

75001-1

75001-1

No. 75001-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

E. DUANE GOLPHENEE, a married individual; and
 JOHN SOLIN, a married individual,
 Appellants/Plaintiffs

and

WILLIAM and SUSAN GOODMAN, husband and wife; MICHAEL and
 JOAN LEDRESSAY, husband and wife; MICHAEL SZEMILLER, and
 individual; and HUNTER and ANGELA NEWTON, husband and wife;
 Plaintiffs pursuant to RCW 7.24.110

v.

PONDILLA ESTATES COMMUNITY ASSOCIATION, a Washington
 non-profit corporation,
 Respondent/Defendant

RESPONDENT'S BRIEF

**(REVISED SOLELY TO MATCH APPELLANTS' INDEX TO CLERK'S PAPERS
 FILED AFTER DUE DATE OF RESPONDENT'S BRIEF)**

Charles Arndt, WSBA #19812
 Attorney for Respondent
 Kelly, Arndt & Walker, Attorneys at Law, PLLP
 504 N. Main Street
 Coupeville, WA 98239
 (360) 678-0259



ORIGINAL

2016 JUL 28 AM 11: 21
 COURT OF APPEALS DIV I
 STATE OF WASHINGTON

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. COUNTERSTATEMENT OF THE ISSUES.....	3
III. RESTATEMENT OF THE CASE.....	4
IV. STANDARD OF REVIEW.....	9
V. ARGUMENT.....	10
A. <u>ISSUE 1</u> : The trial court did not err when it dismissed the Golphenee/Solin complaint as untimely.	10
B. <u>ISSUE 2</u> : The 1991 Agreement did not lack consideration to the beach lot owners where the Association, which had no legal duty to construct a bulkhead, promised to fund and in fact did fund one-half of the cost of constructing a bulkhead in exchange for the beach lot owners' promise to fund all future repairs and maintenance of the road and bulkhead.	13

C. ISSUE 3: The beach lot owner’s grant of the right to use the Private Road to access Tract A to the eight Association members outside the plat does not violate the statute of frauds because the location of the road is specifically described in the recorded plat referred to in the Agreement.
 16

D. ISSUE 4: The 1991 Agreement providing the Association a release of future liability in exchange for money to build the bulkhead is not “indefinitely ongoing”. The beach lot owners’ 24 year wait to contest the Agreement is untimely.
 24

E. Issue 5: Was evidence regarding differing legal opinions presented to the trial court to explain the intentions of the parties to the 1991 Agreement inadmissible hearsay when the evidence was not offered to prove the truth of the statements?
 25

VI. ATTORNEY FEES..... 26

VII. CONCLUSION..... 26

TABLE OF AUTHORITIES

<i>Table of Cases:</i>	<i>Page</i>
<i>Bigleow v. Mood</i> , 56 Wn.2d 548, 413 P.2d 949 (1964).....	17
<i>Berg v. Ting</i> , 125 Wn.2d 544, 886 P.2d 564 (1995).....	22, 23
<i>Brutsche v. City of Kent</i> , 78 Wn. App. 370, 898 P.2d 319(1995)...	10
<i>Buell v. City of Bremerton</i> , 80 Wn.2d 518, 495 P.2d 1358 (1972).....	11
<i>Cary v. Mason County</i> , 132 Wn. App. 495, 132 P.3d 157 (2006).....	10
<i>City of Fed. Way v. King County</i> , 62 Wn. App. 530, 815 P.2d 790 (1991)	11
<i>Davidson v. State</i> , 116 Wn.2d 13, 802 P.2d 1374 (1991).....	12
<i>Dickson v. Kates</i> , 132 Wn. App. 724, 133 P.3d 498 (2006).....	23
<i>Firth v. Lu</i> , 146 Wn.2d 608, 49 P.3d 117 (2002).....	21
<i>Foisy v. Conroy</i> , 101 Wn. App. 36, 40, 4 P.3d 140 (2000).....	9
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	9
<i>Harris v. Morgensen</i> , 31 Wn.2d 228, 196 P.2d 317 (1948).....	15
<i>Jane M. Citizen, I v. Clark County Bd. of Comm'rs</i> , 127 Wn. App. 846, 113 P.3d 501 (2005)	9
<i>Labriola v. Pollard Group, Inc.</i> , 152 Wn.2d 828, 100 P.3d (2004).	13
<i>Loftberg v. Viles</i> , 39 Wn.2d 493, 236 P.2d 768 (1951).....	22

