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This matter involves a challenge by an owner of two lots with the Debra Jane Lake Plat to the authority of the resident homeowners association, Defendant Lake Jane Estates (“LJE”), to enforce a restrictive covenant that requires approval before any lot within the Plat is subdivided. The lot owner, Appellant Randy Jensen (“Jensen”), claims that LJE has no such authority and, even it did, it exercised this authority in an unfair manner. Applying well-established Washington precedent, the trial court disagreed with Jensen on all counts.

I. STATEMENT OF CASE

A. The Debra Jane Lake Plat

LJE is the homeowners association for a subdivision of approximately 440 residential lots within the City of Bonney Lake.¹ The subdivision was created in 1959 through the Debra Jane Lake Plat and consists of relatively large lots.² The subdivision is situated around a lake, and it provides several public amenities, such as parks, lake access, a pool, and a tennis court.³ Because the Lake Jane Estates subdivision contains large wooded lots with only a single residence typically built toward the front of each lot – essentially creating a green

¹ Exs. 1, 2, 3, 4, 58, 59.

² Exs. 1, 2, 3, 4.

³ Exs. 1, 2, 3, 4. RP 214.

belt behind the houses – as well as the lake and park areas, the look and feel of this subdivision is very different from most subdivisions found within the city limits.⁴

When the Debra Jane Lake Plat was recorded with the Pierce County Auditor in 1959, the developer, the Lake Tapps Development Company, set forth restrictive covenants on the face of the Plat.⁵ These notations include the express provision that the “covenants [are] running with the land and binding upon future owners, their heirs, successors or assigns.”⁶ The covenants include a restriction requiring that a lot owner obtain approval before subdividing her lot:

6. No lot in this plat shall be subdivided without the written consent of the LAKE TAPPS DEVELOPMENT CO., INC.⁷

Enforcement of the above restriction, as well as the other restrictions on the Plat, was provided for in paragraph 14 of the plat restrictions:

14. The breach of any of the foregoing conditions shall constitute a cause of action against the person committing the breach by T&J Maintenance Company [now

⁴ RP 256, 359, Exs. 60-64.

⁵ Finding of Fact 2.

⁶ Finding of Fact 2, Ex. 1.

⁷ Finding of Fact 3, Ex. 1.

known as Defendant Lake Jane Estates] or the Lake Tapps Development Company.⁸

The plat restrictions are recorded and, thus, anyone who purchases a lot in the subdivision is on notice of the restrictions.

The developer of the Debra Jane Lake Plat also filed Articles of Incorporation and Bylaws for the T&J Maintenance Company;⁹ the name of T&J Maintenance Company was changed to LJE through an amendment to the Articles of Incorporation in 1970.¹⁰ The Articles also give the Association, through its Board of Trustees, authority to enforce the restrictive covenants.¹¹ Among the Association's other purposes are the improvement and maintenance of common areas; collection of annual assessments from the membership; and engaging in "whatever actions" are necessary or proper for or incidental to the exercise of any of its powers.¹²

⁸ Finding of Fact 4, Ex. 1.

⁹ Exs 57, 58. LJE's Articles of Incorporation were signed in July 1, 1959 by Edward A. Clifford as President of the Lake Tapps Development Company, Inc.; Richard A. Clifford as Secretary/ Treasurer of the Lake Tapps Development Company; and three other individuals, all of whom were the original trustees. Ex. 57. Benjamin Clifford, one of these original trustees, also signed the Bylaws as President of Lake Jane Estates on July 1, 1959. Ex. 58. The Debra Jane Lake Plat, which included the plat restrictions (also known as restrictive covenants) at issue in this lawsuit were also signed by Edward A. Clifford, as President of the Lake Tapps Development Company, Inc., and Richard A. Clifford, as Secretary/ Treasurer of the Lake Tapps Development Company, Inc. Ex. 1. Hence, the developer created LJE even before it approved the plat restrictions that gave LJE the authority to enforce all of the plat restrictions.

¹⁰ Finding of Fact 5.

¹¹ Finding of Fact 5, Ex. 57 at 4.

¹² Ex. 57 at 5 (¶19).

In 2003 the developer filed articles of dissolution with the Secretary of State.¹³ Accordingly, it no longer exists.

B. Subdivisions Within the Debra Jane Lake Plat

1. Subdivisions from 1959 – October 2005.

The developer subdivided a lot into two lots in 1965.¹⁴ In April 1966 the developer transferred all common areas to LJE. In 1973 LJE received and approved two requests from its members to subdivide lots within the Debra Jane Lake Plat.¹⁵

Evidence indicates that in 1990 two property owners wishing to subdivide their properties may have been referred to LJE by the City of Bonney Lake.¹⁶ In 2000 LJE filed two lawsuits seeking to uphold its right to enforce the restrictive covenant on subdivisions. After a trip to this Court,¹⁷ these lawsuits were tried in mid 2004.¹⁸ Between 2001 and October 2005 – when increasing regional population and land pressures made subdivision more attractive – LJE reviewed six applications from lot owners in the Debra Jane Lake Plat seeking to

¹³ Ex. 22. Finding of Fact 16..

¹⁴ Exs. 5, 6. Finding of Fact 6.

¹⁵ Exs. 46, 47. One of these approved subdivisions was not formalized until 1982. Finding of Fact 7, Ex. 47

¹⁶ Exs. 48-50. Finding of Fact 8.

¹⁷ Lake Jane Estates Homeowners Ass'n v. City of Bonney Lake, No. 28471-5-II, 2003 WL 21500745 (July 1, 2003). The issue of whether LJE had authority to enforce Restriction No. 6 was not before the Court in this earlier case.

¹⁸ Finding of Fact 10. LJE prevailed at trial. RP 416.

subdivide their property and subsequently approved or denied those requests.¹⁹ When determining whether to approve or disapprove a request to subdivide a lot, the LJE Board of Trustees considered various factors, including but not limited to overall community sentiment; aesthetics; potential effects on Association property and assets, potential effects on other members' properties, the site plan of the proposed project; the opinions of the lot owner who live closest to the lot(s) that is the subject of the subdivision proposal, and the effect granting the proposal might have on the ability to deny future subdivision requests.²⁰

LJE conducted a survey of its members in 2000 asking for their opinion regarding whether to allow the subdivision of lots within the Debra Jane Lake Plat.²¹ LJE received 117 responses, of which 85% were opposed to allowing the subdivision of lots.²² The Board of LJE has also received very strong opposition from its members to subdivisions in response to specific subdivision requests and during annual meetings.²³

¹⁹ Finding of Fact 9. Exs. 37, 45, 80A, 81A, 82, 83B, 84A, 85A, 86A.

²⁰ Finding of Fact 17. RP 255, 418, 446-47.

²¹ Finding of Fact 14. Ex. 89 RP 409-11. A total of 117 surveys were returned to LJE. RP 410.

²² Finding of Fact 14.

²³ Finding of Fact 15; Exs. 80B, 81D, 84B, 85H.

In addition to the two aforementioned 1990 subdivisions, Jensen maintains that 12 lots – or 2.7% of the total lots within the Debra Jane Lake Plat – were subdivided between 1972 and 2005 for which no approval was obtained from LJE.²⁴ One of these alleged subdivisions was in fact a boundary line adjustment, not a subdivision.²⁵ LJE unsuccessfully attempted to address this with the City of Bonney Lake Hearing Examiner, but it did not file suit because it did not have authority to stop boundary line adjustments.²⁶ Additionally, seven of these lots were “super-sized” lots within Division 3 of the Debra Jane Lake Plat, and another was a large lot on Debra Jane Lake Plat.²⁷ The lots resulting from these seven subdivisions are similar in size or larger than the majority of lots within the Debra Jane Lake Plat.²⁸ It is not known whether the developer approved any of the subdivisions that Jensen claims were not approved by LJE.²⁹

2. The Vanunu Subdivision

In October 2005 LJE approved the request to subdivide a single large lot owned by Nisim Vanunu located at 7035 Locust Avenue East

²⁴ Finding of Fact 11.

²⁵ Finding of Fact 12.

²⁶ RP 415.

²⁷ Finding of Fact 12.

