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THE SUPREME COURT
OF
THE STATE OF WASHINGTON

RIVERVIEW COMMUNITY GROUP,

Appellant,

v.

SPENCER-LIVINGSTON, a Washington Partnership, and/or its
successors in interest, and GEORGE T. AND SHEILA LIVINGSTON,
husband and wife, and the marital community composed thereof, and
S.O.S. LLC, a Washington Limited Liability Company, and/or its
successors-in-interest, et al.

Respondents.

RESPONDENT GEORGE T. AND SHEILA LIVINGSTON'S
SUPPLEMENTAL BRIEF IN RESPONSE TO APPELLANT'S
PETITION FOR REVIEW AND SUPPORTING
CROSS PETITION FOR REVIEW

Dave Kulisch, WSBA #18313
Michael Grover, WSBA #44270
Attorneys for Respondents
George T. and Sheila Livingston

Randall | Danskin, P.S.
601 West Riverside Avenue
Bank of America Financial Center, Suite 1500
Spokane, WA 99201
(509)747-2052

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¹ Respondents incorporate by reference herein the Court of Appeals 26 page decision, which was already filed with Appellant’s petition. If the Court prefers that the

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I. INTRODUCTION

There are five questions of law to be determined on appeal: (1) is Riverview a real party in interest; (2) does Riverview have standing to bring this lawsuit; (3) did Riverview fail to add indispensable parties under CR 19; (4) should current Washington law be overturned, which requires that equitable servitudes be established in writing, thus recognizing the enforceability of equitable servitudes by implication; (5) if implied, equitable servitudes are permitted, is Appellant entitled to a perpetual equitable servitude under the facts of this case?

II. ASSIGNMENTS OF ERROR

No. 1: The Respondent argues that the Court of Appeals erred in overturning the trial court's order dated January 31, 2012 conditionally granting the GSL's defendants' motion to dismiss under CR 12(b)(7).

No. 2: The Respondent argues that the Court of Appeals erred in finding that Appellant is a real party in interest.

No. 3: The Respondent argues that the Court of Appeals erred in finding that Appellant has standing to bring this lawsuit.

No. 4: The Respondent argues that the Court of Appeals erred in finding that Appellant did not have to join the landowners as indispensable parties.

No. 5: The Respondent argues that the Court of Appeals erred in overturning the trial court's order dated February 13, 2012, which dismissed the defendants George T. and Sheila Livingston and defendant S.O.S. LLC.

III. ISSUES PRESENTED FOR REVIEW

No. 1: Can Appellant be a real party in interest when: (a) it owns no land adjoining the golf course; (b) the landowners did not deed, assign or transfer any property, contractual or choses in action to Riverview created; (c) it has no privity with any Respondent because it was not a party to any of the discussions related to real estate sales contracts underlying the landowners' claims; and (d) Appellant did not come into existence until after the golf course was closed?

No. 2: Is Appellant a party with standing to pursue the rights of the non-party landowners when the landowners failed to assign, deed or transfer any of individual property rights to Appellant and Appellant has no contractual privity with any of the Respondents?

No. 3: Are Riverview's "members" indispensable parties that should be joined pursuant to CR 19 because each landowner entered a separate contractual relationship with different Respondents and each landowners' participation is required to establish individual standing, the

alleged promise, the identity of the defendant who made the promise and the existence of a “covenant” that may be enforced?

No. 4: Does Washington recognize equitable servitudes by implication?

No. 5: Does an equitable servitude require a writing under Washington law?

No. 6: Is it equitable to require Respondents to maintain the golf course in perpetuity under the facts of this case?

III. STATEMENT OF THE CASE

The Deer Meadows property consisted of approximately 540 acres that was developed and platted, in three separate plats, by George and Lura Livingston and Charles and Gloria Spencer, hereinafter “GSL”.² *Riverview Cmty. Grp. v. Spencer & Livingston*, 173 Wn. App. 568, 572-73, 295 P.3d 258 (2013). The two couples created Spencer & Livingston, a Washington general partnership in 1987. *Id.* at 573. On October 16, 1990, Deer Meadows Plat 1 was filed and approved by the County. *Id.* Deer Meadows Plat 1 does not mention a golf course and no golf course property was dedicated in the plat. CP 29. Deer Meadows Replat 1 and Deer Meadows Plat 2 were filed and approved by the County on

² Lura Livingston died many years prior to this litigation being filed and George Livingston remarried “Shelia”, who is misidentified in all subsequent pleadings as “Sheila” Livingston and she will continue to be so identified herein for continuity’s sake.

