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DIVISION II
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No. 47126-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; and RIVER PROPERTY, LLC,

Appellants,

v.

JAMES W. BROWN; ROBERT D. DAVIS; KAE HOWARD, TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CRISTI D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG, husband and wife; VINCENT and SHELLY HUFFSTUTTER, husband and wife; THOMAS J. and GLORIA S. KINGZETT, husband and wife; LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E. McCLASKEY, JR. and VERONICA A. McCLASKEY, TRUSTEES OF THE McCLASKEY FAMILY TRUST-FUND A; CRAIG STEIN; and RICHARD and CAROL TERRELL, husband and wife,

Respondents.

AMENDED BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case concerns plaintiffs' attempt to relitigate an issue that was decided by this Court in 2013; namely, that more than 80 percent of the homeowners in Rivershore[1] validly adopted an amendment to the Rivershore Declaration so as to preclude the further subdivision of any lots in Rivershore, including the lot plaintiffs seek to divide in this action. Plaintiffs now try to avoid the law of the case doctrine and to make arguments that they both raised and could and should have raised in connection with the prior appeal.

The Court should decline to reconsider or revisit its 2013 holding. With a proper application of the law of the case doctrine, the trial court's findings of fact, conclusions of law, and judgment should be affirmed.

On the merits, plaintiffs' challenges to the validity of the approval of the owners of three lots to the amendment fails. Each challenged signature was from someone who had an interest in the lot at issue. Each signature clearly was in favor of the amendment. The conclusion that the amendment was legally adopted and is valid should stand.

Plaintiffs also briefly contend that equitable estoppel should have been found to bar the owners from amending the CC&R's. Plaintiffs did not come close to proving the elements of equitable estoppel at trial, let

[1] "Rivershore" refers to Rivershore Estates Phase I, a very upscale and exclusive development on the shore of the Columbia River in Vancouver, Washington.

alone by clear and convincing evidence. The trial court properly ruled in favor of defendants on plaintiffs' estoppel claim.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Response to Assignments of Error 1-4: The trial court acted properly and in accordance with the evidence and law, and in accordance with the prior holding of this Court, when it entered its Memorandum of Opinion, its Conclusions of Law, and the Judgment, relying on the law of the case doctrine.

Response to Assignment of Error 5: The trial court properly found that plaintiffs did not prove the elements of equitable estoppel.

III. RESPONSE TO ISSUES PRESENTED

1. The question of whether the 2008 amendment required the approval of all homeowners within the subdivision has already been decided by this Court, and the law of the case doctrine requires that decision to be followed.

2. Whether the owners of Lots 1, 8 and 9 validly assented to the 2008 amendment is an issue that could and should have been raised in the prior appeal such that the law of the case doctrine precludes the Court from deciding those issues in this appeal.

3. Even if the law of the case doctrine was to be deemed inapplicable to this case, the owners of Lots 1, 8, and 9 unambiguously

consented to the adoption of the 2008 amendment, and their votes should stand.

4. Defendants did not act or fail to act in any way that would justify the application of equitable estoppel to invalidate their assent to the 2008 amendment.

IV. STATEMENT OF THE CASE

In the prior appeal, the principal issue before the Court was whether the trial court erred in granting plaintiffs' motion for partial summary judgment and concluding that the 2008 amendment was invalid. Defendants argued on appeal that the owners of 10 lots voted in favor of the modification and that the vote satisfied the language in the declaration that reserved the power to modify the CC&R's to the votes of 80 percent of the lot owners. *See* Appendix, at A24-26.

In their responsive brief on appeal, plaintiffs contended that the defendants "failed to muster the requisite number of votes necessary to amend." A51. Although plaintiffs cited both *Shafer v. The Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267 (1994) and *Meresse v. Stelma*, 100 Wn. App. 857 (2000), plaintiffs did not argue that the 2008 amendment had to be passed by a unanimous vote.

In an unpublished opinion, this Court held in favor of defendants and upheld the validity of the 2008 amendment. See A71.

> We conclude that the amendment to the covenants was valid because, in conformance with the covenants, it was approved by owners holding more than 80 percent of current ownership interest in the lots in the subdivision....We also conclude that the Andersons' equitable claims must be remanded for further proceedings. We retain jurisdiction so that, should the Andersons be successful in these proceedings, we may consider whether the Andersons' application will need to be processed as a plat alteration or as a short plat.

The court concluded its discussion of the issue, at A83, as follows:

> We hold that each of the two lots within former lot 13 has a one-half vote for purposes of amending the Covenants, and thus the 2008 amendment to the Covenants was approved by an 80.7 percent vote. The trial court's ruling that the amendment was invalid is reversed.

In their motion for reconsideration, plaintiffs belatedly contended that they were still entitled to argue whether the signatures on the amendment were legally valid. A63. On reconsideration, this Court agreed to refer to the signatures as "purported." A69. The Court did not change its fundamental conclusion, however, that the 2008 amendment was legally valid.

Following a trial to the court on remand, the trial court entered its memorandum of opinion on December 22, 2014. CP 16-21. The court found that plaintiffs' issues regarding the signatures of the owners of Lots 1, 8 and 9 had already been resolved by the 2013 opinion. CP 16-17:

> Preliminarily, from the rulings of the appellant [sic] court certain issues can be accepted as verities by this court.

1. <u>The amendment to the covenant was valid</u>.

* * *

> The court further ruled that the signatures "purporting" to be those of the respective lot owners were properly affixed to the amendment. Any issue regarding the authority of the signatures would apparently be validated by this ruling. Consequently plaintiffs would be estopped from challenging the validity of the voting process.

The trial court also found that plaintiffs' contention that the 2008 amendment had to be adopted unanimously had previously been raised but not argued by plaintiffs, such that the argument did not present a new statement of precedent that would justify not adhering to the law of the case doctrine. CP 18-19. The trial court agreed that this issue had been resolved by the 2013 opinion and that issues regarding the validity of the amendment could not be raised on remand. CP 20:

> The vote on the amendment was valid despite questions concerning the signatures of the various owners' capacity as "trustees/assignees." This issue was resolved by the Court of Appeals.

The court then entered findings of fact (none of which are challenged here) and conclusions of law. CP 22-28. There, the court incorporated its memorandum of opinion as the conclusions of law.

Finally, the trial court entered a judgment, confirming that the 2008 amendment "is legally valid, and operates to preclude plaintiffs Anderson from subdividing Lot 2 in Rivershore Phase 1." CP 29-31. The

court also entered a money judgment in favor of defendants for their taxable costs. *Id.*

V. ARGUMENT[2]

A. The Law of the Case Doctrine Precludes Plaintiffs from Challenging the Validity of the 2008 Amendment.

Plaintiffs' attempt to challenge the validity of the 2008 amendment is improper because this Court ruled in 2013 that the 2008 amendment had been legally adopted and was valid. In light of that holding, the law of the case doctrine precludes plaintiffs from again challenging the validity of the 2008 amendment in this appeal.

The law of the case doctrine was summarized in *Columbia Steel Company v. State*, 34 Wn.2d 700, 705 (1949):

> The law is well settled in this state that on a second appeal we will not review questions decided by us on the former appeal. Upon the retrial the parties and the trial court were all bound by the law as made by the decision on the first appeal. On appeal therefrom the parties and this court are bound by that decision unless and until authoritatively overruled.
>
> ...The case having been here upon a former appeal, as to every question that was determined upon that appeal and as to every question that might have been determined, the opinion became what is called the law of the case upon the second trial, and cannot again be considered by this court upon a second appeal. (Citations omitted.)

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[2] Defendants agree with plaintiffs' statement of the standard of review. *See* Brief of Appellants, at 9.

See also Folsom v. County of Spokane, 111 Wn.2d 256, 263 (1988) ("Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal"); *Groverson v. Perez*, 156 Wn.2d 33, 41 (2005) ("...the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent states of the same litigation"); *State v. Worl*, 129 Wn.2d 416, 424 (1996) ("...the parties, the trial court, and [the Supreme] Court are bound by the holdings of the court on the prior appeal until such time as they are 'authoritatively overruled'").

Holst v. Fireside Realty, Inc., 89 Wn. App. 245 (1997), is an example of the court finding that the law of the case doctrine was inapplicable. There, the court in the first appeal held that if a realtor was acting as a party's agent, the realtor did not adequately disclose that fact. *Id.* at 258. This finding did not implicate the law of the case on the second appeal, however, because the court did not decide in the first appeal whether the realtor was in fact acting as the party's agent. The question presented on the second appeal had not been decided in the first appeal.

This case does not present a similar situation. In 2013, this Court did not decide that the 2008 amendment was legally valid <u>if</u> trustee owners approved the amendment by signing in a certain capacity or <u>if</u> the Davis lot owner, due to probate issues, approved the amendment with authority to do so. This Court found, without reservation, that the 2008 amendment was legally valid. It remanded the case for the sole purpose of allowing plaintiffs to try their claim of equitable estoppel to the court. *See* A83-85:

> Because the evidence regarding estoppel is underdeveloped in this case, we affirm the trial court's denial of summary judgment for the Andersons on this issue and remand for further proceedings. The Andersons' success on this issue would permit them to move forward with an application to subdivide lot 2 despite the valid Covenant amendment prohibiting further divisions of lots within Rivershore....
>
> * * *
>
> ...the outcome of this case still depends on whether the Andersons prevail on their equitable claims on remand...

Despite the prior decision of the Court of Appeals, plaintiffs have belatedly asserted that they intend to challenge defendants' signatures on the amendment, including that Ms. Howard and the McClaskeys did not write "trustee" after their signatures. Plaintiffs also contest the signature for Lot 9, which was affixed by one of the owners of that lot. Plaintiffs have waived any right they may have had to raise these contentions.

Plaintiffs' complaint for declaratory relief contains no allegations regarding the signatures or the signators' authority to sign the document adopting the 2008 amendment. CP 1-3. Defendants' amended answer then affirmatively alleged that "[t]he amendment to the CC&R's is effective to prohibit plaintiffs' efforts to subdivide or short plat lot 2." CP 5. Plaintiffs filed a reply to defendants' affirmative defenses, but again failed to allege that there was any issue with the signatures adopting the amendment. SUPP. CP 102-103.

