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STATE OF WASHINGTON
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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.

REPLY BRIEF OF APPELLANT

LAKWOOD RACQUET CLUB

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I. REPLY TO BRIEF OF RESPONDENTS.

A. The Racquet Club's Challenge to the Orr Heirs' Standing to Enforce the Covenants is Properly Before this Court.

The Orr Heirs object that the Racquet Club's challenge to their standing is untimely, arguing that the Racquet Club failed to appeal the trial court's denial of its motion for summary judgment within 30 days of that decision, as required by RAP 5.2. Brief of Respondents, at p. 13. This argument is without merit and should be summarily dismissed.

"There is no right of appeal from an order denying summary judgment." *McDonald v. Moore*, 57 Wn. App. 778, 779, 790 P.2d 213 (1990) (citing *Sea-Pac Co. v. United Food & Comm'l Workers Local Union 44*, 103 Wn.2d 800, 801-02, 699 P.2d 217 (1985)); *see also* RAP 2.2. The Racquet Club did not have the right to appeal the denial of its Motion for Summary Judgment until the trial court issued a final judgment in this case, which did not occur until February 13, 2009, when the trial court granted the Orr Heirs' Motion for Declaratory Judgment. CP 361-63. On March 3, 2009, within 30 days of the trial court's entry of judgment, the Racquet Club timely filed its Notice Appeal, which sought review of both the trial court's grant of Declaratory Judgment for the Orr Heirs as well as the trial court's denial of the Racquet Club's motion for Summary Judgment. CP 364-71.

The issue of standing was properly called to the attention of the trial court, both in the Racquet Club's Motion for Summary Judgment and in the Orr Heirs' Motion for Declaratory Judgment, as required by RAP 9.12, which provides, in pertinent part:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

The trial court's Order Denying Plaintiff's Motion for Summary Judgment states that the trial court considered the Plaintiff's Motion for Summary Judgment, which expressly sought an order declaring "that the defendants have no standing to enforce the restrictions" CP 20. The Orr Heirs themselves concede that the issue of standing was before the trial court in the Racquet Club's Motion for Summary Judgment. Brief of Respondents, pages 13-14.

Further, the Revised Order Granting Defendants' Motion for Declaratory Judgment declares that "the Court reviewed and considered ALL records and pleadings in the Court file," specifically including the Racquet Club's "Complaint for Declaratory and Injunctive Relief dated April 25, 2007." (Supplemental CP 376-78). Section IX, Paragraph 2 of that Complaint asks for a judgment that declares that the Orr Heirs have no standing to enforce the restrictive covenants at issue. These documents were "called to the attention of the trial court" before the trial court's Order granting Declaratory Judgment was entered. The Orr Heirs' assertion that the Racquet Club's challenge to their standing is untimely is unsupported by the record and should therefore be disregarded by this Court.

B. Standing to Enforce Restrictive Covenants Exists Only Where the Party Seeking Enforcement Will Suffer an Actual Injury if the Restrictive Covenants Are Not Enforced.

In their Response Brief, the Orr Heirs cite several cases that hold that an original grantor of a deed containing restrictive covenants has standing to enforce those covenants even when the grantor no longer owns a benefited parcel. Brief of Respondents, pages 15-20. In so doing, the Orr Heirs argue that “rigid black letter law regarding ownership of adjacent parcels does not control, but instead equity and practical considerations do.” Brief of Respondents at 17. Having found no Washington case that supports this contention, the Orr Heirs rely on several cases from other jurisdictions. Each of the cases cited by the Orr Heirs can be distinguished from this case, however, because each of the parties seeking equitable relief in the cases cited by the Orr Heirs had a justiciable interest in the enforcement of the covenants: unlike the Orr Heirs, each was in jeopardy of suffering an actual injury if enforcement was not allowed by the court.

1. The Voice of the Cornerstone Church Case.

In the first case cited by the Orr Heirs, *Voice of the Cornerstone Church Corp. v. Pizza Property Partners*, 160 S.W.3d 657 (2005), the Court of Appeals of Texas found that even though the party seeking enforcement, ExxonMobil, no longer owned any benefited property, it nonetheless had standing to enforce use restrictions on property it had previously conveyed because it had continuing legal exposure under federal and state environmental laws.

