

COURT OF APPEALS
DIVISION II

No. 38906-1-II

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STATE OF WASHINGTON

BY
DEPUTY

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

LAKWOOD RACQUET CLUB,
a Washington nonprofit corporation,

Appellant,

v.

MARY MARGARET JENSEN, A. DWIGHT ORR, JR.,
and MICHAEL SCOTT ORR, being the heirs of A. D.
ORR and MARGARET ORR, Deceased,

Respondents.

BRIEF OF APPELLANT

LAKWOOD RACQUET CLUB

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I. INTRODUCTION

The Lakewood Racquet and Sport Club, a Washington nonprofit corporation, owns and operates a private tennis and swim club on eleven acres in Lakewood, Washington. The Racquet Club got its start in 1962, when its founders purchased ten acres of land from A. Dwight Orr and Margaret Orr by means of a Real Estate Contract. At the time, Mr. and Mrs. Orr resided on property adjacent to the Racquet Club. The 1962 Real Estate Contract between the Racquet Club and Mr. and Mrs. Orr contained restrictions that limited the use and residential development of the Racquet Club property.

Mr. Orr died in 1967. In 1973, the Racquet Club paid the balance of the Real Estate Contract and Mrs. Orr and three of her children (signing as Joint Trustees of A. Dwight Orr's Testamentary Trust) transferred title to the Racquet Club Property by executing a statutory warranty deed in fulfillment of that contract. That deed also contained the original restrictions from the Real Estate Contract that limited the use and development of the Racquet Club Property, but it did not contain a reversionary clause.

In 1976, Mrs. Orr and her children sold and conveyed the remaining balance of Mr. and Mrs. Orr's original 45-acre property. The 1976 deed conveying the last of the Orr property contains no restrictions on the use of that property, nor does it make any mention of the Racquet Club Property or the restrictions imposed on that property by the 1962

Real Estate Contract or the 1973 Fulfillment Deed. Mrs. Orr passed away sometime thereafter, and for the past 33 years neither the Orrs nor their heirs have owned any property in the vicinity of the Racquet Club.

In 2005, the Racquet Club Board of Directors engaged in strategic planning and concluded that the Club should either sell or develop a portion of the Racquet Club Property for residential use and devote the proceeds from such sale or development to renovation and expansion of the Club's existing facilities. Representatives of the Racquet Club contacted the heirs of Mr. and Mrs. Orr, seeking their cooperation in removing the deed restrictions.

One of the heirs – a daughter of Mr. and Mrs. Orr who lives in Nevada – objected to the residential development of any portion of the ten acres of land that the Racquet Club acquired from her parents in 1962 and would not agree to release the restrictions. She believes that the undeveloped portion of the Racquet Club parcel should be left as an open space preserve for future generations.

In 2007, the Racquet Club brought suit against the heirs of Mr. and Mrs. Orr seeking declaratory and injunctive relief. In a motion for summary judgment, the Club sought a ruling that the Orr Heirs (also referred to herein as the "Respondents") lacked standing to enforce the restrictions quoted above. That motion was denied in February 2008. The Orr Heirs then filed a counterclaim by which they sought a declaratory judgment validating the restrictions. Their motion for summary judgment was granted in February 2009, and this appeal followed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the Racquet Club's motion for summary judgment, which sought a ruling that the Orr Heirs lacked standing to enforce restrictive covenants in the deed to the Racquet Club Property and that those restrictive covenants were no longer valid.

2. The trial court erred in granting the Orr Heirs' motion for summary judgment and ruling that the restrictions and restraints on the use, subdivision and sale of the property purchased by the Racquet Club from their predecessors-in-interest remain valid and enforceable.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do the grantors of a deed that contains restrictive covenants have standing to enforce those covenants when they no longer own any of the property that the covenants were intended to benefit? (Assignments of Error Nos. 1, 2)

2. Are restrictive covenants in a deed enforceable where the grantors of that deed have not retained an ownership interest in any property arguably benefited by those covenants? (Assignments of Error Nos. 1, 2)

3. Did restrictive covenants in a deed become unreasonable restraints on alienation after the grantors have conveyed their interest in the adjacent parcel and no longer have any legitimate interest in enforcing those covenants? (Assignment of Error Nos. 1, 2)

IV. STATEMENT OF THE CASE

A. Factual Background

1. The Orr Property.

A. Dwight Orr was a Weyerhaeuser Company executive. (CP 111). In 1939, Mr. Orr and his wife, Margaret, acquired an old, historic home known locally as the Boatman-Ainsworth House (hereinafter “the House”) and approximately forty five (45) acres of land (hereinafter the “Orr Property”) in what is now Lakewood, Washington. (CP 31, 111). The House and land that the Orr family owned from 1939 to 1971 is located as shown on Appendix A.

In 1953 and 1955, Mr. and Mrs. Orr sold and conveyed portions of the Orr property lying south of Clover Creek (which ran through the Orr property) to third parties. (CP 31). The deeds to those properties contain no restrictions on the use of the land bordering Clover Creek, or on subdivision, sale, or residential use generally. (CP 31, 38, 40). Those lands (which are shaded in orange and blue on Appendix A) have subsequently been improved with single family residences. (CP 31).

In 1962, Mr. and Mrs. Orr sold ten acres of their property located away from Clover Creek to the Club for \$30,000.00. (CP 31-32). That land (the “Racquet Club Property”) is the subject of this appeal. The Racquet Club Property (which is shaded in pink on Appendix A) was sold to the Club by means of a Real Estate Contract, a copy of which is attached hereto as Appendix B. (CP 31-32, 42). The final paragraph of the

Real Estate Contract contained language that restricted the use of the Racquet Club Property to tennis and swim club purposes. (CP 42).

The Racquet Club Property was conveyed to the Club by three statutory warranty deeds. (CP 32, 44, 46, 48-52). Copies of those deeds are attached hereto as Appendices C, D and E. None contains a reversionary clause.

The last of the three deeds (the "Fulfillment Deed") contains restrictive covenants, which are substantially similar to the covenants contained in the Real Estate Contract, together with an introductory clause that reads: "The following covenants and restrictions shall run with the land hereby conveyed and shall be binding upon the Grantee herein named, its successors and assigns." (CP 49-50). The restrictive covenants set forth in the Real Estate Contract and the Fulfillment Deed will be referred to hereinafter as "the Covenants."

Mr. Orr died in 1967. (CP 32). In 1971, the Orr children sold the Boatman-Ainsworth House and about an acre of land surrounding it. (CP 32). That land (which is shaded in green on Appendix A) continues to be used for residential purposes. (CP 32). In 1976, Mrs. Orr and her children sold and conveyed the remaining balance of the original 45-acre Orr Property to a real estate developer, CHG, Int'l. (CP 32-33). The land sold to CHG, including two acres located between the House and the Racquet Club Property, is outlined in yellow on Appendix A. The deed used to convey the property to CHG contains no restrictions on subdivision, sale or residential use, nor does it mention the Racquet Club Property. (CP 33, 54-55).

CHG subsequently platted the land, conveyed the two acres between the House and the Racquet Club to the Lakewood Water District, and constructed single family residences on the balance of it. The land conveyed to the Lakewood Water District is shaded in yellow and outlined with dotted red lines on Appendix A. In 1989, the Lakewood Water District sold to the Club about half of the land it had acquired from CHG.

Since 1976, none of the Orr family has had any ownership interest in the Orr Property, and none lives in the vicinity of the Racquet Club. In 1996, Lakewood was incorporated and what was once the Orr Property is now part of that city.

2. The Lakewood Racquet Club.

In 1962, Jim Griffin met with A. Dwight Orr at his home to discuss purchasing ten acres of land from Mr. and Mrs. Orr for a tennis club. (CP 240). At that meeting Mr. Griffin showed Mr. Orr a drawing that depicted the recreational facility that was planned – indoor and outdoor tennis courts, squash courts, a swimming pool, and a running track around the perimeter of the site. (CP 240). There was never any discussion about leaving any portion of the ten acres unimproved. (CP 240).

After the meeting Mr. and Mrs. Orr agreed to sell ten (10) of the original forty five acres of land to the Club on a real estate contract. (CP 240). The purchase price of the land was thirty thousand dollars (\$30,000), which is what ten acres of unimproved land in that location was worth in 1962. (CP 240, 235). In order to ensure that a tennis, swim and squash club

would be built on the Racquet Club Property, Mr. Orr asked that the Covenants be included as part of the Real Estate Contract. (CP 240).

After acquiring the land from the Orrs, the Racquet Club constructed a swimming pool, a squash court and three outdoor tennis courts on a portion of the ten acres. (CP 241). Three more outdoor courts were added a few years later, and in 1969, the Club constructed two indoor tennis courts and a clubhouse. (CP 241). In 1972, two (2) more indoor tennis courts were constructed. (CP 240).

At present, the Club has approximately 350 memberships and a nine member Board of Directors. (CP 23). The improvements to the Club consist of six outdoor tennis courts, four indoor tennis courts, a small clubhouse, a swimming pool, fitness facility, pro shop, office and a parking area. (CP 24). The existing improvements utilize approximately fifty percent of the land owned by the Club. (CP 24).

3. The Genesis of the Racquet Club's Lawsuit

In late 2005, the Racquet Club's Board of Directors engaged in strategic planning and adopted a new Master Plan. (CP 24). The Board concluded that the Club should construct town homes/condominiums on a portion of the Club property and use the proceeds of the sale of that property to renovate and expand existing facilities. (CP 242). The Club's objective was to develop a portion of its land so that it can improve its facilities and sustain itself over the years. (CP 27, 243).