Plaintiffs later filed a motion for partial summary judgment. SUPP. CP 35-45. In their supporting memorandum, plaintiffs offhandedly included a sentence stating that the signatures had to be made in the owners' proper capacity. SUPP. CP 68. Nowhere else in plaintiffs' moving or reply pleadings (SUPP. CP 35-45, 104-112) is this sentence expanded upon. The concept is not even mentioned again, let alone argued.

By failing to raise the signature issue in their reply to defendants' affirmative defenses, plaintiffs waived their right to assert the issue. CR 8. *See also Harting v. Barton*, 101 Wn. App. 954 (2000). Plaintiffs also waived any right to rely on this issue by failing to present further argument to the trial court or to the Court of Appeals. *See, e.g., Skagit County Public Hospital District No. 1 v. Dept. of Revenue*, 158 Wn. App.

426, 440 (2010) ("An appellant waives an assignment of error if it fails to present argument or citation to authority in support of that assignment").

Plaintiffs similarly did not raise the issue on appeal until after the appellate court had ruled, when plaintiffs filed their motion for reconsideration and clarification. A63-67. Again, plaintiffs' attempt to create an issue regarding the signatures came too late, and the issue was waived. Plaintiffs cannot generally use a motion for reconsideration to raise an issue for the first time. *See Howe v. Douglas County*, 146 Wn.2d 183, 185 n.1 (2002).

It is noteworthy that plaintiffs had earlier filed a "motion to strike defenses not pleaded" in February 2010. SUPP. CP 113-115. Plaintiffs therefore recognized that unplead affirmative defenses cannot be asserted. Plaintiffs must be held to the same standard. The invalidity of one or more signatures on the amendment is an affirmative defense to defendants' claim that the 2008 amendment was valid. Having failed to assert the defense properly, plaintiffs have waived the defense.

In their brief in the first appeal, plaintiffs addressed defendants' contention that the 2008 amendment was valid at 12-14. A19-21. They made no contention that any signatures were invalid. This was certainly a contention which should have been made, given that defendants were asking the Court of Appeals to find that the 2008 amendment was legal,

valid, and enforceable. The validity of the signatures, if in issue, was necessarily an element to be raised in resolving that issue. Plaintiffs were aware of this potential issue, given that they had mentioned it in their motion for partial summary judgment.

The purpose of the law of the case doctrine is "to promote finality and efficiency in the judicial process." *Roberson v. Perez*, 156 Wn.2d 33, 41 (2005). *See also* RAP 2.5(c)(2). This purpose would be ill-served by allowing plaintiffs to now challenge this court's 2013 opinion with arguments that were known and that should have been made at the time. As Division III recently noted, "We may also refuse under the doctrine to address issues that could have been raised in a prior appeal." *Sambasivan v. Kadlec Medical Center*, 184 Wn. App. 567, 576 (2014). *See also Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64 (1988). Under the circumstances of this case, the Court in its discretion should apply the law of the case doctrine and preclude plaintiffs' belated challenge to the signatures on the documents approving the 2008 amendment.

B. There Was No Intervening Change in Controlling Precedent to Justify not Applying the Law of the Case Doctrine.

Plaintiffs erroneously contend that the decision in *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241 (2014) was a change in controlling precedent, justifying a departure from the law of the case

doctrine. Where there has been an intervening change in controlling precedent between the times of the first and second appeals, the court may choose to disregard the law of the case doctrine. *Roberson*, 156 Wn.2d at 42-43. Plaintiffs' argument fails because *Wilkinson* does not represent a change in controlling precedent. The trial court properly reached that conclusion.

In the first appeal, plaintiffs relied on *Shafer v. The Board of Trustees of Sandy Hook Yacht Club Estates*, 76 Wn. App. 267 (1994) and *Meresse v. Stelma*, 100 Wn. App. 857 (2000) in support of their challenge to the validity of the 2008 amendment. *Shafer* concerned the adoption of new restrictive covenants without the agreement of all affected property owners. While the court ultimately found that the development documents expressly reserved the power for less than 100 percent of the property owners to adopt new restrictions, the proposition being relied upon was the same as that relied on by the *Wilkinson* court: If the governing documents do not reserve the power in less than 100 percent of owners to adopt new restrictions, then the adoption of new restrictions must be unanimous.

Meresse was to similar effect. There, through interpretation of the restrictive covenants, the court held that a majority lot owner could not subject the dissenting minority owner to a major change (relocation

of an access road). In other words, the major change could only be put into effect if there was unanimous approval.

While *Wilkinson* clarified these holdings, it did not announce a new principle of law representing a change in controlling precedent.[3] The court held, as in *Meresse*, that a majority of owners could not impose a new restriction on the dissenting minority owners where the new restriction was unrelated to any existing covenant. *Wilkinson*, 180 Wn.2d at 255.

Wilkinson did not change precedent or open the door for plaintiffs to renew their objection to the validity of the 2008 amendment. The law of the case doctrine should still be applied to foreclose plaintiff's attempt to overcome the 2013 holding that the 2008 amendment was legal and valid.

C. In Any Event, Plaintiffs' Challenge to the Signatures is Without Merit.

Although the issue is precluded by the law of the case doctrine, defendants will briefly address plaintiffs' contentions regarding the signatures from the owners of Lots 1, 8, and 9.

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[3] The trial court properly so found, stating: "Contrary to plaintiffs [sic] assertions this does not appear to be a case of first impression as *Meresse* and others were cited as authority." CP 18.

Kae Howard, the owner of Lot 1, signed an approval to the 2008 amendment. Ex. 1, at Tab 6.[4] Todd and Veronica McClaskey, the owners of Lot 8, also signed an approval of the 2008 amendment. *Id.* So did Roberta Davis, the owner of Lot 9. *Id.*

Plaintiffs contend that the Howard and McClaskey signatures are invalid because they owned their lots through trusts, rather than as individuals, and they did not handwrite "trustee" after their signatures.[5] However, the authorities relied upon by plaintiffs concern attempts to convey real property. Such conveyances have specific and detailed requirements to be valid. *See* RCW 64.04.020 (requiring all deeds to be "signed by the party bound thereby"). No conveyance is at issue in this case. Instead, the owners were merely signifying their assent to the 2008 amendment. Their signatures are valid for that purpose.[6]

As for Lot 9, plaintiffs contend that Ms. Davis' signature is invalid because she only held a one-half interest in the lot. There is no evidence in the record that the owners of the other one-half interest were opposed to the 2008 amendment. In the absence of such evidence,

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[4] All trial exhibits have been transmitted as part of the record on appeal as "Exhibit 1."
[5] The only legal effect of a trustee not placing the word "trustee" after his signature is to prevent the trustee from asserting that he has no personal liability on a contract. *See* RCW 11.98.110(2). Plaintiffs in effect have no right or standing to contest the manner in which the McClaskeys and Ms. Howard signed the amendment to the CC&R's.
[6] At a minimum, Ms. Howard and the trustees should be considered to be agents of their trusts for purposes of signifying their approval of the amendment.

Ms. Davis' signature should be deemed sufficient to signify approval by the owners of Lot 9 of the 2008 amendment.[7]

Even if the Court were to consider the signatures issue on the merits, all of the evidence in the record supports the conclusion that the owners of Lots 1, 8, and 9 were in favor of and approved the 2008 amendment. Their vote should stand.

D. The Trial Court Correctly Concluded That Plaintiffs Had Not Established a Claim of Equitable Estoppel.

The sole issue for trial on remand was whether defendants should be deemed equitably estoppped from challenging plaintiffs' attempt to short plat their lot. Plaintiffs' sole basis for claiming equitable estoppel arose from the late James Brown's division of Lot 13 into two lots in 2003-04. Plaintiffs argued that the other Rivershore residents did not fight hard enough to keep Mr. Brown from dividing his lot, and therefore should have been precluded from challenging plaintiffs' attempt to divide their lot. The trial court found that plaintiff did not establish the elements of equitable estoppel. CP 20:

> Regarding the estoppel argument, plaintiffs argue that since some lot owners indicated at one time that they would not seek legal action to restrict Brown's short plat, they are now restrictive from barring similar action by plaintiffs. While acknowledging evidence that plaintiffs would [not] have purchased an additional lot based on this perception, this

[7] Again, at a minimum Ms. Davis should be considered to be acting as the agent for all the owners of the Lot 9 property.

> would not constitute a waiver of defendants' right to vote on any amendments. The covenants prescribe that any past waiver is not binding on any future enforcement. Further, a waiver on one's voting rights would have to comport to the voluntary, willing, and knowing forfeiture of a known right standard. The evidence would not support this claim.

This conclusion was supported by unchallenged Finding of Fact No. 6, which summarized the estoppel evidence. CP 24-25:

> Dale Anderson contacted Zachary Stoumbos, an attorney in Vancouver, to attempt to stop the division of Lot 13, in approximately September of 2002. Ms. Howard, Ms. Andrist, Ms. Davis, Mr. Stein, and Mr. Huffstutter joined in the retention of Mr. Stoumbos as per Exhibit 29. They unsuccessfully attempted to convince the City of Vancouver not to approve the proposed division. After Mr. Stoumbos' letter to Mr. Anderson of April 8, 2003, (Exhibit 36) and after his letter of April 23, 2003, to the Andersons, Ms. Howard, Ms. Andrist, Ms. Davis, Mr. Stein, and Mr. Huffstutter on April 23, 2003, which included a copy of the April 8, 2003, letter (Exhibit 37), the group chose not to pursue litigation to stop the division of Lot 13.

A decision not to file suit, appeal, or otherwise proceed through formal legal means does not amount to an estoppel. *See, e.g., State Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19-20 (2002) (declining to find equitable estoppel where Ecology did not appeal a 1986 short plat determination). The trial court properly concluded that defendants were not estopped from challenging plaintiffs' proposed division by their decision to halt their legal challenge after receiving an adverse result at the City level.

Equitable estoppel also does not apply to this situation because Mr. Anderson was the key member of the group that chose not to continue the legal fight against Mr. Brown. *See Kramarevcky v. DSHS*, 122 Wn.2d 738, 743 n.1 (1993):

> A party may not base a claim of estoppel on conduct, omissions, or representations induced by his or her own conduct, concealment, or representations. This principle is known as the "clean hands" doctrine. (Citations omitted.)

