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NO. 73369-9-1

COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

BIRNEY DEMPCY and MARIE DEMPCY,

Petitioners/Appellants,

vs.

CHRIS AVENIUS and NELA AVENIUS, husband and wife, and
their marital community,
Jack SHANNON, an individual, and
Radek ZEMEL, an individual,

Respondents.

BRIEF OF RESPONDENTS AVENIUS, SHANNON AND ZEMEL

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Table of Abbreviations

ACC	Architectural Control Committee
A/S/Z	Chris and Nela Avenius, Jack Shannon and Radek Zemel, the three Respondents herein
C.A.T.	Common Area Tract (see Appendix 2)
CC&Rs	Declaration of Protective Covenants, Restrictions, Easements, and Agreements for Pickle Point Association recorded in June, 1990 (see CP 113-27)
PPA	Pickle Point Association

I. INTRODUCTION

Washington law unambiguously provides the right to tenants-in-common owners of property to sever relations with other tenants-in-common by partitioning property. The special statutory procedures found in RCW chap. 7.52 provide the procedural mechanism for partition.

In this case, three of the four owners of common property¹ have requested partition. Even a glance at the record and the Appellants' brief demonstrates that these owners have serious and irreconcilable differences about the present (and future) use of the common property. One owner, the appellant Dempcy (Birney and Marie) has filed suit to compel the other owners to repair a tennis court that lies adjacent to their home, but within the C.A.T. The other three owners wish to remove the obsolete court and replace it with an attractive greenbelt. Three of the four owners desire to avoid continued litigation (and expense) with the fourth owner and to partition the property. The trial court agreed and entered orders that the C.A.T. should be partitioned; this court should affirm those orders.

¹ This area will be referenced herein as the common area tract or "C.A.T." See the Table of Authorities at p.iii for other references.

II. COUNTERSTATEMENT OF ISSUES

1. Did the trial court err in entering orders that the C.A.T. owned by the tenants-in-common to this case be partitioned?
2. Are there obligations or equities that exist that should prevent partition?
3. If partition is not ordered, do covenants adopted in 1989 require that at least two common owners to agree to expenses of the type demanded by the appellants?
4. Are the appellants expressly prohibited by the 1989 covenants from bringing a damage action against the three other owners?
5. Did the trial court properly award attorney fees to respondents Avenius, Shannon and Zemel and should appellate attorney fees be awarded?

III. COUNTERSTATEMENT OF THE CASE²

A. COUNTERSTATEMENT OF FACTS

This case concerns four private residential properties and one C.A.T. located in the City of Bellevue. The general location of

² The page numbers referenced in the Table of Contents to the Dempcy brief do not correspond to the page numbers in the body of the brief. In addition, the headings to the arguments are somewhat different in the body of the brief compared to the Table of Contents. In this brief, A/S/Z will refer to page numbers and headings found in the brief, not in the Table of Contents.

these properties, referenced as “Pickle Point Association,” is shown on an aerial photograph, Exhibit A-1 of the Declaration of Jack Shannon (CP 109) attached as Appendix 1 to this brief. A map showing the boundaries of the specific five properties, taken from a King County aerial photograph, is found in the record at Exhibit A-2 to the Declaration of Jack Shannon (CP 110) and is Appendix 2 to this brief. As set out on the map, there are four residential properties, one owned by the plaintiffs below and appellants here, Marie and Birney Dempcy (hereinafter Dempcy or Dempcys) and the other three owned by the defendants below and respondents here, Chris and Nela Avenius, Jack Shannon, and Radek Zemel (collectively hereinafter, “A/S/Z”). Access to the several properties is from 94th Avenue S.E., a private street.

As shown in Appendix 2, the C.A.T. is a rectangular property except for a narrow dogleg to the west between the Zemel, Shannon and Avenius properties. More than fifty percent of the C.A.T. is taken up by a tennis court, plainly visible on Appendix 2. The C.A.T. area outside of the tennis court includes an open grassed area over which the driveways to the four residential properties pass, as provided by ingress / egress easements, as well as a retaining wall on the north side. Three other owners wish

to remove this obsolete court and replace it with an attractive greenbelt, but the Dempcys object. Over the years, the four owners of the residential properties have unanimously voted to share the cost of mowing the grass, power washing of the tennis court and road maintenance. See Shannon Declaration at page 2 (CP 105).

As also shown on Appendix 2, the tennis court runs along the entire easterly boundary of the Dempcy property. However, on the west side of the tennis court, there is a private entrance to the court that leads directly to the Dempcy house, which is only 34 feet away. CP 105. See photographs in Exhibit B to the Shannon Declaration, CP 111-12, found at Appendix 3 to this brief.

The Dempcys acquired their property by deed in September, 1973. See Exhibit 1 to the Aramburu Declaration (CP 94-98) . Though the tennis court was already constructed when the Dempcys purchased their property, their vesting deed contained no reference to it. See excerpts from the deposition of Birney Dempcy at CP 533, ll.9-16 and their deed (CP 94-98). The deed did grant a one-quarter interest in the C.A.T., as did the deeds of A/S/Z. *Id.*

In November, 1989, Birney Dempcy approached A/S/Z about creating covenants for the four residential properties and the C.A.T. Shannon Declaration, page 2, CP 105. A/S/Z were invited

to the Dempcys' home to discuss covenants and upon their arrival were handed a document entitled "Declaration of Protective Covenants, Restrictions, Easement and Agreements for the Pickle Point Association" (hereinafter the "1989 CC&Rs" - the recorded 1989 CC&Rs are Appendix 4 to this brief and are found at CP 113-127). See the declaration of Bonnie Mikkelson (the prior owner of the Avenius home) at CP 90 and the Shannon Declaration at CP 105-06. The 1989 CC&Rs were drafted by Mr. Dempcy, who had recently retired from practicing law, and were wholly his idea (CP 105, 90), as confirmed by him in his deposition (CP 100). During the meeting, both the Dempcys urged A/S/Z to sign the covenants. Each owner then signed the draft prepared by Mr. Dempcy - without any changes - and returned them to him; he recorded them in June 1990. During his deposition, Mr. Dempcy professed no memory of how his CC&Rs were distributed to the other owners nor any meetings regarding them. CP 101-102.

The CC&Rs at Paragraph 2 placed typical residential restrictions on the four residential lots regarding such matters as animals allowed (§2.5), fencing (§2.6), signs (§2.7) and landscaping (§2.12). In addition, the CC&Rs created an "Architectural Control Committee" ("ACC") consisting of all four

property owners. The ACC had two functions. First, it was to exercise design control over construction and renovation of homes on the four lots, as described in Paragraph 3. Second, in §5.3 of the CC&Rs, the ACC was constituted as the “Assessment Committee” (CP 119) to decide on work to be done on the C.A.T. and to “establish regular and special assessments . . .” for maintenance of the C.A.T. Assessments under the CC&Rs “shall be used exclusively to maintain the common property.” CP 119. The CC&Rs expressly provided (Section 5.6) that special assessments “shall require consent of 50% of the Parcels excluding Parcel 5 [the C.A.T.]” Appendix 4 (CP 120). Mr. Dempcy’s draft indicated that special assessments would be “for the extraordinary maintenance of or capital improvements to the common property . . .”. *Id.*

By the early 2000s, the tennis court on the C.A.T. had begun to deteriorate. On July 1, 2003, Mr. Dempcy sent a letter to the other owners in which he said that his real estate agent felt that: “the current condition of the tennis court is having a negative effect on the value of the area and particularly the two houses that adjoin the court.” See Exhibit D to the Shannon Decl. (CP 128-29). He proposed to “refurbish the court with an ivy barrier” (to keep out

roots). *Id.* He also stated that: if the three other owners don't want to participate in the court any more, they could convey their interest to the Dempcys. *Id.* None of the other owners agreed to his proposal. Shannon Decl., CP 106.

Seven years later, on May 1, 2010, Mr. Dempcy sent another letter to the other three property owners in the Pickle Point Association ("PPA"). See Exhibit E to the Shannon Decl. (CP 130-31). In that letter he again referenced the CC&Rs, noting that: "The covenants were recorded and are binding on all subsequent owners." *Id.* He stated that the tennis court "has fallen into disrepair" and that "we got an estimate a few years ago which was about \$40,000." CP 130. Mr. Dempcy then stated that:

The covenants require two of us to agree to make this assessment. Since I could not get another vote, the project failed.

Id. He went on to say he "would hope that I could get one of you to vote for the project" but if not, he would consider "undertaking the improvement myself if you would convey the driveway and property south of the driveway (*the tennis court*) to us." CP 130. Mr. Dempcy also said "this property has no value since it is not a buildable lot." *Id.* His letter also requested a meeting of the ACC for May 29, 2010 (CP 131).

As requested, a meeting was held on May 29, 2010 at which three of the owners attended. Meeting minutes (taken by Mr. Dempcy) are found at Exhibit F to the Shannon Decl., CP 132-33. Mr. Dempcy's minutes noted that Robert's Rules of Order would control procedures at the meeting, a quorum would be three members, and a majority vote was required for action. *Id.* The minutes state that Mr. Dempcy "was appointed chairman of the Committee" (CP 132) and one alternative discussed for the "commonly owned property including the tennis court," was:

- 1) If two members approved of an assessment to refurbish the tennis court, this action would be taken and each member would be assessed for the cost.

See Paragraph 5.6 of the CC&Rs, CP 120.

Since that time, knowing that they needed the approval of at least one other owner in order to take action, the Dempcys have repeatedly urged the other three owners in the PPA to agree to rebuild the tennis court, but no one else has joined him. See Shannon Decl., CP 104. Since 2003, through different owners of two parcels in the PPA (now Avenius and Zemel), the Dempcys have not found any support for their plan.

Meetings were held between the owners again in 2013 to attempt to resolve these issues. Generally, Dempcy continued

efforts to get agreement to reconstruct the tennis court, but the other owners did not support his plan. CP 106-07. None played tennis and all three believed that it was in the best interest of the Pickle Point Association to replace the unused tennis court with an attractive landscaped greenbelt, as Dempcy described at Paragraph 19 of the Amended Complaint:

Defendants have declared that they are preparing a plan under Section 5.6 of the Declaration to remove the tennis court and replace it with a “green belt” upon the vote of 50% (2) of the members.

CP 10. Prior to implementation of that plan, the current litigation was commenced (November 2013) and therefore no further official action on the greenbelt was taken by the ACC.

B. COUNTERSTATEMENT OF PROCEDURE

This case began with the filing of a complaint on November 13, 2013 by the Dempcys against the three other owners, Avenius, Shannon and Zemel. CP 1-7. Two months later, and before any responsive pleadings, the First Amended Complaint was filed (January 14, 2014). CP 8-16.

The complaint alleged two general allegations against different parties.

First, as against A/S/Z, 1) in the first cause of action the

Dempcys sought a declaratory judgment concerning the interpretation of the covenants (CP 11-12); 2) the Dempcys claimed damages against A/S/Z because the defendants had "breached their obligations" in their third cause of action (CP 12); 3) the plaintiffs claimed the three owners had tortiously interfered with a contract for work on the tennis court in their fourth cause of action (CP 12-13).