<i>Maier v. Giske</i> , 154 Wn.App. 6, 223 P.3d 1265 (2010).....	18, 20
<i>Neighbors & Friends of Viretta Park v. Miller</i> , 87 Wn.App. 361, 940 P.2d 286 (1997).....	11, 12
<i>Richardson v. Taylor Land & Livestock Co.</i> , 25 Wn.2d 518, 171 P.2d 703 (1946).....	22
<i>Schreiner Farms, Inc. v. American Tower, Inc.</i> , 173 Wn. App. 154, 293 P.3d 407 (2013)	10, 12
<i>Seattle v. Nazareus</i> , 60 Wn.2d 657, 661, 374 P.2d 1014(1962).....	18
<i>Snyder v. Peterson</i> , 62 Wn. App. 522, 527, 814 P.2d 1204 (1991).....	22
<i>Western Plaza, LLC v. Norma Tison</i> , 184 Wn.2d 702, 364 P.3d 76 (2015).....	17
Statutes:	
RCW 7.24	10
RCW 4.16.040	11
Rules:	
CR 56.....	9

I. INTRODUCTION

The sole issue in this appeal is whether the trial court correctly granted the respondents' motion to dismiss the appellants' declaratory judgment action on the basis of untimely commencement of the action where appellants sought a judgment voiding a 21-year-old contract. The contract at issue concerns who is legally obligated to pay for repairs and maintenance of a bulkhead designed to protect seven beach front properties ("beach lots") and a private road accessing those properties. The Appellants/Plaintiffs Golphenee and Solin are beach lot owners.

Pondilla Estates is a residential development located on the west side of Whidbey Island. The majority of the Plat of Pondilla Estates thirty-one residential lots are upland, but seven of the residential lots are beach front. The beach lots are accessed by a road designated on the plat as "Private Road". This road is also known to beach lot owners as "Pebble Beach Drive". The road also accesses "Tract A" (referred to as "community beach" by the beach lot owners). Tract A is primarily a salt water lagoon that was dedicated in the plat for the recreational use of Pondilla Estates plat lot owners.

Pondilla Estates Community Association (formerly named Pondilla Estates Water Association) was established several years after the creation of Pondilla Estates for the purpose of operating a water system for its

members. The Association membership includes all owners of lots located within the Pondilla Estates plat, as well as owners of lots located outside the plat. The Association has never had an ownership or management interest in the Private Road, Tract A or any of the beach front lots.

In 1989 Pondilla Estates beach lot owners approached the Association because they were worried that sea wave and tide erosion could pose a danger to their residential lots and the private access road that serviced their lots. They wanted financial assistance from the Association to build a protective bulkhead. Most members of the Association felt the financial responsibility for a bulkhead should be borne by the beach lot owners. After two years of disagreement over who was legally responsible for building the bulkhead, in 1991 the Association entered an agreement with the beach lot owners that provided the Association would pay for half the cost of the proposed bulkhead (\$15,000) in exchange for the beach lot owners' promise that the beach lot owners would be responsible for all future costs of maintenance and repair for the bulkhead and private access road. Because some of the Association's members owned property outside of the Pondilla Estates plat and thus had no legal access to Tract A, beach lot owners enticed those members to support the

agreement to fund the bulkhead by granting them the right to access and use Tract A.

The Association fully performed by contributing \$15,000 to the bulkhead project, the bulkhead was built, and for a quarter century Pondilla Estates lots were bought and sold in reliance on the 1991 Agreement. Notwithstanding the benefit of a protective bulkhead made possible by the 1991 Agreement and the money paid by the Association, beach lot owners Golphenee and Solin filed this declaratory judgment action asking the court to declare the 1991 agreement void and unenforceable. The trial court correctly ruled that the Golphenee/Solin complaint was untimely.

II. COUNTERSTATEMENT OF THE ISSUES

ISSUE 1: Whether the trial court erred when it ruled as a matter of law that the lawsuit was untimely?

ISSUE 2: Whether the 1991 Agreement lacked consideration to the beach lot owners when the Association paid the beach lot owners money to build a protective bulkhead and to settle a dispute over who had legal responsibility for repair and maintenance of the bulkhead and private access road?

ISSUE 3: Whether the beach lot owner's grant of the right to use the Private Road to access Tract A to the eight Association members outside the Pondilla Estates plat violates the statute of frauds?

ISSUE 4: Whether the 1991 Agreement is "indefinitely ongoing" such that an action seeking to void the agreement is never untimely, where the agreement settled a dispute over who was liable for the cost of building and maintaining a bulkhead designed to protect a private access road, but did not describe the procedure for how future repair and maintenance duties would be managed?

Issue 5: Was evidence regarding differing legal opinions presented to the trial court to explain the intentions of the parties to the 1991 Agreement inadmissible hearsay when the evidence was not offered to prove the truth of the statements, but rather why the Association chose to pay money to settle the dispute?

