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No. 40490-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MAPLE BEACH ESTATES PROPERTY
OWNER'S ASSOCIATION, Appellant

vs

NORMAN TROTZER and VIRGINIA TROTZER, Respondents.

APPELLANT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

Maple Beach is a small, twenty-two owner, platted development in Mason County, having been developed in 1964. Each owner received an easement over the internal roadways and over Lot 13 therein which provided access to Lake Isabella.

An original covenant on the face of the plat provided for road maintenance. In 1986, a road maintenance agreement was executed which provided for more extensive road maintenance provisions. Mrs. Trotzer did not sign that agreement. In 1989, the Maple Beach Estates Property Owner's Association was formed and Lot 13 was transferred from the developer to the association. Mrs. Trotzer appeared at that meeting and voted in favor of accepting the association's formation and accepting Lot 13 from the developer. As a result of this meeting, the association became an active entity and Lot 13 was transferred from the developer to the association. For the next fifteen years the association made assessments, which Mrs. Trotzer paid. In addition Mrs. Trotzer participated in the affairs of the association and otherwise benefited therefrom.

In 2004, she refused to pay assessments and this law suit ensued.

The Superior Court ruled that Mrs. Trotzer was liable for maintenance of the roadway and insurance related thereto on a per owner basis as had been traditionally assessed, but was not liable for contributing to the costs of maintaining Lot 13. The court also ruled she was not a member of the association.

II. ASSIGNMENTS OF ERROR.

- A. The Superior Court should have held Mrs. Trotzer was a member of the Maple Beach Estates Property Owner's Association and she and her property were obligated thereto.
- B. The Superior Court should have held that regardless of her membership in the association, Mrs. Trotzer was obliged to contribute to the maintenance of Lot 13.
- C. The Superior Court should have awarded attorney's fees to Plaintiffs.

III. ISSUES

- A. Mrs. Trotzer should be deemed a member of the Maple Beach Estates Property Owner's Association and her property bound thereto.

1. Mrs. Trotzer, by participating in the affairs of the Maple Beach Estates Property Owner's Association and accepting benefits therefrom, has ratified the acts of the association and is estopped to deny she is a member thereof.
 2. RCW 64.38.010, and by implication of law, allows common interest communities to compel membership in an association.
- B. Mrs. Trotzer is otherwise liable for reasonable expenses in maintaining Lot 13.
1. She is liable as a co-holder of an easement thereto.
 2. She is liable under an implied in law, quasi-contract, unjust enrichment theory.
- C. Mrs. Trotzer is liable for attorney's fees pursuant to the association documents.
- D. Mrs. Trotzer is likewise liable to the association for attorney's fees for this appeal.

IV. STATEMENT OF CASE

This case has a long and convoluted history in two courts over a situation where the legal issues and ramifications have dwarfed a simple

need for a group of people with common interests to require all benefited persons to contribute for the common good.

A. PROCEDURAL HISTORY

This matter was originally brought in Mason County District Court (CP 435-438). Cross motions for Summary Judgment were brought (CP 359-360, 370, 374). The District Court determined it did not have jurisdiction over some of the matters as it affected title to real property (CP 149, 154, 155), and therefore, pursuant to CRLJ 14A(b), moved the entire matter to the Mason County Superior Court (CP210-211).

Cross Motions for Summary Judgment were again filed (CP 206-207, 193-196).

Plaintiff asserted various theories, those being:

1. Ratification/estoppel.
2. RCW Chapter 64.38.
3. Inherent authority of a common interest community.
4. Contract implied in fact.
5. Contract implied in law/unjust enrichment.
6. Liability as concurrent users of the easement.

(CP 197-198, 201-205, 361-369).

A close reading of the Defendants responses discloses that the

Defendant produced virtually no authority in contravention to the theories set forth by the Plaintiff. (CP 228-232, 370-374).

Of the six theories cited above by Plaintiff, Defendants addressed only one, the concurrent user issue. (CP 231). Beyond that, they asserted the statute of frauds, (CP 230) which is wholly inapplicable as all of Plaintiffs theories do not require a writing.

On January 26, 2009, the court ruled in the Plaintiff's favor on the basis of ratification/estoppel, on the basis of RCW Chapter 64.38 et. seq., and by implication of law as a result of the Defendants' position of being a part of a common interest community. (RP 48-51).

Thereafter, the Plaintiff sought attorney's fees (CP 125-134) and the Defendants brought a Motion for Reconsideration. (CP 116-124).

In that motion, the Defendants again emphasized the statute of frauds. (CP 118-122). They addressed only one of the bases of the court's decision. They did not reference ratification, estoppel or implied formation. The Defendants did reference RCW 64.38.010(1). (CP 123-124).

On March 19, 2009, the court reversed itself, and held there had been no ratification indicating the facts in the present case did not rise to the level of the facts in Ebel v. Fairwood Park II Homeowners' Ass'n, 136 Wash.App. 787, 150 P.2d 1163 (2007). (RP 96-98).

The court said nothing regarding RCW Chapter 64.38 et. seq., or of implied formation. (RP 96-98).

Consequently, to summarize the foregoing, on January 26, 2009, the court provided three reasons for its decision. In the Motion for Reconsideration the Defendants barely addressed only one of the reasons and nevertheless the court granted the Motion for Reconsideration on a basis other than that argued by the Defendants without addressing the other two issues upon which it based its original decision. (RP 96-98).

