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I. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the Respondent City of Tacoma (“Tacoma”) does not have a non-possessory property interest in the North Shore Golf Course (“Golf Course”).

2. The trial court erred in Granting Respondents North Shore Golf Associates, Inc. (“Associates”) and Northshore Investors, LLC’s (“Investors”) Joint Motion for Summary Judgment Dismissal of Intervenor-Plaintiffs’ Claims and Denying Motion to Strike, and dismissing all of Appellants Johnnie E. Lovelace, Lois S. Cooper, and James V. Lyons and Renee D. Lyons’ (“Intervenors”) claims.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Where an Open Space Taxation Agreement executed by a developer and a municipality restricts use of certain land to “golf course and open space use,” and the Open Space Taxation Agreement further provides that it “shall run with the land,” is a non-possessory real property interest created in favor of the municipality?

B. Where summary judgment dismissing Intervenors’ third-party-beneficiary causes of action is entered, does such dismissal include Intervenors’ claims based on restrictive covenant and “common plan”

theories when those theories were not raised or otherwise addressed in defendants' summary judgment motion?

III. STATEMENT OF FACTS

A. Northshore Country Club Estates Zoning

Northshore Country Club Estates ("County Club Estates") is an approximately 338-acre planned residential district ("PRD") consisting of residential areas and an 18-hole Golf Course located north of 33rd Street NE and Norpoint Way NE and west of 45th Avenue NE in the City of Tacoma, Washington. CP 3, 1961.

Prior to 1978, all property now included in the Country Club Estates PRD, including the Golf Course, was owned by the Tacoma Land Company ("TLC"). CP 3, 1961. The zoning classification for the property was R-2, One-Family Dwelling District. CP 3, 81, 1961. In 1981, the property was rezoned as R-2 PRD. CP 3, 1961.

At the time of the PRD rezone approval, the R-2 PRD zoning classification provided for greater flexibility in large scale residential developments, including, but not limited to: permitting townhouses, retirement homes and condominiums (not permitted under the standard R-2 zone); reductions or elimination of building setback requirements; opportunities to increase building heights above the standard 35-foot

limit; reductions in lot size requirements and opportunities to reduce street rights of way below standard code requirements. CP 3. Applying these PRD principles to the original PRD application resulted in approval for approximately 350 residential units above what would have been permitted under the standard R-2 zoning code requirements. CP 3.

At the time of the original R-2 PRD zoning approval in 1981, the Golf Course was the subject of an “*Agreement Concerning North Shore Golf Course*,” (“Agreement”) between Associates, as the owner of the Golf Course, and the developer of the surrounding Country Club Estates residential area. CP 3-4, 8, 1962. The Agreement allowed the residential property developer to include the Golf Course as an open space and recreation area necessary to obtain an R-2 PRD zoning classification for residential development of the Country Club Estates. CP 3-4, 1962. In reliance on the Agreement, Tacoma approved R-2 PRD zoning for Country Club Estates, including the Golf Course and the surrounding residential properties. CP 3-4, 8-9, 1962. Tacoma’s decision to rezone the Country Club Estates property to R-2 PRD was conditioned upon restriction of the Golf Course to golf course and open space uses in perpetuity. CP 4, 1962.

Intervenors purchased their homes to be located next to the Golf Course and paid higher purchase prices for their homes because of proximity to the Golf Course. CP 125-129.

B. Proposal for Elimination of Golf Course with Residential Development

On or about January 29, 2007, Investors applied to Tacoma for a permit to establish a substantial residential development within the Golf Course portion of the Country Club Estates PRD. CP 4, 1963. The proposal involves a multi-phased residential development, and includes construction of approximately 860 residential units consisting of approximately 370 single-family detached units and approximately 490 town home units, to be developed in four or more phases over the next six-plus years. CP 4, 1963. As part of the proposed development, Investors seek to eliminate the Golf Course (CP 1963), thereby destroying the open space feature of the neighborhood and eliminating a major property condition upon which the original R-2 PRD zoning approval was based.

C. Declaratory Judgment Action

Tacoma filed a declaratory judgment action against Investors and Associates on January 2, 2008, seeking judicial interpretation and enforcement of the Open Space Tax Agreement (“OSTA”) and the

Concomitant Zoning Agreement (“CZA”). CP 19-20. In addition to seeking declaratory judgments and specific performance of the OSTA and CZA, Tacoma also pled a cause of action to quiet title in the Golf Course real property and to establish that the OSTA had conveyed a non-possessory property interest in the Golf Course to Tacoma. CP 18-19.