Second, the Dempcys made two claims against just the Aveniuses. In their second cause of action (CP 12) they claimed the Aveniuses had violated certain provisions of the CC&Rs and that they had established an "easement by prescription" over portions of the Avenius property. In their fifth cause of action (CP 13), the Dempcys made another claim of "easement by prescription." The second and fifth clauses of action expressly stated they were against only the Aveniuses. *Id.*

The Dempcys' request for relief sought the following against A/S/Z: Under request #1, they sought a declaration that the defendants "are responsible for providing for the maintenance of the Tennis Court and to pay their share for same" (CP 13); under request #2 (CP 13-14) they sought damages for tortious interference with plaintiffs' "contract rights"; request #3 (CP 14) was

a similar request for damages and losses incurred "as a result of Defendants breach as allowed by the Covenant and/or law"; and request #4 (CP 14) requested an "order restraining Defendants from violating" the Dempcys' "right to maintain the common property."

As against the Aveniuses, the Dempcys asked for an order finding that the Avenius "fence and mass planting violate the Declaration" and interfere with "Dempcys prescriptive easement across the Avenius property." Request #7, CP 14.

Each of the defendants answered denying the Dempcys' allegations. Zemel, CP 43-50, Avenius, CP 17-32 and Shannon CP 33-42. Because no claims concerning prescriptive easement or violation of the CC&Rs due to fences or planting were alleged against them, Shannon and Zemel did not reply to these claims.

Each of the defendants filed a counter and cross claim requesting that the court partition the C.A.T. under RCW Chap. 7.52. Shannon CP 38-40, Avenius CP 27 and Zemel CP 48-49. The Dempcys denied the counter and cross claims and opposed partition as to each claim. Shannon CP 58-61, Avenius CP 51-57 and Zemel CP 62-66.

Following both written discovery and party depositions, both

sides moved for summary judgment on all claims, supported by declarations. A/S/Z filed a joint motion (CP 69-88); the Dempcy motion is found at CP 225-250. The cross motions were scheduled to be heard at the same time (January 30, 2015) before assigned judge Theresa B. Doyle. CP 67-68 (A/S/Z) and CP 223-224 (Dempcy).

After hearing oral argument, the Court entered an order granting summary judgment to A/S/Z (CP 719-723) and denying the Dempcy motion (CP 715-723). The court requested the preparation of additional findings related to partition, which were entered by the court. CP 751-756.

In her order, Judge Doyle dismissed the three causes of action against A/S/Z and specifically dismissed all claims for damages. CP 721-22. She ordered that the C.A.T. be partitioned and that a referee be appointed to determine the manner of partition, i.e., by sale, physical divisions and/or compensation to be paid to any party to assure equitable treatment. The judge ordered the parties to confer regarding the appropriate referee, but reserved the option to appoint a referee in the event of disagreement. CP 722.

The judge also determined that at least two owners in the

ACC must agree to make decisions regarding the improvements that were sought by the Dempcys in their complaint. CP 722. The Dempcys were further ordered to pay attorney fees and expenses of litigation under Section 6.1 of the CC&Rs, though Judge Doyle reserved a decision concerning the actual amount of these fees until the entry of final judgment. *Id.* All other issues, the remaining easement, fence and hedge issues between Avenius and the Dempcys, were reserved for trial.

Because the court decision was not final, and contemplated both a trial of the Dempcy/Avenius access, fence and hedge issues and the report of the referee on partition, the court's decision of January 30, 2015 was not appealable. See CR 54(b). However, Dempcys filed a motion on February 15, 2015 requesting the entry of a certification under CR 54(b) allowing the court's partial summary judgment order to be made appealable (CP 726-734) and for a stay of all proceedings in the case concerning the C.A.T., including appointment of a referee and the referee report. CP 734. Though this motion was opposed by A/S/Z (CP 735-44), the Court entered an order certifying the case for immediate appeal and entering a stay. The stay was limited to the issues concerning the partition and the common property. CP 756. This appeal followed.

CP 757-758.

The easement, fence and hedge issues between Avenius and Dempcy were assigned to a new judge and a trial was held on those matters; an appeal by the Dempcys of those rulings is now before this court under Case Number 73869-1-I.

IV. SUMMARY OF ARGUMENT

The trial court correctly determined on summary judgment that the C.A.T. owned by the four tenants-in-common should be partitioned. The parties have serious, extended and irreconcilable differences concerning the property in question, meeting the statutory prerequisites for partition. Claims of exceptions were properly found to be inapplicable because of the unambiguous language of the CC&Rs, drafted by Mr. Dempcy.

Summary judgment was also correctly entered on the plain language of the CC&Rs requiring at least two owners to agree on the refurbishment of the tennis court, supported by statements and interpretations by Mr. Dempcy. Nor can the Dempcys claim a right to unilaterally repair the court, and charge back the cost to the other owners, in light of the CC&Rs.

The trial court also correctly interpreted on summary judgment provisions of the CC&Rs that a) prohibit damage suits by

and between the owners and b) provide for the assessment of attorney fees to the prevailing parties in the event of a suit over the CC&Rs. Based on the same provisions, this court should award appellate attorney fees to the respondents A/S/Z.

The trial court's orders should be affirmed.

V. ARGUMENT

A. STANDARDS FOR ISSUANCE OF SUMMARY JUDGMENT

Under CR 56(c), summary judgment is granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "Summary judgment is a procedural device designed to avoid the time and expense of a trial when no trial is necessary." 4 Tegland, Karl B., *Washington Practice, Rules Practice*, Sixth Edition, at 399. A defending party must submit supporting material rebutting the moving party's contentions and cannot rest upon mere allegations, conclusions, denials or the content of pleadings. CR 56(e).

Summary judgment is appropriate for declaratory judgment proceedings to determine the meaning of contracts. See *e.g.*, *Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 420, 961 P.2d 358 (1998). If contract provisions are unambiguous, the court's

interpretation of the contract is a question of law which may be decided on summary judgment. *Truck Center Corp v. General Motors Corp.*, 67 Wn.App. 539, 544, 837 P.2d 631 (1992). When reviewing covenants, language is given its usual meaning. As stated in *Hearst Communications Inc, v. Seattle Times*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005):

We do not interpret what was intended to be written but what was written. *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wash.2d 337, 348-49, 147 P.2d 310 (1944), cited with approval in *Berg*, 115 Wash.2d at 669, 801 P.2d 222, 154 Wn.2d at 504. In *Riss v. Angel*, 131 Wn.2d 612, 624-25, 934 P.2d 669 (1997) the court stated, that in interpretation of restrictive covenants:

The court will place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests." *Lakes at Mercer Island Homeowners Assoc.*, 61 Wash.App. at 181, 810 P.2d 27.

As the Dempcys point out in their brief at page 23, the interpretation of restrictive covenants, such as the 1989 CC&Rs, is a question of law. See *Wimberly v. Caravello*, 136 Wn.App. 327, 149 P.3d 402 (2006).

In the present case, a special rule is incorporated into the 1989 CC&Rs proposed by Mr. Dempcy (as confirmed in his deposition at CP 102-103) concerning interpretation:

6.6. Interpretation. The Architectural Control Committee

shall have the right to determine all questions arising in connection with this Declaration and to construe and interpret the provisions of this Declaration. Its good faith determination, construction, or interpretation of this Declaration shall be final and binding.

Consistent with the foregoing, evidence as to the unilateral and subjective intent of one party to a contract is not relevant or admissible. See *Hollis v. Garwell*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999). Where the language of the CC&Rs on such matters as approval of the membership is unambiguous, there is no need to look further to discern the intent of the drafters. *Mariners Cove Beach Club, Inc. v. Kairez*, 93 Wn.App. 886, 891, 970 P.2d 825 (1999).

As will be described herein, the trial court correctly entered summary judgment on the motion of A/S/Z and that decision should be affirmed by this court.

B. THE TRIAL COURT CORRECTLY ORDERED PARTITION; NO EXCEPTIONS TO THE DIVISION OF PROPERTY APPLY

1. The Partition Statute Grants the Right of Even a Single Owner to Partition

The Washington Partition Statute, RCW chap. 7.52, was adopted in 1881 and has remained largely unchanged since. The statute allows a common owner of a tenancy in common to have

the property partitioned as between the owners, even over the objections of the other co-tenants. The plaintiffs' Amended Complaint correctly asserts that the C.A.T. is held by the four property owners "as tenants in common. . .". See Paragraph 7, CP 9.

Washington statutes establish the right of joint owners to partition:

When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be maintained by one or more of such persons, for a partition thereof, according to the respective rights of the persons interested therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

RCW 7.52.010. In an early decision, *Hamilton v. Johnson*, 137

Wash. 92, 100, 241 P. 672 (1925), the court stated the firm rule:

The right of partition by a tenant in common of real property is absolute, in the absence of an agreement to hold the property in such a tenancy for a definite and fixed time.

See also *Schultheis v. Schultheis*, 36 Wn.App. 588, 590, 675 P.2d 634 (1984), citing *Hamilton*. See also *Friend v. Friend*, 92 Wn.App. 799, 803, 964 P.2d 1219 (1998) ("The partition statute gives tenants in common the right to partition their property, either in kind or by sale.") See also *Anderson & Middleton Lumber Co. v.*

Quinault Indian Nation, 130 Wn.2d 862, 873, 929 P.2d 379 (1996)
("The right of partition by a tenant-in-common of real property is absolute in Washington, and is governed by statute in RCW 7.52." Citing *Hamilton, supra*). Partition is absolute because the policy of the state of Washington is not to compel persons to maintain a common ownership in property against their will. Cases such as *Hegewald v. Neal*, 20 Wn.App. 517, 518, 582 P.2d 529 (1978) have analogized partition to divorce:

Tenancy in common, like marriage, can be an unhappy relationship and the process of dissolution may be prolonged, painful and expensive.

That other owners may disagree concerning the division of property does not prevent partition: "Inconvenience of the other owners, or a depreciation in value of the interests by a partition, is not a defense." *Hamilton*, 137 Wash. at 100.

It is evident from this litigation, commenced by a single tenant in common (Dempcy), that the owners of the C.A.T. have an "unhappy relationship" that has dissolved into expensive, difficult and prolonged litigation. Indeed, Mr. Dempcy's declaration addresses all variety of complaints and criticisms regarding relations between the parties. See, e.g., CP 303-05. "Unhappy" is an understatement as applied here.

Indeed, there is no issue of fact that the four tenants-in-common are at an impasse concerning the C.A.T., the predicate for partition. Though conceding that point, the Dempcys advance several arguments that seek to compel the three other owners to continue in this untenable relationship. Contrary to the claims of the Dempcys, none of the limited exceptions to partition apply here, as will be described below.

2. Any Exceptions to the Right of Partition Do Not Apply Here

At pages 25 to 30 of their brief, the Dempcys' claim that certain exceptions apply to the right to partition. The Dempcy brief places substantial reliance on *Carter v. Weowna Beach Community*, 71 Wn.2d 498, 429, P.2d 201 (1967) to support their claim of error by the trial court. However, the facts of *Carter* (attached as Appendix 5 for the court's ready reference) are inapposite. *Carter* involved a proposal by 40 of 205 owners of a residential plat to sell a common park and watershed area established by the original subdivision and to remove any restrictions against development of that parcel. The plaintiffs wished to sell this valuable property and pocket the cash from the transaction.

But *Carter* involves a unique set of circumstances not evident in this case. In *Carter*, “every deed from the original Grantor” contained an identical provision that each owner had the right “[t]o the joint and common use, pleasure and benefit of said private community park by the several owners of the remaining 81 tracts in said Weowna beach, . . .”. 71 Wn.2d at 400-500. The *Carter* court held that this language prevented partition because it was destructive of the foregoing rights, i.e., park use. However, the circumstances between the four owners here are very different.

