

No. 41421-0-II
Pierce County No.: 10-2-06523-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RACEWAY PARK, INC., a Washington corporation; and T & S
PROPERTIES, LLC, a Washington limited liability company,

Appellants,

and

CORLISS SUNRISE APARTMENTS, LLC, a Washington limited
liability company,

Plaintiff

v.

MERIDIAN SUNRISE VILLAGE, LLC, a Washington limited liability
company; ECT MERIDIAN PARTNERS, LLC, a Washington limited
liability company; JUNCTION 192 LLC, a Washington limited liability
company; ECT BONNEY LAKE PARTNERS LLC, a Washington
limited liability company; INVESTCO FINANCIAL CORPORATION,
a Washington corporation; MICHAEL J. CORLISS; and MARTIN D.
WAISS,

Defendants.

MERIDIAN SUNRISE VILLAGE, LLC, a Washington limited liability
company, ECT MERIDIAN PARTNERS, LLC, a Washington limited
liability company; JUNCTION 192 LLC, a Washington limited liability
company; ECT BONNEY LAKE PARTNERS LLC, a Washington
limited liability company; INVESTCO FINANCIAL CORPORATION,
a Washington corporation, and MARTIN D. WAISS, an individual,

Defendants/Counter Plaintiffs,

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STATE OF WASHINGTON
DEPUTY
COURT OF APPEALS
DIVISION II

ORIGINAL

v.

RACEWAY PARK, INC., a Washington corporation; and T & S
PROPERTIES, LLC, a Washington limited liability company,

Appellants.

and

CORLISS SUNRISE APARTMENTS, LLC, a Washington limited
liability company,

Plaintiff.

EVERGREEN CAPITAL TRUST, a Washington grantor trust,

Respondent,

v.

T & S PROPERTIES, LLC, a Washington limited liability company, and
RACEWAY PARK, INC., a Washington corporation,

Appellant.

APPELLANTS' BRIEF

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I. INTRODUCTION

Appellants T&S Properties, LLC (“T&S”) and Raceway Park, Inc. (“Raceway”) appeal the trial court’s entry of summary judgment in favor of Evergreen Capital Trust (“ECT”) and request that this Court reverse the trial court’s decision. The trial court erroneously granted summary judgment to ECT and found that ECT is a “Primary Guarantor,” as that term is defined by the applicable LLC operating agreements, and accordingly may exercise a Veto Power that effectively prohibits T&S/Raceway from playing any role in the management or operations of the LLCs (of which they are Members and ECT is not). The definition of “Primary Guarantor” in the operating agreements, however, compels the opposite conclusion, or is ambiguous. Under that definition, a Primary Guarantor must be a “Member” of the LLC, not merely a “Person” who meets other specified criteria. At best, whether a Primary Guarantor may be a “Member” or a “Person” who meets other specified criteria is ambiguous.

ECT is not a “Member” of the LLCs, but it is a “Person” as the operating agreements define that term. Because ECT effectively drafted the operating agreements and the definitions of Primary Guarantor that are at issue in this appeal, to the extent the provisions are ambiguous, the Court must construe them against ECT. However, the trial court

(erroneously) took the opposite approach and credited ECT's proposed reading of the Primary Guarantor definition, finding that ECT is a "Primary Guarantor" that can exercise the Veto Power to the exclusion of T&S/Raceway.

Further, ECT is not even a party to the operating agreements at issue, and those agreements contain explicit provisions preventing third parties from asserting rights under them. Nevertheless, the trial court erroneously granted ECT a declaratory judgment that it was a Primary Guarantor who could exercise the Veto Power.

For the reasons set forth herein, T&S/Raceway respectfully request that the Court reverse the trial court's grant of summary judgment in favor of ECT, and find that the operating agreements prohibit a non-Member from being a Primary Guarantor, or that questions of fact as to what "Primary Guarantor" means preclude entry of summary judgment.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in finding that a "Person," who is not a member, may be a "Primary Guarantor," as those terms are defined by the Operating Agreements.

2. The trial court erred in finding that a guarantor is not also required to be a "Member" of Bonney Lake Town Center, L.L.C. or New

Meridian L.L.C. in order to be a “Primary Guarantor,” as those terms are defined by the Operating Agreements.

3. The trial court erred in finding that ECT was a “Primary Guarantor,” as that term is defined by the Operating Agreements.

4. The trial court erred in finding that ECT could exercise the Veto Power.

5. The trial court erred in finding that ECT had standing to seek summary judgment with regard to a determination of the parties’ contractual rights when it is not a party to the operating agreements.

6. The trial court erred in finding that ECT had standing to seek a declaratory judgment pursuant to the Washington Declaratory Judgment Act, RCW 7.24.010, *et seq.*

7. The trial court erred in finding that there were no genuine issues of material fact.

8. The trial court erred in granting summary judgment to ECT.

B. Issues Pertaining to Assignments of Error

1. Whether the trial court erred in granting summary judgment in favor of ECT and holding that ECT, a non-Member of the Project LLCs, is a “Primary Guarantor” that can exercise a Veto Power contained in Project LLCs’ Operating Agreements, to which ECT is not a party, and

thereby effectively prohibit T&S/Raceway from having any role in the management or operations of the Project LLCs (Assignment of Errors 1-4, 7-8).

2. Whether the trial court erred in ruling that ECT had standing to seek relief under the Project LLCs' Operating Agreements, to which it is not a party (Assignment of Errors 5, 8).

3. Whether the trial court erred in ruling that ECT had standing under RCW 7.24 when it is not a member of the Project LLCs and there is no justiciable controversy between ECT and T&S/Raceway regarding the Veto Power (Assignment of Errors 6, 8):

III. STATEMENT OF THE CASE

A. Factual Background

Meridian Sunrise Village, LLC ("Meridian Sunrise") and Junction 192, LLC ("Junction 192") are LLCs that were formed for the purpose of completing the development of shopping centers on two pieces of real property owned in part by Scott Corliss. CP 333 ¶ 8; CP 345-46.

Meridian Sunrise's members are Appellant T&S, Appellant Raceway, and

ECT Meridian Partners, LLC.¹ CP 99. Junction 192’s members are Appellant T&S and ECT Bonney Lake Partners.² CP 213.

ECT is a trust that exists solely for the benefit of Michael Corliss. CP 319 ¶ 5. ECT owns defendants Investco Financial Corporation (“Investco”), ECT Meridian Partners, and ECT Bonney Lake. CP 319-20 ¶¶ 5, 9. Investco is the manager of both Meridian Sunrise and Junction 192. CP 319 ¶ 2.

The dispute between the parties, which consist of the Scott Corliss entities (Raceway and T&S) on one side, and the Michael Corliss entities (ECT, ECT Bonney Lake, ECT Meridian, and Investco) on the other, relates to the structure, management, and finances of Meridian Sunrise and Junction 192 (collectively, the “Project LLCs”). See CP 4-16. Basically, Scott Corliss contributed to the Project LLCs his interest in the real property valued at approximately \$9 million for Meridian Sunrise and in excess of \$5 million for Junction 192.³ CP 76-77 ¶ 8.1; CP 121-22 ¶ 8.1. Michael Corliss contributed approximately \$1.08 million for Meridian Sunrise, and \$50,000 to Junction 192. *Id.* Thus, the respective initial

¹ Tarragon Construction also holds a small interest, but its role is irrelevant for purposes of this appeal. CP 99.

² Tarragon Construction also holds a small interest in Junction 192, but as with Meridian Sunrise, Tarragon Construction’s role is irrelevant to this appeal. CP 213.

capital contributions to the Project LLCs were approximately \$14 million by Scott Corliss, and approximately \$1.1 million by Michael Corliss. *Id.* Michael Corliss also brought in his company Investco to manage the Project LLCs, and another company he controlled called Tarragon LLC to construct the actual shopping centers and lease the stores through various sub-entities. CP 319-20 ¶¶ 2, 6, 7. ECT, Michael Corliss's trust, provided the guaranty for the necessary bank loans for the Project LLCs. CP 218-24, 226-34.

On September 1, 2009, the initial construction loan for Junction 192 was set to expire. CP 323 ¶ 22. Although the construction of the shopping center was largely completed and the stores were already over 90% leased, in the months leading up to the loan expiration, Investco claimed that it was unable to obtain permanent financing. *Id.*; CP 371-72 ¶¶ 10-11. Investco was circumspect about the information that it chose to share with T&S about its efforts to obtain permanent financing, but it appeared that the underlying theme was ECT Bonney Lake's unwillingness to make a capital contribution to reduce the existing loan balance in order to obtain the permanent financing. *See generally*, CP 371-73; CP 375-90 ¶¶ 5-14, Exs. A-F. At the time, the Members' capital

³ Both Raceway and T&S are Members of Meridian Sunrise LLC. Only T&S is a Member of Junction 192 LLC.

accounts remained extremely unbalanced, and pursuant to the Operating Agreement, ECT Bonney Lake would have been responsible for nearly all of any capital contributions required to reduce the loan balance and obtain permanent financing. CP 370, 372 ¶¶ 4 & 13. The Operating Agreement provides that ECT Bonney Lake was required to make 100% of additional required capital contributions until the capital accounts were equalized. *See* CP 121 § 8.1.2. Pursuant to § 8.4 of the Operating Agreement, a payment reducing the loan obligation to obtain financing is a capital contribution for which ECT Bonney Lake was responsible. CP 122.

