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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS CM  
DIVISION II DEPUTY  
OF THE STATE OF WASHINGTON

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FOXVIEW HOMEOWNERS ASSOCIATION,

Appellant

v.

CYNTHIA A. FENBERG,

Respondent

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**REPLY BRIEF OF APPELLANT**

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## **I. ARGUMENT**

### **A. Joinder of necessary parties.**

#### **1. The Association properly preserved the issue of joinder.**

Respondent Fenberg argues that appellant Foxview Homeowner's Association did not preserve the issue of failure to join necessary parties because it raised the issue for the first time on appeal. This argument fails because the Association did not raise the issue for the first time on appeal. Even if the Association had raised the argument for the first time on appeal, it would still be timely.

As noted in the Association's opening brief, the Association raised the joinder issue in its reply to Fenberg's counterclaim, where it stated the affirmative defense that "defendant has failed to join the members of the Association who are necessary parties to resolve issues raised by defendant's counterclaim." (CP 11) CR 12(h)(2) states that a defense of failure to join a party indispensable under rule 19 may be made in any pleading permitted, by motion on the pleadings, or at the trial on the merits. The Association clearly complied with that rule.

The Association again raised the issue to the trial court before entry of the summary judgment. (RP 10-15) Fenberg notes that the issue was raised orally rather than in written affidavits or argument, but cites no

authority requiring the issue to be raised in writing. In fact, Fenberg filed a memorandum with the trial court specifically discussing the joinder issue. (CP 220) There is clearly no basis for Fenberg's assertion that the Association raised the issue of joinder for the first time on appeal.

Even if the issue of joinder had been raised for the first time on appeal, it would be timely. An objection grounded on failure to join a necessary party can be raised for the first time on appeal. *Henry v. Town of Oakville*, 30 Wn. App. 240, 243, 633 P.2d 892 (1981), *review denied*, 96 Wn.2d 1027 (1982); *Treyz v. Pierce County*, 118 Wn. App. 458, 462, 76 P.3d 292 (Div. 2, 2003), *review denied*, 151 Wn.2d 1022 (2004).

Fenberg argues that this rule allowing a party to raise failure to join a necessary party for the first time on appeal only applies to declaratory judgment actions, and asserts that her counterclaim "only sought an injunction, not a declaratory judgment." This is not true.

Both parties to this case asked for a declaratory judgment. The Association's reply to the counterclaim, in addition to raising the affirmative defense of nonjoinder of the members of the Association, requested, "A judgment declaring the rights of the parties to use of the easement." (CP 11) Fenberg's motion for partial summary judgment asked for a determination that "Foxview Homeowners Association and its

members do not have the right to utilize the access easement over Defendant's property for pedestrian access to the beach," and did not even mention an injunction. (CP 206)

The partial summary judgment which is the subject of this appeal, drafted by Fenberg, states that "the Foxview Homeowners Association and its members do not have an easement over Defendant Cynthia A. Fenberg's property for access to the adjacent railroad right of way or the beaches and tidelands of Puget Sound." (CP 228) This partial summary judgment constitutes a declaration of the rights of the parties.

The partial summary judgment goes on to grant an injunction, which is simply "further relief based on a declaratory judgment or decree" as authorized in the Uniform Declaratory Judgement Act, RCW 7.24.080. *See, Ronken v. Board of County Commissioners of Snohomish County*, 89 Wn.2d 304, 309, 572 P.2d 1 (1977) (approving declaratory action together with the coercive remedy of injunction). However, where both parties in this case asked the trial court to determine their respective rights to use the access easement, this is by definition a declaratory judgment action. RCW 7.24.020.

