IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LAGOON POINT IMPROVEMENT CLUB, a non-profit corporation, Respondent, v. HERSCHEL FREEMAN and LAURIE FREEMAN, husband and wife; BRUCE HOWARD and SARAH HOWARD, husband and wife; JOHN F. RAYMOND; TIMOTHY GREENLEAF and REBECCA GREENLEAF, husband and wife; DONOVAN R. FLORA and KATHRYN GOATER, husband and wife, and DENIS TRULOCK, Defendants, WILLIAM J. BYRNE, a single man; GERALD W. GELFAND and VERENA GELFAND, a martial community; DOUGLAS GOUGE and NANCY LEIDHOLM, a marital Community; and FERN RAYMOND, Personal Representative of the Estate of John F. Raymond, Appellants.	No. 35843-3-II UNPUBLISHED OPINION

HOUGHTON, C.J. -- Fern Raymond and other owners of lots in Division 1 of the Lagoon Point development appeal a trial court's decision upholding the Lagoon Point Improvement

Club's (LPIC) assessment to repair jetties protecting a waterway jointly owned by residents of all Lagoon Point divisions.[1] Because the applicable covenants make Division 1 lot owners jointly responsible for the development and maintenance of jointly held property, and jetty repair is an expense purchasers would reasonably expect that obligation to include, the assessment properly applies to all Lagoon Point lot owners, including Division 1 lot owners. Thus, we affirm.

FACTS

In 1950, the plat for the Whidbey Island waterfront development known as Lagoon Point was dedicated. At that time, Division 1 of the plat, which included blocks 1 through 12, was developed. Blocks 13 and 14, located in an area of salt marsh south of Division 1, were not developed. The original plat contained four community lots designated as A, B, C, and D.

Covenants provided purchasers of Lagoon Point lots joint ownership of the community lots' development, maintenance, and upkeep.[2] Additionally, the covenants provided that a majority of lot owners could adopt rules and regulations governing the community lots. Lot C, one of the community lots, which was between Division 1 and blocks 13 and 14, was an undeveloped waterway accessing Admiralty Inlet.

In 1960, residents of Lagoon Point established the LPIC as a nonprofit corporation to govern a clubhouse and social club for residents.

In 1969, a developer applied to Island County to develop blocks 13 and 14 into three new divisions. The development proposal included dredging the waterway in lot C to make the

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[1] We refer to all appellants as Raymond.

[2] The assessed valuation of the lots was to be pro-rated and included in the assessed value of the individual lots.

channel navigable and provide a boat turnaround. The developer also proposed to create canals within blocks 13 and 14 and connected to the lot C waterway. Some of the newly developed lots would front the canals. To protect the lot C waterway from the area's severe storms, the developer planned to construct jetties extending into Admiralty Inlet. The jetties' planned location was partially on lot C and partially on a community-owned easement on one of the new lots adjacent to lot C.

County planners determined that the changes to the first of the new areas to be developed, Division 2, were significant enough to require a re-plat for that division. As a condition of approval, the county required the developer to have a homeowner's association responsible for maintenance and upkeep of the common areas. LPIC agreed to assume that responsibility and granted the developer permission to remove material from the community waterway in consideration for the developer constructing a parking area, boat ramp, and jetties at no cost to LPIC. The developer was to build the boat ramp within the lot C waterway, and it was to be available for use by Division 1 lot owners.

Covenants and restrictions for the Division 2 lots provided that the lot C waterway was a community asset. Division 2 lot purchasers agreed to (1) join LPIC; (2) allow LPIC's articles of incorporation, bylaws, and rules to govern membership; and (3) pay all required dues, fees, and charges. This included paying LPIC $18 per year to create a special fund known as the Waterway Fund, which LPIC was to use exclusively for maintaining the waterways developed on the new plat and lot C. The Division 2 covenants stated that these conditions were in addition to the original 1950 restrictions, which also applied to the new purchasers.

In 1970 and again in 1975, the developer proposed and arranged for the development of

Divisions 3 and Division 4, with essentially the same covenants and restrictions as Division 2.