See also Mutual of Enumclaw Ins. Co. v. Cox, 110 Wn.2d 643, 650-51 (1988) ("...the doctrine of equitable estoppel is available to innocent parties only.") Plaintiffs may not rely upon a decision that was made by a group of which Mr. Anderson was a key participant to support a claim of equitable estoppel.

The trial court properly concluded that plaintiffs failed to establish the three elements of equitable estoppel by the requisite clear, cogent, and convincing evidence. *Kramarevcky, supra*, at 743-744:

> The elements of equitable estoppel are: (1) a party's admission, statement, or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement, or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission.

First, none of the defendants made a statement or acted in a manner inconsistent with their objection to plaintiffs' subdivision. The defendants

either participated in the challenge to Mr. Brown's application or took no action one way or the other. There was no evidence presented that any defendant said or did anything to support the Brown application. At most, they chose to halt the legal challenge in reliance on an opinion from counsel. There was simply no evidence of any inconsistent act or statement by any defendant.

Plaintiffs also had no right to rely on anything the defendants did. Mr. Anderson was the leader of the opposition group. He was the point person for the communications with Stoumbos. He was the sole addressee on the Stoumbos opinion letter. The fact that the remainder of the group went along with the decision not to continue the legal challenge in no way creates a situation that Mr. Anderson was entitled to rely upon to his detriment. There can be no estoppel where Mr. Anderson had knowledge of all of the facts. *See Leonard v. Washington Employers, Inc.*, 77 Wn.2d 271, 280 (1969), *quoting Wechner v. Dorchester*, 83 Wash. 118 (1915):

> In order to create an estoppel it is necessary that: "The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties or both have the same means of ascertaining the truth there can be no estoppel.

See also *Patterson v. Horton*, 84 Wn. App. 531, 544 (1997).

In sum, after considering all of the evidence (primarily contained in the trial exhibits), the trial court properly concluded that plaintiffs had failed to prove any right to relief on their claim of equitable estoppel.

VI. DEFENDANTS ARE ENTITLED TO AN AWARD OF REASONABLE ATTORNEY'S FEES FOR BOTH APPEALS

Following the recent trial of the above-captioned cause, it is clear that defendants are the prevailing parties in this action, and are entitled to an award of reasonable attorney fees per RAP 18.1. Pursuant to Section 19 of the Declaration of Covenants and Restrictions for Rivershore (Trial Exhibit 1), defendants are entitled to an award of reasonable attorney fees and costs. Section 19 provides, in relevant part:

> Should any suit or action be instituted by any of said parties to enforce any of said reservations, conditions, agreements, covenants and restrictions, or to restrain the violation of any thereof, after demand for compliance therewith or for the cessation of such violation, events and whether such suit or action be entitled to recover from the defendants therein such sum as the court may adjudge reasonable attorney fees in such suit or action, in addition to statutory costs and disbursements.

The CC&R's are expressly applicable to all owners in Rivershore, and they expressly run with the land. Trial Exhibit 1, at 1. Thus, "said parties" refers to the owners of land in Rivershore. Defendants are such owners.

Defendants' positon in this case was obviously to restrain the violation of the first amendment to the CC&R's (Trial Exhibit 4). Defendants were successful in that regard. Because the attorney provision is reciprocal by law, defendants are entitled to an attorney fee award.

VII. CONCLUSION

For the foregoing reasons, the trial court's memorandum of opinion, findings of fact, conclusions of law, and judgment should be affirmed.

DATED this 21 day of May, 2015.

HEURLIN, POTTER, JAHN, LEATHAM,
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BRIEF OF APPELLANTS

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I. INTRODUCTION

In 1989 an upscale platted subdivision was created on the Columbia River in Vancouver, Washington. The subdivision was known as Rivershore. It consisted of 13 lots and associated $1/13^{th}$ interests in the tidelands that are part of Rivershore.

This action arose when plaintiffs Anderson sought to subdivide Lot 2, a parcel they own within Rivershore, into two building lots. When plaintiffs' neighbors objected to the proposed short plat of Lot 2, the office of the Vancouver City Attorney concluded that the short plat should be denied unless a plat alteration was filed. In the face of this recommendation, plaintiffs abandoned their short plat application and instead filed the instant lawsuit.

In their complaint plaintiffs sought a declaratory judgment that neither the original covenants and restrictions nor an amendment to them precluded plaintiffs from short-platting their property.

Following cross-motions for summary judgment and cross-motions for reconsideration, the Clark County Superior Court entered a judgment and order on August 20, 2010, concluding that the Court's April 8, 2010, order would serve as the final determination of the Court. In that order, the Court found:

1. The original covenants and subdivision plat do not address the further subdivision of any lot in Rivershore, and the decisions of the Court are not controlling on any future short plat application that may be filed; and

2. The amendment to the original covenants was invalid because 80 percent of the lot owners had not approved them.

II. ASSIGNMENTS OF ERROR

A. THE TRIAL COURT ERRED IN PARTIALLY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FOR DECLARATORY RELIEF.

1. DID THE COURT'S ORDER CONSTITUTE AN IMPROPER ADVISORY OPINION WHERE THERE IS NO PENDING SHORT PLAT APPLICATION?

2. DID THE COURT'S ORDER CONSTITUTE AN IMPROPER ADVISORY OPINION WHERE THERE WAS NO ACTUAL AND PENDING DISPUTE BETWEEN THE PARTIES THAT WAS CONCLUSIVELY DETERMINED BY THE COURT ORDER?

B. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT IN WHICH THEY SOUGHT A DECLARATORY RULING THAT

PLAINTIFFS MAY NOT SEEK APPROVAL OF THEIR PROPOSED SHORT PLAT WITHOUT FIRST COMPLYING WITH RCW 58.17.215.

1. WAS PLAINTIFFS' PROPOSED SHORT PLAT INCONSISTENT WITH THE FACE OF THE ORIGINAL PLAT?

2. WAS PLAINTIFF'S PROPOSED SHORT PLAT INCONSISTENT WITH THE ORIGINAL RESTRICTIVE COVENANTS?

C. THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND CONCLUDING THAT THE 2008 AMENDMENT TO RIVERSHORE'S COVENANTS WAS INVALID.

1. SHOULD EACH OWNER OF THE TWO LOTS WITHIN SHORT-PLATTED LOT 13 EACH BE GIVEN A ONE-HALF VOTE IN DETERMINING WHETHER 80 PERCENT OF THE LOT OWNERS VOTED IN FAVOR OF THE AMENDMENT?

2. AT A MINIMUM, SHOULD THE PARTIAL SUMMARY JUDGMENT ORDER BE REVERSED SO THAT THE TRIAL COURT CAN CONSIDER EVIDENCE OF THE INTENTION OF THE ORIGINAL DEVELOPERS?

D. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

1. DID PLAINTIFFS FAIL TO EXHAUST THEIR ADMINISTRATIVE REMEDIES?

2. DID PLAINTIFFS OTHERWISE FAIL TO COMPLY WITH THE REQUIREMENTS OF THE VANCOUVER MUNICIPAL CODE?

III. STANDARD OF REVIEW

Review of a motion granting or denying summary judgment is "de novo." *J.N. v. Bellingham School District No. 501*, 74 Wn. App. 49 (1994); *Schoneman v. Wilson*, 56 Wn. App. 776 (1990).

Plaintiffs bear the burden of establishing that there are no genuine issues of material fact. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 502-503 (1992). Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant and all inferences from the evidence must be construed in the light most favorable to the nonmoving party. *Magula v. Benton Franklin Title Company*, 131 Wn.2d 171 (1997). On their cross-motion, defendants bear the same burden.

IV. STATEMENT OF THE CASE

The short plat which created Rivershore was created and approved in 1989 (CP 34). The plat contained 13 lots. Note 4 on the face of the plat provides that:

> Tract "A" (the shoreline tract) to be owned and maintained by owners of record of lots 1-13; will be conveyed as an undivided 1/13 interest in, and to tract "A".

Id. In April 1989, the developer of Rivershore also created and recorded the original declaration of covenants and restrictions for Rivershore (CP 36-40). Section 1 of the declaration provides that no lot shall contain more than a single detached family dwelling (CP 36). Sections 15 and 16 address the Tract A tidelands, and provide that "the use and enjoyment of said parcel "A" be restricted to the owners of lots 1-13..." (CP 39). Section 15 mirrors note 4 from the face of the plat. *Id.*

The introduction to the covenants provides for the future modification of them (CP 36):

> ...if prior to such 30 year date, it appears to the advantage of this platted subdivision that these restrictions should be modified, then, and in that event, any modification desired may be made by affirmative vote of 80 percent of the then owners of lots within this subdivision and evidenced by a suitable instrument filed for public record...

In 2008, plaintiffs Anderson filed an application to short plat their Lot 2 in Rivershore into two lots, as a Tier One infill project. (CP 84-128).[1] The proposed plat contemplated dividing Lot 2, which already contained a single family home, into two separate lots, each containing a single family home (CP 86).

[1] It is highly doubtful that estate properties fronting the Columbia River were intended to be the subject of "infill" projects.

On September 18, 2008, defendants submitted their objections to the proposed short plat (CP 32-44). Plaintiffs responded to this objection on September 25, 2008 (CP 129-130). Thereafter, plaintiffs took no further action with the City of Vancouver to move their short plat application forward (CP 133). Plaintiffs' short plat application was neither approved nor denied. *Id.* Instead of proceeding with their application, plaintiffs filed the instant lawsuit in March 2009 (CP 1-3).

In the meantime, the Vancouver City Attorney's office rendered an opinion concerning the objection to the short plat application (CP 45-49). The City attorney concluded:

> In summary, we believe the short plat should be denied and the applicant advised to submit a plat alteration application or a plat alteration with a separate short plat application. In order for the plat alteration to be approved, the applicant must obtain the agreement of all of the property owners providing that they agree to terminate or alter paragraphs 15 and 16 of the CC&R's to allow additional undivided ownership of Tract A.

(CP 45). The City Attorney also concluded that the proposed short plat was inconsistent with note number 4 on the face of the 1989 plat (CP 46-47). Finally, the City concluded that the proposed short plat was inconsistent with Rivershore's covenants (CP 47).