III. RESTATEMENT OF THE CASE

In 1965, Pondilla Estates, a partnership consisting of Clarence M. Shepherd and Howard A. Patrick (hereinafter the "developers"), recorded the Plat of Pondilla Estates, Division No. 1. The plat dedicated all streets to the public "except those marked 'Private Road'." The "Private Road"

is also known as Pebble Beach Drive (hereinafter "Private Road"). A salt water lagoon and beach area identified as Tract A in the plat was dedicated "to the use of all owners of this plat and any future additions thereto for recreational purposes and community activities". Plat of Pondilla Estates (CP 187).

In 1973, the Pondilla Estates Water Association was formed for the purpose of operating a water system for the lot owners within the Pondilla Estates plat and to certain lot owners with property outside the plat. Association Articles of Incorporation (CP 192-196). In 1981, this entity changed its name to Pondilla Estates Community Association. Association Amended Articles of Incorporation (CP 198-201).

In 1989, Douglas Shepherd, a successor in interest to the developers told the Association membership that he believed the Private Road was threatened by sea wave erosion and that he wanted the Association to pay to install a bulkhead to stop the erosion. Owners of lots not serviced by the Private Road believed the legal obligation of prevention of erosion affecting the Private Road and the lots it served fell to the owners of the Private Road lots and the developer. Declaration of Bud Hansen (CP 203). The Association membership asked the Association board to investigate whether the private road was actually

threatened and to determine who owned the private road. At the Association's 1990 annual meeting in May, a resolution was passed directing the Association officers to seek independent legal opinion on the issues. Association minutes (CP 207).

Subsequently, the Association received three differing opinions regarding whether plat lot owners had a legal obligation to repair and maintain the private road/bulkhead. Howard A. Patrick, one of the original developers, provided an affidavit stating that the developers, in dedicating all roads to the public, except the private road, intended that ownership of the private road vest in the "individual lot owner(s) immediately adjacent and contiguous to said private road." Affidavit of Howard Patrick (CP 212-213). Patrick also stated that Tract A was dedicated for the use of all owners of the plat for recreational purposes and that "owners not bordering the 'Private Road' would have the use of the same solely for ingress and egress to the 'Community Beach and Playground' in Tract A".

Attorney Kenneth Pickard provided an opinion that all lot owners in the plat "most likely" had an obligation to repair and maintain the Private Road due to their right to use the road for ingress and egress. Kenneth Pickard Memo (CP 215-217).

The third attorney opinion obtained by telephone stated, “[T]he answer to the question is that there is no answer.” Association Position Paper (CP 219-221). All the opinions addressed whether the plat lot owners (as opposed to the Association) had legal obligations to maintain and repair the Private Road. The Association has no property interest in the Private Road or Tract A.¹ Thus, the Association had no legal duty to repair or maintain the Private Road or Tract A.²

In 1991, the parties resolved the legal ambiguity by entering into an agreement signed by the Association and each of the beach lot owners (including Appellant Solin’s spouse and Appellant Golphenee’s predecessor in interest) (the “Agreement”). The Agreement provides that in exchange for the Association contributing one-half the costs and expenses for construction of a bulkhead to prevent erosion that might affect the Private Road, “that the above-referenced contribution by the Association on behalf of its members constitutes a one-time only contribution toward the maintenance or repair of the Private Road.” The

¹ There is no conveyance of record for the Private Road and for Tract A subsequent to the plat dedication in 1965. See Declaration of Steve Metcalfe (CP 189-190). The Association was not formed until 1973. Art. of Incorpor. (CP 192-196).

² Golphenee and Solin alleged in their Complaint that the Association owned the Private Road and Tract A, and that those properties were “common areas” under the management of the Association. Complaint, paragraphs 11-14 (CP 286-287). Those assertions are false and have apparently been abandoned by Golphenee and Solin.

Agreement, numbered paragraph 3 (CP 224). The parties further agreed that “the obligation for any and all maintenance and repair of the Private Road and any log pile bulkhead, or other preventive measure, which is or may be constructed to prevent damage to the Private Road, is and shall be that of the respective owners of [the beach lots].” The Agreement, numbered paragraph 5 (CP 225). By its terms the Agreement runs with the land and binds all parties to the Agreement along with their heirs, successors and assigns. The Agreement, numbered paragraph 8 (CP 225).

In the time since the Agreement was signed, many lots within the plat have been sold and purchased. The Association lot owners have relied on the 1991 Agreement for almost a quarter of a century for assurance that they are not responsible for maintenance and repair of the Private Road. Declarations of plat lot owners (CP 233-276). Twenty-four years after the Agreement was executed, Appellants Golphenee and Solin filed this action seeking a declaration that the Agreement is void or otherwise unenforceable. Complaint, page 9, section 36 (CP 292).