November 2, 1992. *Riverview*, 173 Wn. App. at 573. Neither of these two plats referenced the golf course or dedicated any land for the golf course. CP 30-32.

Sometime in 1994, a nine-hole golf course was developed and in approximately 1998 the course expanded to 18 holes. *Riverview*, 173 Wn. App. at 573. In July 1995, the Spencer & Livingston partnership platted and the County approved Deer Meadows Plat 3. *Id.* Deer Meadows Plat 3 has the words “golf course” on the plat but no golf course property was dedicated in the plat. CP 33-34. In February 1997, the Spencers and others formed S.O.S., L.L.C., hereinafter “SOS”, to develop the Deer Heights area. *Riverview*, 173 Wn. App. at 574. SOS recorded and the County approved Deer Heights Plat 1 on September 17, 1998. *Id.* Deer Heights Plat 1 does not mention a golf course and no golf course property was dedicated in the plat. CP 35. SOS platted and the County approved Deer Heights Plat 2 on August 21, 2000 and Deer Heights Plat 3 was recorded and approved on September 19, 2003. *Riverview*, 173 Wn. App. at 574. Deer Heights Plats 2 and 3 do not mention a golf course and no golf course property was dedicated in either plat. CP 38-39. The Deer Heights plats do not adjoin the golf course. *Riverview*, 173 Wn. App. at 574. The golf course closed in 2009 and its equipment was sold in 2010. *Id.*

Some of the landowners in Deer Meadows and Deer Heights and in the surrounding communities, who do not live in either of the platted developments, incorporated Riverview Community Group, (hereinafter “Riverview”), as a non-profit organization, on September 20, 2010, almost a year after the golf course was closed. *CP 87, CP 103, CP 114, CP 130, CP 148.*

Riverview filed a Complaint on March 1, 2011, in Lincoln County Superior Court, alleging that Respondents, and other defendants, were part of a joint venture that promised to operate an 18-hole golf course in perpetuity if the landowners, unnamed in this lawsuit, agreed to purchase residential lots.³ *CP 5-6.* The legal theory proposed by Riverview asserts that the Respondents, George T. and Sheila Livingston, Spencer-Livingston, and S.O.S. LLC (hereinafter “S.O.S.”), as well as other named defendants, were obligated to operate the golf course, at any financial cost/loss, in order to satisfy the Appellant’s asserted, implied equitable servitude, which Appellant claims benefits all the landowners in the Deer Meadows, Deer Heights and surrounding communities. *CP 12-20.*

³ The Complaint does not provide specific facts or circumstances regarding which defendants and/or agents of defendants allegedly made promises to landowners in the Deer Meadows or Deer Heights communities or any other adjacent community. *CP 1-20.*

On August 11, 2011, GSL filed a CR 12(b)(7) motion to dismiss Riverview's complaint. CP 154. GSL argued Riverview is not a real party in interest under CR 17 and that CR 19 required Riverview to add the landowners who may have a right to assert equitable servitudes. CP 157-58. On August 22, 2011, Riverview filed its Opposition to GSL's motion including five declarations in which Riverview conceded the following facts: (1) the landowners created it for the sole purpose of investigating "their legal rights" and filing this lawsuit. *CP 87, CP 104, CP 114, CP 130, CP 148*; (2) none of the landowners assigned or transferred by deed or agreement any of their property rights or claims to equitable servitudes to Riverview; (3) Riverview is not a homeowner's association; (4) Riverview does not own any land in Lincoln County, Washington; and, (5) Riverview was formed long after the Deer Meadows and Deer Heights were platted and approved by the County and after the individual landowners signed purchase agreements with the Respondents. CP 1-12.

The trial court granted a conditional order to dismiss and entered that order on January 31, 2012. CP 245-46. The order stated:

The Deer Meadows landowners are necessary parties for a just adjudication of this action and the landowners shall be joined or assignments shall be obtained and filed with the Court within a reasonable period of time. CP 246.

