasible. Existing and proposed sources of supply shall conform to the water quality standards established in WAC 248-54-175.

(1) For wells and springs, the water purveyor shall provide an area of sanitary control for a radius of one hundred feet (thirty meters) and two hundred feet (sixty meters) respectively; except the water purveyor shall control land of a greater or lesser size or of a different shape than is defined by a one hundred or two hundred

foot radius where an engineering justification has been reviewed and accepted by the department. The engineering justification must address geological and hydrological data, well construction details, and other relevant factors indicating a control area of different size or shape is necessary to assure adequate sanitary control in the vicinity of the source.

Within the control area, no source of contamination may be constructed, stored, disposed of, or applied without the permission of the department and the purveyor. The control area must be owned by the water purveyor in fee simple, or he or she must have the right to exercise complete sanitary control of the land through other legal provisions.

A purveyor owning all or part of the control area in fee simple, or who has possession and control of the sanitary control area, even though the legal title is held by another, shall convey to the department a restriction on the use of the land in accordance with these rules, by appropriate legal document, such as a declaration of covenant. This document shall state no source of contamination may be constructed, stored, disposed of, or applied without the permission of the department and the purveyor, and if any change in ownership of the system or sanitary control area is considered, all affected parties shall be informed of these requirements.

Where portions of the control area are in the possession and control of another, the purveyor must obtain a duly recorded restrictive covenant which shall run with the land, restricting the use of said land in accordance with these rules, which shall be recorded in the county wherein the land is located.

(2) Adequate watershed control, consistent with treatment provided, shall be demonstrated and documented for all surface water sources pursuant to WAC 248-54-225. A department guideline regarding watershed control is available to assist utilities in this regard.

(3) In situations where regional ground water resources are being utilized, collaborative actions may be taken by appropriate local, state, or federal agencies when necessary to protect underground sources of drinking water. These may include, but not be limited to: Sole source aquifer designation; special design criteria; or ground water resource management. [Statutory Authority: RCW 43.20.050. 83-19-002 (Order 266), § 248-54-125, filed 9/8/83.]

WAC 248-54-135 Distribution systems. (1) All new distribution reservoirs shall have suitable watertight roofs or covers which excludes birds, animals, insects, and dust, and shall include appropriate provisions to safeguard against trespass, vandalism, and sabotage. Existing uncovered distribution reservoirs shall comply with the provisions of WAC 248-54-245.

(2) Distribution systems shall be evaluated by use of a hydraulic analysis acceptable to the department.

(3) In general, the minimum diameter of all distribution mains should be six inches (150 mm). Systems designed to provide fire flows shall have a minimum distribution main size of six inches (150 mm). Installation of standard fire hydrants shall not be allowed on

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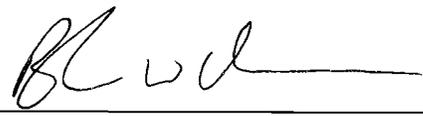
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DATED this 27th day of January, 2011, at Seattle, Washington.



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