IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN MITSCHKE and YANG MITSCHKE, and the marital community composed thereof,	)	**No. 28355-1-III**
	)	
	)	**Division Three**
Appellants,	)	
	)	
v.	)	**ORDER AMENDING**
	)	**OPINION FILED**
DOUGLAS L. NIELSEN and VIVIAN L. NIELSEN, and the marital community composed thereof; and the DOVER ROAD ESTATES' ARCHITECTURAL COMMITTEE, an unincorporated association; and JERRY L. NOBLE, WAYNE ENGSTROM, and ROBERT J. FRISCH, in their capacity as purported members of the DOVER ROAD ESTATES' ARCHITECTURAL COMMITTEE,	)	**AUGUST 10, 2010**
	)	
Respondents.	)	

The Court on its own motion amends the opinion filed on August 10, 2010, as follows:

The following language on page 10 of the slip opinion is deleted:

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will not be filed for public record pursuant to RCW 2.06.040.

And the language will be replaced to delete not in line two with the following:

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

Panel 5: Judges, Brown, Kulik, Siddoway

Dated:

KEVIN M. KORSMO
Acting Chief Judge

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	)	
	)	**Division Three**
Appellants,	)	
	)	
v.	)	**UNPUBLISHED OPINION**
	)	
DOUGLAS L. NIELSEN and VIVIAN L. NIELSEN, and the marital community composed thereof; and the DOVER ROAD ESTATES' ARCHITECTURAL COMMITTEE, an unincorporated association; and JERRY L. NOBLE, WAYNE ENGSTROM, and ROBERT J. FRISCH, in their capacity as purported members of the DOVER ROAD ESTATES' ARCHITECTURAL COMMITTEE,	)	
	)	
Respondents.	)	
	)	

Brown, J. — John and Yang Mitschke appeal the trial court's judgment denying them injunctive and declaratory relief in their suit to enforce covenants, conditions, and restrictions (CCRs) against their neighbors, Douglas and Vivian Nielsen. The Mitschkes contend the trial court erred in deciding CCRs were invalid and in rejecting their equitable covenant claim. Because we reject this contention, we do not reach their arguments that the trial court failed to find the CCRs were violated. Accordingly, we affirm the trial court and award appellate attorney fees and costs to the Nielsens.

FACTS

The facts are mainly drawn from unchallenged findings of fact that we treat as verities on appeal. *Robel v. Roundup Corp*., 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

The Mitschkes and the Nielsens are homeowners in the Dover Road Estates subdivision. There are 18, 10-acre lots in the subdivision. Both the Mitschkes and the Nielsens acquired their property interests by warranty deeds. Both deeds state they are "subject to" the CCRs (recording no. 9308160431). Exs. P1, P2.

Auditor's file no. 9308160431 was recorded on August 15, 1993. This document was not signed, acknowledged or notarized, nor does the document identify a declarant, grantor or grantee. The document states it is the "COVENANTS, CONDITIONS, AND RESTRICTIONS CONTAINED in Declaration of Protective Restrictions, covering Deep Creek Ranchettes." Ex. P5. Deep Creek Ranchettes is a similar development with rural acreage lots. A number of home-based businesses have

been operated in the Deep Creek Ranchettes subdivision including a horse farm, a welding shop, dog kennel business, a daycare center and a fruit and produce stand. The top of the document states, "Dover Road Estates" with a handwritten notation, "NW ¼ of Sect 16, T.25, R. 41 E.W.M." Ex. 5.

Restrictive covenant number 4 of the CCRs restricts lot owners to two car garages. Several homeowners have violated this covenant. Covenant number 4 restricts buildings to a single home, a garage and one additional building consisting of a tool shed or a barn not to exceed 900 square feet in floor space. Several homeowners have violated this covenant. This covenant restricts the use of lots to residential purposes. Many lot owners use their land for agricultural uses. This use is consistent with the rural nature of the development and has not been objected to by the lot owners.