It would seem that RAP 9.12 precludes consideration of the issues not raised by the Defendants before the trial court.

In addition, the court also expressed that the Plaintiff now needed to come forward with some authority for the claim that insurance was a reasonable expense of maintaining a roadway. (RP 97-98). The court reconsidered that issue without the Defendants having asked the court to do so. The Plaintiff properly objected to its consideration. (RP 98).

The Plaintiff then brought a Motion for Reconsideration (CP 104-105) which was denied. (RP 146).

The court ultimately ruled that:

1. Mrs. Trotzer was and is liable for all expenses relating to the maintenance of the roadway within Maple Beach.

2. The full cost of insurance for Maple Beach is a reasonable expense relating thereto.
3. Assessment properly made on a per owner basis as had been historically done.
4. Mrs. Trotzer had no obligation to contribute to the maintenance of Lot 13.
5. Mrs. Trotzer was and is not a member of the association. (CP 9-12).

B. FACTS

Maple Beach is a small development of 22 (earlier 23) ownerships in Mason County, Washington (CP 85, 327, 329, 335). It was originally platted as “Boad’s Maple Beach Tracts” in 1964 (CP 243). The original recorded plat provided on its face that:

“The cost of maintaining area and future improvements of the Private Road shall be part of the owners and purchasers of tracts in this plat” (CP 244).

Virginia Trotzer originally acquired her interest at Maple Beach by way of Deed and Purchaser’s Assignment of Real Estate Contract in 1979, under the name Virginia Colloran. (CP 287-288). She subsequently conveyed the property to herself by way of Quit Claim Deed to show her then true name of Trotzer (CP 289-290). Mr. Trotzer was named as a party herein only in the event he claimed some marital, equitable interest in the

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property.

The original contract of sale was unrecorded and is not part of the record herein, but is reflected in subsequent conveyances (CP 280-290). The transactions also conveyed:

“... a perpetual easement for the purposes of ingress & egress to and from the waters of Lake Isabella over and across Lot 13 of said Plat of Boad’s Maple Beach Tracts” (CP 286, 287) (This language is some how omitted in a later document, CP 290).

In 1986, a Declaration of Road Maintenance Agreement was created (CP 246-260). Mrs. Trotzer never signed that document.

In 1988, a group of owners got together and agreed to form a homeowner’s association (CP 292-293). Shortly thereafter Articles of Incorporation were filed (CP 262-263), and By-laws created (CP 265-276).

On July 1, 1989, the first meeting of the association occurred (CP 294-299). Mrs. Trotzer was in attendance at that meeting and participated (CP 236, 294-299). Among other matters, a proposal was made to repair and clean out ditches, and do other road work. Mrs. Trotzer voted for this proposal which passed (CP 297). A proposal was also made to “purchase/deed over the ownership of the lot commonly known as the “access lot” which is owned by W.E. Boad.” (CP 295). Mrs. Trotzer voted in favor of this proposal, which also passed (CP 298).

As a result, on August 25, 1989, the Boads quit claimed Lot 13 to
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the Maple Beach Estates Property Owner's Association. (CP 278).

Between 1989 and 2003, including the 1989 meeting, it is known that Mrs. Trotzer attended at least four annual meetings. Records are missing from five meetings so it is known of these ten Maple Beach has records for, she did not attend six. (CP 294-344). Mrs. Trotzer has never acknowledged under oath how many she attended.

During this entire fifteen year period, there continued to be annual meetings. Mrs. Trotzer got notice of these meetings and minutes were sent to her. (CP 85, 236). She was made fully aware of the activities of the association and how the dues she was paying were being spent.

At the meetings, the annual assessments were determined, billings were sent to her, and she paid them. (CP 236, 238, 350, 352). At one annual meeting she was delinquent, was told this, and she immediately made payment. (CP 200). The annual assessments were, for the most part, fairly nominal, in the earlier years, \$50.00 per year. (CP 294-302).

In 1993, a separate water system assessment was raised by the board from \$50.00 to \$100.00 (CP 304). While that is unrelated to the assessments here, it was an action by the board which Mrs. Trotzer never protested.

In 2000, the annual road maintenance fee was raised from \$50.00 to

\$75.00 (CP 313). Mrs. Trotzer never objected and paid the increase (CP 236, 350, 352). In fact, she was present at the meeting and voted for the increased assessment. (CP 200, 312, 314). At the meeting on August 31, 2003, the dues were increased to \$225.00 per year (CP 324). In 2004, dues were reduced to \$200.00 (CP 326).

During this period of time, the board voted on and authorized work to be done and paid for on Lot 13. In 1991, removal of some cedar trees from the lot was authorized (CP 300). In 1996, funds were expended to fix the dock (CP 307). In 2000, repairs for a lawnmower to maintain Lot 13 were paid for (CP 312), and boat ramp work was authorized (CP 313). In 2001, work was done on the community dock and bulkhead on Lot 13, and expenses noted and paid for (CP 318). Work to complete the bulkhead and to backfill Lot 13 was discussed (CP 319).

In 2002, a new boat ramp was discussed and approved (CP 321). In 2003, work on the boat ramp, bulkhead and backfill for Lot 13 was reported, and the treasurer's report including payment for the foregoing was approved (CP 323). Liability insurance was discussed at this meeting and it was voted on to acquire it (CP 324). Money was also set aside for lighting for the boat ramp area (CP 324).

