

NO. 38627-5-II

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

MICHAEL R. FEOLA & SHARON L. FEOLA,  
husband & wife; GEORGE WILLIS; & LINDA C.  
SMITH,

Appellants,

vs.

DRIFTWOOD KEY CLUB, a Washington State  
nonprofit corporation.

Respondent.

REPLY BRIEF OF APPELLANT

STATE OF WASHINGTON  
BY MS  
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COURT OF APPEALS  
DIVISION II

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## I. ADDITIONAL STATEMENT OF FACTS

### A. The Various Driftwood Key Plats

There are 15 different plats that comprise the Driftwood Key neighborhood. *CP 25-26*. There was not one developer that developed all of the various subdivisions referred to as Driftwood Key. The Eighth Addition to Driftwood Key was jointly developed by Park Development Co. and Pope and Talbot, Inc. *CP 20*.

The owner/developers of one nearby subdivision in the Driftwood Key neighborhood, the Park Addition, were J.A. Park and Frances M. Park. In 1975, the Parks executed a declaration of restrictive covenants (*CP 276-279*) that differ from the covenants attached to any of Appellants plats. These covenants impose the restriction: "This contract is subject... to annual maintenance dues of \$2.00 per month by the Driftwood Key Club, Inc...." " *CP 279*. The other tracts also had various other parties involved in their development including Kathleen I. Nelson (Smith plat), and the Coon Bay Loafers. Each subdivision has the power to amend its covenants independently. (*CP 285-287, 7<sup>th</sup> Addition; CP 291-294, 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Additions*).

## **B. The Deeds**

DKC incompletely states on page 18 of its brief that: “the deeds to appellants’ homes describe their property interests as subject to dues imposed by Driftwood Key Homeowners Association.” The language on the Feola deed refers to:

“liability for assessments or charges as imposed by Driftwood Key Homeowners Association as recorded under Recording No. 852358 ...”:  
*CP 112.*

The Willis deed (*CP 139*), Exhibit “A”, references the same Recording No. 852358 (*CP 20-21*) which only contains language about “damages or other dues” for architectural violations:

"If the parties hereto, or any of them or their heirs, or assigns, shall violate or attempt to violate any of the covenants herein, it shall be lawful for any other person or persons owning real property situated in said sub-division to prosecute any proceedings at law or in equity against person or persons violating or attempting to violate any such covenants and to prevent him or them from so doing or to recover damages or other dues for such violation."  
*Covenant #16, CP 21.*

This right to collect damages or dues is not granted to DKC, but to other property owners within the respective subdivisions; "Assessments" are not addressed in “Recording No. 852358”, or in the Smith covenants.

It is notable that the owners in Appellant's subdivisions have amended their covenants on more than one occasion, and have not enlarged the assignments to the DKC. *CP 291-294*. At least one subdivision in the area has relieved DKC of all duties. (*7<sup>th</sup>, CP 285-287*).

The original deed dated July 27, 1965 (CP 281) to the Feola property from one of the Developers, Park Development Co., to the original purchaser of what is now the Feola lot, makes no mention of dues, assessments, or the Driftwood Key Club. Also, it is interesting to note, that the same developer deeded a property a year earlier, in 1964, for one of the lots in the First Addition to Driftwood Key with the following restriction:

“PURCHASERS COVENANT and agree that the above described real estate shall be subject to the charges and assessments as provided for in, and for the purposes set forth in THE ARTICLES OF INCORPORATION and the BY-LAWS of the Driftwood Key Club Inc., a non-profit, and non-stock WASHINGTON corporation and that said corporation shall have a valid first lien against the above described real estate for said charges and assessments; and, in addition to the remedies set forth in said ARTICLES of INCORPORATION and BY-LAWS, that if said charges and assessments levied by said corporation shall not be paid within four (4) months after they shall become due and payable, then said corporation may proceed by appropriate action to foreclose its lien together with such sum as the court may adjudge reasonable attorney’s fees in such action. This provision is covenant running with the land and is binding on the purchasers, their heirs, successors and assigns.” *CP 283*.