In December of 2005, at the request of the Racquet Club's Board of Directors, Jim Griffin wrote to the two surviving children of Dwight and Margaret Orr, Dwight Orr, Jr., and Mary Margaret ("Peggy") Jensen, and asked them to cooperate with the Club in extinguishing the Covenants. (CP 243). Mr. Griffin subsequently talked to Mr. Orr and Ms. Jensen by telephone. (CP 243). Initially, Dwight Orr, Jr. told Mr. Griffin that he would be in favor of waiving the Covenants, but Mr. Griffin would first have to get the approval of his sister, Mary Margaret Jensen. (CP 243).

When Ms. Jensen was contacted and asked to waive the Covenants, however, she declined. (CP 114). Ms. Jensen believes that the undeveloped portion of the Club property should be left as "an open space preserve for future generations." (CP 112.) When it became apparent to the Board of the Racquet Club that a satisfactory resolution short of litigation was not possible, this lawsuit followed. (CP 1-18). Some time thereafter, by an instrument entitled "Assignment of Interest in Restrictive Covenants," which was recorded with the Pierce County Auditor on August 9, 2007, Mary Margaret Jensen purported to sell and assign her rights under the 1973 deed to her daughter, Chris Jensen. (CP 311-16). Both Mary Margaret Jensen and Chris Jensen reside in Nevada. (CP 146, 313).

B. Procedural Status of the Case

Lakewood Racquet Club filed its Complaint for Declaratory and Injunctive Relief on April 25, 2007. (CP 1-18). That Complaint sought

relief under the Washington Uniform Declaratory Judgments Act, RCW 7.24, asking the Pierce County Superior Court to enter a judgment:

1. Declaring that the Covenants were terminated when the Orr family disposed of the balance of the property it owned in the vicinity of the Racquet Club;
2. Declaring that the defendants in that case – the heirs of Mr. and Mrs. Orr and the grantors of the Fulfillment Deed – do not have standing to enforce the Covenants;
3. Declaring that the Covenants do not preclude the Racquet Club from selling a portion of its land as residential sites;
4. Declaring that the withholding of consent by the defendants is unreasonable; and
5. Permanently enjoining the defendants from interfering with the Racquet Club's development of its property.

Defendant Mary Margaret Jensen filed an initial Answer on June 27, 2007. On August 31, 2007, the Racquet Club moved for summary judgment. (CP 19-20). The Orr Heirs then retained counsel who asked for a continuance of the summary judgment motion and filed the First Amended Answer on behalf of all of the defendants on March 17, 2008. (CP 166-172). The Amended Answer also contained two counterclaims. The first counterclaim sought a declaratory judgment under RCW 7.24 that the Covenants remain valid, and the other sought damages for breach of contract and anticipatory repudiation of the Covenants on the part of the Racquet Club. (CP 168-170).

The Racquet Club's motion for summary judgment was heard by the trial court on February 22, 2008. In that motion, the Racquet Club argued,

among other things, that the Covenants were void as unreasonable restraints on alienation, that the Respondents had conveyed title to the Racquet Club in fee simple with no reversion or other retained interest in the land, and that the Respondents no longer had any right to enforce the Covenants because none of the Respondents had retained an interest in the land benefited by the Covenants. (CP 56-65). The Respondents argued that the Covenants were enforceable because they were reasonable and that the Respondents had standing to enforce the Covenants because they were parties to the original conveyance. (CP 76-86). The Respondents also argued that they had standing to enforce the Covenants notwithstanding the fact that they had not retained any interest in the adjacent land. (CP 84-85). After hearing the arguments of the parties, the trial court denied the Racquet Club's motion for summary judgment. (CP 163-65).

The Respondents filed their own motion for declaratory judgment on August 14, 2008. (CP 258-318). In that motion, the parties made arguments substantially similar to those that had been made in the Racquet Club's motion for summary judgment. After hearing the arguments of the parties, the trial court granted the Respondents' motion and entered a judgment declaring that "[t]he restrictive covenants in the deeds are valid and enforceable" and dismissing the Racquet Club's claims with prejudice. (CP 361-63). This appeal followed.

V. ARGUMENT

A. The Standard of Review Is De Novo.

The Racquet Club is appealing the trial court's denial of its motion for summary judgment and the trial court's granting of the Respondents' motion for summary judgment. On an appeal from a summary judgment, the standard of review is *de novo* and an appellate court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)).

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005). To defeat summary judgment, the nonmoving party must come forward with specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the party's claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Argumentative assertions, unsupported speculation, suspicions, beliefs and conclusions, as well as inadmissible evidence that unresolved factual issues remain, are insufficient to meet this burden. *White*, 131 Wn.2d at 9; *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Where reasonable minds could reach only one conclusion based on the facts presented,

summary judgment should be granted. *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

B. The Trial Court's Ruling Must Be Reversed and Judgment Entered for the Racquet Club Because the Respondents Did Not Have Legal Standing to Enforce the Restrictive Covenants.

In granting summary judgment, the trial court ruled as a matter of law that the restrictions on the use of the Racquet Club Property contained in the Fulfillment Deed created restrictive covenants (hereinafter, the "Covenants") and that those Covenants remain valid and enforceable. *Revised Order Granting Defendants' Motion for Declaratory Judgment*. The trial court did not appear to consider, however, whether the Respondents (also referred to herein as the "Orr Heirs" or the "Grantors") had standing to seek enforcement of the Covenants. The trial court's ruling should be reversed and judgment entered granting the relief sought by the Racquet Club because the Respondents lacked standing to enforce the Covenants.

The Respondents no longer own the real property that the Covenants were intended to benefit. The Respondents will suffer no actual injury if the Covenants are terminated. Whether analyzed under the Uniform Declaratory Judgments Act, the common law, or under the provisions of the *Restatement (Third) Property: Servitudes*, the trial court's decision should be reversed and judgment should be entered in favor of the Racquet Club because the Respondents have no legitimate interest in enforcing the Covenants and thus are without standing.

1. The Respondents Have No Standing Under The Washington Uniform Declaratory Judgments Act.

The Respondents sought relief under the Uniform Declaratory Judgments Act (RCW 7.24.010 *et seq.*, attached hereto as Appendix “F”). Under that statute, there is a two-part test for standing: first, a party must be within the zone of interests to be protected or regulated by the statute in question, and second, the party must have suffered an “injury in fact.” *American Legion Post # 149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 192 P.3d 306 (2008). Each of the Respondents is a “person interested under a deed” under RCW 7.24.020, so each falls within the zone of interests to be protected by that statute. The Respondents fail the second part of this test, however, because none of the Respondents will suffer an “injury in fact” if the Covenants are invalidated or held to be unenforceable.

The “injury in fact” test focuses on whether a plaintiff has suffered an actual injury. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 713, 42 P.3d 394 (2002). An “injury in fact” involves harm that is not speculative or abstract. *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 864, 103 P.3d 244 (2004).

In this case, the Respondents cannot show that they would incur an actual injury if the Covenants were to be terminated. While the Respondents may object that the Racquet Club will be in technical breach of the Covenants if it subdivides the property without the Respondents’ consent or if it uses part of the Racquet Club Property for purposes other than a tennis, swimming, and squash club, the Respondents cannot

establish that they will suffer any actual damages that would result from such breach. Accordingly, the trial court's ruling that the Covenants are valid and enforceable should be reversed and the trial court should be directed to enter judgment on behalf of the Racquet Club.

2. The Respondents Have No Standing To Enforce The Covenants Under Common Law Rules.

To understand why the defendants cannot enforce the Covenants under the common law requires an analysis of the Covenants to determine whether those Covenants “run with the land.” *See 1515-1519 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.*, 102 Wn. App. 599, 603, 9 P.3d 879 (2000) (“For a covenant to run with the land, it often depends on what type of covenant it is.”). Unless the covenant runs with the land, only the person to whom the promise is made or a third party beneficiary of the promise may enforce it. *Restatement of Property* § 542 (1944).

a) When First Executed, the Restrictive Covenants Ran with the Land and the Respondents Had Standing to Enforce the Covenants.

Traditionally, there are two types of restrictive covenants: “real covenants” (or covenants running at common law) and “equitable restrictions” (or covenants enforceable in equity). *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691, 974 P.2d 836 (1999); 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 3.1, at 123 (2d. ed. 2004) (hereinafter, “Stoebuck & Weaver, *Washington Practice*”).

“A covenant running with the land is a promise made between owners of two neighboring parcels of land which benefits and burdens not only the original covenanting parties, but also the successor owners of the parcels.” Gerald Korngold, *Private Land Use Arrangements: Easements, Real Covenants, and Equitable Servitudes*, § 8.01 at 287 (2d ed., 2004). To run at common law, a real covenant must meet five elements: (1) the covenant must be enforceable as a contract between the original parties; (2) the covenant must touch and concern estates in land with which the burdens and benefits run; (3) the covenanting parties must have intended to bind their successors in interest; (4) there must be vertical privity of estate; and (5) there must be horizontal privity of estate. *1515-1519 Lakeview Boulevard Condominium Ass’n v. Apartment Sales Corp.*, 102 Wn. App. 599, 603, 604, 9 P.3d 879 (2000); 17 Stoebuck & Weaver, *Washington Practice* §§ 3.2-3.6.

An equitable restriction requires all of the above elements except horizontal privity of estate. *Id.*; 17 Stoebuck & Weaver, *Washington Practice* §§ 3.10-3.15. Instead, the successor of the covenantor must have actual or constructive notice of the equitable restriction. 17 Stoebuck & Weaver, *Washington Practice* § 3.16.

