



LIFE BEGINS

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Save the Date!

Senior Lawyers Section 2004 ANNUAL MEETING & CLE SEMINAR

Friday, April 16, 2004
Seattle Marriott SeaTac Airport

By Robert A. Berst

How can we make the 2004 annual meeting and CLE seminar as exciting as the 2003 seminar? Each year, the entire committee works as a team to bring you new, exciting, and relevant programs. As those regular attendees know, your committee is not bashful about experimenting with unusual material.

But, enough of this technical stuff – we again decided to keep the seminar tuition at \$100, which includes the seminar, materials, lunch, social hour, and parking. We arranged for the top-of-the-line lunch served by the SeaTac Marriott. As he has done for many years, the reception immediately following the seminar will be hosted by one of our speakers, James C. McClendon, and the Pacific Financial Group, of which he is the president.

This is the only seminar where you will know most of those in attendance.

SEE YOU THERE!

Meritorious Conduct

By Claude M. Pearson – Legal Consultant for
Davies, Pearson, P.C.

Ed. note: We are fortunate again to present an article by one of our frequent contributors, Claude M. Pearson.

The enclosed piece is a part of a memoir that I continue to work on from time to time. Actually, I have spent considerable time this summer making video-cassettes in which I read selected parts of letters I wrote home from the Pacific to my parents and younger brother during WW II. These letters were preserved by my mother in a scrapbook. With the help of my daughter, I have looked back through the censorship that shrouded WW II submarine operations to tell the viewers what was actually happening. The letters and cables were bunched up neatly because they were written after my return to Midway after War Patrols 7, 8, 9 and 10. It is an effort to preserve a bit of family history for my grandchildren. It has been fun. It involves my preparing a script that is used by me in responding to questions I have written for my daughter to propound to me. This result is a moderately good product. I commend it to the members who really ought to leave such a family record.

Here is a chapter from my unpublished manuscript "A Memoir of Four War Patrols on USS Pogy (SS 266)."

CHAPTER 6. QUEEN BEE

Before his death, Staff Sergeant Howard E. Pendergast, USAAF (Ret) published a newsletter for the crew of a B-29 Bomber who still meet periodically to recall and reminisce about their unforgettable experiences of long ago. I ex-

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changed letters with Staff Sgt. Pendergast, who, along with 9 members of the crew of Queen Bee, involuntarily exposed themselves to submarine duty aboard Pogy.

With the help of Marilyn Bowers, I provided Pendergast with a copy of the Letter of Commendation awarded our skipper for effecting their rescue from the sea, about a hundred miles south of Kyushu. The CITATION:

The Command in Chief, U. S. Pacific Fleet takes pleasure in commending LIEUTENANT COMMANDER JOHN MICHAEL BOWERS, UNITED STATES NAVY for services set forth in the following

CITATION: For meritorious conduct in action in the line of his profession as Commanding Officer of a United States Submarine during a war patrol of that vessel. Despite severe difficulties encountered while in dangerous waters, he displayed considerable resourcefulness and ingenuity in order to remain on his station. Subsequently, as a result of his exceptional determination, ten aviators were expeditiously rescued from a downed plane. His conduct throughout was an inspiration to the officers and men in his ship and in keeping with the highest traditions of the United States Naval Service.

Chester W. Nimitz

From Crew Chief "Penny" Pendergast I received the following:

Dear Claude,

Thank you for your letter. I did not personally know Commander John Michael Bowers. I have never met Admiral Nimitz, who signed his Commendation, although I met his flight crew on Guam and got a look-see through his personal aircraft. Some Digs!

It occurred to me after reading the events that preceded the 29th of April on Pogy; you might be interested in the circumstances that led to the rescue of the Queen Bee crew. We left Tinian Island at 142,000 pounds gross weight, which was a bit over the 138,000 pounds limit. This was not particularly unusual. The target was Kyushu. We had 500-pound general-purpose demolition bombs set to explode at intervals from 1 to 144 hours in a random display.