Rather than issuing a capital call to ECT Bonney Lake to reduce the loan balance and obtain permanent financing, Investco (the manager) instead permitted the loan go into default. It then attempted to force T&S to agree to a new construction loan extension with the existing lender that basically extended the terms of the previous construction loan. CP 322-23 ¶¶ 20-23) *see also* CP 393-97 ¶¶ 7 & 8, Exs. A & B. The Michael Corliss entities' motivations for this approach were twofold: First, ECT Bonney Lake was able to avoid what would likely have been a close to \$5 million capital call to reduce the loan balance. CP 372-73 ¶ 13. Second, the terms of the construction loan and the new construction loan extension were such that Investco claimed that Junction 192 was unable to pay T&S's full Preferred Return on its capital contribution pursuant to the Operating

Agreement, enabling Investco to use that cash for Junction 192 operations instead of seeking capital calls from ECT Bonney Lake. CP 370-73; CP 375-90 ¶¶ 4-13 and Exs. A- F.

The issue presented by the loan situation constituted a Major Decision as defined by the Operating Agreement and, accordingly, required a majority vote to be approved. *See* CP 109. When the Members deadlocked on the issue, pursuant to the Operating Agreement they were required “to make a concerted effort to agree among themselves.” CP 116 § 6.10.2. There is no provision in the Operating Agreements that allows a non-Member loan guarantor to break a deadlock.

Instead, Investco, the supposedly impartial manager, for the first time took the position that ECT was entitled to exercise the Operating Agreement’s Veto Power clause, and that the Veto Power allowed ECT to affirmatively force Junction 192 to approve the loan, despite the fact that the Members were deadlocked. CP 372 ¶ 12; CP 348-49. Over T&S’s protests, Investco obtained the new construction loan extension. *See* CP 393-97. This action, in violation of both the Operating Agreement and Investco’s fiduciary duties to T&S, has caused substantial financial harm to T&S. *See* CP 372-73 ¶ 13.

Based on this and other inequitable conduct by the defendants, Raceway and T&S filed their lawsuit, seeking, *inter alia*, declaratory

judgment concerning ECT's unlawful exercise of the Veto provision. CP 1-16.

B. Procedural History

Raceway and T&S filed their Complaint against defendants Meridian Sunrise, ECT Meridian, Junction 192, ECT Bonney Lake, Investco, Michael J. Corliss, and Martin D. Waiss on February 16, 2010 (CP 345), and they filed their First Amended Complaint on March 31, 2010 (CP 4-16).⁴ Raceway and T&S alleged in the First Amended Complaint that the defendants breached the contracts that govern the Project LLCs, breached fiduciary duties to Raceway/T&S, engaged in self-dealing, and have been unjustly enriched. *Id.* Included in the First Amended Complaint are allegations that Investco, as manager of the Project LLCs, improperly allowed ECT, which is not a member of Junction 192 or a signatory to Junction 192's Operating Agreement, to exercise a veto provision in the Operating Agreement to override T&S's vote, and cause Junction 192 to extend its construction loan rather than secure permanent financing. CP 8-12.

On March 31, 2010, ECT filed a separate complaint (which it amended on April 5, 2010) naming Raceway and T&S as defendants,

⁴ Michael Corliss was removed from the case as a named defendant by stipulated order on April 12, 2010.

seeking a declaratory judgment concerning the Veto Power in the Meridian Sunrise and Junction 192 Operating Agreements, and claiming “anticipatory” breach of various contracts related to the Project LLCs. CP 511-19. The two cases were consolidated by order dated June 29, 2010. CP 52-55.

On August 26, 2010, ECT filed a motion entitled, “Motion of Evergreen Capital Trust for Partial Summary Judgment on Veto Power” (“Motion”). CP 298-314. While titled one for partial summary judgment, the Motion was actually a motion for a declaratory judgment. For example, the Motion stated, “ECT respectfully moves this Court to grant partial summary judgment and *declare that the Veto Power provisions are valid and subsisting provisions and are in full force and effect,*” (CP 300 (Motion at 3; emphasis added)), and “ECT seeks a declaration that the Veto Power provisions are valid and subsisting provisions, and are in full force and effect.” CP 308. Further, the Motion cited to RCW 7.24, the Uniform Declaratory Judgments Act, as the standard governing the Motion. *Id.* Appellants filed their opposition to the Motion, along with supporting declarations and exhibits, on September 13, 2010. CP 342-

400. ECT filed its reply, along with supporting declarations and exhibits on September 20, 2010.⁵ CP 479-88.

The trial court held oral argument on September 24, 2010. During argument, Judge Arend stated,

[T]he issue of whether ECT has standing or not I think is inextricably intertwined with whether or not they're the primary guarantor, because if they are the primary guarantor it seems to me they have standing to address this issue because of the reasons that are set forth in their brief and those four factors. And I think that the language is interesting, but "person" is defined and is not limited to the word "member." And if the parties had intended the primary guarantor to be limited to members, it seems to me they could have just as easily used the word "member" as the word "person" and they chose to use the word "person." So ECT does meet the definition because counsel has agreed to the first part of the definition, meaning that the amount is greater than 50 percent of the outstanding liability of the company, that they meet the definition of a primary guarantor because they don't need to be a "member" under that language, they need to be a "person," and a person defined very broadly.

RP 35-36.

The trial court entered its written Order granting the Motion on October 8, 2010 (the "Order"). CP 489-93; Appendix A1-A5. The trial court's Order states,

The Court finds that a "Person" as defined in the Revised Operating Agreement of Bonney Lake Town Center, L.L.C. and of the Revised Operating Agreement of New Meridian, L.L.C. (hereinafter, "Operating Agreements") may be a "Primary Guarantor" as defined therein. A "Primary Guarantor" is not also

⁵ The reply was re-filed on September 21, 2011, because 2 pages were inadvertently left out of the original filing.

required to be a “Member” of Bonney Lake Town Center, L.L.C. or New Meridian, L.L.C. in order to satisfy the definition of “Primary Guarantor.” The Court further finds that because there is no dispute that ECT is a “Person that is providing a guaranty to any lender or other party in connection with Company recourse debt(s) or obligation(s) which represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company” for Bonney Lake Town Center, L.L.C. and New Meridian, L.L.C., ECT meets the definition of “Primary Guarantor.” The Court further finds that because ECT meets the definition of “Primary Guarantor,” it is entitled to exercise the veto power set forth in Article 6.10.3 of the Operating Agreements, entitled “Veto Power of Primary Guarantor” (“Veto Power”).

CP 491-92; Appendix A3-A4.

Raceway and T&S filed a notice of appeal on November 5, 2010.

CP 494-506. The Court of Appeals issued a letter to all parties on November 18, 2010, stating that because the Superior Court did not enter findings pursuant to CR 54(b), it was questionable whether the Order was appealable as a matter of right under RAP 2.2(d). Appendix A6-A7.

Raceway and T&S informed the Superior Court of the Appellate Court’s letter and filed a Motion for Partial Final Judgment seeking CR 54(b) findings. On December 17, 2010, the Superior Court denied the motion “without prejudice to renew after decision by the Court of Appeals.”

Appendix A9-A11. On January 18, 2011, Raceway and T&S informed the Court of Appeals of the Superior Court’s decision. Appendix A8. On January 19, 2011, the Court of Appeals concluded that the Superior Court’s Order was not appealable as a matter of right and converted

plaintiffs' notice of appeal to a notice of discretionary review. Appendix A12.

The Commissioner of this Court held oral argument on March 30, 2011, and granted Raceway/T&S's Motion for Discretionary Review on April 18, 2011. Appendix A13. The Commissioner found that

The confusion in the definition of Primary Guarantor stems from the first sentence, which uses both the phrase "any Person" and "such Member's percentage interest" in referencing the requirements of being the "Primary Guarantor." It is unclear from this sentence whether the Primary Guarantor must be a Member or simply a Person as defined in the respective Operating Agreements.

...

Here, the definition of Primary Guarantor is capable of two definitions: it can be read as allowing a Person to be a Primary Guarantor or it can be read as allowing only a Member (who is, per se, a Person) to be a Primary Guarantor. Reading the contract as a whole, the sentence defining Primary Guarantor is ambiguous as well because section 17.10 of both Operating Agreements limits the benefits of the Operating Agreement to Members only; thus, implying that the Veto Power, which is a benefit, could not be extended to ECT, a nonmember.

Because both the contract as a whole and the definition of Primary Guarantor are ambiguous, the trial court committed probable error by entering an order for partial summary judgment. *See Go2Net*, 115 Wn. App. at 83.

Appendix A22-A24 (Order at 10-12).

IV. SUMMARY OF ARGUMENT

The operating agreements for two limited liability companies, Meridian Sunrise Village and Junction 192, provide that in certain

circumstances a Primary Guarantor may exercise a Veto Power with respect to those companies. The operating agreements provide that a Primary Guarantor need not only have guaranteed a certain amount of the company's debt, it must also be a *member* of the company. ECT guaranteed the companies' debt, but it is not a member of either company.

Despite that ECT is not a member of either Meridian Sunrise Village or Junction 192, and therefore cannot be a Primary Guarantor under those companies' operating agreements, the trial court held on summary judgment that ECT may exercise the Veto Power for each company. The trial court's granting of summary judgment must be reversed because under the operating agreements, a non-member cannot be a Primary Guarantor. Additionally, ECT lacks standing under the operating agreements and the Declaratory Judgment Act to obtain the relief erroneously granted by the trial court.

V. ARGUMENT

A. Standard of Review

This Court reviews summary judgment *de novo*, disregarding findings made by the trial court. *See, e.g., Redding v. Virginia Mason Med. Cent.*, 75 Wn. App. 424 (1994); *Hearst v. Commc'ns., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501 (2005) (appellate court engages in same inquiry as trial court and views facts and all reasonable inferences in light

most favorable to nonmoving parties). In reviewing an order granting summary judgment, this Court must draw all reasonable inferences from the pleadings, affidavits, depositions, and admissions in the light most favorable to T&S/Raceway, the nonmoving parties. See *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991). Summary judgment should be denied unless there are no genuine issues of material fact. CR 56(c); *Hearst*, 154 Wn.2d at 501.

