101908-4

No. 83761-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RICHMOND JPJ ENTERPRISES, INC. and NIELSEN BROTHERS, INC.

Appellants,

vs.

THE LAKE TRUST,

Respondent.

PETITION FOR REVIEW

Peter R. Dworkin, WSBA# 30394
Belcher Swanson Law Firm, PLLC
900 Dupont Street
Bellingham, WA 98225
(360) 734-6390
pete@belcherswanson.com
Attorney for Appellants

Cases

Statutes

Rules

I. Identity of Petitioners.

Petitioners Richmond JPJ Enterprises, Inc. and Nielsen Brothers Inc. were defendants in the trial court and respondents in the Court of Appeals.

II. Court of Appeals Decision.

Petitioners seek review of the Court of Appeals' unpublished decision filed February 13, 2023, which was followed by the Court of Appeals' denial of Petitioner's Motion to Publish, in an order entered March 17, 2023. A copy of the Court of Appeals decision is attached hereto as Appendix A and the Order Denying Motion to Publish as Appendix B.

III. Issue Presented for Review.

The Court of Appeals' reversal of the trial court's entry of judgment in favor of Petitioners after a bench trial raises the following issue for review:

1. Did the Court of Appeals err when it held that the trial court improperly considered extrinsic evidence in interpreting and applying a restrictive covenant on real property which was adopted over 70 years earlier?

IV. Statement of the Case.

The underlying facts and history of the real property at issue are described in great detail in Respondents' Brief filed in the Court of Appeals, citing the trial court's findings of fact. *See*, Brief of Respondents at 4-33 (Attached hereto as Appendix C).

A. The Plat and Restrictive Covenant.

Richmond JPJ Enterprises, Inc. ("JPJ") and The Lake Trust both own parcels of real property located within the Lake Cavanaugh Subdivision in Skagit County. The Lake Cavanaugh Subdivision ("Plat") is comprised of approximately 766 lots having been platted in three separate "divisions" recorded between 1946 and 1948:

Division 1 in June 1946 (208 lots), Division 2 in September 1946 (314 lots), and Division 3 in July 1948 (244 lots). The property owned by JPJ and The Lake Trust are within Division 3 of the Plat ("Plat Div. 3").

When Plat Div. 3 was recorded in 1948, the declarant listed three numbered "Restrictions" on the face of the Plat, quoted as follows:

1. No noxious or offensive trade shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance to the neighborhood;

2. No race or nationality other than white or Caucasian race shall use or occupy any building on any lot except that this covenant shall not prevent occupancy by domestic servants of a different race or nationality employed by an owner or tenant;

3. No lots shall be used for commercial business or manufacturing purposes;

("Plat Restrictions"). All three divisions of the Plat contain similar restrictions on the face of each recorded plat map,

with some minor word variations. No separate document containing restrictive covenants or explaining the above restrictions was recorded, and Plat Div. 3 contains no definitions or other explanation of the intended meaning of the Restrictions.

The Plat has two main roads that circumnavigate Lake Cavanaugh's shores—South Shore Drive and North Shore Drive. Most of the residences in the Plat are vacation or seasonal homes. Many lots within the Plat are vacant, wooded lots with no residences, particularly those on the non-lake side (also called "back lots").

The lands abutting and surrounding virtually all of Lake Cavanaugh Divisions 1, 2, and 3 are primarily managed for timber cultivation and harvest and owned mostly by DNR and private timber companies. Both North and South Shore Drive are, and have been, used by log trucks and equipment to transport timber (and equipment

necessary for harvesting timber). South Shore Drive is the main haul road for log trucks in the Lake Cavanaugh area bringing timber to the Hampton mill in Darrington and the Sierra Pacific mill in Burlington. Logging operations take place in forest lands surrounding Lake Cavanaugh every year, and have for nearly 100 years.

The trial in this case was about the interpretation and enforcement of Plat Restriction No. 3[1] as it related to JPJ's use of the JPJ Property.

B. Use of the JPJ Property.

JPJ is a real estate holding company, owned by brothers Robert and David Nielsen. Robert and David also own Nielsen Brothers Inc. ("NBI"), a logging and contracting company focusing on timber harvesting,

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1 Plat Restriction No. 1 was not raised by The Lake Trust, and Plat Restriction No. 2 is of course void as a matter of law pursuant to RCW 49.60.224.

replanting, forest road construction, and rock crushing. Two other entities (non-parties in the lawsuit) affiliated with Robert and David Nielsen own approximately 276 acres of forest land abutting the southern side of Plat Div. No 3 ("Timberlands").

The JPJ Property abuts South Shore Drive on its northern boundary, and the Timberlands on its southern boundary. JPJ received a Forest Practices Act Permit ("FPA") to haul logs from the Timberlands, through the JPJ Property, to South Shore Drive, using an old logging/haul road located on it (a significant fact detailed further below). Work under that FPA took place and was completed in the summer of 2022.

C. The Lake Trust Property and Robert McCullough.

The Lake Trust (Robert McCullough, Trustee) owns two lots in Div. 3 of the Plat, located approximately one-half mile from the JPJ Property. One of the lots is waterfront,

abutting the shores of Lake Cavanaugh with a vacation home on it, and the other lot is a vacant "back lot" on the south side of South Shore Drive, and is vacant ("The Lake Trust Property"). The Lake Trust purchased the Lake Trust Property in 2004 and remodeled the cabin into a vacation home in 2006.

Robert McCullough is on the board of a non-profit named "The Lake Cavanaugh Trust" which is not affiliated with the Lake Trust that is a named party to this case. The stated mission of The Lake Cavanaugh Trust is to "stop all logging above south shore on Frailey Mountain [sic]." The Lake Cavanaugh Trust's website goes on to outline all of its legal efforts opposing the permitted logging by Respondent, pointing out that "The Trust and Bob McCullough have joined forces, creating a two-prong effort to stop or severely limit Nielsen Brothers attempt to log Frailey Mountain."

If The Lake Trust and McCullough are ultimately successful in stopping the use of the JPJ Property for removal of timber, the alternative (which may not be possible, and if so, will be extremely expensive) would have log trucks traversing an unopened right of way and entering South Shore Drive significantly closer to The Lake Trust Property than the current route. Point being: The Lake Trust's lawsuit will increase any potential impact on its property, not decrease it. This was undisputed at trial.

D. Historical Evidence the Trial Court Rightly Considered which the Court of Appeals Rejected.

The parties stipulated to many of the historical and background facts in this case, which the trial court adopted as its own. The trial court of course also entered additional findings. The long history of logging around Lake Cavanaugh and the use of South Shore Drive as a haul road was undisputed at trial. That history was given great

attention by the trial court and was thoroughly outlined in briefing below. Thus, only a short snippet of it will be provided here.

In the early 1920's, the English Lumber Company and its affiliates owned virtually all of the thousands of acres of old growth timber in the areas surrounding Lake Cavanaugh. The English Lumber Company established logging camps on both the west and east ends of Lake Cavanaugh. During the 1920's and 1930's, the English Lumber Company logged a majority of the old growth timber surrounding the lake. Today, approximately 62 acres of old growth timber remains in the Timberlands owned by NBI and its affiliates—which will of course remain untouched.

Prior to 1945, the primary use of the area surrounding Lake Cavanaugh was logging, done almost exclusively by the English Lumber Company. Logging at

that time was dependent on railroads, and a vast system of logging railroads existed in this area. English Lumber Company ran a railroad that circumnavigated the entire Lake, for the purpose of hauling logs. This railroad ran through and along much of the Timberlands, as well as the land that would eventually become the Plat. Robert Nielsen has personally walked the Timberlands and seen evidence of these old railroads—grades, marks where the ties were, old logging and railroad debris.

On January 1, 1945, the English Lumber Company sold its entire operation to Puget Sound Pulp and Timber Company and conveyed all of the timber properties it owned around Lake Cavanaugh. However, English Lumber Company retained ownership of the land directly surrounding Lake Cavanaugh ("Lake Cavanaugh Lands"). The Lake Cavanaugh Lands essentially make up the property that would eventually be platted as Lake

Cavanaugh Subdivision, Divisions 1, 2 and 3. The Lake Cavanaugh Lands were eventually deeded to one Leslie Eastman, who ultimately developed the Plat and imposed the Restrictions at issue here.

The transactions and title history involving the Lake Cavanaugh Lands, Leslie Eastman, the Puget Sound Pulp and Timber Company, and the surrounding timber properties (including the Timberlands owned by NBI) are all outlined in the record, as best as possible. Those records are replete with evidence of Puget Sound Pulp and Timber taking steps to preserve its rights to haul logs from the upland timber properties through the Lake Cavanaugh Lands to remove timber.

Between June 1946 and July 1948, most of the Lake Cavanaugh Lands were platted into the three Divisions of the Lake Cavanaugh Plat. The face of Plat Div. No. 3, on the "Title Certificate" specifically notes the Plat Div. 3 is

subject to easements to “the Puget Sound Pulp and Timber Company.”

As a result of the above history, the trial court held in Finding of Fact No. 10:

> “Because Leslie Eastman was aware of the January 1, 1945 Agreement, PSPT's logging operations in the timberlands, and PSPT's continued rights of way over what was to become Subdivision 3 when he created the subdivision, it was his intention to exclude logging transit to and from the timberlands from the term "commercial business."

This unchallenged finding[2] was not only based upon the historical evidence leading up to the recordation of the plat, but it was also based upon the historical evidence of how lots within the Plat were historically used thereafter.

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[2] On Appeal, this finding of fact was not properly challenged by the Lake Trust under RAP 10.3(g). However, the Court of Appeals elected to exercise discretion to review this finding and reverse the trial court’s conclusions of law based upon it. *See,* Appendix A (Slip Opinion) at pg. 10-11.

Through the late 1940's and into the early 1950's, Puget Sound Pulp and Timber Company transitioned from railroad logging to trucking. The railroad that circumnavigated Lake Cavanaugh was eventually removed, but the railroad grades remained. By the mid 1950's, all railroad logging operations had ceased and had been converted to truck logging. Most of the old railroad grades were converted to truck roads.

These truck roads paralleled South Shore and North Shore Drive and were connected to the Skagit County public road system around Lake Cavanaugh, including South Shore Drive. The trial court specifically found that the road on the JPJ Property was actually one of these old truck roads used to haul logs from the timberland, through the Richmond JPJ Property, to the county road. These

events occurred *after* the Plat was recorded.[3]

In the early 1960's, Puget Sound Pulp and Timber Company sold all assets, including Lake Cavanaugh operations, to Georgia-Pacific Corp. For the next 25 or so years, Georgia-Pacific continued extensive timber harvest operations in the Lake Cavanaugh vicinity, including much of the remaining old-growth. No evidence was presented one way or the other as to whether lots within the Plat were used to remove timber.