Although the City Attorney had suggested that plaintiffs proceed with a request for a plat alteration, plaintiffs did not seek a plat alteration,

appeal any decision regarding the original short plat filing, or take any further action regarding the short plat filing. (CP 133).

Several years earlier, in 2002, James Brown, who owned Lot 13 within Rivershore, sought to short plat Lot 13 (CP 13). A number of neighbors, including plaintiffs, objected to this proposal. *Id.* The City rejected the objection, however, and allowed Lot 13 to be subdivided (CP 27). Defendant Brown then sold Lot 2 of short platted Lot 13 to plaintiffs' company, River Property, LLC (CP 28-29). With this sale, the owners of Lots 1 and 2 of short platted Lot 13 each became owners of a 1/26 interest in the tidelands, as the original plat contemplated each owner within Rivershore having a 1/13 interest in those tidelands (CP 27; CP 36-40).

Despite this sale, defendants submit that there remain only 13 "lots" which may vote to modify the covenants. Twelve of those votes are Lots 1 through 12. The owners of Lots 1 and 2 of short platted Lot 13 should each be deemed to hold a one-half vote. This is consistent with the original plat's stated intention that there would be 13 undivided lot owners.

In September 2008, the owners of Rivershore voted to enact the first amendment to the declaration of covenants and restrictions for Rivershore (CP 51-64). This amendment added further clarity to the 1989 covenants, that the original 13 lots within Rivershore may not be further

subdivided or short platted (CP 52). The owners of Lots 1, 3, 5-12, and Lot 1 within short platted Lot 13 all approved the amendment to the covenants (CP 51-64). Only the plaintiffs and their LLC chose not to sign off on the modification.

If Mr. Brown is treated as having a one-half vote for his interest in what was previously Lot 13, then 10.5 of 13 votes were cast in favor of the amendment. That is 80.7% of the total available votes. Accordingly, more than the requisite 80% of the lot owners voted in March 2008 to approve the amendment to Rivershore's covenants.

On January 7, 2010, plaintiffs filed a motion for summary judgment (CP 74-75). Plaintiffs' principal contentions were that the amendment to the covenants was ineffective and that the original covenants did not preclude the proposed short plat (CP 65-74).

Defendants opposed plaintiffs' motion, contending that plaintiffs could not prevail in the absence of compliance with RCW 58.17.215, and cross-moved for the dismissal of the action because plaintiffs had not exhausted their administrative remedies (CP 76-83). (*See also* CP 137-142).

On April 8, 2010, the trial court entered an order granting in part plaintiffs' motion for summary judgment. (CP 264-268). In that order, the court concluded (CP 267):

1. That it had authority to make rulings under the declaratory judgment act, notwithstanding RCW Ch. 58.17;

2. The original covenants and the subdivision plat "do not address the further subdivision of any lot in Rivershore", and the court's rulings "are not controlling on any determination that may be made on any particular short plat application that may be determined by the City of Vancouver";

3. The amendment to the covenants is invalid because an 80 percent vote was not achieved; and

4. Plaintiffs' claims were not prohibited for failure to exhaust administrative remedies because they did not have a present application pending before the City of Vancouver.

Plaintiffs then filed a motion for clarification or reconsideration (CP 277-280). Defendants also filed a motion for reconsideration (CP 281-285).

In defendants' motion for reconsideration, the defendants argued that the court's order constituted an improper advisory opinion. *Id.*

On May 11, 2010, the court denied all parties' motions for reconsideration (CP 300). This order was accompanied with a letter ruling, making clear that any application for further subdivision that may

be filed "must be dealt with administratively by the City of Vancouver." (CP 298-299).

On July 27, 2010, the court issued its memorandum opinion, denying plaintiffs' request for attorney fees (CP 311-313).

On August 20, 2010, the court entered its final judgment, adopting the April 8, 2010, order as the final determination of the court (CP 314-318). Defendants' notice of appeal was then filed on September 14, 2010 (CP 319-331).

IV. LEGAL ARGUMENT

A. The Trial Court Erred in Partially Granting Plaintiffs' Motion for Summary Judgment for Declaratory Relief Because the Matter was not Ripe for Determination and the Court's Order Therefore Constitutes an Improper Advisory Opinion.

In August 2008, plaintiff Dale Anderson proposed to divide Lot 2 of Rivershore into a two-lot short plat, and a preapplication conference was scheduled for September 18, 2008 (CP 84-92). Defendants submitted objections to this proposal on September 18, 2008 (CP 32-44). Plaintiffs' counsel responded to those objections on September 25, 2008 (CP 129-130). The Vancouver City Attorney's office issued an opinion on December 5, 2008, concluding that the short plat should be denied unless plaintiffs submitted a plat alteration application or a plat alteration with a separate short plat application (CP 45-48).

Thereafter, plaintiffs took no action to pursue a short plat application or plat alteration (CP 133). There is no application pending before the City of Vancouver (CP 200). Indeed, the contemplated short plat remains nothing more than a possibility, and one which may or may not ever be pursued.

In their complaint, plaintiffs sought only a declaratory judgment "that neither the original Covenants nor the alleged "Amendment" preclude Plaintiffs from short-platting their properties." (CP 3).[2] In the order of April 8, the Court found that the original covenants and the original subdivision plat do not address the further subdivision of any lot in Rivershore, and that the amendment to the original covenants is invalid (CP 264-268). The Court left it to the City of Vancouver to ultimately determine whether the original covenants or plat allow or prohibit any particular short plat application.

The Court's final order does not address or resolve any ripe, pending, or actual dispute between the parties. In the absence of a pending short plat application, there was nothing for the Court to rule upon. Without an existing, justiciable controversy, the Court's order constitutes a prohibited advisory opinion.

[2] Plaintiffs' complaint did not even ask the Court to address the original plat. Nor did their motion for summary judgment. Thus, the Court's order goes beyond the relief requested in this case.

A party seeking declaratory relief must establish, as a threshold requirement, that a justiciable controversy exists between the parties. *Osborn v. Grant County*, 130 Wn.2d 615, 631 (1996). A "justiciable controversy" has been defined as:

> (1)...an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.[3]

To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411 (2001). Here, there is no present controversy that can be resolved by the declaratory judgment requested by plaintiffs. Accordingly, plaintiffs asked the trial court to issue an advisory opinion.

Instructive on this issue is the recent case of *Bloome v. Haverly*, 154 Wn. App. 129 (2010). There, the court reversed the trial court for issuing a prohibited advisory opinion where there was no mature dispute or justiciable controversy between the parties. Like this case, *Bloome* involved restrictive covenants, and whether the plaintiff could develop one of the parcels at issue. He filed a complaint for declaratory relief, seeking

[3] Here, the trial court's order does not direct the City how to rule on any particular application. Nor does it preclude the City from denying an application on any number of grounds. Thus, the order does not provide a "final and conclusive" ruling on the matter in issue.

a judgment that the restrictive covenant did not prohibit him from building a house on his parcel. The defendant sought a declaratory judgment that the covenant in fact did prohibit such development. Significantly, at the time the court entered its order, "nothing in the record indicate[d] that Bloome either planned or plans to construct a building on the downhill parcel." *Bloome*, 154 Wn. App. at 137.

Because there were no specific plans before the court, Division I determined that a declaratory judgment was improper, stating, at 142:

> In the absence of a dispute over whether actual building plans satisfy the covenant or of other evidence establishing a necessary minimum degree of interference with the view from the uphill property, a declaratory judgment as requested by either party would not conclusively settle the controversy between then.

In holding that declaratory relief was unavailable, the court concluded, at 146-47:

> As there is no disputed building plan that a court can rule as being either in conformance with or in violation of the covenant, a judgment interpreting the scope of the covenant's restriction on development rights in the estate of the downhill parcel would constitute nothing more than an advisory opinion.
>
> ...further, the record does not establish the existence of an actual, mature dispute that could be conclusively resolved by the requested relief....Accordingly, neither party has established an entitlement to the declaratory relief he seeks.

The present case is to the same effect. There is no short plat application pending before the City of Vancouver. If and when one is filed, the parties can address that application at the administrative level, as is appropriate. Once the administrative process has been concluded and all parties have exhausted their administrative remedies, they can then proceed to court for a ruling that will resolve their controversy, should they so choose. Because there was no short plat application pending, however, the trial court ruled in a vacuum and issued a prohibited advisory opinion.

B. The Trial Court Erred in Denying Defendants' Cross-Motion for Summary Judgment in Which They Sought a Declaratory Ruling that Plaintiffs may not Seek Approval of Their Proposed Short Plat Without First Complying with RCW 58.17.215, as a Subdivision Such as that Sought by Plaintiffs is Inconsistent with the Face of the Plat and with the Original Covenants.

As correctly concluded by the Vancouver City Attorney's office, plaintiffs must comply with the provisions of RCW 58.17.215 in order to pursue approval of their proposed short plat. That "alteration" statute provides, in relevant part:

> When any person is interested in the alteration of any subdivision or the altering of any portion thereof,...that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered.

> If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

The original subdivision was created with the clear intention to limit the subdivision to 13 single-family dwelling lots, with each of those lots holding a 1/13 interest in the adjoining tidelands. Note 4 on the face of the plat provides that:

> Tract "A" (the shoreline tract) to be owned and maintained by owners of record of lots 1-13; will be conveyed as an undivided 1/13 interest in, and to tract "A".

(CP 34). Similarly, Rivershore was subject to restrictive covenants when it was created in 1989. Those covenants reflect the same intention. Section one of the covenants provides that no lot shall contain more than a single detached family dwelling (CP 36). Section 15 and 16 mirror note 4 from the face of the plat, and make clear that only the owners of lots 1 through 13 may own an undivided 1/13 interest in the tidelands, tract A (CP 36-40). The proposed short plat would violate those restrictions and the intention that Rivershore be limited to 13 single-family dwelling lots. As a result, plaintiffs are seeking an alteration of the Rivershore subdivision. Plaintiffs must therefore submit an application for alteration

that contains the signatures of all parties subject to the covenants. RCW 58.17.215. Plaintiffs have failed to do so, and are thus not entitled to proceed with their short plat application, let alone to have it approved, and the trial court should have so held.

