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I. INTRODUCTION

There are basically two touchstones for resolving this case. The first is the principle that agreements must be kept (in the latin, *pacta sunt servanda*). This is a case where the Lakewood Racquet Club asks the Court to put a noble cloak on its broken promise not to develop residences on the parcel it took from the Orrs subject to covenants agreeing not to do so without first obtaining the consent of the Orrs. The second touchstone is that words should mean what they say, and the intent of the parties as expressed in their real estate contract of 1962 and Fulfillment Deed of 1973 should control the outcome of this case.

In 2005, as the housing bubble reached fever pitch and everyone suddenly knew a mortgage broker, certain interests on the Lakewood Racquet Club Board set their sights on a multi-million dollar speculation in the development of 24 townhomes on its 10 acre parcel. The Board devised a plan for a residential subdivision that would envelope the existing outdoor courts, clubhouse, and indoor facilities with townhomes, and leave no space for future expansion of courts or recreational buildings. (CP 151, 154)

The deed to the land was inspected. The deed restricted use to tennis, squash, and swimming facilities. Importantly, the deed also stated clearly that the land was not to be subdivide or residences built upon it

unless the consent of Dwight Orr and Margaret Orr or their heirs and assigns was first obtained. (CP 119-120). The Club contacted the Orr heirs. Contrary to the Club's assertions, the contacts were not cooperative. Although the language of the letters is at first cordial, it quickly became clear that the Club was not interested in alternative financing for the desired improvements, but rather was dead set on the speculative play in townhome development. In reality, the contacts were heavy-handed, and essentially of the sign or be sued variety--in this case, sign a relinquishment of your rights or be sued. (CP 113-114.)

The Orrs were unanimous and undivided behind the proposition that they would all agree or none would agree--they would stand together as a family. This was important to the Orrs because the recreational use restrictions on the parcel was their joint family legacy, and a legacy entrusted to them by their father Dwight Orr, Sr. to which they had each consented at the inception of negotiations for the sale of the parcel.

The Club sued the Orrs. The Club brought a motion for declaratory judgment in Pierce County Superior Court seeking a ruling that the Orr heirs lacked standing. This was the first and only time the Club raised the standing issue. This motion was denied in February 2008. The Club failed to appeal that ruling, and months passed. The Orrs then brought their own motion seeking a declaratory judgment that the covenants were

valid. This motion was heard in February of 2009. Standing was not raised on this motion. The Orrs prevailed and obtained a Declaratory Judgment that the covenants were valid and enforceable. The Club appealed and now tries to resurrect the standing issue and reargue a restraint on alienation issue that was soundly rejected at the trial court.

II. ISSUES

1. Whether the Club has timely appealed on the standing issue, where the last time any party raised the standing issue was at the hearing on the Club's Motion for Summary Judgment, which motion was denied, and an Order entered On February 22, 2008, more than a year before this appeal was filed?

2. Whether the Orr's have standing to enforce promises made to them to restrict the use of certain land, where an original grantor is seeking relief, the deed demonstrates a clear intent to require the consent of the heirs and assigns who also seek relief, and where equity favors the Orrs' ability to stand to enforce bargained-for written promises.

3. Whether covenants that allow for the sale and encumbrance of a property without any reverter or penalty whatsoever may be classified as "restraints" on alienation? And if so, whether they are unreasonable, where they are supported by a narrow scope, legitimate interests of the parties, and consideration.

4. Whether covenants restricting use can be called unreasonable as a matter of law, where the covenants promote recreational use which has no tendency to do evil nor violate any public policy, and where no circumstances have changed such as to make the covenants useless?

III. STATEMENT OF THE CASE

A. Factual Background

Ultimately, the Court's goal will be to discern the intent of Dwight Orr, Sr. and James Griffin (on behalf of the Lakewood Racquet Club) when they negotiated and bargained for a real estate contract and a deed to a 10 acre parcel that contained these covenants:

The following covenants and restrictions shall run with the land hereby conveyed and shall be binding upon the Grantee herein named [the Club], 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 [Defendant's A. Dwight Orr, Jr., Michael Scott Orr, and Chris Jensen].

(4) The deed is given and accepted upon the agreement that the foregoing covenants and restrictions apply [to the entire 10 acre parcel].

The Respondents respectfully urge that the plain language of these deed restrictions are the clearest and most forceful and unambiguous expression of the parties' intent. Respondents pray this honorable Court of Appeals agree with the trial court and affirm the Declaratory Judgment which confirmed that this deed means what it says it means.

1. The Orr Family and their Legacy

A. Dwight Orr, Sr., was a Weyerhaeuser comptroller/treasurer familiar with transactions in land. (CP 111). He was married to Margaret Orr. They lived in the Lakewood area for decades, including in a home adjacent to the Lakewood Racquet Club that is on the Historic Registry--the Boatman-Ainsworth House. (CP 108-109; 111). Mr. and Mrs. Orr are now deceased. (CP 107).

In 1962, A. Dwight Orr, Sr. sold 10 acres of the family property to the Lakewood Racquet Club (the "Club") by way of a real estate sale contract only after consulting with his wife and children. (CP 111). He told them he specifically wanted this transaction to "leave something for posterity," and told the kids to "remember, this is your inheritance." (CP 111).

The children are Dwight Orr, Jr., Michael Orr, and Mary Margaret Jensen, more commonly and affectionately known as "Peg." Margaret Orr and each of the children are original grantors in the 1973 deed which eventually conveyed the property that was the subject of the 1962 contract. (CP 118). All Orr heirs and assigns have an interest in the parcel insofar as the deed states that their consent must be obtained before any subdivision of the land. (CP 120).

The Orr's only daughter, Peg Jensen, attended Stanford University from 1950-54. (CP 111). Her brother Michael Orr followed her to Stanford in 1951 and graduated in 1955. (CP 151). Their father visited them on many occasions. (CP 151). Dwight Orr Sr. spoke admiringly of the public legacy the Stanford's left to the State of California when they bequeathed the property that would become the Stanford Campus, after his only teenage son, Leland Jr., died of typhoid. (CP 151). After that death, Leland Stanford reportedly had a dream in which he was told, "the children of California shall be our children," and this prompted him to leave an enduring legacy. When Mr. Orr visited the campus, it remained a campus free of residential and commercial encroachment. (CP 151).

The Orr children were avid tennis players at Clover Park High School. (CP 107; CP 111). When Mr. Orr decided to create his own modest legacy he consulted with the children, who were by then educated,

mature adults, about how they could leave something to posterity. (CP 111). Together they jointly agreed that a 10 acre parcel, the children's inheritance, should be devoted to racquet sports, swimming, and recreational uses purposes. (CP 112). **Mr. Orr did not want the 10-acre parcel used for land development.** (CP 107, 111, 115)

In 1973, the Club had paid the contract terms and was conveyed a fulfillment deed. (CP 118). The original grantors on the deed were Margaret Orr, Mary Margaret Jensen (Peg Jensen), Dwight Orr, Jr., and Michael Orr. (CP 118). Dwight Orr, Jr. still resides in the Tacoma area. (CP 107). Michael Orr passed away leaving his interest to his son and heir Micheal Scott Orr. Margaret Orr is deceased. Mary Margaret Jensen (Peg Jensen), after being sued by the Club, assigned her interest to her daughter Chris, largely because youth has the blessing of stamina suitable for such things as litigation. (CP 227-231). Peg trusted her daughter Chris Jensen to stay the course and fight for the family legacy.