E. Future Use of JPJ Property.

The Timberlands abutting Lake Cavanaugh encompasses mostly second growth timber (70-80 years old) with approximately 62 acres of old growth timber that is 200+ years old. NBI intends to harvest permitted timber

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[3] The Court of Appeals ignored the Title Certificate on the face of the plat, dismissing this pertinent fact because "the trial court did not make any findings of fact or conclusions of law regarding the title certificate."

on its property (excluding of course old growth) using many roads and old grades that have existed for 85 or more years. This includes using the old truck road on the Richmond JPJ Property.

The uncontested findings at trial showed that, at most, log trucks will travel 24 trips per day (12 round trips), taking three minutes per trip, which equates to 72 minutes per day of trucks traversing the JPJ Property (with logs, or empty). The record further showed that this amount of traffic would take place for, at most, twelve weeks per summer, over the next three to four years.

After all logging is completed, the Richmond JPJ Property would be used very little. The Timberlands are to be replanted and maintained, which requires small amounts of traffic over the next five to six years. After replanting and initial maintenance, the JPJ Property would not be used to haul timber through for the next 50 – 60

years while the timber re-grows. This, of course, is assuming the JPJ Property is not sold or used for some other purpose.

V. Argument Why Review Should Be Accepted.

A. Standard of Review.

Of the four criteria for review set forth in RAP 13.4, two apply to this case: RAP 13.4(b)(1): the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; and RAP 13.4(b)(4): the Petition involves an issue of substantial public interest that should be determined by the Supreme Court.

B. The Court of Appeals Erroneously Reversed the Trial Court based upon a Conflict in This Court's Jurisprudence on the Rules of Interpretation of Restrictive Covenants.

The rules of interpretation of restrictive covenants have evolved significantly over the past 26 years, through different cases with differing fact patterns. This evolution

of precedent by this Court over a number of years has created an inconsistency in how these rules are applied. The incompatibility of the rules is exacerbated when the restrictive covenants at issue are brief, contain no written definitions or express indications of intent, and were adopted decades ago, when the presumed rule of law was that covenants were construed against the drafter, in favor of the free use of land. This case highlights that incompatibility.

In *Riss v. Angel*, 131 Wn.2d 612, 624, 934 P.2d 669 (1997), this Court reversed over 50 years of precedent when it held that restrictive covenants were no longer to be interpreted by "rules of strict construction against the grantor or in favor of the free use of land." In abandoning the old rule, this Court directed that future attention be paid to resolving ambiguities in favor of "the homeowners' collective interests." *Id*. This change in the law was

motivated by the emergence of protective covenants in the twentieth century to improve property values in areas where maintaining the 'character of the neighborhood' was important. *Id*.

The *Riss* case involved a residential development with restrictive covenants in place since the 1950's. *Id*. at 616. The development included many homes built in the 1950's, single-level or split-level ramblers, with distant views of Lake Washington, the Seattle skyline, and the Olympic Mountains. The specific restrictive covenants at issue contained "express restrictions on minimum square footage of residences, minimum setback requirements, and maximum roof heights." *Id*. at 61. The covenants also created a homeowners association and gave the board of directors authority to approve or disapprove construction or remodeling. In 1990, the covenants were amended to provide methods of appealing decisions by the board. *Id*.

at 617. Point being—the covenants at issue in *Riss v. Angel* were sophisticated and detailed. Further, while they were originally adopted in the 1950's, they were ratified and amended by the landowners 40 years later.

Here, the restrictive covenants at issue have not been formally acknowledged or amended by those subject to them. There is no homeowner's association, there is no evidence on the record that anyone has ever attempted to enforce them, and there was even evidence presented showing that Restriction No. 3 had been repeatedly ignored.[4]

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[4] At trial evidence was presented in support of the affirmative defense of abandonment of covenants. The trial court held (as an alternative means for entry of judgment for JPJ) that to the extent Restriction No. 3 would prohibit the removal of timber through the JPJ Property, it had been abandoned. The Court of Appeals reversed this conclusion as well. *See*, Appendix A (Opinion) at pg. 17-19.

Next, in 1999, this Court adopted the "*Berg* context rule" in interpreting restrictive covenants, in *Hollis v. Garwall*, 137 Wn.2d 683, 974 P.2d 836 (1999).[5] The Court held that the *Berg* rule allows for courts to "look to the surrounding circumstances of the original parties to determine the meaning of specific words and terms used in the covenants" *Id*. at 696. The *Hollis* Court held that "extrinsic evidence may be relevant in discerning that intent [of the drafter] where the evidence gives meaning to words used in the contract." *Id*. It is important to note that *Berg* originally had rejected the plain meaning rule in its entirety, over the years, the *Berg* rule was honed by this Court to outline several categories of prohibited extrinsic evidence:

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[5] The *Berg* rule arose out of *Berg v. Hudseman*, 115 Wn.2d 657, 801 P.2d 222 (1990) when this Court adopted the "context rule."

- Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term;
- Evidence that would show an intention independent of the instrument; or
- Evidence that would vary, contradict, or modify the written word.

Hollis, 137 Wn.2d at 697.

The restrictive covenants at issue in *Hollis v*. *Garwal* were similar in stature to those at issue here. The covenants consisted of three brief paragraphs found on the third page of a six-page recorded plat document. *Id*. at 687. The third numbered restrictive covenant at issue in *Hollis* stated that tracts or lots within the plat were not to be used other than one single family residential unit. *Id*. Garwall began a mining and rock crushing operation which Hollis sought to stop. *Id*. at 688. At trial, Garwall presented an affidavit by the original drafter of the covenants stating

that the residential restriction was only intended to apply to the smaller lots, not the lots Garwall was using.

This Court held that the affidavit was inadmissible even under the new *Berg* context rule because it was evidence of a "unilateral subjective intent" of one of the original contracting parties. *Id*. at 696. The Court noted that relying on such evidence would require the court to redraft or add language to the covenant, which of course is improper.

Garwal also argued that the application of the restriction should be limited to only the smaller lots, because the language of the restriction was intended to apply only to a smaller section of the subdivision (which was subject to a short plat). *Id*. at 697. This argument too, was rejected by this Court.

While Garwal's arguments were ultimately unsuccessful even with the benefit of the *Berg* context rule,

the analysis that this Court engaged in on the latter issue is critical to this case. In that analysis, this Court looked at the words "plat" and "subdivision" in the language of the restrictions, and found that those words were not ambiguous, or subject to more than one interpretation. *Id.* at 697. Despite this finding, the Court engaged in further analysis under the *Berg* context rule to reach the following conclusion:

> The evidence offered by Garwall also does not support a conclusion that the parties intended the language to have anything but its usual meaning in the subdivision setting.

The Court went on for a few paragraphs to examine the evidence surrounding this argument and explain why the contextual evidence surrounding the creation of the restrictions did not support Garwall's arguments as to the intent of the drafter.

This brief foray into that further analysis is absolutely critical in this case. It demonstrates the relevance extrinsic evidence in interpreting the intent and meaning of a restrictive covenant of the type involved here—where only have mere a few sentences exist, without any overall scheme, specific definitions, or recitals stating the intent of the covenants. Engaging in this analysis also demonstrates that this Court meant what it said when it held that extrinsic evidence is admissible to evince the intent of the drafters and the meaning of words in restrictive covenants, regardless of whether those words are ambiguous.

In reversing the trial court in this case, the Court of Appeals relied heavily on one of the next seminal cases in interpreting restrictive covenants: *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 250–51, 327 P.3d 614 (2014). The *Wilkinson* case, as used by the Court of

Appeals here, is in conflict with *Hollis v. Garwal* because it ignores the nuances of the *Berg* Context rule as applied in *Hollis*. Specifically, it ignores the fact that *Hollis v. Garwal* stands for the proposition that extrinsic evidence can be used to define unambiguous terms in a restrictive covenant differently from their so-called "plain meaning" if it evinces the intent of the drafter, so long as the extrinsic evidence considered does not violate the three limitations outlined in *Hollis*. This carries on *Berg's* repudiation of the "plain meaning" rule.

In *Wilkinson,* this Court contradicted its adoption of the *Berg* context rule when it held "In determining the drafter's intent, we give covenant language 'its ordinary and common use' and will not construe a term in such as way "so as to defeat its plan and obvious meaning." *Wilkinson*, 180 Wn.2d at 250. In making this statement, the Court cited *Mains Farm*, 121 Wn.2d 810, 854 P.2d

1072 (1993). *Mains Farm* predated *Hollis v. Garwall*. *Hollis v. Garwall* expressly noted that in adopting the *Berg* rule, this Court "explicitly rejected the plain meaning rule," *Hollis*, 137 Wn.2d at 693, and instead adopted the three categories of inadmissible extrinsic evidence. Thus, while *Hollis v. Garwall* did not expressly overrule *Mains Farm*, it certainly abrogates any portion of *Mains Farm* that refers to the "plain meaning" rule.

At oral argument,[6] the Court of Appeals acknowledged the awkward interplay between the *Berg* context rule, the rules in *Wilkinson v. Chiwawa* and the "objective manifestation theory of contract interpretation." *See*, Appendix A (Opinion) at pg. 13. The Court of Appeals

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6 *See*, Oral Argument at 1:58 (https://www.courts.wa.gov/content/OralArgAudio/a01/20230125/2.%20The%20Lake%20Trust%20v.%20Richmond%20JPJ%20Enterprises%20Inc.%20%20%20837613.mp3)

seems to have latched on to the argument made by The Lake Trust that *Wilkinson v. Chiwawa* is a more modern case than the *Hollis v. Garwal*, and it somehow "clarifies" the limited purpose for which extrinsic evidence may be used. But, as pointed out above, *Wilkinson* wrongly cited *Mains Farm* to use the "plain meaning" rule, even though *Hollis v. Garwal* had abrogated it in favor of the *Berg* context rule.

Wilkinson v. Chiwawa is also internally inconsistent, particularly when applied to the facts of this case. *Wilkinson* cites *Hollis v. Garwal* and confirms that "extrinsic evidence can be "used to illuminate what was written" and that it cannot be used to "show an intention independent of the instrument." *Wilkinson v. Chiwawa*, 180 Wn.2d at 251-252. But what *Wilkinson* arguably muddles up, is that extrinsic evidence can be used to show the intention of the drafter of the instrument by giving meaning to

unambiguous words, even if that meaning differs from the plain meaning. Using extrinsic evidence to do this is illuminating what was written, not showing an intention independent of the instrument, and that is what happened in this case.