In 1977, the owners of property within the Lagoon Point plat adopted a resolution formally delegating to LPIC the responsibilities for developing and maintaining all common areas, including lot C. The resolution created a limit of $5,000 for maintenance or $500 for new improvements in any calendar year without a majority vote of LPIC members. LPIC later incorporated the resolution into its bylaws.

In 2003, LPIC members agreed, by majority vote, to repair the jetties by means of a special $195 per lot assessment, which LPIC would collect from the owners and deposit in LPIC's Jetty Long Term Reserve Fund. The assessment was paid by 516 of the 523 lot owners. Raymond and other Division 1 lot owners refused to pay, and LPIC brought suit for the assessment and applicable late fees. The parties tried the case on stipulated facts, and the trial court ruled in favor of LPIC. Raymond appeals.

ANALYSIS

Raymond argues that LPIC's jetty assessment exceeds the authority granted by the covenants applicable to the Division 1 lots and fails to comport with the grantor's intent to impose differing burdens on owners in the different divisions of the Lagoon Point development.

The parties stipulated to the facts. We review any questions of law de novo. *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 273, 883 P.2d 1387 (1994). We interpret a covenant as a question of law. *Meresse v. Stelma*, 100 Wn. App. 857, 864, 999 P.2d 1267 (2000). Our primary goal in interpreting covenants that run with the land is to ascertain and give effect to the covenants' intended purposes. *Hollis v. Garwall*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999); *Meresse*, 100 Wn. App. at 864. We apply contract interpretation rules when construing covenants. *Hollis*, 137 Wn.2d at 695-96.

Raymond concedes that earlier litigation established LPIC's authority to adopt regulations to collect assessments regarding lots A, B, C, and D.[3] But relying principally on *Shafer* and *Meresse*, Raymond argues that the jetty repair assessment is improper because it constitutes an unexpected expansion of the Division 1 lot owners' original obligation under the 1950 covenants.

In *Shafer*, the trial court rejected a plaintiff's challenge to new covenants adopted by the majority of property owners in a luxury waterfront development that prohibited junk vehicle storage on individual properties for more than six months. 76 Wn. App. at 272. Finding the covenants consistent with the overall development plan, Division One affirmed, holding that "an express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions respecting the use of privately owned property is valid, provided that such power is exercised in a reasonable manner consistent with the general plan of the development." *Shafer*, 76 Wn. App. at 273-74.

In *Meresse*, the majority of development owners voted to override the minority owner, Meresse, and relocate a subdivision access road onto Meresse's property by characterizing the relocation as "'road maintenance,' 'construction,' or 'repair,'" which did not require unanimous agreement under the covenants. 100 Wn. App. at 864. The trial court found that the majority's

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[3] The record includes *Hamilton v. Lagoon Point Improvement Club*, noted at 33 Wn. App. 1026 (1982). In that case, Division 1 lot owners contended that owners of the other divisions had no property interests in lots A, B, C, and D, and, therefore, had no right to use the boat ramp situated on the lot C waterway. The trial court rejected that proposition and Division One affirmed, holding that all owners jointly owned the common lots within Lagoon Point. LPIC later adopted the trial court's order and the court's unpublished opinion in its bylaws.

decision went beyond the original intent of a covenant for the "'construction, maintenance and repair of the [road].'" *Meresse*, 100 Wn. App. at 863.

On appeal, we affirmed, holding that the relocation of the road was an unexpected expansion of Meresse's obligation to share in road maintenance because the language of the covenants "[did] not place a purchaser or owner on notice that he or she might be burdened, without assent, by road relocation at the majority's whim." *Meresse*, 100 Wn. App. at 866-67. Unlike *Shafer*, the homeowners in *Meresse* did not act in "'a reasonable manner consistent with the general plan of the development.'" *Meresse*, 100 Wn. App. at 865 (emphasis omitted) (quoting *Shafer*, 76 Wn. App. at 274).

Here, contrary to Raymond's contention, the jetty assessment comported with the general plan of the development as presented in the original 1950 covenants. *See Shafer*, 76 Wn. App. at 273-74. At the time of the original development, lot C was "an undeveloped waterway that accessed Admiralty Inlet." Clerk's Papers (CP) at 12. The development's location at Lagoon Point on Whidbey Island, including and surrounding Lagoon Lake, demonstrates the significance of water access to the development's overall plan. The means used to develop lot C, including dredging and building jetties, were foreseeable.

