

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

DATE: FEBRUARY 19, 2010

TO: KEN HARER & THERESA TORGESEN

FROM: JENNIFER HILL

RE: ADMIRAL'S COVE

YOU ASKED: Do lot owners have an obligation to pay assessments for Tract A which are enforceable under the Washington Homeowners' Association Act?

SHORT ANSWER: There are credible arguments in support of a conclusion that the bylaws reflect an enforceable covenant against owners who purchased their lots after the bylaws were recorded because they would have had notice of the obligation to pay the assessment. The bylaws may also be enforceable against owners who purchased before the bylaws were adopted and recorded, depending on the intent of the developer to have owners pay assessments for the maintenance of Tract A, as well as the owners' awareness of and acquiescence to the obligation.

***The analysis provided is based on the facts that we have been presented up to this point and new information could change the analysis.**

FACTS: Admiral's Cove, Inc. began developing the Admiral's Cove neighborhood in 1963. Restrictive covenants were recorded in July 1967, but the covenants do not address the pool or the Admiral's Cove Beach Club. The pool was constructed and opened in May 1969. The Admiral's Cove Beach Club ("Club") was incorporated in October 1969.

According to a copy of the Articles of Incorporation, the Club has the authority to construct, install, maintain and/or own and operate athletic and recreational facilities of all types and kinds for the benefit of the members; to maintain entryways, parks and all land set aside for community development purposes and promote friendly relations and social intercourse among the owners and purchasers of properties in the Admiral's Cove development; **and to levy assessments against owners of property in the Admiral's Cove development and/or members of this Club on a pro rata basis for the maintenance and upkeep of this corporation's properties and enforce collection of the same.** The Club purchased the pool from Admiral's Cove, Inc. in December 1969, and the purchase and sale agreement for the transaction was recorded in 1978.

In 1982, the Club adopted amended bylaws which were recorded and which affirm the Club's authority to **levy assessments for the maintenance and upkeep of the Club's properties.** The

bylaws stated that the expenses of the Club in carrying out its responsibilities will be defrayed by Club dues and assessments. The Club's responsibilities included providing and operating recreational facilities for the benefit of the members. There are two classes of Club members: "active members" who are Admiral's Cove property owners, and "associate members" who are not property members but who pay dues in exchange for Club privileges. It is unclear from the documentation whether "active members" include all property owners or only those who elect to become members of the Club. In 1985, the Club adopted amended bylaws which were recorded in June 1986 and mirror the 1982 amended bylaws. The 1986 amended bylaws appear in title reports, along with the original restrictive covenants for Divisions 1-7 of Admirals Cove.

STATUTORY ANALYSIS: For the Homeowners' Association Act to apply to the Club, the lot owners must be obligated to pay assessments on property other than their own as part of their membership in the "association." If the lot owners have an obligation to maintain the Club, then the Homeowners Association Act applies to the Club. Under the Homeowners Association Act, associations have the power to adopt bylaws, regulate common areas and collect fees to maintain the common areas. This statutory power gives Admirals Cove the authority to make mandatory assessments for the maintenance of Tract A, if it is determined that the Club is subject to the Act.

- **Homeowners Association Act**

- R.C.W. 64.38.010: (1) "Homeowners' association" or "association" means a corporation, unincorporated association, or other legal entity, **each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member.**
- R.C.W. 64.38.020: Unless otherwise provided in the governing documents, an association may: (1) Adopt and amend bylaws, rules, and regulations; (6) Regulate the use, maintenance, repair, replacement, and modification of common areas; (10) Impose and collect any payments, fees, or charges for the use, rental or operation of the common areas.

The Admiral's Cove Beach Club is a nonprofit corporation, whose members are owners of residential real property within the Admiral's Cove development. Tract A is real property not owned by the members, which likely means it is a common area. If every owner is a Club member, and if Club members have an obligation to pay maintenance costs for Tract A, then

the Club has the authority under the act to regulate the maintenance of Tract A and impose assessments for the operation of the facilities in Tract A against every lot.

CASELAW ANALYSIS:

Relationship between Lot Ownership and Club Membership: The bylaws of the Club define “Active Members” as owners of property in the Admiral’s Cove Development Division 1 through Division 7. The bylaws also state that Active Membership shall be appurtenant to the lot or lots owned or being purchased by the members, and that lot owners previously exempt from compulsory Club membership who elect to acquire membership are subsequently bound to permanent membership. Upon termination by sale or transfer of such a lot, the membership appurtenant there to shall be deemed to be transferred to the contract purchaser or grantee. It is difficult to ascertain from the bylaws which lots were subject to compulsory membership and which lots may have elected to participate in club membership, but it seems that once a lot gained membership through either route, the membership became permanent and transferred with the property. With Club membership comes the obligation to pay maintenance costs for Tract A, and that obligation would pass to successors in interest for the lots associated with Club membership.