Restrictive covenant number 6 prohibits the keeping of animals or pets which habitually make loud or disturbing noises. Several homeowners have loud animals. There has been no action to enforce this covenant and it has been ignored by the lot owners because of the rural nature of the development. This covenant restricts ownership of animals by lot owners to household pets, three grown horses, two colts and cattle under certain circumstances. Homeowners, however, have kept other types of animals such as chickens, emus, ostriches, ducks and llamas. This covenant prohibits commercial enterprises unless approved in writing by the Architectural Control

Committee (ACC). One property owner, however, operates a website business, a scrapbooking business and a drag racing business where dragsters are stored, repaired, and maintained. Another owner has emus, ostriches, ducks and chickens, and has expressed a desire to start an egg business. And, the Mitschkes conduct their rental property business from their home. The covenant does not distinguish between third parties coming to the subdivision for business purposes as opposed to commercial enterprises that do not involve traffic in the subdivision.

Restrictive covenant number 9 requires lot owners to submit plans for new construction and remodels to the ACC for approval. Very few of the lot owners in Dover Road Estates have ever submitted such plans to the ACC.

Restrictive covenant number 11 relates to covenant enforcement: "Any violator so adjudged by such court shall bear the costs of such action, including reasonable attorneys fees." Ex. 5.

The Nielsens farm lavender. Mrs. Nielsen sells the lavender and lavender products. The Nielsens store some products and lavender in their home and garage. No products are stored outside of buildings. The vast majority of lavender and products sold by the Nielsens are sold at craft fairs and similar events at locations other than their home. Annually, the Nielsens hold a lavender festival. The attendance at these festivals range from 2 to 150 people. In connection with the lavender festival, the Nielsens provide a "U-pick" experience for individuals who wish to pick the lavender

themselves. The Nielsens have not profited from the lavender farm and do not expect to make a profit. Both Mr. and Mrs. Nielsen have full-time jobs.

In September 2006, the Nielsens received notice of a Spokane County Building and Planning Department investigation based on a complaint filed by the Mitschkes. The county took no action, concluding the activities complained of were permitted in rural traditional zoning applicable to lots in Dover Road Estates.

The Mitschkes then complained to the Nielsens that their lavender farm violated the restrictive covenants and demanded that the Nielsens cease all commercial activity on their property. Neither the Mitschkes nor other homeowners in Dover Road Estates have complained about other nonresidential and commercial uses on other lots in the subdivision.

In February 2008, the Mitschkes sued for injunctive and declaratory relief. In response, the Nielsens sought, and obtained, the ACC's written approval to operate their lavender farm including harvesting and selling the lavender, advertising with signs and conducting classes. The ACC then disbanded. Despite the resignation of the ACC, no effort has been made by the homeowners to form a new ACC.

The court entered judgment for the Nielsens, finding their farm was a "hobby" and "[t]he lavender festivals and the you pick program do not involve increase traffic through Dover Road estates." Clerk's Papers at 138. The court concluded the CCRs were void under the statute of frauds or not enforceable because of abandonment

based on the frequency of violations, and an equitable covenant did not exist. The court awarded the Nielsens their attorney fees as the prevailing party. The Mitschkes appealed.

ANALYSIS

A. Validity of CCRs

The dispositive issue is whether the trial court erred in concluding the CCRs were unenforceable and void under the statute of frauds, or alternatively, because of abandonment and frequency of violations. The court further concluded equitable covenants did not exist. The Mitschkes contend the CCRs satisfy the statute of frauds because they are specifically referenced in the parties' warranty deeds and have an adequate legal description. Alternatively, they contend equitable covenants run with the land restricting the Nielsens' use of their property.

When a trial court has weighed the evidence, our review is limited to determining whether the court's findings of fact are supported by substantial evidence and, if so, whether the findings support the court's conclusions of law and judgment. *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing*, *Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). "The party challenging a finding of fact bears the burden of showing that it is not supported by the

record." *Panorama Vill.*, 102 Wn. App. at 425. We review conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Two basic types of covenants run with the land, real covenants and equitable covenants, although Washington courts do not generally distinguish between them. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691, 974 P.2d 836 (1999). Under Washington law, both real covenants and equitable servitudes "must originate in a covenant that is enforceable between the original parties under the law of contract." 17 *William B. Stoebuck & John W. Weaver*, Washington Practice: Real Estate: Property Law § 3.11, at 149 (2d ed. 2004). Thus, we must determine whether the original covenant was, as a matter of law, enforceable between the original parties.

