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COURT OF APPEALS  
DIVISION II

NO. 38627-5-II

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STATE OF WASHINGTON

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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Michael R. Feola and Sharon L. Feola,  
husband and wife; George Willis; Linda C.  
Smith,

Appellants,

vs.

Driftwood Key Club, a Washington State  
nonprofit corporation,

Respondent.

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**RESPONDENT DRIFTWOOD KEY  
CLUB'S BRIEF**

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## I. INTRODUCTION

Like so many other communities on the Puget Sound, Driftwood Key is a community that finds its genesis in a love of recreational boating. This love spurred the original community members to dredge the local harbor in the early 1960s and, in turn, lead those that followed to maintain that waterway. Through the years, the community would add a private marina, marina slips, launch ramp, and other community facilities such as a swimming pool and clubhouse. The Driftwood Key Club (“DKC” or the “Club”) was formed to manage these shared amenities for the benefit of its members. All those residing in Driftwood Key are members of the Club and have exclusive access to these facilities.

Not surprisingly, Driftwood Key homeowners—they number in the hundreds—share equally in the benefit and burden of keeping the community’s amenities in good repair. The recorded covenants, DKC’s Articles of Incorporation, and Bylaws call for as much, not to mention a sense of fundamental equity. Appellants knew before they bought their homes that they would be expected to contribute their fair share as members of DKC, and they complied with this obligation for many, many years after purchasing.

Today, however, appellants argue that they are not obligated to pay homeowners dues and assessments to DKC and that the Club lacks

authority to file liens to collect the same. This was the situation facing the trial court. After reviewing cross motions for summary judgment, the trial court concluded that, upon “undisputed facts,” appellants were personally liable for dues and assessments levied by DKC.

Appellants now appeal this decision, but their position remains a curious one: they insist that they should reap the benefits of living in Driftwood Key with its community facilities and resulting increased property values, without shouldering *any* of the cost.

## II. ISSUE ON APPEAL

1. Whether Driftwood Key Club may require appellants to contribute, in the form of dues and assessments, towards maintaining the neighborhood’s shared amenities when (1) DKC’s Articles of Incorporation and Bylaws authorized it to levy and collect dues and assessments, (2) appellants acquired title to their properties subject to homeowners dues and assessments, (3) appellants had notice of their liability for dues and assessments before purchasing their homes, (4) appellants benefited from the common facilities, and (5) appellants have historically paid homeowners dues and assessments without interruption or protest.

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History**

Appellants filed a lawsuit against DKC in Kitsap County Superior Court on April 9, 2008, seeking declaratory relief from dues and assessments levied by DKC and to quiet title in their respective properties. CP 3-7. Appellants moved for summary judgment six days later—before DKC even had a full opportunity to answer. CP 8-13.

DKC set forth several counterclaims against appellants, praying for, *inter alia*, a declaratory judgment that appellants were liable for homeowners dues and assessments and that DKC may record liens to collect any unpaid amounts. CP 45-56. DKC later filed its own motion for summary judgment claiming that (1) appellants were precluded by previous adverse judgments from seeking declaratory relief on the issue of DKC's right to collect dues, (2) an implied contract render appellants personally liable for dues, (3) appellants knew that their homes were subject to DKC's express authority to collect homeowners dues and file liens, and (4) the appellants' previous payment of dues estopped them from refusing to pay now. CP 57-76.

After reviewing the cross motions for summary judgment, the trial court judge, the Honorable Russell W. Hartman, rendered an oral decision on October 3, 2008, concluding that the theory of implied in law contracts

“is appropriately applied to undisputed facts in this case to establish liability.” VRP 10/3/08 at 13:11-13. Judge Hartman granted in part DKC’s motion for summary judgment and denied appellants’ motion and held that appellants “do have to be members [of DKC], and there are lien rights” held by DKC.<sup>1</sup> Id. at 13:15-17.

The trial court entered Final Judgment on December 17<sup>th</sup>, but by that time, appellants had already filed a notice of appeal on December 4<sup>th</sup> seeking review by the Washington State Court of Appeals, Division II. CP 336. In their appellate brief, appellants address each of DKC’s arguments raised on summary judgment. For its part, however, DKC revisits only its notice and implied contract arguments on appeal as they are the basis for the decision below.

**B. Substantive Facts**

1. Overview of the Driftwood Key Club

Driftwood Key is a community built around Coon Bay, which is located on the north end of the Kitsap Peninsula. Driftwood Key is managed by the nonprofit corporation Driftwood Key Club, which was formed in 1962 to build, improve, and maintain the community facilities owned by DKC and to regulate private property. CP 77. Today, DKC is nearly 600 homeowners strong and its common property includes a

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<sup>1</sup> Judge Hartman granted DKC relief in the form requested, but declined to award attorney fees. Hence, the judgment “in part.”

waterway (Coon Bay), marina, launch ramp, community beach, swimming pool, and clubhouse. CP 78. All those who own property in the Driftwood Key subdivision are members of the association, which entitles them to full access to DKC's various facilities. CP 77-78. These shared amenities are not available to the general public. CP 78.

