

No. 36094-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
CLERK OF COURT
KCS

LAKE JANE ESTATES, a Washington non-profit corporation,

Appellant,

v.

RANDY S. JENSEN, a single man,

Respondent.

APPELLANT'S REPLY BRIEF

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

Dianne K. Conway
John T. Cooke
Attorneys for Appellant

1201 Pacific Avenue, Suite 2100
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500
WSBA No. 28542

TABLE OF CONTENTS

I. SUMMARY OF REPLY BRIEF1

II. REPLY ARGUMENT3

A. The Clear Purpose and Intent of the CC&Rs is to Protect the Planned Development in the Debra Lake Jane Plat.3

1. Restrictive Covenant 14 Provides Blanket Enforcement Authority in the Event Lake Tapps Development Company Opts not to Enforce the Covenants or Dissolves.....3

2. Evidence of Lake Jane Estates Efforts to Oversee Subdivisions for the Last 18 Years is Relevant and Admissible to Determine the Intent and Purpose of the Covenants.....5

3. The Absence of Lake Tapps Development Company Alone Cannot Deprive the Homeowners of the Benefit they Reasonably Expected to Receive from this Covenant.....7

B. White v. Wilhelm and Barbato v. Shundry are Easily Distinguishable.9

1. *Wilhelm* Analyzed the Enforceability of a Restrictive Covenant under an Abandonment Analysis. The Absence of a Committee to Approve Plans was just one Factor the Court Considered in Reaching its Conclusion that the Covenant was Unenforceable.....9

2. The Ohio decision Barbato v. Shundry also Relies on the Absence of *de facto* successor to reach its Decision.12

C. Washington Law does not Require a Formal Assignment of Enforcement Authority Where the CC&Rs Provide that the Covenants Run with the Land and Bind Future Owners, their Heirs, Successors or Assigns.....14

D. The Case is not Appropriate for Judgment on the Pleadings.....17

III. Conclusion19

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Green v. Normandy Park Riviera Section Community Club</u> , 137 Wn. App. 665, 151 P.3d 1038 (2007).....	7, 8, 10, 14, 15, 16, 17, 18
<u>Lakes at Mercer Island Homeowners Assoc. v. Witrak</u> , 61 Wn. App. 177, 181, (1991), <i>review denied</i> , 117 Wn.2d 337, 883 P.2d 1383 (1994).....	12
<u>Mendez v. Palm Harbor Homes, Inc.</u> , 114 Wn. App. 466, 45 P.3d 594 (2002).....	12
<u>Viking Properties, Inc. v. Holm</u> , 155 Wn.2d 112, 118 P.3d 322 (2005).....	5
<u>White v. Wilhelm</u> , 34 Wn. App. 763, 665 P.2d 407 (1983) <i>rev. denied</i> , 100 Wn.2d 1025 (1983)	9, 10, 11, 13

OUT OF STATE CASES

<u>Barbato v. Shundry</u> , 1991 WL 115949 (Ohio App. 5 Dist. 1991)	9, 12, 13, 14
---	---------------

RULES OF APPELLATE PROCEDURE

RAP 10(h)	6
RAP 10.4.....	6, 12

STATUTES

RCW 64.38.020	8
---------------------	---

OTHER

Restatement (Third) of Property: Servitudes § 5.6(1)	12, 17
--	--------

I. SUMMARY OF REPLY BRIEF

Respondent purchased the property at issue knowing that approval from the Lake Jane Estates Homeowner's Association ("Lake Jane Estates") would be required before subdividing the property. Respondent in fact submitted an application to Lake Jane Estates for subdivision approval. Yet Respondent now argues that the restrictive covenant requiring subdivision approval is unenforceable because Lake Jane Estates does not have the ability to enforce it. Instead of seeking the consensus of the lot owners within Lake Jane Estates to amend the CC&Rs to allow for unrestricted subdivision, Respondent asks the Court to declare the covenant invalid. In the process, Respondent also asks the Court to unilaterally deprive the lot owners of Lake Jane Estates the benefit they receive from having an entity oversee subdivisions within their community.