The Dempcys’ first claim is that there were covenants imposed when the four lots were originally created that bring this case within the *Carter* ruling. Brief at 28-29. They assert that there were commitments made in the original conveyances of the property in the late 1960s that assure mutual rights to the tennis court that is at the center of this case. *Id.* However, only two of the four deeds make any reference to the tennis court. The Dempcys’ brief admits in footnote 5 at page 7 that there is no reference to the tennis court in respondent Zemel’s deed. Similarly, the Dempcy deed from 1973 recites language which matches word for word to the two other deeds, but excises the reference to the tennis court or any maintenance responsibilities therefore. CP 93-98.

Mr. Dempcy admitted during his deposition that his deed contained no reference to any tennis court. CP 534.

Settled Washington law proscribes:

The rule is stated in 18 C.J. page 395: 'But a general building scheme for an entire tract is not shown where although the original proprietor makes conveyances of portions of such tract subject to restriction, he also conveys large portions of it free from any restrictions whatsoever.

Tindolph v. Schoenfeld Bros., 157 Wash. 605, 608, 289 P. 530 (1930). Unlike *Carter*, where the "printed land contracts and deeds were clear and unambiguous in expressing the grantor's intention" concerning the use of the community park, here both the Dempcy and Zemel deeds say nothing about the tennis court, a critical fact since the tennis court was right next to the Dempcy house.

Next the Dempcys claim that the 1989 CC&Rs bring the current case within the terms of *Carter* and obligate the parties to refurbish the tennis court for the sole benefit of the Dempcys (none of the other owners play tennis and all have expressed a preference to convert the obsolete court into a greenbelt)(see CP 10 (¶19), CP 220). Even the Dempcys admit they use the court only "on rare occasions." CP 130. But again, there is no reference in the CC&Rs to the centerpiece of the Dempcys' claim, the tennis court. This omission is telling because Birney Dempcy was the

author of the CC&Rs; there is no evidence that he or his wife even suggested to the other owners that the tennis court should be specifically referenced in the CC&Rs. Nor do the CC&Rs contain an agreement among the tenants-in-common not to partition, which could have easily been included by the drafter.³ It is also significant that two of the 1968 deeds explicitly referred to the tennis court (CP 150, 157), but the reference in the 1989 CC&Rs is only to a "common undivided interest in Parcel 5", deleting references to a tennis court. See CP 534.

Further, A/S/Z have never proposed that the C.A.T. be sold to some third party as was the case in *Carter*. Respondents have requested, and the trial court has agreed, that partition of the C.A.T. should allocate portions of the C.A.T. to the existing lots in the community, with possible financial payments to equalize unequal real property interests. See Appendix 2.⁴ It is certainly possible that if the tennis court is so important to the Dempcys, it

³ However, even if there was such an agreement, "[G]enerally, an agreement never to partition is not enforceable." *Schultheis v. Schultheis*, 36 Wn.App. 588, 590, 675 P.2d 634 (1984). A reasonable time for partition in *Schultheis* was concluded to be ten years. *Id.*

⁴ A payment to equalize interests is known as an "owelty" and is specifically authorized by the partition statute. RCW 7.52.440. See *Adams v. Rowe* 39 Wn.2d 446, 236 P.2d 355 (1951) and *Carson v. Willstadter* 65 Wn.App. 880, 886, 830 P.2d 676 (1992) ("Owelty is money paid in the event of an unequal partition of real property.")

could be allocated to them by the referee when the property is physically partitioned.⁵

Contrary to the Dempcy assertions at pages 28-29 of their brief, subsection 2.15 of the CC&Rs at page 4 does not prohibit partition; that section reads as follows:

2.15 Subdivision. No parcel shall be subdivided into smaller parcels without the written consent of all parcel owners.

The reference to “subdivision” and “subdivided” clearly reference the statutory procedures to create new, separate parcels of property as regulated by the State Subdivision Statute, RCW chap. 58.17 and local regulations implementing the statute in the City of Bellevue.⁶ See Bellevue Municipal Code Chapter 20.45B relating to divisions of land:

20.45B.050 General requirements.

A. Every short subdivision shall comply with all applicable goals, regulations and standards of the Bellevue City Code and RCW Title 58, Boundaries and Plats. Short subdivisions shall also be in accord with the policies of the City’s Comprehensive Plan.

There is no subdividing implicated here: the partition will likely allocate portions of the C.A.T. to the existing property ownerships

⁵ The partition statute spells out the duties of the referees in some detail. At RCW 7.52.080-220, 7.52.250-.270, 7.52.360-.420 and 7.52.450-480.

⁶ Again, the Court should recall that the 1989 CC&Rs were drafted by Mr. Dempcy, a licensed lawyer at the time.

of the four owners.⁷ The C.A.T. will not be “subdivided into smaller parcels” but added to existing parcels, with the net result that each ownership will be made larger, not smaller.

Next, at page 28, the Dempcys argue that “the partition the Respondents seek would be purely hollow” because the C.A.T. will still be subject to the CC&Rs. Yes, the CC&Rs will continue to be in effect after partition, as they relate to the restrictions applicable to the individual properties found in Subsection 2 concerning the use of property (residential only) and restrictions concerning trash, animals, signs and antennae. CP 113-16. However, the provisions found in Subsection 5, “Joint Use and Maintenance of the Common Area,” would not be effective when the C.A.T. is partitioned.

Finally, page 30-33, the Dempcys claim that their equitable rights are being violated by partition. To begin with, the C.A.T. is mostly an open area of land and driveways, but with a tennis court that is immediately adjacent to the Dempcy property. Indeed to the casual observer, the tennis court appears to be a part of the

⁷ Mr. Dempcy has already stated that the property is not a building lot and thus has no value to a potential third party purchaser in his correspondence in 2003: “The lot [the C.A.T.] by itself is not large enough to be a buildable lot and therefore by itself only has value as a tennis court.” CP 128. This was repeated almost word for word in 2010: “This property has no value since it is not a buildable lot and no one has suggested any use for it.” CP 130.

Dempcy property since a private door to the court opens onto the Dempcys' patio. See Appendix 3. However, our courts have made it clear that the interpretation of covenants should protect the interests of all of the owners, not just one. As indicated in *Riss v. Angel*, 934 P.2d 669, 131 Wn.2d 612 (1997):

The court will place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests." *Lakes at Mercer Island Homeowners Assoc.*, 61 Wash.App. at 181, 810 P.2d 27.

Id. at 623-24. In the present case, the majority of owners wish to be rid of the C.A.T. with its bitter controversy, prolonged litigation and significant expense, all over a facility (the tennis court) that no one uses. Ironically, it was Dempcy back in 2010 that proposed that the area of the tennis court and his driveway be ceded to him – in effect, a partition. CP 130.

In fact, the Dempcys oppose partition because they want the other owners to refurbish the tennis court to benefit the value of their private property. But partition allows the opportunity for an independent referee to consider a plan to allocate the property to the owners.

Partition is appropriate to bring an end to the difficult and prolonged litigation and may, as a consequence, give the Dempcys

the result they desire. The trial court made no error in ordering partition and the ruling should be affirmed on appeal.

C. THE TRIAL COURT CORRECTLY DETERMINED THAT IT REQUIRES TWO MEMBERS TO AGREE TO REFURBISH THE TENNIS COURT

At pages 33-38, the Dempcys contend that the trial court erred in its ruling that the CC&Rs requires two votes to undertake the repairs requested by the Dempcys. The trial court found as follows:

2. There is no genuine issue of material fact in dispute that all decisions concerning special assessment for extraordinary maintenance of the common area tract and tennis court, as sought by plaintiffs, must be made by at least two owners of property in the Pickle Point Association, under Section 5.6 of the CC&Rs.

CP 721 (Order Granting Defendants Motion for Partial Summary Judgment). The court ordered as follows:

3. A declaratory judgment is entered determining that at least two owners of the ACC must make any decision regarding any special assessment for the extraordinary maintenance costs of repairing the common area property and tennis court, as sought by plaintiffs in this action.

Id. CP 722. Respondents will respond to this claim herein, but note that if the order for partition is affirmed, this issue is moot.

Section 5.6 of the CC&Rs spells out the procedures for special assessments for extraordinary maintenance. It calls for the

Architectural Control Committee to send a notice to all owners, to state reasons for the assessment, the amount to be assessed and the date and place for a meeting to discuss the assessment. Most importantly, Section 5.6 states:

Approval of a special assessment shall require consent of 50% of the Parcels excluding Parcel 5 [the C.A.T.].

CP 120. As will be shown, the trial court correctly ruled that this section of the CC&Rs will be enforced as written and the Dempcys' objections below are misplaced.

First, the Dempcys argue that material facts exist concerning what is an extraordinary expense. Appellants' Brief at 34.

However, this distinction does not matter as the Dempcys acknowledged that two votes were necessary for the actual work that Dempcys wanted the other three parties to pay for:

We have not done the tennis court maintenance each year so it now must be redone. We got an estimate a few years ago which was about \$40,000. The covenants require two of us to agree to make this assessment. Since I could not get another vote, the project failed. In addition the retaining wall is giving way and the corner of the court is sagging. We need to do maintenance on this problem.

Letter to owners from Mr. Dempcy, May 1, 2010 (CP 130)

(emphasis supplied). In the same letter, he proposed having a meeting on May 29, 2010 to discuss his request for action. *Id.*

The other owners accommodated the Dempcys' meeting request and a meeting was indeed held on that date; the minutes thereof (taken by Mr. Dempcy) are found in the record at CP 132-33. The minutes are captioned as the "PICKLE POINT ACC MEETING MINUTES," with "ACC" referencing the Architectural Control Committee. The meeting began with agreement on procedures for committee action:

The first order of business was the adoption of Robert's Rules of Order to control the procedures of the meeting with the proviso that, in any event, a quorum for conducting business would be three members and a majority of those present would be necessary to adopt resolutions of the committee.

CP 132 (emphasis supplied). The minutes reflect that "these resolutions were approved unanimously by those present." *Id.* Nothing in these adopted parliamentary rules or procedures allows a single owner to dictate actions to other members.

The minutes also reflect that there was discussion about the "condition" of the C.A.T. and the tennis court. Three alternatives were discussed, the first of which was:

1) If two members approved of an assessment to refurbish the tennis court, this action would be taken and each member would be assessed for the cost.

Id (emphasis supplied). As shown in the minutes, the parties did

reach agreement on the ordinary maintenance of the court and the division of the cost, which was \$500 for power washing the court.

Id. But no agreement was reached on refurbishing the court.

Since Mr. Dempcy was a) the drafter of the CC&Rs, b) a lawyer, c) the one proposing the assessment to refurbish the court and d) the chairman of the committee, his interpretation that two votes were necessary for making the special assessment is binding on him.

Second, at page 35 of their brief, the Dempcys argue that the trial court “conflated a *right to assess* with the *obligation to maintain*.” The trial court made no mistake; it simply confirmed the statements and interpretations of the Dempcys, consistent with the CC&Rs, that two members must approve any assessment to refurbish the tennis court. The minutes of May 29, 2010 make clear there was no confusion. CP 132.

Also on page 36, the Dempcys claim that:

To exercise this additional power, notice has to be given so that tenants can discuss the need for such assessment.

Keep in mind that the “notice” required by the CC&Rs was notice by the ACC that a special assessment was proposed, not to the ACC that a member wanted a meeting. But there was notice of a

meeting of the members, provided by none other than Mr. Dempcy himself (CP 130). Following this notice, a meeting was held to discuss any need for action on the tennis court, the minutes of which are in the record (CP 132-33). The Dempcys' real complaint is that they could not find another vote for their request to refurbish the court and to oppose the idea of removing the court in favor of a greenbelt.

