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Washington Supreme Court Holds that Developer's Statements 25 Years Ago Could Limit Future Use of Property

The Washington Supreme Court was asked to decide whether a developer could modify a plat 25 years after the start of development to address changed economic conditions in *Riverview Community Group v. Spencer & Livingston, et al.*, a decision issued on November 20, 2014, Cause No. 88575-3. The decision serves as a warning to developers to be cautious not to limit potential restrictions on a property in advertising and oral statements.

A group of homeowners challenged the closure of a golf course complex and its replat into new residential lots. The homeowners stated that they relied on advertising showing a plat map with a golf course and a statement by one of the developers (now deceased) referencing the golf course in a newspaper, and that they purchased the properties relying on a permanent golf course in the development. Following a determination that the group had organizational standing to bring the case, the Supreme Court found that an equitable servitude and injunctive relief are available, relying primarily on 1920 Washington Supreme Court precedent.

An equitable servitude is a nonpossesory interest in land. Generally, this type of servitude must be created by writing. However, in some limited circumstances in some states, an implied servitude can be created, so long as the landowners have notice of the agreement. Our Supreme Court found that plat limitations, regardless of whether the restriction appears on title, can be enforced under an implied equitable servitude.

While the Supreme Court's decision is breathtaking in its potential ability to restrict future property use, the specific holding is not yet determinative here. As the Court acknowledges in a footnote, the trial judge observed that there was "nothing in writing". The Court reasons that on remand, documents may be found during discovery to "provide at least some evidence that those with the power to encumber the property did so". It also seems possible that the group has already presented the best evidence it has and no additional documents will be found. The Court concludes that there is a question of fact, requiring a trial, whether "those with the power to burden the property induced purchasers to purchase lots on the promise that the golf course would remain a permanent fixture of the community."

Although the Court recognizes that it would be "inequitable" to require the remaining developer "to operate an unprofitable golf course", it found no facts in the record to support the claim that the golf course was unprofitable, thus leaving the question of the appropriate equitable and injunctive relief for the trial court.

Only five justices joined in the majority opinion. A concurrence and dissent were filed by Justice McCloud, and three justices filed a separate dissent arguing that the group lacks standing. Justice McCloud concurs that an implied equitable servitude may exist, but concludes that based on the evidence in the record, it does not exist here, nor is it necessary to remand the case to the trial court. The evidence introduced for summary judgment included seven recorded plats, only one of which noted a golf course; and real estate contracts for the lots and covenants, conditions, and restrictions (CC&Rs) which did not reference a golf course. Justice McCloud distinguishes the facts in the 1920 case, where all but 4 or 5 of 650 lots included the written residential restriction, with these facts, where a handful of property owners declared that they relied on statements made by their real estate agents, real estate flyers, and a 1997 recreation guide which referenced the golf course. These facts do not suggest future building restrictions on the property or any commitment to maintain the existing golf course in perpetuity.

For questions on land use or real estate transactions, please contact Richard Phillips or Heather Burgess.

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