

No. 36094-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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LAKE JANE ESTATES, a Washington non-profit corporation,

Appellant,

v.

RANDY S. JENSEN, a single man,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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APPELLANT'S OPENING BRIEF

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**ORIGINAL**

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## I. INTRODUCTION

Restrictive covenants exist to protect property owners' expectations. Accordingly, in Washington courts liberally interpret restrictive covenants with the goal of protecting the property owners' *collective* interests – namely, the value of property within a community and the reasonable expectations of the members of that community.

The present dispute involves the interpretation of a restrictive covenant placed on the Debra Jane Lake Plat to preserve the Plat's common design plan and thereby the character of the community and property values. The restriction, which requires a lot owner to obtain written approval of the developer before subdividing any lot, has been enforced by Appellant Lake Jane Estates Homeowners Association for at least 18 years with the strong support of its membership. After Lake Jane Estates refused to approve his request to subdivide two lots into a total of six lots, Respondent Jensen sued Lake Jane Estates, arguing that only the developer – which was dissolved in 2003 – had the authority to approve or disapprove lot subdivisions. The trial court agreed and granted the Respondents Motion for Judgment on the Pleadings.

The trial court's decision has upended decades of property owners' understanding and expectations and exposed the 440-lot community to a radical transformation with predictable adverse consequences. The grant of the judgment on the pleadings was both improper given the disputed

facts but also in direct conflict with the mandate that restrictive covenants be interpreted with the goal of preserving property values and property owners' expectations.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. Did the trial court err as a matter of law in granting the plaintiff judgment on the pleadings?

### **B. Issues Pertaining to Assignments of Error**

1. Should a party be entitled to judgment on the pleadings when material facts are in dispute and no discovery has been conducted?

2. Can a homeowners association be the successor to a developer's authority to enforce a restrictive covenant when there is no written assignment of the developer's right to enforce the restrictive covenant?

3. Should a homeowner association be denied the right to enforce a restrictive covenant that protects the character of the development and property values when the association has enforced the restrictive covenant for at least 18 years and the vast majority of property owners support its enforcement?

### III. STATEMENT OF THE CASE

#### A. Statement of Facts

Appellant Lake Jane Estates is the homeowners association for residents of the Debra Jane Lake Plat in the City of Bonney Lake. The Plat, which was created in 1959, is a subdivision of approximately 440 relatively large residential lots.<sup>1</sup> There are only six buildable lots that have less than 10,000 square feet, and most of the lots are over 15,000 square feet.<sup>2</sup> The lots are situated around Lake Jane (although most of the lots are not on the lake itself), and the Plat contains several public amenities, such as parks, a pool and a tennis court.<sup>3</sup> Because this subdivision contains large wooded lots with only a single residence typically built toward the front of each lot (essentially creating a green belt behind the houses), a lake and park areas, the look and feel of this subdivision is very different from most subdivisions in the area.<sup>4</sup>

When the Debra Jane Lake Plat was approved in 1959, the developer, the Lake Tapps Development Company, set forth several restrictions on the face of the plat that was recorded with the Pierce County Auditor.<sup>5</sup> The notation on the Plat includes the express provision that the “covenants [are] running with the land and binding upon future owners, their heirs, successors or assigns.”<sup>6</sup> Included on the Plat is

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<sup>1</sup> CP 243-56.

<sup>2</sup> *Id.*

<sup>3</sup> CP 134-35

<sup>4</sup> *Id.*

<sup>5</sup> CP 258-61.

<sup>6</sup> CP 258.

restriction requiring approval before any approval of any subdivision of a lot:

6. No lot in this plat shall be subdivided without the written consent of the LAKE TAPPS DEVELOPMENT CO., INC.<sup>7</sup>

Enforcement of the above restriction, as well as the other restrictions on the plat was provided for in paragraph 14 of the restrictions:

14. The breach of any of the foregoing conditions shall constitute a cause of action against the person committing the breach by T&J Maintenance Company [Lake Jane Estates] or the Lake Tapps Development Company.<sup>8</sup>

The restrictions are recorded and, thus, all who purchase lots in the subdivision are on notice of the restrictions.