DKC members are expected to share equally in the financial burdens of keeping up DKC's common amenities by paying homeowners dues and assessments – a common practice with homeowners associations to be sure. On an annual basis, DKC currently charges members \$172 for general dues. Id. There are also three special assessments in effect: an annual \$20 assessment for a building and maintenance fund, an annual \$178 assessment for a harbor/dredging fund and, most recently, a two-year \$67 annual assessment for a legal fund. Id.

2. DKC's Governing Documents Grant It Authority to Levy Dues and Assessments.

The original plat of Driftwood Key was recorded in 1962, and since that time, 13 additions have been platted, each with its own recorded set of protective covenants. Id. Despite the fact that they are 14 in number and were recorded over the course of more than 12 years, the covenants of the various Driftwood additions are largely the same. Id. The covenants have been revised several times over the years, but their essential character remains unchanged from the early 1960s. Id. The

recorded covenants for each addition reference the entity known as the “Driftwood Key Club” and its “Board of Trustees.” CP 86-89.

The recorded covenants for each addition state in Paragraph 16 that dues may be recovered for various covenant violations, but the covenants do not otherwise mention the issue of dues. CP 87, 89. DKC’s Articles of Incorporation and Bylaws, however, are replete with references to DKC’s authority to collect dues and assessments from its members.

DKC filed its Articles of Incorporation with the Department of State (known today as the Washington Secretary of State) after the original plat of Driftwood Key was recorded in 1962. CP 93. Under the Articles, the Club’s stated purpose was to “purchase or otherwise acquire, construct, improve, develop, repair, maintain, operate, care for and/or dispose of ... community facilities appropriate for the use and benefit of its members....” CP 94. The Articles also charge DKC with a role in improving and maintaining neighborhood roadways, drainage areas walkways, and fences all for the benefit of its members. Id.

DKC adopted corporate Bylaws in 1962, but because they were the club’s working documents and filing was not mandatory, they were not filed with the State. CP 78. From time to time, DKC has amended both its Articles and Bylaws to make changes such as removing the “Inc.” from the Club’s name and correcting grammatical errors. CP 78.

As for DKC's authority to levy and collect dues and assessments, its Articles and Bylaws are unequivocal on this score; for example, Article II, paragraph 14, of DKC's Articles of Incorporation provides that DKC has authority to:

*fix, establish, leby [sic] and collect annually such charges and/or assessments as may be necessary*, in the judgment of the board of trustees to carry out any or all of the purposes for which this corporation is formed, but not in excess of the maximum from time to time fixed by the by-laws.

CP 96. (emphasis added). Likewise, Article I, Section 2, of the Bylaws states that DKC "*shall have the power to levy and collect assessments against its members* and against the tracts owned or purchased by them for the purposes in its Articles of Incorporation and By-Laws." (emphasis added). [CP 103, Whitehead Decl., Ex. 3]. The Bylaws provide further at Article IX, Section 4 that:

*In addition to dues and assessments limited by Bylaw Article IX-1 the Board of Trustees may develop projects consistent with the purposes of the club and Bylaw Article VI-7 [placing an \$8,500 limit on capital improvement expenditures], which may require special assessments of the members in excess of such limit . . . only after they have been approved by a simple majority of the votes cast . . . .*

CP 109. (emphasis added).

3. Failure to Pay Dues and Assessments May Result in a Lien Against an Offending Member's Property.

Members of DKC have a duty to pay the dues and assessments imposed by DKC. CP 108-109. In the event that a member fails to pay his or her fair share of neighborhood dues and assessments, DKC may file a claim of lien against their property. This authority is found in DKC's governing documents. In relevant part, Article IX, Section 1, of the Bylaws states that:

*The members of the Corporation shall be liable for the payment of such dues or assessments as may from time to time be fixed and levied by the Board of Trustees* pursuant to the Articles of Incorporation and these By-Laws and subject to the provisions of said Articles and Bylaws.

CP 108-109. (emphasis added).

In the very next section, the Bylaws state that members of the Club "shall pay the amount" assessed by DKC "within thirty days after the mailing of the notice of such dues and/or assessment . . . ." CP 109. The Bylaws continue on in the same section to read that the "amount of such dues and/or assessment, together with all expenses, attorneys' fees and costs reasonably incurred in enforcing the same, shall be paid by the members and *a lien shall be placed upon said land* and the membership appurtenant thereto . . . ." Id. (emphasis added).

Not to be outdone, Article II, paragraph 8, of DKC's Articles of Incorporation provides that one of the purposes of DKC is to: "*enforce liens*, charges, restrictions, conditions and covenants existing upon and/or created for the benefit of parcels of real property over which [DKC] has jurisdiction...." CP 95. (emphasis added).

4. Appellants Received Title Reports and Other Closing Documents at Time of Purchase that Described Their Homes as "Subject To" Liability for Dues.