After considering the undisputed facts presented by the parties, the trial court ruled that the action was untimely because the 1991 Agreement was enforceable at the time it was entered, and that even with a scrivener’s error and subsequent correction, the public was put on notice no later than

March 23, 1992, of any legal issues or claims arising out of the Agreement.³ Findings of Fact (CP 1-11). Golphenee/Solin now appeal, requesting that this court enter a declaratory judgment that the 1991 Agreement is unenforceable as a matter of law, without further proceedings. Brief of Appellant (Br. App.) at 40.

IV. STANDARD OF REVIEW

The trial court dismissed Golphenee and Solin's Complaint as untimely. (CP 11). The standard of review for an action dismissed on the basis of untimeliness is *de novo*. See *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) ("The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.").

³ The Association moved to dismiss the action on the grounds that it was untimely. Appellants now contend that the Court should have converted the motion to a motion for summary judgment because documents outside the pleadings were considered in conjunction with the Association's motion. In this case the distinction is immaterial. The Appellants also submitted documents outside the pleadings in their response to the motion. Appellants do not claim that they were unable to present evidence relevant to the issue decided by the Court. See *Jane M. Citizen, I v. Clark County Bd. of Comm'rs*, 127 Wn. App. 846, 853, 113 P.3d 501 (2005) (upholding dismissal under CR 56 where the trial court ruled the opposing party had been given a reasonable opportunity to submit information to support its claims when the court converted the CR 12(b)(6) motion to one for summary judgment); *Foisy v. Conroy*, 101 Wn. App. 36, 40, 4 P.3d 140 (2000) (affirming dismissal when opposing party declined trial court's offer for additional time to respond to motion upon conversion and failed to show he was prejudiced by having too little time to respond).

V. ARGUMENT

A. **ISSUE 1: The trial court did not err when it dismissed the Golphenee/Solin complaint as untimely.**

Although the trial court did not call the proceeding “summary judgment,” the court decided the case as if it had been presented pursuant to CR 56. (CP 1-11). The trial court reviewed documentary evidence presented by the Association (Defendant’s Motion to Dismiss, CP 175-276) and documentary evidence presented by Golphenee and Solin (Plaintiffs’ Response to Motion to Dismiss, CP 76-174), the court relied upon the relevant undisputed material facts to rule as a matter of law that the complaint was untimely. (CP 1-11); *See* CR 56(h).

Declaratory judgment actions are governed by the Uniform Declaratory Judgment Act (UDJA), chapter 7.24 RCW. “The UDJA does not have an explicit statute of limitations, but lawsuits under the UDJA must be brought within a ‘reasonable time.’” *Brutsche v. City of Kent*, 78 Wn. App. 370, 376-77 (1995). A “reasonable time” is measured by an analogous statute of limitations. *See Cary v. Mason County*, 132 Wn. App. 495, 501 (2006); *Schreiner Farms, Inc. v. American Tower, Inc.*, 173 Wn. App. 154, 159 (2013); *Neighbors & Friends of Viretta Park v. Miller*,

87 Wn. App. 361, 372, 940 P.2d 286 (1997). The “right to declaratory relief should be barred when [the] right to coercive relief is barred.” *City of Fed. Way v. King County*, 62 Wn. App. 530, 537 (1991).

The trial court applied the analogous six-year contract statute of limitations to rule that Golphenee and Solin’s Complaint was untimely. Trial Court Letter Opinion (CP 73-75); Findings page 9 (CP 9); *see* RCW 4.16.040(1). Plaintiffs filed this action contesting the validity of the 1991 Agreement 24 years after the agreement was signed and recorded. It is patently unreasonable to allow plaintiffs to use a “declaratory judgment” action to attack a written agreement 18 years after the applicable statute of limitations has run. Plaintiffs’ right to declaratory relief should be barred since their right to coercive relief is barred. The trial court correctly dismissed the Golphenee/Solin Complaint as untimely.

Although the trial court did not reach the issue of laches in ruling the complaint untimely (CP 11), the doctrine of laches also bars the Golphenee and Solin action. “Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them.” *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). “Laches bars a cause of action where there is: (1) knowledge by the plaintiffs of the facts constituting their cause of action or a reasonable opportunity to discover

such facts; (2) unreasonable delay in commencing the action; and (3) damages to the defendant resulting from the delay.” *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn.App. 361, 373, (1997) citing *Davidson v. State*, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991).