The developers of Lake Jane Estates also filed articles of incorporation and bylaws for the T&J Maintenance Company,<sup>9</sup> the name of T&J Maintenance Company was changed to Lake Jane Estates (the Appellant in this matter) through an amendment to the Articles of Incorporation in 1970.<sup>10</sup> The Articles of Incorporation, in addition to the plat restrictions themselves, also give the Association, through its Board of Trustees, authority to enforce the restrictive covenants:

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> CP 263-79.

<sup>10</sup> CP 264.

The purpose for which this corporation is formed are:

....

11. To enforce liens, charges, restrictions, conditions and covenants existing upon and/ or created for the benefit of parcels of real property over which said corporation has jurisdiction . . .

....

13. To exercise such powers of control, interpretation, construction, consent, decision, determination, modification, amendment, cancellation, annulment and/ or enforcement of imposed covenants, reservation[s], restrictions, liens and charges imposed upon said property, and as may be vested in, delegated to, or assigned to and assumed by said corporation.<sup>11</sup>

Among the Association's other purposes are the improvement and maintenance of common areas; collection of annual assessments from the membership; and engaging in "whatever actions" are necessary or proper for or incidental to the exercise of any of its powers.<sup>12</sup>

Consistent with its authority, the Lake Jane Estates Homeowners Association has accepted, approved, and sometimes denied proposals for subdivisions within Debra Lake Jane Plat for at least 18 years.<sup>13</sup> This

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<sup>11</sup> CP 266.

<sup>12</sup> CP 267-68.

<sup>13</sup> CP 26-30.

enforcement is strongly supported by its members: in response to a 2000 survey of its members, for instance, 85% opposed short subdivisions.<sup>14</sup> In 2000, the Association successfully filed suit on two occasions to uphold its right to enforce the restrictive covenant on subdivision approvals.<sup>15</sup> The two suits, which were consolidated, resulted in an unpublished opinion in Lake Jane Estates favor from this Court.<sup>16</sup> Lake Jane Estates later prevailed at trial. Among other things, the trial court held that Lake Jane Estates had the authority to enforce the Restrictive Covenant on subdivision:

2. Plat restriction number 6 to the Lake Jane Estates plat, formerly the Debra Jane Lake plat, prohibits the subdivision of lots within the Lake Jane Estate plat with the consent of the Lake Jane Estates Homeowners Association. The Lake Jane Estates Homeowners Association has a clear legal and equitable right to enforce plat restriction number 6. The Lake Jane Estates Homeowners Association has not abandoned its right to enforce plat restriction number 6, nor has it waived its right to enforce the plat restriction.<sup>17</sup>

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<sup>14</sup> CP 136.

<sup>15</sup> CP 166-74.

<sup>16</sup> Lake Jane Estates Homeowners Ass'n v. Ugas, 2003 Wash. App. LEXIS 1319 (2003) (unpublished).

<sup>17</sup> CP 172. Conclusion of Law No. 6 created a similar injunction against property owned by Defendants Linda Smith and Peggy Hayes. CP 173.

5. The Lake Jane Estates Homeowners Association is entitled to an injunction prohibiting Albert and Luann Ugas from taking any further action or actions to complete the subdivision of the Ugas property until or unless approval of the subdivision is obtained from the Lake Jane Estates Homeowner's Association. The injunction shall include prohibition of selling the divided lots as approved by the City of Bonney Lake to separate owners and prohibition from developing the lots separately. Unless Association approval is obtained, the two lots that comprise the Ugas Property must, for development purposes, be treated as a single lot.<sup>18</sup>

Respondent Randy Jensen owns two lots containing single family homes within Debra Jane Lake Plat. In February 2006 Jensen submitted an application to Lake Jane Estates seeking approval to short subdivide these two lots into six lots.<sup>19</sup> After thoroughly vetting the matter, Lake Jane Estates rejected this request.<sup>20</sup> The plaintiff then filed the present lawsuit on July 28, 2006.<sup>21</sup>

#### **B. Procedural History**

After doing nothing to pursue the matter for six months, on January 25, 2007, Jensen filed a motion for judgment on the pleadings, claiming that restriction no. 6 gave only the Lake Tapps Development

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<sup>18</sup> CP 173.