Appellants obtained title to their homes by way of statutory warranty deed, which each described their properties' as liable for certain homeowners dues and assessments and "subject to" the recorded covenants of Driftwood Key. These deeds, however, were all preceded in time by title reports and other closing documents that uniformly state that Driftwood Key homeowners are responsible for paying their fare share of dues and assessments to DKC.

a. *The Feolas*

The Feolas acquired title to their property in the Eighth Addition of Driftwood Key by statutory warranty deed recorded in the Kitsap County Auditor's files on February 6, 1998. CP 112. Their deed was expressly "Subject to ... liability for assessments or charges as imposed by Driftwood Key Homeowners Association...." Id. Mr. Feola underlined this "subject to" language and drew a star beside it for good measure. Id.

When asked how he interpreted the underlined language, Mr. Feola testified during his deposition as follows: “When I read that originally, I interpreted it the same way I do today. Okay. And that means that *I’m liable for homeowners association dues if there’s a homeowners association*, number one. Number two, per that document, which happens to be the covenants.” CP 117.

The Feolas’ deed is not the only document that describes their obligation to pay homeowners dues and assessments. The Feolas received three other pre-purchase documents that referenced homeowners dues payable to DKC. First, the Feolas’ pre-purchase title insurance report referred to the “Driftwood Key Homeowners Association” and described the homeowners liability for “[a]ny unpaid assessments or charges, and liability to further assessments or charges, for which a lien may have arisen (or may arise).” CP 123. Just as the Feolas had underlined and starred their dues obligation described in their deed, they circled and starred information concerning homeowners dues in their title report. Id.

Second, the Feolas’ closing statement provided for prorated homeowners dues payable by the Feolas to the seller. Specifically, the closing statement acknowledged that “Driftwood Key homeowners dues” were payable to the seller in the amount of \$28.60. CP 127. Mr. Feola testified during his deposition that he and his wife inquired with their real

estate and escrow agents about the charge and ultimately paid their share of the homeowners dues at closing. CP 115.

Lastly, the Feolas' home was featured on the "Computer Multiple Listing Service" ("MLS") prior to their purchase. The MLS information sheet highlighted information about the property, including DKC facilities such as beach access and moorage, and refers to "H.O.A. \$192 per yr." CP 129. "H.O.A." is a common abbreviation used as real estate shorthand for "Home Owners Association." Wikipedia, [http://en.wikipedia.org/wiki/Homeowners'\\_association](http://en.wikipedia.org/wiki/Homeowners'_association) (last visited March 9, 2009).

b. *George Willis*

Appellant George K. Willis acquired title to his property in the Eighth Addition of Driftwood Key by statutory warranty deed recorded with the Kitsap County Auditor on December 31, 2002. CP 139. His deed was expressly "subject to" a list of "exceptions" detailed in "Exhibit A" to the deed. CP 140. Pursuant to Exhibit A, Mr. Willis was subject to "[a]ny future assessments or charges, and liability to further assessments or charges, for which a lien may have arisen (or may arise)." Id. That exception referred to "Driftwood Key Homeowners Association" as the entity that "imposed" these assessments or charges. Id.

Like the Feolas, Mr. Willis received several other pre-purchase documents that referenced dues payable to DKC. Mr. Willis's title insurance report described under "special exception" number four, "[a]ny unpaid assessments or charges, and liability to further assessments or charges, for which a lien may have arisen (or may arise)," as "imposed by Driftwood Key Homeowners Association." CP 147. In addition, Mr. Willis's Closing Statement provided for prorated "Assessments" payable to the seller for \$55.35 and he testified at his deposition that he paid this charge at the time of closing. CP 132-133.

During his deposition, Mr. Willis was also asked whether he and his wife were advised before he bought his home that Driftwood Key featured a community pool and beach, to which he responded, "I imagine we were, but I don't recall." CP 132.

c. *Linda Smith*

Appellant Linda C. Smith acquired title to her property in the Fifth Addition of Driftwood Key by a statutory warranty deed recorded in the Kitsap County Auditor's files on November 22, 1989. CP 152. That deed was expressly "subject to: liability for assessments levied by Driftwood Key Club[.]" *Id.* Similar to the Feolas and Mr. Willis, Ms. Smith received a title insurance report before purchasing her home, and like the others, her title report listed as a special exception "Liability for assessments

levied by Driftwood Key Club, which attaches to said premises, if unpaid.” CP 157. Likewise, her closing statement provided for prorated “Association Dues” payable to the seller in the amount of \$46.41. CP160.

5. This Appeal Marks the Fifth Time the Feolas Have Litigated These Issues.

More so than the other Appellants, Michael and Sharon Feola have led a personal crusade against DKC’s efforts to collect an equal contribution from each homeowner to maintain the community’s common facilities. So much so, that they have litigated the matter to final judgment on three separate occasions in Kitsap County District Court, losing each time. CP 165, 169, 175, 189. Including the lawsuit in Kitsap Superior Court and the instant appeal, the Feolas have now litigated these same issues five times over.

During the Feolas’ second bite at the apple in District Court, the court dismissed their claim and Judge Stephen Homan held the following in his order on November 3, 2006:

Although it is arguable that plaintiff was not put on complete and thorough notice of ownership in Driftwood Keys [sic] Homeowners Assn/Club, he has enjoyed the benefits of membership, and his property is more valuable as a result of membership. Plaintiff [Mr. Feola] should not be unjustly enriched by membership without being subject to payment of dues.