At the time they were executed, the Covenants met all of the elements necessary to be enforceable at law (as real covenants) or in equity (as equitable restrictions). First, they were fully enforceable as a contract between the original parties, being part of the Real Estate Contract and the deed conveying the Racquet Club Property in fulfillment of the Real Estate Contract by which the Racquet Club had purchased the

parcel. Second, the Covenants touched and concerned both the burdened Racquet Club Property and the benefited Orr property; they restricted the use of the burdened parcel and prohibited residential development, thus benefiting the adjacent property then owned by the Grantors. Further, the Grantors expressed the intent to bind the successors in interest to the Racquet Club by stating that the Covenants “shall be binding upon the Grantee herein named, its successors and assigns.” Privity of estate – whether horizontal or vertical – was not an issue at that time, since the Covenants were embodied in the Real Estate Contract and the Fulfillment Deed that consummated the purchase and sale transaction between the two original parties. The Covenants were fully enforceable under the common law when the Real Estate Contract and the Fulfillment Deed were executed.

b) When the Respondents Sold the Land Benefited by the Covenants, They Lost the Right to Enforce the Covenants.

Less than four years after executing the Fulfillment Deed, the Respondents sold the remainder of the 45 acres that the original grantors, Mr. and Mrs. Orr, once owned. Since 1976, none of the Respondents has owned an interest in any real property located in the vicinity of the Racquet Club. At least one of the Respondents resides outside the state of Washington. By selling the parcel that benefited from the Covenants, the Respondents lost the right to enforce the Covenants.

Under the common law, the Respondents no longer have standing to enforce the Covenants because they no longer own the

property that was intended to be benefited by the Covenants. *See Restatement of Property* § 542 (1944); 51 A.L.R.3d 556, *Restrictive Covenants - Who May Enforce* (1973) (restrictive covenant can be enforced only by the owner of some part of the dominant land for the benefit of which the covenant was made); 20 Am.Jur.2d *Covenants, Etc.* § 242 (2005) (“The parties to a restrictive covenant may enforce it among themselves, at least so long as the covenantee continues to own any part of the tract for the benefit of which the restrictions have been created.”); 20 Am.Jur.2d *Covenants, Etc.* § 244 (2005) (“Where a person no longer has any land in the vicinity which might be affected by the disregard of a covenant, he or she cannot enforce the restrictions.”). This principle has been adopted by many jurisdictions.¹

Although no Washington case has directly addressed this issue, Professor Stoebuck has recognized the rule that the right of enforcement generally follows ownership of the benefited property:

¹ *See, e.g., First Permian, L.L.C. v. Graham*, 212 S.W. 3d 368 (Tex. App. Amarillo 2006) (real covenant can only be enforced by the owners of the land the covenant was intended to benefit); *Snook v. Bowers*, 12 P.3d 771, 784 (Alaska, 2000); *McLeod v. Baptiste*, 315 S.C. 246, 247, 433 S.E.2d 834 (1993) (“We therefore adopt the majority rule and hold the trustee lacked standing to enforce this covenant against appellants since the trust no longer owns any real property which would benefit from the covenant’s enforcement”); *Lacer v. Navajo County*, 141 Ariz. 396, 403, 687 P.2d 404 (1983) (In order to enforce the promise, the successor to the original grantor, whether heir or assignee, must retain an interest in land which the promise was intended to benefit at the time it was made; otherwise the promise merely creates a personal covenant); *see also Stegall v. Housing Authority of City of Charlotte*, 278 N.C. 95, 178 S.E.2d 824, 829 (1971); *Minch v. Saymon*, 96 N.J.Super. 464, 233 A.2d 385, 387 (1967); *Forman v. Safe Deposit & Trust Co.*, 114 Md. 574, 80 A. 298, 300 (1911).

If the covenantee has conveyed his land, so that the benefit of the promise has run to his grantee, the covenantee generally loses the right to enforce the covenant on any theory, so that the covenantor or his privy is liable only to the covenantee's grantee.

William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861, 887 (1977) (citing *Restatement of Property* §§ 549, 550 (1944)).

Application of this rule assumes, however, that the Grantors intended the benefit of the Covenants to run with the land. (CP 77, CP 113, ¶11). The Respondents have argued that this intention is evidenced in the preface to the Covenants (found only in the Fulfillment Deed), which states, “[t]he following covenants and restrictions shall run with the land hereby conveyed and shall be binding upon the Grantee herein named, its successors and assigns,” and in the restriction against subdividing and selling the land in tracts without the consent of Mr. and Mrs. Orr, “their heirs and assigns.” (CP 77, 83). If this court accepts these arguments and determines that the Covenants run with the land, the rule cited by Professor Stoebuck applies and the Respondents, who no longer own the property benefited by the Covenants, lose the right to enforce the covenant “on any theory.”

To avoid this result, the Respondents have also argued that they have standing to enforce the Covenants because they hold the Covenants “in gross.” (CP 85, lines 4-10, citing *Restatement (Third) of Property: Servitudes* §2.6, comment D (2000) (hereinafter, “*Restatement (Third)*”). An analysis of the provisions of the *Restatement (Third)* establishes that, even if the Respondents’ contention that they hold the Covenants in gross were true, the result under the *Restatement (Third)*

would be the same as it is under the common law: the Respondents lack standing and the trial court's ruling should be reversed.

3. The Respondents Have No Standing to Enforce the Covenants under the *Restatement (Third) of Property: Servitudes*.

The result dictated by application of common law rules governing real covenants and equitable restrictions is entirely consistent with the result that is reached if the Covenants are analyzed under the provisions of the *Restatement (Third)*. As noted above, the Respondents have argued that they hold the Covenants "in gross" and therefore have standing to continue to enforce them. An analysis of the Covenants under the *Restatement (Third)* establishes that the Covenants are appurtenant and personal to the Grantors in their capacity as owners of the land that was benefited by the Covenants. Thus, under the *Restatement (Third)*, as under the common law, the Respondents lack standing to enforce the Covenants because they no longer own the land benefited by the Covenants.

a) Both the Burden and the Benefit of the Covenants are Appurtenant.

A court's first objective in interpreting a servitude is to ascertain the intent of the original parties. *Restatement (Third)* § 4.1, at 496-97; accord, *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). In determining the intent of a covenant, the court generally gives the language its ordinary and common use and will not read the covenant so as to defeat its plain and obvious meaning. *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 815-16, 854 P.2d 1072 (1993); see

also *Restatement (Third)* § 4.1, cmt. d, at 499. When analyzed under the precepts set forth in the *Restatement (Third)*, it is evident that these covenants are appurtenant.

As a preliminary matter, the Covenants constitute “servitudes” as that term is defined in the *Restatement (Third)*.² The Covenants create both an obligation that burdens the Racquet Club Property and a benefit that accrues to the property that was owned by the Grantors at the time the Covenants were created.

Under the provisions of the *Restatement (Third)*, both the benefit and the burden of a servitude are subject to three classifications: “appurtenant,” “in gross,” and “personal.” *Restatement (Third)* § 1.5 at 30.³ An analysis of the nature of the burden and the benefit created by the Covenants in this case establishes that both are appurtenant.

² Section 1.1(1) of the *Restatement (Third)* defines a servitude as “a legal device that creates a right or an obligation that runs with land or an interest in land.” A right that runs with the land is called a “benefit” and the interest in land with which it runs may be called the “benefited” or “dominant” estate. *Id.* § 1.1(1)(b), at 8. An obligation that runs with the land is called a “burden” and the interest in land with which it runs may be called the “burdened” or “servient” estate. *Id.* § 1.1(1)(b), at 8. A covenant is a servitude if either the benefit or the burden runs with the land. *Restatement (Third)* § 1.3(1), at 23.

³ Section 1.5 of the *Restatement (Third)* provides:

(1) “Appurtenant” means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land. The right to enjoyment of an easement or profit, or to receive the performance of a covenant that can be held only by the owner or occupier of a particular unit or parcel is an appurtenant benefit. A burden that obligates the owner or occupier of a particular unit or parcel in that person’s capacity as owner or occupier is an appurtenant burden.

(2) “In gross” to mean that the benefit or burden of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land.

First, the burden imposed on the Racquet Club Property by the Covenants falls squarely under the definition of appurtenant in the *Restatement (Third)* § 1.5(1) because the burden obligates the Racquet Club in its capacity as owner of the burdened parcel. The burden is appurtenant because it “could more reasonably be performed by a successor to a property interest held by the original obligor at the time the servitude was created than by the original obligor after having transferred that interest to a successor.” *Restatement (Third)* § 4.5(3) at 540; *see also Restatement (Third)* § 4.5 cmt. e at 543 (the burden of a restrictive covenant is always appurtenant).

The benefit that was created by the Covenants is also appurtenant because it serves purposes – assurance that the land will be used as a tennis club and control of residential development of the Racquet Club Property – that were primarily useful to the Grantors, whose residence was adjacent to the Racquet Club parcel at the time the Covenants were created. *Restatement (Third)* § 4.5(1)(a) at 540. “The fact that the benefit serves a purpose that is only or primarily useful to the holder of a particular interest in land, which was held by the original beneficiary at the time the servitude was created, strongly suggests that the benefit is appurtenant.” *Restatement (Third)* § 4.5 cmt. d at 541. Further, “[t]he fact that the benefit serves a purpose that would be more useful to a successor to an interest in land held by

(3) “Personal” means that a servitude benefit or burden is not transferable and does not run with the land. Whether appurtenant or in gross, a servitude benefit or burden may be personal.

the original beneficiary than to the original beneficiary after having parted with that interest in land also should lead to the conclusion that the benefit is appurtenant.” *Id.* “In cases of doubt, a benefit should be construed to be appurtenant rather than in gross.” *Restatement (Third) § 4.5(2)*.

b) The Respondents are No Longer Entitled to the Benefit of the Covenants Because They No Longer Own the Benefited Property.

The duration of the obligations and enjoyment rights of the original parties and their successors is addressed in *Restatement (Third) § 4.4*, which provides, in pertinent part:

If no duration is stated and the servitude has not terminated under Chapter 7, the duration of a party’s obligation under, or right to enjoy the benefit of, a servitude is as follows:

* * *

(2) An original party or successor to a servitude benefit that runs with an interest in property is entitled to the benefit only during the time the party or successor holds the benefited property.