If there is a link between lot ownership and club membership, then the Club may assess dues for the maintenance of Tract A from homeowners who live in Divisions 1-7. More information is needed to identify the lots that had compulsory and non-compulsory membership, though there seems to be some indication that only lots purchased before 1969 were non-compulsory. Evidence of this might be found in deeds, purchase & sale agreements, etc. stating that all purchasers must become or automatically become members of the Beach Club and will have to pay annual membership dues. We note that non-compulsory or “exempt” members would have no right to use any of the Club’s facilities.

Benefit of Use: Even if there are no documents that make membership of the club compulsory, there may be documents provided to all homeowners which expressly or impliedly state that homeowners will have the benefit of use of Tract A facilities. If homeowners are guaranteed the benefit of using the facilities, this will lend weight to the argument that they will be unjustly enriched if the court does not recognize a responsibility to fund the maintenance of the facilities in exchange for the right to use them.

Quasi-Contract/Contract Implied in Law: A contract implied in law, also known as a quasi-contract, occurs where there is an absence of any agreement, express or implied, but in spite of the absence of an agreement one party renders services to another party with a reasonable expectation of being compensated; the other party knowingly accepts the benefits of the services; and that party would be unfairly benefited by the services if no compensation were

paid to the party rendering the services. Since 1969, the Admiral's Cove Beach Club has been providing the upkeep of Tract A with the expectation that lot owners would pay assessments to fund that maintenance. To determine whether this expectation is reasonable, it would be necessary to understand the basis of that expectation. This may stem from the developer's original intent regarding Tract A or any understanding between the Club and lot owners until the 1986 bylaws were recorded. For lot owners in Admiral's Cove, the benefit received from the maintenance of Tract A may be their own personal use of the Beach Club facilities, increased market value of the homes because of the presence of and access to the Beach Club, or some other benefit reaped by virtue of having those facilities in the development. It would be unfair for lot owners to gain these benefits without paying for them, and this is an argument for recognition of the recorded bylaws as a covenant/contract implied in law.

Contract Implied in Fact: A contract implied in fact is an actual contract arising when there is an agreement, but the parties' intentions are inferred from their conduct in light of the circumstances. A court may find that a contract implied in fact existed between the Club and its members between 1969 and today, when there was no formal agreement for the assessment of dues but members paid them in exchange for the Club's maintenance of Tract A.

Is this an enforceable covenant? Under Washington case law, the Admirals Cove bylaws may be an enforceable contract as either an equitable restriction or a servitude/affirmative covenant.

Equitable Restriction: An equitable restriction has four elements: (1) a promise, in writing, which is enforceable between the original parties, (2) which touches and concerns the land or which the parties intended to bind successors, (3) which is sought to be enforced by an original party or successor, against an original party or successor in possession, (4) who has notice of the covenant. Washington courts have found that an equitable restriction could include a recorded declaration of covenants, a deed, or a subdivision plat which contains information about the restriction, but also found that a purchase and sale agreement mentioning the restriction was sufficient to satisfy the writing requirement. A recorded document provides constructive notice to a subsequent purchaser which will satisfy the test for equitable restrictions.

The Admirals Cove bylaws recorded in 1986 are a promise, in writing, between the Association and the homeowners. The bylaws touch and concern the land because they include an obligation to pay assessments for maintenance of neighborhood property, and the bylaws were intended to bind successors in interest. The Association is an original party who would be enforcing the restriction against an original party or a successor in interest. The Admiral's Cove Beach Club is an original party to the bylaws (as its creator) and any homeowner is either an original party or a successor in possession. The recording of the bylaws may be sufficient to

satisfy the notice requirement. The Club should be able to assess the pool maintenance fees against any homeowner who satisfies these requirements, which should be most, if not all.

Covenant: To be enforceable, a covenant must run with the land, which means it must traditionally satisfy five elements: (1) it must be enforceable between the original parties and satisfy the statute of frauds; (2) it must touch and concern both the burdened and benefited land; (3) it must be intended to bind successors in interest; (4) there must be vertical privity; and (5) there must be horizontal privity. Vertical privity characterizes the relationship between the original party to the covenant and the subsequent owner. To be bound by the covenant, the successor must hold the entire estate in land held by the original party (strict vertical privity of estate). Horizontal privity is found if at the time the original parties enter into the agreement, they share some interest in land independent of the covenant (e.g. landlord and tenant, mortgagee and mortgagor, or holders of mutual easements). Washington courts have found that horizontal privity is no longer required to create a servitude obligation. Where a covenant obligates payment of money, the “touch and concern” element is the most critical and the Washington Supreme Court has found that an obligation to pay assessments for the maintenance of neighborhood property is one that touches and concerns the land.