Requiring plaintiffs to comply with the alteration statute is consistent with the rules applicable to disputes between lot owners in a subdivision. As held in *Fawn Lake Maintenance Commission v. Abers*, 149 Wn. App. 318, 324 (2009):

> When a dispute arises between a landowner and the other owners in a subdivision, courts interpret covenants in a way that "place[s] 'special emphasis on arriving at an interpretation that protects the homeowners' collective interests.'"

In doing so, courts do not apply rules of strict construction, but rather look to the purposes sought to be accomplished by the covenant. *Id.*

Here, the purpose of the restrictions is clearly to maximize the future value of this riverfront property. Limiting development of Rivershore to 13 single-family dwelling lots maximizes the size of the lots and their resulting value. Limiting ownership of the tidelands to 13 lots similarly maximizes the value of those rights. Allowing "infill" projects such as the one proposed by plaintiffs is in no way in the Rivershore homeowners' collective interests. As properly concluded by the City Attorney's office, the proposed short plat would result in the violation of

the language and intent of these restrictions. Accordingly, the trial court erred in denying defendants' cross-motion for summary judgment, requiring plaintiffs to comply with RCW 58.17.215.

C. The Trial Court Erred in Granting Plaintiffs' Motion for Partial Summary Judgment and Concluding that the 2008 Amendment to Rivershore's Covenants was Invalid.

On October 15, 2008, the vast majority of the Rivershore homeowners caused to be recorded the first amendment to declaration of covenants and restrictions for Rivershore (CP 51-64). This amendment added the following language to section one of the original declaration, effective immediately:

> Lots 1 through 13, consisting of the original 13 lots contained in Rivershore, shall not be further subdivided or short platted. (CP 52).

Every Rivershore owner except the plaintiffs voted in favor of and signed this amendment. These votes included the owners of lots 1, 3, 5-12, and lot 1 of short-platted lot 13. Only the owners of lots 2, 4, and lot 2 within short-platted lot 13 did not sign in favor of the modification. Each of these lots are owned by one or more of the plaintiffs.

The original covenants expressly allow for their modification if "80 percent of the then owners of lots within this subdivision" affirmatively vote in favor of a modification (CP 36). It is clear that 10 lot owners voted in favor of the modification. The dispositive question is

what to do with lot 13, given that it was subdivided in 2002 over the objection of Rivershore owners, into two smaller building lots (CP 27). Either each of the short-platted lot owners get a single vote (bringing the total available votes to 14), or each owner of lots 1 and 2 within short-platted lot 13 is given a one-half vote (keeping the total available votes at 13). Defendants submit that the appropriate, fair, and logical result is to grant a one-half vote to the owners of each of the smaller lots within short-platted lot 13. By doing so, the total votes available remain at 13.

This result is consistent with the original intention to restrict the ownership in Rivershore to 13 single-family dwelling lots. As created, the Rivershore covenants could be modified by an 80 percent vote. At 13 lot owners, 10.4 percent of the owners would have to vote affirmatively in order to pass a modification. If it were determined that 14 votes were available, it would require 11.2 votes to pass a modification. This is a significant difference, and would effectively give plaintiffs veto power over any possible modifications to the Rivershore covenants.

If each of the short-platted lot owners within lot 13 is afforded a one-half vote, the intention of the developers and the collective interests of the homeowners is honored. With the affirmative vote of lot 1 within short-platted lot 13, 80.76 of the lot owners voted in favor of the modification. Counting the votes in this fashion compels the conclusion

that the trial judge erred in finding that the 2008 amendment to the Rivershore covenants was legally ineffective.

At a minimum, the trial court's order should be reversed and this case should be remanded for a determination as to which vote-counting method comports with the intention of the original developers. Making this determination in connection with plaintiffs' motion for summary judgment was improper and is not supported by the record.

D. The Trial Court Erred in Denying Defendants' Motion for Summary Judgment Where They Sought a Ruling that Plaintiffs had Failed to Exhaust Their Administrative Remedies or Otherwise Comply with the Requirements of the Vancouver Municipal Code.

1. Plaintiffs Failed to Exhaust Their Administrative Remedies.

As set forth above, plaintiffs' proposed short plat was the subject of a pre-application conference on September 18, 2008. In December 2008, the City Attorney's office suggested that plaintiffs' application should be denied. Since the issuance of that opinion, however, the application has not been denied and plaintiffs have not submitted an application for an alteration. The application expired due to the passage of time.

Plaintiffs filed this lawsuit without exhausting their administrative remedies. They should have pursued the approval or denial of their application before seeking relief from the judicial system. If the

application was denied, plaintiffs could have appealed that decision under Vancouver Municipal Code 20.210.130. If that appeal were unsuccessful, plaintiffs could have then proceeded with an appeal to superior court. Plaintiffs took none of these steps, but rather interjected the judicial system into the application process. This failure to exhaust their remedies should result in the reversal of the order partially granting their motion for summary judgment and in the dismissal of their claims for relief.[4]

The doctrine of exhaustion of administrative remedies is well established in Washington, and is based "upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges." *South Hollywood Hills Citizens Association v. King County*, 101 Wn.2d 68, 73 (1984). Where administrative remedies have not been exhausted, the courts will not intervene. *Id.* Here, plaintiffs did not pursue their application to conclusion, let alone through the appeals available to them. As a result, the underlying order should be reversed and plaintiffs' claims should be dismissed because plaintiffs have not exhausted their administrative remedies.

An applicant who desires to develop land in the City of Vancouver must first request a pre-application conference. Two of the purposes of the

[4] Indeed, plaintiffs did file a second short plat application with the City as this appeal was pending.

pre-application conference are to (1) "acquaint the applicant with the applicable requirements of the Vancouver Municipal Code and other laws to identify issues and concerns in advance of a formal application to save the applicant time and expense through the process," and (2) "inform applicable...neighborhood associations of potential development activity within their neighborhoods." VMC §20.210.080(A)(2) and (3).

Type II development applications, like the one at issue in this case, involve the following steps:

a. Pre-application conference.

b. Formal application including payment of required fees.

c. City determines at filing whether the application is "counter-complete."

d. Within 28 days after receiving a "counter-complete" application, the planning official notifies the applicant of that fact.

e. Within 14 days after determination of completeness, the planning official distributes a detailed Notice of Application.

f. A 14-day comment period follows publication and mailing of the Notice of Application.

g. Final Decision is made on the application within 120 calendar days (or 90 days for short subdivisions) after determination of completeness.

h. Notice of Decision is issued.

VMC §20.210.050; VMC §20.210.020B(2).

The applicant may appeal the Notice of Decision within 14 days after the Notice of Decision is mailed, and that appeal will be heard by a Hearings Examiner. VMC §20.210.020(2) and VMC §20.210.130. The decision of the Hearings Examiner may be appealed to Superior Court within 21 days from such decision. *Id.* The Notice of Decision becomes final on the day after the appeal period expires, VMC §20.210.130(M), after which time the applicant may submit a final plat application under VMC §20.320.050.

2. Plaintiffs Have Failed to Follow the Required Procedures Under the Vancouver Municipal Code and State Statutes.

In September 2008, plaintiffs submitted to the City of Vancouver certain documents in connection with a request for the pre-application conference required by VMC §20.210.050(A) (CP 143-152). Based on that request, the City scheduled a pre-application conference per VMC §20.210.080(G), and issued a Pre-Application Conference summary per VMC §20.210.080(H) (hereafter, "Summary") (CP 153-187). The Summary indicates (CP 155) that plaintiffs' proposal is governed by the Type II decision-making process. Plaintiffs were therefore required to

submit a formal "counter complete" application within one year from the pre-application conference. VMC §20.210.080(J).

There is no evidence that plaintiffs submitted a formal preliminary plat application for short platting Lot 2 within the Rivershore subdivision, as required by VMC §20.320.030. Indeed, plaintiffs have not taken any required administrative action beyond attending the pre-application conference. After the City attorney's office issued its legal opinion, plaintiffs effectively abandoned their efforts to submit to the City the required documentation concerning their proposed development of Lot 2.

The City's legal opinion (CP 45-49) notes that the plaintiffs' application to short plat Lot 2 would be denied because VMC §20.320.040(E) "requires compliance with all of the terms and conditions of the existing subdivision as approval criteria for a short plat," and their proposal is inconsistent with Note 4 of the 1989 subdivision plat. The City's legal opinion also notes that a plat-alteration application (under RCW 58.17.215) would be inconsistent with the 1989 CC&R's, and would therefore require an agreement by all owners within the subdivision to terminate or alter the covenants that prohibit the division of Lot 2 into separate parcels.

Recognizing that the City had interpreted the VMC to prohibit a short-plat application (because of Note #4 of the original plat), and that

they would not be able to obtain the unanimous consent of their neighbors in order to comply with the plat-alteration requirements of RCW 58.17.215, plaintiffs filed the instant lawsuit in March 2009. They did so without even filing their short-plat application and obtaining a Notice of Decision from the City. If they had filed their short-plat application with the City and received a Notice of Decision denying same, plaintiffs could then appeal that decision to the Hearings Examiner, and if still unsatisfied with the result, could file an appeal with the superior court. Plaintiffs have not come close to exhausting their administrative remedies. The judgment below should be reversed for that reason and plaintiffs' claims should be dismissed, requiring plaintiffs to proceed through the administrative channels before seeking relief from the courts.

E. Defendants Should be Awarded Attorney Fees.

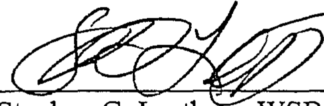
Pursuant to RAP 18.1 and section 19 of the original covenants and restrictions (CP 36-40), defendants should be awarded reasonable attorney fees as the prevailing party on appeal.

VI. CONCLUSION

For the foregoing reasons, the order partially granting plaintiffs' motion for summary judgment and denying defendants' cross-motion for summary judgment should be reversed, and this matter should be remanded to the trial court for the dismissal of plaintiffs' claims for relief.

DATED this 13 day of December, 2010.

HEURLIN, POTTER, JAHN,
LEATHAM & HOLTMANN, P.S.



Stephen G. Leatham, WSBA #15572
Of Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that I caused the foregoing BRIEF OF APPELLANTS to be served on the following:

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LEATHAM & HOLTMANN, P.S.

