IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE CITY OF TACOMA, a Washington municipal corporation, Respondent, And JOHNNIE E. LOVELACE, an individual; LOIS S. COOPER, an individual; and JAMES V. LYONS and RENEE D. LYONS, a marital community, Appellants, v. NORTHSHORE INVESTORS, LLC, a Washington limited liability company; NORTH SHORE GOLF ASSOCIATES, INC., a Washington corporation; and HERITAGE SAVINGS BANK, a Washington corporation, Respondents.	No. 38941-0-II UNPUBLISHED OPINION

Armstrong, J. — Johnnie Lovelace, Lois Cooper, and James and Renee Lyons intervened in a declaratory judgment action between the City of Tacoma, North Shore Golf Associates, Inc., and Northshore Investors, LLC. Lovelace, Cooper, and Lyons appeal (1) the trial court's ruling

that a taxation agreement between the City and North Shore Golf Associates did not convey a property interest in the North Shore Golf Course to the City, and (2) the trial court's order dismissing all of their claims with prejudice. Because Lovelace, Cooper, and Lyons do not have standing to challenge the City's alleged property interest and the trial court properly dismissed all of their claims on summary judgment, we affirm.

FACTS

The North Shore Golf Course is part of the North Shore Country Club Estates, a planned residential development (PRD) in Tacoma, Washington. In 1979, North Shore Golf Associates purchased the golf course property from Tacoma Land Company and Nu-West Pacific, Inc. purchased the property surrounding the golf course. Nu-West and North Shore Golf Associates agreed to use the golf course property to fulfill the open space and density requirements for the PRD planning process and to restrict the golf course to open space use "for such period as is required by the City of Tacoma." Clerk's Papers (CP) at 24-25.

Nu-West and North Shore Golf Associates submitted an application to the City to reclassify the golf course and surrounding property from R-2, a one-family dwelling district, to R-2 PRD, a planned residential development district. The application included a master plan offering the golf course for designation as open space. North Shore Golf Associates also submitted a separate application to the City to classify the golf course as open space under chapter 84.34 RCW.[1]

[1] Under chapter 84.34 RCW, land owners may apply to designate qualifying property as open space land. *See* RCW 84.34.030. The property's value, for tax purposes, is then assessed based on its current use as open space, rather than its potential use, such as developing the property for commercial or residential uses. *See* RCW 84.34.060; *Van Buren v. Miller*, 22 Wn. App. 836, 837-38, 592 P.2d 671 (1979). The purpose of this classification scheme is to "maintain, preserve,

In 1981, the City and North Shore Golf Associates executed an Open Space Taxation Agreement (Tax Agreement). The Tax Agreement provides, in relevant part, that use of the North Shore Golf Course "shall be restricted solely to golf course and open space use," that the agreement "shall run with the land described herein and shall be binding upon the heirs, successors and assigns of the parties hereto," and that the agreement shall "remain in effect until such time as nullified by the City of Tacoma." CP at 27.

The City then adopted an ordinance rezoning the golf course and surrounding property to R-2 PRD. Nu-West and the City executed the North Shore Concomitant Zoning Agreement (Zoning Agreement), which provides that the North Shore Country Club Estates PRD must be developed and maintained in accordance with the Zoning Agreement and the approved site plan. The site plan designates the North Shore Golf Course as open space.

In 2007, North Shore Golf Associates and Northshore Investors applied for a permit to redevelop the golf course for residential use, proposing to build 860 residential units on the golf course property. The City filed an action for declaratory judgment in Pierce County Superior Court, requesting an order declaring that the Tax Agreement and the Zoning Agreement restrict the North Shore Golf Course to open space and golf course use, the restrictions are binding until the City agrees to nullify them, and the land use restrictions in the agreements created a real property interest for the City in the golf course. Lovelace, Cooper, and Lyons own homes adjacent to the golf course. They intervened in the declaratory judgment action and requested substantially the same relief as the City, claiming that they were intended third-party beneficiaries

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conserve and otherwise continue in existence adequate open space lands for the production of food, fiber and forest crops, and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens." RCW 84.34.010.

of the Tax Agreement and the Zoning Agreement.

The parties filed cross-motions for summary judgment on these issues. The trial court ruled that the land use restrictions in the Tax Agreement and the Zoning Agreement created "an open space land use designation," not a real property interest for the City. CP at 1,965. The trial court also ruled that the Tax Agreement "remains binding and enforceable by the City of Tacoma unless and until the City of Tacoma approves a different use of the North Shore Golf Course property through the applicable land use application process." CP at 1,964. Finally, the trial court ruled that Lovelace, Cooper, and Lyons are not third-party beneficiaries under the Tax Agreement or the Zoning Agreement and dismissed all of their claims with prejudice.