In 2004, the liability insurance was reported on (CP 325).

Throughout, Mrs. Trotzer paid her dues and never raised any objection to the amount or what the monies were spent for. (CP 85, 237). On April 5, 2004, she was sent a reminder that her dues assessed the prior August were due. (CP 354). She responded with a note and payment of \$20.00 on April 7, 2004, and indicated she would only pay \$50.00 per year (CP 354), referring to the \$50.00 per year under the Road Maintenance Agreement from 1986 (CP 354-355), a copy of which she attached to her letter (CP 355). This was the first indication in 15 years that she was not considering herself a part of the association.

She made an additional payment on June 4, 2004, of \$20.00 (CP 350, 352). Thereafter she stopped making payments.

This action was commenced on October 4, 2005 (CP 435).

Throughout this action she refused to make payments of any kind until January 14, 2008, when she realized she was in arrears even given the position she was taking with the District Court. (CP 228, 350, 352).

Prior to Mrs. Trotzer objecting to the increase in assessments and asserting she was not a member, she twice asked the association to gravel her private road which was not a part of the platted road system. They did (CP 139-140). The association constructed a stand to place mailboxes, which she used (CP 140).

During this period she attended meetings in 1989 (CP 238), 1991 (CP 236-237), 1992 (CP 200), and 2000 (CP 237). She was regularly given notice of the meetings and was provided copies of the minutes (CP 85).

In 2000, she attended the annual meeting where it was voted to increase assessments from \$50.00 to \$75.00 (CP 237, 313). The vote was unanimous. (CP 200, 312, 314).

For years, her dues were being spent to maintain Lot 13 and its improvements (CP 300, 307, 312, 313, 318, 319, 321, 323, 324, 325).

V. DISCUSSION

A. MRS. TROTZER SHOULD BE DEEMED A MEMBER OF THE MAPLE BEACH ESTATES PROPERTY OWNER'S ASSOCIATION AND HER PROPERTY BOUND THERETO.

1. Mrs. Trotzer by participating in the affairs of the Maple Beach Estates Property Owner's Association and accepting benefits therefrom, has ratified the acts of the association and is estopped to deny she is a member thereof.

Ebel v. Fairwood Park II Homeowner's Ass'n, 136 Wash.App. 787, 150 P.3d 1163 (2007), is directly on point and Maple Beach asserts it compel a determination she is a member of the association.

In Ebel, supra. there were seventeen plaintiffs, eight spouses and one single person. Over a period of four years, these parties participated "... to

varying degrees ...” in the affairs of the association (supra at 790 & 794). Some of the parties were board members and several on committees, others did not. Some “... submitted requests for property improvement to the Association for approval”, *Ebel*, supra. at 794.

Mrs. Trotzer attended at least four association meetings that can be proven, voted to accept the formation of the association and for the association to accept Lot 13, paid dues assessed by the association without complaint for 15 years, asked the association to gravel her road twice, used the association mail box stand, and received all mailings of the association, including notices of meetings and minutes thereof.

The facts in *Ebel*, show that the Trotzers participated more than some and less than others for eleven more years than any of them. All were held to have ratified the association’s existence.

While of less significance, as in *Ebel*, she “... submitted requests for property improvements to the association for approval”, *Ebel* at 794, by asking her road to be graveled and graded twice.

The Superior Court initially held that she had, indeed, ratified her membership and was estopped from denying her membership. On January 26, 2009, the court stated,

“I believe that, for what it’s worth – and I think it may be worth something – that Ms. Trotzer believed that she was a member of the

homeowners' association. She participated as a member of the homeowners' association, whether she went to just four meeting or three meetings, or whether she attended them all. She held herself out as a member of the association, paid its dues, and ... there are – I don't know what else she could have done.”

(RP 48, See also RP 49, lines 9-14).

However, after Maple Beach sought attorney's fees under the By-laws (CP 40), the court abruptly changed its decision and indicated that the Ebel case required Mrs. Trotzer to participate in the management of the association in order to be considered a member. (RP 96). The court later expressed it did not think her “participation evidenced an intent to be bound to the terms that there is no evidence she understood or should have understood”. (RP 146).

However, the court in Ebel, supra., at p. 794, made it clear that what Mrs. Trotzer may have thought about the effect of her participation is not relevant.

Also, if the comparison with the facts in Ebel is the issue, then Maple Beach should prevail. However, the Trotzers' comparative level of participation with the Plaintiffs in Ebel is not even the crux of the issue. The holding in Ebel does not rest on the extent to which a person participates, although it has some relevance. The holding makes it clear that is not determinative.

If a property owner is on notice that they are considered a part of an association and they keep silent or continue to accept the benefits of the association, they will be estopped from challenging the association;

“... the Property Owners ratified the 1998 covenants and thus are estopped from challenging them now. “A party ratifies an otherwise voidable contract, if, after discovering facts that warrant rescission, remains silent or continues to accept the contract’s benefits.” Snohomish County v. Hawkins, 121 Wash.App. 505, 510-11, 89 P.3d 713 (2004), review denied, 153 Wash.2d 1009, 111 P.3d 1190 (2005). The party must act voluntarily and with full knowledge of the facts.

It is undisputed that the property owners participated in the association to varying degrees after it was created. All paid dues over three years. Some served on the board, others served on committees. Some submitted requests for property improvements to the association for approval. All attended meetings in person or by proxy. The property owners clearly were aware of all the facts and accepted benefits from the association. In these circumstances, they cannot now claim the association lacks authority.