Finality is important in land use matters, and the law requires a party to seek declaratory relief within “a reasonable time as measured by an analogous statute of limitations.” *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 372, 940 P.2d 286 (1997). In the *Neighbors* case, the court found that no analogous statute of limitation allows 80 years to pass before bringing an action to contest a vehicular right of way. Likewise, a declaratory judgment action regarding an alleged breach of lease was ruled untimely because not brought within the analogous contract statute of limitations. *Schreiner Farms, Inc. v. American Tower, Inc.*, 173 Wn. App. 154, 160-161, 293 P.3d 407 (2013). In our case, Golphenee and Solin delayed 24 years, well beyond the analogous six-year contract statute of limitations. The matter is untimely and the trial court’s dismissal should be affirmed.

All the information necessary for Golphenee and Solin to bring their complaint was a matter of public record since no later than 1992 when the Agreement was re-recorded with the corrected Exhibit A.

Golphenee and Solin's 24-year delay is unreasonable, and the Association and its members are harmed by now having to fight to enforce the liability protection they purchased in 1991. The action is untimely. The trial court's dismissal should be affirmed.

B. ISSUE 2: The 1991 Agreement did not lack consideration to the beach lot owners where the Association, which had no legal duty to construct a bulkhead, promised to fund and in fact did fund one-half of cost of constructing a bulkhead to protect the Private Road in exchange for the beach lot owners' promise to fund all future repairs and maintenance of the road and bulkhead.⁴

Washington courts have adopted the Restatement (Second) of Contracts on the issue of what constitutes adequate consideration. See, e.g., *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834, 100 P.3d 791 (2004). The Restatement provides that:

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of
 - (a) an act other than a promise, or
 - (b) a forbearance, or
 - (c) the creation, modification, or destruction of a legal

⁴ Although Golphenee and Solin raised the consideration issue in their Complaint, page 9 (CP 292), they did not argue the issue to the trial court. See Plaintiffs' Response to Motion to Dismiss (CP 76-174), Plaintiffs' Motion for Reconsideration (CP 40-68), and Plaintiffs' Supplemental Brief to Motion for Reconsideration (CP 28-39).

relation. Restatement (Second) of Contracts § 71 (1)-(3) (1981)

In this case, the beach lot owners bargained for and received a financial contribution from the Association in exchange for their promise to be financially responsible for all future costs of maintaining the bulkhead and Private Road. (CP 5). This is a classic example of legally binding consideration.

Golphenee and Solin argue that all 31 lot owners in the Pondilla Estates plat had a duty to share in repair and maintenance costs of the Private Road due to their joint ownership of Tract A, and therefore the Association's funding of the bulkhead was not "new" consideration. Brief of Appellant (Br. App.) at 12-19. This argument misleadingly ignores the fact that the Association is not equivalent to the 31 individual lot owners of properties within the Pondilla Estates plat. Not only is the Association a separate legal entity, but its membership is broader than the group of Pondilla Estates plat lot owners. The Association also includes eight members who own properties outside the Pondilla Estates plat. See Agreement numbered paragraph 1 (CP 224). Even under the Golphenee/Solin analysis, the eight Association members outside the Pondilla Estates plat never had a legal duty to contribute to the protection of any property located in Pondilla Estates, because they had no rights to use the Private Road or Tract A.

Golphenee and Solin's lack of consideration argument rests upon application of the general legal principle that a promise to perform an existing legal obligation is not valid consideration. Br. App. at 12-19. "Of course, where no legal duty exists, the principle is inapplicable." *Harris v. Morgensen*, 31 Wn.2d 228, 240, 196 P.2d 317 (1948) cited in Br. App. at 14. The principle does not apply in our case because the Association had no legal duty to pay for the bulkhead or maintenance of the Private Road. Golphenee and Solin's argument is without merit.

Golphenee and Solin concede that the bulkhead would not have been built if the Association had not provided the funding. Br. App at 7. Absent the beach lot owners' promise that all future bulkhead and access road costs would be borne by the beach lot owners, the Association would not have provided funding for the bulkhead. Declarations of Bud Hansen and Pete Cosmos (CP 203-204); Br. App. at 8.

As a result of the 1991 Agreement, the beach lot owners received the benefit of immediate funding to build the bulkhead which has protected their properties for the past quarter century. The beach lot owners received their promised benefit. (CP 5, para 8). In exchange for money to build the bulkhead, the beach lot owners promised the Association that the Association would not be responsible for the

maintenance of the bulkhead or the Private Road and that the beach lot owners would be responsible for “any and all maintenance and repair of the Private Road and any log pile bulkhead, or other preventive measure, which is or may be constructed to prevent damage to the Private Road...” Agreement, numbered paragraphs 3 and 5 (CP 224-225). After receiving their benefit and twenty-five years after the Association performed according to the 1991 Agreement, Golphenee and Solin now ask the court to allow them to be excused from their promise to maintain the bulkhead and Private Road.