These were to be placed on a runway that was active in support of the enemy action against the Okinawa effort. Scattering them on a runway would keep it out of action for a few days. Then we would do it again.

This was a daylight encounter, which meant we went in to the target in formation. The night raids were single ships. We grouped up at 14,000 feet and went for it as a squadron. The Japanese were not entirely happy with our arrival and it could be said that a few of them were downright inhospitable. The malcontent who airmailed the FLAK (the German is flieger abehr kanon) has never been on my Christmas list.

We had a trail of black smoke from an engine that attracted attention. This was before Congress enacted laws to protect the disabled. About this time, the bomb bay doors opened and Mark Boltz dumped the load where it was intended to go. I hope this stopped a Kamikaze attack on one of your ships.

This was an Excedrin day. We had a tough time getting off the runway at Tinian because of the weight. We had lost an engine by flak before the bomb run. Another engine had symptoms of menopause and there were rising sun fighters who thought we were the quarterback and wanted sack time. They did a coordinated attack with one coming out of the sun and two others from below. The hero coming from the sun became immortal and one of the two rascals who tested the underbelly more than probably fed the fish. We cleared the coast and were out of their fuel range.

It was a pleasant day. There were a few clouds. The sea was more or less calm. We had no wounded and it was getting near lunchtime. What could be better? All the caliber 50's had worked as advertised. The bombs were on target. The only thing that could spoil a great outing was Captain Brown telling us that we were losing altitude and should prepare to bail out. Not a pretty picture. We did, about noon on the 28th, and Pogy picked us up about sundown on the 29th.

Thanks, Penny

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Washington State Tax Issues Related to the Sale of a Business

By Robert L. Mahon – Perkins Coie LLP

Ed. note: The following article by Robert L. Mahon appeared in the WSBA Business Law Section publication, Volume 26, No. 1, Summer 2002; and is reprinted courtesy of Mr. Mahon, with our thanks.

Business lawyers who advise clients regarding the sale of a Washington business should be familiar with the state tax consequences that flow from the form of the transaction and the nature of the business property.

A. Asset Sale

Retail Sales Tax In an asset sale of a business, the buyer is liable for sales tax on the purchase of non-exempt tangible personal property located in Washington.¹ The sales tax is imposed

a rate of 8.8 percent to 7.0 percent, depending on the location of the assets. The parties should consider that one or more of the numerous sales tax exemptions may apply to some or all of the assets (e.g., the resale exclusion for inventory and the manufacturing machinery and equipment exemption for certain equipment).

Business and Occupation (B&O) Tax The asset sale of a business is frequently exempt or partially exempt from B&O tax as a casual or isolated

sale.² WAC 458-20-106. Sellers who hold themselves out to the public as making sales cannot make casual or isolated sales of the type of property which they hold themselves out as selling. For example, a hardware store might be exempt from B&O tax on the casual sale of its cash register and shelving, but not its inventory.

Real Estate Excise Tax (REET) The sale of real property located in Washington is subject to REET at a rate of between 1.28 percent and 2.78 percent, depending on the location of the real property. The measure of the tax is the true and fair value of the real property – typically the consideration paid. If the consideration paid for the real property cannot be determined or the consideration does not accurately reflect the fair market value, the parties may determine the value of the real property using an appraisal, the parties' allocation of consideration under IRC § 1060, or, as a last resort, the value of the real property on the county property tax rolls. WAC 458-61-030(10). REET is the obligation of the seller, although the tax is a lien on the real property and the buyer cannot record the transfer instrument until the REET is paid.

B. Sale of an Entity

Retail Sale Tax The sale of an entity is not subject to sales tax because stock and other ownership interests are intangible property.

B&O Tax The sale of an entity is not subject to B&O tax unless the seller is engaged in the business of selling entities. WAC 458-20-106.