Thus, the defendant's are one original grantor (Dwight Orr, Jr.), one heir (Michael Scott Orr) and one assignee (Chris Jensen). The pleadings also contain a declaration from Ed Jensen, who is Peg's husband and Dwight Orr Sr.'s son-in-law. (CP 150). Ed Jensen married Peg in 1955, seven years before the real estate contract involving the Club. (CP 150). Ed was well-trusted and well-liked by his father-in-law Dwight Orr,

Sr. They knew each other well, and spoke on many occasions about Mr. Orr's properties. (CP 150-151). Ed Jensen was involved directly in calls with Dwight Orr, Sr. and his wife Peg about the 10 acre parcel eventually sold to the Club. (CP 151). Based on those conversations, Ed Jensen is firm in his conviction that Dwight Orr told him he intended to preserve this pace for recreation. (CP 151). Ed recalls Dwight Orr, Sr. being intrigued with the Stanford bequest to the State and how that created a public compound that retained its character without pieces being sold off for private development. (CP 151). He believes this forward-thinking influenced Dwight Orr, Sr.'s purpose in restricting the 10 acre parcel to recreational uses and to prohibit residential development. (CP 151).

2. Mr. Orr and Mr. Griffin Negotiate At Arm's Length, the Club Agrees to the Covenants insisted on by Mr. Orr, and Consideration is Paid for the Covenants in the Form of an Unrestricted Deed to Three Acres to Allow For Immediate Financing of Improvements

With this background on the family's intentions, the negotiation between Dwight Orr, Sr. and James Griffin, who then represented the backers of what would become the Lakewood Racquet Club (CP 240), comes into sharper focus. James Griffin's first declaration reveals that by 1964, just two years after the purchase from the Orr's, he had subdivided a nearby 40 acre parcel into 82 lots in a development he called "Racquet

Club Estates". (CP 22). It is highly probable that Dwight Orr, Sr. knew at the time of the negotiation for the 10 acre parcel, that Mr. Griffin had a financial interest in large scale residential development nearby and that he may have been looking for other residential development opportunities. Partially, in contemplation of Mr. Griffin's business interests, Mr. Orr, Sr. wisely insisted on the redundant promises that (1) the parcel be used for recreational purposes, and an insisted on additional explicit promise, just to make it perfectly clear, (2) that the land not be subdivided or used for residential purposes. The other consideration was, of course, to better secure the entire parcel for the purpose of the first covenant--recreation.

Today, in breach of his promises to Mr. Orr, James Griffin, has provided two declarations to the Club to assist the Club in breaking its promise to forego residential development without the consent of the Orrs, and has assisted in the development of a strategic plan to use half of the Club's parcel for development of dozens of townhomes. (CP21-22; CP 239-243). In fairness, however, neither side, whether for tactical reasons or practical financial considerations, took discovery depositions in this litigation, so the extent of Mr. Griffin's financial interest in the proposed development, if any, is unknown.

It can certainly be said that both Dwight Orr, Sr. and James Griffin, who also attended Stanford (CP 240), were educated parties with

some sophistication in land transactions. They were not related. They bargained as peers with equal leverage and at arm's length. Mr. Griffin was free to pursue other parcels on other terms. Mr. Griffin, on behalf of the Club backers, could have pursued parcels free of use restrictions. He was free to negotiate price and terms, and did so.

There has been a lot of ink spilled by the parties over whether fair market value was paid. On closer examination of the case law, it hardly appears to matter. All the rules that do take into account whether consideration was paid do not concern themselves with the amount of consideration or whether it was fair market value, but rather merely whether valuable and real consideration was exchanged. Nonetheless, to the extent it may be of interest to this Court, this brief addresses the facts about consideration.

The Club's Appellate brief states that \$30,000 was paid for the 10 acre parcel (p.4), and that the Club paid fair market value for the land in the amount of \$3,000¹ per acre, for a total of \$30,000 (p. 37). This argument was soundly rejected by the trial court following Defendant's Reply on the Motion for Declaratory Judgment, which deals with it

¹ The Court will please note that although \$30,000 is written into the real estate sales contract as consideration, at the bottom the price typed appears to be \$3,300 per acre. The difference is inconsequential because the real issue is whether valuable consideration was exchanged, not the amount of the consideration, and unquestionably valuable consideration was exchanged by sophisticated parties bargaining at arm's length.

extensively. (CP 328-333). In sum, it makes no sense to believe that a savvy land developer like Mr. Griffin paid what is argued to be fair market value for unrestricted land, for land that was clearly and unambiguously restricted. Mr. Griffin was a sophisticated party with other nearby land holdings. He had no reason to pay fair market value for unrestricted land when he knew Mr. Orr was insisting on use restrictions.

In fact, Mr. Griffin did not pay fair market value. (CP 108; 115; 351). Both price and terms are part of the consideration paid for land. The declaration put forward by the Club's appraiser is completely silent on the consideration of the terms that accompanied the price for this deal. (CP 235). The Club's own manager, Cindy Smith, stated at a Board Meeting, in the presence of Mr. Larson, the Club's attorney on this litigation, that the Club paid less than fair market value because of the use restrictions; this apparently went unchallenged by Mr. Larson as recorded in the Board Meeting Minutes. (CP 351). Mr. Griffin's own declaration states that Mr. Orr "*insisted*" on the restrictions. (CP 240). Mr. Griffin deftly extracted important consideration for the restrictions, he got Mr. Orr to agree to "accommodate" the Club by giving the Club an unrestricted deed to three acres at the inception of the Contract. (CP 240). This unrestricted deed was very valuable consideration; Mr. Griffin describes it as essential to allowing the Club to obtain a loan of \$35,000 for the first round of

improvements. (CP 240-241). Mr. Orr was left with only seven acres, valued at \$3,000 per acre², as collateral and security for his real estate contract to 10 acres. Mr. Orr unquestionably gave up something valuable, i.e., collateral, to get the use restrictions he insisted on, regardless of whether that sacrifice came in the negotiation of the price. It cannot be doubted that a good bit of consideration was paid and that negotiation took place over the price, terms, and content of the deed and covenants.

3. Mr. Griffin and the Club Seek Fortune In Housing Boom, Break Their Promise to the Orr Heirs, and Sue Them

Land speculation in the housing market began to peak in 2005, and the open space around the club, itself situated amidst a residential area, looked like fertile ground for townhome development. The Club created a master plan for growth whose aim was to cash in on the housing bubble. (CP 154). There does not appear to have been any consideration of other ways to finance facilities improvements. The club had added courts and facilities before without resorting to subdivision and residential construction for financing (CP 241-242).

² The defendants/respondents have never conceded that \$3,000 per acre represented fair market value. See _____. Nonetheless, even if they did, there would be no issue of material fact as to whether consideration was paid for the restrictions because of the undisputed evidence from the Club's declarant's that less than fair market value was paid, and critical terms were extracted in the form of a free and clear three acre deed, apart from any concession on price, in exchange for the restrictive conditions.

The Club never explained why other "non-subdivision" financing were suddenly unavailable to the Club when the housing market got hot. The approach of the Club to the Orr restrictions was, "like it or not, we've set our mind to build townhomes." The attitude was "you're either with us, or against us" on residential construction, alternative financing strategies for achieving the same facilities improvement were not considered. The Club had made its decision to break its promise to the Orr's and they could accept its rationale for doing so, or be sued.

B. Procedural Status of the Case

The Respondent's are satisfied with the Appellant's survey of the Procedural Status of the Case.

IV. ARGUMENT

A. The Respondents Have Standing.

1. The Appellant's Standing Arguments are Untimely.

The time allowed to file a notice of appeal is 30 days after the entry of the decision of the trial court which the party filing the notice wants reviewed. RAP 5.2. Here, the Lakewood Racquet Club (hereafter, "the Club") raised the standing issue only in its initial brief relating to the Club's Motion for Summary Judgment filed in August of 2007. Even then, the Club cited no controlling authority on the issue. (CP 64-65). The

Defendant's Response brief argued that the defendant's had standing as parties to the real estate contract and original grantors of the deed. (CP 83-84). The trial court issued an Order denying the Club's Motion Summary Judgment on February 22, 2008. (CP 163-165).

The Club did not file for reconsideration on the standing issue. The Club did not appeal within 30 days of that Order.

Month after month went by without the Club complaining of standing. The standing issue was not argued or raised in any way by either party on Defendant's Motion for Declaratory Judgment, originally filed in August of 2008, but heard in February of 2009. See Defendant's Motion for Declaratory Judgment (CP 173-233), Plaintiff's Response (CP 234-257), and Defendant's Reply (CP 328-347).

