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ASSIGNMENT OF ERROR

Appellants appeal the ruling of the Cowlitz County Superior court in the partial Summary Judgment of March 26, 2009 which held that the Bylaws of Ryderwood Improvement and Service Association were covenants that ran with the land and the ruling by the court in the final judgment that Ryderwood Improvement and Service association is HOPA compliant.

ISSUES

1. Whether the trial court erred when it ruled that the adoption of 1975 “Bylaws” created an enforceable covenant for all Ryderwood residents who did not specifically reject the Bylaws.
2. Whether the trial court erred when it ruled that the 1975 adoption of the By-Laws which created the restriction on ownership was a agreement of all the members as to the future of Ryderwood.
3. Whether the trial court erred when it ruled the 1975 By-Laws was an agreement intended to run with the land.

4. Whether the trial court erred when it ruled that the 1975 was an expressed agreement of all of its members.
5. Whether the trial court erred when it ruled that the plaintiffs may show that Ryderwood is not in compliance with HOPA by conducting the own survey.

STATEMENT OF THE CASE

In November 2007, Charles and Susan Weaver (hereafter Weavers) filed suit against Ryderwood Improvement and Service Association (hereafter RISA) alleging that RISA unlawfully filed bylaws in 1975 and again in 1992 on property that Weavers subsequently purchased in 2005. Weavers' further alleged that RISA's bylaws were not real covenants and/or equitable servitudes that ran with the land and that RISA's claim that Ryderwood was a 55+ community was void because RISA since 1988 had failed to comply with the provisions of the Housing for Older Persons Act, HOPA. CP 1- 35

After a protracted Summary Judgment Motion in which the trial court requested supplemental briefing and arguments over the course of three months, a lengthy hearing was held on March 11, 2009, resulting in a

partial Summary Judgment in favor of RISA on the question of the Bylaws as covenants that ran with the land. The judgment was entered against the Weavers on March 26, 2009. CP 266-269

In the March 11, 2009 Hearing, the court continued the remaining allegation of HOPA compliance and ordered the Weavers to perform a new HOPA survey of all the residents of Ryderwood and provide those findings to the court within ninety days. On July 20, 2009, after the Weavers refused/failed to perform such a survey, the court entered a final Summary Judgment in favor of RISA on the remaining allegation of HOPA compliance. CP 309-311

The original bases for the courts decision that the bylaws applied to Weavers property was laches (to late to complain about it) because the rules was adopted and recorded with the auditor in 1975. After the court reviewed the pleadings of the parties on Weavers' Motion for Reconsideration, CP 209-216, the court now holds that the adoption of the 1975 Bylaws of RISA created an enforceable covenant for all Ryderwood residents who did not specifically reject the Bylaws. CP 270-271

The bases for the courts decision that Ryderwood was a 55+ community was a single contested survey, spanning over two years, perform by RISA and completed in August of 2007. CP 309-311

ARGUMENT SUMMARY PER-RAP 10.3 (a) (6)

Weavers' appeal the trial court's partial Summary Judgment of March 26, 2009 that certain "Bylaws" of RISA, a private social association, apply to their real property. In addition, Weavers' appeal the trial courts Final Judgment of July 20, 2009.

ARGUMENT

1. Whether the trial court erred when it ruled that the adoption of 1975 "Bylaws" created an enforceable covenant for all Ryderwood residents who did not specifically reject the Bylaws.

RISA Bylaws filed on Weavers' property in 1975, 1993, and 1994 violate the statute of frauds. A real covenant is an interest in land. Dickson v. Kates, 132 Wash. App. 724,733,133 P.3d 498 (2006); see also Stoebuck, Law of Property 2nd edition P. 470 (2004). RCW 64.04.010 requires that every conveyance or encumbrance shall be by deed. RCW 64.04.20 requires that every deed shall be in writing, signed by the party to be bound, and acknowledged. A deed must contain a description of the property conveyed. Dickson, 132 Wash.App. at 133, Howell v. Inland Empire Paper Co., 28 Wash.App. 494, 495, 64 P2d 739 (1981).