The property owners argue they did not ratify the association because they did not know their participation would so bind them and they can disassociate themselves at any time. They had notice of the 1972 and 1998 CCRs and had full knowledge of all the relevant facts. Even, if they can disassociate themselves at any time, the fact remains that they had a three-to-four year period of participation and acquiescence in the association’s authority. The property owners ratified the 1998 amendments and cannot challenge them now.” Ebel, supra. at 793-794.

A person who participates in and benefits from the affairs of an organization as a member cannot later disavow that association. That person has ratified the contract. Ward v. Richards & Rossano, Inc., 51 Wash.App.

423, 754 P.2d 120 (1988), rev. denied, 111 Wash.2d 1019, and Hooper v. Yakima County, 79 Wash.App. 770, 904 P.2d 1193 (1995).

Viewed in another light, while the Defendant claims to have not agreed to be a member of the association and thereby not agreed to be contractually bound thereby, Washington follows the objective manifestation theory relating to the formation of contracts, Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa, 123 Wash.2d 678, 871 P.2d 146 (1994), and agreements to be bound can be gleaned from the parties dealings, Bell v. Hegewald, 95 Wash.2d 686, 628 P.2d 1305 (1981), or implied from the circumstances, Kintz v. Read, 28 Wash.App. 731, 626 P.2d 52 (1981).

What is even more telling is, while the Plaintiff has shown numerous acts of the Defendant consistent with her membership, the Defendant has not pointed to one act, in 15 years, by Mrs. Trotzer evidencing an intent to not be a part of the association.

2. RCW 64.38.010, and by implication of law, allows common interest communities to compel membership in an association.

Homeowner's associations can be formed, and membership compelled, within a common interest community by way of implication and/or under RCW Chapter 64.38, et. seq.

RCW Chapter 64.38, et. seq. specifies the rights and responsibilities of homeowner's associations and those persons living within them. An interesting feature of the act is it does not define a homeowner's association as a group specifically organized for that purpose and enumerated as such. Rather, the act specifies that if a collective group meets the definition of the statute, it is a homeowner's association with the powers vested by the act.

RCW 64.38.010(1) defines a homeowner's association as:

“(1) “Homeowners’ association” or “association” means a corporation, unincorporated association, or other legal entity, each member of which is an owner of the residential real property located within the association’s jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member. “Homeowners’ association” does not mean an association created under chapter 64.32 or 64.34 RCW.”

Maple Beach, without its Articles of Incorporation and By-Laws, is an unincorporated association of persons who, by virtue of their ownership interests in real property which are benefited by at least two easements, and, by its common ownership in Lot 13, are obligated to pay for some or all of the obligations defined in the statute. This conforms to the foregoing definition.

Since the criteria of the definition is met, Maple Beach is vested with the authority of RCW Chapter 64.38 et. seq., and can regulate the affairs of

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the group through a corporation with by-laws as it has done.

While this notion of a homeowner's association by operation of law may sound novel, it actually is not. The law, where it has been considered, recognizes that the authorization to establish homeowner's associations may be otherwise implied by law.

The following cases, Wisniewski v. Kelly 437 N.W.2d 25 (Mich. Ct.App. 1989), Sea Gate Ass'n v. Fleischer, 211 N.Y.S.2d 767 (N.Y. Sup.Ct. 1960), Spinnler Point Colony Association, Inc. v. Nash, 689 A.2d 1026 (Pa.Comm. Ct 1997), and Lake Tishomingo Prop. Owners Ass'n v. Cronin, 679 S.W.2d 852 (Mo. 1984), recognize that a common interest community may be formed by implication when an express creation is defective or where owners in a community share the use of certain property but neither the developer nor the owners have provided for the shared responsibility for managing and maintaining the shared property.

See also, Hyatt, Condominium & Homeowners Association Practice: Community Association Law, 3rd Edition, Sec. 2.03. (copy attached as Exhibit A).

In accord is the Restatement of the Law Third, Property, Servitudes.

Section 4.13 provides, in pertinent part:

“4.13 Duties of Repair and Maintenance.

Unless the terms of a servitude determined under Sec. 4.1 provide otherwise, duties to repair and maintain the servient estate and the improvements used in the enjoyment of a servitude are as follows:

- (1) The beneficiary of an easement or profit has a duty to the holder of the servient estate to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary's control, to the extent necessary to
 - (a) prevent unreasonable interference with the enjoyment of the servient estate, or
 - (b) prevent unreasonable interference with the enjoyment of the servient-estate owner to third parties.

. . .

Section 6.5 provides, in pertinent part,

6.5 Power to Raise Funds: Assessments, Fees, and Borrowing

- (1) Except as limited by statute or the declaration:
 - (a) a common-interest community has the power to raise the funds reasonably necessary to carry out its functions by levying assessments against the individually owned property in the community and by charging fees for services or for the use of common property;
 - (b) assessments may be allocated among the individually owned properties on any reasonable basis, and are secured by a lien against the individually owned properties.
- (2) Unless expressly authorized by the declaration, fees for services rendered, or for the use of common property, must be reasonably related to the costs of providing the service, or providing and maintaining the common property, or the value of the use or service.”

It is reasonable to conclude that RCW 64.38.010(1), was intended to implement this notion of implied formation.