In that case, ExxonMobil's predecessor-in-interest, Mobil Oil Corporation, had settled litigation with a state environmental commission by agreeing to remediate environmental contamination that had occurred on property that had once served as one of Mobil Oil's oil pipeline terminals. Further, Mobil Oil agreed to impose restrictive covenants on that property to bar uses that could create environmental risks. *Cornerstone Church*, 160 S.W.3d at 661-62. Thus, when Mobil Oil sold the property in 1997, the deed included restrictive covenants limiting the use of the property to "commercial/light industrial purposes only" and specifically prohibiting use "for residential purposes, healthcare facilities, daycare facilities, schools, playgrounds." *Cornerstone Church*, 160 S.W.3d at 662.

Three years later the buyer resold the property to a church. *Cornerstone Church*, 160 S.W.3d at 663. The church renovated an old industrial warehouse, converting it into a church sanctuary where it held worship services. The church also opened a kitchen, a printing shop, an appliance repair shop, and a retail store on the property. It also created a baptismal pool from one of the tank farm's old fuel storage tanks. Upon learning of these uses, Mobil Oil (which had since become ExxonMobil) sued, seeking an injunction that would prohibit use of the property for "church services and related fellowship and worship activities" and alleging, among other things, that Cornerstone's activities constituted a breach of the restrictive covenant. *Cornerstone Church*, 160 S.W.3d at 664.

The church counterclaimed, seeking a declaration that ExxonMobil was not entitled to enforce the covenant because ExxonMobil

had no legal or equitable interest in such enforcement. *Cornerstone Church*, 160 S.W.3d at 664. On cross-motions for summary judgment, the district court granted summary judgment for ExxonMobil and eventually entered an order permanently enjoining the church from “using the property . . . for church services and related fellowship and worship activities or anything else other than commercial or light industrial purposes” and from “using, in any way, the baptismal pool located on the Property.” *Cornerstone Church*, 160 S.W.3d at 664. The district court also prohibited the church from violating the terms of the restrictive covenant. Finally, the district court disallowed any type of construction without first allowing ExxonMobil to review the construction plans to ensure that any such plans would accommodate and facilitate ExxonMobil’s remediation plan. *Cornerstone Church*, 160 S.W.3d at 664.

On appeal, the church argued that ExxonMobil lacked standing to enforce the covenant because (1) it was not an adjacent landowner, (2) enforcement did not relate to a benefit to adjacent land, and (3) ExxonMobil had no legitimate interest affected by the prohibited activities. The court rejected that argument with little discussion of Texas precedents and with no analysis of the *Restatement (Third) of Property (Servitudes)*, summarily concluding that the restrictive covenant at issue “runs with the land and that ExxonMobil properly had standing to seek its enforcement.” *Cornerstone Church*, 160 S.W.3d at 665-66.

A close reading of the *Cornerstone Church* case reveals that the Texas Court of Appeals’ determination that ExxonMobil had

standing to enforce the covenants was based not on the court's analysis of the real covenants at issue but instead on a more conventional standing analysis – one that requires a justiciable interest and actual injury. In reaching its determination, the court held that:

Standing is a component of subject-matter jurisdiction and is therefore essential to a court's power to decide a case. To establish standing, one must show a justiciable interest by alleging an actual or imminent threat of injury peculiar to one's circumstances and not suffered by the public generally.

Cornerstone Church, 160 S.W.3d at 665.¹ Under this analysis, the Court found that ExxonMobil had standing to enforce the covenants because – as part of its settlement agreement with the former Texas Water Commission concerning remediation of a contaminated property – ExxonMobil was under a continuing duty to maintain the restrictions on the land it had conveyed or be subject to possible liability under federal or state environmental protection laws.

In this case, no such compelling reason exists to support a finding that the Orr Heirs have standing to enforce the restrictive covenants. The Orr Heirs have no justiciable interest in enforcing the covenants because they will incur no actual or imminent injury if the covenants are held to be void and unenforceable.