The By-laws, of RISA, filed violate the Statue of Fraud. The By-laws do not identify the parties to be bound; do not provide legal description for the Town of Ryderwood. or RISA's jurisdictional boundaries or Weaver's Property (servient property), nor do the By-laws provide legal description of the intended benefited (dominant) estate nor does it refer to any documents that have an

adequate legal description of the subject properties. Id See also Dickson 132 Wash.App. at 734. A covenant with an inadequate legal description is void. Id.

2. Whether the trial court erred when it ruled that the 1975 adoption of the Bylaws which created the restriction on ownership was an agreement of all the members as to the future of Ryderwood.

RISA was unable to produce a single record/document in which members conveyed an interest in their property to RISA that complied with the statute of frauds. RISA could not even produce a ballot or a recorded vote adopting the 1975 Bylaws. RCW 65.08.080 See 3 & 4 below.

3. Whether the trial court erred when it ruled the 1975 By-Laws was an agreement intended to run with the land.

Creating Real Covenants:

To create a real covenant that restricts the use of land and that binds successors in interest, certain formalities and requirements must be met:

(1) The covenants must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds;

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(2) The covenant must 'touch and concern' both the land to be benefited and the land to be burdened;

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(3) the covenanting parties must have intended to bind their successor-in-interest;

(4) there must be vertical privity of estate, i.e., privity between the original parties to the covenant and the present disputants; and

(5) there must be horizontal privity of estate, or privity between the original parties.

Leighton v. Leonard, 22 Wn. App. 136,139, 589 P.2d 279 (1979). RISA cannot show the first, fourth or fifth elements of a real covenant, has been met. See 4 below.

4. Whether the trial court erred when it ruled that the 1975 Bylaws was an expressed agreement of all of its members.

Senior Estates Covenants A-1 through A-11 expired in June of 1975. Once the covenants expired, they could not be revived without each homeowner in Ryderwood explicitly agreeing to be bound. *Brandwein v. Serrano*, 338 N.Y.S.2d 192, 197 (1972) (holding that because neither defendants nor their predecessors-in-interest signed agreement extending covenants, they were not bound by such an agreement). Indeed, it is questionable whether these covenants could even be extended by community vote as they do not provide for amendment or extension by any method. See *Hardy v. Aiken*, 631 S.E.2d 539, 541-42 (S.C. 2006) (holding that covenants could not be extended because expiration clause contained no provision permitting change of termination date); see also *Hardy v. Aiken*, 631 S.E.2d 539, 541-42 (S.C. 2006) (Del. Ch. Nov. 7,

2007) (holding that vote to create corporation to police and enforce covenants did not imply that homeowners voted to extend covenants past termination date); *Barker v. Lake Camelot Property Owner's Ass'n, Inc.*, 751 N.W.2d 903, 2008 WL 878525 at *4 (Wis. App. Ct. April 3, 2008) (holding that vote to extend termination date of covenants was improper therefore covenants had expired and association had no right to impose liens on plaintiffs' property).

No Contract or written agreement exists between RISA or Predecessors to the Weavers. At the time that RISA adopted its bylaws in August 1975, those covenants imposed by Senior Estates on the Weavers' property had expired by their own terms. RISA has produced no contract or agreement between itself and any of the predecessors-in-interest to the Weavers that rises to the level of binding contract that complies with the Statute of Frauds that permitted RISA to record its bylaws as real covenants restricting the use of the Weavers' property. *See Brandwein*, 338 N.Y.S.2d at 197 (holding that in absence of agreement to bound, homeowners were not subject to neighborhood covenants). . *Compare Bradley*, 2007 WL 3317600 at *4 (“the document does not demonstrate that the owners knew they were voting for anything other than the incorporation of their homeowners (*sic*) association.”).

RISA is not in either Vertical or Horizontal Privity with Weavers. RISA has admitted that it never owned the property now owned by the Weavers. Hence RISA is in neither vertical nor horizontal privity with the Weavers. Because these privity elements are lacking, RISA cannot enforce the bylaws against the Weavers as real covenants. Therefore, the only way to enforce RISA's bylaws is if the Weavers are members of RISA – which they are not.

5. Whether the trial court erred when it ruled that the plaintiffs may show that Ryderwood is not in compliance with HOPA by conducting their own survey.