REET To the surprise and disappointment of many clients and their lawyers, the sale or acquisition of a controlling interest in an entity that

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At a Pogy reunion dinner in Indianapolis in 1993, Lt. Eugene Brown, the pilot of Queen Bee, in the company of Alvin Mellow and her co-pilot and her radar operator, Marv Paul, raised his glass for a toast to the Pogy crew: "My 22 grandchildren, my 6 children, and my 2 wives all join me in thanking the Pogy for not giving up the search." It was an extraordinary event with a happy ending for everyone except Lt. Summy, the Navigator, who could not be found. This is a rare thing in war.

The efforts of Pogy in the rescue pale almost to the minimal when compared with the experiences and valor of the Queen Bee Crew. How can a flyer be more at risk than parachuting into the sea? The Queen Bee Crew fought a hard and risky war. When we found them each member of that crew was in his own separate life raft and a few of them had linked up. Most of them were just tiny dots marked with green dye on a vast ocean. They were wet and cold. They hotbunked with the Pogy crew and we fattened them up on Pogy chow and claimed all their gear as souvenirs, and at length delivered them to their colonel, all in sailor

dungarees aboard the Submarine Tender Orion anchored at Saipan Island.

The Air Force Colonel invited several of us, Rose Woodall, Medling and me to accompany Brown and Mellow to a Quonset hut serving as the Squadron Officers Club for a farewell beer. He was a genial host. A month or so later when Pogy docked at Pearl Harbor the *Honolulu Star Bulletin* carried a front-page story on Queen Bee. It is my memory that we threw a celebratory party for the Queen Bee personnel at the Royal Hawaiian Hotel before we left on our tenth patrol. We did not see Lt. Brown again until 1993 in Indianapolis where it was great to learn that the entire crew of Queen Bee was still alive and meeting periodically to relive their long-ago adventure.

I have not heard from any of the Queen Bee Crew, except that I recently learned that Penny Pendergast had died – or as we submariners euphemistically put it, he had "departed on eternal patrol." As I look back it was an honor to be the safety net for these brave airmen. It may have been the greatest accomplishment of the USS Pogy.

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owns Washington real property triggers REET.³ RCW 82.45.010(2). A "controlling interest" means (a) 50 percent or more of the voting power of a corporation, or (b) 50 percent or more of the capital, profits, or beneficial interest in a partnership, LLC, or other entity. RCW 82.45.033. All transfers and acquisitions within a twelve-month period are considered in determining whether a controlling interest has been transferred or acquired. Washington also aggregates the acquisitions of "persons acting in concert." RCW 82.45.010.

The REET is measured by the full value of the real property owned by the entity. RCW 82.45.030(2). For example, the sale of 50 percent of a corporation is subject to REET measured by 100 percent of the value of the corporation's Washington real property - not the consideration paid for the stock and not 50 percent of the value of the real property.

The seller of the entity is liable for the REET. RCW 82.45.080. If a single buyer (or buyers acting in concert) acquire a controlling interest from multiple sellers, each seller is liable for its proportional share of REET based on the value of the property on the date of sale. WAC 458-61-025(7)(c).

C. "Drop and Kick" Method of

Avoiding Sales Tax on Asset Sale

As an alternative to an asset sale, which can carry significant sales tax disadvantages as compared with the sale of an entity, parties should consider using a newly formed entity as a vehicle to transfer the assets without sales tax.

The basic "drop and kick" strategy involves three steps, which may be performed in immediate succession. First, the seller contributes the target assets to a newly formed LLC or other entity (the "drop"). This step is considered a nontaxable adjustment in the beneficial interest in the business. WAC 458-20-106. Second, the seller

sells its ownership interest in the new entity to the buyer (the "kick"). This step is a nontaxable sale of intangible property. Finally, the buyer may, if it chooses, liquidate the new entity. The liquidating distribution is also a nontaxable adjustment in the beneficial interest in the business. The Washington Department of Revenue (the "Department") will respect the form of the transactions and will not use the step transaction doctrine to collapse the steps into a taxable sale.⁴ Wash. Dept. of Revenue, Det. No. 87-212, 3 WTD 259 (1987).

If the target assets have substantial value, the parties should consider requesting a written ruling from the Department confirming the tax treatment of the transactions. Although the "drop and kick" strategy is relatively common, there is little statutory basis for its favorable tax treatment. A written ruling is binding on the Department and protects the parties against a retroactive change in the Department's favorable interpretation of the law.