It is not necessary to specifically mention the Uniform Declaratory Judgments Act or request a declaratory judgment, to bring the action

within the parameters of that statute. As stated by the Wyoming Supreme Court in *Ohio Oil Co. v. Wyoming Agency*, 63 Wyo. 187, 209-210, 179 P.2d 773, 780 (1947):

Counsel have not asked us to notice the Uniform Declaratory Judgment Act, Sec. 3-5801 et seq., C.S. 1945, in this connection, but we think it is not improper for us to add that, after a trial of issues raised by pleadings showing a dispute over the title, we should not reverse the judgment which may be sustained under that act. An action to quiet title is essentially an action for declaratory relief. *Holly Sugar Corp. v. Fritzler*, 42 Wyo. 446, 462, 296 P. 206; Borchard on Declaratory Judgments (2d ed.) 139. It has been said that the act provides for 'a kind of expanded bill quia timet, meant to do in general what that suit did in its limited field.' Judge L. Hand in *Meeker v. Baxter*, 2 Cir., 83 F.2d 183, 187. That the purpose of the act 'to settle and to afford relief from uncertainty and insecurity with respect to rights' (Sec. 3-5812) may be carried out in actions not expressly based on the act, is shown by many cases. *Hasselbring v. Koepke*, 263 Mich. 466, 248 N.W. 869, 93 A.L.R. 1170 (action to enjoin interference with a claimed easement); *West v. Chase*, 92 N.H. 104, 25 A.2d 688 (petition for construction of a will); *Moore v. Moore*, 147 Va. 460, 137 S.E. 488, 51 A.L.R. 1517 (petition for mandamus); *Mason & Mason v. Brown*, Tex.Civ.App., 182 S.W.2d 729 (action to annul provision of a will); *Southeastern Greyhound Lines v. Knoxville*, 181 Tenn. 622, 184 S.W.2d 4 (action to enjoin collection of taxes); *Hess v. County Club Park*, 213 Cal. 613, 2 P.2d 782 (action to annul building restrictions); *Teal v. Maxon*, 233 Ala. 23, 169 So. 477 (action to quiet title to land not in plaintiff's possession). In *Renwick v. Hay*, 90 N.J.Eq. 148, 106 A. 547 (noticed in *Holly Sugar Corp. v. Fritzler*, 42 Wyo. at page 464, 296 P. at page 210), a suit to determine rights in private ways, it was held that relief might be granted by considering the case either as one in equity or as one under the declaratory judgment act. In *Faulkner v. Keene*, 85 N.H.

147, 156, 155 A. 195, 201, it is stated that ‘The cause being plainly presented to the court, the appropriate remedy will be granted, however erroneously the proceeding be entitled.’ See, also, Borchard on Declaratory Judgments, pp. 427, 741.

This Wyoming decision is important because the Uniform Declaratory Judgments Act must be interpreted and construed to effectuate its general purpose to make uniform the laws of those states which enact it. RCW 7.24.140.

Thus, it is not the label attached by the parties, but the nature of the relief requested and granted that determines whether the action involves a declaratory judgment. The relief requested and granted in this case involved a declaration of the rights of the parties. Fenberg concedes that failure to join an indispensable party can be raised for the first time on appeal from a declaratory judgment.

Finally, even if the Association had not raised the joinder issue before the trial court, and even if this case did not involve a declaratory judgment, this Court is not precluded from considering the issue. RAP 2.5(a) gives this Court discretion on whether to review such a claim depending on the circumstances of the case. *Geroux v. Fleck*, 33 Wn. App. 424, 427, 655 P.2d 254, 256 (1982), *review denied*, 99 Wn.2d 1003 (1983).

**2. The individual lot owners are necessary parties in this case.**

Fenberg does not dispute that the members of the Association have an interest in the subject of the action which may be impaired by the disposition of this action. This makes them necessary parties whose joinder is required under CR 19(a)(2).

Fenberg claims that the lot owners do not have to be joined because the Association can represent their interests. Fenberg cites two cases which are clearly distinguishable. In *Crosby v. County of Spokane*, 137 Wn.2d 296, 308-309, 971 P.2d 32 (1999), the Court held that neighboring property owners are not necessary parties to an appeal from the denial of a plat application, because they:

have no legal, property, financial or ownership interest in the property which is the subject of the land use decision, and thus do not have an interest significantly affected by that decision. Their interest is like that of the public in general - to assure that a correct decision is made in accord with applicable laws and proper public interest considerations. That interest is sufficiently represented by the Board.

At the same time, the Court restated the long-standing rule that the owner of the property which is the subject of the land use decision is a necessary party, because of the significant property interest of that owner. This distinction shows why the individual lot owners in Foxview are necessary parties to this action, because they have a significant individual property

interest in the easement which is the subject of the action. They are not simply members of the general public.