The Admirals Cove bylaws satisfy the requirements of a covenant running with the land because they satisfy the statute of frauds, they touch and concern the land because they obligate assessment for neighborhood property, and they were intended to bind successors in interest. As long as there is vertical privity between the original owners and the current owners, the covenants should be enforceable against them and the HOA may assess the pool maintenance dues. To determine if there is vertical privity, it is necessary to look at the conveyances of Admiral’s Cove lots and find out if the same interest in the property has been conveyed from predecessors to successors in interest. If predecessors conveyed their entire interest to successors, there is vertical privity to satisfy the test for a covenant. Usually any transfer or sale will have vertical privity.

Intent of the parties: Where there is an express agreement between the parties, the courts will interpret the written agreement based on the intent of the parties. Intent of the parties at the time of executing covenants is important when resolving issues concerning enforcement of the covenants. When the meaning is doubtful, surrounding circumstances must be considered and doubts resolved in favor of the free use of land. Thus, in looking at the 1986 bylaws, the articles of incorporation, the sale of Tract A, etc., a court could consider all of the facts and circumstances in interpreting the meaning of the documents and their enforceability. If there is clear evidence that Admiral’s Cove lot owners were intended to pay the dues for the maintenance of the pool, a court could uphold that obligation despite procedural problems with the documentation. Property owners’ acquiescence to the payment of annual dues for

Club membership and maintenance of the facilities would be further evidence of the intent of the owners to pay the expenses of the Beach Club even in the absence of a written obligation to do so.

Enforceable against whom? The covenant is enforceable against an owner/purchaser who has notice of the covenant, most often provided by some recorded document. The covenant may also be enforceable against an owner/purchaser if his predecessor in interest had notice of the covenant and/or acquiesced to it. A North Dakota case found that covenants/bylaws which imposed an obligation to pay assessments for common areas could be enforced retroactively against owners who had possession of their units when the amended bylaw was passed. Assessments may be made against a single owner of several lots on a per-lot basis.

The Admiral's Cove bylaws may be an enforceable covenant against lot owners who purchased after 1986. Those purchasers had actual (or at least constructive) notice of the obligation because the recorded bylaws appeared on their title reports. The bylaws/dues obligation may also be enforceable against purchasers whose predecessors paid the dues or were given other notice of the obligation, such as a clause in a purchase and sale agreement. Admiral's Cove owners who own more than one lot may also be charged on a per-lot basis for the maintenance costs.

Abandonment and Enforceability: Courts will enforce a covenant that has not been habitually and substantially violated so as to create an impression that it has been abandoned. Courts will consider the relative number of subdivision lots that violate the covenant and the extent of the violations. The violations must be material to the covenant's overall purpose, and minor violations are insufficient to show abandonment. The Club does not appear to have abandoned any rights of enforcement.

STATUTE OF LIMITATIONS: The Homeowners' Association Act is silent on a statute of limitations for amendments to governing documents. Some cases have treated governing documents as contracts to be interpreted, and the statute of limitations for contracts is six years. The statute of limitations for torts and all other disputes of any kind is three years and has been applied to some homeowners' association disputes.

Either way, it has been 24 years since the amended bylaws were adopted and recorded so it is likely that the statute of limitations has run out for any challenge to the assessment of the pool maintenance dues under this legal theory.

- **Three Year SOL under 4.16.080:** In *Hardy v. Fairwood Greens*, the court relied on this statute to time-bar Hardy's challenge to amended bylaws.

- **R.C.W. 4.16.080(2)** – The following actions shall be commenced within 3 years:
An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated.
- If the statute of limitations for the Club’s amended bylaws was three years, it would have expired in 1989.
- **Six year SOL under Contract Theory:** The statute of limitations for breach of contract actions is six years in Washington. Several cases from Washington and other states have found that declarations of condominium are contracts. It would follow that those contracts would be subject to the 6 year statute of limitations. One Washington case, however, found that a condominium declaration was not a contract for purposes of the Condominium Act provision against enforcing unconscionable contracts.
 - **R.C.W. 4.16.040(1)** – The following actions shall be commenced within six years:
An action upon a contract in writing, or liability express or implied arising out of a written agreement.
 - If the statute of limitations for the Club’s amended bylaws was six years, it would have run out in 1992.

Factual issues that may affect enforceability of the covenants:

- Language in the original deeds about the Admiral’s Cove Beach Club and any discussion of how lot ownership is related to Club membership.
- Language in deeds, purchase & sale agreements, etc. about Tract A and any lot owner obligation for the maintenance of Tract A.
- Procedures used to adopt the 1985 bylaws

Documents which could shed some light on these issues:

- Any pre-1982 bylaws of the Admiral’s Cove Beach Club
- Purchase and Sale Agreements for homes in Admiral’s Cove from 1963-present
- 1969 Articles of Incorporation for the Admiral’s Cove Beach Club
- Any sales literature from the development company that may mention the Admiral’s Cove Beach Club facilities, lot owners’ membership in the Club and use of the facilities.