CP 169. The Feolas did not appeal this ruling or, for that matter, any of the other District Court rulings.

6. Appellants All Paid Dues For Many Years Without Objection.

Given their long history of paying homeowners dues and assessments without interruption, appellants' reversal in opposing their duty to pay their fair share of neighborhood dues is surprising. The Feolas came to Driftwood Key in 1998 and paid dues without pause for *seven years* until 2005. CP 78. Ms. Smith's streak of paying dues is more than twice as long at *17-years* straight. CP 79. Mr. Willis is a relative newcomer to Driftwood Key, paying dues uninterrupted for three years between 2002 and 2005. CP 78-79.

**IV. SUMMARY OF RESPONDENT'S ARGUMENT**

Appellants are liable for homeowners dues and assessments levied by DKC and are obligated to contribute their fair share toward maintaining the neighborhood's amenities, which benefit all Driftwood Key homeowners. To hold otherwise would be to permit appellants to retain a benefit—access to facilities maintained by DKC and the attendant increase in their home value—without paying for it.

This position is justified by an undisputed factual record and case law, which holds that when read as correlated documents, the recorded covenants, DKC's Articles of Incorporation and Bylaws make plain the

appellants' duty to pay homeowners dues and assessments. Appellants all had notice of this duty, whether actual or inquiry, from title reports and other closing documents received before they took title to their homes. Appellants all abided by this duty for many years and should not now be permitted to reverse course.

More than that, though, appellants are bound in equity. Upon nearly identical facts, the Washington Division II Court of Appeals held in Lake Limerick v. Hunt Mfg. Homes, Inc., 120 Wn. App. 246, 261, 84 P.3d 295 (2003), that a homeowner would be unjustly enriched if it were not held personally liable for homeowners dues that accrued while it owned the property, even absent notice of the bylaws authorizing the dues. Here, just as in Lake Limerick, an implied contract obligates appellants to contribute their fair share even if express authority is not otherwise found.

Rather than address the fundamental inequity of retaining the benefits of living in Driftwood Key without sharing in the cost, appellants merely reargue the same theory they urged—and lost—on summary judgment.

Because this case involves a question of law that the trial court decided on summary judgment, the conclusion that appellants would be unjustly enriched if allowed to live in Driftwood Key without paying dues is a question subject to de novo review. Blueberry Place Homeowners

Ass'n v. Northward Homes, Inc., 126 Wn. App. 352, 358, 110 P.3d 1145 (2005). Thus, when reviewing a summary judgment order, appellate courts will engage in the same inquiry as the trial court. Reynolds v. Hicks, 134 Wash.2d 491, 495, 951 P.2d 761 (1998).

DKC also asks for an award of any applicable appellate costs and attorney's fees under RAP 14.2 - 4 and RAP 18.1.

## V. **ARGUMENT**

### A. **Appellants Had Notice of the Correlated Documents Which Obligated Them to Pay Dues and Assessments.**

Real-estate developments, such as Driftwood Key, involving multiple parcels almost always include covenants, which are typically set out in a recorded document separate from the individual deeds. Restatement (Third) of Property-Servitudes § 2.1 cmt. c. at 54. DKC's covenants refer to the entity know as "Driftwood Key Club" and state that dues may be collected for covenant violations ranging from creating nuisances (No. 9) to operating commercial business (No. 13). CP 86-89. The covenants also contain architectural controls, but they do not otherwise mention dues. Id.

However, recorded covenants may be "correlated" with a homeowners association's Articles of Incorporation and Bylaws to impose an obligation on the part of homeowners to pay dues and assessments. Rodruck v. Sand Point Maint. Comm'n, 48 Wn.2d 565, 577, 295 P.2d 714

(1956) (“The articles of incorporation, by-laws, and deeds are correlated documents.”). DKC’s Articles and Bylaws abound with references to its authority to assess dues.

When read as correlated documents, the appellants’ deeds, the recorded covenants, DKC’s Articles of Incorporation and Bylaws make plain the appellants’ duty to pay homeowners dues and assessments. See id. Appellants all had notice of this duty, whether actual or inquiry, from their title reports and other closing documents received before they bought their homes.

1. DKC’s Governing Documents Grant It Express Authority to Levy Dues and Lien Member Property.

DKC draws its ability to levy and collect dues and assessments from its Articles of Incorporation and Bylaws. These governing documents are available to all Driftwood Key residents, and in the case of the Articles, were recorded with the Secretary of State. These documents consistently refer to the Club’s authority to levy and collect dues and assessments to carry out its functions. [CP 96 and CP 108-109. Whitehead Decl., Exs. 2 & 3].

Contrary to appellants’ claim that DKC lacks authority to collect dues and record liens against its members’ properties, it is clear that DKC derives such authority from its governing documents. See Lake

Arrowhead Cmty. Club v. Looney, 112 Wn.2d 288, 296 n.4, 770 P.2d 1046 (1989) (noting that unrecorded bylaws may bind a property owner).