Stephen G. Leatham, WSBA #15572
Of Attorneys for Appellants

No. 41201-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II, AT TACOMA

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; AND RIVER PROPERTY LLC,

Respondents,

JAMES W. BROWN; ROBERTA D. DAVIS; KAE HOWARD; TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CHRISTI D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG, husband and wife; VINCENT and SHELLY HUFFSTUTTER, husband and wife, THOMAS J. and GLORIA S. KINGZETT, husband and wife, LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E. MCCLASKEY, JR. and VERONICA A. MCCLASKEY, TRUSTEES OF THE MCCLASKEY FAMILY TRUST – FUND A; CRAIG STEIN, RICHARD AND CAROL TERRELL, husband and wife,

Appellants.

BRIEF OF RESPONDENTS

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STANDARD OF REVIEW

Summary judgment awarding declaratory relief is reviewed de novo. Hisle v. Todd Pacific Shipyards Corp., 151 Wash.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The Court of Appeals must consider all facts and reasonable inferences from them in the light most favorable to the nonmoving party. City of Lakewood v. Pierce County, 144 Wash.2d 118, 125, 30 P.3d 446 (2001). The trial court can grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. Wilson v. Steinbach, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

The interpretation of a restrictive covenant is a question of law that is reviewed de novo. Parry v. Hewitt, 68 Wash.App. 664, 668, 847 P.2d 483 (1992). Like the trial court, the primary task is to determine the intent of the drafters. Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999); Wimberly v. Caravello, 136 Wn.App. 327, 336, 149 P.3d 402 (2006)

STATEMENT OF FACTS

The parties to this litigation each own an interest in property within Rivershore Subdivision, located in Clark County, Washington. CP 2.

When this subdivision was first developed, covenants were recorded to address development within the subdivision. CP 2; CP 16-20. Plaintiffs Dale E. and Leta L. Anderson, Trustees of the Dale E. Anderson and Leta L. Anderson Family Trust (hereinafter referred to as the 'Trust') purchased a lot within the Riverside Subdivision in 1990. CP 13.

Appellant Brown also acquired a lot within Riverside. CP 2; CP 8. He later submitted an application to the City of Vancouver for the purpose of dividing that lot in two. CP 8; CP 13. A number of neighbors objected, CP 21-23, including the Trust, CP 13, to no avail. CP 25-26. The City approved the application. CP 13. Defendant Brown, addressing the common interest in Tract A, divided the original lot's interest in half, assigning one-half interest in Tract A to each of the resulting lots. CP 27. No appeal or legal challenge to the final decision of the City was undertaken. CP 13.

Thereafter, River Property LLC (hereinafter the LLC) purchased one of Brown's lots. CP 13. At the time of purchase, and at all material times since, the LLC understood and believed that the lot which it purchased from Brown was a legal lot and could be used by said Plaintiff for all lawful purposes, subject only to whatever restrictions that zoning ordinances or the covenants might otherwise impose. CP 13-14.

Later, Lot 2 within the subdivision became available for sale. Plaintiffs Dale E. Anderson and Leta L. Anderson (hereinafter referred to as "Andersons"), having personal knowledge of the prior short plat approval received by Appellant Brown, purchased that Lot with the express intent and for the express purpose of short platting the same. CP 14. Upon completing their purchase, Andersons submitted preliminary plans to the City for evaluation and comment, pursuant to the City's pre-application review process. *Id.* During the course of that initial review, the Defendants below, and Respondents herein, (hereinafter collectively referred to as the "Neighbors") objected, claiming that the original covenants precluded further division of lots; and that they had effectively amended their covenants to bar any such development. CP 32-33. The Neighbors had recorded a document that purported to preclude any further platting or subdividing of existing lots. CP 42-44.

In the face of the legal objections, City staff submitted the question to the City Attorney for an opinion. 45-48. The City Attorney's office recommended that staff deny any application, and require that the applicant appeal the adverse determination. *Id.*

The subject litigation then ensued. Neither the Trust nor the LLC has any plans to divide or develop their respective properties at this time. However, neither of said Plaintiffs concurs with the position of the

Neighbors. CP 1-3. By contrast, the Andersons purchased Lot 2 solely for the purpose of dividing it in the same manner as invoked by Defendant Brown. CP 14.

After responsive pleadings were exchanged, the parties filed cross motions for summary judgment. CP 12-75; CP 77[1]. The Trial Court crafted its own language in preparing the final Order. CP 264-268. Critically for the Plaintiffs, the Court ruled that the Neighbors' attempt to modify the covenants was invalid and that the original covenants and plat did not restrict any short plat of an existing lot. *Id.*

The Plaintiffs had also argued that the prior failure to interpose a legal objection to Brown's short plat of a lot within the Riverside development precluded any right to challenge a proposed short plat on grounds that the original covenants or plat barred the same. CP 70-72. However, the Trial Court ruled that waiver was barred by the covenants, and that the issue of estoppel could not be resolved by summary judgment due to one or more unidentified issues of fact. CP 267. Plaintiffs did not seek a mandate compelling the City to approve any plat application, and the Court deferred to the City's authority to consider such an application on other grounds. CP 267.

---

[1] The Appellants other than Appellant Brown included their motion for declaratory relief by summary judgment within their Memorandum filed with the Court.

Finally, the Trial Court ruled that the Plaintiffs, although the prevailing parties, were not entitled to an award of attorneys' fees and costs on the grounds that no legal basis existed for the same, as argued by the Neighbors. CP 301-303; CP 311; CP 314-318.

APPELLANTS' FIRST ASSIGNMENT OF ERROR

That the matter was not ripe for determination and the Order was an improper 'advisory' opinion.

As described above in Respondents' Statement of Facts, there are three separate Plaintiffs, each owning a different Lot within the Rivershore development. The Trust has an interest in the status of the covenants and conditions, as well as the manner in which those documents of record may be amended or modified. The Trust has no plans or intentions to short-plat its property. The LLC has an interest in confirming, indirectly, that the Lot that it acquired is a legal lot and may be used for all purposes which conform to the zoning and building requirements of the City of Vancouver, including the construction and occupation of a single family residence thereon. The Andersons were the last to buy a Lot. They did so with the express understanding that they could divide that Lot according to the same procedures invoked by Defendant Brown, and purchased that Lot for that express purpose.

Each of these Plaintiffs has an immediate and direct interest in the recorded covenants which affect the use of their property, and the use of their Neighbors' Lots that are situated within the Rivershore development.

RCW 7.24.020 expressly affords the remedy sought by Plaintiffs. It has been a long-standing practice for the Courts to issue declaratory relief in addressing the rights and obligations of parties that are subject to covenants. Plaintiffs are entitled to judicial determination of their property rights under the applicable covenants without the necessity of a short-plat filing. Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 185, 157 P.3d 847 (2007). The Declaratory Judgment Act is to be interpreted liberally in favor of a party seeking relief. *Id.*

The Neighbors rely upon the decision in Bloome v. Haverly, 154 Wn.App. 129, 225 P.3d 330 (2010) to argue that the decision of the Trial Court was premature and advisory. The circumstances in the instant case are not comparable or analogous to those in Bloome, *supra*. To the contrary, the instant facts stand in sharp contrast to the dilemma confronting the Court in Bloome. The concern in that case was with the nature and extent of a view easement and the grantor's intent in crafting the easement. In Bloome, *supra* the Court was asked to decide whether a view easement prevented construction of a home, and, if not, to what extent such construction was limited by the easement.

The Court of Appeals declined to rule, noting that "the record does not contain facts necessary for a court to resolve the apparent underlying dispute between the parties: to what extent does the covenant limit development of the downhill parcel? The answer to this question depends on facts not contained in the record." Bloome, *supra*, at 141. The Court observed that it was a matter of conjecture whether a home could be constructed without adversely affecting the view, and therefore declined to render judgment. "A justiciable controversy must exist between the parties", the Court observed, citing Osborne v. Grant County, 130 Wn.2d 615, 631, 926 P.2d 911 (1996).

Unlike Bloome, *supra* the facts in this case are not those of "conjecture", but immediate and stark reality. These circumstances meet the "justiciable controversy" test affirmed in Bloome *supra*:

> (a)"an actual, present and existing dispute, or the mature seeds of one, as opposed to a possible, dormant, hypothetical, speculative or moot disagreement."

The dispute whether short plats are barred in this instance is 'actual, present and existing'. It is neither hypothetical nor speculative.

(b)"between persons having genuine and opposing interests."

This case clearly involves the same.

(c) "which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic."

The Plaintiffs interests in this case are both direct and substantial. Considerable value and use issues as well as the rights of lot owners are immediately and directly at stake. The status of Plaintiff LLC's lot; the ability of Plaintiffs Anderson to fulfill their intentions to short plat; the rights of Plaintiff Trustees to determinations regarding their rights and obligations under the covenants along with the corresponding rights and obligations of its Neighbors are all 'direct and substantial' under this test.

(d) "a judicial determination of which will be final and conclusive."

Certainly this is the remedy sought by Plaintiffs, and one which is within the Court's authority to render. There are no legal restrictions precluding the same.

Whether Plaintiffs are precluded from short platting their properties based upon the language within the original covenants governing property within Riverside subdivision; whether Plaintiff River Property LLC in effect purchased an illegal lot; and whether the covenants were ineffectively amended, are precisely the subjects that the UDJA was intended to address.

The trial Court did not err in entering declaratory relief.

APPELLANTS' SECOND ASSIGNMENT OF ERROR

Under RCW 58.17.215, unanimous consent of all owners within River is required to short plat in light of the original covenants and "the face of the Plat".

The relevant language within RCW 58.17.215 reads as follows:

> When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW 58.17.040(6), that person shall submit an application to request the alteration to the legislative authority of the city ... where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

The language upon which the Neighbors rely has been emphasized. It is conditional. The first condition, whether the property is subject to covenants, is readily answered in the affirmative. The second condition requires a determination that "the application for alteration would result in

violation" of a covenant. The Court's duty of inquiry concerns this question.

Interpretation of language contained in a restrictive covenant is a question of law. Green v. Normandy Park Riviera Section Cmty. Club, Inc., 137 Wn.App. 665, 681, 151 P.3d 1038 (2007). The objective is to determine the dedicator's intent. Hollis v. Garwall, Inc., *supra*. The Court must give effect to and enforce that intent. It is not a function of 'the majority rules'. Meresse v. Stelma, 100 Wn.App. 857, 866, 999 P.2d 1267 (2000).