Here, the parties recognize that lot C was an undeveloped waterway at the time of the plat's dedication and the original covenant expressly made lot C's "development, maintenance and upkeep" a joint obligation of purchasers. CP at 11. Accordingly, the assessment to repair the jetties protecting lot C as currently developed is consistent with the development's general plan and is a burden a reasonable Division 1 purchaser would have expected. LPIC's assessment for jetty repair is a reasonable exercise of the covenant's grant of authority to the majority of lot owners to make decisions affecting individual owners. *See Shafer*, 76 Wn. App. at 273-74.

Rather than analyze the original covenants and the circumstances surrounding the 1950 development, Raymond instead attempts to use post-contractual events to interpret the original contractual intent, focusing on the events surrounding the developments of Divisions 2, 3, and 4, which occurred during and after 1969. Raymond maintains that the covenants applicable to only Divisions 2, 3, and 4 establishing the Waterway Fund show the original covenant's purpose did not include development or maintenance of any subsequently developed lot C waterway. *See Berg v. Hudesman*, 115 Wn.2d 657, 666-67, 801 P.2d 222 (1990) (post-contractual behavior may be used to interpret contractual intent). We disagree.

The later covenants, that created the Waterway Fund, addressed the upkeep of canals created as a result of Divisions 2, 3, and 4's development in addition to the maintenance of lot C. Additionally, other documents surrounding the post-1950 developments, such as the environmental impact statement, do not provide persuasive support for Raymond's position. The developer's post-1950 actions are not in conflict with the understanding that LPIC's jetty assessment was consistent with the general plan as established in the 1950 covenants.[4]

Raymond also contends that requiring Division 1 owners to pay the jetty assessment contravenes the developer's intent to impose unequal burdens on property owners in the different

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[4] Moreover, a party may use the *Berg* "context rule," which allows extrinsic evidence of the parties' intent, only to elucidate the meaning of contractual language and not to show an intention independent of that language. *In the Matter of the Marriage of Schweitzer*, 132 Wn.2d 318, 326-27, 937 P.2d 1062 (1997). The plain language of the original 1950 covenants is clear and resolves the issue before us. Therefore, even if the circumstances surrounding the development of Divisions 2, 3, and 4 arguably showed a different intent from that expressed in the relevant Division 1 covenants, it would not change the outcome.

divisions. But nothing in the record supports this contention that the developer intended for an unequal assessment for jetty maintenance. The jetties protect lot C, and under the original covenants, all Lagoon Point lot owners jointly share the burden of developing and maintaining lot C, just as the original covenants allow all to benefit from its use.[5] The covenants applicable only to Divisions 2, 3, and 4 do not change this. In applying the jetty assessment equally to all Lagoon Point lot owners, LPIC has exercised its authority in a manner entirely consistent with the grantor's intent in the general plan as established in the 1950 covenants.[6]

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, C.J.

We concur:

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[5] Raymond emphasizes that Division 1 lot owners do not have the benefit of private canals fronting their property that some of the Divisions 2, 3, and 4 lot owners have. But Division 1 lot owners benefit from the use of the private boat ramp on lot C and the waterway leading out between the jetties into Admiralty Inlet.

[6] Raymond also asserts, without citation to the record, that LPIC is also considering extensive dredging activities and asks us to decide that "future assessments for the cost of maintenance, repair or improvements to the waterway, boat basin and jetties on Tract C, or private property within the plat of Lagoon Point be levied exclusively on lot owners of Divisions 2, 3, and 4 and not on lot owners of Division 1." Appellants' Reply Br. at 13. But the record contains no information about the nature of any such dredging or whether there would be overlap in the expense of such work between the lot C waterway and the Division 2, 3, and 4 canals. Thus, we address only the jetty repair assessment and express no opinion on any potential future assessment or expenditure that LPIC may propose.

Quinn-Brintnall, J.

Penoyar, J.