²⁸ *Id.*

²⁹ Finding of Fact 13.

that was formerly two lots into four lots.³⁰ A key consideration of the LJE Board of Trustees when approving the subdivision proposal was the fact that the lots in question contained an abandoned, derelict former fire station building that created a serious nuisance, and it would be torn down if the subdivision occurred.³¹ LJE received by mail nine responses in favor of the subdivision and six responses opposing the subdivision.³²

3. The Jensen Subdivision

Jensen owns two partially adjacent lots containing single family homes within Debra Jane Lake Plat.³³ After applying with the City of Bonney Lake and learning from the City that he needed to get LJE's approval before subdividing these lots, he approached LJE and was provided with information about its approval process.³⁴ In November 2005 Jensen submitted an application to LJE seeking approval to short subdivide these two lots into six lots.³⁵ The Board of Trustees sent a survey to approximately 85 lots owners seeking their opinion regarding

³⁰ Finding of Fact 18.

³¹ Finding of Fact 20. RP 269-71, 423. More information about the Vanunu subdivision is provided in Section II.B.

³² Finding of Fact 19.

³³ Finding of Fact 21.

³⁴ RP 166.

³⁵ Finding of Fact 21..

Jensen's proposed subdivision.³⁶ Jensen spoke with the owners of these 85 neighbor properties to explain his proposal and seeking to turn in their surveys for them; ultimately, 26 of the lot owners he spoke to – or 30% – gave Jensen their surveys to submit in support of his proposal.³⁷ Three of these lot owners later rescinded their approval.³⁸ Notably, Jensen admitted he did not submit any surveys from lot owners who told him they were opposed to his proposal.³⁹ Including the 26 surveys turned in by Jensen personally, 34 supported the proposal and 17 were opposed.⁴⁰

As part of his application, Jensen submitted a map of the Debra Jane Lake Plat on which he marked all of the lots he believed could be subdivided given the current regulations and water availability and which could not.⁴¹ Overall, Jensen claimed that there were 95 lots that could be subdivided.⁴²

On May 18, 2006, the LJE Board of Trustees unanimously rejected Jensen's request to triple the number of houses on his lots.⁴³

³⁶ Finding of Fact 23.

³⁷ RP 181.

³⁸ Finding of Fact 24. RP 233, 264-66.

³⁹ Finding of Fact 24. RP 181-82.

⁴⁰ Finding of Fact 24.

⁴¹ Ex. 98, RP 495-96, 499-502.

⁴² Ex. 98.

⁴³ Ex. 39.

Before doing so, LJE investigated and considered the relevant circumstances, including concerns about the possible floodgate effect of allowing too many subdivisions.⁴⁴ At the meeting where the application was denied, Jensen requested an explanation for the Board's decision, and the Board member declined to give him one.⁴⁵ A follow letter to Jensen invited him to contact the Board if he had any questions, but he declined to do so.⁴⁶

C. Procedural History

Jensen filed the present lawsuit on July 28, 2006⁴⁷. On January 25, 2007, he filed a motion for judgment on the pleadings, claiming that restriction no. 6 gave only the developer the authority to approve or deny shortplat requests and, since the developer was dissolved in 2003, there was no longer any entity with the authority to approve or deny shortplat requests. The trial court granted the Jensen's motion on February 2, 2007.⁴⁸ Three days later, Division I of the Court of Appeals issued its decision in Green v. Normandy Park Riviera Section

⁴⁴ Findings of Fact 30, 32.

⁴⁵ Finding of Fact 25.

⁴⁶ Ex 36.

⁴⁷ CP 1-3.

⁴⁸ Finding of Fact 26.

Community Club;⁴⁹ LJE filed a motion for reconsideration based on this new authority, and the motion was denied.⁵⁰ LJE timely appealed.⁵¹

On May 13, 2008, this Court reversed the grant of judgment to Jensen and remanded this matter back to the trial court. Citing extensively to the Green v. Normandy Park Riviera Section Community Club decision, this Court held that the dissolution of the developer did *not* render the plat restriction on subdivision unenforceable. Rather, the only question was whether LJE had either direct or “de facto” authority to enforce it:

Here, the purpose of restrictive covenant number 6 is to protect the planned development in the Debra Lake Jane Plat by providing a method for community approval of any subdivisions within the plat. Restrictive covenant number 6 benefits the community's homeowners because it requires homeowners to seek approval before subdividing their land, thus maintaining the character of the community. Moreover, the benefit created by the covenant adds value to the homeowners' land. *See Green*, 137 Wn.App. at 684, 151 P.3d 1038. By the terms of the covenants, they run with the land and, thus, subsequent purchasers of individual lots are bound by the restrictions automatically. **If the covenant became invalid and unenforceable when the developer dissolved, as Jensen asserts it should, it would compromise the benefit homeowners had purchased and bargained for.** These other homeowners have the right to rely on the restrictive covenants in place when they purchased into

⁴⁹ 137 Wn. App. 665, 151 P.3d 1038 (2007), *review denied*, 163 Wn.2d 1003, 180 P.3d 783 (2008) .

⁵⁰ Finding of Fact 26.

⁵¹ *Id.*

the Debra Lake Jane Plat. See Green, 137 Wn.App. at 684, 151 P.3d 1038. Accordingly, we hold that the developer's dissolution did not terminate authority to enforce these covenants. **Whether LJE has such enforcement authority either as a de facto successor or under the terms of the covenants remain issues for trial.**⁵²

A bench trial before the Honorable Judge Culpepper was held starting on April 13, 2010.⁵³ This issues before him at trial were (1) whether LJE had direct or de facto authority to enforce the restrictive covenant on subdivisions; (2) whether the authority to enforce the restriction on subdivision had been abandoned or waived, and (3) whether LJE acted arbitrarily and in bad faith when it denied Jensen's application to subdivide his two lots into six lots.⁵⁴ On April 21, 2010 Judge Culpepper issued a ruling finding for LJE on all counts.⁵⁵ Jensen subsequently filed a motion for reconsideration, which was denied.⁵⁶ Notably, the motion for reconsideration raised brand new arguments that LJE did not have an opportunity to respond to at trial.⁵⁷

⁵² Jensen v. Lake Jane Estates, No. 36094-2-II, 2008 WL 2026096, 3 (May 13, 2008) (emphasis added) (attached to this memorandum as Exhibit B).

⁵³ CP 132.

⁵⁴ RP 28-29.

⁵⁵ RP 594-612.

⁵⁶ RP 141-42.

⁵⁷ RP 121-128.

II. ARGUMENT

On appeal, Jensen presents two arguments⁵⁸ to support his contention that he should be allowed to subdivide his two lots into six lots: (1) only the Lake Tapps Development Company – which is now dissolved – had the authority to enforce Restriction 6; and (2) LJE acted unreasonably and in bad faith when it denied his request to subdivide his two lots into six lots. These will be addressed in turn. LJE will then address the two evidentiary issues raised by Jensen.

A. LJE Has the Authority to Enforce the Restriction on Subdivision

Jensen continues to argue that only the developer has the authority to enforce the plat restriction on subdivision. But in its prior decision in this matter – which is, of course, the law of the case – this Court rejected this argument and held the only question was whether LJE had either direct or *de facto* authority to enforce the restriction.⁵⁹ Following trial, the Honorable Judge Culpepper ruled that LJE had both direct authority to enforce the restriction on subdivision as well as *de facto* successor authority.⁶⁰

1. The Role of Restrictive Covenants

⁵⁸ Jensen does not appeal the trial court's ruling that LJE had abandoned or waived its right to enforce the restrictive covenant on subdivisions.

⁵⁹ *Jensen v. Lake Jane Estates*, No. 36094-2-II, 2008 WL 2026096, 3 (Wn. App. May 13, 2008).

⁶⁰ Conclusions of Law 4, 5.

Restrictive covenants are interpreted according to a special set of rules in Washington. A covenant that runs 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.”⁶¹ Enforcement of restrictive covenants protects the character of established residential neighborhoods.⁶² As observed by this Court, such enforcement is increasingly important to preserve the expectations of property owners in the face of increased urban growth pressures:

[Courts] recognize the necessity of enforcing restrictive covenants to protect property owners from increased pressures of urbanization. The modern view is that building restrictions are for the protection of the public as well as the property owner and that such restrictions, in order to be valid, need only be reasonable and reasonably exercised.⁶³

Hence, “if more than one reasonable interpretation of the covenants is possible regarding an issue, [Washington courts] must favor that

⁶¹ Thayer v. Thompson, 36 Wn. App. 794, 797, 677 P. 2d 787, *review denied*, 101 Wn. 2d 1016 (1984).

⁶² Hagemann v. Worth, 56 Wn. App. 85, 88-89, 782 P. 2d 1072 (1989).