2. Appellants Had Notice That DKC Homeowners Were Obligated to Pay Dues and Were Aware of the Club's Many Amenities.

Before purchasing property within Driftwood Key, appellants knew, reasonably should have known, or with reasonable diligence could have discovered that (i) acquiring property in Driftwood Key would automatically make each appellant a member of DKC, (ii) DKC assesses and collects dues and other charges from DKC members to maintain common areas within Driftwood Key and for other lawful purposes, and (iii) the penalty for failure to pay dues was a claim of lien against the member's property.

To start, appellants must be charged with actual knowledge of their obligation to pay dues because they each received title insurance reports and closing statements which describe their liability for homeowners dues and assessments before purchasing their homes. CP 112, 115, 123, 127, 129, 140, 147, 152, 157, 160. Further, appellants knowingly paid a prorated share of homeowners dues at the closing of their sales. Id. Further still, the deeds to appellants' homes describe their property interests as subject to dues imposed by "Driftwood Key Homeowners Association." When asked what he understood this statement to mean,

Mr. Feola explained that he was liable for homeowners association dues. CP 117. Thus, the undisputed facts evidence actual knowledge on the part of appellants of their duty to pay dues.

At the very least, appellants must be charged with inquiry notice of the existence of Driftwood Key Club and its Articles and Bylaws. See e.g., Diimmel v. Morse, 36 Wn.2d 344, 348, 218 P.2d 334 (1950) (the inquiry rule imputes notice of facts “that are naturally and reasonably connected with the fact known, and to which the known fact can be said to furnish a clue”); Miebach v. Colasurdo, 102 Wn.2d 170, 175-76, 685 P.2d 1074 (1984) (“where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be [charged] with knowledge thereof”). Appellants closing documents and the covenants all refer to “Driftwood Key Club” or the “Driftwood Key Club Homeowners Association.” For better or worse, homeowners associations are associated with the payment of dues, so knowledge of the existence of a Club or Association can reasonably be said to impute notice of an obligation to pay dues.

Moreover, Driftwood Key’s community facilities are conspicuous and appellants had knowledge of their existence before they purchased

their homes. Surely, a reasonable person would have made some inquiry concerning who was responsible for maintaining the neighborhood's beach, clubhouse, and pool (to name a few amenities), and whether homeowners were expected to contribute towards maintenance costs. Here again, appellants must be charge with inquiry notice of the existence of the Club and their obligation to pay dues.

3. The Underlying Conveyances Abide by the Statute of Frauds.

Appellants took title to their properties by way of statutory warranty deeds, which stated that their property interests were subject to liability for dues and assessments imposed by the "Drift Key Club Homeowners Association" according to its recorded covenants. The deeds were written, signed by the parties, and notarized pursuant to RCW 64.04.020. Moreover, the document which defined the scope of the Club's corporate functions was also recorded.

Appellants cast doubt on whether the Statute of Frauds has been satisfied, and while the thrust of their argument is not easily discerned, there can be no doubt that appellants acquired title to their property in line with the Statute of Frauds given these uncontested facts.

4. DKC Has Express Authority Under RCW 64.38.020 to Collect Dues From Its Members.

The Washington State Legislature passed RCW Chapter 64.38 regulating homeowners associations in order to provide “consistent laws regarding the formation and legal administration of homeowners’ associations.” RCW 64.38.005. Under Washington law, a “homeowners’ association” means the following:

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(1). Unless otherwise provided in its governing documents, an association may “[i]mpose and collect any payments, fees, or charges for the use, rental, or operation of the common areas; ... [e]xercise any other powers conferred by the bylaws; ... [e]xercise any other powers necessary and proper for the governance and operation of the association.” RCW 64.38.020(10), (12), (14).

In their brief, appellants argue that DKC is not a homeowners association within the meaning of the statute because “there are members who are owners of commercial property” and because membership is open

to persons who do not own property within Driftwood Key. Appellants' Brief Pg. 21. This simply is not the case.

Read literally, appellants' first objection is nonsensical. Of course there may be DKC members who own commercial property *somewhere* other than within the confines of Driftwood Key. But to the extent that appellants suggest that DKC members own and operate commercial property within the bounds of Driftwood Key, their object is misplaced. To begin, DKC's covenants expressly forbid its members from operating commercial businesses from any lot of Driftwood Key.<sup>2</sup> CP 87, 89. In any event, the plain language of the statute does not hold any prohibition against member-owned commercial property within the confines of the association.

Appellants' second objection is similarly unfounded. DKC's Bylaws specifically limit membership to those who own real property within Driftwood Key. CP 103. Members of the general public are not entitled to a "voice, vote, or authority" in the Club, never mind access to its facilities. CP 104.

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<sup>2</sup> Commercial businesses owned by DKC members and operated within Driftwood Key are forbidden, save for several narrow exceptions, such as dressmaking, baby-sitting, music teaching, and similar activities.