Third, at page 36, the Dempcys claim the maintenance responsibility sought was actually that which came from the 1968 deeds. However, as noted above, in 1968, provisions relating to the tennis court were included in deeds for only two of the four properties. See CP 147-151 and CP 154-159. These deeds also included references to paying for roads and parking areas and include the signatures of the grantees to confirm their acceptance. See CP 150-51 and 157-58. However, the Dempcys' deed mentioned nothing about the tennis court or road obligations and does not include their signatures as grantees. See CP 98. The obvious purpose of the 1989 CC&Rs was to replace that language with the new mechanism for allotting decision-making and costs. Indeed, the Dempcy brief, at pages 9-14, goes into great detail about the CC&Rs, saying, at page 12: "Article 5 of the PPD (the

CC&Rs) contains specific provisions which apply to the use and maintenance of the Common Property.” In addition, the 1989 CC&Rs built in the procedures for deciding what maintenance would be done, as described above, an element missing from the 1968 deeds. It is clear the 1989 CC&Rs were intended to replace any prior covenants. This is evident from the first paragraph:

1.1. Declarant. The undersigned (hereinafter "Declarant") are the owners of certain real property described in paragraph 1.2 below. Declarant hereby declares that the real property described in paragraph 1.2 below shall be held, transferred, sold, and conveyed subject to the conditions, restrictions, covenants, reservations, easements, and charges (hereinafter collectively referred to as "Covenants") set forth in this Declaration.

CP 113. Paragraph 1.2 reads as follows:

1.2. Property Subject to Covenants. All of the property described on Exhibit A is subject to the Covenants contained in his Declaration, Exhibit A consists of five parcels described in Exhibits A-1 through A-5, Parcel 5 being commonly owned.

*Id.*⁸ To the same effect is Article 1.3:

The Covenants shall inure to the benefit of, shall burden,

⁸ The legal descriptions included in Exhibit A were obviously “cut and pasted” by Mr. Dempcy. See CP 125-127. Though the legal description in each of the original deeds for the four private properties included a one-quarter interest in the C.A.T., the legal descriptions which Mr. Dempcy included in the 1989 CC&Rs deliberately excised any references to the C.A.T. tract for the four properties, including the Dempcys. Compare the description of the Dempcy property in the CC&Rs (Exhibit A-1, CP 126) with the Dempcys' vesting deed at CP 94.

and shall pass with the property and each and every parcel thereof, and shall apply and bind the owners of the property subject to these Covenants, their legal representatives, heirs, successors, and assigns in perpetuity.

*Id.*⁹ Instead the C.A.T. was set forth as Parcel A-5, referenced in CC&Rs as “Parcel 5 being commonly owned property” with no reference to the tennis court. CP113. The application of the CC&Rs to the common property was also clear.

5.1. Common Ownership. Each owner of a parcel within the property subject to this Declaration shall also own a common, undivided interest in Parcel 5. This parcel shall be referred to herein as the common property. Each owner of a parcel shall have a right to use and to enjoy the common property according to the nature of that property and subject to the restrictions contained in this Declaration.

CP 119. The CC&Rs met the requirements of a deed or covenant as it was signed by each owner to be bound by the document (CP 121-122), each signature was notarized (CP 122-124), legal descriptions of all properties were included (CP 125-127), and it was duly recorded.¹⁰ These niceties originated with the drafter, Mr. Dempsy.

⁹ As noted above, even if the CC&Rs contained some provision prohibiting partition, such agreements are not enforceable. See page 23, Footnote 3, *supra*.

¹⁰ Mr. Dempsy even signed the CC&Rs twice, once because he was the self-appointed representative of the Pickle Point Association and once as an owner. CP 101.

Fourth, at page 37, Dempcy cites *Meresse v. Stelma*, 100 Wn.App. 857, 999 P.2d 1267 (2000). *Meresse* does not support their position for two principal reasons. First, *Meresse* involved the amendment of covenants; this case concerns the enforcement of the terms of existing CC&Rs. Second, the effect of the amendment in *Meresse* was to burden the private property of the minority owner by moving the road onto Meresses' private property. See 100 Wn.App. at 862. Here, no private property rights are at stake; the controversy concerns a common property and how it should be used; the private ownership of the Dempcys is not impacted. The *Meresse* court also concluded that the impacted owner was not on notice that their property might be impacted (100 Wn.App. 866-67). However, Dempcy knew what the 1989 CC&Rs intended because he wrote them, providing for fifty percent (two votes) to approve any significant expenditures.

Fifth, and finally, at page 38, the Dempcys assert that material issues of fact exist as to whether the ACC "ever interpreted" Section 5.6 of the CC&Rs. But Dempcy clearly understood, from his prior correspondence cited above, that two votes are required to "refurbish" the tennis court.

The trial court correctly determined that the plain language

of the 1989 CC&Rs, supported by Mr. Dempcy's own admissions, required two votes for expenditures necessary to refurbish the tennis court. The trial court should be affirmed.

D. THE DEMPCYS HAVE NEITHER THE RIGHT TO MAINTAIN THE C.A.T. NOR THE RIGHT TO REQUIRE CONTRIBUTION FROM THE RESPONDENTS

Beginning at page 38, the Dempcys claim that they have an independent right to maintain the tennis court themselves and to seek compensation from the other three dissenting owners. This is the flip side of the argument presented on pages 33-38, that the respondents have a contractual obligation to share the costs of the tennis court as created by the 1989 CC&Rs.

Again, if the court affirms the partition order, this issue is moot because the C.A.T. would be divided between four owners and cease to exist. Given the proximity of the tennis court to the Dempcys' property it is possible the tennis court will be partitioned to them. However, the Dempseys' own motion to stay brought an end to any development of a partition plan pending resolution of this appeal. See CP 726.

This argument continues with a claim that: "a co-tenant in a tenancy in common who makes repairs to common property which

are necessary or increased the value of the property is entitled to pro rata reimbursement.” Brief at 39. This legal principal is discussed and expanded upon in the succeeding pages. This is a disguised backdoor attempt to force the remaining homeowners to accept Dempcy’s plans for refurbishing the tennis court, and then to pay for it, contrary to the plain language of the CC&Rs.

As the Dempcys complaint acknowledges:

19. Defendants have declared that they are preparing a plan under Section 5.6 of the Declaration to remove the Tennis Court and replace it with a "green belt" upon the vote of 50% (2) of the members.

As noted the other owners want to eliminate the tennis court and create a greenbelt that will provide benefit for all four properties. But the idea that one owner, unilaterally and without the consent of the others, can start work on the C.A.T., then charge back the cost to the other owners is an invitation to chaos. Under the rule sought by appellants, Mr. Shannon could hire someone to rip out the tennis court and put in a dog run if he thought it was a benefit - and then charge back the cost to the other owners. But here the other three owners have decided on a course of action. The filing of this case by the Dempcys effectively postponed any effort to create the greenbelt agreed on by the majority. Obviously paying for

refurbishing the tennis court is not consistent with their intentions and creates more expense.

The cases cited by Dempcy do not involve a situation where the majority of the owners do not support work in the C.A.T. Nor do they address the circumstances found here that call for such substantial expenditures to be approved by fifty percent of the owners. For example, *Yakavonis v. Tilton*, 93 Wn.App. 304, 968 P.2d 908, (1998), concerned questions of offset and rights for maintenance in absence of a contract controlling the rights of the parties. *Womach v. Sandygren*, 107 Wash. 80, 180 P. 922 (1919), cited on page 41, recognizes that the agreements of the parties, either express or implied, modify common law rules. 107 Wash. at 84. To the same effect is *In re Foster's Estate*, 139 Wash. 224, 246 P. 290 (1926), where there was no written agreement and common law principles were applied. None of those cases involve an admission by the party seeking reimburse for improvements that:

The covenants require two of us to agree to make this assessment. Since I could not get another vote the project failed.

CP 130. In addition, each of these cases involves payment for expenses already incurred; here, the Dempcys' request is to be

able not only to incur expense (over objections of the other owners), but to charge them back to the other co-tenants.

It was Mr. Dempcy that requested that the parties agree to CC&Rs as to how expenditures for the C.A.T. were to be made. As a lawyer, Mr. Dempcy was undoubtedly aware of the difficulty of forcing the other owners to pay for the tennis court when his deed said nothing about it. Though dissatisfied with the arrangement he proposed, he cannot seek to avoid his own contract by references to common law principles.

The trial court correctly determined that relations between the parties were governed by Mr. Dempcy's contract, which requires a collective decision on the use of the C.A.T. Indeed, it was Mr. Dempcy's idea to formalize and regulate relations between the parties by adoption of the 1989 CC&Rs, thus abandoning the generality of tenants-in-common interests created by the earlier deeds. The trial court correctly rejected this argument.

E. THE 1989 CC&RS PROHIBIT DAMAGE ACTIONS AGAINST OTHER MEMBERS OF THE PICKLE POINT ASSOCIATION

When the Dempcys drafted the 1989 CC&Rs and presented them to the other owners, they were careful to expressly prohibit one owner from suing another for damages based on joint

decisions and actions of the ACC. See Section 3.6. at CP 118. The language here is expansive: it prohibits “any action” against an owner “which seeks to hold that member personally or individually liable for damages relating to or caused by any action or decision by the Committee.” *Id.* Ignoring the prohibition they created, the Dempcys’ complaint claims damages against the other three owners for their refusal to accept their demand that the tennis court be refurbished. Applying the plain language of the CC&Rs, the trial court correctly entered an order dismissing the Dempcys’ claim. See *Green v. Normandy Park Community Club, Riviera Section*, 137 Wn.App. 665, 684, 151 P.3d 1038 (2007) (in interpreting covenants, the Court must place “special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.” (omitting citations)).

At pages 43-44, the Dempcys claim that the defendant/respondent Shannon “interfered with a private contract to repair the tennis court” apparently by writing a letter. The brief contains no citation to the record for such a contract, the essential element of a breach of contract claim. Brief at 43. Nor could the Dempcy’s lawfully make a “private contract” for repair of the tennis court, since under the CC&Rs all work in the C.A.T. must be

controlled by the ACC.

They further claim that Mr. Shannon's actions were taken outside of any meetings. Brief at 43. On page 44, the Dempcys claim that they have "presented substantial evidence" to support their claim of contract interference. However, the only citation to the record for these several claims is CP 8-16, the Dempcys' Complaint. There is no reference to any evidence, much less substantial evidence. It is settled law that opposition to a summary judgment motion but must show specific facts:

CR 56(e) provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Jones v. State, Dept. of Health, 170 Wn.2d 338, 365, 242 P.3d 825 (2010). The failure to allege specific facts or provide evidence requires affirmation of the trial court's ruling.

But the record is also clear that the three members of the association voted against having a tennis court in a meeting on July 23, 2013. In part, the minutes for that meeting state:

By motion made and seconded all three attending voted against having a tennis court or any athletic court in the commons. Radek and Chris were charged with developing and proposing a plan that best fits the interest of all in this

very complex issue. We expect execution of that plan within a three to five year time frame.