This is a rather remarkable argument for a number of reasons. First, the clear intent of the CC&Rs is that Lake Jane Estates would have the ability to enforce the subdivision covenant if or when Lake Tapps Development Company ceased to exist or no longer desired to exercise oversight authority. Consistent with that intent, Lake Jane Estates approved subdivisions for at least 18 years¹ with the tacit consent of both

¹ Following the trial court's rulings in this matter, Lake Jane Estates discovered documents that showed that Lake Jane Estates was approving subdivisions as of the early 1970s. At that time it was too late to add these documents to the record in this matter, however.

the Lake Tapps Development Company and, more importantly, the homeowners within Lake Jane Estates. Moreover, Respondent himself acknowledged the authority Lake Jane Estates has to review and approve of subdivision proposals by applying to the Lake Jane Estates for permission to subdivide his property.

On a more fundamental level, however, Respondent's argument reflects a misunderstanding of the role covenants, conditions and restrictions play in communities today. Respondent's view of the CC&Rs focuses rather myopically on the benefit the Lake Tapps Development Company received from enforcing the subdivision covenant, while wholly ignoring the benefit the homeowners reasonably expected to receive from having an entity oversee subdivisions. But the Respondent's attempt to unilaterally deprive the homeowners of that benefit is completely contrary to Washington law.

Overall, Respondent's arguments fail to justify the trial court's hasty judgment in this action. Accordingly, this Court should reverse the trial court's decision rendering judgment in favor of Respondent.

II. REPLY ARGUMENT

- A. The Clear Purpose and Intent of the CC&Rs is to Protect the Planned Development in the Debra Lake Jane Plat.**
- 1. Restrictive Covenant 14 Provides Blanket Enforcement Authority in the Event Lake Tapps Development Company Opts not to Enforce the Covenants or Dissolves.**

As noted in Lake Jane Estates' Opening Brief, the restrictive covenant at issue limits the subdivision of lots within Lake Jane Estates:

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

The covenants also provide that Lake Jane Estates has the right to enforce this restriction:

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.

Respondent makes much ado of the difference between Restrictive Covenant 6 and Restrictive Covenant 14 to emphasize that Lake Jane Estates cannot enforce Restrictive Covenant 6. Ultimately, Respondent concludes that because Restrictive Covenant 14 includes both Lake Tapps Development Company and Lake Jane Estates and Restrictive Covenant 6 only includes Lake Tapps Development Company that the parties intended

that Lake Jane Estates would never be able to oversee subdivisions.² But to the contrary, the combination of these two covenants establishes a priority system of enforcement. It does not, as Respondent contends, lead to the situation where Covenant 6 is unenforceable simply because the Lake Tapps Development Company no longer exists.

Yet there is a readily available and somewhat obvious explanation for the discrepancy that removes any inference created by not expressly including the Lake Jane Estates. If Restrictive Covenant 6 did give simultaneous authority to oversee subdivisions to both Lake Jane Estates and Lake Tapps Development Company simultaneously, it would pit the developer against Lake Jane Estates. Giving both entities concurrent oversight authority over subdivisions would lead to the classic childhood scenario where a child seeks permission from one parent and then goes to the other because the child did not like the first answer. To avoid this situation the drafters made a “common sense” decision to give the developer priority to oversee subdivisions while giving blanket authority over all conditions to both entities in case one failed to exist or do its job. Covenant 6 simply sets forth a priority for enforcement. Covenant 6 does not state, as Respondent contends, that it becomes unenforceable when Lake Tapps Development Company ceases to exist. Respondent’s

² Respondent’s Brief at 7-8.

“common sense interpretation” supported by “common principles of contract interpretation” fails in light of the practical realities presented by providing for concurrent enforcement authority. To the contrary, the two covenants are more reasonably read as creating a priority system of enforcement that allows Lake Jane Estate to oversee subdivisions in the absence of the Lake Tapps Development Company.