### **C. DKC's Articles of Incorporation**

DKC's powers are limited by its own Articles of Incorporation.

Sections 10 & 16, Art. II of their Articles state, in pertinent part:

“10. To exercise such powers of control, interpretation, construction, consent, decision, determination, modification, amendment, cancellation, annulment, and/or enforcement of covenants, reservations, restrictions, liens and charges imposed upon said property, and as may be vested in, delegated to, or assigned to said corporation and such duties with respect thereto as may be assigned to and assumed by said corporation.... *CP 96.*

16. Generally, to do any and all lawful things which may be advisable, proper, authorized and/or permitted to be done by said corporation under or by virtue of any restrictions, conditions, and/or covenants or laws affecting said property or any portion thereof (including areas now or hereafter dedicated to public use); and to do and perform any and all acts which may be either necessary for, or incidental to, the exercise of any of the foregoing powers or for the peace, health, comfort, safety and/or general welfare of owners of said property, or portions thereof, or residents thereon. *CP 97.*

The full extent of the authority given to the DKC is stated in the covenants. *CP 291; as amended, CP 294.*

### **D. The DKC By-Laws**

The 1981 published by-laws for DKC stated: “Ownership of a tract at Driftwood Key is not a condition precedent to membership.” *CP 266-267.* At least one of the subdivisions contains commercial property and the Driftwood Key Club (hereinafter “DKC”) claims that the owners of

this commercial property are members of the corporation by their ownership of said property. *CP 32*.

**E. Common Areas, Easements or “Right to Enjoy”**

The record is bereft of any grant or conveyance of common land to the DKC or that Appellants have any easement or other “right to enjoy” any property owned by the DKC. Further, DKC cannot point to any common scheme of development or intent of the various developers other than in the documents in the record.

**II. ARGUMENT**

**A. The DKC Admits No Covenant Authorizes It to Collect Dues.**

On page 6 of its brief, the DKC admits that pursuant to the covenants recorded under Recording No. 852358 (*CP 20-21*), that dues may be recovered for certain covenant violations, but the covenants do not otherwise mention the issue of dues. This same admission is made on page 16 of its brief.

The DKC urges that filing of their Articles of Incorporation with the Secretary of State put Plaintiff on notice and hence authorizes it to collect dues and lien properties. This is not the state of the law in

Washington State. There is ample case law cited in Plaintiffs' brief-in-chief which holds otherwise.

In *Ellingsen v. Franklin County*, 117 Wash.2d 24, 810 P.2d 910 (1991), the Washington Supreme Court found that a grant of easement recorded in the county engineer's office, did not provide constructive notice under RCW 65.08.070:

The issue is whether a conveyance of an easement gives constructive notice to a bona fide purchaser when that conveyance is "recorded and filed" in the county engineer's office, but is not recorded with the county auditor? The answer is that "recording and filing" in the county engineer's office does not give constructive notice.  
*Ellingsen at 25.*

In a Massachusetts case, *Houghton v. Rizzo*, 281 N.E.2d 577, 361 Mass. 635 (1972), the Court stated well the reason for relying on the written record and chain of title:

"There is good reason not to divine rights and servitudes that 'cannot be readily ascertained by an examination of the records of the appropriate registry of deeds or of the Land Court' lest the integrity and reliability of those records suffer erosion."  
*Houghton at 643-644.*

## **B. Statute of Frauds**

DKC creates a straw man and answers an argument not made by Plaintiffs when it states that "appellants acquired title to their property in

line with the Statute of Frauds...”. Appellants do not argue that their respective properties were acquired contrary to the Statute of Frauds.

Appellants argue differently. Pursuant to the Statute of Frauds contained in RCW 64.04.010, every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed. The same is required in covenants that would bind a subdivision.