⁶³ Mains Farm Homeowners Ass'n v. Worthington, 64 Wn.App. 171, 179, 824 P.2d 495 (1992), *aff'd*, 121 Wn.2d 810; 854 P.2d 1072 (1993); *see also* Thayer, 36 Wn. App. at 797.

interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions."⁶⁴

Accordingly, Washington courts have moved away from the position of strict construction historically adhered to when interpreting restrictive covenants.⁶⁵ Instead of viewing restrictive covenants as restraints on the free use of land, Washington courts now acknowledge that restrictive covenants "tend to enhance, not inhibit, the efficient use of land."⁶⁶ Consequently, Washington courts strive to interpret restrictive covenants in such a way that protects the homeowners' *collective* interests:

The time has come to expressly acknowledge that 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, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court's goal is to ascertain and give effect to those **purposes** intended by the covenants. . . . [and] The court will place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests."⁶⁷

⁶⁴ Green v. Normandy Park Riviera Section Community Club, 137 Wn. App. 665, 151 P.3d 1038 (2007), *review denied*, 163 Wn.2d 1003, 180 P.3d 783 (2008).

⁶⁵ Viking Properties Inv. v. Holm, 155 Wn.2d 112, 120, 118 P.3d 322 (2005).

⁶⁶ *Id.*

⁶⁷ Riss v. Angel, 131 Wn. 2d 612, 623, 934 P. 2d 669 (1997).

The Washington Supreme Court has said this is especially true when the maker of the restrictive covenants – i.e. the developer – has departed the scene:

[W]here 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, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. **The court's goal is to ascertain and give effect to those purposes intended by the covenant.**⁶⁸

Notably, the trial court found, and Jensen does dispute, that the developer of the Debra Jane Lake Plat had an interest in establishing LJE to provide some regulation to preserve the feel of the development.⁶⁹ Jensen also does not dispute the trial court's Conclusion of Law that if more than one reasonable interpretation of Restriction No. 6 is possible, the Court must favor that interpretation that avoids frustrating the reasonable expectations of the lot owners within the Debra Jane Lake Plat, and the Court's goal is to ascertain and give effect to those purpose intended by Restriction No. 6.⁷⁰ Finally, Jensen does not dispute the trial court's conclusion that limited

⁶⁸ *Riss v. Angel* 131 Wn.2d 612, 934 P.2d 669 (1997) (second emphasis added); *see also Lakes at Mercer Island Homeowners Ass'n. v. Witrak*, 61 Wn. App. 177, 180 (1991), *review denied*, 117 Wn.2d 1013, 816 P.2d 1224 (1991).

⁶⁹ Finding of Fact 5.

⁷⁰ Conclusion of Law No. 3.

density is a valid exercise of power by a homeowner's association such as LJE.⁷¹

2. LJE Has the Direct Authority to Enforce the Plat Restriction Regarding Subdivisions

This Court held in its earlier ruling that LJE could have enforcement authority "either as a de facto successor or under the terms of the covenants. . ."⁷² LJE maintains – and the trial court agreed – that it has direct authority under the terms of the covenants themselves.

Enforcement of the restriction on subdivision, as well as the other restrictions on the Plat, was provided for in paragraph 14 of the plat restrictions:

14. The breach of any of the foregoing conditions shall constitute a cause of action against the person committing the breach by T&J Maintenance Company [now known as Defendant Lake Jane Estates] or the Lake Tapps Development Company.⁷³

The Articles of Incorporation also give the Association, through its Board of Trustees, authority to enforce the restrictive covenants⁷⁴ as well as engage in "whatever actions" are necessary or proper for or

⁷¹ Conclusion of Law No. 8.

⁷² Jensen v. Lake Jane Estates, 2008 WL 2026096, * 3.

⁷³ Finding of Fact 4, Ex. 1.

⁷⁴ Finding of Fact 5, Ex. 57 at 4.

incidental to the exercise of any of its powers.⁷⁵ As previously noted by this court, “[t]he developer expressly granted LJE the authority to enforce all of its restrictive covenants, both in the plat restrictions themselves and in LJE's articles of incorporation.”⁷⁶

Having the authority to enforce the restriction on subdivisions would be an empty power unless LJE itself was able also to wield the authority to approve or disapproved subdivisions. Indeed, the trial court’s analysis mirrors that of a Missouri court that addressed the identical issue as that presented here. This decision, Sherwood Estates Homes Ass’n v. Schmidt,⁷⁷ was noted by the Court in its earlier decision in this matter⁷⁸ and cited with approval in the Green decision.⁷⁹ As in the present case, the declaration filed by the developer in Sherwood Estates stated that the developer – *not* the homeowners association – had the authority to approve building plans:

APPROVAL OF PLANS

No building, fence, wall or other structure shall be commenced, erected or maintained, nor shall any addition thereto or change or alternations therein be made, until plans and specifications, color

⁷⁵ Ex. 57 at 5 (¶19).

⁷⁶ Jensen v. Lake Jane Estates 2008 WL 2026096, 3.

⁷⁷ 592 S.W.2d 244 (Mo. Ct. App. 1979).

⁷⁸ Jensen v. Lake Jane Estates, 2008 WL 2026096, *6 n. 5.

⁷⁹ 137 Wn. App. at 684 n. 15.

scheme, plot plan and grading plan therefore, or other information satisfactory to the company shall have been submitted to and approved in writing by the company ["company" was defined as the developer]. . .⁸⁰

And, as also in the present case, the declaration had a global enforcement provision that stated that the homeowners association could enforce all restrictive covenants,⁸¹ including those regarding the building restrictions:

The Association shall have the following powers and duties: . . . FIRST: To enforce, either in its own name or in the name of any owner within the district, any or all building restrictions . . ."⁸²

While the trial court ruled that the declaration itself "assigned" to the homeowners association the right to "enforce the restrictions on the use of [] land"⁸³ through this global enforcement provision, the trial court held that the term "company" meant only to the developer, so only the developer could in fact approve or disapprove such restrictions. In other words, the trial court followed Jensen's line of reason in the present case.

⁸⁰ 592 S.W.2d at 245.

⁸¹ *Id.* at 246.

⁸² *Id.* at 247.

⁸³ *Id.* at 245.

The sole issue on appeal, in Sherwood Estates was “[d]oes the term ‘company’ in Restriction VII include the [homeowners] Association?”⁸⁴ The Missouri Court of Appeals reversed the trial court and held that it did:

The vortex of the single remaining issue on appeal has now been reached – did [the developer’s] assignment of the right to enforce the Restriction to the Association substitute the Association in the place of [the developer] as the “company” for the purpose of granting or denying approval as to plans or specifications as prescribed by Restriction VII? . . .

The power to enforce Restriction VII is a legally sterile power if it does not include the power to grant or withhold approval of plans and specifications falling within its purview. Perhaps no other single restriction is quite so adaptable for perpetuating Sherwood Estates’ status as a “residence neighborhood possessing features of more than ordinary value to a residence community.” Extraordinary vision is not required to see that Restriction VII was carefully designed to preserve the architectural tone and character of the subdivision, all of which inures to the immeasurable value of the various homeowners in the subdivision. [The company] was a subdeveloper and builder, and once its role was completed in Sherwood Estates it had an overriding interest in transferring all powers and duties attendant to the Restrictions, and authority to enforce them, to the Association whose membership was comprised of the homeowners in Sherwood Estates. In view of the homeowners’ natural community of interest

⁸⁴ *Id.* at 246.

it is impossible to imagine a more suitable repository for such powers, duties and authority. **Manifestation of [the developer's] intent to substitute the Association in its place for the purpose of assuming and performing all powers and duties associated with the Restrictions, including but not limited to Restriction VII, and the authority to enforce them, permeates the "Sherwood Estates Homes Association Declaration."** As it turned out, [the developer's] persistent desire to unburden itself of any continuing responsibility concerning Sherwood Estates was indeed fortunate as [the developer's] corporate charter was subsequently forfeited in 1967.

...

... [T]he trial court's conclusion that the term "company" in Restriction VII meant [the developer] and not the Association, notwithstanding the assignment, was a mismatch of law and facts.⁸⁵

In sum, the Sherwood Estates court held that the global enforcement provision set forth in the declaration of restrictive covenants effectively assigned to the homeowners association the right to step into the developer's shoes for the purpose of enforcing the restriction that required obtaining approval from the developer before construction. In other words, the global enforcement provision was in essence an express transfer of all authority from the developer to the homeowners association. Notably, the Missouri Court of Appeals

⁸⁵ 592 S.W. 2d at 247-48.

arrived at this conclusion even though, unlike in Washington, Missouri courts strictly construe restrictive covenants.⁸⁶

The exact same situation is present here: the Debra Jane Lake Plat restrictions adopted by the developer gave LJE the right to enforce all of the plat restrictions, including the restriction requiring obtaining approval from the developer before any lot subdivision:

14. The breach of **any** of the foregoing conditions shall constitute a cause of action against the person committing the breach **by T&J Maintenance Company [Lake Jane Estates]** or the Lake Tapps Development Company.⁸⁷

Additionally, the Articles of Incorporation drafted and signed by the developer also give LJE enforcement authority. Following the Sherwood analysis, these enforcement provisions give LJE the authority to enforce the restriction on subdivisions, even though this restriction only mentions the developer.