<sup>19</sup> CP 176.

<sup>20</sup> CP 178.

<sup>21</sup> CP 1-3.

Company the authority to approve or deny shortplat requests and, since the Development Company was dissolved in 2003, there was no longer any entity with the authority to approve or deny shortplat requests.<sup>22</sup> In its response, Lake Jane Estates argued, among other things, that restrictive covenants are liberally construed in Washington to give effect to those purposes intended by the covenant.<sup>23</sup> Following oral argument, the Court granted Jensen's motion for judgment on the pleadings.<sup>24</sup> Lake Jane Estates filed a Motion for Reconsideration ten days later asking the trial court to reconsider its decision in light of the just-released Green v. Normandy Park Riviera Section Community Club<sup>25</sup> opinion from Division I of the Court of Appeals.<sup>26</sup> This motion was denied.<sup>27</sup>

#### IV. ARGUMENT

Contrary to the collective understanding of the residents, historical practice, and earlier court rulings, the trial court ruled – based on the pleadings alone – that the residents of Lake Jane Estates, through their homeowners association, do not have the authority to oversee the division of property within the Debra Jane Lake Plat. The court's ruling is erroneous because Jensen's complaint is insufficient to support a motion

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<sup>22</sup> CP 6-15.

<sup>23</sup> CP 16-102.

<sup>24</sup> CP 183-84.

<sup>25</sup> 137 Wn. App. 665, 151 P.3d 1038 (2007).

<sup>26</sup> CP 185-239.

<sup>27</sup> CP 295-96.

on the pleadings and, most importantly, Jensen's position is not supported by Washington law.

**A. Standard of Review**

The Court of Appeals reviews a trial court's dismissal of a lawsuit based on the pleadings alone de novo.<sup>28</sup> When considering a motion for judgment on the pleadings the court must accept as untrue all of the moving party's allegations that have been denied by the nonmoving party:

The rule is that the party who moves for judgment on the pleadings admits, for the purposes of the motion, the truth of every fact well pleaded by his opponent and the untruth of his own allegations which have been denied. However, a motion for judgment on the pleadings admits only facts well pleaded. It does not admit mere conclusions, nor the pleader's interpretation of statutes involved, nor his construction of the subject matter.<sup>29</sup>

Consequently, motions for judgment on the pleadings are granted sparingly and should be denied when the pleadings fail to conclusively establish a factual basis upon which to grant judgment in favor of the moving party.

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<sup>28</sup> Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630, 634, 128 P.3d 627 (2006) (citing Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005) and Suleiman v. Lasher, 48 Wn. App. 373, 376, 739 P.2d 712 (1987) (a motion to dismiss for failure to state a claim (CR 12(b)(6)) and a motion for judgment on the pleadings (CR 12(c)) raise identical issues)).

<sup>29</sup> Pearson v. Vandermay, 67 Wn.2d 222, 230, 407 P.2d 143 (1965).

**B. The Pleadings Do Not Support a Judgment on the Pleadings**

Jensen moved for a judgment on the pleadings stating that defendant admitted “all facts material to [its] motion.”<sup>30</sup> A key component of Jensen’s Complaint is that:

7. Restriction 6 on the face of the plat gives discretion only to the Lake Tapps Development Co. to consent to subdivision of lots. That corporation no longer exists. In the absence of any entity authorized to consent to subdivision, this restriction is unenforceable.<sup>31</sup>

Although Jensen claimed otherwise, Lake Jane Estates denied the material factual allegations contained in this paragraph.<sup>32</sup> Consequently, pursuant to a Judgment on the Pleadings analysis, the court must find that Jensen admits for the purposes of his motion that “Restriction 6” gives discretion to the Lake Jane Homeowners Association to consent to subdivisions.<sup>33</sup> As a result, Jensen’s Motion for Judgment on the Pleadings should have been denied because the pleadings are insufficient to justify judgment in plaintiff’s favor.

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<sup>30</sup> CP 8.

<sup>31</sup> CP 2.

<sup>32</sup> CP 1. Lake Jane Estates admitted that the Lake Tapps Development Co. no longer exists in paragraph 4 of its Answer. CP 4-5.