Overall, what is clear from the covenants is that the parties wanted some level of control over subdivisions. Since the covenants reserved enforcement authority to both Lake Tapps Development Company and Lake Jane Estates, the only reasonable interpretation of these covenants that protects the homeowners’ collective interests and reasonable expectations is that Lake Jane Estates, as the body representing the lot owners, would exercise the oversight of subdivisions in the absence of Lake Tapps Development Company.³

2. Evidence of Lake Jane Estates Efforts to Oversee Subdivisions for the Last 18 Years is Relevant and Admissible to Determine the Intent and Purpose of the Covenants.

Respondent attempts to frame Lake Jane Estates’ efforts to oversee subdivisions for at least the last 18 years as Lake Jane Estates’ “unilateral or subjective intent” of the covenant and, therefore, inadmissible.⁴ This

³ See Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 120, 118 P.3d 322 (2005) (noting that when determining the intent of CC&Rs courts “will place special emphasis on arriving at an interpretation that protects the homeowner’s collective interests.”).

⁴ Respondent’s Brief at 9.

argument – which was never raised below and thus shouldn't be considered here – conflicts with the facts. Lake Jane Estates exercised subdivision oversight for many years while Lake Tapps Development Company was still a lawful entity. If anything, Lake Jane Estates' exercise of subdivision oversight while Lake Tapps Development Company existed is evidence of the parties' bilateral intent that Lake Jane Estates would exercise oversight authority when Lake Tapps Development Company no longer wanted to or when Lake Tapps Development Company was dissolved.⁵ If Lake Tapps Development Company truly believed that it and it alone had the authority to oversee subdivisions, it would have and could have objected to Lake Jane Estates' exercise of that authority. The fact that it did not raise any objection is evidence of the parties' bilateral intent, not Lake Jane Estates' unilateral or subjective intent as Respondent contends.

⁵ Appellant referred to an unpublished decision as evidence that Lake Jane Estates has enforced the subdivision covenant in the past. Respondent asks for sanctions for citing to an unpublished opinion. That rule states, in pertinent part, that:

A party may not cite as an authority an unpublished opinion of the Court of Appeals.

RAP 10(h)(emphasis added). Appellant's did not cite to the unpublished opinion as an authority for its right to enforce the restrictive covenant. It simply cited to that case as evidence of its efforts to enforce the restrictive covenant that Respondent alleges it does not have the right to enforce.

3. The Absence of Lake Tapps Development Company Alone Cannot Deprive the Homeowners of the Benefit they Reasonably Expected to Receive from this Covenant.

The subdivision covenant provides dual benefits. On one hand, it benefits the Lake Tapps Development Company by granting it authority to oversee subdivisions while it still had a development interest in the property. On the other hand, the covenant benefits the homeowners within Lake Jane Estates by guarding against the unsupervised subdivision of property within Lake Jane Estates.

As discussed at length in Lake Jane Estates' Opening Brief, the Court of Appeals in Green v. Normandy Park Riviera Section Community Club⁶ recognized the dual benefits served by a similar restriction when it ruled that the benefit of the enforcement authority still existed even though the developer no longer existed:

The lot-owners' estates are benefited by the existence of an entity with authority to enforce covenants by requiring owners of the burdened lots to submit construction plans to an entity for approval. The benefit created by the covenants adds value to the lot owners' land. 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.⁷

⁶ 137 Wn. App. 665, 151 P.3d 1038 (2007).

⁷*Id.* at 684 (internal citations omitted).

Thus, the Court then construed the covenants in favor of recognizing enforcement authority that existed for the benefit of the lot owners.⁸

Respondent argues that the absence of a “formal” successor to the developer results in the invalidity of the covenant. This argument misses the point and ignores that the individual lot owners are also beneficiaries of this covenant. Moreover, as is discussed later in Section C of this Reply Brief, Respondent’s argument fails to acknowledge that, unlike here, the covenants in Green did *not* provide for assignment to non-successor estates. Accordingly, in the absence of a formal successor to the developer’s estate, the benefit bestowed by this covenant must run to the lot owners – who, in this case, are represented by Lake Jane Estates. Since there is an entity that is capable of enforcing the covenant on behalf of the homeowners,⁹ and since that entity has enforced this covenant for at least 18 years, this Court should reverse the trial court’s judgment on the pleadings.