D. Claims by Intervenors

Intervenors are owners of residential properties adjacent to the Golf Course. CP 155-156; 124-131. Intervenors were allowed by the trial court to intervene in this action to prosecute their claims against Investors and Associates. CP 179-186. Among their claims, Intervenors asserted that the OSTA creates a restrictive covenant that runs with the land which Intervenors are entitled to enforce (CP 168-171), and that the OSTA and CZA operate as a common plan enforceable by Intervenors. CP 158-159, 168-171, 177-178.

E. Cross-Motions for Summary Judgment

Tacoma moved for partial summary judgment against Investors and Associates, seeking summary judgment in its favor on its declaratory judgment claims, including a declaration that the OSTA, as a matter of law, created a property interest for Tacoma in the Golf Course. CP 225. Intervenors joined in Tacoma’s partial summary judgment motion

on the same grounds, bases and evidence submitted by Tacoma. CP 1651-1653.

Investors and Associates jointly cross-moved for summary judgment against Tacoma seeking resolution of the declaratory judgment claims in their favor and a determination that the restrictions imposed by the OSTA and CZA constituted an unconstitutional taking. CP 1420-1454. Investors and Associates' further sought dismissal of Intervenors' third-party beneficiary-based causes of action. CP 1450-1453.

F. Trial Court's Decision on Cross-Motions for Summary Judgment Motion

On February 4, 2009, the trial court entered an Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment and Defendants' Joint Motion for Summary Judgment. CP 1957-1970. The trial court held that the golf course/open space land use designation in the OSTA remains binding and enforceable by Tacoma, unless and until the City of Tacoma approves a different use of the North Shore Golf Course property through the applicable land use application process. CP 1964. The trial court erroneously held, however, that the open space land use designation for the Golf Course property set forth in the OSTA and CZA does not constitute a property interest held by Tacoma in the Golf Course property. CP 1964. Having

determined that Tacoma does not have a property interest in the Golf Course property, the trial court dismissed with prejudice Tacoma's claim to quiet title. CP 1966. The trial court granted Investors' and Associates' cross-motion for summary judgment to the extent that it found that the OSTA and CZA did not create a property interest in Tacoma; it denied all other relief sought by Investors and Associates against Tacoma. CP 1965.

G. Court's Decision on Investors' and Associates' Motion for Summary Judgment Against Intervenors.

Coextensively, on February 27, 2009, the trial court entered an Order Granting Defendants North Shore Golf Associates, Inc. and Northshore Investors, LLC's Joint Motion for Summary Judgment Dismissal of Intervenor-Plaintiffs' Claims and Denying Motion to Strike. CP 1971-1979. This order dismissed all of Intervenors' claims in the action with prejudice (CP 1974), apparently relying on Investors' and Associates' incorrect assertion that all of Intervenors' causes of action and claims for relief were premised on Intervenors' allegations of third-party beneficiary status with respect to the OSTA and CZA. CP 1450.

IV. LAW AND ARGUMENT

A. Summary Judgment Standard.

On review of a summary judgment order, the Court engages in the same inquiry as the trial court. Wash. State Major League Baseball Stadium Public Facilities District et al. v. Huber, Hunt & Nichols-Kiewit Construction Co. et al., 165 Wn.2d 679, 202 P.3d 924, 926 (2009). All questions of law are reviewed de novo. Id.

Summary judgment is only appropriate only when there are no disputed issues of material fact and the prevailing party is entitled to judgment as a matter of law. CR 56(c); Wash. State Major League Baseball Stadium Public Facilities District et al., 202 P.3d at 926; Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). The party moving for summary judgment bears the initial burden of showing the absence of material issue of fact. LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

When determining whether an issue of material fact exists, the court construes all facts and inferences in favor of the nonmoving party. Michael, 165 Wn.2d at 601. A genuine issue of material fact exists where reasonable minds could reach different conclusions. Id. The nonmoving party need only forth specific facts that sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. Id.