This Court also reviews de novo the construction of a contract and whether it is ambiguous. *Schwab v. Seattle*, 64 Wn. App. 742, 751, 862 P.2d 1089 (1992). “Contract interpretation is only a question of law when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.” *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006) (internal quotations omitted). While a contract is not ambiguous simply because the parties suggest different meanings, a contract is ambiguous when “its terms are uncertain or they are subject to more than one meaning.” *Id.* (citations omitted). “In the contract interpretation context, summary judgment is not proper if the parties’ written contract, viewed in light of the parties’ other objective manifestations, has two or more reasonable but competing meanings.”

Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 83, 60 P.3d 1245 (2003)

(internal quotations omitted).

B. ECT Is Not a “Primary Guarantor” Under the Operating Agreements Because It Is Not a Member of the Project LLCs.

The trial court erroneously found that ECT is a “Primary Guarantor” under the Operating Agreements, and accordingly erred in granting ECT summary judgment. In its Order, the trial court found that any “Person” could be a “Primary Guarantor,” and accordingly, a Primary Guarantor need not be a “Member,” as the Operating Agreements define those terms. CP 491. The trial court further found that because ECT

is a “Person that is providing a guaranty to any lender or other party in connection with Company recourse debt(s) or obligation(s) which represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company” for Bonney Lake Town Center L.L.C., and New Meridian L.L.C., ECT meets the definition of “Primary Guarantor.”

CP 491-92. Accordingly, the trial court found that ECT “is entitled to exercise the veto power set forth in Article 6.10.3 of the Operating Agreements.” CP 492.

The trial court was wrong. The Operating Agreements’ language compels the opposite conclusion or, at the very least, is ambiguous.

The Operating Agreements set forth the following definition:

“Primary Guarantor” means any Person that is providing a guaranty to any lender or other party in connection with Company recourse debt(s) or obligation(s) which represents (in the aggregate) an amount that is greater than fifty

percent (50%) of the outstanding liabilities of the Company and greater than **such Member's percentage interest in the Company** (a "Disproportionate Guaranty").

Notwithstanding the foregoing, the Members acknowledge and agree that any guaranty obligations required in connection with permanent financing (i.e. non-recourse carve-out obligations) shall be allocated among the Members, pro rata, so that no single Member will be obligated to provide the sole guaranty to such lender.

CP 66, 111 "Definitions" (emphasis added). While ECT provided guaranties to the Project LLCs' loans, it is not a Member of either Project LLC (CP 64, 96-97; 109, 141-42), and thus may not be a "Primary Guarantor" as defined in the Operating Agreements.

ECT issued a financial guaranty (49% of which is a guaranty provided for ECT's wholly-owned subsidiaries in the Project LLCs) in exchange for lucrative fees⁶ and full recourse rights against both the Project LLCs and their Members as established in separate contracts – the Guarantor Fee and Indemnity Agreements for each Project LLCs (the "Guarantor Fee Agreements"). See CP 217-34. However, neither of the Guarantor Fee Agreements provides that ECT is a "Primary Guarantor" for purposes of the Project LLC Operating Agreements or give any rights

⁶ Michael Corliss, the owner and sole beneficiary of ECT, has noted that ECT agreed "to guaranty in excess of \$100 million in loans to the Project LLC's." CP 335 ¶ 19. At the rates set forth in the Guarantor Fee Agreements, ECT received an initial payment of one quarter percent of this amount (over \$250,000), and continuing "spread fees" each fiscal quarter at the same rate on the outstanding principal balance of the guaranteed loans. Plaintiffs estimate that ECT has been paid over \$2.5 million to date in "loan fees." CP 370 ¶ 3.

to ECT to control the operations of the Project LLCs. *See id.* Rather, the plain language of the Operating Agreements limits the status of “Primary Guarantor” to persons who are Members of the Project LLCs. *See* CP 66, 111.

At the very least, it is unclear whether a Primary Guarantor must be a Member or whether it can be simply a Person. To the extent this provision is ambiguous, it must be construed against ECT because the Michael Corliss entities drafted it. *See* CP 332-33 ¶ 4; *Hanson Indus., Inc. v. County of Spokane*, 114 Wn. App. 523, 531, 58 P.3d 910 (2002) (ambiguous contracts are construed against the drafter); *see also* *Guy Stickney v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966). ECT argues that the Court should not give the word “and” its natural meaning but rather should find that it is an “inclusive disjunctive.” CP 481-82. This argument reveals the desperation of ECT’s position and is an incorrect application of the term. Specifically, ECT argues that, “[i]n short, a Person may be a Primary Guarantor if it meets the first requirement [“providing a guaranty . . . which represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company]. A Member may be a primary Guarantor only if it meets both [providing a guaranty *and* that guaranty is greater than such Member’s percentage interest in the Company].” CP 482. If

providing a guaranty greater than 50% of the Company's liabilities was the *only* requirement for a Person to be a Primary Guarantor, absurd results would follow. Consider an example where (1) the Company has a value of \$50 million and (2) outstanding liabilities of \$10 million, where (3) ECT guarantees \$6 million, or 60% of the Company's outstanding liabilities. If the Court were to accept ECT's proposed reading, in this example ECT is the Primary Guarantor with the ability to control all Major Decisions of the Company based solely on its \$6 million guarantee, which represents a guarantee of only 12% of the value of the Company. This is hardly the "Disproportionate Guaranty" set forth in the "Primary Guarantor" definition.

Despite the absurd outcome if ECT's proposed reading is credited, the fact that there are two competing readings of the Primary Guarantor definition shows that, at the very least, it is unclear whether a non-Member can be Primary Guarantor under the Operating Agreements. Accordingly, the trial court erred as a matter of law in granting summary judgment and finding that ECT, a non-Member, was the Primary Guarantor. *See Dice*, 131 Wn. App. at 684 (internal quotations omitted).

If the trial court erred and ECT does not qualify as a "Primary Guarantor" (or there is a question of fact on that issue), the trial court also

erred in holding that ECT may exercise the “Veto Power of Primary Guarantor.” Summary judgment should be reversed.

C. ECT, Which Is Not a Party To the Operating Agreements, Does Not Have Standing To Seek Relief Under Them.

ECT lacks standing to seek a declaratory judgment under the Operating Agreements because it is not a party to them, nor is it a third-party beneficiary of them, and the trial court erred in granting summary judgment to ECT finding otherwise. *See, e.g., Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 342-43, 831 P.2d 724 (1992) (non-party to contract generally cannot claim benefits under it). In fact, the Operating Agreements specifically prohibit non-parties, such as ECT, from seeking to enforce or benefit from them. Section 17.10 of the Operating Agreements provides as follows:

The provisions of this Agreement (including, but not limited to any provisions that make reference to any lender or other third party or that could benefit any lender or other third party) are intended for the exclusive benefit of the parties hereto, and no other person (including, but not limited to, the creditors of the Company or any Member) shall have any right or claim against any party by reason of any provision of this Agreement or be entitled to enforce any provision of this Agreement against any party.

CP 94; CP 139.

In its written order the trial court did not explicitly rule on whether ECT was a third party beneficiary of the Operating Agreements or whether the parties to the Operating Agreements intended to benefit ECT

at the time they executed the Operating Agreements. *See* CP 489-93. However, the trial court acknowledged in its oral ruling that “the issue of whether ECT has standing or not I think is inextricably intertwined with whether or not they’re the primary guarantor, because if they are the primary guarantor it seems to me they have standing to address this issue” RP 35-36. Further, by affirmatively granting summary judgment in ECT’s favor as to the terms of the Operating Agreement, the trial court implicitly found that ECT did in fact have standing to seek relief under the Operating Agreements, despite the clear language of Section 17.10 of the Operating Agreements; if ECT did not have standing, it could not seek (and obtain) the affirmative relief that the trial court erroneously granted it.

In its motion for summary judgment, ECT states that “[t]he LLC Act gives limited liability company members the same or greater freedom [as close corporations] to waive or vary its voting and control provisions by agreement. The LLC Act requires majority vote – ‘[E]xcept as provided . . . in the limited liability company agreement.’ RCW 26.15.120(1) & (2)” *[sic]*.⁷ CP 311. ECT’s fundamental argument – apparently accepted by the trial court– is that the Washington Limited

Liability Company Act provides that the terms of the Project Operating Agreements control the analysis.

By that same token, the trial court may not selectively choose to ignore Section 17.10 of the Project LLCs Operating Agreements, which prohibits ECT – a non-party to the Agreements and a Non-Member of the Project LLCs – from pursuing this contractual claim. “Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it.” *Seattle-First Nat. Bank v. Westlake Park Assoc.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985). The language of Section 17.10 is unambiguous in denying nonparties – including ECT – standing to bring claims under its terms. *See* CP 94; CP 139.

ECT’s rights with regard to its loan guarantees for the Project LLCs are specifically set forth in the Guarantor Fee Agreements (CP 217-34), and its contractual privity with the Project LLC Members may not be expanded beyond those contracts. There is no “Veto” provision or right to affirmatively dictate actions by the Project LLCs that would otherwise require a majority vote established by the Guarantor Fee Agreements. ECT is contractually estopped from asserting the veto or any other

⁷ ECT’s Motion at page 14 refers several times to RCW 26.15.120. CP 311. Presumably, it intended to refer to RCW 25.15.120 *et seq.* of the Washington Limited

provision in the Operating Agreements, and accordingly, the trial court erred in finding that ECT had standing under the contracts (the Operating Agreements) to seek and obtain summary judgment regarding the contractual Veto power.

D. ECT Does Not Have Standing Under RCW 7.24 Because It Is Not a Member Of the Project LLCs, And There Is No Justiciable Controversy.