Here, in 1975, RISA unilaterally imposed an age restriction on owners and residents in Ryderwood, requiring that they be over 55 years of age. But in 1988 Congress amended the FHA to include a provision that prevented housing discrimination based on age. *Massro v. Mainlands Section 1 & 2 Civic Ass'n, Inc.*, 3 F.3d 1472, 1476 (11th Cir. 1993). WLAD adopted these same provisions. *See* RCW 49.60.222. Congress excepted housing designed for persons over 55 years of age from this anti-discrimination provision, but only if those communities and developments followed certain rules – the Housing for Older Persons Act Amendments (“HOPA”). *Id.*

Congress gave communities and developments a one year transition period to come into compliance with HOPA. *See* 24 C.F.R. § 100.305. RISA/Ryderwood did not take advantage of this transition period. Indeed, we know from the record presented on summary judgment that RISA/Ryderwood was not in compliance with HOPA in 1993, when *Massaro* was published. RISA only claims compliance with HOPA beginning in 2007. *see also Simovits*, 933 F. Supp at 1401-02 (holding that the circumstances surrounding the taking of the survey – in response to litigation threat – was merely fortuitous and not indicative of any intent to provide housing for persons age fifty-five or over and “effective compliance” does not meet FHA requirements as exceptions to discrimination are to be narrowly construed to effectuate the important goal of preventing housing discrimination). Hence, for over 17 years RISA has overtly discriminated against families with children as they were not in compliance with HOPA – from 1988 until perhaps 2007. *Accord Wilson v. Playa de Serrano*, 123 P.3d 1148, 1149 & 1152 (Ariz. App. 2006) (noting that the passage of the Fair Housing Act anti-age discrimination amendments in 1988 voided the “adult townhouse” restriction prohibiting children from residency in the complex).

HOPA cannot be unilaterally imposed in the absence of contractual authority. The *Wilson* court, *supra*, addressed a situation strikingly similar

to the instant matter. The declaration governing the community in *Wilson* contained a similar restriction to that in the Weaver's deed: The declaration defined the community as an "adult townhouse development." *Id.* at 1149. In 2002 the community took a vote to amend its bylaws and impose an age restriction of 55 years or over in the community. The vote passed, twenty-five to six. The appellate court invalidated the vote because it found that such a fundamental change to the occupancy criteria of a community had to be made in the chain of title – here the declaration. *Id.* at 1150. The appellate court found that the declaration did not grant the power to alter the contractual arrangements between the residents related to occupancy restrictions through a change to the bylaws – rather a change to the declaration had to take place, and that had not been done: "HOPA merely establishes that [a community] would not act illegally by enforcing an age restriction; such compliance does not mean, however, that [a community] has the contractual authority or right to impose that requirement on its members in the first instance." *Id.* Similarly, here, the Weavers have argued that RISA does not have the right to impose HOPA on the entire Ryderwood community without that community's consent – consent which RISA has failed to show exists.

CONCLUSION

The trial court erred when it ruled that the RISA bylaws were covenant that ran with the land and when it ruled that a single disputed survey in 2007 evidence HOPA compliance for the previous 19 years Therefore this court should reverse the trial courts decisions and grant judgment in favor of the appellant.

Respectfully Submitted,



Charles Weaver Pro Se

CERTIFICATE OF SERVICE

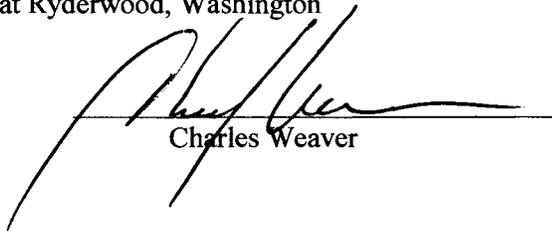
On this day, I caused a true and correct copy of the document; Appellants Appeal Brief to which this certificate is attached to be served upon the person(s) listed below at their respective address and/or fax number as follows:

- by mail by depositing same, in a properly addressed and postage paid envelope, with the United States Postal Service
- by fax to their respective fax number

Steve Goldstein
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of November, 2009 at Ryderwood, Washington



Charles Weaver

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