In the subdivision setting, the Washington Courts have found this writing requirement satisfied in three different ways: (1) as a declaration of covenants, see *Mountain Park Homeowners Ass'n*, 125 Wash.2d 337, 883 P.2d 1383 (1994); (2) set forth as a restriction contained in the deed transferring an interest in the property; or, (3) on the face of the subdivision plat. See *Thorstad v. Federal Way Water & Sewer Dist.*, 73 Wash.App. 638, 870 P.2d 1046 (1994). In the instant case, none of the listed methods has been satisfied.

### **C. DKC Is Not a Homeowners Association Under RCW 64.38.020**

DKC is not a homeowners association as defined under *RCW 68.30.010*, which provides in pertinent part:

#### **64.38.010. Definitions**

For purposes of this chapter:

(1) “Homeowners' association” or “association” means a

corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member.  
*RCW 64.38.010.*

*RCW 64.38.015* provides:

**64.38.015. Association membership**

The membership of an association at all times shall consist exclusively of the owners of all real property over which the association has jurisdiction, both developed and undeveloped.  
*RCW 64.38.015.*

Appellants, in making argument that DKC is not a homeowners' association under RCW Title 64.38, do not complain, as stated on page 22 of DKC's brief, that there may be DKC members "who own commercial property somewhere other than within the confines of Driftwood Key." Plaintiffs' argument is that there are owners of commercial property within the confines of the Driftwood Key plats whom the DKC claims are members by virtue of their ownership of this commercial property.

Further, membership has been open to persons who do not own property within the Driftwood Key additions. *CP 266-267*. Both of these factors disqualify the DKC as a Homeowners Association under RCW Title 64.38 and the DKC cannot claim the right to assess dues under these statutes.

DKC has offered its own set of by-laws in which they claim membership is limited to persons who own properties within the confines of the Driftwood Key subdivisions. *CP 103*. It is interesting to note that the document proffered by the DKC is in modern word processing format with strikeouts and amendments that were not available in 1981, a prochronism. The version offered by Plaintiffs is a hard print copy that is in conformity with the technology of the time.

**D. DKC's Implied-In-Law Contract Theory Cannot be Supported Under Washington Law**

DKC relies heavily on the cases of Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wash.App. 246, 84 P.3d 295 (2004) and Rodruck v. Sand Point Maint. Com. 48 Wash.2d 565, 295 P.2d 714 (1956) to support its theory that an implied-in-fact contract binds the Plaintiffs to pay dues and assessments to the DKC. DKC ignores in its reliance on these cases, that the homeowner's organizations in both cases were empowered by written, valid and recorded covenants that satisfied the Statute of Frauds.

In Rodruck, the Court stated:

In order that the burden of maintaining public improvements should rest upon the land benefited by the improvements, the grantor exacted from the grantee of the land with its appurtenant easement or right of

enjoyment a covenant that the burden of paying the cost should be inseparably attached to the land which enjoys the benefit.

Rodruck at 576.

In Lake Limerick, the Court, prior to any implied-in-law contract first found it necessary to establish that: (1) there was a covenant running with the land effective with the original conveyance of the lot in question; (2) the Statute of Frauds had been satisfied; and (3) that horizontal and vertical privity were satisfied. Only after making these findings, did the Court find:

“Other Washington cases are likewise in accord. Although the court in Hollis v. Garwall first said that a condition “for finding an equitable restriction in the subdivision setting” is “a promise, in writing, which is enforceable between the original parties, it went on to note “that the writing containing the covenant is often recorded as a declaration of covenants, or is set forth as a restriction contained in the deed transferring an interest in the property.” In Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc., the court said that “in modern usage, the term covenant generally describes promises relating to real property that are created in conveyances or other instruments.” Based on these authorities, we hold that the recorded Declaration of Restrictions created a servitude (i.e., a covenant running with the land) that became effective with the original conveyance of Lot 53.”

Lake Limerick at 258.