ECT lacks standing to seek a declaratory judgment under RCW 7.24 *et seq.* because, due to its non-membership in the Project LLCs, there is no justiciable controversy between ECT and T&S/Raceway on this issue.⁸ The Washington Declaratory Judgment Act, RCW 7.24.10 *et seq.*, provides in part that “[a] person ... whose rights, status or other legal

Liability Act.

⁸ In his ruling granting Discretionary Review, Commissioner Schmidt noted that the trial court did not make findings with respect to whether ECT met the standing requirements of RCW 7.24, and further that “it is unclear from the record whether ECT intervened under CR 24.” Appendix 26. He concluded that “*assuming the trial court properly permitted ECT to intervene pursuant to CR 24*, the trial court did not commit probable error in concluding ECT had standing to assert its interest.” Appendix at 28. However, none of the briefs submitted to Commissioner Schmidt (or in the trial court) referenced CR 24, and in fact ECT did not intervene – rather, it filed its own lawsuit against T&S/Raceway, which was consolidated with T&S/Raceway’s complaint against the other defendants. *See* Section III.B, *supra*; CP 52-55. Accordingly, Commissioner Schmidt’s assumption regarding ECT’s intervention is simply incorrect and not supported by the record. It follows that his conclusion – that the trial court did not commit probable error – is also incorrect. Based on Commissioner Schmidt’s apparent misunderstanding of the procedural background of this case – and his apparent reliance on that misunderstanding in reaching his conclusion as to RCW 7.24 – T&S/Raceway are briefing the issue to this Court with the understanding that, had Commissioner Schmidt understood the procedural background, he would have explicitly granted review of this issue as he did with the other issues. Whether ECT had standing under RCW 7.24 is inextricably intertwined with whether the trial court erred in granting ECT what amounts to a declaratory judgment regarding ECT’s use of the Veto Power. RP 35-36; CP 493-92.

relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder.” RCW 7.24.020. In *Diversified Industries Development Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973), the Washington Supreme Court stated that “in the absence of the intrusion of issues of broad overriding public import, [we have] steadfastly adhered to the virtually universal rule that, before the jurisdiction of a court may be invoked under the act, there must be a justiciable controversy.”

The criteria for identifying a justiciable controversy are well established. To meet the requirements of the justiciability test, a party must “demonstrate a direct, substantial interest in an actual, immediate dispute with a truly adverse party, and that dispute must be one that the court’s decision will conclusively resolve.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416-18, 27 P.3d 1149, 1155-56 (2001) (citing *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815). This test also incorporates the doctrine of judicial restraint: “An actual, immediate dispute cannot be moot and must be ripe, and a party lacking a direct, substantial interest in the dispute will lack standing.” *To-Ro Trade Shows*, 144 Wn.2d at 416-18. Where the four justiciability factors are not

met, “the court steps into the prohibited area of advisory opinions.”

Diversified Indus. Dev. Corp., 82 Wn.2d at 815.

The trial court did not make explicit findings under RCW 7.24, nor did it explicitly find that ECT had standing. CP 489-92. However, as noted above, the trial court stated in its oral ruling on the Motion that “the issue of whether ECT has standing or not I think is inextricably intertwined with whether or not they’re the primary guarantor, because if they are the primary guarantor it seems to me they have standing to address this issue” RP 35-36. Further, ECT’s motion for summary judgment explicitly sought relief under RCW 7.24 (CP 308), and the trial court granted that Motion (CP 489-92). Accordingly, the trial court necessarily implicitly found that ECT had standing under RCW 7.24.

ECT is indisputably a non-party to the contract it seeks to enforce by declaratory judgment (*i.e.*, the Operating Agreements), and the governing contracts contain a provision that specifically bars non-parties from seeking to assert contractual rights under them. *See* CP 94; CP 139. Nonetheless, the trial court erroneously permitted ECT to seek and obtain relief under the Declaratory Judgment Act.

ECT’s proffered evidence in support of its motion for summary judgment fails to satisfy any of the four justiciability requirements required by the Washington Declaratory Judgment Act. With regard to the

first requirement, there is no actual, present existing dispute between ECT and T&S regarding the loan guarantee other than what has been manufactured by ECT's declaratory judgment claim. ECT is simply a guarantor of the Project LLCs' loans, and its compensation, rights, and duties are set forth in Guaranty Fee Agreements (CP 218-24, 226-34), which no one alleges have been breached by any party. Thus, there is no actual dispute between ECT and T&S regarding this issue.

Similarly, with regard to the second and third requirements of justiciability, ECT does not show that its "interests" in the Operating Agreements between the Members of the Project LLCs are "ripe" and "direct and substantial," as opposed to "potential, theoretical, abstract or academic," at least with regard to T&S/Raceway. *See Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815. In order for ECT to suffer an "injury," the Project LLCs must default on the loans, the respective bank must call the guarantees, and the members of the Project LLCs must be unable to pay ECT the amount of the guaranty. In other words, there must be a breach of the Loan Guarantor Fee Agreements.

ECT's motion argued about alleged harms it *might* face with respect to Junction 192 and Meridian Sunrise LLC. CP 313-14. However, the Junction 192 issue is now moot with regard to ECT's claims – it was able to force Junction 192 to take another construction loan rather than

obtaining permanent financing, and that may not be “undone.” CP 299-300, 304; CP 323 ¶ 23; CP 334-35 ¶ 15. Similarly, the Meridian Sunrise LLC financing issue in June 2010 was resolved by agreement of the parties with a reservation of rights. CP 300, 306-07; CP 316-17 ¶¶ 3-11; CP 335 ¶¶ 16, 18; CP 338-39 ¶¶ 4-7, 10-11. Thus, the only issue set forth in ECT’s Motion was a potential or theoretical future challenge to a future attempt to exercise the Veto power by ECT. CP 302-17. As stated by Michael Corliss, “[i]t may not be possible to cure another needed use of the Veto Power by reserving rights.” CP 336 ¶ 19. In other words, the trial court’s grant of summary judgment in favor of ECT means that if, hypothetically, ECT wished to exercise the Veto Power at some time in the future on some as yet unidentified issue, and the parties could not agree to use the same mechanism they previously used to resolve the issue, then ECT would have the right to use the Veto Power, effectively without regard to the factual circumstances. This is precisely the potential, theoretical type of interest that does not meet the justiciability test.

The fourth requirement of justiciability – that a judicial determination will be final and conclusive – is obviously paramount in the context of this appellate review. T&S/Raceway filed a notice of appeal under the impression that the trial court’s declaratory judgment order was

entered pursuant to RCW 7.24.010 and “shall have the force and effect of a final judgment or decree” pursuant to that law. However, the very fact that this appeal is before this Court on discretionary review – rather than review as a matter of right, which should have been granted if the trial court’s order was a “declaratory judgment” – shows that the trial court’s determination is not “final and conclusive” and accordingly, declaratory judgment should not have been entered.

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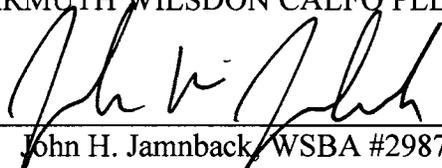
VI. CONCLUSION

For the reasons set forth above, T&S/Raceway respectfully request that the Court reverse the trial court's decision granting ECT summary judgment, holding that ECT is a Primary Guarantor that can exercise the Veto Power under the Project LLCs' operating agreements. Likewise, T&S/Raceway respectfully request that the Court reverse the trial court's related decision that ECT had standing under the operating agreements and RCW 7.24 to seek relief under the Project LLCs' operating agreements.

Dated: August 15, 2011.

Respectfully submitted,

YARMUTH WILSDON CALFO PLLC

By 

John H. Jamnback, WSBA #29872

Attorneys for Petitioners

Raceway Park, Inc. & T&S Properties, LLC

VII. APPENDIX

- A1: Order Regarding Evergreen Capital Trust's Motion for Partial Summary Judgment on Veto Power
- A6: Letter dated November 18, 2010 from David Ponzoha
- A8: Letter dated January 18, 2011 to Mr. Ponzoha
- A9: Order Denying Motion for Partial Final Judgment on Order Regarding Motion for Partial Summary Judgment on Veto Power
- A12: January 19, 2011 letter from Mr. Ponzoha
- A13: Court of Appeal Ruling Granting Review

CERTIFICATE OF SERVICE

I certify that on this date, I caused true and correct copies of the foregoing document and a copy of the Verbatim Report of Proceedings to be served as follows:

COUNSEL FOR RESPONDENT EVERGREEN

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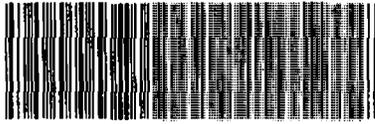
- Via Email
- Via U.S. Mail

11 AUG 15 PM 4: 18
STATE OF WASHINGTON
BY _____
DEPUTY
FEDERAL
COURT OF APPEALS
DIVISION II

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

Dated: August 15, 2011 at Seattle, Washington.


Colette Saunders
Legal Assistant



10-2-06523-2 35189642 OR 10-13-10

THE HONORABLE STEPHANIE AREND
Noted for Hearing on September 24, 2010 at 9:00 a.m.
With Oral Argument
Moving Party

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

RACEWAY PARK, INC., a Washington corporation; and T & S PROPERTIES, LLC, a Washington limited liability company,

Plaintiffs,

v.

MERIDIAN SUNRISE VILLAGE, LLC, a Washington limited liability company, ECT MERIDIAN PARTNERS, LLC, a Washington limited liability company; JUNCTION 192 LLC, a Washington limited liability company; ECT BONNEY LAKE PARTNERS LLC, a Washington limited liability company; INVESTCO FINANCIAL CORPORATION, a Washington corporation, MICHAEL J. CORLISS; and MARTIN D. WAISS,

Defendants.

