The Effect of Tax Foreclosure Sales on Servitudes: *Olympia v. Palzer*

I. INTRODUCTION

The purpose of this note is to examine whether a tax foreclosure sale should act to extinguish pre-existing servitudes such as easements and real covenants. A majority of jurisdictions have held that easements and restrictive covenants are not extinguished by a tax foreclosure sale. In addition, a number of states have gone so far as to enact statutes to deal specifically with this issue. However, there are a minority of jurisdictions that have taken the opposite approach and have considered a tax title to be a new and perfect title that extinguished all pre-existing liens and encumbrances of any kind, including easements and real covenants.

1. For purposes of this note two forms of servitudes will be discussed: easements and real covenants. An easement is an interest that entitles the owner of that interest to the limited use and enjoyment of land possessed by another. Restatement of Property § 450 (1944). Easements are divided into two categories: appurtenant and easements in gross. An easement appurtenant is an easement that is created to benefit the owner of the easement as possessor of a particular tract of land. Restatement of Property § 453 (1944). An easement in gross is an easement that is not created to benefit any specific parcel of land. Restatement of Property § 454 (1944).

A real covenant is an agreement or promise between two or more parties that something is done, will be done or will not be done regarding real property. 5 R. Powell, The Law of Real Property 670 § [2] (P. Rohan rev. ed. 1986). Covenants are divided into two types: affirmative and negative (restrictive). Id. Affirmative covenants require the covenantor to perform some act. Id. An example of an affirmative covenant would be a requirement that a property owner in a residential community pay dues to a homeowner's association. Negative covenants require the covenantor to refrain from doing some act. Id. An example of a negative covenant would be a promise restricting a land owner from using his land for commercial purposes. See 6 Rohan, Home Owner Associations and Planned Unit Developments—Law and Practice § 8.02(2) (1986).

2. Available case law that addresses the issue of real covenants and tax foreclosure sales involves restrictive covenants. See Restatement of Property § 567 Caveat, (1944) (refusing to take a position as to the effect of a tax deed in extinguishing an interest in land arising out of a promise to perform an act).

3. See infra note 38 and accompanying text.

4. See infra note 62 and accompanying text.

5. These jurisdictions are Iowa, Mississippi, Washington, Florida, Kansas, and Massachusetts. At present, most of these states have altered their positions to some degree by statute. See infra notes 62-65 and accompanying text.
Prior to the decision in Olympia v. Palzer, Washington's approach was divided between the majority and minority positions. Washington’s pre-1959 decisions followed the minority position and allowed complete extinguishment of both easements and restrictive covenants upon a tax foreclosure sale. In 1959, the approach toward easements changed when the Washington legislature enacted a statute establishing that tax deeds are taken subject to any prior existing appurtenant easement. This statute aligned Washington with the majority of jurisdictions as to easements, but the statute failed to specifically address the situation regarding real covenants. Palzer is the first case since 1938 to address both tax sales and real covenants.

This Note analyzes the historical position taken by Washington courts regarding servitudes and tax sales prior to and subsequent to the 1959 statute dealing with easements. The Note next examines the Palzer holding, the degree to which it aligns Washington's position with that of the majority, and its limited support for future litigation involving other forms of servitudes.

II. HISTORICAL PERSPECTIVE

A. Pre-1959 Statutory Approach

Prior to 1959, the Washington Supreme Court had taken a rigid position regarding the effect of tax foreclosure sales on easements and real covenants. The court's position was based

7. See infra note 15.
8. WASH. REV. CODE § 84.64.460 (1987); see infra text accompanying notes 66-76.
9. Id.
10. The only other Washington case to address the effect of a tax foreclosure sale on real covenants is Messett v. Cowell, 194 Wash. 646, 79 P.2d 337 (1939). In Messett, property that was burdened by a covenant restricting the use of lime located on the property was sold for delinquent taxes. Id. at 648, 79 P.2d at 339. The court held the restrictive covenant to be extinguished by the tax sale. Id. at 658, 79 P.2d at 342. The Messett opinion contains no analysis as to why the covenant should be extinguished. The court simply states that the land is free from the restriction. Id. The holding is consistent with holdings of the same period regarding easements. See infra note 15.
11. See infra text accompanying notes 15-76.
12. See infra text accompanying notes 77-99.
13. See infra text accompanying notes 100-109.
15. Brown v. Olmsted, 49 Wash. 2d 210, 214, 299 P.2d 564, 567 (1956) (a tax foreclosure sale creates a new title that extinguishes any rights of way, public or private); Harmon v. Gould, 1 Wash. 2d 1, 11, 94 P.2d 749, 754 (1939) (where an
on a very strict reading of the taxation statutes and a desire to promote the priority of tax liens. No consideration was given to possible benefits derived from such servitudes or the burden that would be placed on the parties owning the beneficial interest in the servitudes.

The first example of the court's doctrine was the 1911 decision of Hanson v. Carr. In Hanson, the court held that an easement to use a strip of land as a private road was extinguished by a subsequent tax foreclosure sale. The court interpreted the tax statutes to provide that all taxes imposed on real estate shall create a lien that has priority over any mortgage, judgment, debt, obligation or responsibility to or with which the real estate may become charged. This priority rationale became the foundation for the subsequent cases addressing the issue of tax foreclosure sales and servitudes regardless of whether the servitude was an easement or a covenant.