ANALYSIS

Lovelace, Cooper, and Lyons first assign error to the trial court's ruling that the Tax Agreement did not create a real property interest for the City in the golf course. They argue that the Tax Agreement created a restrictive running covenant, which is a nonpossessory property interest. North Shore Golf Associates and Northshore Investors respond that Lovelace, Cooper, and Lyons do not have standing to challenge the trial court's ruling because they do not have standing to enforce the alleged covenant. Thus, we must address whether Lovelace, Cooper, and Lyons have standing before considering whether the Tax Agreement created a restrictive running covenant.

I. Standing to Enforce a Covenant

Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610 (2007). The doctrine of standing

prohibits a party from asserting another's legal right. *West v. Thurston County*, 144 Wn. App. 573, 578, 183 P.3d 346 (2008). The rule ensures that courts render a final judgment on an actual dispute between opposing parties that have a genuine stake in resolving the dispute. *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 223, 232 P.3d 1147 (2010). We review standing issues de novo. *Link*, 136 Wn. App. at 692.

A "restrictive covenant" is an agreement between two or more parties that limits permissible land uses. *See Hollis v. Garwall*, *Inc.*, 137 Wn.2d 683, 690, 974 P.2d 836 (1999); Restatement (Third) of Property: Servitudes § 1.3 (2000). Enforcement between the original parties is a matter of contract law. *Deep Water Brewing, LLC v. Fairway Res. Ltd*., 152 Wn. App. 229, 257, 215 P.3d 990 (2009); *Leighton v. Leonard*, 22 Wn. App. 136, 139, 589 P.2d 279 (1978). A covenant may also be enforced by the original parties' successors in interest if the covenant "runs with the land." *See Deep Water Brewing*, 152 Wn. App. at 257-58; *Leighton*, 22 Wn. App. at 139. Finally, a covenant may be enforced by third-party beneficiaries. *See Deep Water Brewing*, 152 Wn. App. at 255-57; Restatement (Third) of Property: Servitudes §§ 2.6, 8.1. A third-party beneficiary is one who is not a party to the contract but will receive a direct benefit from the contract. *See McDonald Constr. Co. v. Murray*, 5 Wn. App. 68, 70, 485 P.2d 626 (1971). The original contracting parties must have intended to create a third-party beneficiary at the time it formed the contract. *See Ramos v. Arnold*, 141 Wn. App. 11, 21, 169 P.3d 482 (2007).

Here, Lovelace, Cooper, and Lyons are not original parties to the Tax Agreement between North Shore Golf Associates and the City, successors in interest to the original parties, or

intended third-party beneficiaries.[2] They attempt to circumvent this procedural obstacle by

[2] The trial court ruled that Lovelace, Cooper, and Lyons are not third-party beneficiaries under any of the agreements at issue, including the Tax Agreement. Lovelace, Cooper, and Lyons do not assign error to this conclusion and do not argue that they have standing as third-party beneficiaries. "Unchallenged conclusions of law become the law of the case." *State v. Moore*, 73 Wn. App. 805, 811, 871 P.2d 1086 (1994).

arguing that even though they are not "conventional third-party beneficiaries," the benefits of a restrictive running covenant may also be enforced by "remote parties." Reply Br. of Appellants at 5.

It is not clear how a "remote beneficiary" differs from a third-party beneficiary. Any beneficiary who is not a party to the original contract but nevertheless has the right to enforce the contract is, by definition, a third-party beneficiary. *See McDonald*, 5 Wn. App. at 70, Restatement (Third) of Property Servitudes, §§ 2.6, 8.1. Furthermore, under Washington law, that a party benefits from a contract does not confer standing to enforce the contract unless the party is an intended third-party beneficiary. *See Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 43, 114 P.3d 664 (2005) (citing *Del Guzzi Constr. Co. v. Global Nw. Ltd.*, 105 Wn.2d 878, 886, 719 P.2d 120 (1986)) ("An incidental, indirect, or inconsequential benefit to a third party is insufficient to demonstrate an intent to create a contract directly obligating the promisor to perform a duty to a third party."); *McDonald*, 5 Wn. App. at 70 ("An incidental beneficiary acquires no right to recover damages for non-performance of the contract.").

Finally, the authorities that Lovelace, Cooper, and Lyons rely on do not support their contention that "remote beneficiaries" are an additional category of parties entitled to enforce a covenant. *See Deep Water Brewing*, 152 Wn. App. at 255-61 (successor in interest enforcing a running covenant against an original contracting party); *Save Sea Lawn Acres v. Mercer*, 140 Wn. App. 411, 421-22, 166 P.3d 770 (2007) (discussing, and refusing to apply, the doctrine of implied reciprocal servitudes); 17 William B. Stoebuck, Washington Practice: Real Estate: Property Law § 3.2, at 126 (2d ed. 2004) (using the term "remote parties" to refer to the successors in interest

of an original contracting party).