The second case cited by Fenberg, *Ruston v. Tacoma*, 90 Wn. App. 75, 82, 951 P.2d 805 (1998), *review denied*, 136 Wn.2d 1003 (1998), is also clearly inapplicable. That case involved a boundary dispute between the City of Tacoma and the Town of Ruston. This Court rejected Tacoma's rather silly assertion that all citizens of Tacoma and Ruston are necessary parties to the action. The individual citizens of each municipality had no rights in the city boundaries independent of the municipality. In the case at bar, the individual lot owners have an easement for pedestrian access to the beach independent of the Association's right to use that same access to maintain the storm drainage facilities. They have a right to be individually joined before that valuable property right is taken away.

Fenberg argues that the Association is authorized by RCW 64.38.020(4) to represent the interests of its members in this lawsuit. The Association agrees that it is authorized by the statute to represent the interests of its members on some of the issues involved in this lawsuit, but not the issue involved in this appeal. The Association filed this lawsuit to compel Fenberg to comply with the restrictive covenants requiring ACC

approval before installing certain improvements on her lot. This enforcement authority is granted by section 15.2 of the CRRs jointly to the Association and its members. (CP 76) The statute clearly allows the Association to bring that enforcement action.

However, RCW 64.38.020(4) states that the Association may not institute, defend or intervene in litigation on behalf of owners involved in disputes that are not the responsibility of the Association. Nothing in the CRRs imposes on the Association the responsibility for defending the members' individual right to cross Fenberg's lot for access to the beach.

Fenberg notes that the Association requested relief on behalf of the individual lot owners. This action by the Association cannot waive the rights of those lot owners to be joined in this case before deprived of their rights. As noted in the Association's opening brief, if the trial court had granted summary judgment to the Association, determining that the Association and its members had the right to cross Fenberg's property for access to the beach, the failure to join the individual lot owners would have been harmless. They would not have been prejudiced by the court's decision because their rights would not have been lost. However, the court cannot take away those property rights without joining them as parties to the action.

Finally, Fenberg cites the case of *All Star Gas, Inc., of Washington v. Bechard*, 100 Wn. App. 732, 737, 998 P.2d 367, 370 (2000). That case had nothing to do with the issue of joinder of necessary parties, and the issue is never mentioned in the decision. In that case the issue was whether an individual who was not named in an injunction against competition was nevertheless bound by that injunction. The Court concluded that persons who are not named in an injunction can be bound by it if they are “so identified in interest with those named in the decree that it would be reasonable to conclude that their rights and interests have been represented and adjudicated in the original injunction proceeding.” The Court noted that a person can be “so identified in interest” if he had a high degree of control and participation in the injunction proceeding, or was the successor or assign of the entity named in the decree. That case would certainly be relevant in determining the extent to which individual members of the Association are bound by the trial court’s injunction, since none of them were named therein. That issue is not before this Court. However, that case says nothing about whether the individual lot owners should have been joined in the action before determining their property interests in the easement, and purporting to extinguish those interests.

**B. Validity of the easement.**

**1. The plat and recorded covenants clearly create an easement for pedestrian access to the beach.**

Fenberg asserts that the language of Section 3.6 of the CCRRs does not convey an easement because it does not indicate a present intent to convey, or specify the grantees. She points to the language in this section of the CCRRs that states, “There exists a 15 ft wide Access Easement encumbering Foxview Lot 8.” The flaw in Fenberg’s argument is that she does not read Section 3.6 in conjunction with the plat to which it references.

The easement over Lot 8 was created by the recording of the plat of Foxview. The easement is clearly shown on page 5 of that plat, and described as a “15' access easement to Tract A.” (CP 50) This easement was dedicated to the public on page 2 of the plat, where it states:

Know all people by these presents that we, the undersigned owners of interest in the land hereby subdivided, hereby declare this plat to be the graphic representation of the subdivision made hereby, and do hereby ... dedicate to the use of the public all of the easements and tracts shown on this plat for all public purposes as indicated thereon, including but not limited to parks, open space, utilities and drainage unless such easements or tracts are specifically identified on this plat as being dedicated or conveyed to a person or entity other than the public, in which case we do hereby dedicate and convey such streets, easements, or tracts to the person or entity identified and for the purpose stated.