**B. Appellants are Personally Liable under an Implied Contract for Dues and Assessments Levied by DKC.**

Express authority to collect dues and assessments from its members rests in the correlated documents as explained above, but even in their absence, appellants are nevertheless obligated by an implied-in-law contract to pay their fair share of neighborhood dues and assessments in order to avoid being unjustly enriched.

Whether a homeowner can become liable for homeowners dues through an implied in law contract is not a novel issue. Under similar circumstances, Division II of the Washington Court of Appeals held in Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wn. App. 246, 261, 84 P.3d 295 (2003), that a property owner could be found personally liable for paying homeowners dues under an implied in law contract to prevent unjust enrichment. A contract implied-in-law is “based not on facts and circumstance showing mutual consent and intention to contract, but rather on the fundamental principle of justice that no one should be unjustly enriched at the expense of another.” Id. at 261.

Here, an implied contract must be found in order to prevent unjust enrichment.

1. Appellants Would be Unjustly Enriched if Allowed to Reside in Driftwood Key and Benefit From the Community's Common Facilities Without Paying Their Fair Share of Dues and Assessments.

Division II of the Washington Court of Appeals has found unjust enrichment, and therefore, an implied in law contract, to exist where (1) one party has conferred a benefit to another, (2) the receiving party has an appreciation or knowledge of the benefit, and (3) the receiving party accepts or retains the benefit under circumstances that make it inequitable for him to retain the benefit without paying its value. Dragt v. Dragt/DeTray, LLC, 139 Wn. App. 560, 576, 161 P.3d 473 (2007). These elements are all satisfied in the case before the court.

First, DKC has conferred a benefit on appellants in the form of access to the neighborhood's common facilities as well as the increased property value associated with keeping these facilities in good repair. DKC facilities maintained for the benefit of Driftwood Key homeowners include a waterway, marina, marina slips, launch ramp, community beach, swimming pool and clubhouse. In addition, DKC plays a role in improving and maintaining neighborhood roadways, drainage areas walkways, and fences all for the benefit of its members. Whether appellants utilize these facilities is inconsequential because their properties are worth more as a result of the right of access and proximity to these facilities. Lake Limerick, 120 Wn. App. at 261.

Second, appellants do not contend that these community facilities are without value, nor can they. The right to access these shared amenities is inherently beneficial. See Rodruck, 48 Wn.2d at 576. Thus, DKC need not quantify the exact value of the benefit conferred upon appellants – it will suffice that these facilities carry *some* value. To be sure, were the appellants to sell their homes, Driftwood Key’s many amenities would be featured prominently in the listing as an added value to prospective buyers.

Finally, forcing the other homeowner’s within the neighborhood to shoulder all of the cost, while appellants enjoy all of the benefits and contribute nothing is fundamentally unjust. Judge Holman of the Kitsap County District Court reviewed the same facts as presented on appeal, balanced the equities, and reached the same conclusion: “[Mr. Feola] has enjoyed the benefits of membership, and his property is more valuable as a result of membership. *Plaintiff [Mr. Feola] should not be unjustly enriched by membership without being subject to payment of dues.*” CP 169. (emphasis added). Judge Hartman reached the same conclusion at the trial court level. VRA 10/3/08.

Moreover, appellants seek to assert their rights after many years of paying dues without protest. They offer no legitimate excuse for their decades-long delay, and given that DKC has undertaken capital projects in

reliance of appellants continue payment, it would be unjust for them to abruptly cease payment now. See CP 78. An implied in law contract obligating appellants to pay homeowners dues and assessments is the mechanism to prevent this type of unjust enrichment from occurring.

In Lake Limerick, the court grappled with a similar set of circumstances and found a property owner *personally* liable for homeowners dues accruing after it took title, even though the owner claimed ignorance of the covenants which imposed those dues. Id. at 260. In holding the property owner liable for post-title dues, the court explained as follows:

Hunt [the property owner] acquired property that carried with it the right to enjoy certain common facilities. Even if Hunt elected not to exercise that right, Hunt was benefited because its property was worth more as a result. Hunt would be unjustly enriched if it could retain that benefit without paying for it, and thus the law will imply a contract to pay dues imposed according to [the homeowners association's] obligation to act "fairly and within the scope of the corporate functions outlined in its charter and bylaws."

Id. at 261.

At bottom, an implied in law contract obligating appellants to pay dues must be found, even in the absence of express language in the covenants. DKC has conferred a benefit upon appellants that they have

knowingly retained, and under these circumstances, equity and good conscience require that they pay their fair share of neighborhood dues.

2. The Extent of DKC's Authority to Collect Dues and File Liens is Shaped by its Governing Documents.

In determining the extent of the parties' obligations under an implied-in-law contract to pay homeowners dues, Washington court's look to the Articles of Incorporation and Bylaws of the homeowners association. Lake Limerick, 120 Wn. App. at 261. In this way, the contours of the property owner's obligations and the Association's authority are shaped by the association's governing documents.

Thus, DKC does not have *carte blanche*, to incur cost and pass them along to appellants; rather, it is bound to act in accord with its Articles of Incorporation and Bylaws, which authorize it to manage and maintain the community's common facilities and to enforce liens to collect the same. [CP 94-98 and CP 103. Whitehead Decl. Ex. 2 & 3]. Conversely, appellants are bound by these same terms which obligate them to pay dues and submit to a claim of lien to collect unpaid amounts.