Restatement (Third) § 4.4 at 534.⁴ Under this rule, if the benefit of the Covenants is appurtenant and runs with the land (*i.e.*, passes automatically to the Grantors’ successors), then the Grantors can no longer enjoy the benefits created by the Covenants and do not have standing to enforce them

⁴ The rationale for the rule that a party is entitled to enjoy the benefit of a servitude that runs with the land only so long as the party owns the land is that it reflects the probable intent of the parties. The same rationale underlies the rule stated in § 4.5, that the benefit of an interest intended to run with the land is not ordinarily severable from the land. Although the parties have the power to create severable benefits that can be retained by the original beneficiaries after transfer of the property, the situation is sufficiently unusual that the language of the instrument would probably have reflected their intent. *Restatement (Third) § 4.4 cmt. c* at 536.

because they no longer hold the benefited property. To determine if this rule applies, it must be determined whether the benefits created by the Covenants run with the land under the *Restatement (Third)*.

According to the *Restatement (Third)*, a benefit that is appurtenant can “run with the land” or it can be “personal,” but these attributes are not mutually exclusive. As stated in the *Restatement (Third)* § 1.5, cmt. a at 31:

Only appurtenant burdens and benefits run with the land, but the terms are not synonymous. Running with land means that the benefit or burden passes automatically to successors; appurtenant means that the benefit can be used only in conjunction with ownership or occupancy of a particular parcel of land, or that only the owner or occupier of a particular parcel of land is liable for failure to perform a servitude obligation. Appurtenant benefits and burdens ordinarily run with the land, but they may be made personal to particular owners or occupiers of land.

There may be some question as to whether the benefits created by the Covenants were intended to run with the land or whether they were personal to the Grantors. The actual language of the Covenants (“The land shall not be subdivided and sold in tracts, without the consent of A. Dwight Orr and Margaret Orr, their heirs and assigns”) suggests that the Grantors may have intended at least some part of the benefits to be transferable. If that is the case, then the benefits should be construed to run with the land, thereby depriving the Grantors of the right to enforce the Covenants once they had conveyed their interest in the remaining Orr property.

c) Even If the Benefit Was Intended to be Personal, the Respondents Still Do Not Have Standing to Enforce the Covenants.

Even if the Covenants are construed to have created benefits that were intended to personally benefit Dwight and Margaret Orr (and their heirs) in their capacity as grantors of the Racquet Club parcel, the Respondents would still lack standing to seek enforcement of the Covenants. This very issue was before the New Hampshire Supreme Court in a recent case, *Shaff v. Leyland*, 154 N.H. 495, 914 A.2d 1240 (2006), that involved a set of facts nearly identical to those in the case at bar.

The *Shaff* case presented the Court with the following issue: whether a restrictive covenant contained in a deed can be enforced by the original grantor (Ms. Shaff, who included a restrictive covenant in the deed) when the grantor no longer owns any real property benefited by the deed restriction. *Shaff*, 914 A.2d at 1244-45. In the 1960s, Ms. Shaff acquired approximately seventy-five acres where she lived in the only house located on that property. *Id.* at 1242-43. In 1975, she sold portions of this land to various parties. *Id.* at 1243. In 1985, Ms. Shaff conveyed approximately twenty-three acres to a Ms. Leyland, employing a warranty deed that contained the following restrictive covenant:

The above described premises are conveyed subject to the restriction, which shall run with the land, that the Grantees, their heirs and assigns shall construct on said premises only a colonial-type residence having a market value of at least One Hundred Thousand Dollars (\$100,000).

Id. at 1243. Ms. Shaff did not reserve a right of enforcement in the deed. *Id.* In 1998, Ms. Shaff conveyed the last 11.6 acres of her original seventy-five acre parcel and at the time the case was adjudicated, she owned no real estate in the vicinity of the original parcel. *Id.*

At trial, the grantee, Ms. Leyland, sought a declaratory judgment, asking the court to rule that the restrictive covenant did not limit the number of homes that could be built on her property. *Id.* She moved for summary judgment, asserting that Ms. Shaff lacked standing to object to the relief she sought. *Id.* Noting that Ms. Shaff “does not dispute that she currently owns no land . . . that benefits from the Restrictive Covenant,” the trial court entered summary judgment for Ms. Leyland finding that Ms. Shaff lacked standing to enforce the restrictive covenant because she would suffer no legal injury if the covenant were to be extinguished. *Shaff*, 914 A.2d at 1243. Ms. Shaff appealed.

On appeal, Ms. Leyland urged the New Hampshire Supreme Court to affirm the common law rule relied upon by the trial court and rule that Ms. Shaff lacked standing to enforce the covenant because she no longer owns property benefited by the restriction. *Shaff*, 914 A.2d at 1244. Ms. Shaff, on the other hand, argued that the Court should adopt the view of the *Restatement (Third)*, which eliminates the requirement of an ownership interest in benefited property in order to have standing to enforce a covenant in gross, instead requiring only that a holder “establish a legitimate interest in enforcing [it].” *Id.* (quoting *Restatement (Third)* § 8.1 at 474).

The *Shaff* Court noted that, because the common law has not previously recognized covenants in gross, it requires that a person own the land that benefits from the restriction in order to have standing to enforce the restriction. *Shaff*, 914 A.2d at 1244. The Court then proceeded to analyze the covenant and the intentions of the parties in creating the covenant to determine the outcome of the case under the principles announced in the *Restatement (Third)*. *Id.* at 1244-45.

Although not citing the *Restatement (Third)* for the proposition, the Court noted that the general rule of construction favors appurtenant servitudes over servitudes in gross. *Id.* at 1245; *accord*, *Restatement (Third)* § 4.5 and comment d., at 540-41. The Court also held that “[r]estrictions in a deed will be regarded as for the personal benefit of the grantor unless a contrary intention appears, and the burden of showing that they constitute covenants running with the land is upon the party claiming the benefit of the restriction.” *Id.* (citing *Stegall v. Housing Authority of City of Charlotte*, 278 N.C. 95, 178 S.E.2d 824, 829 (1971)). Combining these principles, the New Hampshire Supreme Court determined that, unless a contrary intent is expressed in the language of the covenant, it would construe restrictive covenants to be appurtenant to an interest in land, the benefit of which is personal to the covenantee and is enforceable only by the covenantee. *Id.*

Applying those interpretive rules to the covenant at issue in *Shaff*, the New Hampshire Supreme Court observed that the covenant expressly stated that the burden “shall run with the land” but that it

expressed no intent regarding the benefit of the covenant or the type of covenant conveyed. *Shaff*, 914 A.2d at 1245. The Court noted that, at the time Ms. Shaff conveyed the twenty-three acres and created the restrictive covenant, she still owned acreage in the immediate area, and had she “wished to hold the covenant in gross, regardless of whether or not she owned land in the area, she could have included language to that effect.” *Id.*

Based on this analysis of the covenant, the Court concluded that: (1) the restrictive covenant was created to personally benefit Ms. Shaff as the owner of land that benefited from enforcement of the restriction; (2) the restrictive covenant at issue was appurtenant and Ms. Shaff held the benefit personally; and (3) that Ms. Shaff did not have standing to enforce the covenant because she no longer owned land that benefited from it. *Id.*

The New Hampshire Supreme Court went on to acknowledge that the adoption of the rule set forth in the *Restatement (Third)* § 8.1 could permit an original covenantor to enforce a covenant in gross regardless of the ownership of benefited land. While the Court declined to adopt such a rule (noting that the need to adopt such a rule was not necessary to its decision), it stated that, even if it were to adopt that rule, the covenant at issue in that case would still be unenforceable by Ms. Shaff because the Court had determined that the covenant was appurtenant.

The reasoning employed by the New Hampshire Supreme Court supports the conclusion in the instant case that the

Respondents lack standing to seek enforcement of the Covenants. The Covenants here differ from those in the *Shaff* case in that they reserve the right to approve any plan to subdivide or sell the Racquet Club parcel in tracts to the Grantors, Mr. and Mrs. Orr, or to their heirs and assigns. While this difference may lead to a finding that the benefits are not personal but instead run with the land, it does not change the ultimate outcome under the *Restatement (Third)*: the benefit is appurtenant and the grantors have no standing because they no longer own the benefited land.

Applying the same analysis used in the *Shaff* case to the Covenants here also leads to similar conclusions with regard to the nature of the restrictions imposed by the Covenants. As in *Shaff*, the Covenants here are “appurtenant,” rather than “in gross.” They were created to benefit Dwight and Margaret Orr (and their heirs) in their capacity as the owners of the adjacent parcel. The Covenants benefited the Orrs by ensuring that the Racquet Club Property would indeed be used as a tennis, swimming and squash club. The Covenants also benefited the Orrs by allowing them to have the right to approve whether residential development would occur on the land next to their home. As the Court observed in the *Shaff* case, “[h]ad the respondent wished to hold the covenant in gross, regardless of whether or not she owned land in the area, she could have included language to that effect.” No such language appears in the Covenants here indicating an intention that the Orrs wished to hold the Covenants in gross.

A restrictive covenant in gross arises when the covenant does not benefit a specific parcel of land and the benefit is held personally by the grantor. Gerald Korngold, *Private Land Use Arrangements* § 9.15, at 332 (1990). Washington courts, like the courts of many states, have yet to approve the use of covenants in gross, and there are strong policy reasons why covenants in gross are disfavored. *Id.*, § 9.15, at 335 (citing cases).