Nothing on the plat specifically identifies the access easement across Lot 8 as being dedicated or conveyed to a person or entity other than the public.

Therefore the plat dedicates the access easement to the public.

RCW 58.17.165 states in relevant part:

If the plat or short plat is subject to a dedication, the certificate or a separate written instrument shall contain the dedication of all streets and other areas to the public, and individual or individuals, religious society or societies or to any corporation, public or private as shown on the plat or short plat.

...

Roads not dedicated to the public must be clearly marked on the face of the plat. Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid.

Thus an easement can clearly be created by dedication on the face of the plat.

As stated in *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 654, 145

P.3d 411 (2006), *review denied*, 161 Wn.2d 1012 (2007):

The intent of the plat applicant determines whether a plat grants an easement. If possible, the intent of the applicant is ascertained from the plat itself. When a plat is ambiguous, the applicant's intention may be determined by considering the surrounding circumstances. When the terms of a written instrument are uncertain or capable of being understood as having more than one meaning, the instrument is ambiguous.

[citations omitted] Here, the plat unambiguously created an access easement over Lot 8. Because it did not label that easement as dedicated to someone other than the public, by the terms of the dedication and the statute it was dedicated to the public.

Section 3.6 describes the purposes of the easement and the responsibility for its maintenance. The recitals to the Second Amendment to the CRRs state that “the Developer desires to further amend the Declaration to expand and clarify the Common Area maintenance responsibilities of the Association, particularly inasmuch as the plat has special maintenance requirements as a result, in part, of its ... access roads ... both on certain lots pursuant to easements as well as in the public right-of-way ...” (CP 89) Section 3.6 states that the maintenance and repairs of the access road are the obligation of the Association. (CP 90)

In addition to delegating maintenance obligations to the Association, section 3.6 also describes the purposes of the access easement. It states that it provides access to the storm drainage tract and wetland tract, necessary for the Association’s obligation to maintain those areas. It also states that the access easement provides pedestrian access to the railroad right-of-way and Puget Sound beach and tidelands.

Fenberg asserts that use of the language “possible and/or potential” to describe the pedestrian access to the beach creates uncertainty that is fatal to the easement. It is not fatal to the easement because the easement was already created by dedication on the plat. The purpose of this language was explained by its drafter, Rob Tillotson. He stated that he added this language to describe the access easement because he did not want the developer to warrant the validity of the historic easement over the railroad right-of-way and beach. (CP 22) The language did not diminish the effect of the easement already created on the face of the plat. It merely described its purpose.

Furthermore, mere uncertainty as to the scope of the easement is not fatal to an easement. If the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances. *Colwell v. Etzell*, 119 Wn. App. 432, 439, 81 P.3d 895 (2003). Mr. Tillotson’s declaration provides an explanation of the intention of the drafter. To the extent there is any uncertainty regarding the intent of this language, under the rules applicable to summary judgments the facts must be construed in the light most favorable to the non-moving party, the Association. *Vallandigham v. Clover Park School District No. 400*, 154 Wn.2d 16, 26,

109 P.3d 805 (2005).

Fenberg argues that even if the easement was validly created over Lot 8, it was solely for access to Tract A and cannot be used to access the beach. Even if the original plat dedication could be so narrowly construed, the effect of Section 3.6 is clearly to expand those uses. Section 3.6 says that the easement is intended for access to both Tract A and B, as well as pedestrian access to the beach. This language was recorded long before Fenberg acquired her property, and she is subject to its provisions.

Fenberg misstates the holding in *Brown v. Voss*, 105 Wn.2d 366, 371-372, 715 P.2d 514 (1986). The Court stated its holding as follows:

As a general rule, an easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant.

This case speaks to which properties have the right to use an easement, not where that property owner has a right to go after crossing it. Applied to the facts in the case at bar, this means that the right to cross Fenberg's lot for pedestrian access to the beach (the easement appurtenant) cannot be extended by the owner of a lot in Foxview (the dominant estate) to other parcels owned by him or her outside of Foxview. It does not mean that the access easement cannot be used for the purpose for which it was created.