¹ Ironically, the Texas Court also observed in a footnote that, because standing is a component of subject-matter jurisdiction, it “cannot be waived and *may be raised for the first time on appeal*.” Thus, the court held that *Cornerstone* could challenge ExxonMobil's standing even though it had failed to raise that issue in the trial court. *Voice of the Cornerstone Church Corp. v. Pizza Property Partners*, 160 S.W.3d 657, 666 n.5 (2005).

2. **Cases Involving Subdivisions or “General Schemes of Development.”**

In the other cases cited in the Orr Heirs’ Brief, the parties seeking to enforce the covenants at issue were found to have standing because those covenants arose in the context of a multi-lot residential subdivision or a general scheme of development. Neither of those circumstances is involved in the case before this Court, and therefore the cases cited by Orr Heirs have little, if any, application to this case.

While Washington courts have recently carved out an exception to this rule of strict construction against the grantor or in favor of the free use of land, that exception applies only “where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants.” *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005); *see also 1515-1519 Lakeview Boulevard Condominium Ass’n v. Apartment Sales Corp.*, 146 Wn.2d 194, 204, 43 P.3d 1233 (2002) (the requirements for covenants running in subdivisions have been relaxed compared to covenants running in other contexts); *Riss v. Angel*, 131 Wn.2d 612, 622, 934 P.2d 669 (1997) (“Construction against the grantor who presumably prepared [a] deed is quite a different matter from construction of covenants intended to restrict and protect all the lots of a plat and future owners who buy and build in reliance thereon.”).

Two of the cases cited by the Orr Heirs involved planned residential subdivisions: *Christiansen v. Casey*, 613 S.W.2d 906 (1981) and

B.C.E. Development, Inc., v. Smith, 215 Cal.App.3d 1142, 264 Cal.Rptr. 55 (1989). The case at bar does not involve a dispute among homeowners in a subdivision or a general scheme of development being implemented by mutually restrictive covenants. Rather, it is a dispute between the sellers of a parcel of property who restricted the use of that property to benefit their adjacent residence and the owner of the property burdened by those restrictions. The cases cited in the Orr Heirs' Brief that involve enforcement of covenants in the context of a subdivision or where there is a general scheme of development have little value because they are factually distinct and irrelevant to the case at bar.

The third case cited by the Orr Heirs, *West Branch Conservation Assn. v. County of Rockland*, 163 Misc.2d 290 (1994), was a trial court decision in which the court ruled that a third party may equitably enforce a restrictive covenant to which it is not a direct party where the subject parcels, ***which had been donated to the county***, were part of a plan or general scheme of development. The facts in the *West Branch* case are inapposite to those in this case, and therefore the ruling of a trial court in Rockland County, New York, provides little, if any, guidance.

3. Thayer v. Thompson.

The Orr Heirs also rely heavily on a 1984 Washington case from Division One of the Court of Appeals, *Thayer v. Thompson*, 36 Wn. App. 794, 677 P.2d 787 (1984), for the proposition that “covenants of broader scope than those at issue in this case” can be “reasonable, valid

and enforceable.” Brief of Respondents, at 42. The *Thayer* case involved a covenant that provided that no buildings or improvements were to be constructed or placed upon a particular lot without the prior consent of the vendor, his heirs or assigns. A subsequent purchaser (Thayer) brought a declaratory judgment action asking the court to invalidate that covenant, but the trial court found that the covenant was valid and enforceable and dismissed Thayer’s complaint. *Thayer*, 36 Wn. App. at 794. Thayer appealed, contending that the covenant was an unreasonable prohibition on the use of land and therefore violated public policy. *Thayer*, 36 Wn. App. at 794-95.

On appeal, the Division One panel affirmed, agreeing with the trial court’s ruling that the covenant was reasonable and did not violate public policy. *Thayer*, 36 Wn. App. at 797. The *Thayer* Court also affirmed the trial court’s refusal to determine the covenant’s duration, noting 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. *Thayer*, 36 Wn. App. at 797 (emphasis added).