Once an association is deemed formed then it has all the powers enumerated by RCW 64.38.010, including the power to levy assessments. Thereafter, any decisions which are reasonable are to be upheld and all documents will be construed as arriving at an interpretation that protects the homeowner's collective interests. Riss v. Angel, 131 Wn.2d 612, 934 P.2d 669 (1997), Heath v. Uruga, 106 Wash.App. 506, 24 P.3d 413 (2001), Panther Lake Homeowner's Ass'n v. Juergensen, 76 Wn.App. 586, 877 P.2d 465 (1995), Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wash.App. 246, 84 P.2d 295 (2004).

Mrs. Trotzer has challenged the right of the association to levy certain assessments but has never asserted the expenditures did not meet the foregoing tests.

B. MRS. TROTZER IS OTHERWISE LIABLE FOR REASONABLE EXPENSES IN MAINTAINING LOT 13.

1. Mrs. Trotzer is liable as a co-holder of an easement thereto.

Mrs. Trotzer has an obligation as a concurrent holder of an easement over Lot 13.

Bushy v. Weldon, 30 Wash.2d 266, 191 P.2d 302 (1948), provides that concurrent users of an easement can be required to contribute equally to

the maintenance of that easement.

This is consistent with the Restatement of the Law, Property, Sections 4.13(4) which provides:

“The holders of separate easements or profits who use the same improvement or portions of the servient estate in the enjoyment of their servitude have a duty to each other to contribute to the reasonable costs of repair and maintenance of the improvements or portions of the servient estate.”

Washington courts have adopted the Restatement of Property in its various forms quite frequently. Most recently, in Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., supra, , Division II, adopted the Restatement of Property (Third), as it relates to equitable servitudes versus real covenants.

Other states have recognized this obligation. Barnard v. Gaumer, 146 Colo. 409, 361 P.2d 781 (1961), Bina v. Bina, 213 Iowa 432, 239 NW 68 (1931), Kennedy v. Bond, 80 NM 734, 460 P.2d 809 (1969). California has achieved the same result by statute. Cal.Civ.Code Sec. 845(a). See also Brice, Ely, Law of Easements and Licenses in Land, Revised Ed., Sec. 8.07, which, interestingly enough, does not indicate that any court in the United States has ever held that co-users of an easement do not have an obligation to contribute to maintenance.

This is also consistent with a similar analysis involving co-owners of property where the Washington Supreme Court has held that maintenance

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costs and improvements upon the property of a co-tenant can be charged against the other if they were necessary or enhanced the value of the property. Cummings v. Anderson, 94 Wash.2d 135, 614 P.2d 1283 (1980).

The assessments for Lot 13 are also proper as Lot 13 is a part of Maple Beach's road system in that it provides ingress and egress to Lake Isabella.

Finally, liability for dues and assessments for expenditures not fully explained in covenants but "correlated" thereto are permitted. Rodruck v. Sand Point Maint. Comm'n, 48 Wash.2d 565, 577, 295 P.2d 714 (1956), Lake Limerick Country Club v. Hunt Manufactured Homes, Inc., supra.

2. Mrs. Trotzer is liable under an implied in law, quasi-contract, unjust enrichment theory.

There are two classes of implied contracts, those implied in fact and those implied in law.

Contracts implied in fact arise from facts and circumstances showing a mutual consent and intent to contract. Contracts implied in law, sometimes called quasi-contracts, arise from an implied duty or obligation, not one created by an agreement, because the circumstances are such that the obligation rests upon the principle that whatever is certain a person ought to do, the law will suppose him or her to have promised to do. Chandler v.

Washington Toll Bridge Authority, 17 Wn.2d 591, 137 P.2d 97 (1943).

The purpose of implying quasi-contract is to prevent an unjust enrichment. Park v. Ross Edwards, Inc., 41 Wn.App. 833, 706 P.2d 1097 (1985).

The rule has been applied when one has performed services which help to preserve another's property. Chandler, supra. at 603. In this case, not only was Mrs. Trotzer's property interest preserved, but the value of her property enhanced (CP 233-234). The association made it clear to her through their historical assessment process that they expected her to pay her share, and she willing did so.

A person who has a right of access to facilities, even in the absence of an exercise of the right, which enhances the value of that person's property, is unjustly enriched if allowed to retain the benefit of the maintenance of those facilities. Lake Limerick, supra.

C. MRS. TROTZER IS LIABLE FOR ATTORNEY'S FEES PURSUANT TO THE ASSOCIATION DOCUMENTS.

If this court determines that Mrs. Trotzer is a member of the Maple Beach Estates Property Owner's Association, then Maple Beach is entitled to an award of costs and attorney's fees pursuant to Article VII, Section 2, of its By-laws which provides that when assessments are delinquent, Maple Beach shall also receive,

“... all expenses, attorney’s fees and costs incurred in enforcing same ...”.

D. MRS. TROTZER IS LIKEWISE LIABLE TO THE ASSOCIATION FOR ATTORNEY’S FEES FOR THIS APPEAL.

For the reasons set forth in Section C above, Maple Beach should be awarded its costs and attorney’s fees on appeal.

VI. CONCLUSION

Mrs. Trotzer should be deemed a member of the Maple Beach Estates Property Owner’s Association and responsible for all assessments made, and for Maple Beach’s costs and attorney’s fees throughout and on appeal.

DATED this 19 day of August, 2010.