⁸ *Id.*

⁹ *See* RCW 64.38.020 (granting the homeowner’s association the authority to act on behalf of the homeowners).

B. White v. Wilhelm and Barbato v. Shundry are Easily Distinguishable.

1. *Wilhelm* Analyzed the Enforceability of a Restrictive Covenant under an Abandonment Analysis. The Absence of a Committee to Approve Plans was just one Factor the Court Considered in Reaching its Conclusion that the Covenant was Unenforceable.

The only Washington case Respondent cites in support of his position is the 1983 White v. Wilhelm¹⁰ decision from Division One. Ignoring for the moment the interpretive evolution of restrictive covenants that has occurred over the 24 years since White v. Wilhelm was decided, the facts and analysis in Wilhelm do not lend themselves to Respondent's blanket assertion that covenants become unenforceable when they require approval of an entity that no longer exists. In fact, when viewed in its entirety, the analysis in Wilhelm actually supports Lake Jane Estates' position.

The CC&Rs at issue in Wilhelm required approval by an architectural control committee ("Committee") of buildings before construction. By the time the suit was filed, the Committee no longer existed. If Respondent analysis was correct, the court could have easily concluded its analysis and rendered a decision by simply stating that a restrictive covenant becomes unenforceable when it requires approval of an entity that no longer exists. The court, however, could not come to

¹⁰ 34 Wn. App. 763, 665 P.2d 407 (1983), *rev. denied*, 100 Wn.2d 1025 (1983).

such an immediate conclusion because the mere absence of the Committee was not sufficient to find abandonment. Instead the court launched into an abandonment analysis focusing on whether violations had been “habitual and substantial,”¹¹ revealing that its main concern lay not in the absence of the Committee needed to approve the plans but whether the covenant requiring approval by the Committee had been abandoned through repeated violations by other homeowners (including, it turned out, the plaintiffs). The nonexistence of the Committee was simply one factor considered by the court in its abandonment analysis.¹²

In actuality, the court’s analysis in Wilhem is more consistent with the position taken by Lake Jane Estates here. It is the position of Lake Jane Estates that covenants that provide benefits to both the developer and homeowners alike cannot be declared unenforceable based upon the absence of the developer alone. Like the court in Wilhelm, there must be some other manifestation that establishes the *homeowners’* intent to give up the benefit they derived from the covenant, whether it be abandonment, equitable estoppel, or some other legal argument. To find otherwise would deprive the homeowners of their “reasonable expectations.”¹³

¹¹ *Id.* at 769 (emphasis added).

¹² *Id.* at 770-71.

¹³ Green, 137 Wn. App. at 665 (interpreting the covenant with the homeowner’s reasonable expectations in mind).

In the present dispute, the covenant requiring approval of subdivisions has not been abandoned. To the contrary it has been openly enforced by the Lake Jane Estates for at least 18 years without challenge from the Lake Tapps Development Co during the time the two entities co-existed.

Finally, even if Wilhelm stood for what Respondent says it does, it should not be followed here. As noted above, there has been a vast evolution in how Washington law views restrictive covenants. The court in Wilhelm issued its decision against the backdrop that restrictive covenants are “strictly construed” and viewed the dispute from a perspective where the public policy of the time was for “the free use of land.”¹⁴ This is no longer the view held in Washington or elsewhere:

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

¹⁴ Wilhelm, 34 Wn. App. at 772.

arriving at an interpretation that protects the homeowners' collective interests.¹⁵

In other words, Washington law recognizes that restrictive covenants protect homeowner's collective interests and serve valid planning goals and interpret them accordingly.¹⁶ Interpreting covenants in accordance with their purpose and intent mandates that the homeowners' collective interest in enforcing the covenant be protected, not just that of the individual landowner.