MERIDIAN SUNRISE VILLAGE, LLC, a Washington limited liability company, ECT MERIDIAN PARTNERS, LLC, a Washington limited liability company; JUNCTION 192 LLC, a Washington limited liability company; ECT BONNEY LAKE PARTNERS LLC, a Washington limited liability company; INVESTCO FINANCIAL CORPORATION, a Washington corporation, and MARTIN D. WAISS, an individual,

Defendants/Counter Plaintiffs,

v.

RACEWAY PARK, INC., a Washington corporation; and T & S PROPERTIES, LLC, a Washington limited liability company,

Plaintiffs/Counter Defendants.

NO. 10-2-06523-2

[Consolidated With No. 10-2-07936-5]

~~PROPOSED~~ ORDER REGARDING
EVERGREEN CAPITAL TRUST'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON VETO POWER



1 EVERGREEN CAPITAL TRUST, a
Washington grantor trust,

2 Plaintiff,

3 v.

4 T & S PROPERTIES, LLC, a Washington
limited liability company, and RACEWAY
5 PARK, INC., a Washington corporation,

6 Defendants.

7 This matter came before the Court on September 24, 2010 with oral argument on the
8 Motion of Evergreen Capital Trust ("ECT") for Partial Summary Judgment on the Veto Power.
9 The Court finds it has jurisdiction over the subject matter and the parties, and has considered
10 the arguments of counsel and the following documents:

- 11 1. Motion of Evergreen Capital Trust for Partial Summary Judgment on Veto
12 Power;
- 13 2. Declaration of Christopher I. Brain in Support of Motion of Evergreen Capital
14 Trust for Partial Summary Judgment on Veto Power;
- 15 3. Declaration of Michael J. Corliss in Support of Motion of Evergreen Capital
16 Trust for Partial Summary Judgment on Veto Power;
- 17 4. Declaration of James D. Gradel in Support of Motion of Evergreen Capital Trust
18 for Partial Summary Judgment on Veto Power;
- 19 5. Declaration of Thomas J. Martineau in Support of Motion of Evergreen Capital
20 Trust for Partial Summary Judgment on Veto Power;
- 21 6. Declaration of Martin D. Waiss in Support of Motion of Evergreen Capital Trust
22 for Partial Summary Judgment on Veto Power;
- 23 7. Evergreen Capital Trust's List of Exhibits Supporting It's Motion for Partial
24 Summary Judgment on Veto Power;
- 25 8. Plaintiffs/Counter-Defendants Raceway Park and T&S Properties' Opposition to
26 Evergreen Capital Trust's Motion for Partial Summary Judgment;

[PROPOSED] ORDER REGARDING EVERGREEN
CAPITAL TRUST'S MOTION FOR PARTIAL SUMMARY
JUDGMENT ON VETO POWER - 2

4871/005/235391.2

APPENDIX A-2

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

1 9. Declaration of Eric Corliss in Support of Plaintiffs' Opposition to ECT's Motion
2 for Partial Summary Judgment;

3 10. Declaration of Scott Corliss in Support of Plaintiffs' Opposition to ECT's
4 Motion for Partial Summary Judgment;

5 11. CR 56(f) Declaration of John H. Jamnback in Support of Plaintiffs' Response to
6 ECT's Motion for Partial Summary Judgment ; and

7 12. Evergreen Capital Trust's Reply in Support of Motion for Partial Summary
8 Judgment on Veto Power;

9 13. Reply Declaration of Christopher I. Brain in Support of Motion fro Partial
10 Summary Judgment by Evergreen Capital Trust;

11 14. Declaration of G. Perrin Walker in Support of Evergreen Capital Trust's (ECT)
12 Motion for Partial Summary Judgment on the Veto Power; and

13 15. The balance of pleadings and documents on file in this action.

14 Based on the foregoing and the argument of counsel, the Court **ORDERS AS**
15 **FOLLOWS:**

16 1. ECT's motion for partial summary judgment is granted in part and withdrawn in
17 part.

18 2. The Court finds that a "Person" as defined in the Revised Operating Agreement
19 of Bonney Lake Town Center L.L.C. and of the Revised Operating Agreement of New
20 Meridian L.L.C. (hereinafter "Operating Agreements") may be a "Primary Guarantor" as
21 defined therein. A "Primary Guarantor" is not also required to be a "Member" of Bonney
22 Lake Town Center L.L.C. or New Meridian L.L.C. in order to satisfy the definition of "Primary
23 Guarantor." The Court finds further that because there is no dispute that ECT is a "Person that
24 is providing a guaranty to any lender or other party in connection with Company recourse
25 debt(s) or obligation(s) which represents (in the aggregate) an amount that is greater than fifty
26 percent (50%) of the outstanding liabilities of the Company" for Bonney Lake Town Center

1 L.L.C. and New Meridian L.L.C., ECT meets the definition of "Primary Guarantor." The
2 Court further finds that because ECT meets the definition of "Primary Guarantor," it is entitled
3 to exercise the veto power set forth in Article 6.10.3 of the Operating Agreements, entitled
4 "Veto Power of Primary Guarantor" ("Veto Power").

5 3. The Court further finds that ECT has withdrawn its request to dismiss the claims
6 of Plaintiffs Raceway Park, Inc. and T & S Properties, LLC for declaratory judgment and other
7 relief concerning ECT's past or future use of the Veto Power, including but not limited to
8 claims related to the Junction 192 Union Bank loan extension.

9 **IT IS SO ORDERED.**

10 DONE IN OPEN COURT this 8 day of October, 2010.

11 
12 THE HONORABLE STEPHANIE AREND

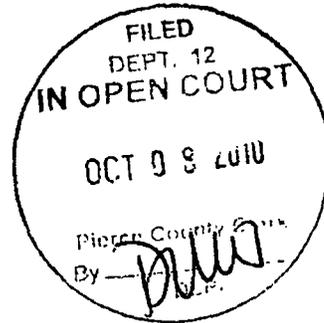
14 Presented by:

15 TOUSLEY BRAIN STEPHENS PLLC

17 By:

18 Christopher I. Brain, WSBA #5054
19 Mary B. Reiten, WSBA #33623

Attorneys for Plaintiff, Evergreen Capital Trust



20 Copy received and notice of presentation waived:

21 VANDEBERG JOHNSON & GANDARA LLP

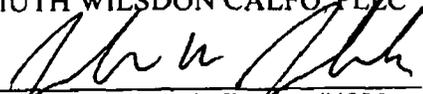
22 By:

23 G. Perrin Walker, WSBA #4013
24 Scott D. Winship, WSBA #17047
Marlo DeLange, WSBA #27080

25 Attorneys for Defendants/Counter Plaintiffs, Meridian
26 Sunrise Village, LLC, ECT Meridian Partners, LLC,
Junction 192, LLC, ECT Bonney Lake Partners, LLC,
Investco Financial Corporation, and Martin D. Weiss

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YARMUTH WILSDON CALFO, PLLC

By: 

Richard C. Yarmuth, WSBA #4990
John H. Jamnback, WSBA #29872

*Attorneys for Plaintiffs/Counter Defendants,
Raceway Park, Inc. and T&S Properties, LLC.*



Washington State Court of Appeals

Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

November 18, 2010

Christopher Ian Brain
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1700 7th Ave Ste 2200
Seattle, WA, 98101-4416

John Hugo Jamnback
Yarmuth Wilsdon Calfo PLLC
818 Stewart St Ste 1400
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G. Perrin Walker
Scott D. Winship
Marlo D Lange
Vandenberg Johnson & Gandara
1201 Pacific Ave Ste 1900
Tacoma, WA 98402-4391

Court of Appeals Case #: 41421-0-II
Raceway Park Inc, et al, Appellants v Meridian Sunrise Village
Pierce County No. 10-2-06523-2 (consolidated at trial court with 10-2-07936-5)
Case Manager: Sandy

Counsel:

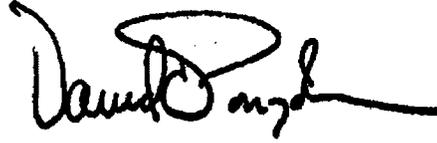
The decision appealed from in the above referenced matter is an Order Regarding Evergreen Capital Trust's Motion for Partial Summary Judgment on Veto Power. In a case with more than one claim or multiple parties, where the trial court directs the entry of judgment as to one or more, but fewer than all the claims or parties, CR 54(b) requires written findings supporting the determination that there is no just reason for delay. It appears that either no findings have been filed or that the findings are not sufficient, and therefore it is questionable whether the order is appealable as a matter of right as provided in RAP 2.2(d). See Fox v. Sunmaster Products, Inc., 115 Wn.2d 498 (1990); Doerflinger v. New York Life Ins. Co., 88 Wn.2d 878 (1977); Nelbro Packing Co. v. Baypack Fisheries, 101 Wn. App. 517 (2000) (five required types of findings).

Pursuant to RAP 6.2(b), I am placing this matter on the court's motion docket for appealability. The motion will be considered without oral argument. **A written response shall be filed no later than December 3, 2010.** Division II General Order 91-1. Counsel will be advised, in writing, at a later date of the commissioner's decision. **PLEASE NOTE:** If sufficient written findings are entered and a copy forwarded to this court, the clerk's motion will be stricken.

The requirement that a party file a notice for discretionary review has been waived, if necessary, assuming the notice of appeal has been timely filed. In its decision on the appealability issue, the court will advise the parties if a motion for discretionary review is

necessary and set the due date for the motion for discretionary review. If counsel have any questions concerning this action, do not hesitate to contact this office.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha". The signature is fluid and cursive, with a large loop at the top and a long horizontal stroke extending to the right.