STEPHEN WHITEHOUSE, WSBA #6818
Attorney for MAPLE BEACH

EXHIBIT A

**Condominium and Homeowner
Association Practice:
Community Association Law**

THIRD EDITION

Wayne S. Hyatt
Hyatt & Stubblefield, P.C.

American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street, Philadelphia, PA 19104-3099



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Perry, demonstrates an understanding of the importance of restrictions in residential communities and adopts a creative and helpful stance, rather than an overly technical or narrow view based on the notion that restrictions should be strictly construed in favor of the free use of land.

In *Tulk v. Moxhay*,⁵ the unfairness of allowing a subsequent purchaser with notice of a restriction to avoid it by claiming there was no privity between the original parties was the critical factor leading the court to grant equitable relief to the neighbor who wanted the covenant enforced. American courts have consistently held that constructive notice from the public records is sufficient to trigger equitable enforcement of covenants. This difference illustrates a public policy debate that much affects common interest communities and that this book revisits frequently.

Can an unrecorded restrictive covenant be enforced against subsequent purchasers? In *Romak v. Naples Mobile Estates Community Ass'n, Inc.*,⁶ the court held that a later purchaser was bound by restrictions created in an unrecorded deed. The purchaser obtained the property through an option contract, which referred to the deed that contained the restrictions. The court reasoned that the reference to the restriction was sufficient to put the purchaser on notice and that the purchaser had the opportunity to enquire into the restriction. The holding is consistent with the general rule that recording is not essential to validity of an instrument unless a statute requires recording. Restrictions and other covenants should always be recorded, however, because they will be terminated if a subsequent purchaser without notice acquires the property. See *Restatement of the Law, Third, Property (Servitudes)* §7.13.

§2.03 IMPLIED FORMATION

What happens when the owners in a community share the use of certain property but neither the developer nor the owners have provided, through covenants or otherwise, for sharing responsibility for managing and maintaining the shared property? A common interest community may be created by implication, notwithstanding a failed or defective attempt to establish one, although such circumstances may produce a less than desirable situation for all concerned.

A common interest community may be formed by implication, intentionally or unintentionally. Suppose three neighbors agree that one will build a common driveway across the land of the other two, and all three will use and share the costs of the driveway. The neighbors have created a common interest community because there are now mutual rights of enjoyment and obligations to pay and to maintain.

The unintentionally created common interest community generally results either when an express creation is defective or when one or more people seek to benefit from the existence of a valid arrangement in which they are not included. What would happen, for

⁵ 41 Eng. Rep. 1143 (Ch. 1848).

⁶ 373 So. 2d 693 (Fla. Dist. Ct. App. 1979).

example, if a fourth party sought to use, on a continuous basis, the driveway created by the three neighbors?

The implied formation of the common interest community is separate from but related to the question of the existence of the community association. There may be an association by implication, and an owner of property within the geographic limits of the common interest community may find himself or herself as a member even though that was not the property owner's intent. If a person receives benefits from the association but does not pay assessments or otherwise participate as a member, those in control of the association may have a duty to compel membership.

The opinion in *Wisniewski v. Kelly*⁷ illustrates the importance of having some governance structure and the necessity of a decision-making process even when that process is adduced by implication. It shows the other main way to create a binding obligation, that is, not one explicitly stated in the documents, but rather implied through the original grantor's intent. It is a good case to begin research on these issues and a continuing discussion about intention and the fact that membership and obligation may arise in ways other than specific language in a recorded covenant.

The *Wisniewski* case points out some difficult issues. How does one determine the original intent of the grantor or other original parties? Who is bound by such an agreement? How long does the obligation last? How could these problems have been better resolved or avoided in the first place? The answers depend on the facts of the case and are made more difficult by the passage of time.

In *Wisniewski v. Kelly*, the court reasoned that language in the covenant providing for creation of an association was sufficient to create the power and authority that the association exercised, even when those rights were not expressly granted. The court's reliance on the grantor's intent seems contrary to the long-standing proposition in the law of contracts: the proper inquiry is not into the intent of the party creating the restrictions but whether there exists a mutual agreement to be bound by those covenants and restrictions. See generally 3 Arthur L. Corbin, *Corbin on Contracts*, §546 (West, 1960). This case, however, illustrates a situation in which the basic contract rules do not apply.

*Sea Gate Ass'n v. Fleischer*⁸ is an often-cited case and has had a significant impact on a long line of assessment cases. The main issue in this case was the basis of implied authority and obligations. The court uncoupled membership and responsibility, and instead looked to the right to enjoy benefits as a basis for responsibility. The court held that "membership in the association bears no relationship to the rights of the property owners" as far as enjoyment is concerned. It was also clear that the association could exercise control over and maintain the property at a level so that it could be used and enjoyed.

The court pointed out that there is a right to management and that "inherent" in this right to manage is the right to maintain, and "maintenance costs money. Those who are entitled to enjoy that easement are the ones who must pay the costs of maintenance." It is

⁷ 437 N.W.2d 25 (Mich. Ct. App. 1989).

⁸ 211 N.Y.S.2d 767 (N.Y. Sup. Ct. 1960).

not membership but the right to use that creates the obligation. As this case shows, factual circumstances may also support an implied agreement.