3. The Statute of Frauds Does Not Preclude an Implied in Law Contract.

In their brief to the Court, appellants continue the refrain that they are not personally liable for dues because there is no writing pursuant to

the statute of frauds. This argument is specious because it is predicated upon an imperfect reading of Lake Limerick.

In Lake Limerick, the court first addressed whether the homeowner was liable for dues accruing on the lot before it took title, and second, whether the homeowner was personally liable for dues and assessments accruing during its ownership of the property. The court answered each question in the affirmative, but employed *separate* rationales to reach its *separate* holdings. Appellants would have the court focus on the Statute of Frauds test for determining the property's liability to the exclusion of the court's personal liability analysis.<sup>3</sup> But one does not necessarily precede the other, as appellants suggest.

In Washington, the Statute of Frauds does not apply to the creation of an implied covenant since the obligation does not arise out of the language of a written conveyance, though presumably the statute applies to the conveyance of the estate that is a required element. Johnson v. Mt. Baker Park Presbyterian Church, 113 Wash. 458, 464, 194 P. 536 (1920); see 17 Karl B. Tegland, Washington Practice, Real Estate Property Law, § 3.2 (2003).

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<sup>3</sup> Lake Limerick is less than unequivocal in its holding regarding the Statute of Frauds and its relation to the lot's liability. See Lake Limerick, 120 Wn. App. at 259 (“Assuming that [the statute of frauds] apply....”).

In Johnson, and as appellants allege here, the property owner's deed contained no express reference to a covenant restricting land use in a common-scheme neighborhood. Id. at 460. Despite this fact, and because the owner had knowledge of the general plan which restricted other lots, the court found that an implied covenant restricted the owner's land use, and expressly held that the statute of frauds was "immaterial" and did not apply. Id. at 464-65.

Measured against Lake Limerick and Johnson, the statute of frauds does not preclude this Court from finding an implied in law contract in obligating appellants to pay homeowners dues.

C. **Washington Is Not Alone in Holding that an Implied Contract May Obligate Homeowners to Pay Dues.**

Other jurisdictions and the Restatement (Third) of Property-Servitudes have recognize the courts ability to impose an implied in law contract obligating property owners in common-interest communities to pay homeowners dues, even absent express language in the covenants.

1. **The Cases are Legion in Which a Contract is Implied Obligating Homeowners to Pay Dues to Maintain the Community's Common Facilities.**

Much like Washington, other jurisdictions will imply a contract to pay dues where it would be unjust for the homeowner to retain the benefits provided by the homeowners association without contributing his or her fair share. For instance, in Hess v. Barton Glen Club, 718 A.2d 908, 912

(Pa. Commw. Ct. 1998), rev. den. 558 Pa. 623, 737 A.2d 745 (1999), the court held that an implied in law contract obligated the homeowner to pay dues, notwithstanding the fact that the homeowner's deed imposed no such obligation. The court explained as follows:

When the owners of property in a residential development are permitted to use the common areas of a development, there is an implied agreement to accept a portion of the cost of maintaining those facilities. And, where a deed is silent on whether a homeowners' association has the authority to make such an assessment, the homeowners may be assessed their proportionate costs of common improvements. **Even if an owner's chain of title makes no reference to a homeowners' association, we have held that the owner is nonetheless obligated to pay a share of the costs of maintaining common areas managed by a homeowners' association for the reason that the owners are the beneficial users of the common areas of the development and are responsible for the cost of repair, maintenance and upkeep of the common areas.** If we were to find to the contrary, lot owners would be able to avoid their duty to pay assessments, and because associations would be powerless to operate, the facilities of a development would fall into disrepair.

Id. at 912 (emphasis added and internal citations omitted).

Authority supporting the rule that the power to levy dues and assessments may be implied to maintain the association's common property can be found in other jurisdictions as well. See e.g., Kaanapali

Hillside Homeowners' Ass'n ex rel. Bd. of Directors v. Doran, 112 Hawai'i 356, 363, 145 P.3d 899 (2006) (homeowners in subdivision were obligated by implied contract to pay assessments to homeowners' association, notwithstanding fact that association's charter and bylaws were not recorded against lots in subdivision); Braeshire Condominium Bd. of Managers v. Brinkmeyer, 841 S.W.2d 217, 221 (Mo.Ct.App. 1992) (holding that equity required unit owners to pay assessments needed for roof replacement even though assessment procedure was defective); Weatherby Lake Improvement Co. v. Sherman, 611 S.W.2d 326, 331 (Mo.App. W.D. 1980) (holding that lot owners were required to pay assessments for upkeep of lake even though developer who created lake failed to impose maintenance obligation in deeds); Perry v. Bridgetown Cmty. Ass'n, Inc., 486 So.2d 1230, 1234 (Miss. 1986) (holding that landowner who purchases property deriving benefits from association implies consent to be charged assessments and dues common to all members; a covenant to maintain common areas is implied by necessity); Sea Gate Ass'n v. Fleischer, 211 N.Y.S.2d 767, 778-79 (N.Y.Sup.Ct. 1960) (holding that there is an implied agreement to pay proportionate costs of maintenance and repair of roads and other common areas when ownership in residential community provides right of use); Seaview Ass'n of Fire Island, N.Y., Inc. v. Williams, 69 N.Y.2d 987, 989, 517 N.Y.S.2d