First, they affect the marketability of the land because it is more difficult to trace the holder of a covenant in gross, inasmuch as that person could be located anywhere; on the other hand, it is relatively easy to locate the holder of interest of an appurtenant covenant. *Id.* § 9.15, at 332. Second, appurtenancy requirements help to limit “the power of the dead hand” and reduce the amount of veto rights that could be exercised against the current land owner because the number of appurtenant covenants would be restricted to the owners of particular properties near the burdened tract of land. *Id.* at 333. Third, covenants in gross allow an outsider to impose his or her views on a community; and finally, appurtenant covenants increase flexibility in enforcing and applying covenants and promote flexible consensual land use arrangements. *Id.*; see also Gerald Korngold, *For Unifying Servitude and Defeasible Fees: Property Law's Functional Equivalents*, 66 *Tex.L.Rev.* 533, 552 (1988).

Because Washington courts have yet to sanction the use of covenants in gross, there has been no need to distinguish between covenants appurtenant or covenants in gross with regard to a party's

standing to enforce real covenants. *See Restatement (Third) § 8.1*, comment a. at 474-75. In this case, as in the *Shaff* case, an analysis under the *Restatement (Third)* leads to the conclusion that the Covenants at issue are appurtenant and not in gross. Accordingly, this court, like the *Shaff* Court, need not address whether to adopt the rule set forth in the *Restatement (Third) § 8.1*.

The Respondents here no longer own the property that was once benefited by the Covenants. They have suffered no actual injury, and they will not suffer any actual injury if it is determined that the Covenants are no longer enforceable. For these reasons, the Respondents lack standing under the Uniform Declaratory Judgments Act, under the common law, and under the provisions of the *Restatement (Third)*. Accordingly, this court should reverse the decision of the trial court and remand this case for entry of judgment granting the Racquet Club the remedies sought in its Complaint.

C. The Covenants are Unreasonable Restraints on Alienation and Therefore Should Be Invalidated.

At issue in this case is whether the Orr Heirs can –nearly fifty years after the Club purchased the subject property from their parents and more than thirty years after the Orr Heirs sold the remainder of the Orr Property – invoke the Covenants agreed to by the Racquet Club in 1962 and again in 1973 in order to prevent the Club from more fully utilizing that land in the interest of its members. Assuming for purposes of argument that the Court concludes that the Respondents have standing to enforce the Covenants, the

Court must then consider whether the Covenants themselves are void as unreasonable restraints on alienation.

Washington, like other states, encourages the free alienation of property. *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 113 P.3d 463 (2005) (Madsen, J., concurring) (citing *Richardson v. Danson*, 44 Wn.2d 760, 766-67, 270 P.2d 802 (1954) (“the law seeks to encourage the ready alienation of property and to discourage restraints upon alienation which would result in withdrawing such property from the ordinary channels of trade”)); *see also* 17 *Stoebuck & Weaver, Washington Practice* § 1.26, at 50 (2d ed. 2004) (“The underlying policy is that interests in land should be allowed to move freely in commerce.”).

The property that Mr. and Mrs. Orr sold to the Racquet Club was conveyed by means of three deeds. None of those deeds contained a reversionary clause or any similar enforcement mechanism. Instead, the Orrs employed Covenants to restrict the use of the Racquet Club Property and to prohibit the Racquet Club from subdividing or selling its property in tracts without first obtaining their consent, or the consent of their heirs. These restrictions constitute restraints on alienation – both direct and indirect – and they are no longer justified by the legitimate expectations of the parties. This court should therefore rule that the Covenants are unenforceable and remand the case to the trial court for entry of judgment in favor of the Racquet Club.

1. The Covenants Are Restraints on Alienation.

Black's Law Dictionary defines a "restraint on alienation" as:

[a] restriction, usu[ally] in a deed of conveyance, on a grantee's ability to sell or transfer real property; a provision that conveys an interest and that, even after the interest has become vested, prevents or discourages the owner from disposing of it at all **or from disposing of it in particular ways or to particular persons**. Restraints on alienation are generally unenforceable as against public policy favoring the free alienability of land.

Black's Law Dictionary 1340 (8th ed. 2004) (emphasis added) (cited with approval in *Alby v. Banc One Financial*, 156 Wn.2d 367, 372, 128 P.3d 81 (2006)).

Restraints on alienation fall into two categories: direct and indirect restraints. *Alby v. Banc One Financial*, 156 Wn.2d 367, 379, 128 P.3d 81 (Wash. 2006) (Chambers, J., dissenting) (citing 3 John A. Borron, Jr., *Simes & Smith: The Law Of Future Interests* § 1112, at 3 (3d ed. 2004)). Direct restraints are those provisions in an instrument which, by their terms or implications, "purport[] to prohibit or penalize the exercise of the power of alienation" of property. *Id.*, (citing 3 *Simes & Smith*, supra, § 1112, at 3). An indirect restraint on alienation "arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the instrument, if valid, would restrain practical alienability." 3 *Simes & Smith: The Law Of Future Interests* § 1112, at 3 (3d ed. 2004).

Working together, the Covenants here impose both a direct and an indirect restraint on alienation. The section of the Covenants that provides

that “[t]he land shall not be subdivided and sold in tracts, without the consent of A. Dwight Orr and Margaret Orr, their heirs and assigns” imposes a direct restraint on alienation: absent the consent of the Grantors or their heirs or assigns, the Racquet Club is prohibited from disposing of the property in “a particular way,” *i.e.*, in tracts. The section of the Covenants that restricts the use of the Racquet Club property by requiring that it be used only for “the purposes of a tennis, swimming, and squash club” and “for no other purpose” imposes an indirect restraint on alienation, preventing the Racquet Club from selling to anyone who might seek to use the property for some other purpose. The effect of these two provisions working together constitutes a restraint on alienation under Washington law because it prevents or discourages the Racquet Club from disposing of the property in a particular way or to particular persons.

2. The Respondents Have No Legitimate Reasons for Continuing to Impose the Restraints on Alienation Created by the Covenants.

A restraint on alienation is only valid if it is reasonable and if it is justified by the legitimate expectations of the parties. *Lawson v. Redmoor Corp.*, 37 Wn.App. 351, 355, 679 P.2d 972 (1984). At common law, “reasonable restraints upon the alienation of property are enforceable, but will be construed to operate within their exact limits.” *Gartley v. Ricketts*, 107 N.M. 451, 453, 760 P.2d 143 (1988) (quoting *State ex rel. Bingaman v. Valley Sav. & Loan*, 97 N.M. 8, 11-12, 636 P.2d

279 (1981)). This is the rule followed in Washington. *Alby v. Banc One Financial*, 119 Wn. App. 513, 523, 82 P.3d 675 (2003).

Washington courts determine whether a restraint on alienation is reasonable or unreasonable based on “factual determinations and consideration of the equities,” *Morris v. Woodside*, 101 Wn.2d 812, 818, 682 P.2d 905 (1984), and on an assessment of the “legitimate interests of the parties.” *Erickson v. Bank of California.*, 97 Wn.2d 246, 249, 643 P.2d 670 (1982). In determining whether a restraint is reasonable, the court must balance the utility of the purpose served by the restraint against the injurious consequences that are likely to flow from its enforcement. *Alby v. Banc One Financial*, 156 Wn.2d 367, 128 P.3d 81 (2006) (citing *Restatement (Third)* § 3.4, at 440 (2000)).

a) Enforcement of the Covenants Will Frustrate Rather than Fulfill Their Original Purpose.

The Covenants’ original purpose has no continuing utility. For nearly fifty years – from the date it first acquired the ten acre parcel from Mr. and Mrs. Orr – the Racquet Club has used the property as a tennis, swimming, and squash club. Whether or not the Covenants are enforced, the Racquet Club intends to continue to pursue this mission. In fact, the Racquet Club has engaged in extensive strategic planning and adopted a new Master Plan by which it would extend its use of the property for those same purposes. As part of that process, the Racquet Club Board determined that it would be in the best interests of the Club

and its members to develop or sell a portion of its property and use the proceeds to improve and expand the Club's facilities.

To that end, the Racquet Club sought the Respondents' consent to allow it to develop or sell a portion of its property in order to generate funds that would allow it to achieve its goals of improving its existing facilities. The Respondents, however, refused to give their consent. In doing so, they have asserted that the purpose of the Covenants was to preserve the undeveloped portion of the Club property as "an open space preserve for future generations." (CP 112, 108, 151). This view of the purpose of the Covenants is entirely new and is not supported by the plain language of the restrictions set forth in the Real Estate Contract or the deed.

The restrictions in the Real Estate Contract make no mention of preserving open space:

This land and the improvements to be placed thereon shall be used for the purposes of a tennis, swimming, and squash club, and shall be used for no other purpose. No residence shall be erected thereon other than a dwelling and outbuilding for the use of a caretaker, nor shall the land be subdivided or sold in tracts, without the consent of the sellers, their heirs, and assigns.

Under these provisions, the Racquet Club could, if it had the means and the inclination, cover the entire Racquet Club Property with large buildings that would house indoor tennis courts or a swimming facility, and it could cover the remainder of property with parking lots necessary to hold the vehicles of its members. The restrictions in the Real Estate

Contract or the Fulfillment Deed do not preclude such a use, even though development of the property in such a manner would clearly not be consistent with an “open space preserve.” If, indeed, Mr. and Mrs. Orr had intended that the Racquet Club property be kept as open space, they could have drafted the Covenants to clearly state that intention.

The Respondents no longer have any legitimate interest in the Racquet Club’s use of its property, and their insistence on enforcing the Covenants simply serves to frustrate further improvement and development of the Racquet Club’s facilities and achievement of its mission. It is unreasonable to require that the Racquet Club maintain its property as open space when the Covenants express no such intention. Enforcement of the Covenants simply serves to impede the Racquet Club’s development by barring the sale of a portion of its property to generate funds that could be used to make needed improvements and upgrades to the Club’s facilities. The Respondents’ refusal to consent to a release of the Covenants works to frustrate the purposes of the Covenants rather than further them.