A critical distinguishing factor of *Wilkinson* and cases like it, as opposed to *Hollis v. Garwal,* is the nature of the underlying restrictive covenants. As already mentioned, the covenants in *Riss v. Angel* were relatively detailed. The covenants in *Hollis v. Garwal* were not—and the Court engaged in a deeper analysis. But in *Wilkinson v. Chiwawa*, this Court expressly shied away from looking at extrinsic evidence because the drafter of the covenants had included massively detailed instructions on the meaning of the terms at issue. *Wilkinson v. Chiwawa*, 180 Wn.2d at 252. This Court was clear in *Wilkinson* to point out that its job was to evince the intent of the drafters of the

covenants, and that the drafters had included "detailed discussion about what Chiwawa homeowners could not do." *Id.*

"While interpretation of the covenant is a question of law, the drafter's intent is a question of fact." *Wilkinson,* 180 Wn.2d at 250–51. *Wilkinson* also held that Courts must still "examine the language of the restrictive covenant and *consider the instrument in its entirety*." *Wilkinson v. Chiwawa*, at 250-51, *citing Hollis,* 137 Wn.2d at 694, 974 P.2d 836 (quoting *Mountain Park Homeowners Ass'n v. Tydings,* 125 Wn.2d 337, 344, 883 P.2d 1383 (1994)). Perhaps most importantly, *Wilkinson* also stated "[w]e caution that the interpretation of a particular covenant is largely dependent upon the facts of the case at hand." *Wilkinson*, 180 Wn.2d at 253.

The facts of the case at hand in *Wilkinson* vary greatly from those here. The restrictive covenants at issue

in *Wilkinson* were recorded separately from the six phases of the plat. *Wilkinson*, 180 Wn.2d at 244-45. The covenants expressly created a "general plan of development" for the community. Several sets of applicable covenants were consolidated into one set by a majority of the owners in the late 1980's. *Id*. The restrictive covenants in *Chiwawa* were lengthy and detailed—as is made obvious just from the quoted material in this Court's opinion. *Id*. at 246-247 (quoting provisions of the covenants for Land Use, Nuisance and Trash Disposal). The neighborhood in the *Wilkinson* case was active in using and enforcing the covenants through a homeowners association.

The facts of the case at hand in the case at bar could not be more opposite than *Wilkinson*. There is no homeowners association enforcing Restriction No. 3 on the Plat. There is no evidence it has ever been enforced.

Further, many of the lots are vacant and forested still, having never been developed. Some lots are used for non-residential purposes, and even a few businesses exist. Most of the homes are vacation homes. The "character of the neighborhood" around Lake Cavanaugh is not one of a pristine neighborhood for which restrictive covenants are required to protect property values. Instead, the character of the Lake Cavanaugh Plat is very much what it was when originally adopted—vacation homes around a beautiful lake, surrounded by timber properties where logging is and has been taking place since the 1920's.

The drafter of Restriction No. 3 has given us no details or explanation about what the words mean, or what landowners could or could not do. This Court is left to interpret the very few words that exist. There was no such fact present in *Wilkinson* which would lead the court to review other documents.

Hollis v. Garwall made clear that the judicial interpretation of restrictive covenants cannot be performed in a vacuum; contextual evidence must be considered, whether terms are ambiguous or not. And while *Wilkinson v. Chiwawa* says all the "right" things, it has sent the wrong message to courts interpreting covenants which have little detail, are very old, and which have no express words showing intent or purpose.

The trial court did not interpret Restriction No. 3 in a vacuum. But the Court of Appeals reversal does just that, refusing to look at admissible contextual evidence. In doing so, it relies on *Wilkinson* over *Hollis*, a mistake that is easily made due to the contradictory analyses set forth in *Hollis* and *Wilkinson.* The trial court's conclusion of law that Restriction No. 3 does not restrict the short-term hauling of logs over the JPJ Property in the context of this Plat, the circumstances surrounding its creation and the history of

logging before and after, is not a violation of the rules of interpretation. A review of the trial court's analysis of this issue of fact should not have been so easily thrown away, not when *Hollis* is still good law.

The trial court did not re-write Restriction No. 3. It did not consider unilateral intent by the drafter. It did not vary, contradict, or modify the written word. Instead, the trial court properly used extrinsic evidence to determine what the words written actually meant, with the focus being to evince the intent of the drafter. The intent of the drafter is a question of fact. That intent was to allow harvested timber to be hauled from the Timberlands, through the JPJ Property to the public road, something that had unquestionably happened in the past on the road that still exists on the JPJ Property.

C. Issue of Public Interest.

Restrictive Covenants, and lawsuits regarding them, are a constant in the practice of real estate law. This Court has time and again (and even recently) reviewed cases interpreting and applying restrictive covenants. *See*, *Bangerter v. Hat Island Community Association*, 199 Wn.2d 183, 504 P.3d 813 (2022). The issue of interpretation of restrictive covenants and what role extrinsic evidence plays is an everyday analysis for some practitioners. Clarifying the existing ambiguities and contradictions in the cases would benefit the general public as restrictive covenants are prolific.

Moreover, as with any bright line rule, creating exceptions for specific circumstances through binding precedent is important. The rules set forth in *Wilkinson v. Chiwawa,* and as followed by later cases, does a potential disservice to litigants who are faced with restrictive

covenants that are 70+ years old and have very little by way of definitions or other expressions of intent. Review of this case with an analysis of the specific facts, evidence and issues benefits the public.

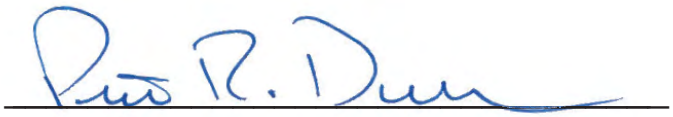
VI. Conclusion.

This Court should grant review, reverse the Court of Appeals, and reinstate the judgment of the trial court.

Pursuant to RAP 18.17, I certify that this Brief of Appellants contains 5000 words, exclusive of the title sheet, table of contents, table of authorities, appendices, certificate of compliance, certificate of service, signature blocks, and pictorial images as calculated by the word processing software used to prepare this document.

Respectfully submitted this 17th day of April 2023.

BELCHER SWANSON LAW FIRM, PLLC



Peter R. Dworkin, WSBA# 30394
Attorney for Petitioners

APPENDIX A

FILED
2/13/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE LAKE TRUST, a revocable trust governed by the laws of Washington, Appellant, v. SKAGIT COUNTY, a Washington municipal corporation including its PLANNING & DEVELOPMENT SERVICES, Defendant, RICHMOND JPJ ENTERPRISES INC., a Washington corporation, and NIELSEN BROTHERS, INC., a Washington corporation, Respondents.	No. 83761-3-I DIVISION ONE UNPUBLISHED OPINION

MAXA, J.[1] – The Lake Trust appeals the trial court's rulings after a bench trial that (1) a subdivision plat's restrictive covenant that prohibited the use of lots for commercial business purposes did not apply to real estate holding company Richmond JPJ Enterprises, Inc.'s (JPJ) and logging company Nielsen Brothers, Inc.'s (NBI) use of a lot in the subdivision for their commercial logging operations, and (2) the restrictive covenant had been abandoned. The trial court stated that the term "commercial business" normally would apply to a logging operation. But the court concluded that the

[1] The Honorable Bradley Maxa is a judge on the Court of Appeals, Division Two, sitting in Division One pursuant to RCW 2.06.040 by order of the Associate Chief Justice.

historical context of the area when the subdivision was platted in the 1940s, specifically the fact that timber was actively being harvested and transported through the subdivision, showed that the covenant was not intended to apply to logging operations. The trial court also held that the abandonment defense applied because after the subdivision was platted, the area continued to be used for logging activities.

We reverse the trial court's decision and remand for the trial court to enter judgment in favor of the Lake Trust.

FACTS[2]

Parties and Relevant Properties

The Lake Trust owns two lots in division 3 of the Lake Cavanaugh Subdivision in Skagit County (Lake Trust property). Both of the lots are located on South Shore Drive. One of the lots abuts the shore of Lake Cavanaugh and is improved with a single family residence. The other lot is upland across South Shore Drive and is vacant. Robert McCullough is trustee of the Lake Trust. McCullough and his wife acquired the Lake Trust property in September 2004 and later transferred ownership to the Trust.

JPJ, West Side Logging, LLC and Timberline Logging, Inc. are real estate holding companies either affiliated with, run by, or owned by brothers Robert Nielsen and David Nielsen. NBI is a logging and contracting company that also is either affiliated with or owned by the Nielsen brothers. NBI contracts with JPJ, West Side and Timberline to harvest timber from their properties.

[2] The parties stipulated to many of the relevant facts, and the stipulation was adopted by the trial court in its findings of fact. Other facts come from unchallenged findings of fact.

In 2018, JPJ acquired a lot in division 3 of the Lake Cavanaugh Subdivision ("JPJ property"). The lot is located on South Shore Drive approximately 2,500 feet away from the JPJ Property. JPJ purchased the lot for the sole purpose of using it for an access road for NBI's logging operations on the timberlands.

Timberline and West Side own four parcels of land totaling approximately 276 acres abutting the Lake Cavanaugh Subdivision ("Timber property"). The zoning of the Timber property allows timber cultivation and harvest of forest products.

Historical Background

In the early 1940s, the English Lumber Company owned much of the land surrounding Lake Cavanaugh, including what is now the Timber property, the Lake Trust property, and the JPJ property. English Lumber harvested timber on the properties using a series of roads and rail lines to move equipment and to remove and transport timber.

In January 1945, English Lumber sold most of its timberlands around Lake Cavanaugh ("timberlands") to Puget Sound Pulp and Timber Company, including most of the Timber property. English Lumber retained the property it owned abutting Lake Cavanaugh ("Lake Cavanaugh lands").

In September 1945, English Lumber sold the Lake Cavanaugh lands to Leslie Eastman. The deed to Eastman stated that the deed was subject to an easement created under an agreement dated as of January 1, 1945 (1945 agreement) between the seller, English Lumber, and the purchaser, Puget Sound Pulp.[3] Under the 1945

[3] The original 1945 agreement was not independently recorded and the parties to this lawsuit have been unable to find a copy of the original agreement.

Agreement, Puget Sound Pulp was permitted reasonable rights of way over the Lake Cavanaugh lands for the purpose of logging its timber. These rights of way and Puget Sound Pulp's rights expired 10 years from the date of the agreement. The deed to Eastman also was subject to easements granted to the State Division of Forestry to construct and maintain roads for forest protection purposes and other agreements.

Between 1946 and 1948, Eastman, Eastman's estate, and other successors-in-interest (primarily Richard Shorett, trustee) subdivided the Lake Cavanaugh lands into the Lake Cavanaugh Subdivision. Lake Cavanaugh division 3 was recorded in July of 1948 and created approximately 244 lots.

The plat maps for divisions 2 and 3 of the Lake Cavanaugh Subdivision dedicated rights of ways for public travel including what would later become South Shore Drive. The plat map for division 3 also dedicated a right of way between lots 20 and 21 of Block 2. The face of the plat division 3 includes the following "Restriction": "No lots shall be used for commercial business or manufacturing purposes." Clerk's Papers (CP) at 449. The face of the plat also contains a "Title Certificate," which identifies easements that encumber the lots in division 3 granted to the State Division of Forestry and Puget Sound Pulp. CP at 449.

Use of JPJ Property

Tract A of division 3, together with tracts A, B, and C of division 2 and other property conveyed by English Lumber to Puget Sound Pulp in 1945, make up the whole of the Timber property. Westside and Timberline acquired the Timber property from Weyerhaeuser Company in 2018.