Moreover, Jensen's argument that LJE, despite all of the powers and obligations enumerated in the Articles of Incorporation and Bylaws for the purpose of protecting and enhancing the Lake Jane community, is powerless to enforce the restriction with the greatest effect on the

⁸⁶ *Id.* at 247.

⁸⁷ Ex. 1, 2, 3, 4.

value and character of the community makes no sense. Covenants exist to protect landowners' expectations. It is simply illogical that parties would manifest an intent to limit subdivisions only to have that protection removed upon some arbitrary event over which they have no control. The whole purpose of covenants is, after all, the ability to control.

3. At a Minimum, LJE is the *De Facto* Successor to the Developer for the Purpose of Enforcing the Restrictive Covenant Regarding Subdivisions

As noted above, this Court previously held that even if LJE did not have direct authority to enforce the restrictive covenant on subdivisions, LJE could still enforce it if it showed it was the *de facto* successor to the developer with regards to enforcing the restriction:

Here, LJE's admission that the developer dissolved does not affect its right to prove that, having exercised the authority to review and approve proposed subdivision requests with the developer's consent, LJE was the legitimate *de facto* successor.⁸⁸

Hence, contrary to Jensen's assertions, *de facto* successor authority has nothing to do with the language of the restrictive covenant. Rather, what matters is whether, in fact, LJE has in fact succeeded

⁸⁸ Jensen v. Lake Jane Estates, 2008 WL 2026096, *3.

The Green decision, which this Court cited extensively in its prior decision in the present matter, strongly supports LJE's status as a *de facto* successor. In Green the subdivision was subject to 1929 covenants requiring that building plans for any of the lots in the neighborhood be approved by the developer.⁸⁹ The covenants further stated they were intended to "be a covenant running with the land."⁹⁰ After a few intervening transfers and assignments, in 1947 the right to enforce the covenants was conveyed to the recently incorporated Normandy Park, Riviera Section, Community Club, Inc. (NPRSCC) and to its "successors or assigns." In 1977, however, NPRSCC failed to file an annual report and was administratively dissolved by the Secretary of State. The former officers of NPRSCC continued to hold meetings and take steps to enforce the covenants.⁹¹ In 1988, however, a new entity, the Normandy Park Riviera Community Club ("Community Club"), was incorporated that assumed the authority to enforce the covenants.⁹² This new entity – which, contrary to Jensen's representations to this Court,⁹³ did not even qualify as a homeowners

⁸⁹ Green, 137 Wn. App. at 682.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 683.

⁹³ Appellant's Brief at 27.

association⁹⁴ – was an *entirely different entity* from the successor to the entity to which the right to enforce had been assigned in 1947.⁹⁵

In 2002 a dispute arose between the Edlemans, their neighbors, and the Community Club regarding whether the new home the Edlemans were constructing complied with certain restrictive covenants.⁹⁶ Three lawsuits were subsequently filed and consolidated. Eventually, the trial court granted the Community Club’s motion for summary judgment that it had successor authority to enforce the restrictive covenants even though this right had never been formally assigned to it.⁹⁷ The Court of Appeals upheld this ruling:

The Edlemans . . . contend that the authority to enforce the covenants could not have validly passed to the present-day Community Club because any such authority was necessarily terminated by the NPRSCC’s 1977 administrative dissolution. We disagree.

The conveyance of authority issued by the Normandy Park Company in 1947 clearly states its intent to assign its authority to the NPRSCC, and to its “successors or assigns.” This conveyance was a valid means by which to pass authority. Restatement (Third) Of Property: Servitudes § 5.6(1) (2000) (“[T]he power to enforce servitudes created to implement a general plan of development may be

⁹⁴ Green, 137 Wn. App. at 686 n. 17.

⁹⁵ *Id.*

⁹⁶ *Id.* at 674.

⁹⁷ *Id.* at 675.

transferred in whole or in part to an association whose membership is based on ownership of property included in the general plan.”).

The covenants do not define “successors or assigns.” The Edlemans have not directed us to any authority which compels the result that the term may not include the unincorporated entity which continued to enforce the covenants between 1977 and 1988, or the subsequent incorporated entity which continues to enforce the covenants today. The Community Club, however, correctly notes that the South Carolina Supreme Court, in Battery Homeowners Ass’n v. Lincoln Fin. Res., Inc., 309 S.C. 247, 422 S.E.2d 93 (1992), held that the phrase “successors” in covenants granting enforcement authority to a homeowners association and its “successor or assigns” included an unincorporated association of property owners formed after the original association’s administrative dissolution. In so holding, the court noted that **“successor” is a term of art that may refer to successors of corporate control,” or simply to an entity that has in fact succeeded.** Battery Homeowners, 209 S.C. at 250 (quoting Bremner v. Alamos Land Co., 11 Cal. App. 2d 150, 53 P.2d 382 (1936)).

As with the covenants themselves, we favor the interpretation of the conveyance of authority that does not frustrate either the purpose of the covenants or the reasonable expectations of the lot owners of the Riviera Section neighborhood. Accordingly, we hold that the Community Club as it exists today is a valid successor to the NPRSCC and its predecessors and, as such, has the authority to enforce the covenants.⁹⁸

⁹⁸ *Id.* at 683-86 (emphasis added).

In sum, the Green court refused to adopt a rigid construction when determining whether the Community Club was the successor of the developer for the purpose of enforcing the restrictive covenant. Instead, the court focused on two underlying principles: (1) the plat restrictions' express statement that they run with the land, and (2) the philosophy that whenever possible restrictive covenants are enforceable in order to protect the value of property within a community and the reasonable expectations of the members of a community.

In the present case, LJE's restrictive covenants also contain an express directive that they "run[] with the land and bind[] future owners, their heirs, successors or assigns."⁹⁹ And, as in Green, LJE has historically enforced these restrictions since the developer left the scene and thereby protected the expectations and property values of its members. Moreover, unlike in Green, the developer expressly gave LJE – which the developer itself created and incorporated before it created the Debra Jane Lake Plat¹⁰⁰ – the right to enforce restrictive covenants in the plat restrictions and Articles of Incorporation. Accordingly, LJE is, at a minimum, the *de facto* successor to the

⁹⁹ Ex. 1.

¹⁰⁰ As set forth in footnote 9, *supra*, the plat and LJE were created by the same people.

developer for the purpose of enforcing the Restriction No. 6 approval requirement for any subdivision within the Debra Jane Lake Plat.¹⁰¹

Jensen's reliance on other cases also fails. Oddly, Jensen makes the same argument regarding the Barbato v. Shundry¹⁰² decision from Ohio that it did the last time the parties were before this Court, claiming it presents the "exact factual pattern present in the case at bar."¹⁰³ But this Court has already rejected this argument:

In Barbato, the restrictive covenant required that the grantor approve plans for all buildings that homeowners wanted to build on their land. 1991 WL 115949, at * 3. The "grantor" was a corporation that subsequently dissolved, without naming a successor. Barbato, 1991 WL 115949, at * 3. Prior to building a structure, the defendants attempted to obtain approval from the former principal of the corporation since the original grantor had dissolved, but he informed the defendants that the covenant was invalid and that they did not need his approval. Barbato, 1991 WL 115949, at * 4.

But like White [v. Wilhelm, 34 Wn. App. 763, 665 P. 2d 407 (1983)], the non-existence of the approval entity authorized to review plans alone was insufficient for the court to find the covenant unenforceable. *See* Barbato, 1991 WL 115949, at * 5. Rather, the Ohio court found that the restrictive covenant had been abandoned because the covenant had not been enforced for quite some time, the development company had dissolved

¹⁰¹ To the extent there is a material distinction between Green and the present matter, it is of course that the developer in the present matter created LJE and granted it extensive powers. Conversely, in Green there was no relationship between the developer and association seeking to enforce the restrictive covenants. Nevertheless, the Court of Appeals held that it could.

¹⁰² 1991 WL 115949 (Ohio App. 5 Dist. 1991).