The *Thayer* case is of little value to an analysis of the Covenants at issue in the instant case because of a key factual difference: **the party seeking enforcement of the covenant in *Thayer* continued to own the property that was benefited by the covenant.** As noted in the Racquet Club’s opening Brief, the Orrs could have enforced the Covenants when they first imposed because Mr. and Mrs. Orr owned the

property that was benefited by the Covenants. When the Orrs sold their property, however, they lost the right to enforce the Covenants on any theory. See William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861, 887 (1977) (if a covenantee has conveyed his land, he loses the right to enforce the covenant on any ground).

In each of the cases cited by the Orr Heirs, the parties seeking enforcement of restrictive covenants were found to have standing because they would have suffered an actual injury if the restrictive covenants had been extinguished. In this case, however, the Orr Heirs lack standing because they will not suffer any actual injury if the Covenants are extinguished. If the Orr Heirs sought damages for the Racquet Club's breach of the Covenants, they would be entitled to none because they no longer own the property that was once benefited by the Covenants. Nonetheless, the Orr Heirs contend that if the Covenants are held to be unenforceable, their family's attempt to "create a common family legacy in the establishment of a lasting public amenity" will be thwarted. Brief of Respondents, at p. 24. The goal of creating this perpetual family legacy is not evidenced in the language used in the Covenants, however, and despite the Orr Heirs' attempts to introduce inadmissible parol evidence that the original grantors intended such a result, this Court should rule that the Covenants have served their original purpose and can no longer be enforced by the Orr Heirs.

C. The Intent of the Original Parties is to be Determined by the Language of the Covenants, Not by Reference to Evidence That Would Show an Intention Independent of the Covenants or That Would Vary, Contradict or Modify the Written Word.

“A court’s first objective in interpreting a restrictive covenant is ascertaining the intent of the original parties.” *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005). Division One of the Court of Appeals recently summarized the recognized principles for construing restrictive covenants:

Courts are to determine the drafter’s intent by examining the clear and unambiguous language of a covenant. We must consider the instrument in its entirety and, 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. While the interpretation of a restrictive covenant is a question of law, intent is a question of fact. Extrinsic evidence of intent is admissible if relevant to interpreting the restrictive covenant. In *Hollis v. Garwall*, [137 Wn.2d 683, 974 P.2d 836 (1999)] the Supreme Court applied the *Berg v. Hudesman* [115 Wn.2d 657, 801 P.2d 222 (1990)] context rule to interpreting restrictive covenants. Under this rule, evidence of the “surrounding circumstances of the original parties” is admissible “to determine the meaning of the specific words and terms used in the covenants.”

Bauman v. Turpen, 139 Wn. App. 78, 88-89, 160 P.3d 1050 (2007) (citing *Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965)).

While extrinsic evidence is admissible to determine the meaning of the specific words and terms used in a covenant, “[o]nly in the case of ambiguity will the court look beyond the document to ascertain intent from surrounding circumstances.” *Mountain Park Homeowners Ass’n, Inc. v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994). Even where

such ambiguity exists and the court looks at evidence of the “surrounding circumstances of the original parties,” admissible extrinsic evidence does not include: 1) evidence of a party’s unilateral or subjective intent as to the meaning of a contract word or term; 2) evidence that would show an intention independent of the instrument; or 3) evidence that would vary, contradict or modify the written word. *Ross v. Bennett*, 148 Wn. App. 40, 203 P.3d 383 (2008) (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999)).

The Orr Heirs contend that the Covenants are unambiguous, stating that “the plain language of these deed restrictions are [sic] the clearest and most forceful and unambiguous expression of the parties’ intent.” Brief of Respondents, page 5. In apparent contradiction to this assertion, the Orr Heirs devote a substantial portion of their Brief to the presentation of parol evidence in an attempt to prove that the intent of these “unambiguous” Covenants was to “further the goals of A. Dwight Orr in leaving the parcel as a recreational space for posterity.” Brief of Respondents, at 28.

In several places in their Response Brief, the Orr Heirs offer parol evidence reflecting their subjective intent as to the meaning of the provision in the Covenants that requires the “consent of A. Dwight Orr and Margaret Orr, their heirs and assigns.” According to the Orr Heirs, A. Dwight Orr intended to “leave something for posterity,” to create a “joint family legacy,” and “to create a public good as a legacy to be safeguarded by the heirs, successors, and assigns of the Orr family.” Brief of Respondents, pages 2, 5, 28, 47-48. While this may be one interpretation of the “consent”

provision in the Covenants, the Covenants themselves contain no clear expression that A. Dwight Orr actually intended such a “legacy.”