In Popponesset Beach Association, Inc. v. Marchillo, 39

Mass.App.Ct., 586, 658 N.E.2d 983 (1996), the Appeals Court of

Massachusetts reviewed a case Plaintiffs believe to be on point with

this case. The Court started its opinion with:

“No express covenant or reservation appears in the chain of title of the defendants that imposes an obligation to contribute to a

planned area association. Popponeset Beach Association, Inc. ("the Association"), provides services, including the maintenance of roads, a beach, and a community building, as well as social programs.... For those services, the Association levies dues and special assessments that the defendants, who are property owners in the Association's service area, have declined to pay on the ground that their registered land titles do not bind them so to do, nor does any contract."

In *Popponeset*, the Court rejected four different theories advanced by the association (1) a title based claim; (2) a claim based on a common scheme; (3) a claim based on implied contract in fact; and (4) unjust enrichment (an essential element of an implied-in-law contract).

Under Washington law, a contract implied in law, also called a quasi contract, 'arises from an implied legal duty or obligation' and is 'founded upon the equitable principle of unjust enrichment.' To state a quasi contract claim, a plaintiff must show that (1) the enrichment of the defendant is unjust, and (2) the plaintiff is not a 'mere volunteer. *Lynch v. Deaconess Medical Center*, 113 Wash.2d 162, 165, 776 P.2d 681, 683 (1989). One who officiously confers a benefit upon another is not entitled to restitution therefor. *Wendover Road Property Owners Association v. Kornicks*, 28 Ohio App.3d 101, 502 N.E.2d 226 (1985). Like the defendants in Popponeset, the Appellants are free to choose not to participate in the amenities offered by the DKC.

## **E. Each Subdivision Has its Own Distinct and Separate**

### **Covenants**

Each of the 15 plats in the Driftwood Key neighborhood has its own distinct and autonomous covenants. Each subdivision may modify its own covenants as demonstrated by the revisions cited in the Additional Statement of Facts.

In *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wash.App. 411, 166 P.3d 770 (2007), restrictive covenants for adjacent platted residential subdivisions, which covenants were created by common grantor, but were recorded within one month of each other and expressly stated that each subdivision's covenants reserved the right to enforcement and to revocation to only those lot owners "in said plat," did not allow lot owners in one subdivision to enforce the other subdivision's covenants or to participate in the process for revoking the other subdivision's covenants. Further, admission of extrinsic evidence to interpret a restrictive covenant is limited to the interpretation of the covenant itself and may not be used to show an intention independent of the instrument.

**F. The Case Law From Other Jurisdictions Do Not Support**

**DKC's Implied-In-Law Contract Theory**

1. Hess v. Barton Glen Club, 718 A.2d 908 (Pa. Commw. Ct 1998). In this case, the property owners in this subdivision had undisputed access by the filing of an easement by the community association granting specifically “the use, liberty and privilege of, and passage in and to the roads, amenities and common facilities”. Hess at 914. Further, all of the original deeds, except for one property owner, subjected the property owners for dues for lake and park privileges.
2. Kaanapali Hillside Homeowners' Ass'n ex rel. Bd. Of Directors v. Doran, 112 Hawai'i 356, 145 P.3d 899 (2006). In Kaanapali, a First Amendment of Declaration of Covenants declared that the covenants and restrictions were “in furtherance of a common building scheme hereby imposed on the Property ... for the purpose of enhancing and protecting the value, desirability and attractiveness of the Property.” The developer informed prospective buyers that they would automatically become members of the KHHA and be required

to pay assessments levied by the KHHA. Kaanapali at 902.