¹⁰³ Appellant's Brief at 32.

and failed to appoint a successor, and the principal of the former corporation refused to get involved. Barbato, 1991 WL 115949, at * 5. Furthermore, unlike Washington courts, Ohio courts do not favor restrictions on the use of land and, as a result, strictly construe restrictions on property against those limitations. Barbato, 1991 WL 115949, at * 1 (citing Driscoll v. Austintown Ass'n, 42 Ohio St.2d 263, 328 N.E.2d 395 (1975)).¹⁰⁴

Jensen's claim that there was an assignment of the right to enforce all building restrictions from the developer to the homeowner's association in Sherwood Estates Homes Ass'n v. Schmidt¹⁰⁵ also misses the point. There was no formal written assignment, as is apparently envisioned by Jensen. Rather, the trial court ruled (and the Missouri Court of Appeals agreed) that the global enforcement provision in the restrictive covenants that gave both the developer and the homeowners association the right to enforce the restrictive covenants – just as restriction No. 6 does here – “assigned” the right to the homeowners association to enforce the restrictive covenants:

Exhibit B, captioned “Sherwood Estates Homes Association Declaration,” filed and recorded of record in the office of the Recorder of Deeds, Clay County, Missouri, which the trial court specifically referred to as the basis for its “Conclusion of Law” that Stanton had “assigned the right to enforce the restrictions” to the Association, contains a preamble expressly declaring,

¹⁰⁴ Jensen v. Lake Jane Estates, 2008 WL 2026096, *5 n. 4 (Wn.App. 2008). Jensen's reliance on a subsequent unpublished Ohio decision, Garvin v. Cull, 2006 WL 2796258 (Ohio App. 11 Dist. 2006), fails for the same reasons.

¹⁰⁵ 592 S.W. 2d 244 (Mo. Ct. App. 1979).

inter alia, that Stanton was desirous of creating and maintaining “Sherwood Estates” as a “residence neighborhood possessing features of more than ordinary value to a residence community”. **To achieve this end Stanton assigned to the Association the right to enforce all restrictions as evidenced by the following provision contained in the “Sherwood Estates Homes Association Declaration”:** “The Association shall have the following powers and duties . . . FIRST: To enforce, either in its own name or in the name of any owner within the district, any or all building restrictions which may have been heretofore, or may hereafter be imposed upon any of the land in said district, . . .”¹⁰⁶

As discussed in more detail above, the key issue in the case was whether, even with the global enforcement provision, the homeowner’s association stepped into the shoes of the developer when the building restriction itself referenced only the developer. The appellate court ruled that it did.¹⁰⁷

B. LJE Did Not Act Unreasonably or in Bad Faith

1. Jensen’s Characterization of LJE’s Actions is Rebutted by the Evidence.

Historically, the crux of Jensen’s argument that LJE acted unreasonably was that if the LJE Board of Trustees approved the Vanunu proposal, it had to approve Jensen’s proposal because, in Jensen’s view, they are identical. But testimony at trial showed that the Board considered the Vanunu proposal unique due to the ongoing

¹⁰⁶ *Id.* at 246-47 (emphasis added).

¹⁰⁷ *Id.* at 248.

eyesore and dangerous nuisance create by the abandoned fire station building on the Vanunu property, which was invested by rats, a dumping ground for garbage, and used by local youth for unhealthy purposes.¹⁰⁸ As described by Jeff Brain:

There was a very strong concern about the old fire station building, which had been an eyesore for almost then years. Not only was it an eyesore, but we felt it was a neighbor hazard. People were dumping their garbage there. Kinds were playing around there. Vermin – like rats and other small animals, wild animals, were hanging around there, and many people in the Association wanted that thing taken care of or eliminated.¹⁰⁹

This concern was also reflected in many of the surveys returned by neighbors.¹¹⁰ Moreover, the Board did not consider the drainage to be as big of a potential problem since the Vanunu site was already covered by a lot of impervious surface due to the fire station building and parking lot.¹¹¹ And there were already two smaller than usual lots next door due to a previous boundary line adjustment.¹¹² In sum, while the Board considered the lot sizes less than ideal, the testimony at trial showed that the Board considered the Vanunu proposal a unique

¹⁰⁸ RP 269-71, 380.

¹⁰⁹ RP 380.

¹¹⁰ Ex. 44.

¹¹¹ RP 272. Conversely, LJE had significant concerns about runoff from Jensen's properties given their collective experience with flooding problems. *See, e.g.* RP 258-61.

¹¹² RP 272.

opportunity to get rid of a neighborhood eyesore and hazard.¹¹³ And, contrary to Jensen's representations, the Board was not aware of any plans by the City to get something done about it.¹¹⁴ Indeed, Duane Shabo, who was LJE President at the time the Vanunu proposal was approved, testified that the City had told LJE "it got nowhere with [Vanunu]."¹¹⁵

Jensen also complains that the results of the neighbor survey should have been determinative of the issue of whether his proposal should be approved. As an initial matter, this argument is contrary to Finding of Fact 17, which Jensen does not contest. Moreover, multiple witnesses testified that the neighborhood survey was just one of many factors considered by the Board.¹¹⁶ Indeed, Jensen himself acknowledged this in a letter to the Board regarding his application.¹¹⁷ Nor did the fact that the survey of neighbors went beyond the usual 600 cause Jensen any harm – as he himself admitted at trial, he picked up more "yes" votes than "no" votes as a result.¹¹⁸ Jensen's complaints about the cover letter from the then-Board president that

¹¹³ In the end, Vanunu never subdivided his lots but instead restored the fire station. RP 281-82.

¹¹⁴ RP 389-90.

¹¹⁵ RP 485.

¹¹⁶ RP 255-56, 306-09, 311.

¹¹⁷ Ex. 35.

¹¹⁸ RP 209.

accompanied the neighbor survey¹¹⁹ are similarly weak – indeed, during his deposition and at trial Jensen could not identify anything in the letter that was in fact objectionable.¹²⁰ Finally, we know from Jensen himself that some of the 85 people he visited told him no, and he didn't bother to submit their surveys. In the end, he turned in only 26 yes votes – or 30% of the people he spoke to.

Oddly, Jensen relies on a footnote in a trial brief written and submitted by LJE's attorney in an entirely different case¹²¹ to support his argument that the neighbor survey is the most important thing considered by LJE when reviewing applications for subdivisions. But this statement was refuted by LJE Board members at trial.¹²² Jensen's reliance on the August 20, 2008 meeting minutes from a different subdivision application that reflect that Jeff Brain stated "[o]ne of the biggest things we consider is the input of the immediate neighbors"¹²³ is also misplaced. In the same meeting minutes Mr. Brain goes on to list other things considered by the Board.¹²⁴ Moreover, as Mr. Brain and Ms. Gubbe testified, Mr. Brain was trying to appease a room full of

¹¹⁹ Ex. 30.

¹²⁰ RP 182-84.

¹²¹ Ex. 40.

¹²² RP 315..

¹²³ Ex. 41.

¹²⁴ Ex. 41.

angry neighbors who had not been formally notified but had heard about the proposed subdivision and were concerned about it.¹²⁵

At trial, Jensen presented a new argument for the first time in his opening statement: Namely, that the Board had a vendetta against Jensen because of (1) his involvement in the litigation that led to the City of Bonney Lake revising its zoning for the Debra Jane Lake Plat, and (2) his opposition to the November 2005 special meeting that the Board scheduled to vote on the change of the annual meeting date and other bylaws. Like most conspiracy theories, however, it lacks any factual support. There was simply no evidence submitted at trial that supported the former. Rather, the testimony was that there wasn't any personal animosity expressed against Jensen during Board meetings due to any involving in a zoning change or the special meeting.¹²⁶ And there is no legitimate evidence of the latter either. Jensen's argument is based solely on an assertion made by Jeff Brain during his deposition regarding his personal frustration that the special meeting was thwarted. Yet this same deposition testimony shows that Brain had no recollection of whether the special meeting happened before or after Jensen submitted his application, and he was very clear he was

¹²⁵ RP 288, 314.

¹²⁶ RP 261-62, 425.

speaking only for himself.¹²⁷ Moreover, the issue of whether Mr. Jensen had obstructed obtaining a quorum at the special meeting was not part of the Board discussions regarding his proposal.¹²⁸

Jensen's claim that LJE was dead set against him no matter what he did is also refuted by the evidence. As stated in its letter denying Jensen's application¹²⁹ and as testified to at trial,¹³⁰ the Board was open to considering less intensive development options. Notably, no one recalled Jeff Brain ever saying that the Board would never allow Jensen to subdivide his properties.¹³¹

Finally, Jensen's argument that LJE's approval of the Heller subdivision demonstrates that LJE acted unreasonably and in bad faith when it denied Jensen's application also fails. There was no testimony about this subdivision at trial, precisely because the trial court sustained Jensen's objection that post-Jensen subdivision applications were irrelevant:

MR. HANDMACHER: I'm going to object, Your Honor. All these subdivisions that occurred after the fact of Jensen are irrelevant to the issues of what happened to Jensen.