In July 2019, West Side, Timberline, and JPJ (as landowner) and NBI (as timber owner and operator) submitted a Forest Practice Application (FPA) to the Department of Natural Resources (DNR) for the harvest of timber on approximately 25 acres of the Timber property. The FPA proposed using the JPJ property for access to the Timber property. DNR approved the FPA in August 2019.[4] Under the FPA, logging operations could take place only from May 15 through September 30.

The FPA proposed three separate harvest areas: units 1, 2 and 3. Units 1, 2 and 3 are separated by streams and/or gullies. The FPA proposed two separate road systems to access the harvest areas from South Shore Drive because unit 1 cannot connect to units 2 and 3 without construction of a large and expensive bridge. Road A accesses unit 1 from South Shore Drive through the right of way between lots 20 and 21 as designated in the plat for division 3. Road B provides access to units 2 and 3 from South Shore Drive by connecting with Road C. Road B connects South Shore Drive to the Timber property by going through the JPJ Property.

After DNR approved the FPA, JPJ submitted a County Road Access Application to construct access from the JPJ property to South Shore Drive for Road B. The application identified the access as commercial. The County approved the application and required JPJ to construct the access to Commercial Class Road Approach standards.

The JPJ property was used for the transit of vehicles (including but not limited to logging trucks, bulldozers and logging equipment) to and from the Timber property to

[4] The Lake Cavanaugh Trust appealed the FPA. Robert McCullough is a board member of the Lake Cavanaugh Trust.

South Shore Drive. JPJ and NBI have used and continue to use the JPJ property to remove timber from Units 2 and 3. The removal of timber included the transport of logging equipment and road building machinery and equipment as well as the employees needed to remove approximately 900,000 board feet of timber from units 2 and 3 and to transport the timber to various mills in the region. Log trucks went through the JPJ property to haul timber out of the Timber property.

Lawsuit and Trial

In October 2019, the Lake Trust filed a lawsuit against JPJ and NBI that included a claim for breach of the commercial business restrictive covenant and requested declaratory judgment and injunctive relief. The Lake Trust alleged that JPJ's and NBI's use of the JPJ property for commercial access associated with commercial logging violated the restrictive covenant. In their answer, JPJ and NBI asserted affirmative defenses of abandonment of the covenant, equitable cancellation or modification of the covenant, and waiver. They also asserted counterclaims for a private way of necessity and implied easement.

The trial court presided over a two-day bench trial. The court entered a Memorandum and Order Following Trial. In addition to adopting the parties' stipulated facts, the court issued detailed findings of fact and conclusions of law.

Findings of Fact

The trial court found that the January 1, 1945 agreement allowed for Puget Sound Pulp to have an easement for purposes of transporting timber across the Lake Cavanaugh lands. And after the timberlands were conveyed to Puget Sound Pulp, Puget Sound Pulp used the timberlands to harvest timber. In the late 1940s and early

1950s, Puget Sound Pulp removed the railroads and converted those grades to trucking roads.

The trial court further found as follows:

> Because Leslie Eastman was aware of the January 1, 1945 Agreement, [Puget Sound Pulp's] logging operations in the timberlands, and [Puget Sound Pulp's] continued rights of way over what was to become Subdivision 3 when he created the subdivision. *It was his intention to exclude logging transit to and from the timberlands from the term "commercial business."*

CP at 544 (emphasis added).

Regarding Road B, the trial court found that Road B connects the Timber property to South Shore Drive via the JPJ property. The court found that Road B was in existence, either as a road or a railroad grade, before English Lumber's sales to Puget Sound Pulp and Eastman. The road was in use after conveyance of the timberlands to Puget Sound Pulp and into the 1950's, but there is no evidence that Road B remained in use on or after January 1, 1955.

Regarding the JPJ property, the trial court found that JPJ purchased the property solely to use it as an access road for NBI's logging on the timberlands. The court found, "JBJ [sic] and NBI's interests on the property are purely related to the commercial business of logging." CP at 543. JPJ/NBI's anticipated use of the JPJ property was to have logging and dump trucks pass through the lot for at least eight weeks each year over the course of three or four years. The logging trucks would be expected to cross the property up to 24 times a day while going to and from the timberlands. It takes a couple of minutes for trucks to cross the JPJ property. The timber harvest on the timberlands is expected to produce a gross amount of $4 million of timber.

The trial court found that the restrictions for division 3 include a prohibition on use "for commercial business or manufacturing purposes." CP at 545. The court specifically found that "JBJ [sic] and NBI's intended use of the JBJ [sic] Property is for commercial business." CP at 545.

Regarding JPJ/NBI's abandonment defense, the trial court discussed the uses of four properties in division 3 of the Lake Cavanaugh subdivision. In 2004, James and Amy Weppler were granted a permit for the purposes of harvesting merchantable timber, along with road construction, on their lot. The logging was not for purposes of clearing the lot for construction of a residence. The Weppler property was logged at some point between 2004 and 2008.

The Linert property also is in division 3, and the property's primary use is as a single family residence. The property owner, Brett Linert, has lived there for 25 years. Linert operates a handyman business in which he goes to other properties to do work on them. Linert has a small pickup truck for the business that he parks on his property. The Secretary of State's address for the business is Linert's property.

Another property within division 3 had a connection with Happy Valley Trucking, Inc. That property address was registered with the Secretary of State as the principal mailing address for the business and its registered agent. The lot also contained an occupied residence. The lot had several commercial vehicles parked on it, primarily dump trucks and a trailer, and piles of rocks that likely were gravel until the property changed hands shortly before trial. Happy Valley Trucking was actively running its operations from that address. Trucks for Happy Valley Trucking had been observed entering and exiting that property over the last several years.

At least one home within division 3 was rented as a VRBO vacation property. Nothing about the outward appearance of that building would suggest that it was anything other than a residence.

Conclusions of Law

The trial court denied the Lake Trust's breach of covenant claim and dismissed that claim. The court provided the following analysis:

> Here, [Puget Sound Pulp] was actively logging the timberlands at the time that phrase was added to the plat restrictions. The January 1, 1945 Agreement and evidence of multiple old railroad grades and truck roads leading into South Shore Drive indicate that the Lake Cavanaugh Lands and specifically Subdivision 3 would be used for access to the timberlands at least through 1954 and potentially longer depending on the use of the right of way or the easement contemplated in the January 1, 1945 Agreement.
>
> While the intention in subdividing the property was to create a more residential area around Lake Cavanaugh, Leslie Eastman clearly contemplated that logging operations would be a component of the area. Under the January 1, 1945 Agreement, logging operations were required to transit through Subdivision 3 for several more years after the subdivision was platted in 1948. *The term "commercial business" would normally apply to a logging operation, but it does not given the historical context of the area surrounding Lake Cavanaugh.* The intended use for Subdivision 3 at the time of its creation was for it to be a residential area around the lake that allowed access to the timberlands, where [Puget Sound Pulp] was actively harvesting timber and entitled to liberal rights of way through Subdivision 3 through the end of 1954.

CP at 548 (emphasis added).

The trial court also ruled that JPJ/NBI's abandonment affirmative defense applied.[5] The court stated,

> Here, there is substantial evidence that the timberlands continued to be logged after Subdivision 3 was platted and that areas such as Road B within the subdivision continued to be used into the 1950s for purposes of accessing the timberlands for logging. Even if the restrictive covenant was

[5] The trial court declined to address the additional affirmative defenses of equitable cancellation and waiver.

> intended to exclude that type of use, it was immediately abandoned by then-owners of lots in Subdivision 3 who permitted such use.

CP at 549. The court did not mention the four uses of other lots discussed in the findings of fact.

Finally, the trial court denied JPJ/NBI's implied easement counterclaim. The court stated, "Given the express language of the January 1, 1945 Agreement, the court concludes that Road B was a temporary right of way and that an implied easement does not exist for this potential access road to the timberlands." CP at 550.

Lake Trust appeals the trial court's Memorandum and Order Following Trial.

ANALYSIS

A. FAILURE TO PROPERLY ASSIGN ERROR

Initially, JPJ/NBI argue that all of the trial court's findings of fact are verities on appeal because Lake Trust did not specifically challenge any numbered findings of fact in its notice of appeal or assignments of error. In reply, Lake Trust argues that it sufficiently identified the issues for appeal. And in its reply brief, the Lake Trust also formally assigns error to the trial court's finding of fact 10 and the court's conclusion of law stating that the Lake Trust's predecessors in interest abandoned the restrictive covenants in the 1950s.

RAP 10.3(g) states, "A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." The Lake Trust assigned error generally to the trial court's Memorandum and Order Following Trial and did not specifically reference finding of fact 10 or any other finding.

Unchallenged findings of fact are verities on appeal. *Real Carriage Door Co. ex rel. Rees v. Rees*, 17 Wn. App. 2d 449, 457, 486 P.3d 955, *review denied*, 198 Wn.2d 1025 (2021).

Based on RAP 10.3(g), we typically do not review a claimed error not included in an assignment of error. *See Phillips v. Greco*, 7 Wn. App. 2d 1, 9, 433 P.3d 509 (2018). Nevertheless, in the exercise of discretion we can address findings of fact not included in specific assignments of error where the nature of the challenge is apparent from the content of the opening brief. *Harris v. Urell*, 133 Wn. App. 130, 137–38, 135 P.3d 530 (2006).

Here, the Lake Trust did not comply with the requirements of RAP 10.3(g). However, the Lake Trust's brief clearly indicated that it was challenging finding of fact 10, that Eastman's intention was "to exclude logging transit to and from the timberlands from the term 'commercial business.' " CP at 544. And the Lake Trust's brief clearly challenged the trial court's conclusion that abandonment had occurred. The issues raised and grounds for appeal were clear enough that JPJ/NBI were able to discern them and address Lake Trust's arguments. Accordingly, we exercise our discretion and consider the Lake Trust's challenge to finding of fact 10 and the trial court's finding of abandonment.

B. STANDARD OF REVIEW

We review a trial court's decision after a bench trial to determine whether the findings of fact are supported by substantial evidence and whether the conclusions of law are supported by the findings of fact. *Real Carriage Door*, 17 Wn. App. 2d at 457. Substantial evidence is the amount of evidence sufficient to convince a rational, fair-

minded person that a premise is true. *Id.* All evidence and reasonable inferences are viewed in the light most favorable to the prevailing party. *Id.* As noted above, findings of fact that are unchallenged are treated as verities on appeal. *Id.*

The trial court's application of facts to law and the conclusions of law are reviewed de novo. *Id.*

C. INTERPRETATION OF RESTRICTIVE COVENANT

The Lake Trust argues that the trial court erred in determining that JPJ/NBI's commercial logging activities did not violate the restrictive covenant prohibiting the use of lots in the Lake Cavanaugh subdivision for commercial business purposes. The Lake Trust claims that the trial court improperly used extrinsic evidence to interpret the term "commercial business" to exclude logging operations. JPJ/NBI argues that the trial court properly applied the context rule in interpreting the restrictive covenant to exclude logging operations. We agree with the Lake Trust.