As noted above, the original purpose of the Covenants – to ensure that the property would actually be developed as a tennis club and not as a residential tract development – was legitimate when Mr. and Mrs. Orr owned the neighboring property and had a personal interest in the use of the Racquet Club Property. None of the Respondents now owns property in the vicinity of the Club that would benefit from enforcement of the Covenants. In fact, Ms. Jensen and her daughter (to

whom she purportedly assigned an interest in enforcing the Covenants) live in Nevada. Preservation of the Racquet Club property as open space is a purpose wholly outside of the intentions expressed in the Covenants, and the Respondents have no legitimate interest in enforcing such provisions.

b) The Grantors Have Already Realized the Benefit of the Bargain They Made with the Racquet Club.

In the *Alby* case, the Supreme Court observed that, when determining the reasonableness of a restraint on alienation, “[w]hether a restraint is limited in scope or time is often highly significant” *Alby*, 156 Wn.2d at 373, 128 P.3d 81 (2006). The *Alby* Court also noted that a reviewing court must also review the purpose of the restraint and whether it was supported by consideration. *Id.*

In this case, there is no limit to the prospective duration of the restraints imposed by the Covenants. The Club has abided by the terms of the Covenants for nearly fifty years, but the Respondents take the position that the restraints imposed by the Covenants are perpetual. Further, when the Racquet Club purchased the property from the Orrs, it paid fair market value for the land. *See* Declarations of James Griffin (CP 21-22) and Robert W. Chamberlain (CP 234-38). The Covenants were supported with little, if any, consideration. While the Respondents have attempted to refute the evidence presented by the Racquet Club that it paid fair market value for the land it purchased from Mr. and Mrs. Orr, they have presented no evidence – only bare assertions – that the Racquet Club paid less than fair market value. (CP 115, lines 21-

22; CP 108, lines 12-13). Bare assertions that a genuine material issue exists, however, will not defeat a summary judgment motion in the absence of actual evidence. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 301, 45 P.3d 1068 (2002)

The restraints imposed by the Covenants were intended by Mr. and Mrs. Orr to benefit their ownership of the parcel adjacent to the Racquet Club. When they owned that property, they enjoyed the benefits of the Covenants, and the Racquet Club abided by the Covenants. Now that neither the Orrs nor their heirs or assigns currently owns any property in the vicinity of the Racquet Club, the Covenants no longer fulfill the purposes they were created to serve. There is no mention in the Covenants that the Orrs intended the Racquet Club property to be preserved indefinitely as open space, and the Respondents cannot reasonably assert that the Covenants should be used in that manner. The Respondents simply have no legitimate interest in enforcing the Covenants. Their demands that the Club continue to be bound by the restraints imposed by those Covenants are unreasonable, and therefore this Court should rule that those restraints constitute unreasonable restraints on alienation and therefore they are no longer valid and enforceable.

VI. CONCLUSION

While Mr. and Mrs. Orr were alive, the covenants contained in the Contract and the Fulfillment Deed served their purpose, which was to ensure that the property they sold to the Racquet Club would be used as a tennis, swim and squash club and to ensure that there would not be a large, residential tract development located next to their house. Mr. and Mrs. Orr have passed on, however, and their children have sold the remainder of the property that was benefited by those covenants. None of the Respondents lives on that property or in the vicinity of the Racquet Club.

Because the Respondents have no interest in the benefited property, they will suffer no actual injury if the Covenants are terminated. The Respondents therefore lack standing to enforce the covenants under the Uniform Declaratory Judgments Act, RCW 7.24. Because the Respondents have retained no interest in the benefited property, they also lack standing to enforce the covenants under the common law and under the principles set forth in the *Restatement (Third) of Property: Servitudes*.

Further, even if the Respondents had standing to enforce the covenants, the covenants themselves work together to prevent or discourage the Racquet Club from disposing of the property in particular ways or to particular persons. Thus, the covenants constitute a restraint on alienation under Washington law. Because this restraint is no longer justified by the legitimate expectations of the parties, and because the Respondents have offered no legitimate reasons to justify continuing this

restraint, the covenants constitute an unreasonable restraint on alienation under Washington law and therefore should be terminated.

For these reasons, Racquet Club respectfully requests this court to reverse the ruling of the trial court and remand this case for entry of judgment granting the relief requested by the Racquet Club in its Complaint below.

DATED this 15th of May, 2009.

VANDEBERG JOHNSON & GANDARA, LLP

By: Scott D. Winship
Scott D. Winship, WSBA # 17047
1201 Pacific Avenue, Suite 1900
Tacoma, Washington 98402
(253) 383-3791

LAW OFFICES OF STEVEN L. LARSON

By: Steven L. Larson
Steven L. Larson, WSBA #01240
1201 Pacific Avenue, Suite 1725
Tacoma, Washington 98402
(253) 383-3791

APPENDIX A

ORIGINAL ORR PROPERTY

SOLD TO BONNELL

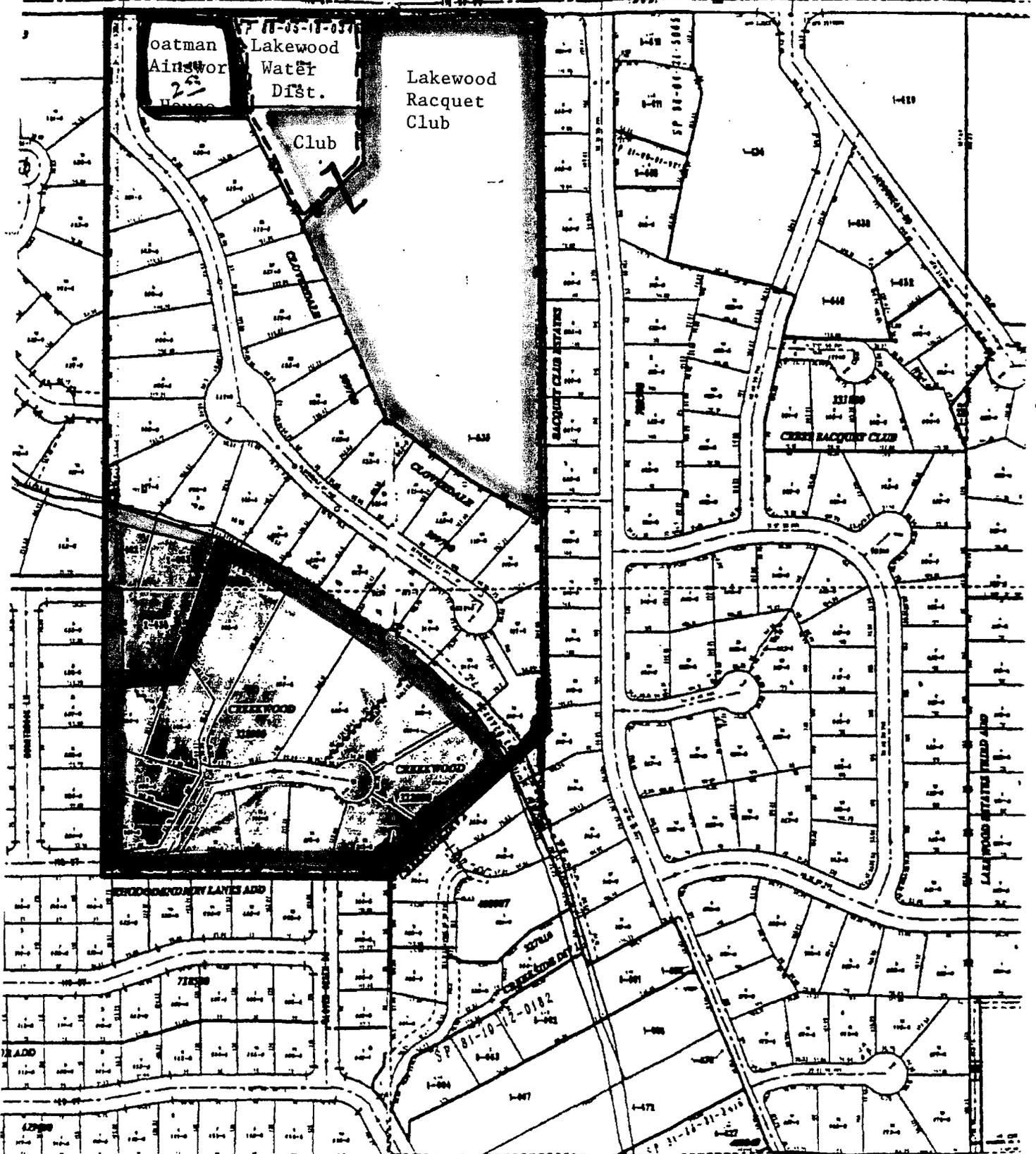
BOATMAN-AINSWORTH HOUSE

SOLD TO GHG

LAKEWOOD RACQUET CLUB

SOLD TO ECKSTROM

POOR QUALITY ORIGINAL



APPENDIX "A"

APPENDIX B

between A. DWIGHT ORR and MARGARET ORR, husband and wife,

hereinafter called the "seller," and LAKEWOOD SACQUET CLUB, INC., a Washington corporation,

REC. NO. 124286 DATE 7/27/62

hereinafter called the *consideration* 30,000

L. R. JOHNSON, Pierce Co. Trust

WITNESSETH the following of State of Washington,

2046457

the purchaser and the *purchase of the* *County of* *1962*
SPOKANE, OR

POOR QUALITY ORIGINAL

Beginning at the Northeast corner of the West half of the West half of the Northwest quarter of the Northeast quarter of Section 11, Township 19 North, Range 2 East, W. M., running thence South along the East line of said subdivision a distance of 30 feet to the true point of beginning;

From said true point of beginning continuing South along said East line a distance of 1143 feet; thence using the aforementioned East line as a North-South meridian North 60 degrees West a distance of 190 feet; thence North 53 degrees 45 minutes West a distance of 230 feet more or less to the West bank of an existing irrigation ditch thence along said West bank North 23 degrees 45 minutes West a distance of 480 feet; thence North 46 degrees 15 minutes East a distance of 195 feet; thence North along a line parallel with the aforementioned East line of said West half of said West half 340 feet more or less to the South line of 11th Street S. W.; thence East along said South line 398 feet more or less to the point of beginning, containing approximately 9.9 acres.