Riverview failed to join the necessary parties and failed to obtain any assignments, deeds or transfer of property rights or interests, as required by the trial court's order. Instead, Riverview appealed the order.

In October 2011, S.O.S. moved the trial court for summary judgment dismissal pursuant to CR 56. CP 271. GSL joined the motion. CP 163-66. S.O.S. primarily argued that: 1) Washington law does not recognize implied equitable servitudes; and 2) equitable servitudes require a promise *in writing*. CP 277. The trial court granted the motions of S.O.S and GSL for summary judgment at the time of oral argument, on December 23, 2011, and subsequently entered its order of dismissal on February 13, 2012. CP 249.

Riverview filed a notice of appeal of both orders of the trial court on February 24, 2012. All parties to the appeal had the opportunity to present written and oral arguments, and on February 14, 2013, the Court of Appeals affirmed the trial court's dismissal of Riverview's case and, in doing so, stated that "[i]t is irrational to require the [Respondents] to rebuild and operate a failing business." *Riverview*, 173 Wn. App. at 591.

V. ARGUMENT

A. The standard of review for 12(b)(7) dismissals is abuse of discretion.

Whether a party has standing to sue and whether a court has subject matter jurisdiction to hear a claim are questions of law that are

reviewed de novo. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 939, 206 P.3d 364 (2009), *review denied*, 167 Wn.2d 1017, 224 P.3d 773 (2010). Questions of joinder present mixed issues of law and fact that are reviewed for an abuse of discretion “with the caveat that any legal conclusions underlying the decision are reviewed de novo.” *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006) (discussing the standard of review for a trial court's dismissal under CR 12(b)(7) for failure to join an indispensable party under CR 19).

The standard of review for a summary judgment is: “A [trial] court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.” *Id.* at 494. This occurs when the court “relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *Id.*

An appellate court reviews a summary judgment de novo and its inquiry is the same as the trial court's. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to

judgment as a matter of law; *Id.*; *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

B. Riverview is not a real party in interest under CR 17.

CR 17(a) provides:

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The real party in interest is “the person who possesses the rights to be enforced.” *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 176, n.2, 982 P.2d 1202 (1999). The Court of Appeals erred in its reasoning and the application of CR 17.⁴ The Court of Appeals recognized that the CR 17 issue and standing issue were “analytically distinct” but the Court chose to intertwine the issues, which resulted in the Court’s failure to analyze the CR 17(a) issue first. The Court of Appeals relied upon the five landowner declarations to show an intent to authorize Riverview to pursue the claims and rights of the landowners; however, the declarations are not a written assignment as required by RCW 4.08.080 or under the common law. The

⁴ Typically, GSL would argue that Riverview’s arguments are in error but most of the arguments and conclusions included in the Court of Appeal’s decision are the Court’s and these arguments were not briefed or supported by Riverview so GSL is forced to reference to the Court of Appeal’s reasoning and conclusions as in error.

declarations are not a “deed” that pass an interest in real property as required by RCW 64.04.010, and the declarations do represent an intent to deed, transfer or assign the landowner’s rights to Riverview. There is no writing that gives Riverview the right to pursue the landowners’ claims.

Riverview’s complaint does not explain how Riverview suffered damage or lost any rights. Riverview owned no land in Lincoln County and it was not a party to any of the contracts or agreements identified by Riverview as the basis of the landowners’ claims for promissory estoppel. The Court of Appeals failed to analyze and explain how Riverview became “the person who possesses the rights to be enforced” here.

C. Riverview lacks standing.

The Court of Appeals decision and Riverview claim that Riverview’s actual standing is found in RCW 24.03.035(2). It is undisputed that a non-profit organization can sue or be sued but this does not give it standing to assert another’s rights. Again, the Court of Appeals relied upon the five landowners’ declarations as establishing standing. Riverview does not claim that Riverview has or will suffer the loss of any property right as a result of the golf course closure. CP 209. Principles of standing are intended to prevent one party from asserting another’s legal right. *West v. Thurston County*, 144 Wn.App. 573, 578, 183 P.3d 346 (2008). Notwithstanding this rule of law, the Court of Appeals skipped

over the first part of the analysis of actual standing and concluded that Riverview had actual standing to pursue the distinct landowners' claimed rights, without determining: (1) how these rights passed from the landowners to Riverview; (2) whether Riverview was in privity of contract with the Respondents; or, (3) how Riverview establishes actual standing.