1. Legal Principles

Restrictive covenants are enforceable promises regarding the use of land. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005), abrogated on other grounds by *Yim v. City of Seattle*, 194 Wn.2d 682, 702, 704, 451 P.3d 694 (2019). The purpose of restrictive covenants is "to make residential subdivisions more attractive for residential purposes." *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 699, 974 P.2d 836 (1999). Covenants are enforceable by injunctive relief if a plaintiff shows (1) a clear legal or equitable right, and (2) a well-grounded fear of immediate invasion of that right. *Id.*

The interpretation of a restrictive covenant is a question of law, and we apply the rules of contract interpretation in determining the meaning of a covenant. *Wilkinson v.*

Chiwawa Communities Ass'n, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). The primary objective in contract interpretation is determining the drafter's intent. *Id.* at 250. Although interpretation of a covenant is a question of law, the drafter's intent is a question of fact. *Id.* But questions of fact may be determined as a matter of law if reasonable minds could reach but one conclusion. *Id.*

"In determining the drafter's intent, we give covenant language its 'ordinary and common use' and will not construe a term in such a way 'so as to defeat its plain and obvious meaning.' " *Id.* (quoting *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993)). When examining the covenant language, we must "consider the instrument in its entirety." *Wilkinson*, 180 Wn.2d at 250.

In general, Washington courts follow the "objective manifestation theory" of contract interpretation, under which the focus is on the reasonable meaning of the contract language to determine the parties' intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). But to assist in determining the meaning of contract language, including restrictive covenants, courts also apply the *Berg*[6] "context rule." *Hollis*, 137 Wn.2d at 693, 696. This rule "enables trial courts to look to the surrounding circumstances of the original parties to determine the meaning of specific words and terms used in the covenants." *Id.* at 696. The context rule allows consideration of extrinsic evidence, but certain extrinsic evidence is not admissible: (1) "[e]vidence of a party's unilateral or subjective intent as to the meaning of a contract word or term," (2) "[e]vidence that would show an intention independent of the

[6] *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

instrument," or (3) "[e]vidence that would vary, contradict or modify the written word." *Id.* at 695.

The court in *Wilkinson* emphasized the limited use of extrinsic evidence. 180 Wn.2d at 251-52. The court stated that extrinsic evidence can be used only " 'to illuminate what was written, not what was intended to be written.' " *Id.* at 251 (quoting *Hollis*, 137 Wn.2d at 697). Further, courts "do not consider extrinsic '[e]vidence that would vary, contradict or modify the written word' or 'show an intention independent of the instrument.' " *Wilkinson*, 180 Wn.2d at 251 (quoting *Hollis*, 137 Wn.2d at 695).

2. Trial Court Findings and Conclusions

The trial court made unchallenged findings of fact that "JPJ purchased the JPJ property solely for purposes of using it as an access road for NBI's logging on the timberlands" and "JBJ [sic] and NBI's interests on the property are purely related to the *commercial business* of logging." CP at 543 (emphasis added). In addition, the trial court made an unchallenged finding of fact that "JBJ [sic] and NBI's intended use of the JPJ Property is for *commercial business*." CP at 545 (emphasis added). And the court noted in its conclusions of law that "[t]he term 'commercial business' would normally apply to a logging operation." CP at 548.

Nevertheless, the trial court relied on extrinsic evidence to make a finding of fact that "[i]t was [Eastman's] intention to exclude logging transit to and from the timberlands from the term " 'commercial business' ", and to conclude that the term " ' commercial business' " does not apply to logging operations "given the historical context of the area surrounding Lake Cavanaugh." CP at 548. The court focused on the fact that when the restrictive covenant was included in the plat for division 3 in 1948, Puget Sound Pulp

was actively harvesting timber in the timberlands and had a right of way to use division 3 for access to the timberlands until at least the end of 1954. As a result, the court found that Eastman "clearly contemplated that logging operations would be a component of the area." CP at 548.

The dispositive issue here is whether the trial court properly relied on extrinsic evidence to determine the meaning of "commercial business" in the restrictive covenant.

3. Analysis

There is little question that the ordinary, common, plain, and obvious meaning of the term "commercial business" includes JPJ/NBI's logging activities. The trial court expressly found that JPJ and NBI used the JPJ property for "commercial business," and concluded that a logging operation "normally" would constitute a commercial business. CP at 548. JPJ/NBI suggest that the term "commercial business" is ambiguous, but the trial court's unchallenged findings refute that suggestion. The trial court confirmed that a logging operation is a commercial business.

As a result, the trial court necessarily was not using extrinsic evidence "to determine the meaning of specific words and terms used in the covenant[]," *Hollis*, 137 Wn.2d at 696, or to " 'to illuminate what was written.' " *Wilkinson*, 180 Wn.2d at 251 (quoting *Hollis*, 137 Wn.2d at 697). The trial court already had determined the meaning of the term "commercial business." Instead, the trial court used extrinsic evidence to conclude that even though a logging operation was a commercial business, Eastman intended to exclude logging operations from the scope of the restrictive covenant. But the covenant contained no such exclusion, and instead stated without qualification that use for commercial business purposes was prohibited.

The Supreme Court in *Wilkinson* was clear: courts "do not consider extrinsic '[e]vidence that would vary, contradict or modify the written word' or 'show an intention independent of the instrument.' " 180 Wn.2d at 251 (quoting *Hollis*, 137 Wn.2d at 695). But that is exactly what the trial court did here. The court essentially rewrote the covenant to state that use of lots for commercial business purposes was prohibited except for commercial logging operations.

JPJ/NBI argue that the restrictive covenant must be considered in its entirety, and they focus on the title certificate on the face of the plat. JPJ/NBI emphasize that the title certificate expressly references Puget Sound Pulp's timber access easement over division 3. They claim that the title certificate and the restrictive covenant are contradictory, requiring extrinsic evidence to resolve the contradiction.

However, the trial court did not make any findings of fact or conclusions of law regarding the title certificate. The court apparently did not find any tension between the title certificate and the restrictive covenant. Further, the title certificate does not contradict the restrictive covenant. The title certificate notes that Puget Sound Pulp had an access *easement* across division 3. The restrictive covenant states that no *lots* shall be used for commercial business purposes. Although the trial court found that Puget Sound Pulp used Road B on the JPJ property into the 1950s, there is no indication in the record that Puget Sound Pulp owned any lots in division 3 when the subdivision was platted as opposed to exercising its easement right to access timber.

We conclude that the trial court erred in using extrinsic evidence to vary the plain language of the restrictive covenant. Accordingly, we hold that the trial court erred in ruling that the restrictive covenant did not apply to JPJ/NBI's logging operations.

4. "Use" of Property

In the alternative, JPJ/NBI argue the trial court's order should be affirmed based on the theory that temporarily transporting logs over the JPJ property does not constitute a "use" for commercial business purposes. We disagree.

JPJ/NBI focus on the fact that their activity is temporary, not permanent. But the trial court found that JPJ/NBI's intended "use" of the land was for commercial business. And the covenant's prohibition on the use of the land for commercial business does not include any temporal qualification. Instead, the covenant imposes a blanket prohibition on the use of the land within the plat for commercial business. Under *Wilkinson*, a temporal exception or qualification cannot be grafted onto the plain language of the covenant. We reject JPJ/NBI's argument.

D. AFFIRMATIVE DEFENSES

JPJ/NBI argue that we should affirm the trial court's decision based on three affirmative defenses: abandonment, cancellation/modification, and waiver.[7] We disagree.

1. Abandonment of Covenant

The Lake Trust argues that the trial court erred in concluding that the restrictive covenant was abandoned in the 1950s. JPJ/NBI argue that the trial court's abandonment ruling should be affirmed. We agree with the Lake Trust.

[7] The trial court ruled that abandonment had occurred, but declined to rule on cancellation/modification, and waiver. But we can affirm a trial court's decision based on any grounds supported by the record. *Hoover v. Warner*, 189 Wn. App. 509, 526, 358 P.3d 1174 (2015).

a. Legal Principles

Abandonment is an equitable defense that will preclude enforcement of a covenant. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). "The defense of abandonment requires evidence that prior covenant violations by other residents have so eroded the general plan as to make enforcement useless and inequitable." *Id.* at 342. Equity will not enforce a covenant if it "has been *habitually and substantially violated* so as to create an impression that it has been abandoned." *Id.* (emphasis added) (quoting *White v. Wilhelm*, 34 Wn. App. 763, 769, 665 P.2d 407 (1983)).

However, a few violations of covenants do not constitute abandonment. *Peckham v. Milroy*, 104 Wn. App. 887, 890, 17 P.3d 1256 (2001). "Violations must be material to the overall purpose of the covenant, and minor violations are insufficient to find abandonment." *Mountain Park Homeowners*, 125 Wn.2d at 342.

Whether a violated covenant has been abandoned generally is a question of fact. *Green v. Normandy Park Riviera Section Cmty. Club*, 137 Wn. App. 665, 697, 151 P.3d 1038 (2007). However, we can decide questions of fact as a matter of law if reasonable minds could not differ. *See Meyers v. Ferndale School Dist.*, 197 Wn.2d 281, 289, 481 P.3d 1084 (2021).

b. Trial Court Ruling

The trial court concluded that the Lake Trust's "predecessors in interest abandoned the restrictive covenants in the 1950s when Subdivision 3 experienced significant logging activity." CP at 549. The court found that "there is substantial evidence that the timberlands continued to be logged after Subdivision 3 was platted

and that areas such as Road B within the subdivision continued to be used into the 1950s for purposes of accessing the timberlands for logging." CP at 549. The court reasoned that even if the restrictive covenant was intended to exclude that type of use, "it was immediately abandoned by then-owners of lots in Subdivision 3 who permitted such use." CP at 549.

c. Analysis – 1950s Logging

It is undisputed that Puget Sound Pulp continued to use the Lake Cavanaugh subdivision property, including Road B on what is now the JPJ property, for its logging activities after the restrictive covenant was imposed in the division 3 plat. But there is no indication in the record that these activities violated the covenant.

Puget Sound Pulp had the contractual right to a right of way on the Lake Cavanaugh lands under the 1945 Agreement with English Lumber, which allowed the right of way for 10 years. Therefore, evidence of logging in and around division 3 is consistent with Puget Sound Pulp's preexisting rights. And division 3 owners could not enforce the covenant because of these contractual rights. Not coincidentally, the trial court found no evidence that Road B was used on or after January 1, 1955 – when the January 1945 agreement expired.

In addition, the trial court did not find and there is no evidence in the record that Puget Sound Pulp violated the restrictive covenant. Covenants run with the land, and burdens the owner of property subject to the covenant with a duty to comply with the restriction. *Kiona Park Estates v. Dehls*, 18 Wn. App. 2d 328, 336, 491 P.3d 247 (2021). Therefore, the covenant here necessarily applied only to owners of lots in division 3. But there is no evidence that Puget Sound Pulp or any other logging

company owned a lot within division 3 during the 1950s.[8] As a result, they were not subject to the covenant and could not have violated it.