<sup>33</sup> See Pearson, 67 Wn.2d at 230.

**C. This Dispute Requires the Court Determine the Purposes of the Covenant, Which Involves Factual Issues not Plead by Plaintiff.**

A motion on the pleading is an inappropriate vehicle to issue a judgment that interprets a contract that is at best ambiguous as to the parties' intentions.<sup>34</sup> This is especially true in this case because Washington takes a more liberal approach to interpreting restrictive covenants where the dispute involves successors to the original parties.

**1. Role of Restrictive Covenants**

A covenant that runs with the land “has an indefinite life, subject to termination by conduct of the parties or a change in circumstances which renders its purpose useless.”<sup>35</sup> Enforcement of restrictive covenants protects the character of established residential neighborhoods.<sup>36</sup> As observed by this Court, such enforcement is increasingly important to preserve the expectations of property owners in the face of increased urban growth pressures:

[Courts] recognize the necessity of enforcing restrictive covenants to protect property owners from increased pressures of urbanization. The modern view is that building restrictions are for the protection of the public as well as the property owner and that such restrictions, in order to be

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<sup>34</sup> In re Estates of Wahl, 99 Wn.2d 828, 664 P.2d 1250 (1983) (noting that a motion for summary judgment may not be used to resolve a contractual dispute that is ambiguous).

<sup>35</sup> Thayer v. Thompson, 36 Wn. App. 794, 797, 677 P. 2d 787, *review denied*, 101 Wn. 2d 1016 (1984).

<sup>36</sup> Hagemann v. Worth, 56 Wn. App. 85, 88-89, 782 P. 2d 1072 (1989).

valid, need only be reasonable and reasonably exercised.<sup>37</sup>

Plat restrictions are “indispensable to the functioning of a homeowner association” and thus are enforceable by such associations against homeowners and their successors.<sup>38</sup> Indeed, the core feature of the homeowner association concept is an agreement by landowners to share real property rights and obligations<sup>39</sup> that can only be enforced by restrictive covenants:

Without the ability to enforce its rules, not only against the original homeowner, but against subsequent purchases as well, the community would not long be able to maintain its planned character, nor provide the lifestyle which its residents sought in making their homes there. . . . It is through the use of recorded covenants and restrictions that ‘run with the land’ that the homeowner association seeks to make the controls and assessments vital to its continued existence binding not only on those who acquired their homes from the developer, but also on their successors in interest, who may not have personally agreed to be bound by the community’s rules.<sup>40</sup>

Thus, restrictive covenants allow residents to have greater control over the environment in which they live. By sacrificing the ability to use their

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<sup>37</sup> Mains Farm Homeowners Ass’n v. Worthington, 64 Wn.App. 171, 179, 824 P.2d 495 (1992) (internal citation omitted), *aff’d*, 121 Wn.2d 810; 854 P.2d 1072 (1993); *see also* Thayer v. Thompson, 36 Wn. App. 794, 797, 677 P. 2d 787 (1984).

<sup>38</sup> HOME OWNER ASSOCIATIONS AND PUDS § 2.04[2] at 2-30 (1999).

<sup>39</sup> *Id.* § 2.04[2] at 2-29

<sup>40</sup> *Id.* § 8.01 at 8-3.

property to its fullest potential, residents rest assured that development will occur within pre-set parameters.

**2. Restrictive Covenants are Interpreted in a Manner that Accomplishes Their Purposes Consistent with Their Role as a Growth Management Tool**

Washington courts have moved away from the position of strict construction historically adhered to when interpreting restrictive covenants.<sup>41</sup> This is due in large part to a shift in perception regarding restrictive covenants. Instead of viewing restrictive covenants as restraints on the free use of land, courts now acknowledge that restrictive covenants “tend to enhance, not inhibit, the efficient use of land.”<sup>42</sup> Consequently, courts strive to interpret restrictive covenants in such a way that protects the homeowners’ *collective* interests:

The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court’s goal is to ascertain and give effect to those **purposes** intended by the covenants. . . . [and] The court will place “special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.”<sup>43</sup>

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<sup>41</sup> Viking Properties, 155 Wn.2d 112, 120, 118 P.3d 322 (2005).