In *Leighton v. Leonard*, 22 Wn.App. 136, 139, 589 P.2d 279 (1978), (citing William Stoebuck, *Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861 (1977), the Court stated:

The prerequisites for a covenant to "run with the land" are these: (1) the covenants must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds; (2) the covenant must "touch and concern" both the land to be benefitted and the land to be burdened; (3) the covenanting parties must have intended to bind their successors in interest; (4) there must be vertical privity of estate, *i.e.*, privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate, or privity between the original parties. (Footnotes and citation omitted); See also: *Lake Limerick v. Hunt Mfd. Homes*, 120 Wn.App. 246, 25-56, 84 P.3d 295 (2004). . .

[T]he burden of a real covenant may be enforced against remote parties only when they have succeeded to the covenantor's estate in land. Such parties stand in privity of estate with the covenantor. Likewise the benefit may be enforced by remote parties only when they have succeeded to the covenantee's estate. They are in privity of estate with the covenantee.
W. Stoebuck, at 876.

Riverview cannot point to any promise made to it that establishes a written covenant or that meets the requirements of RCW 64.04.010.

Riverview did not participate in any discussions between an individual landowner and any defendant. Riverview cannot establish vertical or horizontal privity. *Leighton at p. 139*

Riverview's complaint does not reference an assignment, transfer, or deed between the defendants and Riverview. The Court of Appeals relied upon five declarations filed about six months after Riverview filed suit. A plaintiff may not avoid dismissal by acquiring standing after filing suit. *Amende v. Town of Morton*, 40 Wn.2d 104, 106, 241 P.2d 445 (1952). Riverview's attempt to establish standing based upon the late filed declarations will not establish standing. Moreover, Riverview argued that it had organizational standing in an attempt to avoid the requirements of CR 17(a). *App. Br. at 11-13*. The Court of Appeals again relied upon the five late filed declarations as evidence to establish organizational standing. However, even organizational standing must be determined at the time that suit was filed. *Amende at p. 106*.

Then, the Court of Appeals concluded that Riverview satisfied the three prong test used to establish "organizational standing" but its analysis ignored the distinctions between entities that were accorded standing by this Court in the past and Riverview here. In *Riverview at p. 579*, the Court of Appeals stated:

In light of the broad reading of the *Firefighters* test in *Five Corners*, we agree that Riverview has standing here. Five of its members filed declarations establishing their apparent standing. That is four members more than the one person who was sufficient to give organizational standing to two groups in *Five Corners*. Riverview has standing to pursue this action.

The Court of Appeals failed to consider that every prior case analyzing organizational standing involved an entity with a preexisting right or responsibility to assert its members' rights, i.e., the organization had a contractual right, representational right, statutory right or similar basis to enforce the members' rights or claims. In *Firefighters v. Spokane Airport*, 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002), the union was the collective bargaining agent of the individuals with the right and obligation to pursue the firefighters' overtime wage claims and this gave it standing. (See also: *Teamsters Local Union 117 v. The Department of Corrections*, 145 Wn.App. 507, 187 P.3d 754 – bringing a wage claim on behalf of its members as authorized by the exclusive collective bargaining agreement); *Save a Valuable Environment, v. The City of Bothell*, 89 Wn.2d 862, 576 P.2 401 (1978), the non-profit corporation was accorded standing because it was challenging a zoning ordinance and federal precedent and RCW 7.16.050 gave it the standing to assert its members rights; *Five Corners Family Farmers v. The State of Washington*, 173 Wn.2d 296, 268 P.3d 892 (2011), involved a claim for a procedural injury in a declaratory relief judgment action. In these types of action, standing requirements are

relaxed and the organization qualified for standing was found under the very broad “are affected” language allowing standing in RCW 7.24.020. No such statutory or public policy interest exists here.