The Orr's and Jensen's have been sued, paid attorneys, filed declarations, appeared at Court hearings, overcome the plaintiff's quest for summary judgment, obtained a Declaratory Judgment, and been compelled to contest an appeal, only to be told by the party suing them that they had no right to stand before the Court in the first place. If the Club had serious reservations about the Orrs' standing, it was incumbent upon them to appeal that issue within 30 days after the denial of its summary judgment motion rather than to resuscitate this issue a year later after succumbing on the merits when the delay forced the defendants' to incur an additional

year of litigation expense. The plaintiff's have slept on their appellate rights on this issue and considerations of equity should control if not the plain language of RAP 5.2. The Plaintiff/Appellant has not raised the standing issue in a timely manner.

2. An Original Grantor Has Standing to Enforce.

In *Voice of the Cornerstone Church Corp. v. Pizza Property Partners*, the Court of Appeals of Texas, held that the original grantor of a deed containing restrictive covenants could enforce them, even when it no longer owned neighboring parcels. 160 S.W.3d 657, 666 (2005) (citing *Eakens v. Garrison*, 278 S.W.2d 510, 514 (1955); *Pierson v. Canfield* 272 S.W. 231, 233 (1925)). In this case, MobilOil owned environmentally contaminated property which was sold to Pizza Property Partners by special warranty deed with a restrictive covenant stating that the property “shall be used for commercial/light industrial purposes only” and that the covenant “shall run with the land.” The Church purchased the property from Pizza Property Partners and operated religious services and other functions falling outside of “commercial/light industrial” use. MobilOil learned of the Church’s use of the property and sought to enforce the covenant. The Church asserted that ExxonMobil, successor-in-interest to MobilOil, lacked standing to enforce the covenant because ExxonMobil

was not an adjacent landowner and ExxonMobil had no legitimate interest affected by the Church's religious activities. The Court upheld standing and the restrictive covenant, finding that the covenant "burdens the property itself" and its terms made clear an intention to bind future owners of the property, and showed an intention that it run with the land. *Id.* at 666.

This case is squarely analogous. *Cornerstone* involved a restriction on commercial or light industrial uses, and likewise the restrictions here are to certain types of uses, namely, recreational uses. Here, the terms of the deed also state they shall run with the land. In both cases, the terms of the deed show an intention to bind future owners by stating the covenants shall be binding upon the Grantee...its successors and assigns and by stating the consent of the Orrs or their heirs or assigns must be obtained. (CP 119-120).

The restriction to light industrial and commercial uses was not the kind of restriction that was meant to benefit an adjacent parcel--Mobil One didn't have an adjacent parcel. Instead, the restriction was meant to safeguard future generations against environmental risks. Analogously, the intention of the recreational use restriction in the Orr deed is not to benefit an adjacent parcel, but to safeguard the existence of 10 acres in Lakewood for recreational uses for future generations. The type of

covenant restrictions at issue are not meant to benefit adjacent parcels, but to, in the language of the *Cornerstone* Court, "burden the property itself" in order to provide a common benefit for the community. Under this reasoning, A. Dwight Orr, Jr., at a minimum, has standing to enforce as an original grantor.

3. The Respondent's Have Standing In Equity to Enforce a Written Promise Made to Them.

Rigid black letter law regarding ownership of adjacent parcels does not control, but instead equity and practical considerations do. In *Christiansen v. Casey*, 613 S.W.2d 906 (1981) the court upheld the standing of a developer to enforce a restriction prohibiting anything other than chain link fencing in a subdivision, even though the developer no longer owned property located within the subdivision encumbered by the covenant³. The *Christiansen* Court relied on the reasoning of Professor Stone in his law review article, *The Equitable Rights and Liabilities of Strangers*, 18 Colum.L.Rev. 291, 313 (1918), which is, in summary, that contractual promises are equitable rights *in personam* that are themselves a species of property worthy of protection, and it is equitable to allow a person to enforce a promise made to him or her. *Id.* at 910, fn. 2. The

³ Although the developer still owned some parcels in the vicinity, there was no evidence that these parcels benefited from the fencing restriction, and this fact was not essential to the reasoning supporting the holding.

Court agreed with Professor Stone that the idea that a person to whom a bargained-for promise was made should be able to stand before the Court to enforce it appeals to our innate sense of justice and that this must triumph over arcane doctrines of real property derived in the days of Sir Edward Coke. *Id.*

The trend toward application of equitable principles to find standing in cases like this one was also thoroughly considered in *B.C.E. Development, Inc. v. Smith*, 215 Ca.App.3d 1142 (1989), where the Court analyzed precisely the same arguments that the Club puts forward in this case on the standing issue. In *B.C.E.*, a successor-in-interest to the original developer, sued to enforce restrictive covenants to prohibit construction of the Smith's home, complaining that the plans violated certain architectural requirements. The Smith's argued that because the original grantor/developer transferred all land in the development to third parties, B.C.E., the successor to the original developer, had no standing to enforce the covenants. B.C.E. conceded it owned no property in or around the development.

The Court noted that the Smiths, "cite as black letter law the proposition that one who imposes reciprocal land covenants retains the right to enforce the same only so long as he continues in ownership of some of the land benefited by the covenants." *Id.* at 1145. The Smiths

insisted B.C.E. lacked standing on the same grounds, lack of interest in a benefited property, whether the covenants were deemed to be covenants running with the land or equitable servitudes. *Id.* at 1146-47. The Club makes the same arguments in this appeal. The *B.C.E.* Court refused to apply that black letter rule, calling it "rigid," and resolved the issue as follows:

We conclude, however, that the talisman for enforcement is not the rigid requirement of retention of an interest in land, but rests instead upon a determination of the intention of those creating the covenant.

Id. at 1147.

The *B.C.E.* Court carefully observed that the landmark California case on equitable servitudes, *Werner v. Graham*, 181 Cal. 174 (1919), emphasized the importance of determination of the parties' intent in the original deed restrictions, and that many subsequent authorities finding a requirement of land ownership in the party seeking enforcement did so not because this was an absolute condition but because that was found to be the intent of the restriction.

The *B.C.E.* Court reviewed the covenants and observed that "no limitation is imposed upon action by the [developer] in terms of its continued ownership of land." Similarly, in this case, in neither the real estate contract or the 1973 fulfillment deed is any limitation imposed upon

the ability of the grantor, heirs, or assigns to enforce the covenants in terms of their continued ownership of adjacent land. (CP 119-20; 42)

In *West Branch Conservation Assn. v. County of Rockland*, 163 Misc.2d 290, 292 (1994), the plaintiffs were donors, or successors-in-interest to donors, of real property conveyed to the County with restrictive covenants requiring the land be used for passive recreation, and also requiring all other land obtained for inclusion in the park to be used for the same purposes. The plaintiffs sued to stop the County from including in the park some property obtained from a third party that had a large tower and 'guy wires' on it. *Id.* at 291. The County complained that the plaintiff's lacked standing. *Id.* at 292.

The Court held that written pledges from the County to preserve property for passive recreation created standing for the plaintiffs, separate and apart from the plaintiff's standing in equity to enforce on the basis that the new property was part of a general scheme. *Id.* There was no need for the Conservation Association to show that it owned a parcel adjacent to the park or that it directly benefited from the deeded parcels subject to the covenant. Similarly, here, the Club made written promises to the Jensens' and the Orrs' to keep property for recreational uses, and now plan to devote half to residential uses (CP 25). The Orr Family has an equitable

right to enforce written promises made to them, regardless of whether the Orr's show direct benefit from the deed parcels.

4. The Respondents Have Standing Because The Intent of the Parties Was that the Orr's Could Enforce, and the Document Was Silent That Such A Right Should Extinguish Based Upon Ownership of Adjacent Land.

A portion of the 1973 deed is excerpted again to support this section of the brief:

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:

(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.*

(CP 119-120).