There is no evidence that the restrictive covenant was " 'habitually and substantially violated' " in the 1950s. *Mountain Park*, 125 Wn.2d at 342 (quoting *White*, 34 Wn. App. at 769). Therefore, we conclude that the trial court erred in concluding that the restrictive covenant had been abandoned because of logging activity in the 1950s. We hold that as a matter of law, no such abandonment occurred.

d. Analysis – Four Alleged Violations

The trial court did not find abandonment based on the four more recent alleged violations of the restrictive covenant by the Wepplers, Linert, Happy Valley Trucking, and the VRBO property. Nevertheless, JPJ/NBI argue that these violations are sufficient to affirm the trial court's finding of abandonment. We disagree.

Even if we find that substantial evidence supports those alleged violations, we conclude they are insufficient to support JPJ/NBI's defense of abandonment. The four alleged violations involve four separate properties in a 244 lot subdivision. There is no indication that these were habitual and substantial violations. And we cannot reasonably conclude that these alleged violations "so eroded the general plan as to make enforcement useless and inequitable." *Mountain Park*, 125 Wn.2d at 342.

We hold as a matter of law that the four alleged violations of the restrictive covenant cannot support the trial court's ruling that the defense of abandonment applied.

[8] Puget Sound Pulp purchased two "tracts" in division 3, but those tracts were not lots.

2. Cancellation/Modification of Covenant

JPJ/NBI argues that we should affirm the trial court's decision by applying the equitable doctrine of cancellation/modification to the restrictive covenant. We disagree.

Changed neighborhood conditions is an equitable defense to the enforcement of a restrictive covenant. *Mountain Park*, 125 Wn.2d at 341-42. A material change in the character of the neighborhood can modify or eliminate a restrictive covenant. *Peckham*, 104 Wn. App. at 893. Whether the neighborhood's character has changed is a question of fact. *Id.*

JPJ/NBI argue that the history of the Lake Cavanaugh area demonstrates that logging and forestry have constantly been around Lake Cavanaugh and division 3 from before its creation to the present. But no material change has occurred in the Lake Cavanaugh lands neighborhood. The character of the neighborhood has remained the same for decades. Therefore, we reject this argument as a matter of law.

3. Waiver of Covenant

JPJ/NBI argues that we should affirm the trial court's decision by concluding that the restrictive covenant has been waived. We disagree.

JPJ/NBI argue that the equitable doctrine of waiver is applicable because the Lake Trust took no action against past violations over the past 18 years of ownership. But waiver is not listed among the eight equitable defenses identified by the Supreme Court in *Mountain Park* that are available to preclude enforcement of a restrictive covenant. *See* 125 Wn.2d at 341-42. And JPJ/NBI provide no authority suggesting that waiver is a defense applicable to the enforcement of restrictive covenants. Therefore, we reject this argument as a matter of law.

CONCLUSION

We reverse the trial court's decision and remand for the trial court to enter judgment in favor of the Lake Trust.

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 in accordance with RCW 2.06.040, it is so ordered.

Mann, J.

WE CONCUR:

Díaz, J.

Mann, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

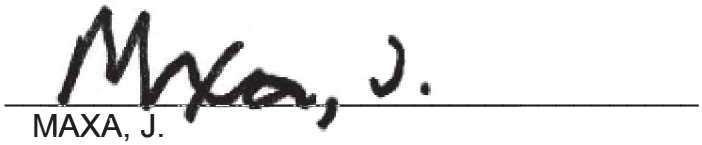
THE LAKE TRUST, a revocable trust governed by the laws of Washington, Appellant, v. SKAGIT COUNTY, a Washington municipal corporation including its PLANNING & DEVELOPMENT SERVICES, Defendant, RICHMOND JPJ ENTERPRISES INC., a Washington corporation, and NIELSEN BROTHERS, INC., a Washington corporation, Respondents.	No. 83761-3-I DIVISION ONE ORDER DENYING MOTION TO PUBLISH OPINION

The respondents have moved this court pursuant to RAP 12.3(e) to publish the opinion filed February 13, 2023. Following consideration of the panel, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: JJ. Diaz, Mann, Maxa[1]

FOR THE COURT:



MAXA, J.

[1] The Honorable Bradley Maxa is a judge on the Court of Appeals, Division Two, sitting in Division One pursuant to RCW 2.06.040 by order of the Associate Chief Justice.

APPENDIX C

II. ISSUES

A. Whether the trial court properly interpreted Restriction No. 3 as not prohibiting the removal of timber through the property owned by Richmond JPJ Enterprises, Inc.

B. Whether the trial court's dismissal of the Plaintiff's claims with prejudice is supported by the record, regardless of legal theories espoused by the trial court in its written ruling.

III. RESTATEMENT OF THE CASE[1]

The facts and history of the properties are critical to a meaningful interpretation and application of Restriction No. 3. The trial court denied Appellant's motion for summary judgment and a preliminary injunction, finding

[1] Citations to Clerks' Papers and Trial Exhibits are "CP" and "Ex" Respectively. Citation to the reports of proceedings is the same as outlined in Footnote 1 of Appellant's Opening Brief ("Feezle RP") and ("Stearns RP").

material issues of fact:

> "[I]t's clear from the face of [the Plat] that some sort of traveling across this particular subdivision, Subdivision III, for timber removal purposes, was part of the uses that were being considered for these properties. So I do find that there are material questions of fact here that would support this case continuing to move forward."[2]

A majority of the background facts and exhibits were stipulated to prior to trial.[3] These Stipulated Facts were adopted as Findings of Fact by the trial court.[4]

A. The Properties and Parties.

The Lake Cavanaugh Subdivision ("**Plat**") is comprised of approximately 766 lots and was platted in three separate "divisions" recorded between 1946 and

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[2] CP 521-522 (Transcript of Ruling Denying Appellant's Motion for Summary Judgment, May 14, 2020, at pg. 2, ln. 21 – pg. 3 line 2).

[3] *See* CP 443-458 ("Stipulation for Trial Re: Facts and Admissible Exhibits").

[4] CP 542 at ¶ 1 (The Findings of Fact and Conclusions of Law are attached hereto as Appendix A, and the Stipulations adopted as Findings as Appendix B).

1948: Division 1 in June 1946 (208 lots), Division 2 in September 1946 (314 lots), and Division 3 in July 1948 (244 lots).[5] Both the Appellant's and Respondents' properties are located within Division 3 of the Plat ("**Plat Div. 3**"). The Plat has two main roads that circumnavigate Lake Cavanaugh's shores—South Shore Drive and North Shore Drive.

Most of the residences in the Plat are vacation or seasonal homes.[6] Many lots within the Plat are vacant, wooded lots with no residences, particularly those on the non-lake side (also called the "back lots").[7] Logging is visible from both sides of the lake along both South Shore Drive and North Shore Drive.[8]

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[5] CP 448 at ¶ 21, 21.a through 21.c, and Ex. 101, 102 and 103.
[6] CP 546 at ¶ 31. At best maybe 15% of the existing residences in the Plat are used full-time. Feezle RP at 66, ln 9-10.
[7] CP 546 at ¶ 30
[8] CP 546 at ¶ 32

The lands abutting and surrounding virtually all of Lake Cavanaugh Divisions 1, 2, and 3 are primarily managed for timber cultivation and harvest and are owned mostly by the DNR and private timber companies.[9] Both North Shore Drive and South Shore Drive are, and have been, used by log trucks and equipment to transport timber, and the equipment necessary for harvesting timber in the lands outside the Plat.[10] South Shore Drive is the main haul road for log trucks in the Lake Cavanaugh area bringing timber to the Hampton mill in Darrington, and the Sierra Pacific mill in Burlington.[11] Logging operations take place in these forest lands surrounding Lake Cavanaugh every year.[12]

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[9] CP 452 at ¶ 43; CP 546 at ¶ 32.
[10] CP 452 at ¶ 44; CP 546 at ¶ 33.
[11] Feezle RP at 193, ln 14-25.
[12] Feezle RP at 194, ln 10-12.

1. The Lake Trust.

Appellant The Lake Trust and Trustee Robert McCullough ("**Appellant**" or "**McCullough**") originally purchased its property in 2004.[13] Appellant owns two lots—one on the shore side of South Shore Drive (Lot 43, Block 1, Division 3) and one across the street on the upland side (Lot 42, Block 2, Division 3) (collectively "**Appellant's Property**").[14] The shore-side property has a vacation house on it.[15]

In 2006, Appellant was required to acknowledge the proximity of Appellant's Property to forest resource lands. Skagit County mandated that he record a "Title Notification" for "Development Activities On or Adjacent to Designated Natural Resource Lands Pursuant to SCC 14.16.870."[16] This notice states in part: "This parcel lies

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[13] CP 443-458 at ¶ 1-5 and Ex 107 and 108.
[14] CP 444 at ¶ 1 and 5; Ex. 108.
[15] CP 546 at ¶ 34.
[16] CP 444 at ¶ 5

within an area or within 500 feet of an area designated as a natural resource land (agricultural, forest or mineral resource lands of long-term commercial significance) in Skagit County."[17] The Notice goes on to state that "commercial activities" may occur in the area which are "not compatible" with residential uses and may in fact be inconvenient and cause "discomfort to area residents." The notice warns owners that this discomfort may arise from the use of spraying chemicals, harvesting, mining and other activities which generate "traffic, dust, smoke, noise, and odor." The notice concludes: "Skagit County has established natural resource management operations as priority use on designated Natural Resource Lands, and area residents should be prepared to accept such incompatibilities, inconveniences or discomfort from normal, necessary Natural Resource Land operations.

[17] CP 444 at ¶ 5 and Ex. 108.

In addition to being the Appellant in the underlying lawsuit in this case, Bob McCullough is also a Board Member of an entity named the "Lake Cavanaugh Trust."[18] The Lake Cavanaugh Trust is wholly unrelated to Appellant "The Lake Trust."[19] The Lake Cavanaugh Trust is non-profit corporation that vehemently opposes any logging around Lake Cavanaugh[20] and has appealed the Forest Practices Act permits granted to Respondents.[21]

McCullough testified at trial that the purpose of the Lake Cavanaugh Trust is to act as a watchdog of sorts and ensure that logging applications are compliant with environmental regulations.[22] But the Lake Cavanaugh Trust website—which McCullough has control over[23]—states that the purpose of the Lake Cavanaugh Trust is to

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[18] CP 451 at ¶ 39.
[19] Feezle RP at 112-113.
[20] Ex 130 and 131.
[21] CP 451 at ¶ 39.
[22] Feezle RP at 113.
[23] Feezle RP at 116.