This Court must determine whether it is comfortable creating a corporate exception to standing where the corporation is created after the fact and after any claims accrued solely for the purpose of filing lawsuits to obtain relief or damages for the actual “real parties in interests.” If so, this Court accepts the likelihood that so-called real parties in interest will hide behind the corporate veil to avoid the scrutiny and requirements imposed by standing filters like CR 17, CR 19 and CR 23.

In addition, Riverview cannot show that it will receive a benefit if its suit is successful and it cannot show an express authorization to represent its members when suit was filed. Not all “organizations” have standing to enforce members’ rights. In *Timberline Homeowners Association, Inc. v. Brame*, 79 Wn.App. 303, 307-09, 901 P.2d 1074, *rev. den.* 129 Wn.2d 1004, 914 P.2d 65 (1996), the Court stated:

The doctrine of standing generally prohibits a party from asserting another person's legal right. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987), *appeal dismissed*, 488 U.S. 805, 102 L. Ed. 2d 15, 109 S. Ct. 35 (1988); *Miller v. U.S. Bank*, 72 Wn. App. 416, 424, 865 P.2d 536 (1994). . . Stated another way, a party has standing if it demonstrates "a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the

party must show that a benefit will accrue it by the relief granted." *Primark, Inc. v. Burien Gardens Associates*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992). . .

Likewise, the case law on which the Association relies does not support its argument. While *Rodruck v. Sand Point Maintenance Comm'n*, 48 Wn.2d 565, 295 P.2d 714 (1956) and *Lakemoor Community Club, Inc. v. Swanson*, 24 Wn. App. 10, 600 P.2d 1022, review denied, 93 Wn.2d 1001 (1979), involve instances where similar "associations" litigated issues for their respective members, neither case addressed the issue of whether, absent express authority from its members, a homeowners association has standing to enforce its members' property rights. Those cases therefore do not permit us to conclude that the Association has standing here.

Here, Riverview has presented no evidence of homeowners association bylaws or articles that provide it express authority to pursue its "members'" rights. So, in order to establish organizational standing, an organization must establish three elements: 1) its members would have standing to sue in their own right, 2) the interests the organization seeks to protect are germane to its purpose, and 3) neither the claim asserted nor the relief requested requires the participation of the individual members of the organization in the lawsuit. *Firefighters* at pp. 213-14.

1. Riverview may have established that a few of its members have standing to sue in their own right.

Riverview has not established that all its members have standing to sue in their own right. Riverview provided only five (5) declarations from Riverview's claimed 100 plus members. Those five members may have

established individual standing. For purposes of this appeal, GSL does not dispute this element of the *Firefighters* test.

2. Riverview does not have a legitimate organizational purpose with regard to standing.

Riverview does not have a legitimate purpose as an organization with regard to standing. Riverview concedes that it is not a homeowners association, union, environmental group, fraternal organization or other organizations that may have, by contract, bargaining agreement or corporate purpose, the right to enforce its members' rights or claims. *RP 12-13 (August 29, 2011); CP 209*. Riverview exists for the sole purpose of investigating and bringing this lawsuit. This is not a purpose germane to the land ownership rights asserted in the Complaint. *CP 87, CP 104, CP 114, CP 130, CP 148*. Moreover, investigating and bringing a lawsuit is not a valid purpose for a non-profit corporation. RCW 24.03.015.

Now, Riverview argues in its opening brief, for the first time, that the purpose of the organization is "preventing these defendants from 'luring them into permanent residences' in the golf-course community by false representations...." *App. Br. at 13*. Riverview's new statement highlights the standing problem identified above because Riverview continually confuses the distinction of the entity and its members' rights and cites its members' rights and claims as if possesses these rights.

3. Riverview cannot bring this lawsuit without the testimony of the individual landowners.

Under the third prong, Riverview cannot bring this lawsuit independently without the participation of the individual landowners. The potential “claims,” “relief,” and proof are dependent solely upon facts known to the individual landowners. Riverview did not negotiate with any defendant, it has no “personal knowledge” of the negotiations and it will not be able to testify about the underlying facts for each landowner’s claim or the alleged promises, which are distinct for each landowner. *CP 1-12*.