Lastly, Lovelace, Cooper, and Lyons assert that they have taxpayer standing to enforce the City's alleged property interest in the North Shore Golf Course. Under certain circumstances, a party may have standing to challenge governmental acts based solely on his or her status as a taxpayer. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997). Taxpayer standing is recognized "in the interest of providing a judicial forum for citizens to contest the legality of official acts of their government." *Greater Harbor 2000*, 132 Wn.2d at 281. Because Lovelace, Cooper, and Lyons seek to enforce a right on behalf of the City and do not contest the legality of an official government act, taxpayer standing does not apply here.

In sum, original contracting parties, their successors in interest, and intended third-party beneficiaries have standing to enforce a running covenant. Lovelace, Cooper, and Lyons do not fit within any of those categories. That they own property adjacent to land allegedly burdened by a running covenant does not confer standing to seek judicial enforcement of the covenant. Accordingly, we hold that Lovelace, Cooper, and Lyons lack standing to challenge the trial court's conclusion that the Tax Agreement did not convey a real property interest to the City in the form of a restrictive running covenant.

II. Dismissal with Prejudice

Lovelace, Cooper, and Lyons also assign error to the trial court's order dismissing all of their claims with prejudice. They argue that two of their claims—that the Tax Agreement created a running covenant, and the Tax Agreement and Zoning Agreement created a common plan of development—were not before the trial court on summary judgment; therefore, the trial court

erred by dismissing those claims.

First, Lovelace, Cooper, and Lyons have not established that they have standing to enforce the running covenant the Tax Agreement allegedly created. For this reason alone, the trial court properly dismissed their restrictive covenant claim. Second, reviewing Lovelace's, Cooper's, and Lyons's complaint shows that all of their claims, including their running covenant claim, were premised on their status as third-party beneficiaries. Thus, the trial court properly dismissed all of their claims, including their restrictive covenant claim, after ruling that they are not third-party beneficiaries.

Third, Lovelace, Cooper, and Lyons did not assert a common plan claim in their complaint. They first raised this argument in their motion opposing North Shore Golf Associates' and Northshore Investors' motion for summary judgment. A civil complaint must "'apprise the defendant of the nature of the plaintiff's claims and the legal grounds upon which the claims rest.'" *Kirby v. City of Tacoma*, 124 Wn. App. 454, 469-70, 98 P.3d 827 (2004) (quoting *Molloy v. Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993)). "'A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.'" *Kirby*, 124 Wn. App. at 472 (quoting *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999)). If a party wishes to amend its pleadings to add an additional claim or theory, CR 15 sets forth the proper procedure for doing so. *See Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment."). Because the common plan claim was improperly pleaded for the first time

in summary judgment proceedings, the trial court properly dismissed that claim. *See Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) ("[A]n appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.").

Finally, even if Lovelace, Cooper, and Lyons had properly asserted a common plan claim, they have not alleged facts sufficient to support the claim. Under the common plan doctrine, when a developer sells land with restrictions designed to implement a common plan of development, the developer impliedly represents to the purchasers that the rest of the land included in the plan is, or will be, similarly restricted. Courts then enforce that representation by imposing an implied equitable servitude on the remaining land included in the developer's plan. *See Sea Lawn Acres*, 140 Wn. App. at 420-21; Restatement (Third) of Property: Servitudes § 2.14(2)(b) cmt. i, at 190-91 (2000). To establish a common plan of development under Washington law, "substantially all of the property sold must be subject to the covenants sought to be enforced." *Tindolph v. Schoenfeld Bros., Inc.*, 157 Wash. 605, 610, 289 P. 530 (1930). Here the trial court found:

> None of the plats which were approved within the Country Club Estates PRD contains any dedication of open space or other use restrictions that affect the Golf Course property owned by North Shore Golf Associates, Inc.

CP at 1,973-74. Thus, Lovelace, Cooper, and Lyons are unable to establish that "substantially all of the property sold" in the North Shore Country Club Estates PRD was subject to a covenant restricting the North Shore Golf Course to golf course and open space use. *Tindolph*, 157 Wash. at 610.

For these reasons, we affirm the trial court's dismissal of all of Lovelace's, Cooper's, and Lyons's claims on summary judgment.

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.

Armstrong, J.

We concur:

Worswick, A.C.J.

Lau, J.P.T.