The court reasoned that when a tax lien is foreclosed, the fee passes to the purchaser and all grants made by the owner

easement by implication is extinguished by a tax foreclosure sale); Messett, 194 Wash. at 658, 79 P.2d at 342 (see supra note 10); Tamlin v. Crowley, 99 Wash. 133, 140, 168 P. 982, 985 (1917) (a tax foreclosure sale creates a new and paramount title that completely divests any claimed private right of easement); Hanson v. Carr, 66 Wash. 81, 118 P. 927 (1911) (see infra text accompanying notes 18-20). In addition, the following cases from other jurisdictions support the Washington approach: City of Jackson v. Ashley, 189 Miss. 818, 199 So. 91 (1940); Nedderman v. City of Des Moines, 211 Iowa 1352, 268 N.W. 36 (1936).

16. See supra note 15 and accompanying text; infra note 20 and accompanying text.

17. Harmon, 1 Wash. 2d at 11, 94 P.2d at 754 (the burden the court considered significant was the burden placed upon tax assessors if the assessors were required to consider the existence of easements in the valuation process).

18. 66 Wash. 81, 118 P. 927 (1911).

19. Id. at 83, 118 P. at 928.

20. Id.; see also Harmon, 1 Wash. 10, 94 P.2d at 753. The present Washington statute regarding tax lien priority is remarkably similar to the earlier versions referenced in both Hanson and Harmon; § 84.60.010 provides:

All taxes and levies which may hereafter be lawfully imposed or assessed shall be and they are hereby declared to be a lien respectively upon the real and personal property upon which they may hereafter be imposed or assessed, which liens shall include all charges and expenses of and concerning the said taxes which, by the provisions of this title, are directed to be made. The said lien shall have priority to and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility to or with which said real and personal property may become charged or liable.

WASH. REV. CODE § 84.60.010 (1987) (emphasis added).

21. See supra note 15 and accompanying text.
of the fee must be extinguished. The new tax title stems from a source independent of the original owner, which consequently would destroy all prior property interests. The source of the new tax title was considered to be a new grant from the sovereign state. The only way to protect a servitude from possible extinction would be to segregate the servitude for tax purposes from the servient estate and then pay the tax on the servitude separately. The court reasoned that a substantial burden would be placed on the taxing authority if the authority were required to examine each tract of land for possible easements.

The tax lien priority rationale was a harsh doctrine and resulted in a per se rule of tax deed superiority. The problem with the tax lien priority approach was that the general policy supporting the analysis only addressed one side of the issue: the collection of taxes. Very little consideration was given to the value of the interests being extinguished.

Today's modern land use planning techniques make extensive use of easements and real covenants as planning devices.

22. Brown, 49 Wash. 2d at 214, 299 P.2d at 567; Harmon, 1 Wash. 2d at 10, 94 P.2d at 753; Messett, 194 Wash. at 658, 79 P.2d at 342; Tamplin, 99 Wash. at 140, 168 P. at 985; Hanson, 66 Wash. at 83, 118 P. at 928.
24. Id.
25. Segregation of the servitude for tax purposes would involve the covenantees and owners of easements separating their interests from the servient estate and specifically entering those interests on the tax roles, similar to other property interests.
26. Harmon, 1 Wash. 2d at 10, 94 P.2d at 753; Hanson, 66 Wash. at 83-84, 118 P. at 928.
27. Harmon, 1 Wash. 2d at 10, 94 P.2d at 753; see infra text accompanying notes 52-55.
28. "The collection of taxes would be seriously hindered, if a taxing authority be required to examine each tract of land for possible easements . . . ." Harmon, 1 Wash. 2d at 10, 94 P.2d at 753. At the time the doctrine was established, the courts were only concerned with maximizing the efficiency of the tax collection system. Id.
29. This lack of consideration is evidenced by the court's reasoning in Harmon. Id.
30. Homeowners associations must, in the absence of statutes providing enforcement tools, rely largely on that body of the law of real property which governs covenants respecting the use of land. It is through the use of recorded covenants and restrictions that "run with the land" that the homeowners association seeks to make the controls and assessments vital to its continued existence binding not only on those who acquired their homes from the developer, but also on their successors in interest, who may not have personally agreed to be bound by the community's rules.

ROHAN, HOME OWNER ASSOCIATION AND PLANNED UNIT DEVELOPMENTS—LAW AND
If easements or real covenants are extinguished by a tax foreclosure sale, entire housing developments and general building plans could be rendered useless. Persons purchasing housing tracts in planned residential developments could not be assured that commercial business or industrial development might not infiltrate the area simply because some party in the development failed to pay their property taxes. The practical effect of the Hanson doctrine is to require any party living in a development making use of easements or real covenants to check on each neighbor to make sure property taxes are being paid. The doctrine over-emphasizes administrative expediency (efficiency of tax collection) to the detriment of the par-

PRACTICE 8.02(1) (1986) (emphasis added); Accord, 1 ROHAN: RESKIN, CONDOMINIUM LAW AND PRACTICE 10.02 (1988) (The purchasers of condominiums rely on the stability of the condominium regime as an assurance that a particular type of life style is maintained. The enforcement of restrictions is necessary to foster the condominium development). See Alamogordo Improvement Co. v. Prendergast, 43 N.M. 245, 254, 91 P.2d 428, 433 (1939).