D. Consider the Nature of the Property

The Washington tax consequences of the sale of a business frequently turn on the nature of the assets sold.

Real v. Personal Property Washington courts and the Department apply three common law tests for determining whether personal property has become a fixture (real property) for state tax purposes. All three tests must be satisfied: (1) Actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold. *Department of Revenue v. Boeing Co.*, 85 Wn.2d 663, 667 (1975).

Parties frequently favor classifying assets as real rather than personal

property because the REET rate is much lower than the sales tax rate. For example, the purchaser of an apartment building successfully argued that the ranges, refrigerators, and other appliances in the building were fixtures rather than personal property. *Lincoln Ballinger L. P. v. Department of Revenue*, Dkt. No. 51253 (Bd. Tax App. 1999). As a result, the sale of the appliances was subject to REET rather than the much higher sales tax.⁵

With the increased availability of significant business sales tax exemptions (e.g., the manufacturing machinery and equipment exemption), many taxpayers prefer that personal property retain its character as personal property. For example, the sale of manufacturing machinery as part of the sale of a plant will not be subject to either sales tax or REET if the equipment retains its character as tangible personal property. If the equipment were affixed to the real property, it would be subject to REET.

Tangible v. Intangible Property

Parties should also consider whether any intangible assets have a different or special characterization for state tax purposes. For example, sales or licenses of "canned" software (software created for sale to more than one person) to end users are subject to sales tax in the same manner as sales of tangible personal property regardless of the method of delivering the software. In contrast, sales or licenses of "custom" software (software created for a single person) are generally taxed as a service by the seller to the buyer (i.e., no sales tax). RCW 82.04.215.

Washington has not clearly addressed the sale of proprietary software that a business originally developed or hired others to develop for its own use. Some states have concluded that subsequent sales of custom software are subject to sales tax. E.g., *Touche Ross & Co. v. State Bd. of Equaliza-*

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Hip Hip Hooray; Traveler Is Grounded for Weeks

By Phil DeTurk, aged 71

During the past five years you have had an opportunity to read about my many travel adventures. These articles included data about my journeys to South America, Egypt, Israel, India, Scotland and even a number of places in our own country. I hope you have enjoyed the vicarious lining and inspiration I tried to instill in my readers.

Now I am going to relate how I spent the summer of 2003. First you must go back with me to 12/1/00 when I awoke with a very serious groin pain. I was in North Carolina at the time, where I don't have a family doctor, so I lived with it until spring and my return to Washington. I thought it was probably a hernia and could be easily repaired; it was not, so I was scheduled for a number of tests. Long story short, I learned in March 2002 that I had a serious hip problem on my right side.

Once again, I lived with the problem since the lack of movement and pain was minimal. By May 2003, this had changed drastically; I could walk only at a slow pace. My local doctor sent me to Seattle for a second opinion, where I learned from Dr. Crockett that my right hip was well past 100% of being useless.

So I finally opted for the replacement of this lifetime part of my body. On July 21, 2003, the procedures began when I went into my future PT for measurements, to the hospital for pre-surgical informational chats, and to Dr. Sulley for the final explanation of the procedure.

As I type this, it is almost nine weeks since that operation, which took two hours. I took a spinal anesthetic, and

remember none of it. I awoke in my bedroom for three days at Good Samaritan Hospital in time to watch the Mariners play somebody.

The next day I was on a walker and moving around a limited part of the hospital. By day four I was in the rehab section of the building learning to get up steps with my walker, and how to proceed in the kitchen and bathroom.

Now at nine weeks, I still hobble but without any mechanical help. I have played very bad golf, gone to entertainments, and generally am back to where I was pre-surgery. The measurements are all much better than they were four days before the operation; they will continue to improve so that by Thanksgiving, I can cross my legs and by Christmas, stop the daily routine of exercises.