As part of the basis for its decision, found:

Prior to purchasing their lot, the Dorans were aware of KHHA's existence and that KHHA was collecting assessments from lot owners to support the services it provided. The Dorans' lot was conveyed subject to the Partial Assignment, which gave KHHA the authority to exercise architectural control over improvements in the Subdivision and to enforce the covenants and restrictions in the First Amended Declaration. Before purchasing their lot, the Dorans received KHHA's Charter and By-laws, which provided that KHHA had the power to levy and collect assessments from lot owners. We hold that under the circumstances of this case, the Dorans implicitly contracted and agreed to pay the assessments authorized under KHHA's Charter and By-laws.

Kaanapali at 906.

In the instant case, the Plaintiffs had no actual knowledge that the “Driftwood Key Homeowners Association”, as recited in their deeds, was a corporation, had articles of incorporation or by-laws; or had any right to collect dues and assessments other than as stated in Covenant 16 for architectural violations. A reading of this covenant gives any owner of property within the plat and not the DKC, the right to enforce a violation and to “...recover damages or other dues for such violations”. DKC does not have this right unless it is an owner of property within said subdivision. *CP 21; CP 291 & 294.* Contrary to the assertions of DKC, the language offered by agents regarding liability and assessments, does

not supersede the actual content of the record cited, the covenants themselves. *DKC Response*, pp. 18.

3. *Meadow Run & Mountain Lake Park Ass'n v. Berkel*, 409 *Pa.Supr.* 637, 598 *A.2d* 1024 (1991). In this case, the Pennsylvania Superior Court ruled that the Mountain Lake Park Association had the power to asses against property owners based on the following language: "This deed, while making no mention of an assessment, does put Appellants on notice that should an association of lot owners be formed in the future, they would be bound by any rules the association adopted concerning usage of development facilities." No such language exists in the instant case.
4. *Perry v. Bridgetown Cmty. Ass'n, Inc.*, 486 *So.2d* 1230 (*Miss.* 1986). In Perry, written amended covenants were properly adopted and recorded in the Chancery's Clerk's Office giving the community association the authority to collect dues for maintenance of the common areas and gave the association authority to enforce collection. In the instant case, none of the covenants give DKC the right to collect dues or assessments for the maintenance of common areas.

5. *Sea Gate Ass'n v. Fleischer*, 211 N.Y.S.2D 767 (N.Y.Sup.Ct. 1960). In this case, the property owner, through their deed, not only gained title to the property, but also a limited easement with other owners in the subdivision. *Sea Gate* at 778. Based on their acceptance of this deed, the Court found that the property owners had accepted the terms of an “implied in fact” contract that they would be liable to the neighborhood association for dues for maintenance of these common facilities.
6. *Seaview Ass'n of Fire Island, N.Y., Inc. v. Williams*, 69 N.Y. 2d 987, 517 N.Y.S. 2d 709 (1987). In this case, the community members, by deeds, enjoyed easements that entitled them to use of ocean beaches. The Defendants in this case also had actual knowledge of the community association and the common facilities prior to purchasing their property. In the instant case, there is no easement, right of enjoyment or notice of common property contained on the deeds or on title.
7. *Spinnler Point Colony Ass'n, Inc. v. Nash*, 689 A.2d 1026 (Pa.Cmwlt. 1997). In this case, the community members, again by deed and chain of title, had a right to travel over

association roads and had lake rights. In the instant case, the neighborhood roadways and improvements are public. *CP 20*.

8. *Weatherby Lake Improvement Co. v. Sherman*, 611 S.W. 2d 326 (Mo.App. W.D. 1980). Once again, in *Weatherby*, the community members had a right to use the lake that was granted by easement. *Weatherby at 328*. This case was primarily about the fairness of assessments to repair a dam and spillway. The court did not rely on a theory of implied contact but on a prior class action adjudication allowing assessments which need to be approved by the Court. *Weatherby at 332, 333*.

#### **G. The DKC started as a private membership club**

DKC started its existence as a private membership club. *CP 266-*

7. The DKC can point to no event or document enabling it to morph into an association that empowers it to collect dues and assessments from the property owner in the neighborhood.