31. See supra note 30.

32. The regulation of commercial business through zoning ordinances is beyond the scope of this article. The following quotation is an example of a recorded restrictive covenant restricting a housing development to residential use only.

C-1 Land Use and Building Type. No lot in Lake Forest Division One shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single family dwelling, not to exceed two stories in height and a private garage for not more than three cars.

Lake Forest, Division No. 1 Declaration of Covenants, Conditions, and Restrictions 7, (1973) Per plat recorded Vol. 18 of plats, pages 4 through 5, records of Thurston County, Washington.

33. For example, each person residing in a residential development that used covenants establishing a minimum value for all homes in the development, would have to check on each neighbor to ensure that he kept all property taxes up to date. If taxes were delinquent on a parcel, then the neighborhood would have to decide how those taxes would be brought up to date. The question that arises is: who should pay? Since the covenant benefits all members of the development, should the homeowner's association pay the delinquent taxes or should individuals take turns making the payments? Finally, how can the party or entity paying the taxes get reimbursed by the property owner? The practical application of the court's analysis creates many such problems.

If one lot is sold for delinquent taxes, according to the court's analysis, then the covenant is extinguished and the new property owner is free to construct lower priced homes. The result is the possible lowering of adjacent property values as well as the destruction of the general scheme of the neighborhood. Harmon, 1 Wash. 2d at 12, 94 P.2d at 754 ("The owner of any easement or similar right has ample opportunity to protect himself in its enjoyment. The burden properly rests upon him to do so."); but see Hayes v. Gibbs, 110 Utah 54, 67, 169 P.2d 781, 788 (1946) (citing Alamogordo Improvement Co., 43 N.M. at 254, 91 P.2d at 433, 122 A.L.R. 1277; State ex rel. Koeln v. West Cabanne Imp. Co., 278 Mo. 310, 213 S.W. 25 (1919); Schlafly v. Baumann, 341 Mo. 755, 764, 108 S.W.2d 363, 368 (1937)).
ties' expectations.\textsuperscript{34}

In addition, the method of protecting servitutes suggested by the court in Hanson is impractical to apply. In Hanson, the court suggested that anyone wishing to protect an interest in an easement could have that interest segregated and taxed separately.\textsuperscript{35} The segregation of interests may have been appropriate under facts such as Hanson, where only two parties were involved.\textsuperscript{36} However, when applied to a large housing development, which may include hundreds or thousands of people, the segregation of interests between parties is not practical.\textsuperscript{37} The Washington court's historical approach to priority of tax deeds and tax foreclosure sales is not practical when overall societal costs are taken into consideration.

On the other hand, the majority doctrine that was developing at the same time as Washington's priority approach produced a more favorable result.\textsuperscript{38} The majority position is based on a tax assessment theory.\textsuperscript{39} The tax assessment theory focuses on a different portion of the typical taxation statute than Washington's priority approach.\textsuperscript{40} The assessment theory focuses on the actual assessed value of property on which the

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\textsuperscript{34} See generally Comment, Extinguishment of Easements and Other Interests by Tax Sale of Delinquent Property, 20 U. CHI. L. REV. 262, 272 (1953)).
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\textsuperscript{35} 66 Wash. at 83-84, 118 P. at 928; Harmon, 1 Wash. 2d at 10, 94 P.2d at 753; see supra note 26.
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\textsuperscript{36} Hanson, 66 Wash. 81, 118 P. 927.
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\textsuperscript{37} See supra note 33.
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\textsuperscript{39} The leading case defining the tax lien assessment theory is Tax Lien Co., 213 N.Y. 9, 106 N.E. 751; the tax lien assessment theory is also the approach accepted by the RESTATEMENT OF PROPERTY § 509 comment a (1944); see generally Kratovil, Tax Titles: Extinguishment of Easements, Building Restrictions, and Covenants, 19 Hous. L. REV. 55 (1981); Comment, Extinguishment of Easements and Other Interests by Tax Sale of Delinquent Property, 20 U. CHI. L. REV. 262 (1953).
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\textsuperscript{40} In Hayes, the court concentrates on the portion of the taxation statute setting forth the criteria for establishing the value of the assessed property. "The assessors in this State are required to appraise all taxable property 'at its full cash value.'" Hayes, 110 Utah at 63, 169 P.2d at 786. The case makes no mention of the priority status of the tax lien. Washington's statute regarding valuation by the tax assessor is very similar to the statute cited in Hayes: "All property shall be valued at one hundred
tax lien is based. The only interests transferred by a tax title are those interests assessed in the value of the property. Any interest not assessed would not be transferred by the tax deed and would remain in effect.