709, 510 N.E.2d 793 (1987) (finding that implied contract obligated homeowner to pay a proportionate share of cost for services and facilities provided by homeowners association when home owner had knowledge that association provided benefits); Meadow Run & Mountain Lake Park Ass'n v. Berkel, 409 Pa.Super. 637, 640, 598 A.2d 1024 (1991) (quoting Sea Gate Ass'n, 211 N.Y.S.2d at 778-779); Spinnler Point Colony Ass'n, Inc. v. Nash, 689 A.2d 1026, 1029 (Pa.Cmwlth. 1997) (holding that appellants were required to pay a proportionate share of costs incurred by a homeowners association in maintaining development's roads, facilities, and amenities, even though there was no mention of association in appellants' chain of title).

2. Under the Restatement, Homeowners Associations Have Implied Authority to Assess Dues and Lien Property.

The Restatement (Third) of Property-Servitudes, which Lake Limerick cites frequently, states that "the power to raise funds reasonably necessary to carry out the functions of a common-interest community will be implied if not expressly granted by the declaration or by statute." Restatement (Third) of Property-Servitudes § 6.5 cmt. b. at 97 (2000). Residential homeowners associations are a classic example of a common-interest community. Id. at § 6.2 cmt. b., d.

Likewise, unless a lien provision has been expressly excluded, “a lien for unpaid assessments may be implied using the court’s traditional power to impose an equitable lien when appropriate to secure payment of an obligation.” Id. at § 6.5 cmt. d. at 99.

And as the Restatement explains, authority to assess dues must be implied because the assessment power is critical to the financial viability of homeowners associations and their ability to carry out their functions. Id. at cmt. b. Both private-property owners in Driftwood Key, including appellants, and the public have a vested stake in the outcome. Id. For instance, if DKC is found without authority to assess dues, the following could result:

- Deteriorating common property and facilities are likely to depress property values within Driftwood Key, decreasing property-tax revenues as well as the wealth of property owners;
- Additional burden will be cast on local government since DKC dues are also used to maintain open space, side walks, beaches, and drainage channels;

See Id.

Moving to a system of user charges and voluntary dues contributions in place of mandatory dues contributions is also problematic. First, demand for use of DKC’s facilities will likely fluctuate, rendering planning extremely difficult. Moreover, costs may become prohibitive for those who relied on the availability of the community’s common facilities

in deciding to purchase property in Driftwood Key. See id. Next, administering such a system would also be unduly burdensome on DKC. A system of voluntary contribution would raise a compliance problem and the possibility of free riders. See id. Finally, a voluntary system would likely result in uneven enforcement, which raises additional issues of fairness. See id.

**D. DKC is Entitled to Attorney Fees and Costs on Appeal.**

DKC is entitled to its costs. RAP 14.2. The recoverable costs are set out in RAP 14.3. DKC will file its cost bill with the appellate court within 10 days after the decision terminating review, as provided in RAP 14.4. DKC is also entitled to an award of reasonable attorney fees, and will submit the required affidavit of fees and expenses at the appropriate time. RAP 18.1.

**VI. CONCLUSION**

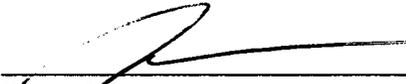
Driftwood Key Club maintains a private marina, marina slips, launch ramp, private beach, clubhouse, and swimming pool for the use and enjoyment of its members – homeowners residing in the Driftwood Key neighborhood. Over time, homeowners have shared equally in the burden of building and maintaining these facilities for the benefit of all. And improved quality of life and financial health of the club’s members has resulted. These truths are not disputed.

When faced with these same facts, the trial court held that appellants were liable for homeowners dues and subject to liens, irrespective of the Club's express authority. The court found that holding otherwise, and allowing appellants to retain the benefits of living in Driftwood Key without contributing their fair share, was fundamentally unjust.

This point is lost on appellants as they simply repeat what they have said before. They identify no error by the trial court and do not even attempt to justify the basic inequity of their position. For this reason, and the others set out above, DKC respectfully requests that the Court affirm the trial court's judgment and award DKC any applicable appellate costs and attorney's fees under RAP 14.2 - 4 and RAP 18.

DATED this 11<sup>th</sup> day of March, 2009.

GARVEY SCHUBERT BARER

By   
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I, Sue Stephens, certify under penalty of perjury under the laws of the State of Washington that, on March 11, 2009, I caused the foregoing Certificate of Service and Respondent Driftwood Key Club's Brief filed contemporaneously with this Certificate to be served on the person listed below in the manner shown:

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DATED this 11th day of March, 2009.

GARVEY SCHUBERT BARER

By Sue Stephens  
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