2. The Ohio decision Barbato v. Shundry also Relies on the Absence of *de facto* successor to reach its Decision.

The only other decision Respondent cites to justify its opinion is an unpublished decision from the Ohio Court of Appeals.¹⁷ In any event,

¹⁵ Lakes at Mercer Island Homeowners Assoc. v. Witrak, 61 Wn. App. 177, 181, (1991), *review denied*, 117 Wn.2d 337, 344, 883 P.2d 1383 (1994). *See also* Restatement (Third) of Property: Servitudes §, cmt. a, which states:

The rule that servitudes should be interpreted to carry out the intent of the parties and the purpose of the intended servitude departs from the often expressed view that servitudes be narrowly construed to favor the free use of land. It is based in the recognition that servitudes are widely used in modern land development and ordinarily play a valuable role in utilization of land resources.

¹⁶ Appellant's Opening Brief at 13-14 and cases cited therein.

¹⁷ While Respondent goes to great lengths to condone its use of unpublished decisions from out-of-state by citing to the Ohio Court rules and tracking there various amendments – none of which apply to the Barbato decision – Respondent conveniently neglected to search Washington case law regarding the interpretation of Washington's rule prohibiting the citation of unpublished opinions. In Mendez v. Palm Harbor Homes, Inc. the court held that RAP 10.4 also prohibits the citation of unpublished out-of-state opinions:

Reading RAP 10.4(g) and (h) in relation to each other, it is clear citation to unpublished opinions of this court is forbidden and citation to unpublished opinions of other jurisdictions is also inappropriate.

114 Wn. App. 466, 473, 45 P.3d 594 (2002). The Mendez court declined to issue sanctions in that case because it felt the rule required "clarification." In this case, it would not appear that a similar result is warranted as Mendez has clarified the scope and intent of RAP 10.4.

Respondents overstate the Ohio court's ruling in Barbato v. Shundry.¹⁸ Like in Wilhelm, the non-existence of the entity authorized to review plans alone was not sufficient to find the covenant unenforceable. Rather, as in Wilhelm, the Ohio court looked for evidence that indicated the covenant was still being enforced before declaring it invalid:

There is no evidence of a successor corporation having been created for the purpose of exercising that approval authority, be it another corporation controlled by the original grantors, the grantor individually, or a homeowner's association.

....

[T]he Court finds in the present case that due to the passage of time, the position of not being involved articulated by [the Grantor], and the dissolution of the [the entity authorized to review plans] that there is no clear procedure in effect for the exercise of the approval authority.¹⁹

In fact, when the Ohio Court of Appeals reviewed the trial court's decision, it distinguished cases presented by the appellant to support its theory that a general plan that is reasonably exercised is enforceable:

Appellants cite us to several cases from other appellate districts. We have reviewed these cases and find them distinguishable because in each case where the courts found

¹⁸ 1991 WL 115949 (Ohio App. 5 Dist., 1991).

¹⁹ *Id.* at *5 (emphasis added).

a general plan that was reasonably exercised, they held them enforceable [sic]. Those that were not were struck down. Here, the general plan that was arguably once in effect has broken down and there is no entity available to reasonably exercise the authority to disapprove of the proposed garage.²⁰

Unlike the situation in Barbato, here there is a clear procedure in effect for the approval of subdivisions by Lake Jane Estates. In fact, Respondent himself acknowledged the procedure by submitting his subdivision plans to the Lake Jane Estates HOA. Thus, Barbato does not support Respondent's position, it undermines it.

C. Washington Law does not Require a Formal Assignment of Enforcement Authority Where the CC&Rs Provide that the Covenants Run with the Land and Bind Future Owners, their Heirs, Successors or Assigns.

Respondent's assertion that Green requires a formal written transfer of enforcement authority is incorrect. The issues in Green were two-fold: First, the court addressed whether the covenants allowed the enforcement authority to pass to successors of the developer's estate. Second the Court reviewed whether there was a valid conveyance of that authority to a non-successor estate.