It is well settled in Washington that courts will determine the drafter's intent of a covenant at the time it was drafted. *Bauman v. Turpen*, 139 Wn. App. 78, 86 (2007); ("The primary goal in interpreting covenants that run with the land is to determine the drafter's intent and the purpose of the covenant at the time it was drafted."); *see also Wimberly v. Caravello*, 36 Wn. App. 327 (2006); *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112 (2005); *Hollis v. Garwall, Inc.* 137 Wn.2d 683 (1999);

Mariners Cove Beach Club, Inc. v. Kairez, 93 Wn. App. 886 (1999).

Courts will consider the instrument in its entirety, and, only when the meaning is unclear, the surrounding circumstances that tend to reflect the intent of the drafter and the purpose of a covenant that runs with the land.

Bauman, at 88.

The argument of the Club would need to be that somehow the words set out above show an intent for the covenant to benefit *the parcel*, rather than to benefit the Orrs *personally* as a family. For only if the deed restriction were intended to benefit the parcel would it matter that the Orrs no longer own the benefited parcel--the crux of the Club's argument. However, if the purpose of the recreational use and subdivision prohibition covenants were intended, in 1962 and 1973, to benefit the Orr's parcel and not the Orr's as a family, then it is completely superfluous and unintelligible to state that the consent of the Orr heirs and assigns would need to be obtained to do build residences. It was only Dwight and Margaret that continued to live on the parcel--if it was about benefiting their parcel, just their consent should have been sufficient. The record is that two of the Orr children had graduated from college in California by 1955. The Orr children were grown and living on their own apart from the parcel.

Why then would a document purporting to benefit the adjacent parcel, rather than the family, call for the consent of a second generation no longer residing in a position to be benefited by the continuation of the prohibition on residential construction? Whatever explanation the Club has to that question is far less compelling than the truth. The only true and rational interpretation of the intent of the real estate document and the deed is the interpretation consistent with the Orr children's declarations about their father's intent: he met and consulted with them about creating a legacy of promoting recreation, included the recreational use restriction and a prohibition on residential development to buttress and confirm that use restriction, and then included in the deed that the consent of the heirs would be necessary after he and his wife died for the Club to subdivide so that the legacy could continue after his death. Surely, Mr. Orr Sr., knew his children were not likely to move back into the family home after his death. The children had left the nest. The words of the deed only make sense if one sees that the intent of the deed was to benefit the Orr family for generations to come, and not specifically their parcel or those children who might continue to own the parcel.

Again, Dwight Orr Sr. passed away in 1967, and the real estate contract came about in 1962 after his children were at least seven years out of college--so, going on 30. Peg had married Ed in 1955. If the

covenant was intended to benefit the parcel then it only made sense to require the consent of Dwight and Margaret, who obviously intended to continue to live on the parcel, and possibly such other heir who might reside on the parcel *after* they both had passed. But, instead, if the Club had come to Dwight in 1966 seeking to subdivide, Dwight would still have had to obtain the consent, by the terms of this document, of his heirs, such as Peg, who were not living on the property. That makes no sense if the intent is to benefit the parcel or the owner/occupier of the parcel, but perfect sense if the intent is to create a common family legacy in the establishment of a lasting public amenity.

The wording is "*the consent of A. Dwight Orr and Margaret Orr, their heirs and assigns.*" The Club would have had to get the consent of the whole group of them, the parents and the kids, even those not living on the property. Dwight Orr, Sr., who **insisted** on precisely these covenants, but must have known he and his wife were going to continue to live on the property, and the kids were out of the next, could have written that the Club must obtain "the consent of Dwight Orr, Sr. and Margaret Orr, his wife, or if both of them shall have passed, or if neither of them lives on the adjacent parcel but an heir does, whichever heir or assign owns or occupies the benefited parcel." He did not. Without belaboring the point further, it is obvious that Mr. Orr intended the covenants to benefit his

family, and not just the owner or occupant of the parcel. There is no other reason to require the consent of any more than just the heir who owns or occupies.

The theories of the Appellants about the need to own adjacent "benefited" land fall flat. First, there is nothing in this deed that supports a finding of an intent in the document to have the "consent authority" terminate when the Orr's no longer owned adjacent property. The warranty deed is silent on what acts or instances shall terminate the standing of the Orrs to enforce. The litigation before this Court is really an attempt to use the Courts to re-write the agreement to insert termination words into the document that do not exist. If the intent of the deed was to terminate the standing of the Grantors to enforce the deed restrictions then the parents or the heirs no longer owned adjacent property it could have and would have expressed as much.

After the 1962 real estate contract was entered, the Club had 11 years to consider, draft, and seek agreement on an "accord and satisfaction" that would have eliminated the deed restrictions by the time it took the 1973 fulfillment deed. Instead, in 1973, at that time the Club paid up on the contract, it was satisfied with the bargain it struck to take subject to restrictive conditions, and content to be a not-for-profit (CP 23) pursuing a mission of providing recreational opportunities in the

community. It was content with its bargain until 2005 when it caught a bad case of land speculation fever.

This warranty deed does not say that the covenants shall be unenforceable "when the Orrs' no longer own adjacent property." The warranty deed does not say that the covenants shall be "enforceable for 50 years," or "until Lakewood incorporates," or "until a future housing boom makes speculation in townhomes irresistible." There is no termination language because none was intended, other than subsequent conduct or agreement of the parties or such change in circumstances as would make the covenants utterly useless. But, these are the bargains that the Club now wishes it had made and so it attempts to use the Courts to re-write its bargain.

5. The Appellant's Reliance on *Shaff* is misplaced.

The Club's appellate motion relies heavily on *Shaff v. Leyland* to assert that the Orr family lacks standing to enforce the restrictive covenant. 154 N.H. 495 (2006). In *Shaff*, the party seeking to enforce the covenant, Mrs. Shaff, owned 75 acres of land, including the parcel she encumbered by a restrictive covenant allowing only one colonial type residence having a market value of at least \$100,000 on the parcel. Over a 40 year period, Mrs. Shaff acquired and sold numerous parcels located

along one road. She sold the parcels over time, including the parcel on which she resided. From the facts of the *Shaff* case, it is clear that the covenant was intended to benefit the other parcels located along that road and to create a benefit to her own land in preserving its monetary value.

The *Shaff* case can be distinguished from this case in two significant respects. First, Mrs. Shaff did not reserve a right of enforcement in the deed. *Id.* at 496. The Orr deed did expressly reserve a right of enforcement in the covenant that states that subdivision shall require the consent of the Orrs, heirs, and assigns. (CP 119-120). Mrs. Shaff's deed had no similar language.

Second, the Orr covenants are properly classified as "in gross," not "appurtenant." Mrs. Shaff's covenants called for building only colonial style homes with a certain market value. The intent was to benefit her parcel economically. Here, by contrast, the covenants are "in gross" meaning the benefit or burden is not tied to ownership or occupancy of a particular unit or parcel. This was discussed at length, *supra*, when discussing the intent of the covenant that requires the consent of Dwight Orr, Sr., Margaret Orr, the heirs, and the assigns, *collectively*, for any subdivision--which makes no sense if the benefit created is purely for the owner or occupier of the parcel, i.e. is an "appurtenant" covenant. *See Restatement (Third) of Property Servitudes* §§1.5(1)-(2).

The court looked at Mrs. Shaff's intentions at the time of the creation of the restrictive covenant to discern the type of covenant created. The court determined that the covenant was not "in gross" but was a covenant appurtenant requiring Mrs. Shaff to own the burdened property in order to enforce the covenant.