David C. Ponzoha,
Court Clerk

DGP: skw



YARMUTH WILSDON CALFO
ATTORNEYS AT LAW

John H. Jamnback
DIRECT 206.516.3837
jjamnback@yarmuth.com

January 18, 2011

VIA E-MAIL and U.S. MAIL

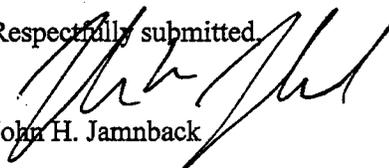
David C. Ponzoha
Court Clerk
Court of Appeals, Division II
950 Broadway, #300
MS TB-06
Tacoma, WA 98402

Re: Case #: 41421-0-II
Raceway Park, Inc. et al., v. Meridian Sunrise Village et al.

Dear Mr. Ponzoha:

In response to your request dated January 14, 2011, regarding the above captioned matter, enclosed please find a copy of the order from the Superior Court dated December 17, 2010. The order denied plaintiffs' request for the entry of CR 54(b) findings without prejudice, pending a decision by the Court of Appeals on the issue of whether the Superior Court's entry of an order of summary judgment on a motion for declaratory judgment pursuant to RCW 7.24.010 *et seq* is appealable for the reasons set forth in our prior submission to Division II dated December 3, 2010.

Respectfully submitted,


John H. Jamnback

Enclosure

cc: Chris Brain
Perrin Walker

T 206.516.3800
F 206.516.3888

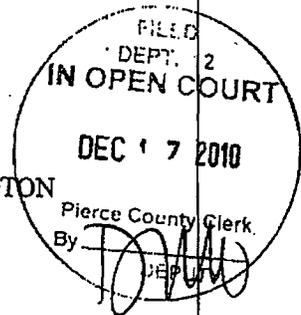
818 STEWART STREET, SUITE 1400 | SEATTLE, WASHINGTON 98101

www.yarmuth.com

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APPENDIX A-8

THE HONORABLE STEPHANIE AREND
Noted for Hearing: December 17, 2010 at 9:00 a.m.
With Oral Argument



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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

RACEWAY PARK, INC., a Washington corporation; and T & S PROPERTIES, LLC, a Washington limited liability company,

Plaintiffs,

v.

MERIDIAN SUNRISE VILLAGE, LLC, a Washington limited liability company, ECT MERIDIAN PARTNERS, LLC, a Washington limited liability company; JUNCTION 192 LLC, a Washington limited liability company; ECT BONNEY LAKE PARTNERS LLC, a Washington limited liability company; INVESTCO FINANCIAL CORPORATION, a Washington corporation, MICHAEL J. CORLISS; and MARTIN D. WAISS,

Defendants.

MERIDIAN SUNRISE VILLAGE, LLC, a Washington limited liability company, ECT MERIDIAN PARTNERS, LLC, a Washington limited liability company; JUNCTION 192 LLC, a Washington limited liability company; ECT BONNEY LAKE PARTNERS LLC, a Washington limited liability company; INVESTCO FINANCIAL CORPORATION, a Washington corporation, and MARTIN D. WAISS, an individual,

Defendants/Counter Plaintiffs,

v.

RACEWAY PARK, INC., a Washington corporation; and T & S PROPERTIES, LLC, a Washington limited liability company,

Plaintiffs/Counter Defendants.

NO. 10-2-06523-2

[Consolidated With No. 10-2-07936-5]

~~PROPOSED~~ ORDER DENYING
MOTION FOR PARTIAL FINAL
JUDGMENT ON ORDER REGARDING
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON VETO POWER

~~PROPOSED~~ ORDER DENYING MOTION FOR PARTIAL
FINAL JUDGMENT ON ORDER REGARDING MOTION FOR
PARTIAL SUMMARY JUDGMENT ON VETO POWER - 1
4871/005/239227.1

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
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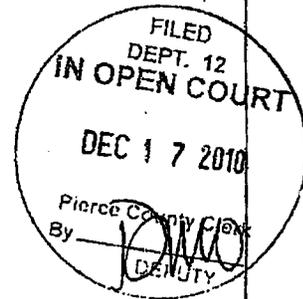
1 EVERGREEN CAPITAL TRUST, a
Washington grantor trust,

2 Plaintiff,

3 v.

4 T & S PROPERTIES, LLC, a Washington
limited liability company, and RACEWAY
5 PARK, INC., a Washington corporation,

6 Defendants.



7 This matter came before the Court on December 17, 2010, with oral argument on
8 Plaintiffs Raceway Park and T&S Properties, LLC's Motion for Partial Final Judgment on
9 Order re Motion for Partial Summary Judgment on the Veto Power. The Court finds it has
10 jurisdiction over the subject matter and the parties, and has considered the arguments of
11 counsel and the following documents:

- 12 1. The Plaintiffs' Motion for Final Judgment on Order Regarding Motion for
13 Partial Summary Judgment on Veto Power;
- 14 2. Evergreen Capital Trust's Opposition to Motion for Partial Final Judgment on
15 Order Regarding Motion for Partial Summary Judgment on Veto Power;
- 16 3. Declaration of Mary B. Reiten in Support of Opposition to Motion for Partial
17 Final Judgment on Order Regarding Motion for Partial Summary Judgment on Veto Power;
18 *2.1. Defendants' letter Plaintiff motion + 2.5. Opposition. P.P.*
- 19 4. Plaintiffs' reply documents, if any; and
- 20 5. The balance of pleadings and documents on file in this action.

21 Based on the foregoing and the argument of counsel, the Court **ORDERS AS**
22 **FOLLOWS:** Plaintiff's Motion for Partial Final Judgment on Order Regarding Motion for
23 Partial Summary Judgment on Veto Power is **DENIED**, *without prejudice to*
renew after decision by the Court of Appeals.
IT IS SO ORDERED.

24 DONE IN OPEN COURT this 17 day of December, 2010.

25 *Stephanie A. Arend*
26 THE HONORABLE STEPHANIE AREND

~~PROPOSED~~ ORDER DENYING MOTION FOR PARTIAL
FINAL JUDGMENT ON ORDER REGARDING MOTION FOR
PARTIAL SUMMARY JUDGMENT ON VETO POWER - 2
4871/003/239227.1

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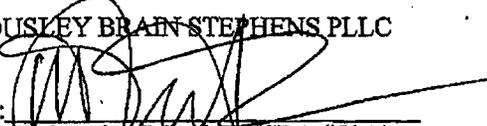
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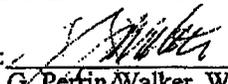
Presented by:

TOUSLEY BRAIN STEPHENS PLLC

By: 
Christopher I. Brain, WSBA #5054
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Attorneys for Plaintiff, Evergreen Capital Trust

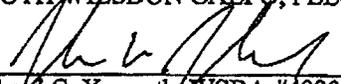
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Attorneys for Plaintiffs/Counter Defendants, Raceway Park, Inc. and T&S Properties, LLC,

[PROPOSED] ORDER DENYING MOTION FOR PARTIAL FINAL JUDGMENT ON ORDER REGARDING MOTION FOR PARTIAL SUMMARY JUDGMENT ON VETO POWER - 3
4871/005/239227.1

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Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

January 19, 2011

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CASE #: 41421-0-II
Raceway Park Inc, et al, Appellants v Meridian Sunrise Village

Counsel:

On the above date, this court entered the following notation ruling:

A RULING SIGNED BY COMMISSIONER SCHMIDT:

The clerk placed this matter on the motion calendar to determine appealability. After considering the responses filed, the court concludes that the trial court's 10/08/10 order, while granting some declaratory relief, does not resolve all issues in the case and so is not a final declaratory judgment that would be appealable as a matter of right. The notice of appeal is converted to a notice of discretionary review. A motion for discretionary review is due 02/11/11.

Very truly yours,

David C. Ponzoha
Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RACEWAY PARK, INC., a
Washington corporation; and T & S
PROPERTIES, LLC, a Washington
limited liability company,

Petitioners,

v.

MERIDIAN SUNRISE VILLAGE, LLC,
a Washington limited liability
company, ECT MERIDIAN
PARTNERS, LLC, a Washington
limited liability company, JUNCTION
192 LLC, a Washington limited liability
company; ECT BONNEY LAKE
PARTNERS LLC, a Washington
limited liability company; INVESTCO
FINANCIAL CORPORATION, a
Washington corporation; MICHAEL J.
CORLISS; and MARTIN D. WAISS,

Defendants,

EVERGREEN CAPITAL TRUST, a
Washington grantor trust,

Respondent.

No. 41421-0-II

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY 

RULING GRANTING REVIEW

Raceway Park, Inc. (Raceway) and T & S Properties, LLC (T&S) seek discretionary review of the trial court's order granting partial summary judgment. The trial court ruled that Evergreen Capital Trust (ECT) was the "Primary

Guarantor” and holder of the “Veto Power” under two LLC Operating Agreements, such that it could exercise the Veto Power to force the approval and extension of a loan modification agreement for one of the LLCs. Concluding that Raceway and T&S have shown that the trial court committed probable error that substantially alters the status quo in the operation of the LLCs, this court grants review.

FACTS

Various members of the Corliss¹ family, including Scott Corliss, own T&S. Scott and Timothy H. Corliss own Raceway. Michael J. Corliss is the sole beneficiary and one of the trustees of ECT.

In 2004, Raceway and T&S owned interests in real property in Puyallup, Washington (the Meridian Sunrise Village Project) and Bonney Lake, Washington (the Junction 192 Project). T&S had begun the project at the Bonney Lake property, but it was not yet completed. Scott requested that Investco Financial Corporation (“Investco”) and Tarragon LLC become involved to aid and advise Scott’s companies with respect to both projects.