The court also pointed out that when the defendants entered the gate as prospective purchasers, they “became aware” of the facilities and services available and they had to realize that someone had to pay for those amenities. The court concluded that when the defendants “undertook to purchase,” they impliedly accepted an offer from the community association to provide the facilities and services and “impliedly agreed” to pay their share of the costs. This obligation did not depend on the amount of use that the defendants made of the facilities and services but rather of that amount available to them. “Such implied agreement is one implied in fact.”

In *Wisniewski v. Kelly*, the court held that the association could exercise authority that the original grantor reserved to himself, although that power was never expressly granted or assigned to the association. Does an association have the authority to enforce covenants contained in a declaration when that declaration did not contemplate the formation or give authority to an association? The court in *Palm Point Property Owners’ Ass’n of Charlotte County, Inc. v. Pisarski*,⁹ held that a property owners association did not have standing to maintain an action to enforce deed restrictions in a property owner’s deed when the association was not a direct successor to the developer’s interest and no provision for such an association appeared in the grantor’s original subdivision scheme.

Compare the *Palm Point* decision with *Merrionette Manor Homes Improvement Ass’n v. Heda*,¹⁰ in which the court held that although the association had no legal title to property, it nevertheless had sufficient interest to bring suit to enjoin alleged covenant violations because its formation was contemplated in the declaration. Another case that assists in the analysis is *Russell v. Palos Verdes Properties*,¹¹ holding that a property owners association has standing to bring suit to enforce restrictive covenants when the formation of such an association was set forth in the declaration, notwithstanding that it owned no realty in the covenant area. The issue of association standing to enforce covenants is further addressed in subsequent chapters.

The court in *Sea Gate Ass’n v. Fleischer* based its holding in part on the determination that there was a contract implied in fact between the parties, and that the Fleischers agreed to pay a proportionate share for the use and enjoyment of services provided by the Sea Gate Association. In *Board of Directors of Carriage Way Property Owners Ass’n v. Western Nat’l. Bank of Cicero*,¹² the court did not find an implied contract between an apartment owner and the association obligating the apartment owner to pay for common area maintenance. See also *Spinnler Point Colony Association, Inc. v. Nash*,¹³ in which the court held that property owners, who had the right to use the development’s roads and lake, were obligated to pay assessments to the association for their proportionate share of expenses of upkeep of

⁹ 608 So. 2d 537 (Fla. Dist. Ct. App. 1992).

¹⁰ 11 Ill. App. 2d 186, 187; 136 N.E.2d 556, 557 (1956).

¹¹ 32 Cal. Rptr. 488 (1963).

¹² 487 N.E.2d 974 (Ill. App. Ct. 1985).

¹³ 689 A.2d 1026 (Pa. Commw. Ct. 1997).

the development's roads and amenities, even though there was no reference to the association in their chain of title.

Restrictive covenants historically have been viewed as having a negative effect on property value. Accordingly, when ambiguities existed in covenants, courts historically have construed them in favor of the unrestricted use of the property. See, for example, *Baltimore Butchers Abattoir & Live Stock Co. v. Union Rendering Co.*¹⁴ and *Briggs v. Hendricks*.¹⁵ Today, restrictive covenants are sometimes viewed as value enhancers of property. See *Mountain Park Homeowners Ass'n, Inc. v. Tydings*.¹⁶ This book highlights several cases that acknowledge the value-enhancing aspects and public-policy justifications of restrictive covenants (because common interest communities provide needed, affordable housing although one might question the *affordable* label in many developments).

All of these issues can arise in the context of amendments. Three interesting cases illustrating different approaches and results are *Lakewood Prop. Owners Ass'n v. Larson*,¹⁷ *Zito v. Gerken*,¹⁸ and *Lake Tishomingo Prop. Owners Ass'n v. Cronin*.¹⁹ The *Lakewood* case might be characterized as an "old view" case because the court examined of the intent of the parties rather than the restrictions and held in favor of the free use of property. The court held that the "language employed determines the extent and scope" of the ability to make changes in the document even when the document itself anticipates that changes will be made.

The court held that the right to change was limited to making changes in existing provisions and did not permit the addition of new provisions. The court ruled in favor of the owner who refused to pay the assessment:

The Association urges that requiring the payment of an assessment does not constitute a new burden upon defendant because the deed conveyed to him included easements permitting him to use common area, the repair and maintenance of which, by law, must be paid by easement holders. While Illinois law recognizes that where a party has an easement on a servient tenement, it has the duty to maintain and repair it..., this duty to pay cannot be imposed in the instant case for several reasons. First, the record does not indicate that the Association sought to assert this theory at trial, and thus waived it. Second, where a grantee has an easement which he shares with others, his duty to repair and maintain it must be apportioned with all other easement holders based upon the extent of the individuals' use of the easement...Furthermore, the duty to pay includes only those repairs and maintenance requirements which are necessary and reasonable....In the instant case, the record does not contain any evidence establishing the extent of defendant's use of the easement, if any,

¹⁴ 17 A.2d 130 (Md. 1940).

¹⁵ 197 S.W.2d 511 (Tex. Ct. App. 1946).

¹⁶ 864 P.2d 392 (Wash. Ct. App. 1993).

¹⁷ 121 Ill. App. 3d 805 (1984).

¹⁸ 225 Ill. App. 3d 79 (1992).

¹⁹ 679 S.W.2d 852 (Mo. 1984).

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that the assessments would be applied to repair and maintain these easements, that the repair and maintenance requirements were necessary and reasonable, or, for that matter, whether the Association had the authority to enforce defendant's obligation to pay for repairs and maintenance. Therefore, based upon the record before this court, the Association's argument lacks merit.