<sup>42</sup> *Id.*

<sup>43</sup> Lakes at Mercer Island Homeowners Assoc., 61 Wn. App. at 181.

This is especially true when the maker of the restrictive covenants – i.e. the developer – has departed the scene:

[W]here construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among *homeowners* in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court's goal is to ascertain and give effect to *those purposes intended by the covenant*.<sup>44</sup>

Notably, the restrictive-covenant document must be construed in its entirety, not by a piecemeal approach.<sup>45</sup> And, as noted in the *Restatement (Third) of Property: Servitudes*, no specific instrument of transfer is necessary to pass servitude benefits and burdens to successors to the benefited or burdened property. Rather, such benefits and burdens pass automatically.<sup>46</sup>

The circumstances here reveal that the purpose of the disputed provision is to protect the planned development in the Debra Jane Lake Plat by providing a method for community approval of all subdivisions within the Plat. For at least the past 18 years subdivision requests have been submitted, approved, and sometimes denied by the Lake Jane

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<sup>44</sup> *Riss v. Angel* 131 Wn.2d 612, 934 P.2d 669 (1997) (second emphasis added); *see also Lakes at Mercer Island Homeowners Ass'n. v. Witrak*, 61 Wn. App. 177, 180 (1991), *review denied*, 117 Wn.2d 1013, 816 P.2d 1224 (1991).

<sup>45</sup> *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994).

<sup>46</sup> *Restatement (Third) of Property: Servitudes* § 5.1, cmt. *b* (2000).

Estates. Indeed, Jensen himself submitted his proposed subdivision to the Lake Jane Estates before filing this action because his request was denied. Lake Jane Estates has exercised this authority without objection from the residents or the Lake Tapps Development Co., even though the Lake Jane Estates exercised the authority to deny and approve subdivision proposals while the Lake Tapps Development Co. was viable. This is strong proof of what the homeowners believe is intended by the covenant when the purchased property within Lake Jane Estates, as well as what the original grantor intended when it placed the restrictive covenant on the properties within the estate.

Significantly, a Missouri court addressed the virtually the same issue as that presented here and ruled in favor of the homeowners association. As in the present case, the developer in Sherwood Estates Homes Ass'n v. Schmidt<sup>47</sup> gave the homeowners association the right to enforce restrictive covenants, but the language of the covenant at issue in the case explicitly required approval by the developer, not the homeowners association. Yet the court rejected the defendant's argument that the homeowners association did not have the right to enforce the restrictive covenant:

The power to enforce Restriction VII is a legally sterile power if it does not include the power to

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<sup>47</sup> 592 S.W.2d 244 (Mo. Ct. App. 1979).

grant or withhold approval of plans and specifications falling within its purview. Perhaps no other single restriction is quite so adaptable for perpetuating Sherwood Estates' status as a "residence neighborhood possessing features of more than ordinary value to a residence community." Extraordinary vision is not required to see that Restriction VII was carefully designed to preserve the architectural tone and character of the subdivision, all of which inures to the immeasurable value of the various homeowners in the subdivision. [The developer] was a subdeveloper and builder, and once its role was completed in Sherwood Estates it had an overriding interest in transferring all powers and duties attendant to the Restrictions, and authority to enforce them, to the Association whose membership was comprised of the homeowners in Sherwood Estates. In view of the homeowners' natural community of interest it is impossible to imagine a more suitable repository for such powers, duties and authority. Manifestation of [the developer's] intent to substitute the Association in its place for the purpose of assuming and performing all powers and duties associated with the Restrictions, including but not limited to Restriction VII, and the authority to enforce them, permeates the "Sherwood Estates Homes Association Declaration." As it turned out, [the developer's] persistent desire to unburden itself of any continuing responsibility concerning Sherwood Estates was indeed fortunate as [the developer's] corporate charter was subsequently forfeited in 1967.