C. ISSUE 3: The beach lot owners’ grant of the right to use the Private Road to access Tract A to the eight Association members outside the plat does not violate the statute of frauds because the location of the road is specifically described in the recorded plat referred to in the Agreement.⁵

In addition to their promise to be solely responsible for future costs of the bulkhead and Private Road as consideration for their receipt of funding from the Association, the beach lot owners also granted the eight Association members not located in Pondilla Estates the right to use the private road to access Tract A. Agreement, numbered paragraph 4 (CP

⁵ The only statute of frauds theory argued by Golphenee and Solin to the trial court prior to the court’s issuance of its letter opinion on 12/23/2015, was that the original exhibit A referred to in the Agreement did not include metes and bounds description of two of the benefitted lots. The multiple theories now argued by Golphenee and Solin were first put forth in their Supplemental Brief to Motion for Reconsideration filed 1/21/2016.

224).⁶ The beach lot owners now argue that this additional consideration which they granted in order to receive Association funding fails the statute of frauds and voids the entire 1991 Agreement. By so arguing, Golphenee and Solin attack the very consideration they promised in order to receive money from the Association.

“The purpose of the real estate statute of frauds is to prevent fraud in contractual undertakings.” *Western Plaza, LLC v. Norma Tison*, 184 Wn.2d 702, 715, 364 P.3d 76 (2015). To comply with the statute of frauds a conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or it must contain a reference to another instrument which does contain a sufficient description. *Bigleow v. Mood*, 56 Wn.2d 548, 550, 413 P.2d 949 (1964) cited in *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995).

In the case of the conveyance of an easement, the servient estate must be sufficiently described. *Berg*, 125 Wn.2d at 551. An easement is different than a fee simple conveyance of land in that an “easement is a nonpossessory right to use another’s land in some way without

⁶ “The undersigned owners of the referenced lots which abut and adjoin the Private Road hereby grant and confirm that the owners of all lots within Blocks 1, 2, and 3, Pondilla Estates, Division No. 1, and the owners of the above-referenced parcels which are described in EXHIBIT “A”, and the guests and invitees thereof, may use and have an easement over and across the Private Road for ingress and egress to Tract “A”, the “Community Beach and Playground”. (CP 224)

compensation.” *Maier v. Giske*, 154 Wn. App. 6, 15, 223 P.3d 1265 (2010). The critical focus is on being able to locate the easement on the servient estate. If the easement’s exact location can be determined without recourse to oral testimony, the description is sufficient to comply with the statute of frauds. *Maier*, 154 Wn. App. at 16; *Seattle v. Nazaremus*, 60 Wn.2d 657, 661, 374 P.2d 1014 (1962).

In our case, Association members owning property outside the Pondilla Estates plat were granted an easement to use the “Private Road”. The 1991 Agreement referenced the recorded plat of Pondilla Estates which provides the specific location of the “Private Road”. Agreement (CP 224); Plat of Pondilla Estates (CP 187). The statute of frauds is satisfied.

Rather than focus on the location of the granted use, Golphenee and Solin argue that the statute of frauds is not satisfied because the metes and bounds description of two benefitted property owners was inadvertently not recorded with the Agreement the first time the Agreement was recorded. Br. App. at 20.

Although the 1991 Agreement was drafted by James L. Kotschwar, he did not represent the Association or the beach lot owners. He did not participate in negotiations and agreed to act as scrivener only. In his

declaration, Mr. Kotschwar stated, “I then agreed to prepare the document for recording with the understanding that, in so doing, I would not be legally representing either the Association or any of the adjoining lot owners.” Declaration of James Kotschwar, paragraph 6 (CP 124).

Mr. Kotschwar initially recorded the Agreement on September 18, 1991. Attached to the Agreement was an exhibit with legal descriptions of six of the eight properties lying outside the Plat of Pondilla Estates. Declaration of Kotschwar, paragraph 8 (CP 125). When Mr. Kotschwar realized he had omitted two lots from the exhibit, he added them to a new “Exhibit A” and re-recorded the same Agreement with the correct Exhibit A on March 23, 1992. Declaration of Kotschwar, paragraph 9 (CP 125).

The Agreement properly referenced the plat of Pondilla Estates which identified the location of the “Private Road”. The properties benefitted by the beach lot owners grant of right to use the Private Road were identified in the body of the Agreement as “the owners of those properties lying outside the plat of Pondilla Estates in Government Lot 3, Section 25, Township 32 North, Range 1, West of the Willamette Meridian, which are described more particularly in EXHIBIT ‘A’”. Agreement, numbered paragraph 1 (CP 224). Exhibit A recorded with the Agreement on September 2, 1991 contained all but two of the benefitted

properties. The Exhibit A recorded with the re-recorded Agreement on March 23, 1992 contained metes and bounds descriptions of all benefitted properties. The Re-recorded Agreement, (CP 151-158).

