Can I Get a Mulligan?

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ATTORNEYS PRACTICE AREAS

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This article is intended to inform the reader of general legal principles applicable to the subject area. It is not intended to provide legal advice regarding specific problems or circumstances. Readers should consult with competent counsel with regard to specific situations.

BY JAMIE HOWSLEY
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A very fascinating case announced on Valentine's Day by Division III of the Washington Court of Appeals denied "a mulligan" to a group of property owners seeking to keep open a golf course located adjacent to their homes. In *Riverview Community Group v. Spencer and Livingston, et al.*, a group of property owners sought an equitable servitude from the court to require the developer (and its varied entities) from whom they had bought their properties to maintain and operate a golf

course. The 18-hole golf course had a pro shop, bar, lounge, and motel. But the course closed in 2009 because of financial difficulty.

A group of property owners banded together and formed the Riverview Community Group in September 2010 to seek relief against the developer. They argued that the properties they had purchased were marketed to them as a "golf course community." They sought an equitable servitude requiring that the developer maintain the golf course in perpetuity. Equitable servitudes are essentially court-created covenants seeking to enforce a promise that people relied on. The Riverview residents wanted the court to adopt the Restatement (Third) of Property1 approach to equitable servitudes as unsettled under Washington law.

The trial court rejected Riverview's attempt to create an equitable servitude citing that Washington law prohibited them from doing so unless there had been an agreement in writing. Division III took a view of this different from the trial court's, but still rejected Riverview's requested relief. The court zeroed in on the fundamental "question of whether a covenant running with the golf course property has been created because of the behavior rather than by mutual intent expressed in writing." Washington requires that contracts for the sale of real estate be made in writing under RCW 64.04.010, including any easements or other restrictions. But courts still have the power at equity to create equitable covenants, even though in Washington the question is usually whether they attach to the land, not whether a covenant was created or not. Division III concluded that an equitable servitude wasn't warranted because it would have been out of proportion to the developer.

Riverview attempted to bring in an Oregon case related to the Mountain High Golf Course in Bend where a developer was ordered to keep a golf course open under an equitable servitude for fifteen years. In that case the Mountain High Homeowners Association sued the J.L. Ward Company and J.L. Ward Construction Company for an equitable servitude, the reformation of a restrictive covenant, and a permanent injunction requiring the restoration of the golf course. Construction of a 9-hole golf course began in 1984, with an expansion and completion of an 18-hole course around 1991. The course abutted houses in the development and included a clubhouse and driving range.

Similar to the Riverview case, the developer marketed the Mountain High subdivision

to prospective buyers as a "golf course community," placing such language on its flyers, brochures, and advertisements, and touting the golf course as a benefit to the subdivision. Mrs. Ward would also drive buyers around on a golf cart, showing them the course, the fence that surrounded the development and course, and the monument sign reading "Mountain High Golf Villages."

The developer promised the residents that they would not bear the financial burden of the course and that there was no need for assurances that the golf course would remain. No written guarantees were ever given to the residents. The court, however, concluded that an equitable servitude was warranted because it met the requirements of the Restatement (Third) of Property that (1) there was an express or implied representation, (2) it was reasonable for people to rely on that representation, (3) the people did rely, (4) the reliance was reasonable, and (5) the establishment of an equitable servitude was in the interest of justice. It is the last issue that shows the differences between the two cases.

While there are many similarities between the Mountain High and Riverview cases, the fact is that the remedy in the Mountain High case applied only against the original developer and would be only for the benefit of the existing owners, not their predecessors-in-interest. In a pretty harsh statement the court states: " the humans who own both the golf course and the homes represented by Riverview will pass away, but the obligation will run forever. It is irrational to require the defendants to rebuild and operate a failing business, particularly when the property owners could have pursued damages awards to compensate them for the diminished values they may have suffered from the closure of the course."

The lesson here is *caveat emptor* (let the buyer beware). Property owners should carefully examine the deed, deed restrictions, and covenants when buying property being marketed with amenities like a golf course. Developers need to be wary of promises being made outside the scope of writing, lest they be sued for making representations beyond the ability to deliver.

1. Restatement (Third) of Property is a national treatise written by former famed professor William Stoebuck from the University of Washington School of Law.

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