The first citation to the record by the Neighbors refers to a notation on the face of the plat of Rivershore. Brief of Appellants, p. 15. The plat notation does not contain any cross-reference to recorded covenants, nor does it preclude division of lots in such a manner as to preserve the integrity of any plan regarding benefits or burdens associated with title to Tract A.

The Appellants further rely upon three covenants in support of their position:

(a) CP 16, provision No. 1.: One residence per lot. There is no express prohibition against division of one lot into two, in the manner undertaken by Appellant Brown expressly or impliedly contained within the language of this covenant. Unfortunately, if Appellants are correct,

then Respondent River Property LLC has either acquired an illegal lot, or may be precluded from constructing any residence thereon. Such an interpretation yields an absurd result, and was properly rejected by the Trial Court. See, *e.g.*, MacLean Townhomes, L.L.C. v. America 1st Roofing & Builders Inc., 133 Wn.App. 828, 138 P.3d 155 (2006).

(b) CP 19, provision No. 15: Common ownership of Tract A. This provision, while labeled as a 'covenant or restriction', is simply a mandate to the developer to provide for common ownership of the tract among owners of property within the project. Again, there is no express or implied prohibition against division of one lot into two, such as in the manner undertaken by Appellant Brown.

(c) CP 19, provision No. 16.: Ban on public easements. Contrary to the Neighbors' claims, the language in question does not preclude future division of any lot. The division of an existing lot into two or more parcels does not render access to Tract A "public" in the common sense use of that term.

The Neighbors urge the Court to speculate as to the grantor's intent, where no such intent is evident from the language upon which they rely. They further urge the Court to speculate as to the nature of Andersons' plat application, and the treatment of Tract A. Their arguments rest upon surmise, and not upon an express statement limiting

the future use and development of a lot. The absence of an expression of intent contained within the covenants establishes that the Court's determination that RCW 58.7.215 did not apply was correct, and the Court did not err in so ruling. This determination also finds support in the historical treatment of the covenants by the Appellants and the City. Defendant Brown's short plat received final approval without legal challenge.

Alternative grounds. If it is determined by the Court of Appeals that the trial Court erred in this regard, then the ultimate result nonetheless remains the same. A decision of the Trial Court may be upheld on any legitimate ground, even if not so articulated by the Court. State v. Carroll, 81 Wn.2d 95, 101, 500 P.2d 115 (1972); Boundary Dam Constructors v. Lawco Contractors, Inc., 9 Wn.App. 21, 31, 510 P.2d 1176 (1973). In that respect, the Trial Court erred in ruling that there was challenged evidence of estoppel. See Respondents first assignment of error and discussion thereunder, *infra*. Even if the original covenants and plat precluded short platting of a lot within the River development, Respondent Brown's successful short plat bars the Respondents from urging the position that the original covenants preclude the same.

APPELLANTS' THIRD ASSIGNMENT OF ERROR

The 2008 Amendment to Covenants was valid.

The Neighbors have cited no authority to advance their argument, and the argument should therefore be disregarded. "We do not consider assignments which are unsupported by argument or authority. State v. Wood, 89 Wash.2d 97, 569 P.2d 1148 (1977). Here the position is supported by argument which we do not find persuasive especially in view of the lack of any authority." Yeats v. Yeats' Estate, 90 Wn.2d 201, 209, 580 P.2d 617 (Wash. 1978). *See also*, Tippie v. Delisle, 55 Wn.App. 417, 420, 777 P.2d 1080 (1989).

In addition, their contention lacks merit. "In order for an amendment to be valid, it must be adopted according to the procedures set up in the covenants...". Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc., 76 Wash.App. 267, 273-274, 883 P.2d 1387 (1994), *review denied*, 127 Wash.2d 1003, 898 P.2d 308 (1995). The relevant provision regarding amendment is set forth in the first Declaration, whereby "modification" may be accomplished "by affirmative vote of 80% of the then owners of lots within the subdivision", and subject to further conditions not relevant for this appeal. CP 16.

Defendants failed to muster the requisite number of votes necessary to amend. Voting rights extend to all "owners of lots" within the subdivision. *Id.* Respondents attempt to diminish the voting rights of Appellant Brown and the LLC by contending that each owner owns only

½ of a "lot" for voting purposes. There is nothing in the covenants or the plat establishing or even implying such a condition for the purposes of voting and determining what constitutes a "lot". The interpretation urged must conform to the understanding that may reasonably be gleaned from the language of the covenants themselves. "The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants." Meresse v. Stelma, *supra*.

The Trial Court properly determined that the Grantor unambiguously provided for a 'one lot-one vote' rule in determining whether the covenants could be modified. The trial Court ruled properly, and did not err.

APPELLANTS' FOURTH ASSIGNMENT OF ERROR

Plaintiffs failed to exhaust their administrative remedies.

The Neighbors claim that the Plaintiffs have failed to exhaust their administrative remedies. This contention is premised upon the underlying and unwarranted assumption that all Plaintiffs wish to short plat all of their lots at this time; that all have a concrete design for doing so; and that state law allocates exclusive jurisdiction to the City in making any such determinations. However, the City is not equipped to address equitable arguments of Plaintiffs Anderson, as conceded by City Attorney (CP 47),

has no cited mechanism for addressing concerns of River regarding its status as a 'lot'; and no mechanism for addressing concerns of Trustees, River and Andersons regarding the manner of modification of covenants that affect their use and enjoyment of their lots. The trial court was solely equipped to address all of the parties' concerns in a single forum, at one time, and did not err in rendering declaratory relief on the issues before it.

Certainly the City is vested with authority to determine whether plat application should be approved. See RCW 58.17.030. The City, in acting upon the pre-application submission regarding Lot 4, candidly observed that it would give facial validity to the position of the Defendants regarding the validity of the covenants as originally enacted. CP 45. This conclusion is premised in part upon an unwarranted assumption regarding the implication of Tract A. To reiterate, there is no requirement that Tract A be involved, or that such involvement would necessarily violate the covenants. See, *e.g.*, CP 27. Furthermore, the City expressly declined to undertake legal considerations such as waiver or estoppel. CP 47. The City has expressly and understandably declined to wade into the troubled waters of equity, deferring to the inherent equitable powers of the Court. See, *e.g.*, Hoggatt v. Flores, 152 Wn.App. 862, 218 P.3d 244 (2009). In so acting, the Court does not tread upon the power of the City to render an

appropriate decision at the appropriate time under the rules that it has adopted. *Id.*

RESPONDENTS' CROSS APPEAL

RESPONDENTS' ASSIGNMENTS OF ERROR

RESPONDENTS' FIRST ASSIGNMENT OF ERROR

The Trial Court erred in ruling that waiver and estoppel were not established under the facts before the Court as an alternative to its declaratory ruling, and denying Plaintiffs' Motion for Clarification or Reconsideration.

RESPONDENTS' SECOND ASSIGNMENT OF ERROR

The Trial Court erred in ruling upon the scope of the City of Vancouver's authority, and implying that said authority included the ability to disregard the ruling of the Trial Court, denying Plaintiffs' Motion for Clarification or Reconsideration.

RESPONDENTS' THIRD ASSIGNMENT OF ERROR

The Trial Court erred in denying Plaintiffs an award of reasonable attorneys' fees.

ISSUES PERTAINING TO RESPONDENTS' FIRST ASSIGNMENT OF ERROR

Were the Plaintiffs entitled to declaratory relief on the grounds that the Neighbors were estopped from their claims?

ISSUES PERTAINING TO RESPONDENTS'

SECOND ASSIGNMENT OF ERROR

Did the Trial Court properly rule on the authority of the City in its Judgment?

ISSUES PERTAINING TO RESPONDENTS'

THIRD ASSIGNMENT OF ERROR

Are the Plaintiffs the prevailing party under the covenants, entitling them to an award of fees?

ARGUMENT

1. Were the Plaintiffs entitled to declaratory relief on the grounds that the Neighbors were estopped from their claims?

Trial Court's Judgment should be affirmed on alternate grounds if it is held that the original covenants precluded future lot divisions. If such error occurred, the Judgment may be sustained on alternate grounds. State v. Carroll, *supra*; Boundary Dam Constructors v. Lawco Contractors, Inc., *supra.*

Assuming that Rivershore's covenants as originally recorded or as subsequently amended effectively barred short platting of lots within the subdivision, the Court erred in ruling that estoppel was not established by evidence.

Equity precludes enforcement.

> A number of equitable defenses are available to preclude enforcement of a covenant: merger, release, unclean hands, acquiescence, abandonment, laches, estoppel, and changed neighborhood conditions. St. Luke's Evangelical Lutheran Church v. Hales, 13 Wn.App. 483, 488, 534 P.2d 1379, *review denied*, 86 Wn.2d 1003 (1975); 5 R. Powell, Real Property, P. 679, (rev. ed., 1991); see Tindolph v. Schoenfeld Bros., 157 Wash. 605, 608, 611, 289 P. 530 (1930).

Mt. Park Homeowners v. Tydings, 125 Wn.2d 337, 341-342, 883 P.2d 1383 (1994).

Certainly, Appellant Brown had no right to object whatsoever. "[O]ne who has violated a building restriction cannot enforce a building restriction against others." Reading v. Keller, 67 Wn.2d 86, 89, 406 P.2d 634 (1965). Having already short-platted his lot into two, and sold one of them for his own benefit, he cannot now assert that others may not do so as well.

Estoppel. The elements of estoppel are three fold: (1) an admission, statement, or act inconsistent with a claim afterward asserted, (2) an act by that party in reasonable reliance on the admission, statement, or act of another, and (3) injury to the relying party if the court allows the first party to contradict or repudiate the earlier admission, statement, or act. Board of Regents v. City of Seattle, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). It is unchallenged that the Andersons, acting in reliance upon the

prior acquiescence in development of the Brown lot, purchased an additional lot with the express purpose and intent to short plat the same. They incurred expense and costs of delay as a consequence of the inconsistent position now adopted by their Neighbors. The Appellants are estopped from preventing the proposed short plat.

Acquiescence: Washington has adopted the doctrine of acquiescence in equity to bar the complainants' objections.