Here, summary judgment should be reversed and granted in favor of Tacoma and Intervenors regarding Tacoma's property interest in the Golf Course. Second, Investors and Associates did not bring all of Intervenors' claims before the trial court on summary judgment and consequently did not show an absence of material fact regarding the Intervenors' claim that the OSTA qualifies as a restrictive covenant and that OSTA and CZA collectively form a common plan. The trial court's order should be reversed on those issues and the issues set for trial.

B. The City of Tacoma has a Non-Possessory Property Interest in the Golf Course

1. Specific portions of the February 4, 2009, Order that Intervenors seek the Court to reverse

Intervenors seek review of the following specified portions of the trial court's Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment and Defendants' Joint Motion for Summary Judgment, filed February 4, 2009:

1. The trial court's finding that "The open space land use designation on the Golf Course property set forth in the OSTA and CZA does not constitute a property interest held by the City of Tacoma in the Golf Course property." CP 1964.

2. The trial court's decree that "Defendants Joint Motion for Summary Judgment is GRANTED as set forth above to the extent that legal relationship between the City of Tacoma and NSGA created by the OSTA and CZA is not a real property interest" CP 1965.

3. The trial court's decree that "Having determined that the City of Tacoma does not have a property interest in the Golf Course, Plaintiff's claim to quiet title is dismissed with Prejudice." CP 1966.

2. Tacoma has a non-possessory property interest in the Golf Course

There were undisputed facts before the trial court on the summary judgment cross motions to determine that Tacoma has a non-possessory property interest in the Golf Course. CP 1961-1963. The trial court erred, however, in applying the law to these facts. The material facts show that this Court should reverse summary judgment and rule in favor of Tacoma, finding that Tacoma does have a non-possessory real property interest in the Golf Course.

a. Hearing Examiner's decision

The Report and Recommendation to the City Council was issued by the Office of the Hearing Examiner on March 3, 1981. CP 858-869.

The Report concluded that the Master Plan for the development of the Golf Course and the surrounding residential development was approved. CP 868. The Hearing Examiner expressly required that the Golf Course be perpetually used as a golf course:

The applicant shall execute an agreement similar in form to that Agreement attached to the Planning Department Report in order to provide a use in perpetuity of this property [Golf Course] in conjunction with the development of the North Shore Country Club Estates. (Emphasis added).

CP 868.

The OSTA was plainly the product of the Hearing Examiner's express requirement that Associates and Tacoma execute a document to ensure Tacoma's permanent non-possessory property interest in the Golf Course.

- b. The OSTA conveys to Tacoma a non-possessory property interest in the Golf Course

The restrictions on use of the Golf Course as open space set forth in paragraphs 2 and 7 of the OSTA (CP 656) constitute non-possessory real property rights conveyed to Tacoma as a condition of Tacoma's approval of the tax classification.

RCW 64.04.130 recognizes Tacoma's authority to acquire such interests and provides that any "development right, easement, covenant,

restriction, or other right, or any interest less than fee simple” acquired by a city to preserve or limit the future use of land for open space purposes “shall constitute and be classified as real property.”

The plain language of the OSTA itself shows that Tacoma has a non-possessory property interest in the Golf Course. Three pertinent provisions of the OSTA are as follows:

2. The use of such land shall be restricted solely to golf course and open space use. No use of such land other than as specifically provided here-under shall be authorized or allowed without the express consent of the City of Tacoma.

...

5. This agreement shall run with the land described herein and shall be binding upon the heirs, successors and assigns of the parties hereto.

...

7. This agreement shall be effective commencing on the date the legislative body receives the signed agreement from the Owner and shall remain in effect until such time as nullified by the City of Tacoma.

CP 656 (Emphasis added).

This language is in the form prescribed by RCW 64.04.130 for conveyance of an interest in land to a governmental entity for conservation, protection or preservation purposes.

The interest Tacoma received was the right to restrict use of the Golf Course for open space and clearly established a restrictive running covenant. As explained in the Declaration of John W. Weaver, a leading property legal scholar and the co-author of Washington Practice: Real Estate: Real Property Law (CP 1677-1679), the language referenced above that the OSTA shall “run with the land” is unique to the conveyance of running covenants; there is no other conceivable purpose for its inclusion in the OSTA (CP 1680), and is consistent with the hearing examiner’s “use in perpetuity” requirement (CP 1679-1680).