Similar to the *Shaff* case, the Orr Family owned adjacent property at the time the covenant was drafted, and disposed of such property thereafter. However, unlike in the *Shaff* case, the testimony of the Orr Family, and the language of the covenants, evidences the intent of the grantors to benefit a cause larger than their own self-interest, and to vest enforceability in themselves as a collective family, not as they may occupy or own a particular benefited parcel. The intent is to create a public good as a legacy to be safeguarded by the heirs, successors, and assigns of the Orr family. The covenant language and the circumstances around the agreement and show that the covenant's purpose was not to benefit the property owned by the Orr Family, but rather to further the goals of A. Dwight Orr in leaving the entire parcel as a recreational space for posterity. (CP 107, 111, 115, 151)

In *Shaff*, the Court recognized the adoption of the rule set forth in the *Restatement (Third) of Property: Servitudes § 8.1* permitting an original covenantor to enforce a covenant in gross regardless of the

ownership of benefited land, but determined that the *Shaff* case was not proper opportunity to decide whether to adopt such a rule because the restrictive covenant in *Shaff* was appurtenant. Unlike in the *Shaff* case, where Mrs. Shaff had many parcels of property for sale and used the restrictive covenant to enhance the value of *each* of the other parcels she owned, the Orr Family sold some of the parcels of property without restriction on residential development but specifically negotiated with the Club to leave this particular parcel free of residential development. The main distinction between these cases is that the restrictive covenant at issue is personal to the Orr Family, or "in gross" while the restrictive covenant in the *Shaff* case was "appurtenant," and Mrs. Shaff's failure to draft enforcement language in her deed.

B. This Deed Does Not Create A Restraint On Alienation, But If It Is So Interpreted, The Restraint Is Reasonable.

1. No Restraint on Alienation

The key fact is that these covenants are use restrictions, not restrictions on sale or encumbrance. The covenants are silent when it comes to sale or encumbrance of the parcel. (CP 119-120). The parcel may be sold, without penalty or reverter. (CP 119-120). The parcel may be encumbered or mortgaged, without penalty or reverter. (CP 119-120). In fact, the parcel is mortgaged. (CP 354). There is no right of reverter in

the deed at all. (CP119-120). There is no evidence in the record that the Club has tried to sell or transfer the parcel, or mortgage it beyond the existing mortgage. The Club may sell the 10 acre parcel as it is. The Club may even subdivide and build residences, if it obtains consent. (CP 119-120).

Neither before the trial court or before this appellate court has the Club cited authority holding that use restrictions on residential building are restraints on alienation. The Club has not cited one case holding that restrictions to promote recreational use are restraints on alienation. The Club, therefore, asks this Court to be the first in all the land to do so.

a. The misapplication of a definition of a term as a legal rule.

The Club relies on Black's Law Dictionary for a definition that, if applied as rule, becomes absurdly broad. The Club tries to shoehorn the recreational use restriction into a restraint on alienation analytical framework that was created by a dictionary definition that is untenably broad. Per the Black's Law definition, the Club argues that a "restraint on alienation" is any "provision that conveys an interest and that...prevents or discourages the owner from disposing of it at all or from disposing of it in particular ways or to particular persons." Appellate Brief at p. 32.

If accepted at face value, as urged by the Club, the use of this definition leads quickly and surely to absurdities, and it is often said that the law abhors absurdities. Per this definition, every use restriction "prevents or discourages" a sale to a "particular person," namely, that person or group of persons who would want to use the land for the restricted purpose. For example, a restriction on building an outhouse or a manufactured home on a lot, would discourage sale to persons looking for a lot for rustic living or looking for a place to set a manufactured home. Under this definition, no restriction for recreational or environmental conservation uses would ever survive, and everyone who wanted to develop a lot could claim the restriction constituted an unlawful restraint on alienation.

The definition that the Appellant's urge to be taken out of context and applied as a rule here, lacks meaningful substantive limits, and it is no exaggeration that such a definition would necessarily rewrite every use restriction in every deed into a restraint on alienation. This would lead to litigation involving a fact-intensive balancing test with subjective factors about the reasonableness of the restriction. This certainly was not the intention of the *Alby* court in citing the Black's Law Dictionary definition, discussed *infra*. The first part of the definition should be emphasized, and was consistent with the facts of *Alby*. The first part of the definition of

restraint on alienation is "[a] restriction, usu[ually] in a deed of conveyance, on a grantee's ability to sell or transfer real property". In *Alby*, the deed at issue contained a reverter, i.e., a true restriction, on sale or encumbrance, to prevent the grantee from selling the property outside the family. In this case, the Orr's had no intention of preventing the Club from selling or transferring, and in fact, the covenant anticipates sale or transfer when it says the restrictions apply to successors, or assigns of the Club. (CP 119-120).

Taking the Black's Law Dictionary definition out of context would be inconsistent with the direction of Washington State common law. In *Riss v. Angel*, the Washington State Supreme court recognized the trend against "[t]he former prejudice against restrictive covenants which led courts to strictly construe them [as being in derogation of the common law right to use land for all lawful purposes], [and recognized that the trend] is yielding to a gradual recognition that they are valuable land use planning devices. 131 Wn.2d 612, 622-23, 934 P.2d 669 (1997). The Court went on to note that its goal "is to ascertain and give effect to those purposes intended by the covenants." *Id.* at 623. *Thayer v. Thompson*, discussed *infra*, contains a similar explication of the modern viewpoint adopted by Washington Courts:

Traditionally, covenants restricting the use of land were disfavored by the courts. This view was based on the common law right to use land for all lawful purposes and the policy disfavoring any encumbrances on title. W. Stoebuck, *Running Covenants: An Analytic Primer*, 52 Wash.L.Rev. 861, 885-86 (1971). In *Leighton v. Leonard*, 22 Wash.App. 136, 142, 589 P.2d 279 (1978), we recognized that the pressures of increased urbanization were forcing changes in judicial reluctance to fetter the use of land, stating: [a]s public restrictions, in the form of zoning, have gained favor, so have private restrictions." The modern viewpoint is that building restrictions are for the protection of the public as well as the property owner. Such restrictive covenants need only be reasonable and reasonable exercised to be valid. See G. Thompson, *Real Property*, §3166 (1981 Supp.).

36 Wash.App. 794, 797, 677 P.2d 787 (1984). The rigid application of the definition urged by the Club will reverse the trend in contravention of the recognition of covenants as valuable land use planning devices, for the protection of the public as well as the property owner.

Here, there is no restriction on the Club's ability to sell or transfer its 10 acre parcel, and in fact the Club did transfer an interest when it mortgaged the property. (CP 354). Again, despite exhaustive research, the Club has not cited on case or authority that says, even under the definition it urges, that a recreational use restriction or restriction against residential construction is a restraint on alienation, or an "indirect" restraint on alienation. If this Court adopts the Club's analytic framework and interpretation of the use restrictions at issue as indirect restraints on

alienation it will be going where no court has gone before, and will open the floodgates of balancing-test litigation to terminate *use restrictions* as unreasonable *restraints on alienation*.

2. Even assuming these use restrictions which do not expressly forbid sale, transfer or encumbrance, and without a reverter or penalty, are restraints on alienation, they are certainly reasonable under Washington law.

Alby v. Banc One Financial strongly supports the respondents arguments, and the respondents cited it at the trial court, even though respondents question the wisdom of the unwieldy analytical framework used by the Court. 156 Wn.2d 367, 128 P.3d 81 (2006). In that case, the Washington State Supreme Court held that a deed restriction which expressly forbade any sale and any encumbrance, and which contained a powerful reverter that eventually stripped Banc One of its recourse on a defaulted mortgage, was nonetheless reasonable and enforceable. In *Alby*, the Court specifically addressed the issue whether a deed containing an automatic reverter to the grantor if the property is mortgaged is an unreasonable restraint on alienation. *Id.* at 369.

As such, the facts here are easily distinguishable because there is nothing like a reverter in this deed, to bring the use restrictions at issue into the classification of a "restraint" on alienation. Nonetheless, the balancing test of reasonableness in the second part of the analytical

framework supports the Respondents, and must be addressed because of the broad definition used by the Court for classifying use restrictions as restraints.

The Alby's sold part of the family farm to their niece and her husband (the Brashlers) for far less than the market value (\$15,000 paid for \$100,000 value). Both the sale contract and the deed contained a clause calling for automatic reverter to the Alby's if the Brashler's sold, mortgaged, or subdivided the property during the Alby's lifetime. The intent was to keep the parcel in the Alby's family.