In April 2006, two specific project LLCs were created, one for each project: (1) Meridian Sunrise Village, LLC² for the Meridian Sunrise Village Project in

¹ For the sake of clarity, this court will refer to members of the Corliss family by using their first names. No disrespect is intended.

² Meridian Sunrise Village, LLC is also referred to in the record as the New Meridian, LLC and the Meridian Partners, LLC. For clarity, this court uses only Meridian Sunrise Village, LLC.

Puyallup, and (2) Junction 192, LLC³ for the Junction 192 Project in Bonney Lake. Investco coordinated the formation of and was the manager for both specific project LLCs.

ECT created two LLCs that each became a part owner in a respective specific project LLC. ECT Meridian Partners, LLC was created to be a part owner in the Meridian Sunrise Village, LLC. ECT Bonney Lake Partners, LLC was created to be a part owner in the Junction 192, LLC. While ECT was the sole owner of both ECT Meridian Partners, LLC and ECT Bonney Lake Partners, LLC, ECT was not directly a part owner of the Meridian Sunrise Village, LLC or the Junction 192, LLC.

The respective Operating Agreements for both specific project LLCs, Junction 192, LLC and Meridian Sunrise Village, LLC, were written by Michael and vest the "Primary Guarantor" with special voting rights over decisions made by Members⁴ as well as the "Veto Power," which is defined in part as "the right to veto the taking of any action or decision which was otherwise approved or disapproved by the Members." Mot. for Disc. Rev., App. at 28, 33 (capitals omitted). The Primary Guarantor is defined as

³ Junction 192, LLC was at one point named and is sometimes referred to in the record as Bonney Lake Town Center, LLC. For clarity, this court uses only Junction 192, LLC.

⁴ The Operating Agreements define "Member or Members" as "each Person who executes a counterpart of this Agreement as a Member and each Person who may hereafter become a Member." Mot. for Disc. Rev., App. at 26, 71. ECT does not argue that it was a Member of either LLC under the respective Operating Agreements.

any Person that is providing a guaranty to any lender or other party in connection with Company recourse debt(s) or obligation(s) which represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company and greater than such Member's percentage interest in the Company (a "Disproportionate Guaranty").

Mot. for Disc. Rev., App. at 28 (emphasis omitted). Petitioners and ECT now dispute whether this definition requires that the Primary Guarantor be a Person or a Member as defined in the Operating Agreements, such that it can exercise the Veto Power. ECT claims that it would not have agreed to guaranty the construction loans for the project LLCs unless the members of both LLCs agreed to the Indemnity Agreement and to grant ETC the Veto Power.

ECT executed guarantees of related loans for Junction 192, LLC and Meridian Sunrise Village, LLC for each LLC's respective project. Lenders for both projects required that ECT provide a full payment and performance guaranty on all debt obligations, so members of both specific project LLCs entered into a Guaranty Fee and Indemnity Agreement for Loans and Bonds. ECT was paid an initial fee for the loan guaranties and received 0.25 percent on the outstanding principal amount of the loan that averaged \$170,000 per quarter.

A. Junction 192 Project

The Junction 192 Project consists of a retail pad, 7.7 acres of land, and approximately 82,000 square feet of improvements in Bonney Lake, Washington. The Junction 192, LLC was created to develop the Junction 192 Project.

ECT Bonney Lake Partners, LLC, T&S, Tarragon Construction, LLC, and Tarragon, LLC formed the Junction 192, LLC. ECT Meridian Partners, LLC owns

a 49 percent interest, Raceway owns a 49 percent interest, T&S owns a 1.23 percent interest, and Tarragon Construction, LLC and Tarragon, LLC each own a one percent interest. ECT is not a part owner in the Junction 192, LLC.

In May 2007, Junction 192, LLC obtained a \$20 million construction loan from Union Bank. Union Bank required ECT to execute an unconditional guaranty of all loans made by Union Bank to Junction 192, LLC and the Junction 192 Project.

On September 1, 2009, the Union Bank loan matured. Raceway and T&S and ECT appear to dispute whether at this time in the financial and economic markets it was possible to obtain alternative or permanent financing. Union Bank was willing to agree to a two-year extension of the Union Bank loan pursuant to the terms and conditions contained in the Loan Modification Agreement. However, Scott did not want to enter into a loan extension. T&S refused to sign the Union Bank Loan Modification Agreement.

Because the members of the Junction 192, LLC had not approved the Union Bank Loan Modification Agreement, the agreement could not be completed. Consequently, on September 9, 2009, Union Bank issued a Notice of Loan Default. ECT, believing itself to be the Primary Guarantor, exercised the Veto Power contained in the Junction 192, LLC Operating Agreement to approve the Union Bank Loan Modification Agreement on behalf of the members of Junction 192, LLC. The Union Bank loan was extended for a term of two years.

B. Meridian Sunrise Village Project

The Meridian Sunrise Village Project consists of the following: (1) the Retail Center, which is approximately 39.6 acres of land with approximately 225,600 square feet of improvements; (2) the Land Parcel, which is two developed parcels of 14.49 acres; and (3) the Valley Bank Parcel, an additional land parcel.

The Meridian Sunrise Village, LLC was created to develop the Meridian Sunrise Village Project. ECT Meridian Partners, LLC, T&S, Raceway, Tarragon Construction, LLC, and Tarragon, LLC formed Meridian Sunrise Village, LLC. ECT Meridian Partners, LLC owns a 49 percent interest, Raceway and T&S own a shared 49 percent interest,⁵ and Tarragon Construction, LLC and Tarragon, LLC each own a one percent interest. ECT is not a part owner in Meridian Partners, LLC.

To fund the project, Meridian Sunrise Village, LLC obtained several loans. First, the Land Acquisition loan was in the amount of \$18.3 million and borrowed from US Bank. Second, the Land Development Loan was for \$41.25 million and funded by the unpaid balance of the Land Acquisition Loan as well as the construction and installation of developmental improvements for the project. Third, the Vertical Construction Loan was in the amount of \$75 million from a

⁵ The ownership flow chart actually shows Raceway owning a 47.7 percent interest and T&S owning a 1.23 percent interest, which is actually a 48.93 percent interest. However, other places in the record identify Raceway and T&S as sharing a 49 percent, not 48.93 percent, interest. Because the exact percentage has no bearing on this case, this court refers to Raceway and T&S as sharing a 49 percent interest.

41421-0-II

four-member group of lenders with US Bank as the lead lender. The lenders based the loan on a 66.79 percent loan-to-value ("LTV") that in turn was on a then-current appraisal. Fourth, the Converted Loan arose from the remaining balance of the Land Development Loan being converted to a separate loan of \$9.686 million secured by the Land Parcel. Fifth, the Valley Bank Loan was in the amount of \$1.68 million based on an LTV of 67.88 percent of appraised value.

In January 2010, the Vertical Construction Loan and Development Land Loan matured, and both were extended to April 4, 2010. On May 15, 2010, the Valley Bank Loan matured.

Raceway and T&S claim that ECT Bonney Lake, LLC and Michael purposefully let the loans mature and go into default because it was in ECT Bonney Lake, LLC's financial interest: First, by doing so, ECT Bonney Lake, LLC avoided an approximately \$5 million capital call to reduce the loan balance. Second, the terms of the new Vertical Construction Loan extension enabled Investco to use cash for Junction 192, LLC operations instead of seeking capital calls from ECT Bonney Lake, LLC.

Raceway and T&S and ECT engaged in negotiations to extend the loans for an additional three years, and the extension was set to close on June 25, 2010. One of the documents required by US Bank for the extension was that all members of Meridian Sunrise Village, LLC execute the Authorizing Resolution. On June 24, 2010, the attorney for Raceway and T&S informed US Bank's attorney that despite earlier attempts to modify the text, the terms of the

Authorizing Resolution were unacceptable. ECT wanted to use the Veto Power to execute the US Bank Loan extension, but US Bank refused to accept it unless T&S and Raceway executed the Authorizing Resolution. Petitioners and ECT worked out a compromise "Reservation of Rights" agreement, and the US Bank Loan extension closed on June 25, 2010. Mot for Disc. Rev., App. at 270.

C. The Fallout

Unsurprisingly, Raceway and T&S opposed ECT's use of the Veto Power. After filing the instant lawsuit, in June 2010 ECT again threatened to exercise the Veto Power, but the matter was resolved without utilizing the Veto Power. On August 26, 2010, ECT filed a motion for partial summary judgment, which Raceway and T&S opposed and claim was really a veiled motion for declaratory judgment. On October 8, 2010, the trial court granted ECT's motion, stating that "ECT . . . is entitled to exercise the [V]eto [P]ower set forth in Article 6.10.3 of the Operating Agreements." Mot. for Disc. Rev., App. at 434. The trial court found that under both Operating Agreements, a "Primary Guarantor" is not required to be a "Member" and that ECT was the Primary Guarantor. Mot. for Disc. Rev at 433-34. Raceway and T&S seek discretionary review.

ANALYSIS

This court grants discretionary review only when:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far

sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

Raceway and T&S argue that under RAP 2.3(b)(2) this court should grant review because (1) ECT is not a "Primary Guarantor" as defined by both Operating Agreements, (2) ECT does not have "standing" under the Operating Agreements, and (3) ECT does not have standing pursuant to RCW 7.24.10. Mot for Disc. Rev. at 10-18. ECT responds that Raceway and T&S have not met the standard under RAP 2.3(b)(2) because (1) applying contract interpretation principles, the Operating Agreements do not require that the Primary Guarantor be both a Person and Member, (2) the Operating Agreements do not prevent ECT from exercising the Veto Power, because if it did, then the Veto Power would be an illusory right, and (3) ECT has standing under RCW 7.24.010 because a justifiable controversy exists.