A running covenant imposes upon the possessor of land restrictions upon how he may use his land. 17 Stoebuck and Weaver, Washington Practice: Real Estate: Property Law § 3.1, at 124 (2d. ed. 2004). Running covenants are servitudes which constitute a burden upon the land. Id.

Though the trial court gave no weight to Professor Weaver’s declaration testimony (CP 1974), Professor Weaver’s declaration should have been considered to illuminate the intent and effect of the

conveyance language in the OSTA. Professor Weaver is a distinguished legal scholar and authority in the field of land use and real property law. Professor Weaver's observation and opinion that the language used in the OSTA "is the type of language typically used to create restrictive covenants" and that the phrase "runs with the land" is "particularly associated with restrictive covenants" is based on the documents Professor Weaver reviewed. CP 1680. Clearly, the restrictive covenant language utilized in the OSTA was included for the specific purpose of conveying a non-possessory real property interest in the Golf Course to Tacoma.

Stated simply, the OSTA constitutes a perpetual, restrictive covenant that runs with the land (the Golf Course) and conveys a non-possessory property interest to Tacoma.

c. CZA language shows Tacoma has a property interest in the Golf Course

In furtherance of the development Master Plan and legal requirements, the developer and the City of Tacoma signed the CZA, which applied to the Golf Course property and surrounding residential development. CP 627-630. The language of the CZA provides further evidence that Tacoma has a non-possessory property interest in the Golf Course. The CZA expressly states:

To insure the integrated development of the site, the total development shall be constructed and thereafter maintained in a unified manner. Such unified development and maintenance shall be in accordance with this agreement and the approved Site Plan, irrespective of the sale or division of ownership of the site. (Emphasis added).

CP 623-24.

- d. A municipality and a developer can create restrictive covenants

The running covenant that conveyed a non-possessory property interest to Tacoma in this instance was created by an agreement between a municipality and a developer as part of a re-zone land use decision. The ability of a municipality to covenant as part of a land use decision has been confirmed by the Washington Supreme Court. Lakeview Condo v. Apartment Sales, 146 Wn.2d 194, 201, 43 P.3d 1233 (2002). Such covenants, contained in arms-length bargained for agreements, run with the land and are enforceable against successive owners. Id. at 202-206.

- e. A property interest is implied by the circumstances

Further, servitudes can be created by implication: “The identity of the beneficiary of a servitude may be implied by the facts or circumstances of the transaction creating the servitude.” Restatement

(Third) of the Law of Property: Servitudes, § 2.11(b) (1998). In this light, the facts surrounding the reason for the OSTA, and its subject, imply the adjunct creation of a restrictive covenant through the OSTA.

The OSTA includes a full and complete legal description of the Golf Course property that it governs. CP 627-30. The Restatement makes clear that an equitable servitude is created by such references:

In a conveyance or contract to convey an estate in land, a description of the land conveyed by reference to a map or boundary may imply the creation of a servitude, if the grantor has the power to create the servitude, and if a different intent is not expressed or implied in the circumstance:

(a) A description of the land conveyed that refers to a plat or map showing streets, ways, parks, open space, beaches or other areas for common use or benefit, implies creation of a servitude restricting use of the land shown on the map to the indicated uses. (Emphasis added.)

Restatement (Third) of the Law of Property: Servitudes, § 2.13 (1998).

The basis for this rule is the assumption that the grantor who uses such description or map intends the use rights shown on the map.

Restatement (Third) of the Law of Property: Servitudes, § 2.13 cmt. a (1998). The standard remedy for breach of an equitable servitude is an

injunction to enforce it. See, e.g., Kalinowski v. Jacobowski, 52 Wash. 359, 100 Pac. 852 (1909). A recorded declaration of property restrictions creates a servitude (i.e., a covenant running with the land). Lake Limerick v. Hunt Mfd Homes, 120 Wn. App. 246, 258, 84 P.3d 295 (2004). Accordingly, the property interest here should be enforced.

C. Intervenors' Restrictive Covenant and Common Plan Claims were Improperly Dismissed

Intervenors further seek review of the February 27, 2009, trial court Order Granting Defendants North Shore Golf Associates, Inc. and Northshore Investors, LLC's Joint Motion for Summary Judgment.