CP 219-220. Any actions taken concerning development of the tennis court following that meeting were directed by the ACC as a whole and Mr. Shannon acted consistent with the ACC's decision. Indeed, Mr. Shannon's letter, written six weeks after the meeting, says: "The Association has elected not to make any improvements to the tennis court until a long range plan been developed and approved." CP 368. He signed the letter as "Chair, Pickle Point Association" indicating he was acting for the Association, not just himself. *Id.* The actions of the committee were so clear that the Dempcys included a paragraph concerning these intentions in Paragraph 19 of their amended complaint:

Defendants have declared that they are preparing a plan under Section 5.6 of the Declaration to remove the Tennis Court and replace it with a "green belt" upon the vote of 50% (2) of the members.

Such actions were taken by the ACC and no damage action, as sought by the Dempcys, was permissible under the terms of Mr. Dempcy's own covenants. There is no ambiguity in the CC&Rs on this point.

The trial court correctly ruled on summary judgment that the Dempcys' damage claims were prohibited by the Covenants.

F. THE TRIAL COURT PROPERLY AWARDED ATTORNEY FEES RELATED TO COVENANT ISSUES AND THIS COURT SHOULD AWARD APPELLATE ATTORNEY FEES

One of the special provisions that Mr. Dempcy included in his 1989 CC&Rs was an enforcement provision and an expansive attorney fee provision. See 1989 CC&Rs at Section 6.1. This provision of the Declaration states:

The prevailing party in any action to enforce the Covenants contained in this Declaration shall have the right to collect attorney's fees, court costs, and other expenses of litigation in addition to any damages which may be awarded.

In the present case, the Dempcys sought enforcement of provisions of the CC&Rs in their complaint, in particular their First, Third and Fourth cases of action. CP 11-13. These claims were dismissed by the trial court in its summary judgment order and accordingly the defendants, now respondents A/S/Z, are entitled to their fees below. Similarly, A/S/Z should be entitled to their attorney's fees and other expenses on the appeal as the attorney's fee clause is not limited to fees at the trial court.

Though the foregoing is dispositive, three extraneous issues raised on page 45 of the Dempcys' brief require brief comment.

First, the Dempcys claim that part of the trial court rationale for the award of fees was based on the partition statute, and in

particular RCW 7.52.480. This is not the case. The Court's order on attorney's fees made it clear that the fees awarded were under the CC&Rs, not other authority:

4. Pursuant to Section 6.1 of the CC&Rs, the plaintiffs shall pay the defendants' reasonable attorney fees, court costs and other expenses of litigation relating to the CC&Rs, the amount of which shall be determined at the time of entry of final judgment in this matter.

CP 722 (emphasis supplied). As noted, the trial court has yet to actually award attorney fees because the stay of proceedings requested by Dempcy. The Dempcys will have abundant opportunity to argue the propriety of the fee award at the appropriate time.

Second, Dempcys argue that they prevailed on their claim that the Aveniuses' hedge and fence violated the CCRs. Brief at 45. However, those separate claims were set forth against only the Aveniuses (the Second and Fifth causes of action in the Dempcys' complaint at CP 11-13). Indeed, when the Dempcys filed their motion for CR 54(b) certification they made clear the issues between them and the Aveniuses were only between them and did not involve the C.A.T. Nothing that happens regarding the Dempcy-Avenius dispute affects the Common Property or the decision on partitioning. The first sentence in their motion was

“This lawsuit involves two totally distinct disputes.” CP 726. This was reiterated later in the motion:

The remaining Dempcy-Avenius issues giving rise to this Lawsuit do not affect the Common Property and are wholly unrelated. These issues can proceed to trial and have no bearing on the Common Property.

CP 730 (emphasis supplied). As even the Dempcys note in their brief at page 45, trial on that matter was tried by a different judge well after summary judgment was entered in this case, and respondents Shannon and Zemel were not parties thereto (nor did they participate in that trial).¹¹ In fact, the Dempcys have filed a separate appeal of that decision, which as of this writing remains unperfected.¹²

Third, the Dempcys argue they are the prevailing party and should be awarded attorney fees. Brief at 44. However, their motion for summary judgment was denied (CP 715-18) and no appeal lies from the denial of a summary judgment. *In re Estate of*

¹¹ At page 45 of their brief, the Dempcys claim error by Judge Allred in ruling on the hedge/fence issues (solely between them and the Aveniuses). However, those rulings are not in the record and were not before the presiding judge in this case. Similarly, references to the trial court ruling, found at footnote 1 on page 2, are not before the Court and should be ignored.

¹² The Administrator of this Court declined to consolidate the two cases, only providing that they would be “linked for consideration by the same panel of judges.” See notation ruling on January 5, 2016 and letter to counsel, January 7, 2016.

Jones, 170 Wn.App. 594, 605, 287 P.3d 610 (2012) (“The denial of a summary judgment motion is not a final order that can be appealed.”) The Dempcys further concede there is no authority to grant attorney fees under the 1968 covenants or common law. Brief at 45. If they prevail on this appeal, which A/S/Z contend they cannot, the matter will be returned to Superior Court for trial, at which time a ruling would be made as to the prevailing party. Further, at page 3, footnote 2, appellants concede that their right to fees is “not scheduled to be briefed at this time.”

Given the foregoing, this court should award attorney fees to A/S/Z and also award fees on appeal.

VI. CONCLUSION

The parties to this litigation are at an impasse concerning how the C.A.T. should be used and developed. Three owners, A/S/Z, wish to remove the obsolete, unused, forty year old tennis court and replace it with an attractive greenbelt. Only one owner wants the tennis court refurbished. It is because of this kind of bitter and divisive dispute over common property that the partition statute was enacted in 1881. The trial court correctly ordered partition and correctly ordered a referee to make recommendations as to the division of the C.A.T., a report that may even suggest that

the tennis court be made a part of the Dempcy property.

If partition is affirmed, other substantive issues in the case may become moot because they also refer to the C.A.T. If partition is not ordered, the trial court correctly determined that, consistent with the 1989 CC&Rs, a majority of owners must determine the nature and extent of maintenance for the C.A.T. and that the Dempcys cannot attempt an end-run around the contract they requested the owners sign by invoking common law principles.

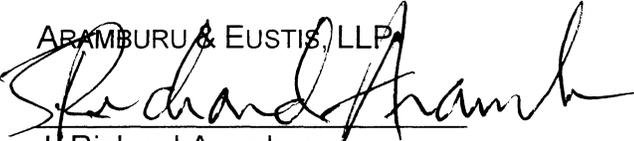
The trial court also correctly followed the explicit language of the 1989 CC&Rs holding that the four owners cannot seek damages from one another for actions dealing with the C.A.T.

Finally, the trial court was correct in awarding attorney fees, following a specific CC&R provision (also drafted by Mr. Dempcy); following the same language, this court should award appellate attorney fees related to CC&R issues.

In all respects the trial court should be affirmed.

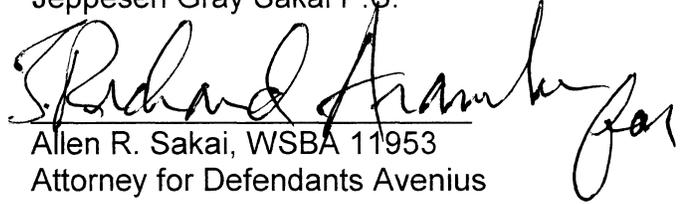
Dated this 1st day of February, 2016.

Respectfully submitted,

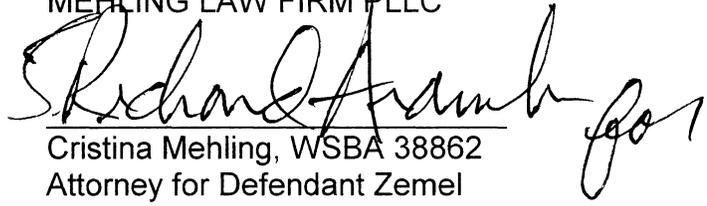
ARAMBURU & EUSTIS, LLP

J. Richard Aramburu
WSBA 466

Attorney for Defendant Shannon

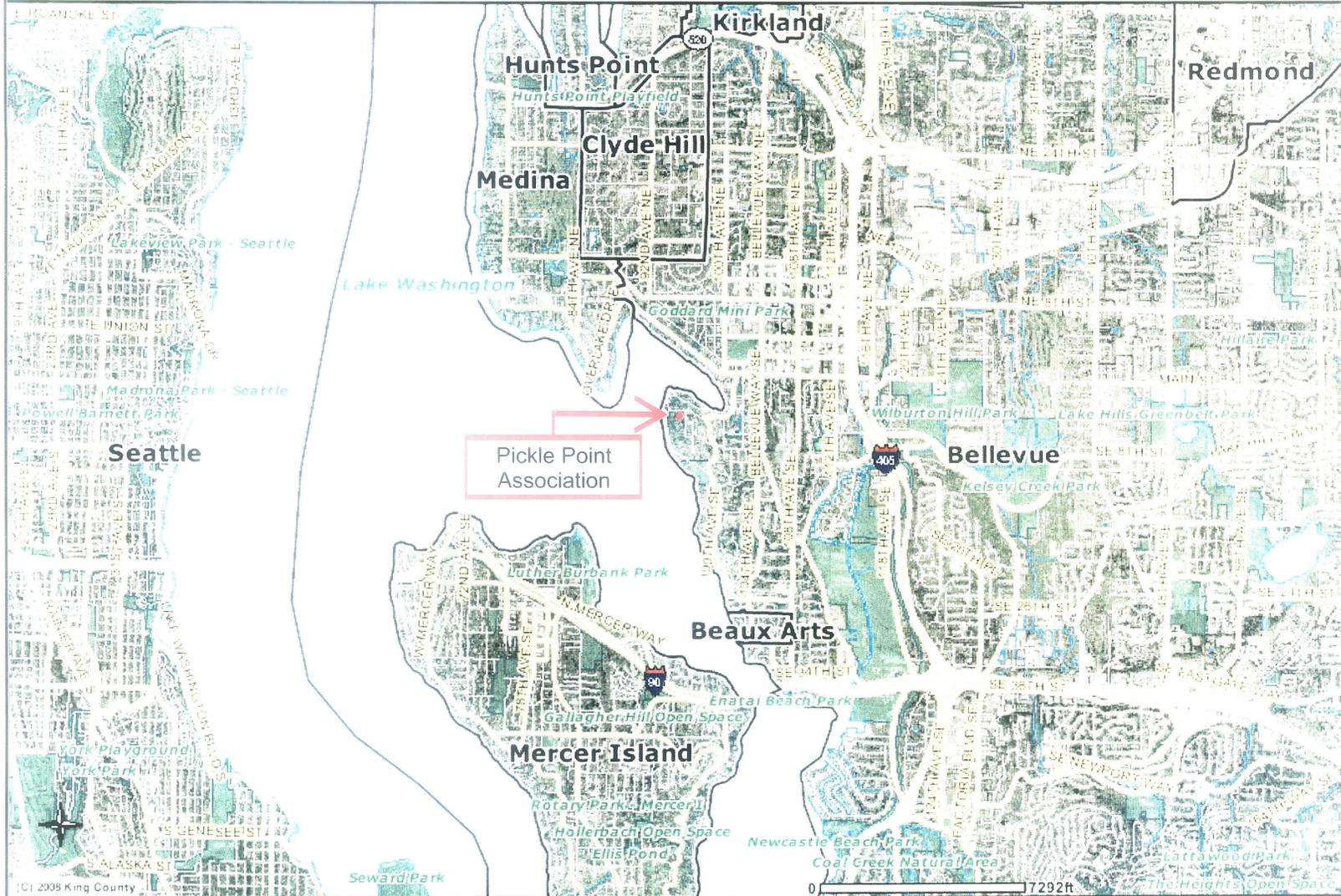
Jeppesen Gray Sakai P.S.