Applying this assessment approach to servitudes, the courts reasoned that the burden of a servitude would tend to lower the assessed value of the servient estate, resulting in a lower tax liability. In effect, the servitude was carved out of the land being taxed and would not be extinguished by a tax foreclosure sale. On the other hand, the benefit of the servitude would enhance the value of the dominant estate and result in an increased tax liability. The interest in the servitude would, accordingly, be passed on through a tax deed of the dominant estate. The state would receive the appropriate amount of tax since the lower assessed value of the servient estate was offset by the increased assessed value of the dominant estate; thus the servitude would remain intact.

percent of its true and fair value in money and assessed on the same basis . . . .” WASH. REV. CODE § 84.40.030 (1987); cf. supra note 20 and accompanying text.

41. “[T]he assessment is the basis of the tax title and only that interest which was properly assessed can be sold.” Hayes, 110 Utah at 63, 169 P.2d at 786.

42. “If property rights which are not included in an assessment are sold or extinguished by a tax sale, there would be a taking of property without due process of law.” Id.

43. Id.

44. In Hayes, the servitudes at issue were restrictive covenants establishing (1) a minimum value for residences constructed in the area, (2) a twenty foot set-back from property lines for all building construction, and (3) a rejection of any building for business purposes. Id. at 56, 169 P.2d at 782. The tax assessment approach was originally based on an easement analysis. Tax Lien Co., 213 N.Y. at 10, 106 N.E. at 752. However, the general theory is just as appropriate when applied to real covenants, either restrictive or affirmative. A real covenant produces a benefit and a burden that would raise or lower assessed values in the same manner as an easement.

45. A servient estate is defined as an estate in respect of which a service is owing as opposed to the dominant estate which is that estate to which the service is due. Northwestern Improvement Co., 104 Mont. at 302, 66 P.2d at 795.

46. In Hayes, the court presumed that the assessor took such burdens into consideration when establishing the value of a particular parcel of land. The court presumed that property assessed without regard to interests such as easements or covenants would be in complete disregard of the fair cash valuation required by statute. Hayes, 110 Utah at 64, 169 P.2d at 786; see supra note 40.

47. Id. at 64, 169 P.2d at 786.

48. For the definition of dominant estate, see supra note 45.


50. See supra note 42 and accompanying text.

51. Assuming that the assessed value of the dominant estate does increase in value and results in an increased tax liability, a double taxation problem could arise. If a
Although the majority approach protects the expectations of the parties as to the use of servitudes for land use control, the practical application of the majority rule is not wholly satisfactory. The administrative burden on the taxing authority would substantially increase if assessors were required to consider all servitudes when valuing property. Determining the existence of an easement or covenant can be quite time-consuming. The tax assessor may have physical evidence of an easement burdening the servient estate, but in most cases the assessor would have to examine the records to determine the existence of covenants or locate dominant estates. If done properly, the extra effort required to acquire and maintain the appropriate information and records could be staggering. Accordingly, there is doubt whether the tax assessing process actually takes such interests into consideration.

The tax assessment theory is based on rationale opposite to that used in support of Washington's tax lien priority position. Under the tax assessment theory, the courts do not consider the rule burdensome to the tax collection system because in order to comply with the tax valuation statutes, the servitudes need to be identified by the taxing authority anyway. Interests that affect the fair cash value of property must be examined in order to obtain a valid appraisal and any other approach would violate the property tax laws. The only burden that the courts considered meaningful was the burden on

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52. See supra note 26 and accompanying text.

53. Additional manpower would most likely be required to continually update records and provide title searches, in order to keep assessors informed as to what exactly is being assessed.

54. Easements providing ingress and egress to isolated tracts of land are often physically visible and, therefore, provide physical notice of their existence to both the servient and dominant estates. On the other hand, a real covenant establishing a minimum construction value for buildings or a real covenant requiring that land owners pay dues to homeowners’ associations does not necessarily leave a physical residue that might put a tax assessor on notice as to their existence. Consequently, the assessor may have to search title records to determine if a covenant exists.


56. Hayes, 110 Utah at 63-65, 169 P.2d at 786.
the landowners if they were forced to keep track of other parcels of land to make sure tax payments were kept up to date.\textsuperscript{57}

On the other hand, Washington's priority theory considers only the burden on the taxing authority.\textsuperscript{58} Whichever approach is taken, the final outcome seems to result from underlying policy considerations.\textsuperscript{59} The majority's result would seem favorable to the chaos that could result if servitudes were eliminated as land use planning tools.\textsuperscript{60}

Many states are now taking a better approach to the problem through statutory reform.\textsuperscript{61} Those states are enacting statutes that allow easements and real covenants to continue after a tax foreclosure sale regardless of whether the interests were considered during the assessment process.\textsuperscript{62} The statutory method has the advantage of eliminating most of the problems associated with either the tax lien priority theory or the tax assessment theory.\textsuperscript{63} The property tax system is a legislative creation and the legislature has the authority to dictate how the system should work. However, the specific wording of the statutes must be carefully drafted. Some poorly drafted statutes, such as Washington's, refer only to easements while others address only restrictive covenants.\textsuperscript{64} To be completely

\textsuperscript{57} Id. at 67, 169 P.2d at 788 (citing Alamogordo Improvement Co. 43 N.M. 245, 91 P.2d 433; State ex rel. Koeln, 278 Mo. 310, 213 S.W. 25; Schlaflly, 341 Mo. 755, 108 S.W.2d 363).

\textsuperscript{58} See supra note 17 and accompanying text.