Intervenors pled claims that the OSTA created an enforceable restrictive covenant, and that taken together, the OSTA and CZA were a "common plan." Investors' and Associates' summary judgment motion did not address these two theories and those two issues were not before the trial court. Investors' and Associates' summary judgment motion merely asserted that Intervenors were not entitled to enforce the OSTA under conventional third-party beneficiary analysis. CP 1450.

Intervenors responded to Investors' and Associates' summary judgment motion by showing that under a "common plan" theory, a property owner in a development may enforce a restriction against another property owner. CP 1696. Intervenors also identified to the

trial court that the equitable servitude created by a common plan theory is related to, but differs from, conventional third-party beneficiary theory. CP 1696-1697. The record does not support the trial court's dismissal of these claims. Accordingly, Intervenors respectfully request that this Court reverse the trial court's decision with respect to these two matters and set the two matters for trial.

Intervenors are entitled to have the OSTA and CZA reflected in the title to the Golf Course as binding restrictive covenants on the Golf Course property, which may only be removed or changed with their consent.

Equitable servitudes may be implied by a general plan:

Unless the facts or circumstances indicate a contrary intent, conveyance of land pursuant to a general plan of development implies the creation of servitudes as follows:

(1) Implied benefits: Each lot contained within the general plan is the implied beneficiary of all express and implied servitudes imposed to carry out the general plan.

(2) Implied burdens: Language of condition that creates a restriction or other obligation, in order to implement the general plan, creates an implied servitude imposing the same restriction or other obligation.

(b) A conveyance by a developer that imposes a servitude on the

land conveyed to implement a general plan creates an implied reciprocal servitude burdening all the developer's remaining land included in the general plan, if injustice can be avoided only by implying the reciprocal servitude.

Restatement (Third) of the Law of Property: Servitudes, § 2.14 (1998).

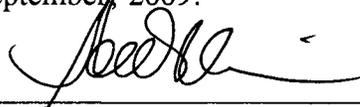
There can be no dispute that a common plan existed with respect to the Golf Course and the adjacent residences in North Shore Country Club Estates. Under the common plan theory, Intervenor's have third-party-like status as explicated by the Restatement and Stoebeuck and Weaver in Washington Practice. Intervenor's are entitled to equitable enforcement of the linchpin of the common plan, that the Golf Course be restricted to golf course/open space purposes.

At the very least, there are questions of material fact as to whether or not there is a common plan. Investors and Associates simply did not in any way address the common plan theory in their summary judgment motion and presented no evidence that a common plan did not exist. Accordingly, the trial court's broad order dismissing all of Intervenor's' claims should be reversed and Intervenor's' restrictive covenant and common plan-based claims should be set for trial.

V. CONCLUSION

To the extent the trial court found that the City of Tacoma does not have a property interest in the Golf Course, this Court should reverse the trial court's decision and grant summary judgment in favor of the City of Tacoma and Intervenors. Further, the Court should reverse the trial court's dismissal of all of Intervenors' claims and remand for trial Intervenors' restrictive covenant and common plan-based claims for declaratory relief.

DATED this 14th day of September, 2009.



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No. 38941-0-II

STATE OF WASHINGTON

BY _____
DEPUTY

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

| | | |
|---|---|------------------------|
| |) | |
| |) | |
| THE CITY OF TACOMA, |) | |
| |) | |
| Plaintiff/Respondent, |) | DECLARATION OF SERVICE |
| and |) | |
| |) | |
| JOHNNIE E. LOVELACE, an individual; |) | |
| LOIS S. COOPER, an individual; and |) | |
| JAMES V. LYONS and RENEE D. LYONS, |) | |
| a marital community, |) | |
| |) | |
| Intervenor-Plaintiffs/Appellants, |) | |
| v. |) | |
| |) | |
| NORTH SHORE GOLF ASSOCIATES, |) | |
| INC., a Washington corporation; |) | |
| NORTHSHORE INVESTORS, LLC, a |) | |
| Washington limited liability company; and |) | |
| HERITAGE SAVINGS BANK, a Washington |) | |
| corporation, |) | |
| |) | |
| Defendants/Respondents. |) | |
| _____ |) | |

The undersigned declares under the penalty of perjury under the laws of the state of Washington that on the date set forth below, true and correct copies of Corrected Brief of Appellants were served by agreement via e-mail, in PDF format, on the following:

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