As noted above, even where an instrument is determined to be ambiguous, extrinsic evidence of the “surrounding circumstances of the original parties” does not include evidence of a party’s unilateral or subjective intent as to the meaning of a contract word or term, nor does it include evidence that would show an intention independent of the instrument. *Ross v. Bennett*, 148 Wn. App. 40, 203 P.3d 383 (2008). The testimony of the Orr Heirs is simply not admissible to show any such intention because it falls into both of these proscribed categories.

D. The Language of the Covenants Indicates an Intention to Create a Covenant Appurtenant, Not a Covenant in Gross.

Despite the Orr Heirs’ vacillation as to whether the Covenants are ambiguous, the Covenants are, in fact, ambiguous because they do not clearly indicate who or what was intended as the beneficiary of the restrictions imposed by the Covenants. A similar ambiguity was considered and resolved by the Supreme Court of Hawaii in a 1993 case, *Waikiki Malia Hotel, Inc., v. Kinkai Properties Limited Partnership*, 75 Haw. 370, 862 P.2d 1048 (1993).

That case involved the enforceability of a restrictive covenant in a deed that imposed a height restriction on a lot in Waikiki, Honolulu, Hawaii. The plaintiff sought to enforce the restrictive covenant to keep the defendant, the owner of the property burdened by the covenant, from constructing a planned six-story building, claiming that the height

restriction was personal to the plaintiff as the assignee of original grantor. *Waikiki Malia Hotel*, 75 Haw. at 378-79. The defendant, on the other hand, contended that the height restriction benefitted an adjacent lot and therefore only the owner of the adjacent lot could enforce the restriction. *Waikiki Malia Hotel*, 75 Haw. at 379.

The defendant moved for summary judgment, but the trial court denied the motion, holding that the benefit of the covenant was intended to favor the grantor, its successors and assigns. *Waikiki Malia Hotel*, 75 Haw. at 380. The plaintiff then moved for summary judgment and a “final injunction” against the defendant to prohibit it from constructing any building, structure, or improvement that was in violation of the covenant. The trial court granted the motion and entered final judgment in favor of the plaintiff, ordering the defendant to remove or demolish any building, structure, or improvement on the burdened property that exceeded the height limitation set forth in the covenant. *Waikiki Malia Hotel*, 75 Haw. at 380. The defendant appealed.

On appeal, the Hawaii Supreme Court found the deed restriction to be a restrictive covenant – an agreement by one person, the covenantor, to do or refrain from doing something enforceable by another person, the covenantee. *Waikiki Malia Hotel*, 75 Haw. at 382 (citing Roger A. Cunningham et al., *The Law of Property* § 8.13, at 467 (1984)). Although the deed stated that the covenant “shall run with the land,” the Hawaii Supreme Court held that the covenant was ambiguous to the extent that it “d[id] not indicate who or what was intended as the beneficiary of the

imposed height restriction.” *Waikiki Malia Hotel*, 75 Haw. at 384-85. Under Hawaii law, as under Washington law, surrounding circumstances may be considered to interpret an ambiguous provision, but not parol evidence. *Waikiki Malia Hotel*, 75 Haw. at 385; *Ross v. Bennett*, 148 Wn. App. 40, 203 P.3d 383 (2008) (Where an instrument is ambiguous, the court will look beyond the document to ascertain intent from surrounding circumstances, but evidence of a party’s unilateral or subjective intent as to the meaning of a contract word or term, evidence that would show an intention independent of the instrument, or evidence that would vary, contradict or modify the written word is not admissible.)

To resolve the ambiguity as to the intended beneficiary of the covenant in *Waikiki Malia Hotel*, the Hawaii Supreme Court reviewed the circumstances surrounding the creation of that covenant. In doing so, the court observed that the “use of such surrounding circumstances, also known as extrinsic evidence, ‘usually concerns the geographical location of the lands and the physical condition of the structures thereon.’” *Waikiki Malia Hotel*, 75 Haw. at 385 (quoting 2 *Amer. Law of Prop.* § 9.29, at 417 (1952)).