Case authority sustaining an assignment of the power to approve construction plans and specifications by a corporate subdivider without reservation of any right to do so is found in Shields v. Welshire Development Co., 37 Del.Ch. 439, 144 A.2d 759 (1958). In Shields, the

assignee was a builder who purchased all of the remaining lots in a subdivision. Assignment of the power of approval in the case at hand rests in a far more favorable atmosphere as the assignee is a corporate composite of all the homeowners in Sherwood Estates. The Shields case, in sustaining an assignment of the power of approval, had this to say at 763: “Since a corporation must act through agents, it is evident that the original grantees had no assurance as to the continuity of ownership of the corporation and therefore of its agents. Thus, approval action by different agents was reasonably to be anticipated. A purely personal reliance was therefore not involved.”<sup>48</sup>

In the present case, the developer, the Lake Tapps Development Company, expressly gave Lake Jane Estates the authority to enforce all restrictive covenants both in the plat restrictions themselves and in Lake Jane Estates’ Articles of Incorporation. Jensen’s argument that Lake Jane Estates, despite all of the powers and obligations enumerated in the Articles of Incorporation and Bylaws for the purpose of protecting and enhancing the Lake Jane Estates community, is powerless to enforce the restriction with the greatest effect on the value and character of the community makes no sense. Covenants exist to protect landowners’ expectations. It is simply illogical that parties would manifest an intent to limit subdivisions only to have that protection removed upon some arbitrary event over which they have no control. The whole purpose of covenants is, after all, the ability to control.

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<sup>48</sup> *Id.* at 247-48.

3. **The Recent Green v Normandy Park Riviera Section Community Club Decision Supports Appellant's Argument that It Has the Authority to Enforce the Restrictive Covenant on Short Subdivisions**

On February 5, 2007, Division I of the Court of Appeals issued a published decision in Green v. Normandy Park Riviera Section Community Club.<sup>49</sup> The decision addresses a number of issues relating to the enforcement of restrictive covenants. The court's discussion of how and when a homeowners association succeeds to the enforcement authority of a subdivision's developer is highly relevant to the present matter.

In Green, the subdivision was subject to 1929 covenants requiring that building plans for any of the lots in the neighborhood be approved by the developer.<sup>50</sup> The covenants further stated they were intended to "be a covenant running with the land."<sup>51</sup> In 1934 the developer's estate was sold to the Seattle Trust and Savings Bank in a foreclosure sale, which sold it to the Normandy Park Company three years later.<sup>52</sup> In 1947 the Normandy Park Company recorded a document entitled "Conveyance of Authority to Enforce Restrictions," which purported to convey all the Normandy Park Company's right, title and interest in the covenants, as

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<sup>49</sup> 137 Wn. App. 665, 151 P.3d 1038 (2007). In the briefing before the trial court, the parties referred to this case as Edleman v. Normandy Park Riviera Section Community Club.

<sup>50</sup> *Id.* at 682.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

well as its right to enforce the covenants, to the recently incorporated Normandy Park, Riviera Section, Community Club, Inc. (NPRSCC) and to its “successors or assigns.” In 1977, however, NPRSCC failed to file an annual report, and NPRSCC was administratively dissolved by the Secretary of State. The former officers of NPRSCC continued to hold meetings and take steps to enforce the covenants after NPRSCC was dissolved.<sup>53</sup> In 1988 a new entity, the Normandy Park Riviera Community Club, was incorporated.<sup>54</sup> After incorporation, the Community Club took steps to enforce the covenants.<sup>55</sup>

In 2002 a dispute arose between the Edlemans, their neighbors, and the Community Club regarding whether the new home the Edlemans were constructing complied with certain restrictive covenants.<sup>56</sup> Three lawsuits were subsequently filed and consolidated. Eventually, the trial court granted the Community Club’s motion for summary judgment that it had successor authority to enforce the restrictive covenants.<sup>57</sup> The Court of Appeals upheld this ruling:

The Edlemans first contend that, by the terms of the covenants, the authority to enforce the covenants was vested exclusively in the

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 683.

<sup>56</sup> *Id.* at 674.

<sup>57</sup> *Id.* at 675.

neighborhood developer and could not, therefore, be passed to subsequent owners of the developer's interests. We disagree.