"Stop all logging above south shore on Frailey Mountain."[24] The Lake Cavanaugh Trust's website goes on to outline all of its legal efforts opposing the permitted logging by Respondent. It further states that "The Trust and Bob McCullough have joined forces, creating a two-prong effort to stop or severely limit Nielsen Brothers attempt to log Frailey Mountain.[25]

In November of 2019, McCullough, along with the three other board members of the Lake Cavanaugh Trust, sent a letter to all property owners within the Plat (including Respondent), requesting donations to support McCullough's lawsuit against Respondents.[26] The letter reiterated that McCullough and The Lake Trust had "joined forces" to do all they could legally to stop the logging.[27] McCullough testified that this statement was mostly

[24] Ex. 130 at pg. 10 of 17.
[25] Ex 130 at pg. 10 of 17.
[26] Ex. 131 at pg. 1 of 4.
[27] *Id*.

accurate but not totally, because he had not "joined forces" with the Lake Cavanaugh Trust.[28] But McCullough also admitted that he never did anything to correct this supposed misstatement with the over 700 lot owners who received it.[29] Despite this evidence, McCullough testified that "the purpose for this lawsuit doesn't have to do with - - the logging of Mount Frailey [*sic*]."[30]

2. Richmond JPJ Enterprises, Inc.

Respondent Richmond JPJ Enterprises, Inc. ("**Richmond JPJ**") owns Lot 2, Block 2 of Plat Div. 3[31] ("**Richmond JPJ Property**"). The Richmond JPJ Property is located approximately one-half mile (2,458 feet) away from the Appellant Property.[32] Richmond JPJ is a real estate holding company owned and/or run by brothers

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[28] Feezle RP at 120.
[29] *Id*.
[30] Feezle RP at 127.
[31] CP 445 ¶ 8 and Exhibit 104.
[32] CP 446 ¶ 14 and Ex. 109; Feezle RP at 94.

Robert and David Nielsen, who own Nielsen Brothers, Inc.[33]

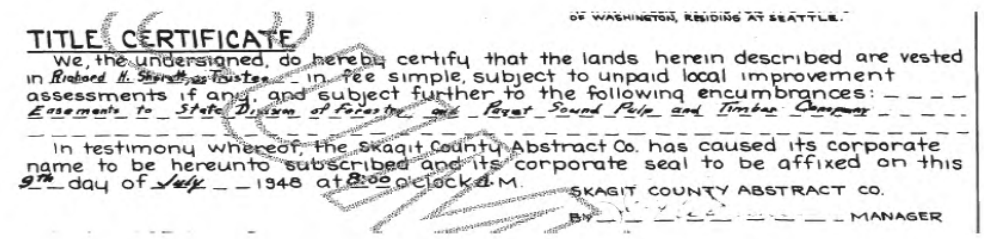
Robert Nielsen's interest in the Richmond JPJ property goes back to the 1990's. Robert Nielsen had interest in the timber properties surrounding the lake and saw that there were old access truck road grades that came up from South Shore Drive and connected to the old railroad grades in the Timber Property (explained more below); Nielsen saw that one of those grades was located within the Richmond JPJ Property.[34]

On the face of each of the original recorded Divisions of the Plat, in a section entitled "Title Certificate", a title reservation was stated for timber rights attendant to the land which would become the 766 lots of the Lake Cavanaugh Subdivision. In Division 1, the Title Certificate noted that there were easements for road purposes given

[33] Feezle RP at 176.
[34] Feezle RP at 223.

to the State Division of Forestry, as well as rights of the Bald Mountain Mill Company to remove timber.[35] Division 2 contained similar restrictions to title.

The Title Certificate on the Plat Div. 3 states that all lands within Division 3 are "subject further to the following encumbrances…Easements to State Division of Forestry and Puget Sound Pulp and Timber Company."[36]



OF WASHINGTON, RESIDING AT SEATTLE.

TITLE CERTIFICATE

We, the undersigned, do hereby certify that the lands herein described are vested in Richard H. Smith, as Trustee, in fee simple, subject to unpaid local improvement assessments if any, and subject further to the following encumbrances: Easements to State Division of Forestry and Puget Sound Pulp and Timber Company

In testimony whereof, the Skagit County Abstract Co. has caused its corporate name to be hereunto subscribed and its corporate seal to be affixed on this 9th day of July 1948 at 8:00 o'clock A.M.

SKAGIT COUNTY ABSTRACT CO.

By _____ MANAGER

This exception applies to the Richmond JPJ Property. Further, this exception must be considered as part of the context of when the Restrictions were adopted.

[35] CP 449 ¶ 24, 25 and 26.
[36] CP 449 ¶ 26 and Ex. 103 (face of the Plat, Division 3).

3. Nielsen Brothers, Inc.

Nielsen Brothers, Inc. ("**NBI**") is a logging and contracting company that focuses on timber harvesting, replanting, forest road construction, and rock crushing services in Washington state.[37] NBI is the company that will conduct the activities at issue in this case on the Richmond JPJ Property.

Robert Nielsen is 66 years old and has lived in Whatcom County for the past 46 years.[38] He began working in the woods in 1974, starting at the bottom of the barrel as a choker setter, eventually learning more about the business, ultimately opening NBI in 1979.[39] From 1979 to the late 80's, NBI engaged primarily in logging and timber purchasing. In the late 80's Robert's brother David joined the business and NBI began engaging in

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[37] CP 445 ¶ 7.
[38] Feezle RP at 172.
[39] Feezle RP at 173.

roadbuilding as well.[40]

Robert Nielsen was involved in his first purchase of real property in 1979.[41] He has extensive experience in reviewing title history and title documents through his work acquiring timber properties for NBI and other related companies.[42] He also has immense knowledge regarding the history of forestry and logging in Whatcom and Skagit Counties.[43]

4. The Timber Property Owners.

West Side Logging, LLC ("**West Side**") and Timberline Logging, Inc. ("**Timberline**") are real estate holding companies owned by or affiliated with Robert and David Nielsen.[44] Together, West Side and Timberline own approximately 276 acres of forest land abutting the

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[40] *Id*.
[41] Feezle RP at 179.
[42] Feezle RP at 175.
[43] Feezle RP at 181-182.
[44] CP 444-445 ¶ 6; Feezle RP at 176.

southern side of Lake Cavanaugh ("**Timber Property**"). NBI will log portions of the Timber Property and haul the logs through the Richmond JPJ Property.

Rob Nielsen has been interested in purchasing the Timber Property since the early 1990's.[45] It had come up for sale a number of times, mostly in auctions, which Nielsen (or related entities) did not win.[46] In 2018, it was up for sale again—this time, with a price.[47] Negotiations ensued and ultimately the price was right; Timberline and West Side Logging purchased the Timber Property.[48]

B. Scope of Use of the Richmond JPJ Property.

NBI has hauled harvested timber from the Timber Property through the Richmond JPJ Property to access

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[45] Feezle RP at 176.
[46] Feezle RP at 176 – 177.
[47] Feezle RP at 177.
[48] *Id*. *See,* Ex 111 for a series of Township maps depicting the Timber Property in relation to Lake Cavanaugh and surrounding properties over the years. Robert Nielsen's testimony explains the maps. Feezle RP at 178-179.

South Shore Drive, pursuant to a Forest Practices Act Permit (No. 2817112 ("**FPA**") Issued by the Washington State Department of Natural Resources ("**DNR**").[49] The FPA approved the harvest of timber on approximately 25 acres of the Timber Property, which were divided into three separate "Harvest Units."[50] Unit 1 is accessed by "**Road A**," which is separated by a large gully and stream from Units 2 and 3. Road A exits the Timber Property to South Shore Drive through a pre-existing county right-of-way.[51]

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[49] CP 450 ¶ 32 and Ex. 132 (the FPA).

[50] The FPA itself identifies five harvest units. Unit 4 is a small area on the southern end of Unit 1, and Unit 5 is a small area on the southern end of Unit 2. They were labeled separately because they are within the Marbled Murrelet buffer area and have separate rules of harvest. They are, however, effectively parts of the larger Units 1 and 2.

[51] Ex. 110 (Attached hereto as Appendix C); This Right of Way is found between lots 20 and 21 of Plat Div. 3. *See*, CP 545 at ¶ 22 and 23, referencing maps in Ex 110, 111 and 114.

Units 2 and 3 are accessed via "**Road B**" which exits the Timber Property through the Richmond JPJ Property.[52] Road B uses a pre-existing road grade (now improved by NBI) which is an old logging road used in the past to haul timber through the Richmond JPJ Property.[53]

Road B was built in the spring/summer of 2020, and all logging (other than some salvage) in the currently approved FPA has been completed.[54] When Road B was constructed, road building equipment was required, but that equipment is no longer on the Richmond JPJ Property or using Road B.[55] As of trial, no equipment remains on the Richmond JPJ Property .[56] Also, a sign has been

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[52] CP 450-451 ¶ 37 and Ex. 110.
[53] CP 544-545 at ¶ 17, and Ex 132 pp. 34-35; CP 545 at ¶ 19 and 22. *See also,* Testimony of Robert Nielsen, Feezle RP at 194-196; 246; Testimony of Samuel Petska, Feezle RP 264-265 and Ex. 110.
[54] Feezle RP at 199.
[55] CP 451 ¶ 41.
[56] Feezle RP at 98 and Ex 13 (Photos of Richmond JPJ Property before and after Road B).

placed at the entrance to the Richmond JPJ Property that states “Road Closed Beyond.”[57]

The Richmond JPJ Property previously had a double-wide mobile home on it (removed by the seller) a pole barn remains.[58] When Richmond JPJ took possession, they discovered large amounts of garbage, wrecked cars, scrap steel, and tires, all of which were piled up for ultimate removal by Richmond JPJ.[59]

As things stand today, no further approvals by the DNR are in place for any additional harvest in the Timber Property. NBI plans to eventually apply for a future FPA (or FPA’s) to harvest additional timber from the Timber Property, virtually all of which will come from the eastern portion of the property and likely use Road B.[60] Exactly when these future FPA’s are submitted and how much

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[57] Feezle RP at 98.
[58] Feezle RP at 205.
[59] *Id*.
[60] Feezle RP at 200.

timber they encompass is a function of many factors, including market conditions.[61]

When (if) future FPA's are approved, NBI agrees it is likely to use Road B. Robert Nielsen estimated that Logging and some dump trucks will pass through the Richmond JPJ Property for at least eight weeks a year in the summer, over a period of three to four years.[62] A truck takes about two to three minutes to traverse the Richmond JPJ Property from South Shore Drive to the Timber Property.[63] Approximately 24 trips per day would take place at peak usage: a total of 10-12 loads of logs per day using a total of four to five trucks, each doing three round-trips a day.[64]

Thus, the uncontested Findings of Fact reveal the following for future use: at most, trucks will travel 24 trips

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[61] *Id*.
[62] CP 543 at ¶ 5; Feezle RP at 200-204.
[63] CP 543 at ¶ 5.
[64] CP 543 at ¶ 5; *see also,* Feezle RP at 204 and 241.

per day, at three minutes per trip, which is 72 minutes per day of trucks traversing the Richmond JPJ Property. Assume that takes place for at most, twelve weeks (three months) per summer, that is 6,048 minutes per year—or 100 hours per year. There are approximately 8,760 hours in a year, meaning trucks will be traversing the Richmond JPJ Property for approximately 1.14 percent of the hours in any particular year for, at most, four years.