The beach lot owners granted the eight lot owners outside Pondilla Estates an easement over the Private Road giving them the right to use the road for access to Tract A. Thus the Private Road is the servient estate and is sufficiently described in the plat of Pondilla Estates referenced in the Agreement. The statute of frauds is satisfied.

Golphenee and Solin also argue: “Because ownership of Pebble Beach Drive [“Private Road”] is appurtenant to all 31 lots in Pondilla Estates, each lot is a servient estate that must be legally described in the deed granting easement.” Br. App. at 23. The court rejected the same argument in *Maier v. Giske*, 154 Wn. App. at 16. Giske argued “that the statute of frauds requires an instrument granting an easement to describe the entire parcel of land burdened by the easement regardless of whether it identifies the easement’s specific location.” *Maier*, 154 Wn. App. at 16. The court disagreed finding it unnecessary to describe the entire servient estate when the easement location is specifically described. 154 Wn.2d at 16-17. The plat of Pondilla Estates which is referenced in the 1991 Agreement provides description of the specific location of the granted

access right. Plat of Pondilla Estates (CP 187). The easement granted in the Agreement complies with the statute of frauds.

Golphenee and Solin argue that the Agreement is not enforceable because it violates the statute of frauds by not providing a legal description of where the bulkhead would be built. Br. App. at 24-26. The 1991 Agreement did not involve the conveyance or encumbrance of real estate for the construction or maintenance of the bulkhead. It simply provided funding in exchange for a release from future liability. The statute of frauds does not apply. *Firth v. Lu*, 146 Wn.2d 608, 615, 49 P.3d 117 (2002) (an agreement not falling within the categories set forth in RCW 64.04.010 may be enforced even if not executed in the form of a deed).

Golphenee and Solin argue that the statute of frauds requires the 1991 Agreement to define the rights and obligations between the individual beach lot owners. Br. App. 26-29. The Agreement did not involve any conveyance or encumbrance of the proposed bulkhead. The statute of frauds does not apply. *Firth*, 146 Wn.2d at 615. The beach lot owners' alleged difficulties in managing their bulkhead repair and maintenance obligations could be resolved by following the advice they received from Mr. Kotschwar in 1991: retain an attorney to draft a

maintenance agreement. Declaration of Kotschwar, paragraph 12 (CP 125); Br. App. at 28.

Assuming for sake of argument that the conveyance of easement failed for not satisfying the statute of frauds, the payment of money by the Association in exchange for the beach lot owners' promise of future responsibility remains a binding contract.

Where a scrivener's error leads to a deficient description, a contract may be reformed. *Berg v. Ting*, 125 Wn.2d at 554 citing *Loftberg v. Viles*, 39 Wn.2d 493, 236 P.2d 768 (1951) and *Snyder v. Peterson*, 62 Wn. App. 522, 527, 814 P.2d 1204 (1991). The scrivener in our case inadvertently omitted the metes and bounds descriptions of two benefitted parcels. This is a scrivener's error. The doctrine of reformation allows the second Exhibit A which was rerecorded with the Agreement to supply the missing metes and bounds descriptions.

The part performance doctrine allows for the enforcement of an agreement despite statute of fraud issues, especially in situations like our case where the repudiating party would reap a windfall. *Berg v. Ting*, 125 Wn.2d at 556 (see concurring opinion 125 Wn.2d at 566 citing *Richardson v. Taylor Land & Livestock Co.*, 25 Wn.2d 518, 529, 171 P.2d 703 (1946)).

“The court has identified three factors, or elements, which are to be examined to determine if there has been part performance of an agreement so as to take it out of the statute of frauds:

(1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract.” *Berg*, 125 Wn.2d at 556. Because the 1991 Agreement involves an easement, possession is not exclusive. However, the Association tendered payment for the construction of the bulkhead, a substantial and valuable improvement referable to the contract. The Agreement is enforceable.

The 1991 Agreement is enforceable under the equitable covenant doctrine. “In order to bind successors, an equitable covenant must be (1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant.” *Dickson v. Kates*, 132 Wn. App. 724, 732, 133 P.3d 498 (2006).

In our case, Golphenee and Solin seek relief from the 1991 Agreement’s provision that the beach lot owners are responsible for future

maintenance and repair of the bulkhead and private access road. The Agreement is enforceable between the original parties. The Agreement concerns the land and the parties intended to bind successors. The Association (an original party) seeks enforcement of the Agreement against Golphenee (a successor in possession) and Solin (an original party). Golphenee and Solin have notice of the covenant. The 1991 Agreement is binding on the beach lot owners.