## **H. The Smith Property is Outside of DKC's Stated Jurisdiction**

As stated in Appellant's opening brief (pp. 5-7), the Smith property lies outside of the stated jurisdiction of the DKC in its Articles of Inc. Even if Smith had discovered and investigated the DKC's Articles of Incorporation and By-Laws (which Appellants maintain she had no such duty), she would have discovered no document to put her on notice that DKC claimed she was subject to its jurisdiction.

## **III. CONCLUSION**

Nothing in Plaintiffs' respective titles authorizes the DKC to assess dues or assessments against Plaintiffs. The Plaintiffs had no actual notice or constructive notice of the claim of authority by the DKC to collect these dues or assessments. Further, DKC's claimed authority does not pass muster with the Statute of Frauds. Washington law does not support an implied-in-law contract under these circumstances or in this case.

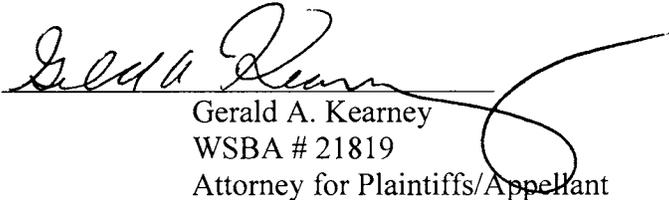
DKC can point to no event that transformed it from a private membership club to an organization that has taxing power over the neighborhood. DKC's authority emanates from the covenants which do not give it the authority to assess dues or assessments from Plaintiffs. Further, Plaintiff Smith's property lies outside DKC's stated jurisdiction.

Declaratory judgment on this subject is the appropriate relief to provide relief to the Plaintiffs regarding this issue. Declaratory relief should be granted declaring that the DKC has no authority or legal justification to charge the person or property of Feola, Willis and Smith with Dues and assessments.

Title should also be quieted in the Feolas, Willis and Smith as against the Notice to Members of Driftwood Key Club of Existence of Corporate Documents filed by DKC with the Kitsap County Auditor under File No. 200804010153. *CP 25-35*. The Court should also quiet title in Plaintiff Willis as against the Claim of Lien recorded by the DKC under Kitsap County Auditor's File No. 200712180364. *CP 38-40*.

Accordingly, the Court should reverse the rulings of the trial court and: (1) grant Plaintiff's motion for summary judgment; (2) deny Defendant's motion for summary judgment; and (3) vacate the judgment entered by the trial court against Plaintiffs Feola, Willis and Smith.

RESPECTFULLY SUBMITTED on this 20<sup>th</sup> day of April, 2009  
by:

  
Gerald A. Kearney  
WSBA # 21819  
Attorney for Plaintiffs/Appellant

FILED  
COURT OF APPEALS

19 APR 21 AM 9:59

STATE OF WASHINGTON

BY                       
Clerk

**NO. 38627-5-II**

**COURT OF APPEALS, DIVISION II,  
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**MICHAEL R. FEOLA & SHARON L. FEOLA,  
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**Appellants,**

**vs.**

**DRIFTWOOD KEY CLUB, a Washington State  
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**Respondent.**

**DECLARATION OF SERVICE**

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I hereby certify, under penalty of perjury of the laws of the State of Washington, that on this date I delivered true and correct copies of the following documents:

1. Reply Brief of Appellant

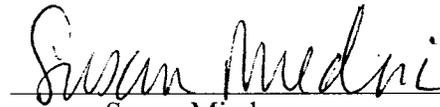
To the following attorneys of record:

Roger Hillman  
Jamal Whitehead  
Garvey Schubert Barer  
1191 Second Avenue, 18<sup>th</sup> Floor  
Seattle WA 98101-2939

on April 20, 2009 by United State First Class Mail.

I declare under oath and penalty of perjury that the foregoing statements are true and accurate.

SIGNED at Kingston, Washington on this 20<sup>th</sup> day of April, 2009.



Susan Miedema  
Secretary to  
Gerald A. Kearney