Accordingly, the Hawaii Supreme Court examined the relationship between the burdened lot, Lot 48, and an adjacent lot, Lot 269. The deed to Lot 48 contained a forty-five-foot height restriction, and the Hawaii Supreme Court noted that “[i]nterestingly, the hotel rooms with views on adjacent Lot 269 begin at approximately the forty-five foot level.” *Waikiki Malia Hotel*, 75 Haw. at 385. Thus, The Hawaii Supreme Court concluded that, when taken as a whole, the extrinsic evidence strongly implicated an

intent by the grantor to have the burden of the covenant run with Lot 48 and the benefit to run with Lot 269. *Waikiki Malia Hotel*, 75 Haw. at 385.

In support of this conclusion, the Hawaii Supreme Court also noted that proof of such an intent can be gleaned from language used in the covenant, observing that “*the use of the phrase ‘and assigns’ or ‘and heirs’ following the name of the promisee has in several cases been held material evidence of an intention to create a benefit appurtenant.*” *Waikiki Malia Hotel*, 75 Haw. at 385-86 (emphasis in original) (citing 2 *Amer. Law of Prop.* § 9.29, at 416 (1952)).

Despite the ambiguity of the covenant, the Hawaii Supreme Court concluded that the extrinsic evidence demonstrated that a covenant appurtenant was created. *Waikiki Malia Hotel*, 75 Haw. at 389. Because the party seeking enforcement did not own any land that the deed restriction could benefit, the Hawaii Supreme Court ruled that that party could not enforce the restrictive covenant.

In this case, the Fulfillment Deed states that the “covenants and restrictions shall run with the land hereby conveyed and shall be binding upon the Grantee herein named, its successors and assigns.” Another provision reads: “The land shall not be subdivided and sold in tracts, without the consent of A. Dwight Orr and Margaret Orr, their heirs and assigns.” When read together, the Covenants evidence an intention to create a benefit appurtenant, which runs to A. Dwight Orr and Margaret Orr, as owners of the benefited parcel, and to their heirs and assigns, to the extent they may also be owners of the benefited parcel.

The Orr Heirs, nonetheless, argue that the Covenants were never intended to benefit the adjacent residence occupied by A. Dwight Orr and Margaret Orr. Instead, they argue that the benefit of the Covenants was intended to be personal to A. Dwight Orr and Margaret Orr, their heirs and assigns. Thus, according to the Orr Heirs, the benefit of the Covenants runs to the Orr family as a whole in the form of a covenant in gross. Brief of Respondents, pages 27, 29. In support of this contention, the Orr Heirs make the novel argument that, if the Racquet Club had sought to subdivide the Racquet Club Parcel or sell it in tracts prior to the death of A. Dwight Orr, Sr., it would have been required to obtain the consent not only of Mr. and Mrs. Orr, but of the entire Orr family.²

In *Waikiki Malia Hotel*, the Hawaii Supreme Court rejected a similar contention that the covenant at issue did not benefit a specific parcel of land but instead provided for the benefit to be personally held by the grantor, its successors and assigns, thereby creating a covenant in gross. *Waikiki Malia Hotel*, 75 Haw. at 387. In doing so, the Hawaii Supreme Court articulated several strong policy reasons why covenants in gross are disfavored:

² “[I]f 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.” “The Club would have to get the consent of the whole group of them, the parents and the kids, even those not living on the property.” Brief of Respondents, at 24. These arguments ignore the fact that an heir becomes a successor owner of real property only following the death of the previous owner. See *Black’s Law Dictionary* 651 (5th ed. 1979) (the term “heir” is defined as “[a] person who succeeds, by the rules of law, to an estate in lands, tenements, hereditaments, upon the death of his ancestor, by descent and right of relationship,” although it also notes that “the term is frequently used in a popular sense to designate a successor to property either by will or by law.”).