The CC&Rs in Green simply stated that they are intended to be "covenant[s] running with the land."²¹ The court determined that this

²⁰ *Id.* at *1.

²¹ Green, 137 Wn. App. at 682

phrase meant “the benefit or burden created in the land passes automatically to successors to the benefited or burdened estates.”²² Accordingly, the court looked for some evidence to convey authority to a non-successor estate. The court found that evidence in a subsequently recorded document that conveyed enforcement authority to a homeowner’s association and its “successors or assigns.”²³

Respondent fixates on the subsequently recorded document and claims that “there is no document that purports to convey the right to approve of subdivisions of lots within the plat.”²⁴ Ignoring for the moment whether a document is required at all where an HOA has assumed the authority, Respondent misses a critical distinction in the court’s opinion: in Green there was no language in the covenants that could be read to convey authority to non-estate successors. Accordingly, the court looked outside of the Covenants to determine if in fact any conveyance of enforcement authority had been made. But in this case such an inquiry is not necessary, as the covenants expressly convey enforcement authority to Lake Jane Estates and the benefits and burdens inure to both successors and assigns in the first place:

The following restrictions are hereby
declared to be covenants running with the

²² Green, 137 Wn. App at 683.

²³ *Id.* at 685.

²⁴ Respondent’s Brief at 17.

land and binding upon future owners, their heirs, **successors or assigns** on the following described real property. . . .

. . . .

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.²⁵

Thus, there is no need for a separate conveyance of authority, because the CC&Rs already convey it. By focusing on what he perceives as a lack of “any attempt by Lake Tapps Development Company to transfer the right to approve subdivision of lots,”²⁶ Respondent conveniently ignores the language of the CC&Rs, the holding in Green, and Lake Jane Estates’ long history of approving and disapproving the subdivision of lots, including at least 14 years of which were while the Lake Tapps Development Company still existed.

Moreover, as discussed at length in Appellant’s Opening Brief and the cases cited therein, no specific method of transfer is required:

Unless prohibited by the terms of the servitudes, the 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

²⁵ CP 1, 2, 4 (emphasis added).

²⁶ Respondent’s Brief at 15. *See also* Respondent’s Brief at 16, 17, 18.

is based on ownership of property included in the general plan.²⁷

Here, the CC&Rs do not prohibit the transfer of enforcement authority. Thus, whether a transfer of authority has occurred is dependent upon an interpretation of the CC&Rs and the facts of the particular case.²⁸ In this case, both the CC&Rs and the facts indicate that Lake Jane Estates has the ability of oversee subdivisions. The CC&Rs clearly indicate that the Lake Jane Estates would exercise subdivision oversight in the absence of Lake Tapps Development Company. Moreover, the exercise of subdivision oversight for at least 18 years is irrefutable evidence that Lake Jane Estates “has in fact succeeded” to Lake Tapps Development Company with regard to subdivision oversight.²⁹ And, most importantly, such an interpretation preserves the reasonable expectations of the homeowners subject to the covenant.

D. The Case is not Appropriate for Judgment on the Pleadings.

As the court in Green noted, determining whether a party succeeds to a developer’s rights involves an intensive factual inquiry:

Neither the *Restatement* nor any Washington cases set out general or default rules for determining succession to developer rights and obligations in the context of subdivisions such as the one here. The *Restatement* explains that the question of

²⁷ Restatement (Third) of Property: Servitudes § 5.6(1).

²⁸ Green, 137 Wn. App. at 684, fn. 15

²⁹ *Id.* at 686.

whether a party succeeds to a developer's rights must be determined on a case-by-case basis based on an interpretation of the document creating those rights and the facts of the particular case.³⁰

Here, contrary to Green there has been no analysis of the facts of this particular case. Moreover, Lake Jane Estates did not admit all material facts in its answer to Respondent's complaint. For instance, Lake Jane Estates denied Respondent's allegation that "[i]n the absence of any entity authorized to consent to subdivision, this restriction is unenforceable." Respondent Jensen argues that this allegation is a legal conclusion and thus, not pertinent to a motion for judgment on the pleadings. In light of Green and other authority cited in Lake Jane Estates' Opening Brief, however, this statement must be read as mixed question of law and fact. Accordingly, the trial court was required to view this allegation as untrue.