\textsuperscript{59} Comment, Extinguishment of Easements and Other Interests by Tax Sale of Delinquent Property, 20 U. Chi. L. Rev. 262, 272 (1953).

\textsuperscript{60} See supra notes 30-32 and accompanying text.

\textsuperscript{61} By addressing the issue of tax sales and servitudes through a statutory route, the problems encountered in both Washington's historical approach and the majority's tax assessment approach can be eliminated. Statutes can be enacted that simply allow servitudes of all kinds to continue in effect after the property with which they are associated is sold at a tax foreclosure sale. Public policy can be furthered with no consideration as to whether the servitudes were or were not assessed in the valuation process. See Kratovil, Tax Titles: Extinguishment of Easements, Building Restrictions, and Covenants, 19 Hous. L. Rev. at 66-72.


\textsuperscript{63} See supra text accompanying notes 28-37 and 52-55.

effective, the statute should refer to all forms of servitudes.\footnote{65. The Illinois statute is an example of a well-written statute taking into consideration all forms of servitutes. The Illinois statute states:

No tax deed issued with respect to any real property sold pursuant to this Act extinguishes or affects any easement, covenant running with the land or right-of-way for water, sewer, electricity, gas, telephone or other public service use which was created, on or over that real property before the time that real property was sold pursuant to this Act and which is evidenced either by a recorded instrument or by wires, poles, pipes, equipment or other public service facilities. Where the real property described in a tax deed issued pursuant to a sale under this Act is a dominant or a servient tenement with respect to any private easement or easements, bona fide created expressly or by operation of law for the benefit of a dominant tenement or tenements, that tax deed shall operate with respect to the easement or easements in the same manner and with like effect as a deed of conveyance made by the owner or owners of the property described in the tax deed, just prior to the issuance of such deed to the grantee in the tax deed.

This Section does not apply to the issuance of a tax deed resulting from failure of the owner of any such easement, covenant running with the land or right-of-way to pay taxes or special assessments assessed to that owner for that easement, covenant running with the land or right-of-way.

\textit{ILL. STAT. ANN. ch. 120, § 747(b)} (Smith-Hurd 1970) (emphasis added).}

B. Post-1959 Statutory Approach

In 1959, the Washington legislature enacted a statute that aligned Washington with the majority of states and stated that a tax foreclosure sale did not extinguish easements on the property being sold.\footnote{66. See supra notes 38 and 62.} The Washington statute states:

The general property tax assessed on any tract, lot or parcel of real property includes all easements appurtenant thereto, provided said easements are a matter of public record in the auditor's office of the county in which said real property is situated. Any foreclosure of delinquent taxes on any tract, lot or parcel of real property subject to such easement or easements, and any tax deed issued pursuant thereto shall be subject to such easement or easements, provided such easement or easements were established of record prior to the year for which the tax was foreclosed.\footnote{67. WASH. REV. CODE § 84.64.460 (1987).}

This statute is a codification of the previously discussed tax assessment theory.\footnote{68. WASH. REV. CODE § 84.64.460 (1987).} The statute removes any question as to whether an easement is included in the assessed value of the servient estate and specifically makes tax deeds subject to appurtenant easements of record.\footnote{69. WASH. REV. CODE § 84.64.460 (1987).} Unlike statutes of other
states, the Washington statute does not go far enough. The statute addresses only appurtenant easements and situations where the servient estate is sold for taxes. The statute does not address the effect of the sale of a dominant estate or the effect a tax sale will have on other types of servitutes such as real covenants.\textsuperscript{70} The statute could have addressed these issues; but now judicial input is required to clarify these deficiencies.

Prior to \textit{Palzer}, there was only one case that had applied section 84.64.460 of the Revised Code of Washington. In \textit{Clippinger v. Birge},\textsuperscript{71} the court was called upon to fill in one of the deficiencies in the statute by deciding whether the statute was meant to apply to the tax sale of a dominant estate. The court held that the legislature had intended to pass a tax deed subject to servient easements appurtenant together with dominant easements appurtenant to the estate sold.\textsuperscript{72} The holding in this opinion is consistent with the overriding public policies requiring preservation of easements.\textsuperscript{73} \textit{Clippinger} brought Washington one step closer to the general protection of servitutes from tax foreclosure sales. However, the courts still faced the problem of determining the fate of real covenants.\textsuperscript{74} Should Washington courts revert to the old tax lien priority analysis\textsuperscript{75} with regard to real covenants, or should the court accept the more practical protection policy embodied in the easement statute? This was one issue before the court in \textit{Olympia v. Palzer}.\textsuperscript{76}

\textsuperscript{70} See supra text accompanying note 67. On the other hand, easements in gross established for public utilities are addressed separately from appurtenant easements under the following Washington Statutes: \textit{Wash. Rev. Code \S 84.20.010} (1987) (easements taxable as personalty); \textit{Wash. Rev. Code \S 84.20.020} (1987) (servient estate taxable as realty); \textit{Wash. Rev. Code \S 84.20.030} (1987) (sale for taxes—realty to be sold subject to easements); \textit{Wash. Rev. Code \S 84.20.040} (1987) (realty not subject to tax on easements or property thereon). These statutes are based on a similar analysis to \textit{Wash. Rev. Code \S 84.64.460} (1987). See also \textit{Restatement of Property \S 509(1)} (1944) (in order to protect an easement in gross from extinguishment by a tax foreclosure sale, the easement must be covered by a duly authorized separate tax).