That will be five months after the surgery; I am more or less still going to be restricted in my movement for that period of time. But I had reached the time in life when this operation was absolutely required; so \$40,000 later I have a new hip. So far, my insurance has paid all the costs.

It has been a great summer in Western Washington, but I spent the majority of it in my condo, exercising, resting, and generally not involved in many activities. Without my books, I would have been completely bored.

I have written about this to enlighten those of you who may face a similar situation. Should you have a hip (or knee) replacement? Yes, if the pain or lack of movement in your joint or joints is so severe that you can no longer enjoy your lifestyle without it.

I would not casually undergo (it was my first hospital stay in 50 years) such a procedure under any other circumstances. Right now my left hip is 70% unusable; my knees will not enable me to get out of chairs without using my arms to push my body upwards. Yet, I have little pain. I do not plan any more operations until the day when such become absolutely necessary.

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tion, 203 Cal.App.3d 1057 (1988). Washington has not addressed this issue in any published authorities, but individual taxpayers have received private rulings that subsequent sales of custom software are not subject to sales tax. If the sale includes a significant amount of proprietary software, the parties should consider requesting a written ruling from the Department.

- 1 The sales tax generally does not apply to sales of real property or intangible personal property.
- 2 Washington, unlike many states, does not have a generally applicable casual or isolated sale exemption from sales tax.
- 3 The application of the REET to transfers or acquisitions of controlling interests can have wide-reaching application (from the sale of a mom and pop business to the sale of a publicly traded company) and can involve significant and complex issues that are beyond the scope of this article.
- 4 As noted above, this strategy does not avoid REET because transfers or acquisitions of controlling interests in entities that own Washington real property are deemed sales of the real property owned by the entity.
- 5 Notwithstanding *Lincoln Ballinger*, the Department maintains that ranges, refrigerators, and similar appliances are generally not fixtures and, accordingly, are subject to sales tax and B&O tax.

Speak Out!

Wanted: Lawyers to volunteer to speak to schools and community groups on a variety of topics. For more information about the WSBA speakers bureau call Amy O'Donnell at 206-727-8213.



Powers of Homeowners' Associations

By Robert D. Wilson-Hoss – Hoss and Wilson-Hoss

Ed. note: The following article from the WSBA Real Property, Probate and Trust Section newsletter of Summer 2003 appears with our thanks and their permission.

I. Introduction

I see homeowners' association issues from a practical perspective. I represent over 40 associations, and have been at this for about 15 years. Daily, I am asked to collect delinquencies, remediate property conditions, and help boards of directors balance their small-business sides with their membership-service sides.

Almost always, before I can answer any questions from a new client about the powers of an association, I need to see all of the association's recorded and other governing documents. These include plat maps, deeds, easements, declarations of covenants, articles of incorporation, bylaws, and other rules. They then have to be compared to the Non-Profit Corporations Act, RCW 24.03 *et seq.*, and the Homeowners' Association Act, RCW 64.38 *et seq.*

Any more, on a good day, all I know is what I don't know. This includes many aspects of Washington State homeowners' association decisional law, especially pre-1995. Cases criticized other cases. Inconsistencies and ignored theories were commonplace. Secondary sources have been happy to point out some of the problems, but they also are not immune. This article is an attempt to provoke discussion about this area of the law. If there are no responses, that will be all right, too. I will then start citing myself in this article to Division II of the Court of Appeals, and it will be amused.

II. The Question of an Association's Lawful Powers

Examples of the questions I and other practitioners who represent homeowners' associations are regularly asked are how to best collect unpaid dues and assessments, how to enforce property condition covenant violations, how to manage the common areas, and how to be both a business and a member-service association at the same time.

A foundation question is almost always, what can this association lawfully do? The answers used to come from a couple of lines of case law and a handful of secondary sources. Since 1995, the Homeowners' Association Act has also become part of the picture, though with an uncertain relationship to prior case law.