Despite the deed restrictions, the Brashlers somehow managed to take out two mortgages in 1999. The second mortgage was assigned to Banc One. The Brashlers defaulted on the first mortgage, and Banc One bought that interest at a trustee's sale in 2000. In 2002, the Albys filed a quiet title action arguing that the automatic reverter was enforceable and should be applied to the Brashlers' 1999 encumbrance with the result being a return of the property to the Albys.

The trial court declared the clause void as an unreasonable restraint on alienation. The Court of Appeals reversed, concluding the clause was not a restraint on alienation, but even if it were, the restraint was reasonable. *Id.* at 369. The Supreme Court accepted review to address the issue of whether *the reverter clause* was a restraint on

alienation, and if so, whether it was reasonable. The Alby court held that *the prohibition on mortgaging or encumbering* was a restraint on alienation. The Court reasoned that the restriction on mortgaging or encumbering prevented the Brashlers (grantees) from disposing of the property in a particular way, and limited marketability by preventing potential buyers from financing the purchase of the property.

Here, the Appellant's are eager to point out that the covenant's prevent them from disposing of the Club property in a particular way and limits the field of potential buyers. But, this argument puts the cart before the horse. The Alby Court was concerned with (1) a powerful reverter clause, and (2) an explicit prohibition on sale or encumbrance, i.e., a true restraint, and by the way the Alby Court narrowly announced the issue it was addressing as a case involving an automatic reverter, it is not clear that the Alby framework must be applied to resolve the question of the validity of the use restrictions at issue in this case.

Having determined that the reverter clause and prohibition on encumbrance was a restraint on alienation, the Court continued its analysis of the reasonableness of the restraint. The Court applied a multi-part balancing test and factors analysis that examined: (1) the legitimate interests of the parties, (2) the utility of the restrictions, (3) the scope, (4) the duration, and (5) whether consideration was paid. *Id.* at 372.

The Supreme Court's application of the test was fact intensive, and divided the Court 5-4, proving that astute and experienced legal minds can still differ on reasonableness even where a deed expressly forbids encumbrance, any sale outside the family, and expressly punishes encumbrance with a reverter. If such an unwieldy 5 point test were more widely applied to use restrictions, imagine how difficult it would be for lay people to determine the validity and enforceability of their use restrictions. The case at bar, having a far less onerous scope and no penalties, is in no way such a close call. A majority of the Court struck the balance in favor of (1) the bargained for contract, (2) what the Court described as it's limited scope, (3) the legitimate purpose of keeping property in the Alby's hands, and (4) the limited duration of the Alby's lifetime. Four dissenting justices would have struck the balance on the same facts in favor of free alienability of land.

In this case, the balance is far more clearly in favor of the Orr family. First, consider the scope of the restriction. The *Alby* Court called it a "limited scope" to expressly forbid sale and encumbrance, and any sale outside the family. The scope of the restrictions in the Orr deed are positively expansive by comparison. The Club can sell, and sell to anyone. (CP 119-120). The Club may even choose to retain the property and subdivide, if it obtains consent of the Orrs. (CP 119-120). The Club

can mortgage the property and it has. (CP 354). The Club can build commercial and other structures related to recreation, and can build a caretaker residence. (CP 119-20).

Second, consider the legitimate interests of the parties. The *Alby* Court considered it a legitimate interest to retain ownership in the hands of the Albys, which is really saying something in the context of a decision about the extent of restriction on alienability. The *Alby* Court, in a footnote, states that the legitimate interests and purposes of a restriction often include preservation, conservation and charitable purposes. *Id.* at 373, fn. 4. This is precisely what we have here; this was a deed to a not-for-profit corporation for the purpose of promoting an enduring recreational space in the community. The Alby's were considered to have a legitimate interest in protecting their family legacy, and likewise the Orr Family seeks to do the same. Additionally, the *Alby* Court noted that both parties had a "legitimate interest" in enforcing the terms of their contract. *Id.* at 372. Certainly, the Orr Family has a legitimate interest in enforcing bargained-for promises made to it.

Third, consideration was paid for these covenants. This argument was laid out in detail in Defendant's Reply Brief on its Motion for Declaratory Judgment. (CP 328-333). Summarized here, the Club admits in its Board Meeting Minutes that the Club paid less than fair

market value because of the deed restrictions. (CP 328-333). While there may be disagreement over whether fair market value was paid, that issue concerns the amount of consideration, and there is no dispute here that very valuable consideration was paid and bargained for at arm's length both with regard to the covenants and the property. The Club's own declarant, James Griffin, who negotiated with Dwight Orr over the purchase, states that Dwight Orr *insisted* on the covenants, and Mr. Griffin negotiated in exchange a deed to three acres of the ten acre parcel without the restrictions. (CP 240). This valuable consideration allowed the Club to finance improvements immediately. (CP 240-241). Doing the simple math, this left Dwight Orr, Sr. with a deed to only seven acres in collateral and security for the real estate contract for the ten acres.

The evidence of consideration paid for the covenants in this case is far more compelling than that of *Alby*. In *Alby* there was no evidence that the parties on both sides of the transaction were familiar with land deals. There were emotional family considerations on both sides of the transaction. There was evidently an imbalance in bargaining power as \$15,000 was all the Brashlers could afford, so that's what the \$100,000 parcel was sold to them for. Here, the parties were sophisticated. Dwight Orr, Sr. was the comptroller/treasurer for Weyerhaeuser (CP 111) and James Griffin subdivide and developed a 40 acre lot nearby into the 82

home Racquet Club Estates in 1964, just two years after the deal with Mr. Orr (CP 22). They were negotiating at arm's length without family ties, and there was no imbalance in bargaining power or position. The Club was free to select another parcel or buy from someone who would not insist on the restrictive covenants.

The duration of the restrictions in the *Alby* case was the lifetimes of the Alby's, and here, the duration is similar, the lifetimes of the Orr's and Jensen's or their heirs, or such duration as subsequent conduct of the parties may bring about. (CP 119-120). This duration is narrowly tailored to the purpose of promoting a family legacy of community recreational space.

The utility of the restriction must be considered next.

Unquestionably, the restrictions at issue have accomplished and continue to successfully accomplish their purpose. For nearly 50 years the Lakewood Racquet Club has flourished. The Board Meeting Minutes reflect a healthy financial report and steady membership. (CP 354; see also CP 132 Letter of Board Member Robert Grenley: "the club is in good financial shape.") It has successfully expanded and updated its facilities in the past, adding racquet and tennis courts and other amenities, without needing to subdivide and develop homes. (CP 241-242; CP 23-24). The Club has promoted its spacious park-like 10 acre parcel on its website as a

place for family and community recreation. (CP 318). The continued persistent existence of the restrictions in 2005 saved the Club from its own short term land speculation fever; now that the housing boom has busted, the Club, thankfully, is not surrounded by a thicket of foreclosed or vacant townhomes. It would have irretrievably lost half its parcel to homes, five acres which it may need for future recreational expansion, if it had been allowed to subdivide. The restriction has served to promote a lasting legacy of recreation and farsighted inspiration for the Orr family.

In sum, all of the *Alby* considerations and factors are far more forcefully in favor of the reasonableness of the use restrictions at issue here than the more stringent encumbrance and sale restraints in that case. It may be that the reasoning of the *Alby* Court which led to a 5-4 split is best left to the narrow issue of that case, which was the reasonableness of a reverter in a deed clearly restricting sale. But if the Orr conditions are analyzed as restraint on alienation, as urged by appellant's, they are surely reasonable under the *Alby* factors, primarily because of the vastly greater scope of things the grantee can do, and the more substantial consideration paid.

If the Court were to hold that a recreational use restriction like the one at bar were unreasonable, a first of its kind ruling, it is wise to consider the substantial uncertainty and doubt that would be created as to

the continued validity of use restrictions on deeds in this state, and the need to for trial courts to apply extensive *Alby* criteria. Given the arguments over the weight and application of the criteria, prolonged litigation up the chain of the courts is likely.

3. *Thayer v. Thompson* provides the proper analytic framework, and these covenants do not violate public policy and have not been rendered useless by change in circumstances.