Overall, Respondent's attempt to qualify the factual allegations it made in its complaint as legal conclusions ignores Washington law on the transfer of authority in the context of CC&Rs. As the Court of Appeals in Green makes clear, a formal transfer of authority to enforce a covenant is not required. Instead, the authority to enforce a covenant may in fact pass to an entity that has exercised a pattern of enforcement.

³⁰*Id.*.

III. Conclusion

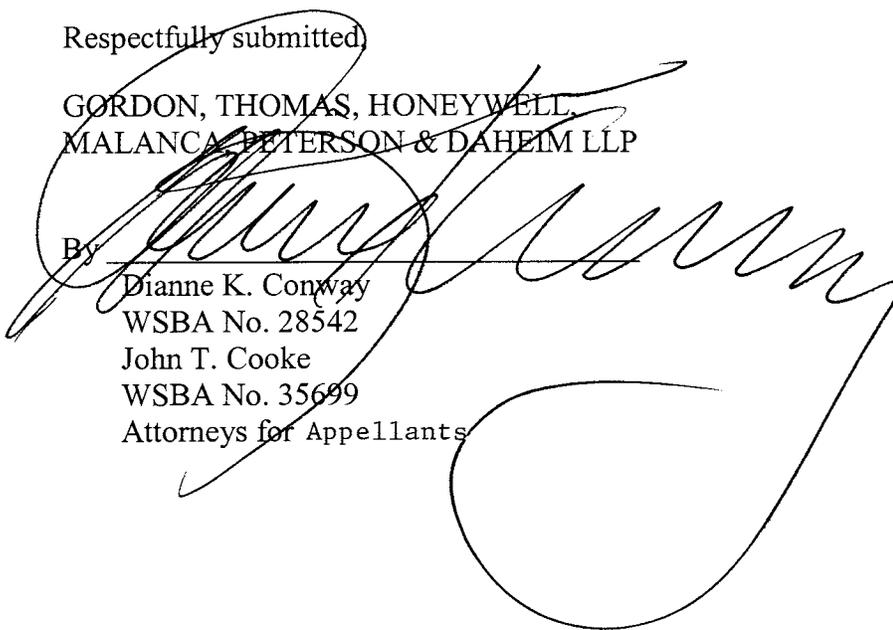
It is clear that the intent of the CC&Rs is that Lake Jane Estates would exercise oversight authority when Lake Tapps Development Company no longer desired to exercise that authority or dissolved. The covenant at issue provides dual benefits to both the developer and the lot owners and cannot be declared unenforceable based upon the absence of Lake Tapps Development Company alone. To reach such a conclusion would deprive the lot owners of their reasonable expectations contrary to Washington law. Moreover, the language of the CC&Rs and the exercise of subdivision oversight for at least 18 years lead to the inescapable conclusion that Lake Jane Estates has authority to exercise subdivision oversight. The trial court failed to take these factors into account when it dismissed the actions on the pleadings alone. Accordingly, Lake Jane Estates respectfully requests that this Court reverse the trial court's ruling.

Dated this 27th day of August 2007.

Respectfully submitted,

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

By


Dianne K. Conway
WSBA No. 28542
John T. Cooke
WSBA No. 35699
Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that on the 27th day of August 2007, a true copy of the APPELLANT'S REPLY BRIEF was delivered via ABC-Legal Messengers to the following:

James V. Handmacher
MORTON MCGOLDRICK, P.S.
820 "A" Street Suite 600
Tacoma, WA 98402
Fax: (253) 272-4338


Cheryl M. Koubik

08/27/07 11:34 AM
BY MARY M. SMITH
STANDARD MAIL
BY AIR MAIL
BY AIR MAIL