Allen R. Sakai, WSBA 11953
Attorney for Defendants Avenius

MEHLING LAW FIRM PLLC


Cristina Mehling, WSBA 38862
Attorney for Defendant Zemel

Pickle Point Association



The information included on this map has been compiled by King County staff from a variety of sources and is subject to change without notice. King County makes no representations or warranties, express or implied, as to accuracy, completeness, timeliness, or rights to the use of such information. This document is not intended for use as a survey product. King County shall not be liable for any general, special, indirect, incidental, or consequential damages including, but not limited to, lost revenues or lost profits resulting from the use or misuse of the information contained on this map. Any sale of this map or information on this map is prohibited except by written permission of King County.



Date: 12/29/2014 Source: King County iMAP - Property Information (<http://www.metrokc.gov/GIS/iMAP>)

Appendix 1

Pickle Point Association



Appendix 2

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 The information included on this map has been compiled by King County staff from a variety of sources and is subject to change without notice. King County makes no representations or warranties, express or implied, as to accuracy, completeness, timeliness, or rights to the use of such information. This document is not intended for use as a survey product. King County shall not be liable for any general, special, indirect, incidental, or consequential damages including, but not limited to, lost revenues or lost profits resulting from the use or misuse of the information contained on this map. Any sale of this map or information on this map is prohibited except by written permission of King County.



Date: 12/29/2014 Source: King County iMAP - Property Information (<http://www.metrokc.gov/GIS/iMAP>)

Shannon Exhibit A-2

94th Avenue SE



View from inside the Tennis Court to the Dempcy home from the access gate leading directly to the Dempcy's patio.



View from the access gate toward the Dempcy home, approximately 34 feet away.

DECLARATION OF SERVICE

I am an employee in the law offices of ARAMBURU & EUSTIS, LLP, over the age of 18 years and competent to be a witness herein. On the date below copies of the foregoing document were sent by *email* to the following counsel of record:

John R. Tomlinson, WSBA 14124
Aric S. Bomsztyk, WSBA 38020
Barokas Martin & Tomlinson
1422 Bellevue Avenue
Seattle, Washington 98122
(206) 621-1871, fax (206) 621-9907
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Bellevue, WA 98004-5044
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asakai@jgslaw.com
for Chris and Nela Avenius

Cristina Mehling, WSBA 38862
MEHLING LAW FIRM PLLC
10900 NE 4TH ST., Suite 2300
Bellevue, WA 98004
Ph: 425-990-1046
cm@mehlinglawfirm.com
for Radek Zemel

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true to the best of my knowledge and belief.

Dated at Seattle, Washington on this 1st day of February 2016.



Carol Cohoe

2100

RECEIVED

90/06/08 #1851 B
REC FEE 2.00
RECD F 19.00
CRSHSL ***21.00

JUN 8 11 51 AM '90

BY THE DECLARANT
DECLARATION OF PROTECTIVE COVENANTS,
RESTRICTIONS, EASEMENTS, AND
AGREEMENTS FOR
PICKLE POINT ASSOCIATION

EXCISE TAX NOT REQUIRED
King Co. Records Division
By *Dennis K. Love*, Deputy

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1. PRELIMINARY MATTERS

1.1. Declarant. The undersigned (hereinafter "Declarant") are the owners of certain real property described in paragraph 1.2 below. Declarant hereby declares that the real property described in paragraph 1.2 below shall be held, transferred, sold, and conveyed subject to the conditions, restrictions, covenants, reservations, easements, and charges (hereinafter collectively referred to as "Covenants") set forth in this Declaration.

1.2. Property Subject to Covenants. All of the property described on Exhibit A is subject to the Covenants contained in this Declaration. Exhibit A consists of five parcels described in Exhibits A-1 through A-5, Parcel 5 being commonly owned property.

1.3. Intent and Term of the Covenants. The Covenants contained in this Declaration are for the benefit of all the property subject to the Covenants and for the benefit of each and every separate parcel of that property. The Covenants shall inure to the benefit of, shall burden, and shall pass with the property and each and every parcel thereof, and shall apply to and bind the owners of the property subject to these Covenants, their legal representatives, heirs, successors, and assigns in perpetuity.

2. RESTRICTIONS ON USE OF PROPERTY BY OCCUPANTS

2.1. Permitted Use. No parcel described on Exhibit A shall be used for any purpose other than the construction of a single-family dwelling. No building shall be erected, altered, placed, or permitted to remain on any parcel other than one detached single-family dwelling, and a private garage; provided

however, that all structures that exist on the date hereof shall be permitted structures.

2.2. No Temporary Dwellings. No trailer, mobile home, shack, garage, barn, or any other outbuilding, or any other structure of a temporary character shall be used on any parcel at any time as either a temporary or permanent residence.

2.3. Nuisance. No noxious or offensive activity shall be carried on upon any parcel, nor shall anything be done on any parcel which is or may become an annoyance or nuisance to the neighborhood. No boats, trailers, or recreational vehicles shall be stored or kept on any parcel for a period of more than 24 hours, unless said boat, trailer, or R.V. is enclosed or screened such that it is not visible from any street or any other parcel in the plat. The streets within the described real property shall not be used for overnight parking of any vehicles other than private automobiles. This covenant specifically restricts street parking of boats, trailers, or other R.V. vehicles.

2.4. Trash. No garbage, refuse, or rubbish shall be deposited or kept on any parcel or building unit except in suitable containers. All areas for the deposit, storage, or collection of garbage or trash shall be substantially screened from neighboring property, and from the common roads and paths. All equipment for the storage or disposal of trash, garbage, or other waste shall be kept in a clean and sanitary condition.

2.5. Animals. No animals, livestock, or poultry of any kind shall be raised, bred or kept on any parcel except as specifically provided for herein. Dogs, cats, and other household pets may be kept provided that they are not kept, bred, or maintained for commercial purposes, that no more than two dogs may be kept on any one parcel, and further provided that they are not kept in separate exterior kennels. (The intent of this covenant is to preclude both visual and audible annoyances to adjoining parcels.)

2.6. Fences. Except for those existing on the date hereof, no fences, wall, hedge, or mass planting other than a foundation shall be permitted between Parcel 1 and Parcel 2 unless

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approved by the owners of both parcels; provided, however, that nothing shall prevent the erection of a necessary retaining wall, the top of which does not extend more than two feet above the finished grade at the back of said retaining wall. With respect to all parcels, no fence, wall, hedge, or mass planting shall at any time extend higher than six feet above the ground. No wire fences shall be used for fencing any parcel unless approved by the Architectural Control Committee, except that the fence existing on parcel 5 on date hereof is approved and shall be the standard for any replacements thereof. The finished side of all fences shall face the exterior of the parcel.

2.7. Signs. No sign of any kind shall be displayed to the public view on any parcel.

2.8. Antennae. No radio or television antennae or transmitters shall extend above the roof ridge line of a dwelling, and no separate towers for such antennae or transmitters shall be permitted, unless approved by the ACC. Cable receiving dishes or any electronic receiving dishes are prohibited.

2.9. Utility Service. No outdoor overhead wire or service drop for the distribution of electric energy or for telecommunication purposes, nor any pole, tower, or other structure supporting said overhead wires shall be erected, placed, or maintained on the property subject to this Declaration.

2.10. Storm Drains. The owner or occupant of any building constructed on any parcel subject to this Declaration shall maintain in proper working order all roof drains and area storm drains on that parcel.

2.11. Construction Period. Any structure erected or placed on any parcel shall be completed as to external appearance, including finish painting and landscaping, within nine (9) months from date of start of construction.

2.12. Landscaping. Growth of alder, madrona, or other bush-type trees shall not be allowed to interrupt views. This restriction shall not apply to any growth on parcel 4.

2.13. Clothes Drying Area. No portion of any parcel shall be used as a drying or hanging area for laundry of any kind where it can be viewed from any street or adjacent house.

2.14. Maintenance Notice/Assessment of Costs. When in the opinion of the Committee certain maintenance needs to be performed on a parcel or parcels, the Committee shall notify the Owner by certified mail specifying in said notice exactly what needs to be repaired or maintained. The Owner shall then have thirty (30) days from receipt of such notice to perform the necessary maintenance or to make written demand for a hearing before the Committee. If a hearing is demanded, the Committee shall set a date therefor and give the owner at least ten (10) days notice thereof. The hearing shall be informal and rules of evidence shall not apply. The Committee shall render its decision in writing. The cost of such exterior maintenance actually performed shall be added to and become a part of the assessment to which the parcel is subject.

2.15. Subdivision. No parcel shall be subdivided into smaller parcels without the written consent of all parcel owners.

3. ARCHITECTURAL CONTROL COMMITTEE

3.1. Establishment. An Architectural Control Committee shall be established. The Committee shall have one member representing each parcel owner other than the common parcel. The initial members shall be appointed and may be removed by the Declarant. The members of the Committee shall designate one of their number to serve as chairman of the Committee and shall adopt such procedures and guidelines as they deem necessary for the orderly administration of their work. The initial address of the Architectural Control Committee shall be 429 94th S.E., Bellevue, WA 98004.

3.2. Structures and Exterior Renovation. No building, fence, hedge, wall, or other structure shall be erected, placed, altered, or exteriorly renovated on any parcel or building site subject to this Declaration until the building or renovation plans, specifications and plot plan are submitted by the owner

or his representative to the Architectural Control Committee for approval.

3.3. Land Clearing. No native trees other than alder and madrona or significant ground cover shall be cut, removed, or destroyed without the approval of the Architectural Control Committee. Any person wishing to cut, remove, or destroy such trees or significant ground cover shall submit a plan showing the location of the trees or ground cover to be cut, removed, or destroyed, along with the location of the existing trees or ground cover to be retained. The applicant shall also submit a brief statement of the reasons supporting his request to cut, remove, or destroy such trees or ground cover; provided, however, that dead trees located on a parcel subject to this Declaration shall be removed by the parcel owner upon request by the Architectural Control Committee.

3.4. Criteria. The Architectural Control Committee shall consider the following criteria in approving or rejecting the plans submitted to it:

3.4.1. The harmony of the external design, color, and appearance of the proposal in relation to the surrounding neighborhood, including the common exterior shingling which exist on the date hereof. Shingles shall not include shakes.

3.4.2. The location of the proposal on the parcel in regard to slopes, soil conditions, existing trees and vegetation, roads and services, and existing building.

3.4.3. The other effects of the proposal on surrounding property; including, but not limited to, potential view blockage.

3.4.4. The compliance of the proposal with the Covenants contained in this Declaration.

3.5. Procedure. The Architectural Control Committee shall approve or reject the plans submitted to it within thirty (30) days from the date of the submission of the plans to the chairman of the Committee unless the person submitting the plans consents to an extension of the time for a decision. If the

Committee does not issue a decision within thirty (30) days from the date of the submission of the plans for the proposal, the plans shall be deemed to be approved. The Committee shall have the right to reject, for any reason whatsoever, any proposal which it decides is not suitable or desirable. The Committee's decision shall be in writing and if a proposal is not approved, the decision shall include a brief statement of the reasons for the Committee's action.

3.6. No Liability. The members of the Architectural Control Committee shall have no personal liability for any action by or decision of the Committee. The owner of that property agrees and covenants not to maintain any action against any member of the Architectural Control Committee which seeks to hold that member personally or individually liable for damages relating to or caused by ~~any action of or decision by the~~ Committee.