A. Primary Guarantor

Petitioners and ECT dispute whether ECT was a Primary Guarantor. The Operating Agreements for both specific project LLCs provide that:

"Primary Guarantor" means any Person that is providing a guaranty to any lender or other party in connection with Company recourse debt(s) or obligation(s) which represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company and greater than such Member's percentage interest in the Company (a "Disproportionate Guaranty"). Notwithstanding the foregoing, the Members

acknowledge and agree that any guaranty obligations required in connection with permanent financing (i.e. non-recourse carve-out obligations) shall be allocated among the Members, pro rata, so that no single Member will be obligated to provide the sole guaranty to such lender.

Mot. for Disc. Rev at 28, 73. "Member" is defined as "each Person who executes a counterpart of this Agreement as a Member and each Person who may hereafter become a Member." Mot. for Disc. Rev., App. at 26, 71. "Person" is defined as "any individual or Entity, and the heirs, executors, administrators, legal representatives, successors, and assigns of such Person where the context so permits." Mot. for Disc. Rev., App. at 28, 73.

Raceway and T&S argue that the definition of Primary Guarantor in the Operating Agreements requires that the Primary Guarantor be a Member. ECT does not argue that it was a Member of either LLC under the respective Operating Agreements; rather, it contends that constituting a "Person" under the Operating Agreements is sufficient to be a Primary Guarantor. ECT relies on a 1967 law review article analyzing the use of the word "and" as an inclusive disjunctive in contracts to support its contention that the Primary Guarantor can be (1) a Person and (2) a Member, but does not require that the Primary Guarantor be both. E. ALLAN FARNSWORTH, "MEANING" IN THE LAW OF CONTRACTS, 76 Yale L.J. 939, 955 (1967).

The confusion in the definition of Primary Guarantor stems from the first sentence, which uses both the phrase "any Person" and "such Member's percentage interest" in referencing the requirements of being the "Primary Guarantor." Mot. for Disc. Rev. App., at 28, 73. It is unclear from this sentence

whether the Primary Guarantor must be a Member or simply a Person as defined in the respective Operating Agreements.

When reviewing an order granting partial summary judgment, this court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is appropriate only where there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

The construction of a contract and whether a contract is ambiguous is a legal question this court reviews de novo. *Schwab v. Seattle*, 64 Wn. App. 742, 751, 862 P.2d 1089 (1992). Interpreting the provisions of a contract is a question of law when the interpretation does not depend on the use of extrinsic evidence or there is only one reasonable inference from the extrinsic evidence. *Lynott v. National Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994).

A contract provision is ambiguous when, reading the contract as a whole, its terms are uncertain or capable of more than one meaning. *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253, *review denied*, 158 Wn.2d 1017 (2006); *Spratt v. Crusader Ins. Co.*, 109 Wn. App. 944, 37 P.3d 1269, *review denied*, 147 Wn.2d 1003 (2002). An ambiguous contract will be given "a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective." *Washington*

Pub. Util. Dists. Util. Sys. v. Public Util. Dist. No. 1, 112 Wn.2d 1, 11, 771 P.2d 701 (1989). Summary judgment is improper if the contract is ambiguous. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 83, 60 P.3d 1245 (2003). A term in a contract, however, is not ambiguous simply because the parties do not agree on the meaning. *Dice*, 131 Wn. App. at 684.

Here, the definition of Primary Guarantor is capable of two definitions: it can be read as allowing a Person to be a Primary Guarantor or it can be read as allowing only a Member (who is, per se, a Person) to be a Primary Guarantor. Reading the contract as a whole, the sentence defining Primary Guarantor is ambiguous as well because section 17.10 of both Operating Agreements limits the benefits of the Operating Agreement to Members only; thus, implying that the Veto Power, which is a benefit, could not be extended to ECT, a nonmember.

Because both the contract as a whole and the definition of Primary Guarantor are ambiguous, the trial court committed probable error by entering an order for partial summary judgment. See *Go2Net*, 115 Wn. App. at 83. The trial court's decision alters the status quo because it has established that ECT has the ability to exercise the Veto Power, which will continue to affect the ongoing business relationships and dealings within both specific project LLCs.

B. Section 17.10 of the Operating Agreements

Raceway and T&S argue the trial court committed probable error because ECT does not have "standing" under the Operating Agreements as section 17.10 of both Operating Agreements limits the benefits provided in the Operating Agreements to Members. ECT responds that general contract terms must yield

to specific contract terms, and that the Petitioners' argument will result in ECT's right being illusory.

Section 17.10 of both Operating Agreements provides:

The provisions of this Agreement (including, but not limited to any provisions that make reference to any lender or other third party or that could benefit any lender or other third party) are intended for the exclusive benefit of the parties hereto, and no other person (including, but not limited to, the creditors of the Company or of any Member) shall have any right or claim against any party by reason of any provision of this Agreement or be entitled to enforce any provision of this Agreement against any party.

Mot. for Disc. Rev., App. at 56, 101.

Generally, a non-party to a contract cannot claim benefits under it. See, e.g., *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 342-43, 831 P.2d 724 (1992). Parties to a contract are presumed to contract for their benefit and not for the benefit of a third party. See *Burke & Thomas, Inc. v. International Org. of Masters, Mates & Pilots*, 92 Wn.2d 762, 767, 600 P.2d 1282 (1979); *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 890, 155 P.3d 952 (2007), *aff'd*, 166 Wn.2d 489 (2009). As an exception to this general principle, a third party beneficiary is entitled to receive benefits under a contract so long as the contracting parties objectively intend to create the third party beneficiary. *Postlewait Constr., Inc. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 99-100, 720 P.2d 805 (1986). "[T]he key is not whether the contracting parties had an altruistic motive or desire to benefit the third party, but rather, 'whether performance under the contract would necessarily and directly

benefit' that party." *Postlewait Const.*, 106 Wn.2d at 99 (quoting *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361-62, 662 P.2d 385 (1983)).

The trial court made no ruling on whether ECT was a third party beneficiary or whether the parties to the Operating Agreements intended to create a third party beneficiary at the time they executed the Operating Agreements.

Because the respective Operating Agreements when read as a whole are ambiguous regarding whether the Primary Guarantor must be a Member, it is also ambiguous as to whether the Primary Guarantor is a specific exception to section 17.10. If under the Operating Agreements the Primary Guarantor must be a Member, then it is possible that section 17.10 limits the rights of nonmembers and third party beneficiaries. But if a Primary Guarantor can be just a Person, then the Primary Guarantor definition could be a specific exception to section 17.10. Such a determination cannot be made on summary judgment. And as stated above, the trial court's decision alters the status quo because it has established that ECT has the ability to exercise the Veto Power, which will continue to affect the parties ongoing business relationships within both specific project LLCs.

C. Standing Under the Uniform Declaratory Judgments Act

Finally, Raceway and T&S argue the trial court committed probable error because ECT lacks standing under RCW 7.24. The trial court made no determination as to whether ECT had standing under the Operating Agreements, and it is unclear from the record whether ECT intervened under CR 24.

“The purpose of the Declaratory Judgment Act is to declare rights not to execute them.” *Peoples Park and Amusement Ass’n v. Anrooney*, 200 Wn. 51, 59, 93 P.2d 362 (1939). Under RCW 7.24, before the jurisdiction of a court may be invoked under the Declaratory Judgments Act, there must be a “justiciable controversy,” which requires: (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, hypothetical, speculative, or moot disagreement; (2) between parties having genuine and opposing interests; (3) involving interests that are direct and substantial, rather than potential, theoretical, abstract or academic; and (4) a judicial determination of which will be final and conclusive. *Brown v. Vail*, 169 Wn.2d 318, 334, 237 P.3d 263 (2010).

Raceway and T&S argue that all four requirements of justiciability are lacking. They contend that: (1) because ECT is a nonparty to the Operating Agreements and Petitioners did not name ECT⁶ as a defendant, there is no existing dispute between ECT and Petitioners; (2) ECT has no interest in the Operating Agreements between the Members of the specific project LLCs, and any interest ECT does have is “potential, theoretical, abstract, or academic”⁷ with regard to Petitioners; (3) ECT has suffered no injury; and (4) any controversy is now moot because the Junction 192, LLC executed the loan extension as a

⁶ Raceway and T&S named ECT Bonney Lake Partners, LLC and ECT Meridian Partners, LLC and defendants, but not ECT.

⁷ See *Brown v. Vail*, 169 Wn.2d at 334.

result of ECT's use of the Veto Power and the parties reached an agreement regarding the Meridian Sunrise Village, LLC loan extension.

RCW 7.24.020 provides:

A person interested under . . . written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

By its terms, RCW 7.24.020 states that a party with an interest under a written contract may have the court determine any question of construction or validity. ECT claims an interest in the Operating Agreements either as a Primary Guarantor or as a third party beneficiary. Thus, assuming the trial court properly permitted ECT to intervene pursuant to CR 24, the trial court did not commit probable error in concluding ECT had standing to assert its interest.

CONCLUSION

Because the Operating Agreements as a whole and the definition of Primary Guarantor in particular are ambiguous, the trial court committed probable error by entering an order for partial summary judgment as summary judgment is inappropriate over an ambiguous contract. The trial court's decision alters the status quo because it has established that ECT has the ability to exercise the Veto Power, which will continue to affect the ongoing business relationships within both specific project LLCs. Therefore, discretionary review of the trial court's order is appropriate under RAP 2.3(b)(2). It is hereby

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ORDERED that Raceway and T&S's motion for discretionary review is granted. The Clerk will issue a perfection schedule.

DATED this 18TH day of April, 2011.

Eric B. Schmidt

Eric B. Schmidt
Court Commissioner

cc: John H. Jamnback
Christopher I. Brain
Mary B. Reiten
G. Perrin Walker
Scott D. Winship
Marlo De Lange
Hon. Stephanie A. Arend