D. ISSUE 4: The 1991 Agreement providing the Association a release of future liability in exchange for money to build the bulkhead is not “indefinitely ongoing”. The beach lot owners’ 24 year wait to contest the Agreement is untimely.

Once the Association made its contribution for the construction of the beach lot owners’ bulkhead, the Agreement was complete. The only future performance required was for the beach lot owners to refrain from attempting hold the Association responsible for the maintenance and repair of the bulkhead and Private Road. The difficulties Golphenee and Solin raise in regards to managing the beach lot owners’ maintenance and repair responsibilities could be easily remedied through a maintenance agreement between the seven beach lot owners. See Declaration of Kotschwar, para 12 (CP 125) (Solin was advised in 1991 that beach lot owners should enter a maintenance agreement).

E. Issue 5: Was evidence regarding differing legal opinions presented to the trial court inadmissible hearsay when the evidence was not offered to prove the truth of the statements, but rather why the Association chose to pay money to settle the issue of future liability?

Golphenee and Solin claim the trial court erred by considering inadmissible hearsay when the court did not strike an affidavit submitted by one of the Pondilla Estates developers describing his intent regarding who owned the Private Road and the telephone response of an attorney called by the Association. Br. App. at 34-37.⁷

This evidence is not hearsay, because it was not offered to prove the truth of the matter asserted. ER 801 (c). Rather, the evidence was offered to show that the Association had to deal with ambiguity regarding who was legally responsible for the beach lot owners' private access road.

VI. ATTORNEY FEES

The Association seeks reimbursement of attorney fees and costs, because Golphenee and Solin's appeal is frivolous. RAP 18.9. Golphenee

⁷ The argument made by Golphenee and Solin would also go to the letter submitted by Kenneth Pickard opining that all 31 lot owners should contribute to maintenance of the private access road. The relevance of that letter is not the assertions contained therein, but that the Association received conflicting information about future liability.

and Solin attempt to justify their untimely complaint by arguing the 1991 Agreement was never an enforceable contract. State law clearly provides that the statute of frauds requirement for easements is met if the easement location is identified in writing. The location of the Private Road is set forth in the Pondilla Estates plat dedication. Likewise, consideration was clearly given by both sides of the 1991 Agreement. Golphenee and Solin have never come forward with any good reason why they waited so long to bring their action. It is untimely. Their appeal is frivolous. The Association seeks reimbursement of its costs and fees.

VII. CONCLUSION

In 1989 Pondilla Estates beach lot owners came to the Association requesting help to pay for a bulkhead to protect their residential properties and private access road. Without any legal obligation to protect the threatened properties and road, the Association paid for half the construction cost of the a bulkhead in exchange for a promise that their payment was one-time only and that future costs would be borne by the beach lot owners. Now that the beach lot owners have already received nearly a quarter century of benefit from the bulkhead, they would like court assistance to rescind their obligation to pay future costs.

Both legal and equitable principles support dismissal of the beach lot owners' declaratory judgment action as untimely. Golphenee and Solin provide no good reason explaining the 24-year delay. The Agreement was enforceable in 1991. It should be enforceable now. The trial court's decision to dismiss the complaint as untimely should be affirmed.

Kelly, Arndt & Walker
Attorneys at Law, PLLP
By:



Charles Arndt, WSBA#19812
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on the 27th day of July, 2016, from Coupeville, WA, I caused a true and correct copy of this Respondent's Brief to be served on the following in the manner indicated below:

To:	E. Duane Golphenee 583 Seaside Drive Coupeville, WA 98239	John Solin 558 Pebble Beach Dr Coupeville, WA 98239
	William & Susan Goodman 565 Pebble Beach Drive Coupeville, WA 98239	Michael & Joan Ledressay 2792 W Pondilla Way Coupeville, WA 98239
	Michael Szemiller 562 Pebble Beach Coupeville, WA 98239	Hunter & Angela Newton PO Box 1077 Coupeville, WA 98239

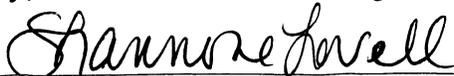
ALL Via: U.S. Mail, Postage Prepaid

AND To: The Court of Appeals of State of Washington Div. I
Attn: Richard D. Johnson, Court Clerk Admin.
One Union Square
600 University Street
Seattle WA 98101-4170

Via: U.S. Mail, Postage Prepaid

Kelly, Arndt & Walker, Attorneys at Law, PLLP

By:



Shannone Lovell, Legal Assistant
504 N. Main Street
Coupeville, WA 98239