4. NATIVE GROWTH PROTECTION EASEMENT

4.1. Restrictions. Within the boundaries of the property subject to this Declaration, no trees other than alders or madronas or significant ground cover shall be cut, removed, or destroyed except as specifically provided herein.

4.2. Hand Pruning. Hand pruning of trees for view maintenance shall be permitted as long as it will not endanger slope stability, and will not adversely affect the tree or trees to be pruned. Such pruning shall be done in a competent and workman-like manner.

4.3. Safety. Trees and significant ground cover may be cut, destroyed, or removed when such an action is necessary to remove a present danger to life or property. Dead, dying, or diseased trees and ground cover, or trees and ground cover which present a fire hazard, shall be removed by the parcel owner.

4.4. No Dumping. No trash, debris, rubbish, or other material which is not biodegradable shall be dumped or disposed of within the the area subject to this Declaration.

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5. JOINT USE AND MAINTENANCE OF THE COMMON PROPERTY

5.1. Common Ownership. Each owner of a parcel within the property subject to this Declaration shall also own a common, undivided interest in Parcel 5. This parcel shall be referred to herein as the common property. Each owner of a parcel shall have a right to use and to enjoy the common property according to the nature of that property and subject to the restrictions contained in this Declaration.

5.2. Creation of Lien and Personal Obligation. Each owner of a parcel agrees to pay any and all assessments provided for in this section. These assessments, together with any interest or cost of collection, shall be a continuing lien upon the property which is the subject of such assessment. Each owner of a parcel shall also be personally obligated to pay the amount of any assessment levied against his property during the time that he is the owner thereof, together with any interest or costs of collection on that assessment. This personal obligation shall not be released by any transfer of the property subsequent to the effective date of the assessment.

5.3. Assessment Committee. The ACC shall be the Assessment Committee. This Committee shall establish rules and procedures for the fulfillment of its obligation. It shall hold meetings and establish regular and special assessments as provided for herein.

5.4. Purpose of Assessments. The assessments levied by the Committee shall be used exclusively to maintain the common property.

5.5. Regular Assessments. Once a year the Committee shall determine the amount of money necessary for the ordinary maintenance of the common property and the operation of the Committee. This amount will be equally divided among the parcels subject to this Declaration other than the common parcel, and notice of such assessment shall be given to each property owner in the manner prescribed by the Committee. The Committee shall establish procedures for the payment of such assessments.

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5.6. Special Assessments. If the Committee determines that a special assessment is necessary for the extraordinary maintenance of or capital improvements to the common property, the Committee shall send a notice of special assessment to the owners of all parcels. This notice shall include a statement of the reasons such an assessment is necessary, the amount to be assessed, the method of payment proposed by the Committee, and the date and place for a meeting to discuss such a special assessment. This meeting shall be held no sooner than thirty (30) days from the date of the notice of special assessment. The meeting will be conducted according to the rules adopted by the Committee, and the owner of each parcel shall be entitled to one vote for each parcel. Approval of a special assessment shall require consent of 50% of the Parcels excluding Parcel 5.

5.7. Enforcement. If any assessment is not paid according to the procedures established by the Committee, the amount of the assessment shall bear interest at the maximum legal rate and the Committee shall file a lien on the property subject to the unpaid assessment for the amount of the assessment plus interest. The Committee may bring an action at law to enforce payment of a delinquent assessment against the owner of record of the property subject to the unpaid assessment in order to recover the amount of the assessment, and the Committee may also take whatever measures are provided for by law to foreclose or collect on the lien filed on the property subject to the assessment. In the event of legal action to enforce or collect any assessment, the prevailing party shall be entitled to recover court costs, actual attorney's fees, and the other expenses of litigation.

6. MISCELLANEOUS

6.1. Enforcement. Any owner of property within the property subject to this Declaration shall have the right to enforce the Covenants contained in this Declaration through an action at law or in equity. The Architectural Control Committee shall also have the right to bring such action in its name. The prevailing party in any action brought to enforce the Covenants contained in this Declaration shall have the right to collect attorney's fees, court costs, and other expenses of litigation, in addition to any damages which may be awarded.

6.2. Waiver. The failure to enforce any covenant contained in this declaration shall not be deemed a waiver of the right to enforce such a covenant.

6.3. Severability. If any covenant contained in this Declaration is held invalid, the remainder of the Declaration shall not be affected and shall continue in full force and effect.

6.4. Captions. The captions in this Declaration are inserted only as a matter of convenience and for reference, and in no way describe, define, or limit the intent of this Declaration. The captions are not to be used in interpreting this Declaration.

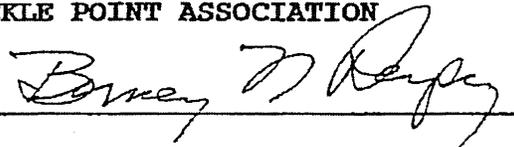
6.5. Municipal Ordinances. These Covenants shall in no way restrict the effect of any ordinance adopted by a municipal corporation having jurisdiction over any portion of the property subject to this Declaration. References to ordinances made in this Declaration shall be construed as references to the ordinances as they exist as of the date of the recordation of this Declaration or as they may thereafter be amended.

6.6. Interpretation. The Architectural Control Committee shall have the right to determine all questions arising in connection with this Declaration and to construe and interpret the provisions of this Declaration. Its good faith determination, construction, or interpretation of this Declaration shall be final and binding.

IN WITNESS WHEREOF, the undersigned have executed this Declaration this _____ day of _____, 19____.

PICKLE POINT ASSOCIATION

By



9006081851

By Barney N Dempsey
 By Marion H. Dempsey
 By Ed Jager
 By James S. Gongjan
 By J. Shauer
 By Bernie S. Mikkelsen
 By Jim Mikkelsen

STATE OF WASHINGTON)
)
 COUNTY OF King) ss.

On this 7th day of November, 1989, before me personally appeared Barney N. Dempsey, and Marion H. Dempsey to me known to be the persons who executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said persons, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

Valma J. Lackey
 Notary Public in and for the State
 of Washington, residing at Belleme
 My appointment expires 4-21-90

STATE OF WASHINGTON)
)
 COUNTY OF King) ss.

On this 7th day of November, 1989, before me personally appeared Ray Gongjan, and Dick Gongjan to me known to be the persons who executed the

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within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said persons, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

Valma J. Lackey
Notary Public in and for the State
of Washington, residing at Belleme
My appointment expires 4-21-90

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STATE OF WASHINGTON)
COUNTY OF King) ss.

On this 8th day of November, 1989, before me personally appeared Jack Shannson, and Lars Mikkelson to me known to be the persons who executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said persons, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

Valma J. Lackey
Notary Public in and for the State
of Washington, residing at Belleme
My appointment expires 4-21-90

STATE OF WASHINGTON)
COUNTY OF King) ss.

On this 6th day of December, 1989, before me personally appeared Bonnie S. Mikkelson, and Lars Mikkelson to me known to be the persons who executed the within and foregoing instrument, and acknowledged said

instrument to be the free and voluntary act and deed of said persons, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

Valma J. Lockey

Notary Public in and for the State
of Washington, residing at Belleme

My appointment expires 4-21-90

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That portion of Moorland, as per plat recorded in Volume 4 of Plats, on page 103, records of King County, and of portions of vacated streets and alleys within said plat, described as follows:

Beginning at a point, which is the intersection of the North line of Lot 10 in Block 9 of said subdivision, extended Westerly, with the center line of vacated 93rd Avenue Southeast;
thence South $88^{\circ}46'29''$ West 148.72 feet;
thence North to the North boundary of the said plat of Moorland;
thence North $89^{\circ}53'49''$ East, along said boundary, to its intersection with the center line of 94th Avenue Southeast, said point of intersection being marked by a stone monument;
thence South, along said center line, which is the existing West margin of said 94th Avenue Southeast, 349.24 feet to an existing iron pipe;
thence South $89^{\circ}53'49''$ West 40.00 feet to the Southeast corner of Lot 28 of said Block 9;
thence South $89^{\circ}53'49''$ West, along the South line of said Lot 28 and the extension thereof, and along the North line of said Lot 10 in Block 9, and the extension thereof to the point of beginning;

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Exhibit A

THAT PORTION OF THE PLAT OF MOORLAND, ACCORDING TO THE PLAT RECORDED IN VOLUME 4 OF PLATS, PAGE 103, IN KING COUNTY, WASHINGTON AND OF PORTION OF VACATED STREETS AND ALLEYS WITHIN SAID PLAT, DESCRIBED AS FOLLOWS:

BEGINNING AT THE INTERSECTION POINT OF THE CENTERLINE OF 94TH AVENUE SOUTHEAST, SAID CENTERLINE NOW BEING THE WEST MARGIN OF SAID 94TH AVENUE SOUTHEAST WITH THE NORTH BOUNDARY OF THE SAID PLAT OF MOORLAND; THENCE DUE SOUTH ALONG SAID CENTERLINE AND WEST MARGIN, A DISTANCE OF 349.24 FEET TO THE EASTERLY EXTENSION OF THE SOUTH LINE OF LOT 28, BLOCK 9 OF SAID PLAT OF MOORLAND; THENCE SOUTH 89°53'49" WEST ALONG SAID EASTERLY EXTENSION AND SOUTH LINE A DISTANCE OF 60 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING SOUTH 89°53'49" WEST ALONG THE SOUTH LINE OF LOTS 28 AND 9, OF SAID BLOCK 9 AND THE WESTERLY EXTENSION OF THE SOUTH LINE OF SAID LOT 9, A DISTANCE OF 236.00 FEET; THENCE SOUTH 88°46'29" WEST, A DISTANCE OF 148.72 FEET TO A LINE WHICH IS 8.69 FEET WEST OF AND PARALLEL TO WHEN MEASURED AT RIGHT ANGLES FROM THE WESTERLY MARGIN OF BLOCK 8 OF SAID PLAT OF MOORLAND; THENCE DUE NORTH ALONG SAID PARALLEL LINE A DISTANCE OF 112.91 FEET; THENCE NORTH 89°53'49" EAST, A DISTANCE OF 384.69 FEET; THENCE DUE SOUTH A DISTANCE OF 110 FEET TO THE TRUE POINT OF BEGINNING;

Exhibit A-1 (429 94th S.E.)

That portion of the Plat of Moorland, as recorded in Volume 4 of Plats, page 103, records of King County, Washington, and portions of vacated streets and alleys within said plat, described as follows:

Commencing at the intersection of the centerline of 94th Avenue S.E., said centerline now being the West margin of said 94th Avenue S.E., with the North boundary of said Plat of Moorland; thence due South along said centerline and West margin a distance of 121.74 feet; thence S89°53'49"W 170.00 feet; thence due North 2.50 feet to the POINT OF BEGINNING; thence due South 17.50 feet; thence N89°53'49" 110.00 feet; thence due South 102.50 feet; thence S89°53'49"W 384.69 feet to a line which is 8.69 feet West of and parallel with the Westery margin of Block 8 of said Plat of Moorland; thence due North along said parallel line a distance of 120.00 feet; thence N89°53'49" 274.67 feet to the POINT OF BEGINNING.

Exhibit A-2 (425 94th S.E.)

LOT 1 OF CITY OF BELLEVUE SHORT PLAT NUMBER 79-29, RECORDED UNDER RECORDING NUMBER 7905290618, SAID SHORT PLAT BEING A SUBDIVISION OF THAT PORTION OF THE PLAT OF MOORLAND, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 4 OF PLATS, PAGE 103, IN KING COUNTY, WASHINGTON, AND PORTIONS OF VACATED STREETS AND ALLEYS WITHIN SAID PLAT.