...

¹²⁷ RP 371-72.

¹²⁸ RP 373, 387, 425, 459-60.

¹²⁹ Ex. 39.

¹³⁰ RP 247-48.

¹³¹ Ex. 248.

THE COURT: I'm going to sustain the objection.¹³²

Yet shortly after losing at trial, Jensen filed a motion for reconsideration based in large part on LJE's approval of the subsequent Heller subdivision.¹³³ Jensen then successfully moved to strike declarations submitted by LJE explaining why the Heller subdivision was approved.¹³⁴ It is noteworthy that the size of the proposed lots is unclear from the exhibit.¹³⁵ Additionally, the subdivision request submitted by Heller showed that they planned to construct only one additional home, not two.¹³⁶ Finally, it is unclear from the exhibit whether LJE approved a two-lot subdivision or a three-lot subdivision; indeed, the neighbor survey sent out asked for feedback on the subdivision into both two or three lots.¹³⁷

2. LJE is Protected by the Business Judgment Doctrine

The business judgment doctrine¹³⁸ is a longstanding common law principle that "a board of directors enjoys a presumption of sound

¹³² RP 275-76.

¹³³ CP 71.77. Although testimony about this subdivision was not allowed at trial, LJE's file on the Heller subdivision was not opposed as an exhibit by Jensen, making it technically part of the official record.

¹³⁴ CP 141-42.

¹³⁵ Ex. 86.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ It is important to note that there is a distinction between the business judgment doctrine and the business judgment rule. "The business judgment *rule* shields individual directors liability for damages stemming from decisions, whereas the business judgment *doctrine* protects the decision itself. . . . Yet the essential

business judgment and its decisions will not be disturbed by a court substituting its own notions for what is or is not sound business judgment if [those decisions] can be attributed to any rational business purpose.”¹³⁹ Washington courts adopted the business judgment doctrine over thirty years ago and have since upheld it.¹⁴⁰

LJE is a corporation. Hence, to prove his claim that LJE acted unreasonably and in bad faith, Jensen has the burden of proving the inapplicability of the business judgment doctrine, and there is a presumption of regularity in favor of LJE.¹⁴¹

While Washington law has unequivocally adopted the basic principle of the business judgment doctrine, the standard for satisfying the doctrine is somewhat ambiguous, as Washington courts have applied two different standards: (1) the association should make decisions with the care of an ordinarily prudent person outlined under RCW 23B.08.300; and (2) the association should make decisions in

elements of the rule and doctrine are the same.” Joseph Hinsey, IV, *Business Judgment and the American Law Institute’s Corporate Governance Project: The Rule, The Doctrine, and The Reality*, 52 Geo. Wash. L. Rev 609, 611-12 (1984). In this case, we are concerned primarily with the judicial review of the decision itself, but because the elements of the rule and doctrine are essentially the same, LJE relies on the jurisprudence addressing both the rule and the doctrine.

¹³⁹ DENNIS J. BLOCK ET AL., THE BUSINESS JUDGMENT RULE 103 (5th ed. 1998), quoting Committee on Corporate Law, *Changes in the Model Business Corporation Act—Amendments Pertaining to Electronic Filings/Standards of Conduct and Standards of Liability for Directors*, 52 Bus. Law. 157,177.

¹⁴⁰ *In re Spokane Concrete Products, Inc.*, 126 Wn. 2d 269, 276, 892 P.2d 98 (1995); *Nursing Home Bldg. Corp. v. Dehart*, 13 Wn. App. 489, 498, 535 P.2d 137 (1975).

¹⁴¹ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

good faith. Which is the correct analysis is immaterial, though, as LJE satisfies both of these standards.

a) LJE Exercised Ordinary Care in Refusing Jensen's Subdivision Request.

The “reasonableness” or “ordinarily prudent person” standard has been more frequently applied than the good faith standard when interpreting the business judgment doctrine.¹⁴² In In re Spokane Concrete Products, Inc., the Washington Supreme Court outlined the ordinary prudent person standard as provided for in RCW 23B.08.300(1):

A director shall discharge the duties of a director . . . (a) in good faith (b) with the care of an ordinarily prudent person in a like position would exercise under similar circumstances; and (c) in a manner the director reasonably believes to be in the best interests of the corporation.¹⁴³

Multiple courts have upheld the application of RCW 23B.08.300 as the standard for the business judgment rule.¹⁴⁴ In

¹⁴² See In re Spokane Concrete Products, Inc., 126 Wn.2d at 276; see also Adam J. Richins, Comment, *Risky Business: Directors Making Business Judgments in Washington*, 80 Wash. L. Rev. 977 (2005).

¹⁴³ 126 Wn.2d at 276; RCW 23B.08.300(1).

¹⁴⁴ See Seafirst Corp. v. Jenkins, 644 F. Supp. 1152 (W.D. Wash. 1986) (a federal court applying Washington law rejected the notion that the business judgment rule shielded any director decision made in good faith, and instead said that they must have also exercised ordinary care under RCW 23A.08.343 (statute preceding RCW 23B.08.300)); Riss v. Angel 131 Wn.2d 612, 934 P.2d 669 (1997) (the Washington State Supreme Court applied the ordinary prudent person standard individual members of a property owner association's board of directors); Duran v. HIMC Corp. 151 Wn. App 818, 214 P.3d 189 (2009) (court described the business judgment doctrine using the standard outlined in RCW 23B.08.300(1)); Schwarzmann v. Ass'n of Apartment Owners of Bridgehaven, 33 Wn. App. 397, 655 P.2d 1177 (1982) (owners of a condominium unit sued an unincorporated condominium association

application, particularly in the setting of property owner associations like LJE, courts look at the process that the association underwent in making its decision. The two most factually on point cases, Schwarzmann and Riss, suggest that a key question is how thoroughly the board investigated and considered the relevant circumstances before making the decision at issue. Notably, both courts stated that a court will not “second guess” that decision or “substitute its judgment for that of [the] directors” so long as the directors “exercise[d] proper care, skill and diligence” in reaching that decision, “even if the errors are so gross as to demonstrate the unfitness of the directors to manage corporate affairs.”¹⁴⁵

As set forth above, the LJE Board of Trustees was very thorough and careful when it reviewed Jensen’s subdivision request. Jensen’s arguments that there was somehow a vendetta against him and he was treated unreasonably as a result were thoroughly refuted at trial. The trial court was correct in refusing to find the Board’s decision unreasonable.

b) Lake Jane Estates Exercised Good Faith in Refusing Mr. Jensen’s Subdivision Request

and the court applied the ordinary prudent standard to individual members of its board of directors).

¹⁴⁵ Riss 131 Wn.2d at 633; Schwarzmann, 33 Wn. App. at 402-03.

As an alternative to the ordinary care standard, there is a strong argument that good faith is the standard for Washington's business judgment doctrine. As noted in the Washington Practice Series:

Under the "business judgment rule," corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction was within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith.¹⁴⁶

Good faith equates to honesty or lack of wrongdoing: "Unless there is evidence of fraud, dishonesty, or incompetence (*i.e.*, failure to exercise proper care, skill, and diligence), courts generally refuse to substitute their judgment for that of the directors."¹⁴⁷ Both before and after the enactment of RCW 23B.08.300 (and its preceding statute, RCW 23A.08.343), the Washington Supreme Court applied the good faith standard for the business judgment doctrine.¹⁴⁸ In addition to case precedent, the legislative history of RCW 23B.08.300 supports

¹⁴⁶ DeWolf, David K., *Elements of an Action*, 29 Wash. Prac. § 11:13 (2009-10).

¹⁴⁷ *In re Spokane Concrete Products, Inc.*, 126 Wn. 2d at 276; *see also* Adam J. Richins, Comment, *Risky Business: Directors Making Business Judgments in Washington*, 80 Wash. L. Rev. 977 (2005).

¹⁴⁸ *Nursing Home Bldg. Corp. v. Dehart*, 13 Wn. App. 489, 535 P.2d 137 (1975) (before the enactment of the statute); *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 64 P.3d 1 (2003) (after the enactment of the statute and the most recent Supreme Court ruling on the business judgment doctrine).

the conclusion drawn in Scott v. Trans-System, Inc. to apply only a good faith standard.¹⁴⁹

As set forth above, there is simply no evidence that LJE acted “with fraud, dishonesty, or incompetence” when it rejected Jensen’s proposal to subdivide his two lots into six lots. Accordingly, Jensen’s argument fails.