After all logging is completed and timber removed, Road B and the Richmond JPJ Property would be used very little. Replanting is done, and some maintenance follows over the next few years, perhaps six or so, both of which would generate minute amounts of traffic.[65] After this, the property would not be used for the next 50 – 60 years while the timber re-grows.[66]

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[65] Feezle RP at 201.
[66] *Id*.

C. History of the Lake Cavanaugh Plat and the Logging on and Around It.

Lake Cavanaugh was named after a logger named James Cavanaugh.[67] Homesteaders settled the area around the lake, but by the early 1920's, the English Lumber and affiliated companies owned virtually all of these original homestead claims.[68] These properties were comprised of thousands upon thousands of acres. The English Lumber Company established logging camps on both the west and east ends of Lake Cavanaugh.[69] During the 1920's and 1930's, the English Lumber Company logged a majority of the old growth timber surrounding the lake.[70] Today, approximately 110 acres of old growth timber remains on Frailey Mountain in and around the Timber Property.[71]

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[67] *Id.* at 182.
[68] *Id.* at 183.
[69] *Id*.
[70] *Id*.
[71] *Id*. at 249.

Prior to 1945, the primary use of the area surrounding Lake Cavanaugh was logging operations, mostly by English Lumber Company.[72] At that time, most of the logging was facilitated by the use of railroads.[73]

During this time, a vast system of logging railroads existed in the thousands of acres near Lake Cavanaugh.[74] A railroad run by English Lumber Company circumnavigated the entire Lake. This railroad ran through and along much of the Timber Property, as well as the land that would become the Plat.[75] Robert Nielsen has personally walked the Timber Property and seen evidence of these old railroads—grades, marks where the ties were, old logging and railroad debris.[76] Nielsen even spoke with an "old timer" in his 80's who remembers walking in the

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[72] CP 543 at ¶ 7.
[73] *Id*.
[74] *See,* Ex 116, and Feezle RP at 186.
[75] *See*, Ex 117, and Feezle RP at 186.
[76] *Id*.

woods and seeing the old trestles still in place in the 1950's or so.[77]

1. English Lumber Company Begins to Sell Its Land Around Lake Cavanaugh.

On January 1, 1945, the English Lumber Company sold its entire operation to Puget Sound Pulp and Timber Company, and conveyed all of the timberland around Lake Cavanaugh, including the Timber Property at issue here ("**PSP&T Deed**").[78] However, English Lumber Company did not sell everything it owned to Puget Sound Pulp and Timber; it retained ownership of the land directly surrounding Lake Cavanaugh ("**Lake Cavanaugh Lands**").[79] The Lake Cavanaugh Lands make up the property that would eventually become the Lake Cavanaugh Subdivision, Divisions 1, 2 and 3.

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[77] *Id*. at 190-191.
[78] CP 543 at ¶ 8; CP 446 at ¶ 16 and Ex. 112 (PSP&T Deed) and 114 (color coded map showing transfers).
[79] *Id*.

On September 22, 1945, English Lumber Company conveyed the Lake Cavanaugh Lands to Leslie Eastman, d/b/a Lake Cavanaugh Sales & Partnership ("**Eastman Deed**").[80] The Eastman Deed references the sale nine months earlier between English Lumber Company and Puget Sound Pulp and Timber. It states that it is "subject to easement created under agreement dated as of January 1, 1945, between the English Lumber Company, a corporation, seller, and Puget Sound Pulp & Timber Company, a corporation, purchaser, as follows" then reciting a long quote from a purported agreement between English Lumber Company and Puget Sound Pulp & Timber ("**January 1945, Agreement**"). Unfortunately, the January 1, 1945, Agreement is not recorded, and cannot be found, despite both parties extensively searching recorded

[80] CP 543 at ¶ 9; CP 544 at ¶ 10; CP 446-447 at ¶ 17-18 and Ex. 113. Paragraph 18 of CP 446-447 contains the exact wording from the Eastman Deed as it is difficult to read on the actual deed.

documents and historical records.[81]

Of particular interest here though is the fact that the PSP&T Deed by English Lumber Company from nine months earlier (Ex 112) did not contain any mention of this January 1, 1945, Agreement, or the alleged easements that were supposedly granted therein.

The Eastman Deed also conveyed title subject to a number of easements— some referenced of record and some mentioned within the January 1, 1945 Agreement. These facts support the notion that the conveyance from English Lumber Company to Eastman was replete with reservations for timber rights of access. Two easements were to the State Division of Forestry to construct and maintain roads for forest protection purposes, granted in

[81] CP 447 at ¶ 19; John Milnor, Appellant's expert title witness could not find evidence of this 1945 Agreement in any public records. Feezle RP at 141. Robert Nielsen could not find it either. Feezle RP at 160.

1935.[82] A third easement was to the Bald Mountain Mill Company.[83] These easements are recorded, are provided as exhibits here, and were referenced on the Lake Cavanaugh Plat.

Trial Exhibit 114 depicts the property that was conveyed in the PSP&T Deed and the Eastman Deed.

2. Lake Cavanaugh Plat is Created.

Between June of 1946 and July of 1948, most of the Lake Cavanaugh Lands conveyed in the Eastman Deed were platted into the three Divisions of the Lake Cavanaugh Plat.[84] Each Division of the Plat contained specific restrictions, each of which is worded slightly different, but which contains similar restrictions.[85]

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[82] These easements are referenced in the Eastman Deed by Auditor's File No. 288266 and 306699. These two easements are Ex. 105 (stipulated as admitted).
[83] This easement (July 30, 1941) is found at Ex. 106.
[84] CP 448 at ¶ 21, Ex 101, 102 and 103 (Plat Maps).
[85] CP 449 at ¶ 24 – 26.

As a result of the above, the trial court held in Finding of Fact No. 10:

> “Because Leslie Eastman was aware of the January 1, 1945 Agreement, PSPT's logging operations in the timberlands, and PSPT's continued rights of way over what was to become Subdivision 3 when he created the subdivision, it was his intention to exclude logging transit to and from the timberlands from the term "commercial business."[86]

This finding is not challenged.

Through the late 1940’s and into the early 1950’s, Puget Sound Pulp and Timber Company was transitioning from railroad logging to truck based operations.[87] The railroad around Lake Cavanaugh was removed, but of course the railroad grade remained. By the mid 1950’s, all railroad logging operations had ceased and were converted to truck logging. Most of the old railroad grades were converted to truck roads.[88]

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[86] CP 544 at ¶ 10.
[87] CP 544 at ¶ 12.
[88] CP 544 at ¶ 13.

These truck roads connect to the Skagit County public road system around Lake Cavanaugh, including South Shore Drive. The trial court specifically found that Road B on the JPJ Property was one of these old truck roads or even an old railroad grade used to haul logs through the Richmond JPJ Property.[89] This too is supported by substantial evidence as outlined above.[90]

Richard Shorett was the successor-in-interest to Eastman, and he is the one who actually signed Plat Div. 3 in which the JPJ Property is located.[91] In 1952, Richard Shorett conveyed a number of the platted "Tracts" as well as actual lots within the Plat of Lake Cavanaugh, Subdivisions 1, 2 and 3 to a man named Ralph Wood.[92] This conveyance included Tracts A and B of Plat Div. 3.

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[89] CP at 544-545, ¶ 17, *citing*, aerial photography in Ex 132, pp. 34 and 45.
[90] Exhibits and testimony of Robert Nielsen and Sam Petska.
[91] Ex. 103 (Face of Plat); *see also* Feezle RP at 185-186.
[92] CP 449 at ¶ 27 and Ex. 134.

On the same day in 1952, these tracts (and other lots in the Plat) were then conveyed from Wood to Puget Sound Pulp & Timber Company, with the notation that Wood warrants "that the easements and restrictions of record pertaining to said described real property shall never be construed by competent authority to limit or prohibit extraction or removal of forest products [on the] described premises or any portion thereof."[93]

In the early 1960's, Puget Sound Pulp and Timber Company sold all assets, including Lake Cavanaugh operations, to Georgia-Pacific Corp.[94] For the next 25 or so years, Georgia-Pacific continued extensive timber harvest operations in the Lake Cavanaugh vicinity, including much of the remaining old-growth.[95]

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[93] CP 449 at ¶ 27 and Ex. 134 and 135.
[94] Feezle RP at 186.
[95] *Id*.

In the late 1980's to early 1990's, Georgia-Pacific sold off large parcels of timberlands, including the areas around Lake Cavanaugh. The ownership of these lands changes several times over the next 20 years.[96] Some of the owners over this period are: Hancock Timber Resources; Hampton Lumber Co.; Green Crow Forestry; Weyerhaeuser; and Washington State DNR.[97] This succession of title can be seen in a series of maps showing the ownership of lands located in Township 33 N. Range 6 E., where the property at issue here is located.[98]

Forest management and timber harvest continues on all of the lands surrounding Lake Cavanaugh through the present (2021). Landowners are now harvesting 2nd and 3rd generation forest around Lake.

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[96] Feezle RP at 177.
[97] *Id*.
[98] Ex. 114 and 115.

The Timber Property encompasses mostly second growth timber (70-80 years) with approximately 62 acres of old growth timber (200+ years).[99] NBI intends to harvest permitted timber on its property using many roads and old grades that have existed for 85+ years, including the old truck road on the Richmond JPJ Property.

IV. STANDARD OF REVIEW

A. Findings of Fact.

Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002).[100] A finding of fact erroneously described as a

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[99] Feezle RP at 181.

[100] The Appellant has not specifically challenged any numbered finding of fact in the notice of appeal nor assignments of error. Further, Appellant has also not specifically briefed challenges to specific findings of fact. Appellant mentions an alleged lack of "substantial evidence" only twice– on page 10 and page 36 of the opening brief. A party who assigns error to a specific finding of fact but fails to properly argue or brief it, waives the error. *Kever & Associates, Inc.*, 129 Wn. App. at 741. If not properly challenged, the findings are not reviewed on

No. 83761-3

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

Richmond JPJ Enterprises, Inc. and Nielsen Brothers, Inc. Appellants, v. The Lake Trust Respondent.	DECLARATION OF SERVICE

On said date below, I sent via email a true and correct copy of Petition for Review in the Court of Appeals Cause No. 83761-3 to:

John T. Cooke
Houlihan Law, PC
100 N 35th St.
Seattle, WA 98103
jt@houlihan-law.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to my best knowledge and belief.

DATED April 17, 2023, at Blaine, Washington.

MYLISSA BODE, Paralegal
Belcher Swanson Law Firm, PLLC

BELCHER SWANSON LAW FIRM PLLC

April 17, 2023 - 2:38 PM

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