The statute of frauds requires, "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed" and "[e]very deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds." RCW 64.04.010, .020. Additionally, every contract or agreement involving a sale or conveyance of platted real property "'must contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number, addition, city, county, and state.'" *Key Design*, *Inc. v. Moser*, 138 Wn.2d 875, 881, 983 P.2d 653 (1999) (quoting *Martin v. Seigel*, 35 Wn.2d 223, 229, 212 P.2d 107 (1949)).

Based on the court's unchallenged finding, auditor's file no. 9308160431 was not signed, acknowledged or notarized nor does the document identify a declarant, grantor or grantee. The document states it is the "COVENANTS, CONDITIONS, AND RESTRICTIONS CONTAINED in Declaration of Protective Restrictions, covering Deep Creek Ranchettes." Ex. 5. Deep Creek Ranchettes is a similar development, but not within Dover Road Estates.

Further, the document does not contain a legal description. The top of the document states "Dover Road Estates" with a handwritten notation, "NW ¼ of Sect 16, T.25, R. 41 E.W.M." Ex. 5. A proper legal description includes, "'the correct lot number(s), block number, addition, city, county, and state.'" *Losh Family*, *LLC v. Kertsman*, 155 Wn. App. 458, 464, 228 P.3d 793 (2010) (quoting *Key Design*, 138 Wn.2d at 882)). In *Losh Family*, Division One of this court held that a lease was invalid under the statute of frauds because the legal description "did not specify the particular plat or addition." *Id.* at 465. "A legal description is insufficient if the court needs to resort to extrinsic evidence to definitively locate the property." *Id.* Here, like in *Losh Family*, the Mitschkes fail to show how a court could definitively locate the property without resorting to extrinsic evidence to identify the city, county and state. Also problematic is that the CCRs specifically reference another development.

Because no writing exists with an adequate legal description signed by the parties to be bound or acknowledgement by the party before some person authorized

by this act to take acknowledgments, the CCRs do not satisfy the statute of frauds to restrict the Nielsens' use of their land. We turn now to the equitable covenant claim.

As noted above, Washington generally does not distinguish between real and equitable covenants. But courts tend to recite two different standards used to determine the validity of real versus equitable covenants. *Dickson v. Kates*, 132 Wn. App. 724, 732-33, 133 P.3d 498 (2006).

In order to bind successors, an equitable covenant must be (1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant. *Id.* at 732 (citing *Hollis*, 137 Wn.2d at 691). Each element is necessary. *Hollis*, 137 Wn.2d at 691.

As determined above, no enforceable document restricts the Nielsens' use of their land. Thus, the Mitschkes cannot satisfy the first element. Additionally, "a person must come into a court of equity with clean hands." *Pierce County v. State*, 144 Wn. App. 783, 832, 185 P.3d 594 (2008) (citing *Income Investors*, *Inc. v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940)). Based on the court's unchallenged finding, the Mitschkes run a rental property business from their home, which undermines their equitable covenant argument.

The Mitschkes argue the CCRs are valid because both parties' warranty deeds

reference the covenants. Both deeds state they are "subject to" recording no. 9308160431. The Mitschkes cite no persuasive legal authority suggesting that a mere "subject to" reference to a recorded invalid document is sufficient to resurrect the invalid document. *See Von Meding v. Strahl*, 30 N.W.2d 363, 369, 319 Mich. 598 (1948) ("subject to all easements in a conveyance means subject to all valid easements"). Thus, while both warranty deeds state they are "subject to" the recorded document, this does not make an otherwise unenforceable document enforceable. The CCRs are invalid.

Given our conclusion that the CCRs are invalid, we need not reach the Mitschkes' additional arguments regarding whether the Nielsens' violated the covenants under the facts found by the trial court. *See Cotton v. City of Elma*, 100 Wn. App. 685, 699, 998 P.2d 339 (2000) (court need not reach additional issues when dispositive issue has been decided).

B. Attorney Fees

Both parties request fees on appeal under restrictive covenant number 11 of the CCRs. While the CCRs are invalid in relation to the Dover Road Estates, Washington courts permit a party asserting unenforceability as a defense to still recover attorney fees under the document if it contains an attorney fee provision. *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984). Because restrictive covenant number 11 permits attorney fees, we, like the trial court, grant the

Nielsens' request, conditioned on compliance with RAP 18.1(d) and in an amount to be determined by a commissioner of this court.

Affirmed.

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

_____
Brown, J.

WE CONCUR:

_____ _____
Kulik, C.J. Siddoway, J.