TOGETHER WITH a perpetual easement sixty (60) feet in width for ingress and egress to and from the above described tract, said easement to be located on the property of adjoining immediately adjoining said tract on the west, and to run parallel with the west line of said tract a distance of three hundred thirty (330) feet from the westerly line of South 11th Street, which is also the westerly line of said tract.

Purchasers agree to improve said strip of land as a road in accordance with present specification of Pierce County for public roads in platted land.

ALSO TOGETHER WITH a rectangular tract sufficient to include and clear the present irrigation intake on Clover Creek by five (5) feet on each side of the center line of the gate and pipeline opening and a perpetual easement for a water line for the use of the above described tract ten (10) feet in width in as direct a line as possible from the end of the buried pipeline leading from Clover Creek, to the above described tract, and for operation, maintenance, repair and replacement of said existing buried pipeline and/or an extension thereof. Sellers will assign to the purchasers their proportionate share in the water rights in Clover Creek which may be appurtenant to the above described property.

Prepayment privilege is granted but in no event shall the total payments on principal, to be made in 1962, exceed 49% of the purchase price, nor shall the purchasers be permitted to pay on principal more than 20% of the purchase price in any year thereafter without consent of the sellers. Any monthly installment remaining unpaid for a period of 15 days after its due date shall be charged a penalty of 1% of the amount thereof, and an additional 1% of the amount thereof each 30 days thereafter that the installment remains delinquent.

The seller will, upon request of purchasers and the payment of the sum of \$3,500.00 per acre, convey by Warranty Deed to the purchasers tracts of not less than 1 acre in area, to be selected by the purchasers.

This land and the improvements to be placed thereon shall be used for the purposes of a tennis, swimming, and squash club, and shall be used for no other purpose. No residence shall be erected thereon other than a dwelling and outbuilding for the use of a caretaker, nor shall the land be subdivided and sold in tracts, without the consent of the sellers, their heirs, and assigns.

3-6-64

PR 235

J.P.

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EX E

APPENDIX C

1974000

Statutory Warranty Deed

WASHINGTON
TITLE INSURANCE
COMPANY

SEATTLE WASHINGTON

1000 1st AVENUE

Mailed to *Sale*

Send This Statement to

POOR ORIGINAL QUALITY

Statutory Warranty Deed

THE GRANTOR A, DWIGHT ORR and MARGARET ORR, husband and wife,

for and in consideration of \$1.00

in hand paid, conveys and warrants to LAKEWOOD RACQUET CLUB, INC., a Washington corporation, the following described real estate, situated in the County of Pierce Washington:

Beginning at a point which is South 355.00 feet measured along the East line of the West half of the West half of the Northwest quarter of the Northeast quarter of Section 11, Township 19 North, Range 2 East of W. M., and West measured at right angles to the said East line 145.00 feet from the Northeast corner of said West half of the West half of the Northwest quarter of the Northeast quarter; thence West 160.00 feet; thence South parallel to said East line 365.00 feet; thence East 160.00 feet; thence North parallel to said East line 365.00 feet to the point of beginning which is 1.34 acres, more or less. Also, a Road Easement 20.00 feet wide and 10.00 feet each side of the following described center line;

Beginning at a point on the South right of way line of 112th Street, S. W and 295.00 feet west of the Northeast corner of the West half of the West half of the Northwest quarter of the Northeast quarter of Section 11, Township 19, North, Range 2 East, W. M.; thence South parallel to the east line of the West half of the West half of the Northwest quarter of the Northeast quarter of Section 11 to a point which is 355.00 feet South and 295 feet West at right angles to the East line of the West half of the West half of the Northwest quarter of the Northeast quarter of Section 11.

C.T.I.

JUL 24 1962

Dated this

16th

day of May, 1962



EXCISE TAX PAID \$ *16.00*
REC. NO. 154233 DATE 7-19-62
L. R. JOHNSON, Pierce Co. Treas.
By *[Signature]* Deputy
STATE OF WASHINGTON

[Signature] (REAL)
Margaret Orr (REAL)

County of Pierce

On this day personally appeared before me A, DWIGHT ORR and MARGARET ORR, husband and wife, to me known to be the individual(s) described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this

16th

day of May, 1962

[Signature]
Notary Public in and for the State of Washington
Residing at

Ex F

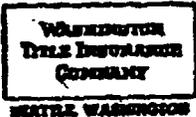
90

APPENDIX D

POOR QUALITY ORIGINAL

Statutory Warranty

20456



Mort Bank
Shelwood

Statutory Warranty Deed

11/10/56

Page 100

THE GRANTORS A. WRIGHT ORR and MARGARET ORR, husband and wife,

do hereby constitute of - one dollar -

to have full, entire and separate LESTER MARGRET GRUB, INC., a Washington

corporation, Platteau Place

Page 101

beginning at a point which is north, along the east line of the west half of the west half of the Northwest quarter of the Northwest quarter of Section 11, Township 19 North, Range 2 East of S.M., 315.00 feet and 145 feet west of the Northwest corner of the west half of the west half of the Northwest quarter of the Northwest quarter of Section 11; thence west 160 feet; thence south 345 feet; thence east 160 feet; thence south 115 feet; thence west 185 feet; thence north 370 feet; thence east 230 feet; thence south 122 feet; thence west 65 feet; thence north 42 feet to the point of beginning. Containing 1 acre. All corners, above are, parallel with or at right angles to the East line of said west half of the west half of Northwest quarter of the Northwest quarter.

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735

This deed is given in partial satisfaction of Loan Contract C.T.I. dated May 16, 1952, after which date the Washington terms shall apply only to the acts of the grantor. May 2, 1954

Wright, Margaret S. - Myself

February 2, 1954

Margaret Orr
Richard Orr

L. E. Davidson, Platteau Co. Trust

CALIFORNIA

STATE OF MICHIGAN

County of Saint Clair

On this day, personally appeared before me A. Wright ORR, and MARGARET ORR, husband and wife known to be the husband & described to me, and who presented the within and foregoing instrument, and acknowledged that they signed the same as GRUB her and statutory act and deed, for the uses and purposes therein expressed.

GIVEN under my hand and official seal this 19th day of February, 1954.



EX G

APPENDIX E

POOR QUALITY ORIGINAL

STATUTORY MARGARET ORR

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MAY 15

THE GRANTORS, MARGARET ORR, as her separate estate as to an undivided one-half interest; and A. DWIGHT ORR, JR, MARY MARGARET JENSEN and MICHAEL ORR, as Joint Trustees under the testamentary trust of A. Dwight Orr, deceased, as to an undivided one-half interest, for and in consideration of the fulfillment of a real estate contract dated May 16, 1962 and recorded March 6, 1964 under Auditor's Fee No. 2046457, in hand paid, convey and warrant to LAKEWOOD RACQUET CLUB, INC., a Washington corporation, the following described real estate situated in the County of Pierce, State of Washington:

Beginning at the Northeast corner of the West half of the West half of the Northwest quarter of the Northwest quarter of Section 11, Township 17 North, Range 1 East, W.M.; running thence South along the East line of said subdivision a distance of 10 feet to the true point of beginning;

From said true point of beginning continuing South along said East line a distance of 1143 feet; thence using the aforementioned East line as a North-South meridian North 60° West a distance of 190 feet; thence North 53°45' West a distance of 330 feet, more or less, to the West bank of an existing irrigation ditch; thence along said West bank North 23°45' West a distance of 480 feet; thence North 48°15' East a distance of 195 feet; thence North along a line parallel with the aforementioned East line of said West half of said West half 340 feet, more or less, to the South line of 112th Street, S.W.; thence East along said South line 390 feet, more or less, to the point of beginning.

TOGETHER with a perpetual easement 60 feet in width for ingress and egress to and from the above described tract, said easement to be located on the property immediately adjoining said tract on the west, and to run parallel with the west line of said tract a distance of 330 feet from the southerly line of South 112th Street, which is also the northerly line of said tract.

ALSO TOGETHER WITH a rectangular tract sufficient to include and clear the present irrigation intake on Clover Creek by five (5) feet on each side of the center line of the gate and pipeline opening and a perpetual easement for a water line for the use of the above described tract ten (10) feet in

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EX H

THIS INFORMATION SUPPLIED COURTESY OF
COMMONWEALTH TITLE INSURANCE COMPANY
1120 PACIFIC AVE. TACOMA, WA 98314-1476
A TICOR COMPANY

POOR QUALITY ORIGINAL

width in as direct a line as possible from the end of a buried pipeline leading from Clover Creek, to the above described tract, and for operation, maintenance, repair and replacement of said existing buried pipeline and/or an extension thereof. Sellers will assign to the purchasers their proportionate share in the water rights in Clover Creek which may be appurtenant to the above described property.

LESS the following described real estate which in partial fulfillment of said real estate contract has been conveyed to and title to which is vested in Lakewood Racquet Club, Inc., a Washington corporation:

Beginning at a point which is south 355.00 feet, measured along the east line of the west half of the west half of the northwest quarter of the northeast quarter of Section 11, Township 19 North, Range 2 East of the W.M., and west, measured at right angles to said east line, 145.00 feet from the northeast corner of said west half of the west half of the northwest quarter of the northeast quarter; thence west 160.00 feet; thence south parallel to said east line 365.00 feet; thence east 160.00 feet; thence north parallel to said east line 365.00 feet to the point of beginning which is 1.34 acres, more or less.