C. Jensen’s Damages Claim Fails for Lack of Competent Evidence

In December 2009 Jensen amended his Complaint to add a damages claim for the first time.¹⁵⁰ The damages claim relied on his reasonableness/ bad faith claim and argued that the value of his two lots is diminished between 2006 and today as a result of LJE’s refusal to approve the subdivision of his lots into six lots because he could not sell them now for what he could have in 2006.¹⁵¹ Jensen, a cement contractor who does foundation work,¹⁵² attempted to act as his own expert witness to prove these damages.

As an initial matter, Jensen’s entire argument regarding whether he should have been allowed to testify as an expert regarding

¹⁴⁹ Adam J. Richins, Comment, *Risky Business: Directors Making Business Judgments in Washington*, 80 Wash. L. Rev. 977 (2005) (citing Senate Journal, S. 5102, Reg. Sess., at 3041-42 (Wash. 1989)).

¹⁵⁰ CP 6-9.

¹⁵¹ *Id.*

¹⁵² RP 63.

his damages is moot given that Jensen does not contest the trial court's conclusion of law that Jensen is not entitled to any damages.¹⁵³ Additionally, whether or not Jensen could have obtained a short plat in 2006 or 2010 is simply unknown because Jensen chose not to pursue his short plat application with the City despite no hurdle to doing so.¹⁵⁴ Accordingly, any damage calculation is speculative at best. Even if this was not the case, however, his argument fails.

1. A Lay Person May Not Testify About the Value of Real Property Where the Valuation is Based Upon Faulty and Improper Methodology.

“Although landowners have the right to testify concerning the fair market value of their property, this right is not absolute.”¹⁵⁵ “[O]wners are entitled to explain their valuation by relevant and competent methods of ascertaining value.”¹⁵⁶ But a valuation should be excluded if it is based upon a “faulty premise.”¹⁵⁷ “[T]estimony may be properly excluded if ‘the owner has not used his intimate experience with and knowledge of the land's uses as a basis for

¹⁵³ Conclusion of Law 12.

¹⁵⁴ RP 176-77.

¹⁵⁵ Port of Seattle v. Equitable Capital Group, Inc., 127 Wn.2d 202, 211, 898 P.2d 275 (1995) (superseded but not overturned by ER 701; see Ashley v. Hall, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999)).

¹⁵⁶ *Id.* at 211 (quoting State v. Wilson, 6 Wn. App. 443, 451, 493 P.2d 1252 (1972) (emphasis added)).

¹⁵⁷ See State v. Rowley, 74 Wn.2d 328, 330, 444 P.2d 695 (1968) (“It is thus apparent that the stricken testimony related only to the numerical value of the property because that value was based on a faulty premise.”).

determining its fair market value, but has obviously determined it upon the application of an improper formula”¹⁵⁸ or “improper method[.]”¹⁵⁹

In Port of Seattle v. Equitable Capital Group, the Washington Supreme Court held that the trial court did not err in excluding a property owner’s opinion about his property’s fair market value where the valuation was based upon speculative future development.¹⁶⁰ There, a corporate property owner reached his conclusion of fair market value “by projecting millions of square feet of building space upon the speculation of building numerous high rise office towers and multiplying that number by \$12.”¹⁶¹ The trial court

observed that he “c[a]me up with a value per foot [] and . . . multiplie[d] that times what he believe[d] to be the potential buildable square feet.” The court further observed that Mr. Dantzler had “done no sort of discounted cash flow or income valuation analysis” and concluded there was “no basis [for the court] to know how he came up with his per foot value.”¹⁶²

The Washington Supreme Court agreed, noting that the property owner “provided no method, reasoning, or explanation for the \$12

¹⁵⁸ Equitable Capital, 127 Wn.2d at 212 (quoting State v. Larson, 54 Wn.2d 86, 88, 338 P.2d 135 (1959)).

¹⁵⁹ *Id.* (quoting Rowley, 74 Wn.2d at 330).

¹⁶⁰ 127 Wn.2d at 213.

¹⁶¹ *Id.*

¹⁶² *Id.* at 210-11 (quoting Report of Proceedings) (brackets and omissions in original) (footnotes omitted).

figure which resulted in [the] fair market value”¹⁶³ Despite the fact that the owner’s determination “ostensibly was based upon his ownership interest in the property, his extensive knowledge about property values and their determinants in the vicinity of the Seattle-Tacoma International Airport, and his knowledge of the prices of property bought and sold in the vicinity[,]”¹⁶⁴ the Court held that it was not error to exclude the testimony.¹⁶⁵

In the present matter Jensen’s testimony about the value of his property is similarly speculative. At trial Jensen sought to testify on the value of his the six lots he wanted to create as a result of the subdivision of his two lots.¹⁶⁶ His opinion was based in part on five houses he bought and sold within half a mile of the two lots.¹⁶⁷ Basically, Jensen claimed that these purchase and sales made him an expert able to opine on the market value of these lots should they have in fact been subdivided and sold.¹⁶⁸ Notably, this testimony relied on evidence never produced to LJE during discovery.¹⁶⁹

¹⁶³ *Id.* at 213.

¹⁶⁴ *Id.* at 210.

¹⁶⁵ *Id.* at 213.

¹⁶⁶ RP 119-121.

¹⁶⁷ RP 138-39.

¹⁶⁸ RP 125.

¹⁶⁹ RP 131, 232.

Additionally, Jensen sought to rely on hearsay evidence regarding what he had allegedly been offered for other lots elsewhere.¹⁷⁰ LJE objected to this testimony, and the objection was sustained.¹⁷¹ The trial court did allow Jensen to testify to some extent about what he had and what he had heard from others about the price of lots in 2006,¹⁷² though the Court sustained hearsay objections to other testimony.¹⁷³ Notably, at trial Jensen admitted that although he had created eight to nine vacant lots through subdivisions since 2000, he had sold only one of them and still owned the remainder.¹⁷⁴ Yet he thought this one sale entitled him to testify as an expert on the value of the vacant lots he proposed to create in LJE.

2. Jensen Does Not Qualify As an Expert in Real Estate Appraisal

“[E]xpert testimony is admissible under ER 702 where (1) the witness qualifies as an expert, and (2) the expert's testimony would be helpful to the trier of fact.”¹⁷⁵ A witness may be qualified as an expert

¹⁷⁰ RP 141. LJE objected to this testimony, and the objection was sustained. RP 145.

¹⁷¹ RP 145.

¹⁷² RP 149.

¹⁷³ RP 156.

¹⁷⁴ RP 198, 213.

¹⁷⁵ *In re Detention of Pouncy*, 144 Wn. App. 609, 624, 184 P.3d 651 (2008) (citing *State v. Riker*, 123 Wn.2d 351, 364, 869 P.2d 43 (1994)).

by “knowledge, skill, experience, training, or education.”¹⁷⁶ Once qualified, an expert may “provide an opinion regarding ‘scientific, technical, or other specialized knowledge’”¹⁷⁷ “[W]here opinion testimony is given by a witness who is not qualified to testify to such an opinion, the testimony given is, by definition, not helpful to the finder of fact.”¹⁷⁸ And “[i]t is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.”¹⁷⁹

Though not directly on point, City of Medina v. Cook,¹⁸⁰ a condemnation case, is instructive. There, the trial court rejected two appraisers’ valuations of “raw acreage” because the estimates “were based primarily on the division of the properties into lots.”¹⁸¹ Our Supreme Court held that the trial court was justified in disregarding the

¹⁷⁶ ER 702.

¹⁷⁷ State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007) (quoting ER 702) (emphasis added).

¹⁷⁸ In re Detention of Pouncy, 144 Wn. App. at 624.

¹⁷⁹ Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (quoting Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), *review denied*, 118 Wn.2d 1010, 824 P.2d 490 (1992)) (quotations omitted); *see also* Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 103, 882 P.2d 703 (1994) (“Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.”).

¹⁸⁰ 69 Wn. 2d 574, 418 P.2d 1020 (1966).