Riverview argues that the participation of the individual landowners is unnecessary because Riverview does not seek monetary damages. *App. Br. at 13*. This argument ignores the facts stated above showing that every landowner must testify about their respective discussions and conversations with one or more of the defendants. As shown by the five landowners’ declarations, these discussions involve different promises made by different defendants. *Firefighters* requires that Riverview prove that “*neither the claim asserted nor relief requested*” requires member participation. *Firefighters*, 146 Wn.2d at 214 (emphasis added). Without each landowners’ testimony here, Riverview has no way to prove its case. Therefore, Riverview cannot satisfy the third prong.

Also, the Court of Appeals ignored Washington law that separates a corporation’s rights and its members’ rights, which does not permit

either to assert the other's rights, except in derivative shareholder actions. See: *Sabey v. Howard Johnson & Co.*, 101 Wn.App. 575, 584, 5 P.3d 730 (2000); *Gustafson v. Gustafson*, 47 Wn.App. 272, 276, 734 P.2 949 (1987). The Court of Appeals and Riverview do not explain how the unnamed landowners' property rights or choses in action may be enforced by the nonprofit corporation. See *Apostolic Faith Mission of Portland, Oregon v. Christian Evangelical Church*, 55 Wn.2d 364, 367-68, 347 P.2d 1059 (1960) (stating that a non-profit organization is an entity both separate and distinct from its members).

D. The individual landowners are indispensable parties pursuant to CR 19(a)(2).

The trial court's decision to dismiss this matter pursuant to CR 19 was not "manifestly unreasonable." The Court of Appeals decision should be overturned and the trial court's order should be affirmed. *CP 245-46*.

CR 19 establishes the standard for the Court's analysis of whether a party is an indispensable party. CR 19(a) provides in pertinent part as follows:

(a) **Persons To Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of Jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition

of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

This Court has established a two part standard for determining whether an indispensable party needs to be joined in a lawsuit, pursuant to CR 19(a), as follows:

First, the court must determine if the absent person is needed for a just adjudication under CR 19(a), that is, if the absent person is “necessary”, and, if so, whether it is feasible to join such person. *In Re Johns-Manville Corp.*, 99 Wn.2d 193, 197, 660 P.2d 271 (1983).

In clarifying the court’s responsibility, the Court of Appeals (Division One) in *Orwick v. Fox*, 65 Wn.App. 71, 79, 828 P.2d 12 (1992) stated:

This requires a determination of whether that person’s absence from the proceedings prevents the court from affording complete relief to existing parties to the action or whether the person’s absence would either impair that person’s interest or subject any existing party to inconsistent or multiple liability. CR 19(a).

The trial court conducted this two-part analysis at the time of GSL’s motion to dismiss, as well as taking into consideration whether the absence of the actual landowners, as named parties, would impair the

court's ability to provide a just adjudication. *CP 208*. The trial court concluded:

Clearly, the Deer Meadow landowners are necessary for a just adjudication of this action. The court will be unable to afford relief to the real parties in interest [the landowners] and to Livingston by failing to require the joinder of the landowners, and Livingston would be subjected to the possibility of multiple lawsuits and inconsistent judgments. *CP 212*.

The Court of Appeals erred in overturning the trial court. The Court of Appeal's conclusion was based upon the faulty assumption that Riverview was the real party in interest and it had standing. As discussed above, these assumptions are incorrect. Then, the Court of Appeals ignored the fact that Riverview was not in privity with any Respondent. (GSL incorporates by reference its arguments above as stated in Section C of Respondent GSL's Supplemental Brief where it discusses covenants and privity.) Riverview's lack of contractual privity, its absence of any interest in the real property allegedly benefitted by an equitable servitude, and lack of any enforceable property right or chose in action, requires the joinder of the landowners. The third and fourth factors in CR 19(b) were dispositive to the trial court and should be here. Riverview could easily join the landowners but refused to do so. Riverview's refusal places the Respondents in the unenviable position of later defending litigation with

these same nonprofit members and with the additional concern of inconsistent litigation results. *Mudarri v. State*, 147 Wn.App. 590, 605, 196 P.3d 153, *rev. den.* 166 Wn.2d 1003 (2009).