First, they affect the marketability of the land because it is more difficult to trace the holder of a covenant in gross, inasmuch as that person could be located anywhere; on the other hand, it is fairly easy to locate the holder of interest of an appurtenant covenant. Second, appurtenancy requirements help to limit “the power of the dead hand” and reduce the amount of veto rights that could be exercised against the current land owner because the number of appurtenant covenants would be restricted to the particular properties near the burdened tract of land. Third, covenants in gross allow an outsider to impose his or her views on a community; and finally, appurtenant covenants increase flexibility in enforcing and applying covenants and promote flexible consensual land use arrangements.

Waikiki Malia Hotel, 75 Haw. at 387-88 (citing Gerald Korngold, *For Unifying Servitude and Defeasible Fees: Property Law’s Functional Equivalents*, 66 Tex.L.Rev. 533, 552 (1988)).

In reaching its decision, the Hawaii Supreme Court emphasized that, because a covenantee who personally holds the benefit of a covenant in gross may be geographically removed from the particular area burdened by the covenant, yet may still exercise control over the use of land in such area, “the covenant must clearly and expressly reflect the intent to create a covenant in gross.” *Waikiki Malia Hotel*, 75 Haw. at 388. Finding that the “express language of the covenant failed to clearly and expressly reflect the intent that [the plaintiff] would hold the benefit of the covenant personally,” the Hawaii Supreme Court concluded that a covenant in gross was not created. *Waikiki Malia Hotel*, 75 Haw. at 388-89. This is consistent with Washington law, which holds that “restrictive covenants, being in derogation of the common law right to use land for all lawful

purposes, will not be extended to any use not clearly expressed, and doubts must be resolved in favor of the free use of land.” *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005) (citing *Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965)).

Notwithstanding the Orr Heirs’ arguments otherwise, the language of the Covenants in this case does not clearly and expressly reflect the intent that the benefit of the Covenants would be held personally as a covenant in gross. Nor do the Covenants clearly and expressly evidence an intent to vest enforceability in the “collective Orr family.” The intent of the Covenants was to benefit members of the Orr family as owners of the adjacent parcel. Because none of the Orr Heirs owns any land which the Covenants could benefit, none can now enforce the Covenants against the Racquet Club.

II. CONCLUSION

When A. Dwight Orr and Margaret Orr sold property to the Racquet Club in 1962, they placed covenants in the real estate contract that would ensure that the purchasers of that property would actually build a racquet club – not a housing development – on the property, which was located next to their own residence. The Covenants imposed on the Racquet Club Property were appurtenant to an interest in land because they were intended to benefit Mr. and Mrs. Orr’s remaining parcel.

When the Orrs sold their home in Lakewood, their right to enforce the Covenants terminated. Nonetheless, the Orr Heirs now seek to enforce the Covenants “to create a public good as a legacy to be safeguarded by the

heirs, successors, and assigns of the Orr family” in perpetuity. The Orr Heirs are pursuing this legacy by claiming that they hold the Covenants in gross. If this had been the actual intent of the Orrs, either when they sold the property to the Racquet Club in 1962 or when they conveyed the Deed in 1973, they could have and should have clearly expressed that intent in the language of the Covenants. They did not. Their current, subjective expressions of intent are not admissible to support a construction of the Covenants that is not clearly expressed in the Covenants themselves.

Accordingly, the Racquet Club respectfully requests that this Court reverse the trial court’s entry of Declaratory Judgment in favor of the Orr Heirs and remand the case to the trial court for entry of a judgment consistent with the relief requested in the Racquet Club’s Complaint below.

DATED this 9th of July, 2009.

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CERTIFICATE OF SERVICE

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandenberg Johnson & Gandara, LLP. On the 10th day of July, 2009, in the manner indicated below, I caused a copy of:

BRIEF OF APPELLANT

to be served, via Legal Messenger, on Counsel for the Respondents:

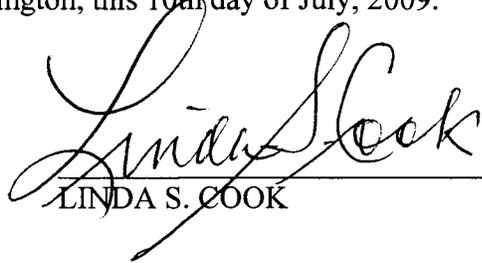
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DEPUTY

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Tacoma, Washington, this 10th day of July, 2009.


LINDA S. COOK