Exhibit A-3 (407 94th S.E.)

The easterly 127 feet of that portion of the Plat of Moorland, as recorded in Volume 4 of Plats, page 103, records of King County, Washington, and of portions of vacated streets and alleys within said plat, described as follows: Beginning at the intersection point of the centerline of 94th Avenue S.E., said centerline now being the West margin of said 94th Avenue S.E., with the North boundary of said plat of Moorland; Thence due South along said centerline and West margin a distance of 121.74 feet; Thence S 89°53'49" W, a Distance of 170.00 feet; Thence due south a distance of 7.50 feet; Thence S 89°53'49" W, a distance of 274.67 feet to a line which is 8.69 feet West of and parallel to, when measured at right angles from the Westerly margin of Block 8 of said plat of Moorland; Thence due North along said parallel line a distance of 129.24 feet to the North boundary of said plat of Moorland; Thence N 89°53'49" E along said North boundary, a distance of 444.69 feet to the point of beginning.

Exhibit A-4 (403 94th S.E.)

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BEGINNING AT THE INTERSECTION OF THE CENTERLINE OF 94TH AVENUE SOUTHEAST, SAID CENTERLINE NOW BEING THE WEST MARGIN OF SAID 94TH AVENUE SOUTHEAST WITH THE NORTH BOUNDARY OF SAID PLAT OF MOORLAND; THENCE DUE SOUTH ALONG SAID CENTERLINE AND WEST MARGIN; A DISTANCE OF 121.74 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING DUE SOUTH ALONG SAID CENTERLINE AND WESTERLY MARGIN; A DISTANCE OF 227.50 FEET TO THE EASTERLY EXTENSION OF THE SOUTH LINE OF LOT 28, BLOCK 9, OF SAID PLAT OF MOORLAND; THENCE SOUTH 89°53'49" WEST ALONG SAID EASTERLY EXTENSION AND SOUTH LINE A DISTANCE OF 60 FEET; THENCE NORTH A DISTANCE OF 212.50 FEET; THENCE SOUTH 89°53'49" WEST, A DISTANCE OF 110 FEET; THENCE DUE NORTH A DISTANCE OF 15.00 FEET; THENCE NORTH 89°53'49" EAST A DISTANCE OF 170 FEET TO THE TRUE POINT OF BEGINNING.

Exhibit A-5

[No. 38920. Department Two. June 22, 1967.]

ROY PERRIN CARTER *et al.*, Appellants, v. WEOWNA BEACH COMMUNITY CORPORATION *et al.*, Respondents.*

[1] **Partition—Sale of Property—Statutory Right—Limitations.** The right of a cotenant under RCW 7.52.010 to have the property sold when partition cannot be made without great prejudice to the owners is not an absolute right, and the cotenant may be estopped or held to have waived the right by express or implied agreement. Where the cotenant has purchased his interest with full knowledge of the rights and privileges of the other cotenants, he cannot require a sale of the property in a manner destructive of those rights and in violation of the restrictions imposed upon the estate by the original grantor through whom the common interest is claimed.

Appeal from a judgment of the Superior Court for King County, No. 603422, William J. Wilkins, J., entered June 18, 1965. *Affirmed.*

Action for partition. Plaintiff appeals from a judgment of dismissal.

Yates & Yates and *Leslie M. Yates*, for appellants.

Lane, Powell, Moss & Miller and *Thomas S. Zilly*, for respondents.

HUNTER, J.—The plaintiff (appellant), Roy Perrin Carter, instituted this partition action with 40 other parties plaintiff against 165 defendants (respondents), including the Weowna Beach Community Corporation. By this action the plaintiffs hope to effect the sale of an 80-acre undeveloped tract free and clear of any and all rights of the parties to the action to enforce any restrictions upon the use of the tract as a private community park and watershed. This appeal is from an order of dismissal entered at the conclusion of the plaintiffs' case granting judgment in favor of the defendants.

In 1925, H. F. Schroepfel and his wife (Schroepfel hereinafter will be referred to as the sole grantor), subdivided four government lots on the shores of Lake Sammamish

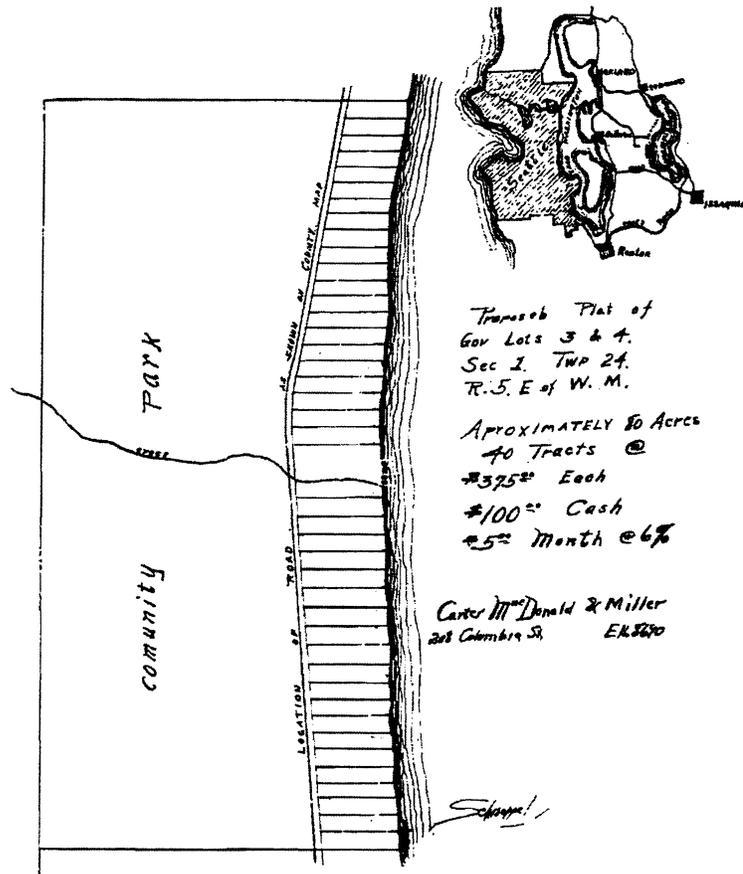
*Reported in 429 P.2d 201.

[1] See Ann. 12 A.L.R. 644, 134 A.L.R. 661; Am. Jur., Partition (1st ed. § 8).

into two tracts (hereafter referred to as tract 1 and tract 2). Tract 1, bordering the shoreline, was made up of 81 residential lots and bounded on the east by the lake and on the west by tract 2, as shown in the following original map of the planned subdivision.

Tract 2 was not divided into lots; but rather Schroepfel, as original grantor, deeded to each grantee a one-eighty-first part and share of tract 2 which is now the subject matter of this partition action.

Every deed from the original grantor provided that tract 2 and the interests of the grantees were subject to certain covenants, reservations and restrictions in use of tract 2 as



a private community park and watershed. The pertinent language from the specially printed deed forms is as follows:

Together with an undivided one-eighty-first parts and share of, in and to the private community Park, being the West 715 feet and water thereon of government lots one, two, three and four, on the west shore of Lake Sammamish, in said County and State, all of said four lots having been subdivided and shown on unrecorded plat and designated as WEOWNA BEACH, all subject, however, to the following covenants, reservations and restrictions, to-wit:

The grantee covenants with grantors that this deed and possession of the premises hereby conveyed is accepted subject:

(2) To the joint and common use, pleasure and benefit of said private community park by the several owners of the remaining 81 tracts in said Weowna Beach, including all water thereon, and on that part of said Tract hereby conveyed lying West of said proposed County Road, and the right to lay and maintain service water pipes for the equal distribution of water to the several owners of said 81 Tracts, under such arrangement and plan as a majority of such owners shall determine, including the right to form a water district under the laws of the State of Washington. (Italics ours.)

The record discloses that sale of the lots in 1925 was according to an unrecorded plat and printed maps showing the entire 81 lots and referring to tract 2 as a community park. Copies of these maps were made available to all persons who purchased lots.

Weowna Beach Community Corporation was thereafter formed in order to provide water to the residential lots. Since 1930 the corporation has utilized the private community park as a watershed and source of water supply for many of the residential properties; water being furnished through underground springs to private wells. The park property, itself, aside from its watershed purposes, has remained in its native state and is used for hiking, picnicking and other forms of recreation.

In 1955, tract 2 was subject to a partition action in which the property, which is not suitable to partition in kind, was ordered sold subject to the rights of the residents of Weowna Beach to use the tract for park and water purposes. This action was subsequently abandoned for failure to join all proper parties with some interest in the property. The present action was then instituted to sell the property free and clear of the rights of the owners of the residential properties to use the tract as provided by the deed reservations.

The trial court held that sale of tract 2 free and clear of deed restrictions would be inconsistent with the intention of the original grantor, and would be contrary to the deeded interests of the purchasers to use the entire tract subject only to the rights of the 80 others to use it similarly; that partition should therefore not be granted. Judgment dismissing the plaintiffs' action was entered accordingly. Plaintiffs appeal.

The plaintiffs first contend that the trial court erred in entering finding of fact 5. By this finding the trial court found that it was the intention of the original grantor to set aside tract 2 as a private community park for the owners of the residential properties; that the original purchasers were told and believed and had the right to believe that they could use this entire park subject to the rights of the 80 other purchasers to use it similarly. The plaintiffs argue that aside from the statement contained in the deeds, there is no evidence in the record to justify this finding; that the true reason for not projecting the east-west lines of the waterfront lots across the 80-acre tract was because taxes on the westerly portion would then be based on lots rather than raw acreage.

This argument is without merit. The printed land contracts and deeds are clear and unambiguous in expressing the grantor's intention, and the record supports the trial court's further finding that the purchasers of the residential properties understood and had the right to believe that their use of the community park would be subject only to the rights of the other purchasers to use it similarly.

The plaintiffs next contend that the trial court erred in not granting partition by sale of the property. The plaintiffs argue that the right to sell is guaranteed by the statute (RCW 7.52.010), and the only statutory condition of its enforcement is that partition in kind cannot be made without great prejudice to the owners.

[1] We think the plaintiffs' argument is unavailing. The right to sale, as a remedy guaranteed by the statute, *supra*, is not absolute in all cases of partition. *Leinweber v. Leinweber*, 63 Wn.2d 54, 385 P.2d 556 (1963); 40 Am. Jur. *Partition* § 83, p. 72. It is not available where a cotenant, by his own acts, is estopped or has waived his right by express or implied agreement, *Huston v. Swanstrom*, 168 Wash. 627, 13 P.2d 17 (1932); or where his cotenant's equitable rights will be minimized or defeated. *Leinweber, supra*, at p. 56; or in violation of a condition or restriction imposed upon the estate by one through whom he claims. *Ortmann v. Kraemer*, 190 Kan. 716, 378 P.2d 26 (1963); See Annot., 132 A.L.R. 666; 68 C.J.S. *Partition* § 44, p. 66, § 213, p. 346; 40 Am. Jur. *Partition* § 5, p. 5.

The plaintiffs in the instant case purchased their property with full knowledge of the rights and privileges of the other purchasers. They may not now claim the absolute right to sell the property in a manner destructive of these rights and in violation of their own agreement and the restrictions imposed on the estate by the original grantor through whom they claim.

The judgment of the trial court, dismissing the plaintiffs' action with prejudice, is affirmed.

FINLEY, C. J., DONWORTH and NEILL, JJ., and LANGENBACH, J. Pro Tem., concur.