Also, Riverview's failure to amend its complaint and join the pertinent landowners will prevent the trial court from a complete adjudication of the material facts because the landowners' testimony should be excluded from participating in the lawsuit. *See: Firefighters*, 146 Wn.2d at 214.⁵

Finally, Riverview must concede that the Deer Meadows development and the Deer Heights developments are platted developments that were approved by Lincoln County. Riverview's sole requested remedy is to amend the platted developments and require the Respondents to dedicate the golf course property for these platted developments. However, Riverview cannot amend a platted development without the participation of the landowners and Lincoln County because they are all indispensable parties. *See, e.g., National Home Owners Ass'n v. City of Seattle*, 82 Wn. App. 640, 643-44, 919 P.2d 615 (1996) (an association's failure to add the actual landowner/developer of property warranted dismissal pursuant to CR 19(a)); *Waterford Place Condominium Ass'n v.*

⁵ Riverview cannot argue, on the one hand, that it has organizational standing because the landowners' participation is not required and then once past that issue before this Court, ask the landowners to testify to prove up their respective claims.

City of Seattle, 58 Wn. App. 39, 42, 791 P.2d 908 (1990) (the owner of the property was deemed an indispensable party in a land use action).⁶

E. The Court of Appeals erred in determining that no writing is required to establish an equitable servitude but correctly decided that it was not equitable to enforce a perpetual equitable servitude.

In *Riverview* at pp. 585-86, the Court defined a servitude as follows:

A servitude is a legal devise that creates a right or obligation that runs with the land.” *Lake Limerick Country Club v. Hunt Manufactured Homes, Inc.*, 120 Wn. App. 246, 253, 84 P.3d 295 (2004) (following *Restatement*). **Our statute of frauds requires contracts for the sale or lease of real property to be in writing.** *Pardee v. Jolly*, 163 Wn.2d 558, 566-67, 182 P.3d 967 (2008) (sales agreement); *Powers v. Hastings*, 93 Wn.2d 709, 711 n.1, 612 P.2d 371 (1980) (lease). Washington’s codification of that requirement is found in RCW 64.04.010, which states in relevant part, **“Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.”** (Emphasis added.) **The broad language of the statute, reaching any encumbrance, also applies to easements and other lesser interests in realty.** *E.g.*, *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995) (easement). . .

Hollis v. notes that there “are essentially two kinds of covenants that run with the land—real covenants and equitable covenants.” 137 Wn.2d at 691. However, “Washington cases have generally not distinguished between the two kinds of covenants.” *Id.* The term covenant is used modernly to describe ““promises relating to real property that are created in conveyances or other instruments.”” *Id.* at 690-91 (quoting 9 RICHARD R. POWELL,

⁶ Although not argued below, the Court may consider this issue because standing issues may be raised at any time. GSL asserts that neither *Riverview* nor the landowners may challenge a land use decision at this late date and attempt to amend the County’s approved plats because the action to “amend” was not asserted within a reasonable time. *M.K.K.I., Inc. v. Krueger*, 135 Wn.App. 647, 145 P.3d 411.

POWELL ON REAL PROPERTY § 60.01[2], at 60-5 (1998)).
(Emphasis added.)

The Court of Appeals failed to determine whether a written or equitable covenant, implied or express, even existed. In order to create a covenant that “*runs with the land*”, there must be a legal devise that creates a right or obligation. Also, RCW 64.04.010 requires the promise to be in writing if it conveys an interest in real property. Riverview cannot point to any writing that contains a promise made to it or the real parties in interest. The present case is factually distinguishable from the cases relied upon by the Court of Appeals. In *Lake Limerick*, the writing was the homeowner’s association bylaws. In *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920), there were several writings. (The developer included written deed restrictions issued to the large majority of the lot purchasers, and the church lot purchaser was told about the residential deed restriction, even though its deed failed to contain that restriction. Also, the church lot purchaser signed a hold harmless/indemnity agreement that required the church lot purchaser to indemnify the developer if it ignored the residential lot requirement.) Accordingly, there existed writings that confirmed the deed restriction and the church lot purchaser was provided with these writings.