\textsuperscript{71} 14 Wash. App. 976, 547 P.2d 871 (1976).


\textsuperscript{73} See supra notes 30-32 and accompanying text.

\textsuperscript{74} See supra text accompanying note 70.

\textsuperscript{75} See supra text accompanying notes 20-21.

\textsuperscript{76} 107 Wash. 2d at 229, 728 P.2d at 137.
III. OLYMPIA V. PALZER: WASHINGTON'S ATTEMPT TO MODERNIZE

A. Facts and Holding of the Court

In 1969, the Evergreen Park Planned Unit Development (PUD) was created in Olympia.\(^{77}\) The Evergreen Park PUD is an integrated development, containing a combination of multi-family residential and commercial units.\(^{78}\) The development plan contained a number of easements and covenants designed to control building development and to maintain the original plan.\(^{79}\) Included in the covenants were building restrictions that required four tracts of land within the development to be set aside as natural greenbelt areas.\(^{80}\) The covenants required these tracts, referred to as tracts A, B, C, and D, to be maintained in their natural condition to beautify the entire development.\(^{81}\)

Evergreen Park, Inc., the developers of the PUD, retained tracts A and D.\(^{82}\) For a number of years prior to the final tax sale, the developers failed to pay the property taxes on these two tracts.\(^{83}\) As a result, Thurston County instituted a tax foreclosure and scheduled the tracts for sale in 1981.\(^{84}\) The county postponed the original sale for one year at the request of some residents of the development in order to allow the residents time to purchase the tracts and pay the taxes.\(^{85}\) Negotiations failed and one year later, in 1982, tracts A and D were

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77. Plat of Evergreen Park recorded October 20, 1969, Thurston County Auditor's Office Vol. 16 of Plats, 61-62. A PUD is defined as:

An area with a specified minimum contiguous acreage to be developed as a single entity according to a plan, containing one or more residential clusters or planned unit residential developments and one or more public, quasi-public, commercial or industrial areas in such ranges of ratios of nonresidential uses to residential uses as shall be specified in the zoning ordinance.

BLACK'S LAW DICTIONARY 1036 (5th ed. 1979).

78. Plat of Evergreen Park recorded October 20, 1969, Thurston County Auditor's Office Vol. 16 of Plats, 61-62.


80. Id. (Article III provided that the covenants would run with the land and be binding for a period of 25 years with automatic extensions for two additional ten year periods).

81. Id.

82. Brief for Appellants at 8, Palzer, 42 Wash. App. 751, 713 P.2d 1125.

83. Brief for Appellants at 12.

84. Id. at 8.

85. Id.
Chris Palzer purchased the two tracts for the sum of $4,401.19, which included all back property taxes and any additional fees established by the Thurston County Treasurer. The tax sale agenda contained a notice of the restrictive covenants imposed by the general building plan; therefore, there is no question that Palzer knew of the restrictions before purchasing the tracts. In February 1983, Palzer sold the tracts to a developer for the sum of $135,000.

The city of Olympia brought suits based on issues not relevant to this article, seeking to rescind and declare void the original tax sale by the county to Palzer. The trial court held that the sale was valid. However, as a side issue, the court ruled that the covenant restricting use of the tracts was valid and was not extinguished by the tax sale.

The court of appeals upheld the trial court's ruling regarding the restrictive use covenants. The court referred to the issue as one of first impression in Washington and then supported the holding with two out-of-state cases which held that restrictive covenants constitute easements that are not extinguished by a tax foreclosure sale. The court made no attempt to explain Washington's historical tax lien priority analysis and gave no reason why restrictive covenants should constitute easements. The court simply adopted the easement analysis

86. Id. at 12.
88. Palzer, 107 Wash. 2d at 227, 728 P.2d at 136.
89. Id.
90. The city of Olympia brought suit basing its original action on City Ordinance 3776. This ordinance was enacted in 1973 and incorporated the restrictive use covenants that established green belt areas. In addition, the ordinance provided further restrictions as to ownership of lots A, B, C, and D. Brief for Respondent at 7, Palzer, 42 Wash. App. 751, 713 P.2d 1125. The court of appeals held that the ownership restrictions in the ordinance were void and ruled on the issue of green belt restrictions as simple covenants rather than based on the city ordinance. Palzer, 42 Wash. App. at 754 n. 4, 713 P.2d at 1127 n. 4. The Washington Supreme Court did not address any issues regarding the validity of the ordinance. Palzer, 107 Wash. 2d at 228, 728 P.2d at 136.
91. Palzer, 42 Wash. App. at 754, 713 P.2d at 1127.
92. Id. (citing Hendley v. Overstreet, 253 Ga. 136, 318 S.E.2d 54 (1984) (restrictive covenants, requiring a tract of land to remain as a park for recreational purposes, created an irrevocable easement and easements are not cut off by tax sales); Halpin v. Pouhster, 59 N.Y.S.2d 338 (1945) (a restrictive covenant, establishing a thirty foot setback from the street for construction of buildings was an easement and thus not extinguished by a tax foreclosure sale)); see also supra note 39 and accompanying text.
93. Palzer, 42 Wash. App. at 754, 713 P.2d at 1127.
and then concluded, stating:

This result is consistent with common sense and sound policy. It is self-evident that restrictive covenants that run with the land are intended to burden as well as to benefit all tracts to which they apply. Invalidating them as to any tract sold for a tax delinquency would result in adversely affecting the value of all other tracts to which they are subject.94

This reasoning is consistent with the policy underlying the majority approach, which is based on the tax assessment theory discussed previously.95

The Washington Supreme Court affirmed the decision of the court of appeals.96 However, unlike the court of appeals, the supreme court attempted to address Washington's previous approach to the issue. The court cited previous Washington cases that allowed tax foreclosure sales to extinguish easements and restrictive covenants, but then distinguished them as taking place prior to 1959 and the enactment of section 84.64.460 of the Revised Code of Washington.97

Next, the court analogized restrictive covenants to negative easements and held that "[i]n PUD's, restrictive covenants are the same as negative easements because they curtail the rights of the owner of the servient tenement in favor of the owners of all of the dominant tenements."98 Once the court determined the restrictive covenants to be easements, section 84.64.460 of the Revised Code of Washington required that Palzer's tax deed be subject to those restrictive covenants. However, by using the easement analogy, the court severely restricted the utility of this case to protect other forms of real covenants.

On the other hand, the court did acknowledge some general policy considerations. In dicta, the court stated that if restrictive covenants were extinguished by a tax sale, the

94. Id.
95. See supra note 39 and accompanying text.
96. Palzer, 107 Wash. 2d at 232, 728 P.2d at 138.
97. Id. at 229-231, 728 P.2d at 137-38, (citing Brown, 49 Wash. 2d at 210, 299 P.2d at 564; Harmon, 1 Wash. 2d at 10, 94 P.2d at 749; Messett, 194 Wash. at 658, 79 P.2d at 337; Hanson, 66 Wash. at 83, 118 P. at 927). The enactment of the statute in 1959 would explain the requirement for a different outcome regarding easements. Nevertheless, the existence of the statute does not completely explain why real covenants should now be protected. The statute refers only to appurtenant easements of record and does not mention real covenants. See supra text accompanying note 67.
98. Palzer, 107 Wash. 2d at 230, 728 P.2d at 137.
planned character of Evergreen Park and the expectations of the homeowners would be defeated.\footnote{Palzer} is the first case where the Washington Supreme Court recognized the general policy considerations behind protecting servitudes. It indicates a step toward accepting the majority viewpoint, which mandates continuing all servitudes after tax foreclosure sales.

\textbf{B. The Ramifications of Palzer}

The Washington Supreme Court’s decision in \textit{Palzer} is a much needed step toward accepting and supporting the reality of modern land use planning.\footnote{The court properly rejected its historical analysis established in the pre-1959 cases as destructive of modern planned developments and the general expectations of property owners.} The court’s research is aimed at showing the close similarities between restrictive covenants and easements.\footnote{By analogizing negative easements and restrictive covenants, the court can produce a desired outcome while taking advantage of a shortcut afforded to them by statute.} \textit{Palzer} is the first case since 1938 to address the effect of a tax foreclosure sale on covenants.\footnote{Once a servitude can be defined as an easement, the problem becomes moot because statutory authority requires easements to continue after tax foreclosure sales.} Since the pre-1959 cases were all hindered by the archaic tax lien priority theory,\footnote{The problem with the easement analogy is that it produces a holding that is unnecessarily narrow and restrictive. The} \textit{Palzer} presented an excellent opportunity for the Washington Supreme Court to align itself with the modern approach of preserving all forms of servitudes.

The holding in \textit{Palzer}, however, is based solely on an analysis that determines that restrictive covenants are equivalent to negative easements and, therefore, not extinguished by reason of statutory authority.\footnote{The court’s research is aimed at showing the close similarities between restrictive covenants and easements.} The problem becomes moot because statutory authority requires easements to continue after tax foreclosure sales.\footnote{See supra text accompanying notes 38, 62, 63.}

\footnote{Id. at 231, 728 P.2d at 138. For an example of homeowner’s expectations as a policy consideration, see supra note 30 and accompanying text.}
\footnote{100. 107 Wash. 2d 225, 728 P.2d 135.}
\footnote{101. See supra notes 15-21 and accompanying text.}
\footnote{102. See supra note 10 and accompanying text.}
\footnote{103. See supra notes 15-21 and accompanying text.}
\footnote{104. 107 Wash. 2d at 229-30, 728 P.2d at 137.}
\footnote{105. Id.}
\footnote{106. See supra text accompanying notes 38, 62, 63.}
\footnote{107. See supra note 67 and accompanying text.}
Palzer holding will protect covenants from tax sales only as long as those covenants can be analogized to easements.\textsuperscript{108} This is not to say that the court's analysis was incorrect. There is substantial authority to analogize restrictive covenants to easements and the final outcome in Palzer is more than supported by public policy.\textsuperscript{109} Nevertheless, by relying completely on the easement rationale, the fate of other forms of servitudes remains uncertain.