Washington Courts have upheld use covenants of broader scope than those at issue in this case. In *Thayer v. Thompson*, Division 1 of the Court of Appeals, held that a restrictive covenant in a real estate contract which provided that no buildings or improvements were to be constructed on a lot without the consent of the seller, his heirs or assigns, was reasonable, valid, and enforceable. As in this case, the covenants do not expressly forbid sale or contain a reverter. However, the use restriction was far more restrictive, preventing any building from being erected.

In *Thayer*, the subsequent purchaser of a lot (Thayer) brought a declaratory judgment action against the seller (Thompson), seeking to declare invalid a covenant that provided "no buildings nor improvements shall be constructed [on the lot] without the prior consent of seller, his heirs or assigns, in writing." Thayer argued this was an unreasonable

prohibition on the use of land. Both the trial Court and the Court of Appeals disagreed.

Although, the covenant at issue in *Thayer* was intended to protect the Thompsons, who still lived in the area and didn't want any building close to their house, this fact was not significant in the reasoning of the *Thayer* court and the rule it set out for determining a covenant's reasonableness. The test, according to *Thayer*, is **whether (1) the covenant violates public policy by unreasonably prohibiting the use of burdened property, and whether (2) a change in circumstances "rendering the covenant useless" had occurred.** *Id.* 796-797. The question of whether a provision violates public policy is whether the contract has a tendency to do evil, to be against the public good, or to be injurious to the public. *Id.* at 796.

The Court found that the covenant at issue *does not prohibit the use* of the burdened property. Although the covenant required the consent of Thompson to erect a building, the land could be used as "a recreation area" even without the seller's consent. Therefore, the covenant was found reasonable and not in violation of public policy. Here, the scope of the covenants is far less burdensome. The Thayers could not erect any building. In this case, the Club can erect all kinds of buildings: indoor courts, pools, clubhouses, a caretaker dwelling, a pro shop, etc.

The Court next addressed the duration of the covenant. It noted that a covenant running with the land has an indefinite life, subject to termination by conduct of the parties or a change in circumstances which renders its purpose useless. *Id.* at 797. The Court found that Thompson had not relinquished the covenant nor had any change in circumstances, which would render the covenant useless, occurred. Whether such conditions may occur in the future was "speculative" and not ripe for resolution. *Id.*

In this case, it cannot be said, as the trial court below recognized, that a covenant for recreational uses violates public policy or has a tendency to do evil--to the contrary, such a restriction is consistent with good public policy and provides a public amenity. The question is not, as the Club tries to make it, whether eliminating the restriction will advance a better and higher purpose, or better foster recreation by allowing facility upgrades, but whether the restriction as it is in the document has a tendency to do evil or violates public policy. Under the *Thayer* rule, the role of the court is a restrained one. It is not to second guess the wisdom, at the present moment, of the restriction, but merely to ask whether it violates public policy or have a tendency to do evil.

Here, too, the duration is similar to that in the *Thayer* case. We have a covenant that runs with the land of indefinite duration, but subject

to termination by conduct of the parties or a change in circumstances, which would render the covenant useless. The only change in circumstances argued below was rote, boilerplate, and identical conclusory statements. (CP 21.) See Declaration of Peter Kram, "The Lakewood area has grown substantially in the last 40 years. Lakewood is now an incorporated city with pressure for growth." (CP 242); Declaration of James Griffin of August 20, 2008, "The Lakewood area has grown substantially in the last 40 years. Lakewood is now an incorporated city with pressure for growth." This is the entire substance of the Club's submission of fact on change of circumstances in the area and is wholly unconvincing. There was also some argument that fitness trends were in flux and that some of the competitor clubs would have the latest and newest gizmos, but competition and new trends in fitness are a constant circumstance, not a changing one. Additionally, as of August 13, 2008, the Club's website has still actively promoting the Club's "spacious park-like grounds ideal for picnics and barbeques." (CP 233.) This negates any argument the Club could make that the restrictions are now rendered "useless."

If anything, the change of circumstances of increased pressure for growth in Lakewood, if any, is an argument for preservation of the covenants, not their termination. (See CP 14.) These covenants continue

to insure that space will be available to grow recreational facilities within the urban environment, even as housing markets boom and bust. Once built over, the land cannot be returned to recreational use. Like the *Thayer* Court, this Court should decline to speculate whether conduct of the parties or change in circumstances might invalidate the restrictions in the future. The use restrictions do not violate public policy and no change of circumstances sufficient to render the conditions useless has occurred. The appeal should be dismissed and the Declaratory Judgment upholding the validity of the restrictions affirmed.

V. CONCLUSION

In conclusion, as the Court did below, the Respondents urge this Court to hold that the restrictions at issue do not violate public policy, are unambiguous, and reasonable. This holding is consistent with the development of Washington case law that respects the use of covenants as land use planning devices and adopts the modern trend against rigid formality and deference to arguments for the free use of land. This holding prevents the realistic scenario of throwing uncertainty onto all use restrictions and inviting litigation and application of a fact intensive balancing test to use restrictions which do not expressly forbid sale or encumbrance. This holding would develop the *Thayer* case law which is

more suitable and workable for applying to use restrictions—and which creates more certainty for landowners and litigants. This holding would also be consistent with the equitable principle that agreements must be kept. Both aspects of the *Thayer* test have objective components to give the test meaning outlines and limits. The public policy prong can be verified by reference to legislation. The change prong, which requires a change that renders the covenant useless, will provide for an easier detection of when covenants should be terminated.

Appellant's argument against standing is untimely, but, even if it were not the Respondents have standing as original grantors, and inequity to enforce a written, bargained-for promise.

This litigation began as a direct result of land speculation fever that was running amok in 2005. The vision of Dwight Orr, Sr. in protecting this 10 acre parcel from residential development was a necessary and wise inoculation against the homebuilding fever that comes and goes every generation. The restriction served to further the ultimate aim of committing the entire parcel to recreational uses, by

making clear that the profit to be gained from residential land speculation
did not trump the value of having a lasting public recreational amenity.

RESPECTFULLY SUBMITTED this 12th of June, 2009.