**2. An easement for the benefit of all owners in a subdivision should receive the same liberal construction as restrictive covenants that provide similar benefits.**

Fenberg acknowledges that covenants and easements are both servitudes. (Respondent's Brief, p. 11) Fenberg acknowledges that covenants and easements are both interpreted according to the same rules. (Respondent's Brief, p. 15) Yet Fenberg asserts that an easement for the benefit of all owners in a subdivision should not be construed to protect the reasonable expectations of the owners, as is done in the interpretation of covenants. Fenberg justifies this disparate treatment by saying that an easement is not the same as a restrictive covenant.

A restrictive covenant has historically been described as a negative easement. *Lake Arrowhead Community Club, Inc. v. Looney*, 112 Wn.2d 288, 292, 770 P.2d 1046 (1989). Similarly, an affirmative covenant has been likened to an affirmative easement. *Id.*, at 293. Both covenants and easements are defined as servitudes in the terminology of the *Restatement (Third) of Property: Servitudes*, §1.1, adopted by this Court in *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 253, 84 P.3d 295 (Div. 2, 2004). In *Beebe v. Swerda*, 58 Wn. App. 375, 793 P.2d 442 (1990), *review denied*, 115 Wn.2d 1025 (1990), the Court quoted with approval the following language:

A covenant or agreement may operate as a grant of an easement if, to carry out the intention of the parties thereto, it is necessary to give it that effect.

Thus, for many purposes a covenant and an easement are the same.

Our Supreme Court has abandoned the former rule of strict construction of covenants in favor of a rule that looks to the intent of the drafter, and places special emphasis on arriving at an interpretation that protects the homeowners' collective interests. *Riss v. Angel*, 131 Wn.2d 612, 623-624, 934 P.2d 669 (1997). This was done in recognition of the fact that such covenants provide benefits to the entire community. *Id.* If more than one reasonable interpretation of the covenants is possible regarding an issue, the Courts will favor that interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions. *Green v. Normandy Park*, 137 Wn. App. 665, 683, 151 P.3d 1038, 1047 (2007), *review denied*, 163 Wn.2d 1003 (2008).

In support of these rules of interpretation, the *Green* court cited to the *Restatement (Third) of Property: Servitudes*, §4.1, which states:

A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.

The Restatement also abandons the rule of strict construction. *Id.*, at Comment *a*. Since the Restatement includes both easements and covenants within the definition of servitudes, it clearly applies the same rules of interpretation to both.

Easements can be just as much a part of a planned community as restrictive covenants. Where an easement is provided for the benefit of all members of a planned community, there is no reason it should be interpreted any differently than a restrictive covenant that is also intended to benefit the same community.

**C. The Association is entitled to attorney fees on appeal.**

Fenberg argues that if the Association prevails on its argument that the individual lot owners are necessary parties, the Association would not be entitled to attorney fees on appeal because the injunction against the Association would not be affected. That is incorrect.

Contrary to Fenberg's assertion, the joinder of the individual lot owners in this action for declaratory judgment and to quiet title is jurisdictional, as discussed in the Association's opening brief. In the absence of jurisdiction to enter the order, the trial court's summary judgment is void and must be vacated. *Doe v. Fife Municipal Court*, 74

Wn. App. 444, 449, 874 P.2d 182 (1994), *review denied*, 125 Wn.2d 1024  
(1995). The Association would thus be the prevailing party on appeal.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of September, 2008.

  
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Morton McGoldrick, P.S.  
Attorneys for Appellant

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY *Cp*  
DEPUTY

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

FOXVIEW HOMEOWNERS  
ASSOCIATION, a Washington non-profit  
corporation

NO. 37563-0-II

CERTIFICATE OF SERVICE

Appellant,

v.

CYNTHIA A. FENBERG, a single  
woman,

Respondent.

Lacina M. Lacy, under penalty of perjury under the laws of the State of Washington  
declares as follows:

I am an individual of at least 18 years of age, a resident of Pierce County, Washington,  
and not a party to this action. On September 19, 2008, I did cause to be served by U.S. Mail a  
true and correct copy of the Reply Brief of Appellant on:

Kevin T. Steinacker  
Dickson Steinacker  
1401 Wells Fargo Plaza  
1201 Pacific Avenue  
Tacoma, WA 98402

DATED this 19<sup>th</sup> day of September, 2008 at Tacoma, Washington

  
Lacina M. Lacy