The court is illustrating a principle as well as problems in the association's case resulting from poor trial presentation. The court also focused on the issue of notice:

The Association further argues, correctly, that had a covenant in the deed required membership in the Association and the payment of dues, a court would be obligated to enforce it. (See *Streams Sports Club, Ltd. v. Richmond* (1982), 109 Ill.App.3d 689, 694-95...*Fox Lake Hills Property Owners Association v. Fox Lake Hills, Inc.* (1970), 120 Ill.App.2d 139, 145-46, 256 N.E.2d 496; *Bessemer v. Gersten* (Fla. 1980), 381 So.2d 1344, 1347; *William W. Bond, Jr. & Associates, Inc. v. Lake O'The Hills Maintenance Association* (Miss. 1980), 381 So.2d 1043, 1044.) However, the instant deed does not contain such a covenant. Therefore, while it may have been wise and proper for the developer to include such a covenant because assessments of this nature serve an important function to insure that owners of individual lots may enjoy the use of their easements and maintain the value of their property..., the developer failed to so include a provision and defendant purchased the property without notice that such a provision may later be imposed upon him. Therefore, just as courts will enforce changes of restrictions made pursuant to a provision so permitting because the grantees take title of the property with notice of the possibility that the original restrictions may be changed..., they should not enforce changes where a grantee takes title without proper notice that a majority of the lot owners may impose an assessment upon his property at some future time. Such a grantee can only be bound by what he had notice of, not the secret intentions of the grantor. *Cimino v. Dill* (1982), 108 Ill. App. 3d 782, 785, 439 N.E.2d 980.

In the *Zito* case, the passage of time and the fact that the documents created an obligation from the outset led the Illinois court to reach a different result. Comparing the two cases can be very helpful to understanding the concepts involved. In *Zito*, the developer had created the association at the outset and had given it broad powers, and the court interpreted and gave effect to that process:

A restrictive covenant which has been modified, altered or amended will be enforced if it is clear, unambiguous and reasonable. *Lakeland Property Owners Ass'n. v. Larson* (1984), 121 Ill.App.3d 805, 810, 77 Ill. Dec. 68, 72, 459 N.E.2d 1164, 1168; *Sanni, Inc. v. Fiocchi* (1982), 111 Ill.App.3d 234, 238, 66 Ill. Dec. 945, 949, 443 N.E.2d 1108, 1112. The covenants here were created to establish a common and uniform scheme of regulation to ensure the open, unobstructed character and nature of the subdivision and to maintain continued enjoyment of the same. The 1987 amendment does not seek to change the character of Lake Briarwood or to impose unreasonable burdens upon any lot owners within the subdivision. Rather, the amendment merely sets forth a

method and plan by which to enable Association to fulfill the original intent and purposes of the covenants.

Moreover, the record demonstrates that the terms and conditions of the 1987 amendment impose a minimal collective burden upon the residents of Lake Briarwood, while at the same time preserving the nature and character of the subdivision. Under the circumstances, the restrictive covenants and the 1987 amendment are clear, unambiguous and reasonable. The trial court, therefore, erred when it failed to enforce the 1987 amendment to the restrictive covenants. But see *Lakeland Property Owners Ass'n. v. Larson* (1984), 121 Ill.App.3d 805, 77 Ill. Dec. 68, 459 N.E.2d 1164. It is therefore unnecessary to address Association's other contentions.

In the interesting *Tishomingo* case, the court was faced with a defective set of CCRs that could not accomplish that which almost all owners acknowledged needed to be done.

It is clear to us that all the property owners in the subdivision, except appellants, have recognized at least a contractual obligation to bear their fair share of the cost of preserving the common properties for the benefit of all owners in the subdivision. 679 S.W.2d at 857.

The court was convinced of the "equitable obligation" but could not do what owners so often ask the attorney to accomplish: have the court rewrite the CCRs because the documents do not do what is desired. The court, however, found an appropriate way to attack the problem.

While the Court is powerless to reform or amend the original covenants, we cannot close our eyes to the fact that, when compared to the cost of the dredging operation, the assessment permitted by the original covenants was tantamount to no assessment at all. The assessment voluntarily made by the large majority of lot owners appears fair and equitable. *Id.*

Finding the assessment both "reasonable and necessary" in light of the facts of the case, the court held:

[O]ur sense of fairness and justice compels us to enforce the clear equitable obligation of appellants to bear their share of the costs necessary for preserving the common property essential for continuation of the subdivision.... Thus understood, the voluntary assessment made and honored by the great majority of property owners was enforceable by the trial court under the court's power to render equity. *Id.*

§2.04 SUMMARY

To understand community association law, it is necessary to appreciate the range and impact of the common interest concept.

Having seen that the common interest community and its community association may be created in various ways, both intentionally and unintentionally, it is appropriate to examine the community association in more detail and to see both its powers and how those powers are to be exercised.

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DECLARATION OF MAILING

I declare:

On the 19th day of August, 2010, I mailed a true and correct copy of Appellant's Brief in a properly stamped envelope by regular mail addressed as follows:

Peter J. Nichols
Attorney at Law
2611 NE 113th Street, Suite 300
Seattle, WA 98125

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

Signed at Shelton, Washington on August 19, 2010.



SANDRA L. BACA