A. Secondary Sources

The secondary sources include, first, Professor Stoebuck, in his *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861 (1977), and his closely related but more recent work in *Washington Practice* at Vol. 17 *Real Estate: Property Law*, Chapter 3 ("Running Covenants"). Also very useful is the discussion by William H. Clarke in the Bar

Association's *Real Property Deskbook*, "Running Covenants," at Chapter 14. Not so useful is *Restatement (Third) of Property: Servitudes*, which is too general, and ignores most of Washington's cases and statutes. There are also two books, Natelson, *Law of Property Owners' Association* (1989), and Hyatt, *Condominium and Homeowners' Association Practice: Community Association Law* (2d ed. 1988), which provide a good general introduction.

B. Washington Case Law

1. Real Covenants vs. Equitable Servitudes

Much of the discussion in cases and secondary sources about the power of homeowners' associations examines the law of running servitudes, or covenants. In general, if the restrictions come within a deed, they are running real covenants; if otherwise, they are running equitable servitudes. Necessary elements of the more formal running real covenants include: (a) a writing requirement (to satisfy the Statute of Frauds), (b) whether the servitude "touches and concerns" the land, (c) intent to bind successors, and (d) vertical and horizontal privity.

Equitable servitudes, as opposed to real covenants, must meet lesser standards. They must "touch and concern" the land, and notice is required, but case law takes a different approach from that applied to running covenants. First, a landmark case in Washington, *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920), enforced as a running equitable servitude a use restriction that was not even based on a writing, but simply on a general neighborhood scheme or common plan. Second, there is no requirement for proof of intent to bind successors; the intent can be easily inferred in most homeowners' association contexts. Third, horizontal privity is not an element at all of running equitable servitudes, and vertical privity requirements are relaxed as to equitable servitudes, as opposed to real covenants.

Those still reading this will by now likely react that all of these distinctions and requirements seem unnecessarily complicated and anachronistic. They are, and increasingly so. For example, most homeowners' associations are supported by covenants recorded separately, outside of deeds. They therefore get the relaxed equitable servitude treatment, as opposed to the more stringent real covenant standards. Even where restrictions are contained within deeds, it is common to also see an independent declaration of cov-

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enants. Do the stricter real covenant standards apply in that situation? Not likely.

At least three recent cases – *Hollis v. Gamwall*, 137 Wn.2d 683, 974 P.2d 836 (1998); *1515-1519 Lakeview Boulevard Condominium Association*, 102 Wn. App. 599, 9 P.3d 879 (Div. 1, 2000); and *Pathe v Zecli*, Nos. 49761-8-I and 50662-5-I, (Div. 1, unpublished, April 28, 2003) – discuss directly some aspects of the current transformation of these rules. I think we may see develop two tests for running covenants in the homeowners' association context. First, there must be either a writing, with notice provided by a Statute of Frauds – worthy recording; or something else that imparts a yet to be determined level of either constructive or actual notice.¹ Second, there will be a relaxed "touch and concern" requirement. Since intent to bind successors and vertical and horizontal privity are the overall reasons for such covenants in the residential development setting, they should be presumed, except where the proof is otherwise.

This would produce a practical result consistent with the intentions of developers when they create residential projects, and the understanding of owners when they buy homes subject to homeowners' associations. When I read between the lines of most decisions, this result would be much welcomed by our appellate courts, as well as practitioners.

Powers of homeowners' associations, then, can be derived from these running servitudes. Anyone who buys land subject to running servitudes is obligated to respect them.

2. Organizational Documents as Contracts

There are at least two other sources for the powers of a homeowners' association, one unexpected. An obscure (to me) general rule in Washington for non-profit associations

is that their articles of incorporation and bylaws constitute contracts with their members. The earliest Washington case I have found is *Seattle Trust Co. v. Pitner*, 18 Wash. 401, 406, 51 P. 1048 (1898) ("(t)his by-law had the force and effect of a contract").