¹⁸¹ *Id.* at 575-76.

testimony of because it was speculative and therefore not competent.¹⁸² In so holding, the Court stated:

The finding of “market value” necessarily includes a consideration of the potential use to which the property may be put. However, the determination of the use value of unimproved acreage by comparison to the value of town lots of a fully developed subdivision leads to speculation and conjecture as to its present market value.¹⁸³

The Court went on to recognize the impropriety of such speculative testimony in valuing property:

The owner cannot . . . introduce evidence of the return that he would derive from cutting up a vacant tract of land into building lots, since this would involve pure conjecture as to how fast the lots would be sold and the price that each would bring; . . . The trial court cannot be too careful in excluding evidence of this character.^[184]

Additionally, since 1894 the Washington Supreme Court has held that offers to purchase property are inadmissible to establish the value of property.¹⁸⁵ And, of course, testimony based on hearsay is not admissible in any event.

Overall, Jensen’s testimony failed to qualify him as an expert. His testimony about damages that was allowed was based on nothing

¹⁸² *Id.* at 577-78.

¹⁸³ *Id.* at 578.

¹⁸⁴ *Id.* (quoting Nichols, Eminent Domain, § 18.11(2), pp. 159, 160, 161 (Rev. 3d ed. 1962)) (omissions in original) (emphasis added).

¹⁸⁵ Parke v. City of Seattle, 8 Wash. 78, 80, 35 P. 594 (1894).

but his own conclusory, self-serving, speculative, and often inadmissible valuations. It was appropriately rejected by the trial court.

D. LJE's 2000 Survey is Admissible

Jensen argues that evidence regarding the 2000 survey of LJE's members regarding subdivisions should not have been admitted. As an initial matter, this argument is highly curious given that Jensen's attorney himself elicited testimony from Mr. Brain regarding the 2000 survey, including the fact that the results showed that 85% of those who returned the survey were opposed to the subdivision of lots within the Debra Jane Lake Plat.¹⁸⁶ Accordingly, due to Jensen's own actions, evidence of the survey results is in the record regardless of whether the survey is admitted.

Moreover, the trial court is given particular deference when presented with fair arguments both for and against admissions.¹⁸⁷ Accordingly, in its discretion a trial court may admit a survey for its relevance even if it is hearsay.¹⁸⁸ In Nordstrom v. White Metal Rolling

¹⁸⁶ RP 384.

¹⁸⁷ Davidson v. Mun. of Metro. Seattle, 43 Wn.App. 569, 572, 719 P.2d 569 (1986); *see also* Maehren v. City of Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979) ("The admission or refusal of evidence lies largely within the sound discretion of the trial court. We will reverse a trial court only upon a showing that it abused that discretion.")

¹⁸⁸ *See* Simon v. Riblet Tramway Co., 8 Wn.App. 289, 294, 505 P.2d 1291 (1973) (holding that a survey was hearsay, but relevant to the issues of the case and difficult to present by individual testimony); *see also* Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wn.2d 629, 453 P.2d 619 (1969).

& Stamping Corporation our Supreme Court considered a publication that reflected relevant opinion on the construction of metal ladders. In affirming the admission of the publication, the Court was persuaded by the Federal Rules of Civil Procedure, by which “the trial judge has discretion to admit evidence and material hearsay if it is necessary and trustworthy.”¹⁸⁹

Any problems with the methodology of the survey go to the weight of the evidence, not its admissibility.¹⁹⁰ The Simon court addressed a survey of engineer salaries that the trial court admitted into evidence. The appellate court noted several flaws in the survey: it was prepared by a lobbying group; the sample size was small; and it left out Spokane.¹⁹¹ Nonetheless, the court affirmed its admission, holding that such criticisms “go to the weight to be given to this evidence by the trier of fact, not to its admissibility.”¹⁹²

Appellant cites three cases in support of excluding the resident survey: Simon v. Riblet Tramway Co.;¹⁹³ Brokerage Concepts, Inc. v. U.S. Healthcare Inc.;¹⁹⁴ Engers v. AT&T.¹⁹⁵ Of those three, only Simon

¹⁸⁹ *Id.* at 639 (citing Fed. R. Civ. P. 43).

¹⁹⁰ Simon, 8 Wn.App. at 294.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ 8 Wn.App. 289 (1973).

¹⁹⁴ 140 F.3d 494 (3d Cir. 1998).

is a Washington case. And as discussed, the Simon court addressed many of the same concerns here and decided to admit the survey.

Brokerage Concepts, in contrast, involved a survey of a market share, which the court found irrelevant because it “used the improper geographic market”¹⁹⁶ The court determined that the survey was moot to the outcome of the case, and so it limited its analysis to a footnote based on the Federal Rules of Evidence.¹⁹⁷ Engers, a case out of the District of New Jersey, involved an internet survey that was carried out on a website for the purposes of advancing the instant litigation.¹⁹⁸ It, too, decides against the admission of the survey based on the facts of that case and the Federal Rules of Evidence.

Here, the admission of the survey is determined by *Washington's* case law as laid out in Simon, not the decisions of the Third Circuit and the District of New Jersey. In Washington, a trial court may in its discretion admit a survey as relevant hearsay, and such a decision is given particular deference. Here, the trial court properly weighed the relevance of the evidence against the burden of having all ninety-two residents testify in court. Appellant could address any

¹⁹⁵ 2005 WL 6460846 (D.N.J. 2005).

¹⁹⁶ 140 F.3d at 517 n.14.

¹⁹⁷ *Id.*

¹⁹⁸ 2005 WL 6460846, at *2.

criticisms of the survey by cross-examination, but just as in Simon, such criticisms go to the weight of the evidence, not its admissibility.

III. CONCLUSION

LJE's authority to enforce the restrictive covenant on subdivision must be construed in line with the Washington Supreme Court's mandates that (1) a restrictive-covenant document must be construed in its entirety, not by a piecemeal approach,¹⁹⁹ (2) "if more than one reasonable interpretation of the covenants is possible regarding an issue, [Washington courts] must favor that interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions,"²⁰⁰ and (3) the business judgment doctrine applies when evaluating the actions a corporation takes through its board of directors. Applying these mandates, the trial court correctly ruled that LJE has the authority to enforce the restriction on subdivision in its own name and did not act improperly when reviewing Jensen's proposal. LJE respectfully asks that these rulings be affirmed.

¹⁹⁹ Mountain Park Homeowners Ass'n, Inc. v. Tydings, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994).

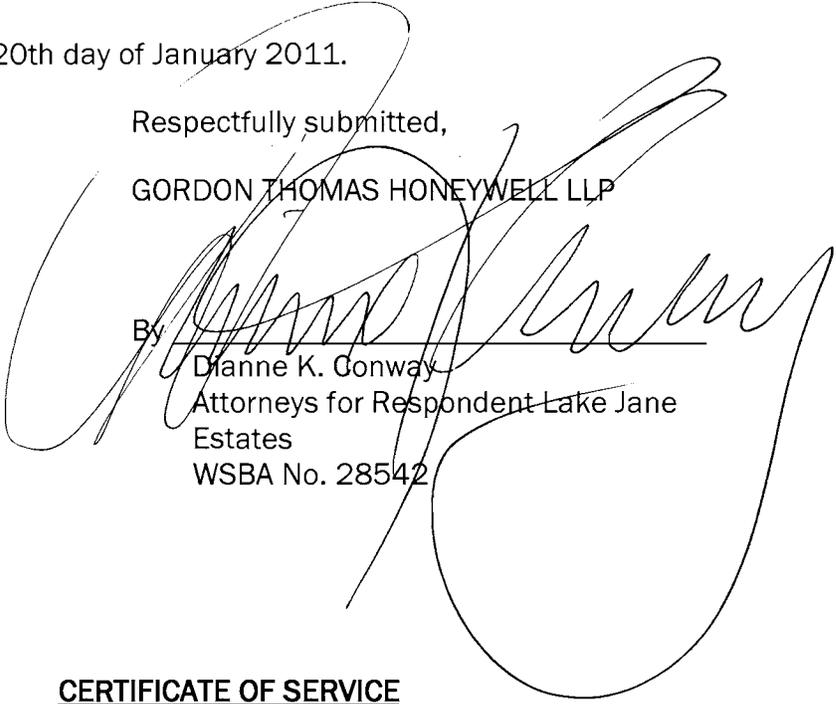
²⁰⁰ Green v. Normandy Park Riviera Section Community Club, 137 Wn. App. 665, 683, 151 P.3d 1038 (2007) (citing Riss v. Angel, 131 Wn. 2d 612, 624, 934 P. 2d 669 (1997)), *review denied*, 163 Wn.2d 1003, 180 P.3d 783 (2008).

Dated this 20th day of January 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 20th day of January 2011, I did
serve via U.S. Mail, First Class, postage prepaid (or other method
indicated below), true and correct copies of the foregoing by
addressing and directing for delivery to the following:

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