However, the unique issue raised in *Johnson* was the fact that the lawsuit was brought by the majority of the landowners who sought to

enforce the residential building restriction because the developer was not doing so. These lot owners were not in privity of contract with the church lot purchaser and it was the lack of privity that required the Court to find the need for equitable relief, i.e., identified as “*implied restrictions*” by the Court. *Riverview* at p. 587.⁷

The present case is factually distinguishable from *Johnson* and its progeny and *Johnson* is not valid precedent to overturn Washington’s longstanding requirement of a writing to create an affirmative interest in property. Here, the landowners could have required the dedication of the golf course property to the development, if that was the primary motivation for purchasing their respective properties or the landowners could have required the Respondents to formalize in writing the alleged promises regarding the continuing existence of the golf course. The landowners did not insist that the alleged promises be in writing, which invokes the exact purpose of RCW 64.04.010, i.e., to avoid a dispute where one party attempts to introduce verbal “promises” into a written contract after the fact. This case is unlike the residential lot purchasers in *Johnson* who were themselves contractually bound to the restricted use of

⁷ The Court of Appeals recognized Respondent’s argument that there were written instruments that satisfied the Statute of Frauds. But, the Court missed the more nuanced argument that *Johnson* was factually distinguishable because the Court was dealing with enforcing a negative, restrictive covenant. The present case involves the creation of an equitable covenant without a writing. *Johnson* and its progeny do not support the creation of “implied” equitable covenants without a some kind of writing. *See: Hollis*.

their lots but had neither control over the developer's dealings with subsequent purchasers nor any involvement in those contract discussions to ensure compliance with the residential building restriction. The Court of Appeals did not articulate a valid reason to abandon *Hollis* and Washington's longstanding requirement of compliance with RCW 64.04.010 to establish an affirmative covenant or other interest in land.

GSL requests that the Court reinstate the trial court's order granting summary judgment dismissal of all claims in this matter. *CP 247-49*. If the Court elects to adopt the Restatement position, then GSL asks the Court to affirm the Court of Appeals reasoning and holding that a "perpetual equitable servitude" is not equitable under these facts.

VII. CONCLUSION

If Riverview is successful in its arguments here, the individual landowners, not joined in the present action, may use the sword of res judicata or collateral estoppel in future actions while the Respondents are prevented from using res judicata or collateral estoppel to defeat their claims. Also, since there has been no real transfer by deed or written assignment of any property rights, claims or choses in action, what is to prevent "members" of Riverview from claiming that Riverview was not authorized to pursue these claims on their behalf? This scenario does not

reflect the “just adjudication” contemplated by Washington courts in CR 19 and its analysis.

The trial court ordered the landowners to assign or transfer its claims to Riverview or join the landowners as parties. GSL suggested that the landowners could have brought a class action under CR 23. Any of these options would have allowed the landowners to pursue their claims and pool their resources to spread the costs of litigation, if that was truly their concern. GSL requests this Court reverse those portions of the Court of Appeals decision involving CR 17(a), CR 19(a)(2) and the standing issue and affirm both of the trial court’s orders, entered January 31, 2012 and February 13, 2012 respectively, and dismiss this case with prejudice.

DATED this 3rd day of October, 2013.

RANDALL | DANSKIN, P.S.

By: 

Dave Kulisch, WSBA #18313
Michael Grover, WSBA #44270
Attorneys for Respondent
George T. and Sheila Livingston

OFFICE RECEPTIONIST, CLERK

To: Janet Pryor
Cc: David Kulisch; Michael Grover
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Sent: Thursday, October 03, 2013 2:27 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: David Kulisch; Michael Grover
Subject: E-Filing for: Supreme Court Case No. 88575-3

Case name: Riverview Community Group v. Spencer & Livingston, et al.

Case number: Supreme Court Case No. 88575-3; Court of Appeals No. 30681-0-III

Party filing: Respondents George T. and Sheila Livingston

Party's counsel: David A. Kulisch (WSBA #18313) and Michael R. Grover (WSBA #44270)

Attached are two (2) pleadings to be filed:

- 1) Respondent George T. and Sheila Livingston's Supplemental Brief In Response To Appellant's Petition For Review and Supporting Cross Petition For Review; and**
- 2) Certificate of Service.**

Please confirm receipt. Thank you.

Sincerely,

Janet Pryor, Legal Assistant to David A. Kulisch



Janet L. Pryor
Legal Assistant

Randall | Danskin
A Professional Service Corporation
601 W. Riverside Avenue, Ste. 1500
Spokane, WA 99201
(509) 747-2052
(509) 624-2528 (fax)
www.randalldanskin.com

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