So, in theory, if a lot owner can be tied to mem-

bership in a non-profit homeowners' association, its articles and bylaws, and presumably other lawful rules, taken together, rise to the status of a contract with the member. This was what the Supreme Court said in 1956 in *Rodruck v. Sand Point Maintenance Commission*, 48 Wn.2d 565, 295 P. 2d 714. The articles and bylaws are "correlated" to the covenants; as such, they "constitute a contract between the (association) and its members."²

Rodruck is usually cited as an early case that liberalized the "touch and concern" requirement, but in the next breath, it offered the correlated document/contract reasoning, derived from corporate law sources. Since *Rodruck*, a handful of cases have reached similar results in the homeowners' association context. Most of the cases since *Rodruck* that could have included this analysis, however, did not.

3. The Homeowners' Association Act, RCW 64.38

Finally, we come to RCW 64.38.020, enacted in 1995. This statute gives remarkably broad powers to homeowners' associations, qualified only by, "(u)nless otherwise provided in the governing documents." So, unless the covenants, articles or bylaws prohibit exercise of a power, a homeowners' association can do anything in its bylaws, anything that any other similar association can do, and also whatever is "necessary and proper for the governance and operation of the association." Or, pretty much everything, within reason.

Since RCW 64.38.020 was enacted in 1995 it has not played a major role in any appellate opinions about homeowners' association powers. It gets mentioned in unpublished decisions from Divisions II and III of the Court of Appeals, but nothing substantive about the Act has been determined in these cases.

I am aware of an argument that this statute does not apply retroactively to associations formed before 1995, but I do not find the argument persuasive. First, although statutes are presumed to apply prospectively only, and RCW Ch. 64.38 does not directly address the issue, based on the language of *Godfrey v. State*, 84 Wn.2d 959, 530 P.2d 630 (1975), I would expect that a court would conclude that the legislative intent was to address existing associations. While it is true that a statute cannot interfere with vested rights under certain circumstances, the real issue is whether a member's or association's rights are actually vested. Such rights, here derived from contract, deeds, and/or equitable servitudes, must be more than "mere expectation based upon an anticipated continuance of the existing law."³ The commonly recited test for vesting is whether the right has "become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another."⁴

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For running servitudes associated with homeowners' associations, those aspects of the association's activities subject to articles of association and bylaws, at least, do not implicate vested rights, because articles and bylaws can be amended. Most homeowners' associations are also subject to RCW 24.03, the non-profit association statute, and what a member of a non-profit association gets is membership in an organization whose articles of incorporation and bylaws can be changed. In addition, many covenants themselves also allow for amendment. If the governing documents of an association can be amended, I have difficulty concluding that any "rights" to the terms of the documents pre-statute are "vested" for purposes of this analysis.

I look at RCW 64.38.020 and wonder why every case about homeowners' association powers since 1995 should not start and end with this statute. Certainly notice, either actual or constructive, of a restriction or covenant that an association intends to enforce is still essential, as is some relationship between a proposed action and the concept of running covenants and a homeowners' association.⁵ Also, the covenants themselves, the nonprofit corporation statutes, and articles and bylaws are necessary to consider. Beyond that, the legislature has spoken, it seems to me.

And what did it say? Just about what I think the case law of running covenants, in its evolution, was starting to

get around to saying: that homeowners' associations have broad powers, subject to requirements of notice and nexus, that are generally enforceable against members. Was RCW 64.38.020 a codification of not only where the common law was, but where it was heading? To me, this seems like a fair conclusion.

III. Conclusion

Throughout the course of Washington homeowners' association cases, courts have produced what some have called significantly inconsistent results. This is a very difficult area of the law for judges as well as practitioners. Now, when I answer an association's questions about the scope of its power or write a brief defending that power from challenge by a disgruntled owner, I first analyze the facts with a traditional running covenant/servitude discussion; I then turn to the less-than-well-seasoned correlated documents/contract theory; and finish with, oh, by the way, RCW 64.38.020 means what it says.

Readers are invited to respond to the author at rob@hctc.coni.

¹ See RCW 64.38.101 (1) and (2).

² *Rodruck v. Sand Point Maintenance Commission*, 48 Wn.2d 565, 577-78, 295 P.2d 714.

³ *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975).

⁴ *Id.*

⁵ See RCW 64.38.010 (1) and (2).