Restrictive covenants are interpreted to give effect to the intention of the parties to the agreement incorporating the covenants and to carry out the purpose for which the covenants were created. Riss v. Angel, 131 Wn.2d 612, 621, 934 P.2d 669 (1997); Restatement (Third) Of Property: Servitudes § 4.1 (2000). The purpose of those establishing the covenants is the relevant intent. Riss, 131 Wn.2d at 621. Subdivision covenants tend to enhance the efficient use of land and its value. The value of maintaining the character of the neighborhood in which the burdened land is located is a value shared by the owners of the other properties burdened by the same covenants. Riss, 131 Wn.2d at 622-24. Thus, we must place “special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.” Riss, 131 Wn.2d at 624 (quoting Lakes at Mercer Island Homeowners Ass’n v. Witrak, 61 Wn. App. 177, 181, 810 P.2d 27 (1991)). Accordingly, **if more than one reasonable interpretation of the covenants is possible regarding an issue, we must favor that interpretation which avoids frustrating the reasonable expectations of those affected by the covenants’ provisions.**

Here, the covenants state that they are intended to “run with the land.” This means that the benefit or burden created in the land passes automatically to successors to the benefited or burdened estates. Restatement (Third) Of Property: Servitudes § 5.1 (2000); Restatement (Third) Of Property: Servitudes § 1.5, cmt. *a* (2000).

The covenants also provide that the developer possesses the authority to enforce the covenant provisions against the owners of the burdened

lots. In other words, the developer retained the benefit of enforcement authority, and the purchasers of the lots are burdened by the requirement that they submit to the authority of the developer. However, the covenants themselves do not specifically state whether the benefit of the enforcement authority passes to the subsequent owners of the developer's interest.

If such authority did not pass to subsequent owners, however, the purposes of the covenants and the reasonable expectations of the lot owners would be frustrated. The lot-owners' estates are benefited by the existence of an entity with authority to enforce the covenants by requiring owners of the burdened lots to submit construction plans to that entity for approval. The benefit created by the covenants adds value to the lot owners' land. Riss, 131 Wn.2d at 622-24. By the terms of the covenants, that benefit runs with the land and passes to subsequent purchasers of individual lots. **The benefit would be compromised if the authority to administer and enforce the covenants terminated when the developer's existence ceased.**

Accordingly, we interpret the provision in the covenants which states that the covenants run with the land to mean that the benefit of the developer's enforcement power properly passed to those companies who acquired the developer's estate, the Seattle Trust and Savings Bank in 1934 and the Normandy Park Company in 1937.

The Edlemans next contend that the authority to enforce the covenants could not have validly passed to the present-day Community Club because any such authority was necessarily terminated by the NPRSCC's 1977 administrative dissolution. We disagree.

The conveyance of authority issued by the Normandy Park Company in 1947 clearly states its intent to assign its authority to the NPRSCC, and to its “successors or assigns.” This conveyance was a valid means by which to pass authority. Restatement (Third) Of Property: Servitudes § 5.6(1) (2000) (“[T]he power to enforce servitudes created to implement a general plan of development may be transferred in whole or in part to an association whose membership is based on ownership of property included in the general plan.”).

The covenants do not define “successors or assigns.” The Edlemans have not directed us to any authority which compels the result that the term may not include the unincorporated entity which continued to enforce the covenants between 1977 and 1988, or the subsequent incorporated entity which continues to enforce the covenants today. The Community Club, however, correctly notes that the South Carolina Supreme Court, in Battery Homeowners Ass’n v. Lincoln Fin. Res., Inc., 309 S.C. 247, 422 S.E.2d 93 (1992), held that the phrase “successors” in covenants granting enforcement authority to a homeowners association and its “successor or assigns” included an unincorporated association of property owners formed after the original association’s administrative dissolution. In so holding, the court noted that **“successor” is a term of art that may refer to successors of “corporate control,” or simply to an entity that “has in fact succeeded.”** Battery Homeowners, 209 S.C. at 250 (quoting Bremner v. Alamitos Land Co., 11 Cal. App. 2d 150, 53 P.2d 382 (1936)).

As with the covenants themselves, we favor the interpretation of the conveyance of authority that does not frustrate either the purpose of the covenants or the reasonable expectations of the lot owners of the Riviera Section neighborhood.