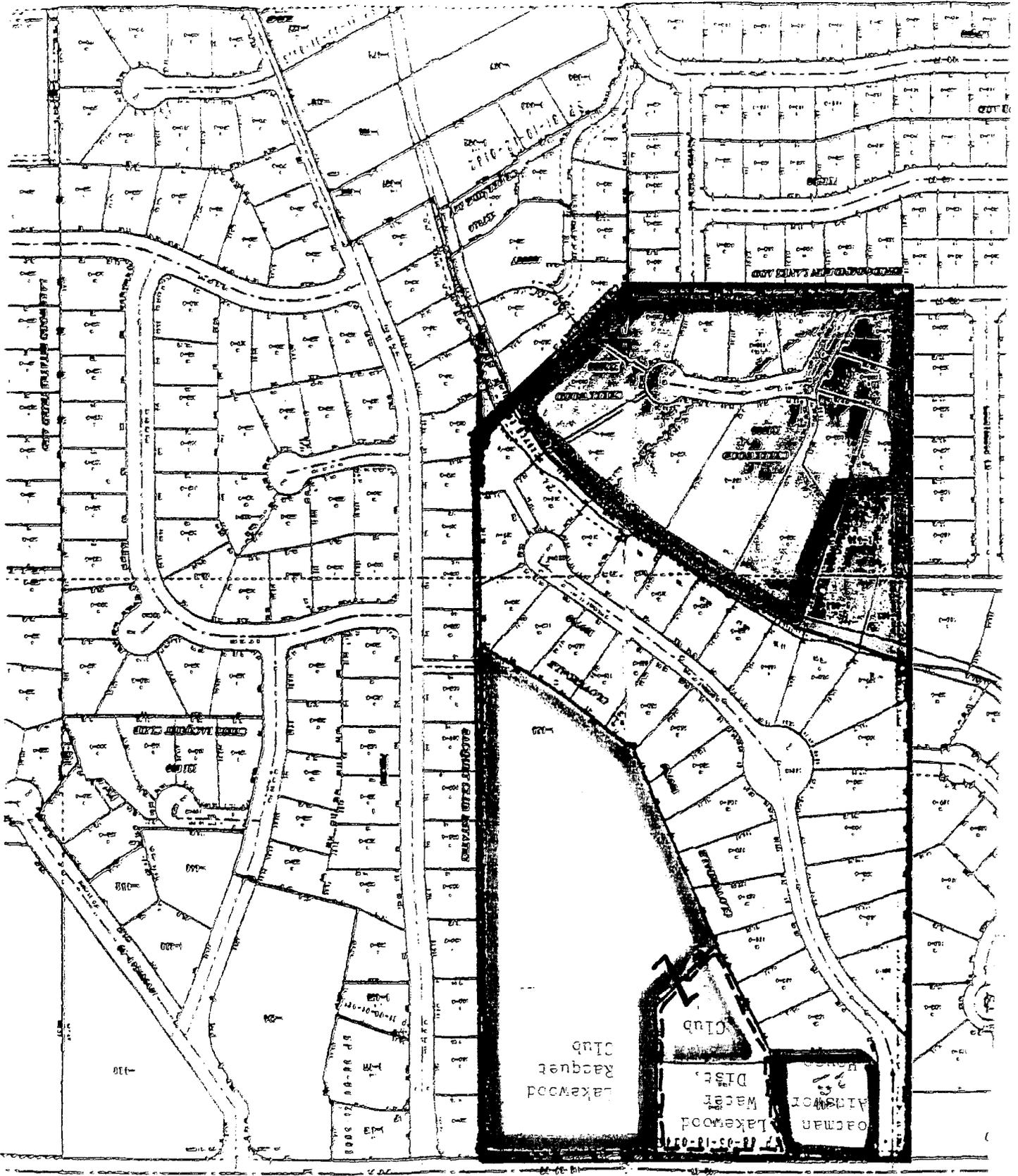
THE GOSANKO LAW FIRM

By: 
Clayton A. Hill, WSBA #34103
7513 SE 27th St., Ste. A.
Mercer Island, WA 98040
(206) 275-0700

THE YORK LAW FIRM

By: 
Heidi York, WSBA #37493
2611 31st Avenue West
Seattle, WA 98199
(206) 661-8827

APPENDIX A



POOR QUALITY ORIGINAL

BOATMAN-ALMSBORTH HORSE

LAKEMOOD RACQUET CLUB

LAKEMOOD RACQUET CLUB

ORIGINAL ORA PROPERTY

APPENDIX B

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

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

CALUSE TAX PAID \$300.00

REC. NO. 154286 DATE 7-17-62

hereinafter called the

considered
30,000

L. R. JOHNSON, Pierce Co. Trans.

WITNESSETH
seller the following
State of Washington,

2046457

the purchaser and the seller agree to purchase of the
the County of Pierce

ST. P. & N. W. 1/4

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 optioners 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 1964, exceed 20% 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 \$3,300.00 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

P235

J.P.

APPENDIX C

1274000

Statutory Warranty Deed

WASHINGTON
TITLE INSURANCE
COMPANY
SEATTLE, WASHINGTON

Mail to
Send Tax 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, of 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 \$ No Tax
REC. NO. 154237 DATE 7-19-62

L. K. JOHNSON, Pierce Co. Treas.

By [Signature] Deputy
STATE OF WASHINGTON

County of Pierce

[Signature] (REAL)
Margaret Orr (REAL)

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

APPENDIX D

POOR QUALITY ORIGINAL

Statutory Warranty

20456/1

WASHINGTON
TRUST INSURANCE
COMPANY

WENTRE WASHINGTON

M. B. Walt Beck
Ch. Leonard

Read The Statement to

Statutory Warranty Deed

THE GRANTOR A. BRIGGS ORR and WALTER ORR, husband and wife,

be and in consideration of One Dollar-

to have full, certain and lawful title LESTER BARRETT CLUB, INC., a Washington Corporation, Marion of Washington

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 Northwest quarter of Section 21, Township 19 North, Range 2 East of T.M., 355.00 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 165 feet; thence east 160 feet; thence north 115 feet; thence west 145 feet; thence north 370 feet; thence east 210 feet; thence south 122 feet; thence west 65 feet; thence north 42 feet to the point of beginning.

All corners, above are percolated with or at right angles to the Grant line of said west half of the west half of Northwest quarter of the Northwest quarter.

This deed is given in partial fulfillment of Land Contract C.T.I. dated May 16, 1962, after which date the Washington Trust shall apply only to the acts of the grantor. MAY 2 1964

WALTER ORR, JR. Walter Orr Attorney for Grantor
L. E. MILLER, PHOENIX, AZ
CALIFORNIA
STATE OF WASHINGTON
County of San Joaquin

WALTER ORR, JR. Walter Orr
Walter Orr
Walter Orr

On this day, personally appeared before me A. Dwight ORR, and WALTER ORR, husband and wife as the husband & described to and with WALTER ORR, JR. as the wife and beginning instrument, and acknowledged that they signed the same as WALTER ORR, JR. her and ordinary act and deed, to the use and purpose therein expressed.

GIVEN under my hand and official seal this 19 day of February, 1964.



APPENDIX E

POOR QUALITY ORIGINAL

CTI
MAY 1964

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 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 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 51°45' 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°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

219457

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THIS INFORMATION SUPPLIED COURTESY OF
COMMONWEALTH TITLE INSURANCE COMPANY
1120 PACIFIC AVE. TACOMA, 383-1476
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 purchaser 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 155.00 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 150.00 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 19.00 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 150 feet; thence south 365 feet; thence east 160 feet; thence south 125 feet; thence west 165 feet; thence north 570 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

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COMMONWEALTH TITLE INSURANCE COMPANY
1120 PACIFIC AVE. TACOMA, 383-1476
ATICOR COMPANY

POOR ORIGINAL QUALITY

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

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

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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.

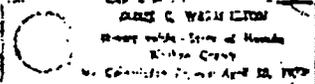
Margaret Orr
Notary Public in and for the State of Washington, residing at Tacoma

STATE OF NEVADA

COUNTY OF WASHINGTON

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 1st day of April, 1973.



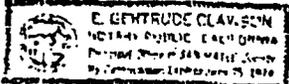
Ann C. Washington
Notary Public in and for the State of Nevada, residing at Jarline Village, Nev.

STATE OF NEVADA

COUNTY OF WASHINGTON

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. Gertrude Clavson
Notary Public in and for the State of Nevada, residing at Boulder

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

POOR QUALITY ORIGINAL

STATE OF WASHINGTON
COUNTY OF PIERCE

ss.

On this day personally appeared before me MICHAEL ORR,
to me 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 10th day of APRIL, 1973.

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

NOTARIAL SEAL

2404585

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

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.

AFFIDAVIT OF SERVICE

Clayton A. Hill, WSBA # 34103
The Gosanko Law Firm
7513 SE 27th St., Ste. A.
Mercer Island, WA 98040

Heidi York, #37949
The York Law Firm
2611 31st Ave. W.
Seattle, WA 98199

Attorneys for the Orr Family - Respondents

FILED
BY *[Signature]*
CLERK OF COURT
OCTOBER 21 2019
SEATTLE, WA

ORIGINAL

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, Alek McCune, being first duly sworn upon oath, deposes and states:

1. On June 24, 2009, I caused to be served via ABC Legal Messenger a copy of the Brief of Respondents to the parties identified below:

2. Scott D. Winship, 1201 Pacific Avenue, Suite 1900, Tacoma, WA 98402, via ABC Legal Messengers on June 12, 2009.

3. Steven L. Larson, 1201 Pacific Avenue, Suite 1725, Tacoma, WA 98402, via ABC Legal Messengers on June 12, 2009.


Alek McCune

Signed and sworn to before me on 24th day of June, 2009,
by Alek McCune




Notary Public in and for the State of Washington, residing at Renton
Printed name: Theresa Chandler
My appointment expires: 08-28-10