The Palzer court left the following question unanswered: what will happen when a real covenant that cannot be slipped in under an easement analysis is threatened with destruction from a tax foreclosure sale? For example, would an affirmative covenant such as a requirement to pay homeowners' association dues, or to maintain property in a certain state of repair, be extinguished by a tax foreclosure sale?\textsuperscript{110} When a covenant imposes an affirmative duty upon the covenantor, it is not possible to construe the covenant as an easement.\textsuperscript{111}

\textsuperscript{108} 107 Wash. 2d at 229-30, 728 P.2d at 137; see infra text accompanying notes 111-12.

\textsuperscript{109} See supra note 99; see also Alamogordo Improvement Co., 43 N.M. at 248, 91 P.2d at 430-31, 122 A.L.R. 1277; Northwestern Improvement Co., 104 Mont. at 301, 66 P.2d at 794, 110 A.L.R. 605; Annotation, Easements or Servitude or Restrictive Covenant as Affected by Sale for Taxes, 168 A.L.R. 529, 536 (1947).

\textsuperscript{110} Today, typical provisions of residential development schemes call for common areas in the subdivision to be operated by an association of homeowners. The declaration of covenants and restrictions often calls for mandatory membership in the association for all unit owners and for the payment by each lot owner of periodic charges for maintenance within the development and provides for the imposition of special assessments for repairs or improvements. Other covenants may call for submission of plans for new buildings or renovations to an architectural control committee set up by the association, and for the proper maintenance of his property by the individual lot owner.

\textsuperscript{111} The creation of an easement appurtenant operates to transfer some of the rights, powers, privileges, and immunities from the owner of the servient land to the owner of the dominant land. Therefore, the easement is itself an interest in the land of the servient owner, and its creation requires no privity of estate relationship between the parties. . . . On the contrary, a real covenant transfers no property interest in the burdened land to the covenantee, but creates in him a contractual right \textit{in personam} against the burdened landowner. Since in the case of easements the rights of the dominant landowner are rights \textit{in rem}, the duties of the servient landowner are purely negative in character. . . . Whenever a covenant imposes purely negative duties upon this covenantor, it is impossible for the court to construe the covenant as an easement so as to escape the necessity for privity of the estate between the parties.

\textsuperscript{2} \textit{American Law on Property} 9.12 (A. Casner ed. 1952) (footnotes omitted).
Therefore, based strictly on the Palzer analysis, it is still possible for a court to extinguish affirmative covenants under the old tax lien priority theory.\textsuperscript{112}

However, affirmative covenants are supported by the same general public policy arguments that require easements to be protected. To allow them to be extinguished by a tax foreclosure sale does as much damage to land use planning schemes and property owner's expectations as the destruction of easements.\textsuperscript{113} Often affirmative covenants are made part of easement grants in order to facilitate the easement.\textsuperscript{114} If the easement is to be preserved against destruction by a tax sale, then it stands to reason that a covenant that makes up a part of that easement should also be preserved.\textsuperscript{115} The narrow holding of Palzer is not capable of supporting such a result.

Even though the Palzer analysis is narrow, the court's acknowledgement of the overriding public policy supporting the general protection of all forms of servitudes does provide a positive starting point for future litigation. The Palzer court's acceptance of the policy is apparent in its statement that, "[i]f these restrictive covenants were extinguished by the tax foreclosure sale, the planned character of Evergreen Park, the expectations of homeowners and statutory authority would be defeated." The next step will be to push the policy considerations beyond dicta. Real covenants, regardless of their nature as either restrictive or affirmative, are equally necessary as land use planning tools and require equal protection from extinguishment under tax foreclosure sales.

**IV. Conclusion**

The decision in Olympia v. Palzer is a step in the right direction for the Washington courts regarding tax sales and their effect on servitudes. However, the court's reasoning fails to go far enough.

\textsuperscript{112} See Lake Arrowhead Club v. Looney, 50 Wash. App. 238, \_ \_ P.2d \_ (1988). Looney, decided just prior to publication of this Note, is an example of the inappropriate consequences resulting from the courts' continued reliance on the old tax lien priority theory. See supra notes 20-21 and accompanying text.

\textsuperscript{113} See supra notes 30-32 and accompanying text.


\textsuperscript{115} See supra note 114.

\textsuperscript{116} Palzer, 107 Wash. 2d at 231, 728 P.2d at 138.
In the past, Washington courts have subscribed to an outdated theory, which established tax deeds as superior to all other forms of liens or encumbrances including easements and servitudes of any kind. This approach produced a severe hardship on land use plans that utilized servitudes to control land development and create better living environments. The situation was partially remedied in 1959 with the passage of statutory authority recognizing the importance of easements, but the statute failed to take into consideration other forms of servitudes. Thus, the burden still remains on the courts to provide the necessary analysis to protect servitudes other than easements.

The *Palzer* holding provides some of that protection. Based on an easement analogy, the court has now answered the question as to restrictive covenants. Nevertheless, the fate of affirmative covenants is still questionable. If future litigation takes a more generalized approach and focuses on the public policy approach instead of a narrow easement analysis, all forms of covenants including affirmative covenants could enjoy the protection that is due these necessary and practical land use planning devices.

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