Accordingly, we hold that the Community Club as it exists today is a valid successor to the NPRSCC and its predecessors and, as such, has the authority to enforce the covenants.<sup>58</sup>

In sum, Division I of the Court of Appeals refused to adopt a rigid, legalistic construction when determining whether the Community Club was the successor of the developer for the purpose of enforcing the restrictive covenant. Instead, the court focused on two underlying principles: (1) the plat restrictions' express statement that they run with the land, and (2) the philosophy that whenever possible restrictive covenants are enforceable in order to protect the value of property within a community and the reasonable expectations of the members of a community.

In the present case, Lake Jane Estates' restrictive covenants also contain an express directive that they "run[] with the land and bind[] future owners, their heirs, successors or assigns."<sup>59</sup> And, as in Green, Lake Jane Estates' has historically enforced these restrictions since the developer left the scene and thereby protected the expectations and property values of its members. Accordingly, Lake Jane Estates is the *de facto* – and legal – successor to the developer.<sup>60</sup>

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<sup>58</sup> *Id.* at 683-86 (emphasis added).

<sup>59</sup> CP 258.

<sup>60</sup> Lake Jane Estates had only five days to respond to Jensen's motion, and during that time it did not uncover any evidence that Lake Tapps Development Company had formally assigned in writing its rights regarding the Plat Restrictions to Lake Jane Estates. But Lake Jane Estates does not wish to foreclose the possibility that it might find such evidence if given more time to investigate.

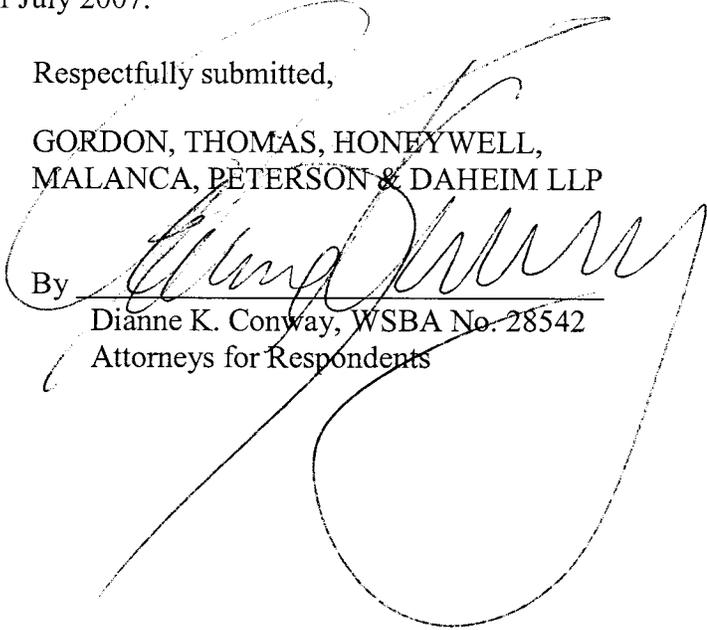
#### IV. CONCLUSION

The effect of the trial court's ruling is profound. It not only allows Jensen to triple the number of homes on his two lots but opens up the rest of the lots in the Debra Jane Lake Plat to similar "downsizing." What is now a 440-lot subdivision could potentially double (or more) in size, straining the common amenities like the pool and Lake and profoundly affecting other properties within the Plat. This Court should reject this outcome and enforce the reasonable expectations of the residents of the Debra Jane Lake Plat – namely, that all subdivisions be approved by the Lake Jane Estates Homeowners Association as they have been for at least 18 years. To the extent that the Court believes that the record is insufficient to support such a finding at this point in time, the matter should be remanded to allow pertinent discovery.

Dated this 2<sup>nd</sup> day of July 2007.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,  
MALANCA, PETERSON & DAHEIM LLP

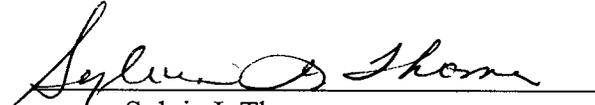
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**CERTIFICATE OF SERVICE**

I certify that on the 2<sup>nd</sup> day of July, 2007, a true copy of the APPELLANT'S OPENING BRIEF was delivered via ABC-Legal Messengers to the following:

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