ALSO, a Road Easement 20.00 feet wide and 17.00 feet each side of the following described center line:

Beginning at a point on the south right of way line 112th Street, S.W. and 295.00 feet west of the northeast corner of the west half of the west half of the northwest quarter of the northeast quarter of Section 11, Township 19 North, Range 2 East, W.M.; thence south parallel to the east line of the west half of the west half of the northwest quarter of the northeast quarter of Section 11 to a point 355.00 feet south and 295 feet west at right angles to the east line of the west half of the west half of the northwest quarter of the northeast quarter of Section 11;

ALSO beginning at a point which is south, along the east line of the west half of the west half of the northwest quarter of the northeast quarter of Section 11, Township 19 North, Range 2 East, W.M., 355.00 feet and 145 feet west of the northeast corner of the west half of the west half of the northwest quarter of the northeast quarter of Section 11; thence west 160 feet; thence south 365 feet; thence east 160 feet; thence south 125 feet; thence west 165 feet; thence north 370 feet; thence east 230 feet; thence south 122 feet; thence west 65 feet; thence north 42 feet to the point of beginning. All courses above are parallel with or at right angles to the east line of said west half of the west half of northwest quarter of northeast quarter.

The following covenants and restrictions shall run with the land hereby conveyed and shall be binding upon the Grantee

2498586

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THIS INFORMATION SUPPLIED COURTESY OF COMMONWEALTH TITLE INSURANCE COMPANY 1120 PACIFIC AVE. TACOMA, 383-1476 ATICOR COMPANY

POOR QUALITY ORIGINAL

herein named, its successors and assigns:

- (1) The land and the improvements to be placed thereon shall be used for the purposes of a tennis, swimming, and squash club, and shall be used for no other purpose.
- (2) No residence shall be erected thereon other than a dwelling or outbuilding for the use of a caretaker.
- (3) The land shall not be subdivided and sold in tracts, without the consent of A. Dwight Orr and Margaret Orr, their heirs and assigns.
- (4) This deed is given and accepted upon the agreement that the foregoing covenants and restrictions apply equally not only to the herein conveyed land but also to the excepted parcels hereinabove identified previously conveyed by deeds recorded under Auditor's Fee Nos. 1974088 and 2045688.

This deed is given in fulfillment of that certain real estate contract between the parties hereto dated May 16, 1962, and conditioned for the conveyance of the above described property, and the covenants of warranty herein contained shall not apply to any title, interest, or encumbrance arising by, through or under the purchaser in said contract, and shall not apply to any taxes, assessments or other charges levied, assessed or becoming due subsequent to the date of said contract.

Real Estate Excise Tax was paid on this sale or stamped exempt on July 19, 1962, Rec. No. 154236.

DATED this 24 day of APRIL, 1973.

Margaret Orr
Margaret Orr

A. Dwight Orr, Jr.
A. Dwight Orr, Jr., as Joint Trustee

Mary Margaret Jensen
Mary Margaret Jensen, as Joint Trustee

Michael Orr
Michael Orr, as Joint Trustee

2498586

THIS INFORMATION SUPPLIED COURTESY OF
COMMONWEALTH TITLE INSURANCE COMPANY
1120 PACIFIC AVE. TACOMA, 383-1476
A TIGOR COMPANY

828

NOTARY PUBLIC

POOR QUALITY ORIGINAL

STATE OF WASHINGTON
COUNTY OF Pierce

On this day personally appeared before me MARGARET ORR, to be known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that she signed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 24th day of April, 1973.

Margaret Orr
Notary Public in and for the State of Washington, residing at Thurston

STATE OF NEVADA
COUNTY OF WASHOE

On this day personally appeared before me MARY MARGARET JENSEN, to be known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that she signed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned and on oath stated that she as a Joint Trustee under the testamentary trust of A. Dwight Orr, deceased, is authorized and has the power to execute and deliver a deed in fulfillment of the contract noted above.

GIVEN under my hand and official seal this 12th day of April, 1973.

ANG C WEN CHOW
Notary Public, State of Nevada
Washoe County
My Commission Expires April 28, 1979

Ang C Wen Chow
Notary Public in and for the State of Nevada, Residing at Las Vegas, Nevada.

STATE OF CALIFORNIA
COUNTY OF Santa Clara

On this day personally appeared before me A. DWIGHT ORR, JR., to be known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned and on oath stated that he as a Joint Trustee under the testamentary trust of A. Dwight Orr, deceased, is authorized and has the power to execute and deliver a deed in fulfillment of the contract noted above.

GIVEN under my hand and official seal this 9th day of April, 1973.

E. GENTRUDE CLAVSON
Notary Public, California
Fresno County
My Commission Expires June 15, 1976

E. Gentrude Clavson
Notary Public in and for the State of California, residing at Red Bluff

2198586

THIS INFORMATION SUPPLIED COURTESY OF
CIGNA/ROYALTY TITLE INSURANCE COMPANY
1120 PACIFIC AVE. TACOMA, 383-1476
A TICOR COMPANY

829

POOR QUALITY ORIGINAL

STATE OF WASHINGTON)
COUNTY OF PIERCE) ss.

On this day personally appeared me MICHAEL ORR, to be known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned and on oath stated that he as a Joint Trustee under the testamentary trust of A. William Orr, deceased, is authorized and has the power to execute and deliver a deed in fulfillment of the contract noted above.

GIVEN under my hand and official seal this 15th day of APRIL, 1973.

M. A. Lardine
Notary Public in and for the State of
WASHINGTON, residing at _____

2408583

830

THIS INFORMATION SUPPLIED COURTESY OF
COMMONWEALTH TITLE INSURANCE COMPANY
1120 PACIFIC AVE. TACOMA, 383-1476
ATCOR COMPANY

APPENDIX F

Chapter 7.24 RCW - Uniform Declaratory Judgments Act

7.24.010

Authority of courts to render.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

7.24.020

Rights and status under written instruments, statutes, ordinances.

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

7.24.030

Construction of contracts.

A contract may be construed either before or after there has been a breach thereof.

7.24.050

General powers not restricted by express enumeration.

The enumeration in RCW 7.24.020 and 7.24.030 does not limit or restrict the exercise of the general powers conferred in RCW 7.24.010, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

7.24.060

Refusal of declaration where judgment would not terminate controversy.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

7.24.070

Review.

All orders, judgments and decrees under this chapter may be reviewed as other orders, judgments and decrees.

7.24.080

Further relief.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. When the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

7.24.090

Determination of issues of fact.

When a proceeding under this chapter involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions, in the court in which the proceeding is pending.

7.24.100

Costs.

In any proceeding under this chapter, the court may make such award of costs as may seem equitable and just.

7.24.110

Parties — City as party — Attorney general to be served, when.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

7.24.120

Construction of chapter.

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

7.24.130

"Person" defined.

The word "person" wherever used in this chapter, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.

7.24.135

Severability — 1935 c 113.

The several sections and provisions of this chapter, except RCW 7.24.010 and 7.24.020, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the chapter invalid or inoperative.

7.24.140

General purpose stated.

This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

7.24.144
Short title.

This chapter may be cited as the Uniform Declaratory Judgments Act.

7.24.146
Application of chapter — Validation of proceedings.

This chapter shall apply to all actions and proceedings now pending in the courts of record of the state of Washington seeking relief under the terms of the uniform declaratory judgments act [this chapter]; and all judgments heretofore rendered; and all such actions and proceedings heretofore instituted and now pending in said courts of record of the state of Washington, seeking such relief, are hereby validated, and the respective courts of record in said actions shall have jurisdiction and power to proceed in said actions and to declare the rights, status and other legal relations sought to have been declared in said pending actions and proceedings in accordance with the provisions of said chapter. This chapter does not apply to state agency action reviewable under chapter 34.05 RCW.

7.24.190
Court may stay proceedings and restrain parties.

The court, in its discretion and upon such conditions and with or without such bond or other security as it deems necessary and proper, may stay any ruling, order, or any court proceedings prior to final judgment or decree and may restrain all parties involved in order to secure the benefits and preserve and protect the rights of all parties to the court proceedings.

COURT OF APPEALS
DIVISION II

09/15/15 PM 4:03

STATE OF WASHINGTON
BY cm
DEPUTY

No. 38906-1-II

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

LAKWOOD RACQUET CLUB,
a Washington nonprofit corporation,

Appellant,

v.

MARY MARGARET JENSEN, A. DWIGHT ORR, JR.,
and MICHAEL SCOTT ORR, being the heirs of A. D.
ORR and MARGARET ORR, Deceased,

Respondents.

PROOF OF SERVICE

VANDEBERG JOHNSON & GANDARA, LLP
By: Scott D. Winship, WSBA #17047
Attorneys for Appellant
Lakewood Racquet Club

I hereby certify under penalty of perjury under the laws of the state of Washington, that the following is true and correct:

That on May 15, 2009,, I caused to be delivered a true and correct copy of the BRIEF OF APPELLANT, to be delivered to Clayton A. Hill, attorney for the Respondents, at the following address:

The Gosanko Law Firm
7513 SE 27th Street, Suite A
Mercer Island, WA 98040-2836

by the following method:

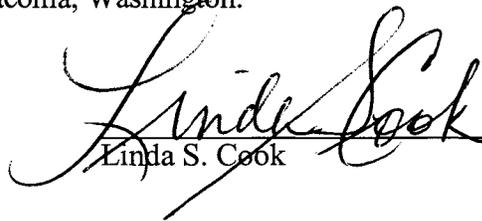
Depositing same postage pre-paid in the United States Mail, regular and certified mail, return receipt requested, addressed to the person identified above.

Delivering a copy to ABC/Legal Messenger Service, Inc., with appropriate instructions to deliver the same to the person(s) identified above.

Delivering a copy to Scott D. Winship, with appropriate instructions to deliver the same today to the person(s) identified above.

Personally delivering copies to the person(s) identified above.

DATED: May 15, 2009, at Tacoma, Washington.


Linda S. Cook