> In 3 Pomeroy, Equity Jurisprudence § 818 (5th ed. 1941), the general rule is stated: Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent. A most important application includes all cases where an owner of property, A, stands by and knowingly permits another person, B, to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection, as by expending money upon it, making improvements, erecting buildings, and the like.
>
> Nugget Properties, Inc. v. Kittitas County, 71 Wash.2d 760, 767, 431 P.2d 580 (1967).

The Neighbors, having acquiesced to the short plat of Brown and the ensuing sale to LLC, are barred from asserting their claim

that the covenants preclude short platting. The Judgment of the Trial Court should be affirmed on these alternate grounds.

2. Did the Trial Court properly rule on the authority of the City within the Court's Judgment?

The Trial Court ruled *sua sponte* that the City was not bound, without the benefit of briefing or argument. The ruling of the Court regarding the effect of its ruling upon the City is ambiguous. CP 267. It appears that the Court is confirming the obvious: it cannot and is not ordering the City to approve any particular plat application which it may receive, and that such application must meet the requirements which the City standards otherwise impose upon the applicant. The Plaintiffs requested clarification and/ or modification to no avail. CP 277-281; CP 300. Assuming that the Court actually intended that the City was free to disregard the declaratory rulings of the Court regarding ability of Andersons to short plat their lot under the provisions of the original plat, covenants, and subsequent attempts at amendment, the Court erred.

Given the absence of the City as a party to the litigation, the rights of the City cannot be included within the Court's decision. No party sought to have those rights enumerated, although Defendant Brown insisted that the City was a necessary party. No appeal has been taken

from the Order denying that defense. The judgment of the Court found that no application was pending from any of the three plaintiffs[2], and that the City was not 'necessary' to the adjudication of the rights of the parties regarding further short platting within the subject subdivision. The ruling cannot enumerate the rights of the City accordingly. The Plaintiffs did not seek mandamus relief. Certainly the Court did not mandate any proposed short plat, and it would not be within the Court's authority to review the specific material advanced by the Defendants to determine whether the criteria for short plat approval have or have not been met. The declaration of rights contained within the final Judgment need not and should not reference the City's role at all.

In addition, the parties did not brief nor argue 'issue preclusion', and that subject was not before the Court. It is an exhaustive subject. See, *e.g.*, Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L.REV. 805 (1984); Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 96 P.3d 957 (2004). If the question was to be considered, then the Plaintiffs should have reasonable opportunity to brief and argue the same.

[2] No evidence of a pending application was offered, although one of the Plaintiffs had undergone the 'pre-application review process.' The absence of a pending application at all material times during Court proceedings was undisputed.

Moreover, the issue is not 'ripe' for adjudication. If an application for subdivision approval is submitted to the City, and the City determines that the amendment was effective notwithstanding the Court's ruling, for example, then that determination is subject to further review. It is inappropriate to issue a preliminary ruling on the issue.

To the extent that the Judgment bound the City, or enumerated its rights, that ruling was error.

3. Are the Plaintiffs the prevailing party under the covenants, entitling them to an award of fees?

The trial Court erred in denying Plaintiffs' request for fees. CP 311-313; 314-318. The Respondents are entitled such an award, both in the proceedings before the Trial Court, and herein. See, *e.g.*, Day v. Santorsola, 118 Wn.App. 746, 76 P.3d 1190 (2003).

The Trial Court relied upon Meresse v. Stelma, *supra,* to deny Respondents' fees. CP 311-313. Meresse v. Stelma, *supra,* is readily distinguished. The ***sole*** issue before the Court therein concerned the attempt to amend the governing documents. In this instance, the 'issue' concerns the lawfulness of a short-plat action, in the context of both the original covenants and the attempted amendment. As noted in the context of the parties' briefing herein, it is immediately apparent that this case

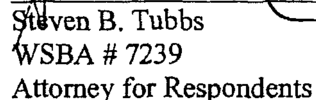
involves the covenants and their interpretation, and the successful party is entitled to an award of fees accordingly.

The Appellants concede the error of the Trial Court's ruling that denied Respondents' request for fees, by invoking the same language under the covenants[3] to request such an award on their own behalf. In so doing, the Appellants have waived any right to object to reversal, as they themselves have elected to invoke the jurisdiction of the Court in ruling upon fees in favor of the prevailing party. See Appellants' Brief at 24. Having made such an election, they may not be heard to complain when the Trial Court is reversed on this issue.

RESPONDENTS' REQUEST FOR FEES

Pursuant to the provisions of the covenants in question (CP 20) and RAP 18.1 (b), Respondents request an award of its fees and costs incurred herein.

Respectfully submitted,



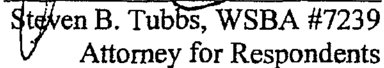
Steven B. Tubbs
WSBA # 7239
Attorney for Respondents

[3] CP 20, Provision 19.

CERTIFICATE OF SERVICE

I, Steven B. Tubbs, certify that I have mailed a copy of the attached Brief of Respondents to Mr. Stephen G. Leatham, of Heurlin, Potter, Jahn, Leatham & Holtmann, P.S., 211 E. McLoughlin Blvd., Vancouver, WA 98666-0611; and to Mr. Cary Cadonau of Brownstein, Rask, Sweeney LLP, 1200 SW Main St., Portland, OR. 97205; and the original and one copy of said Brief of Respondents to David C. Ponzoha, Clerk of the Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454, postage prepaid, on this 15 day of February, 2011.

Respectfully submitted,



Steven B. Tubbs, WSBA #7239
Attorney for Respondents

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; AND RIVER PROPERTY LLC, RESPONDENTS	)	CASE NO. 41201-2-II
vs.	)	MOTION FOR RECONSIDERATION AND CLARIFICATION
JAMES W. BROWN; ROBERTA D. DAVIS; KAE HOWARD; TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CHRISTI D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG, husband and wife; VINCENT and SHELLY HUFFSTUTTER, husband and wife, THOMAS J. and GLORIA S. KINGZETT, husband and wife, LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E. MCCLASKEY, JR. and VERONICA A. MCCLASKEY, TRUSTEES OF THE MCCLASKEY FAMILY TRUST – FUND A; CRAIG STEIN, RICHARD AND CAROL TERRELL, husband and wife, APPELLANTS	)	

1. IDENTITY OF MOVING PARTY

Respondents above ask for the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

a. Reconsideration of that portion of the Opinion of the Court holding that each owner of the two lots created from former lot 13 should be given a one-half vote;

b. Clarification that neither the Trial Court nor the Court of Appeals ruled on whether the owners' signatures as set forth on the amendment were themselves valid and met the legal requirements for those signatures.

3. FACTS RELEVANT TO MOTION

On September 4, 2013, this Court filed an unpublished opinion holding that Respondent River Property LLC, purchaser of a lot short-platted by one of the Appellants, was and is entitled to only ½ of a vote on the question of modifying covenants that touch and concern said lot. In addition, the Court recited factually that all of the "owners" of lots of Appellants had signed an amendment modifying those covenants. However, at summary judgment, the Respondents did not present facts pertinent to the validity of the signatures on the amendment, but reserved the same after the Trial Court ruled that the amendment was invalid, even assuming that all signatures were valid.

4. GROUNDS FOR RELIEF AND ARGUMENT

a. The Court erred in determining as a matter of law that the owners of the lots resulting from Brown's short plat were limited to one-half of a vote in matters concerning amendment to applicable covenants.

The legal standard for review of restrictive covenants is set forth in *Riss v. Angel*, 934 P.2d 669, 131 Wn.2d 612 (Wash. 1997):

> The court's primary objective in interpreting restrictive covenants is to determine the intent of the parties. *Metzner v. Wojdyla*, 125 Wash.2d 445, 450, 886 P.2d 154 (1994); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wash.2d 810, 815, 854 P.2d 1072 (1993); *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wash.App. 177, 179, 810 P.2d 27, review denied, 117 Wash.2d 1013, 816 P.2d 1224 (1991). In determining intent, language is given its ordinary and common meaning. *Metzner*, 125 Wash.2d at 450, 886 P.2d 154; *Mains Farm*, 121 Wash.2d at 815, 854 P.2d 1072; *Krein v. Smith*, 60 Wash.App. 809, 811, 807 P.2d 906, review denied, 117 Wash.2d 1002, 815 P.2d 266 (1991)(emphasis added).

It is therefore unnecessary to create a definition of 'lot' where none is required, given its ordinary and common meaning. The observation that "Andersons ...admit an ambiguity ... exists", based upon the absence of a definition is incorrect. No such ambiguity is present, nor was one conceded. To the contrary, the term 'lot' does not require definition. It has a common and readily understood meaning. Critically, there is nothing in the covenants to suggest that a contrary definition was intended. Given that the term 'lot' is unambiguous, the term does not require judicial creation. See, e.g., *Saunders v. Meyers*, 68249-1-I:

> The term "trees" is not ambiguous. It is in no need of interpretation. The plain meaning is not limited to evergreen and madrona trees. The covenant

cannot be rewritten to exclude maple trees in the guise of determining intent.

The Trial Court postulated, entertained, and then rejected the notion that a 'lot' was other than a 'lot'. Given the circumstance that the owners knew of Brown's proposed and eventual prior short plat, which resulted in two lots from an original one, they knew or should have known at that time that the voting requirements had changed accordingly.

The Court struggles with the developers' provision for common ownership of Tract A as though it were synonymous with all of the rights and interests of owners in the development. The owners' rights and interests in votes and Tract A, however, are not co-extensive or synonymous. Resort to the reference to Tract A as evidence of intent regarding voting privileges of a 'lot' owner is patently inapt and unjust. The communal interests in Tract A, which are "tidelands" along the Columbia River, *i.e.*, a riverfront beach, differ vastly from the communal interests in the integrity of the Covenants and the voting privileges pertaining thereto. There is no connection, either factually or by reasonable and necessary implication, between the intent of the grantors in providing for a mechanism to amend Covenants that govern the otherwise free and unrestrained use of property; and the creation of Tract A in order to provide for common enjoyment of the riverfront.

Critically, there is nothing on the face of the Brown short plat that enunciates the interpretation announced. In addition, as with Brown's plat, the original plat depicting Tract A says nothing about voting rights. This silence does not establish an ambiguity where none exists. To the contrary, there is nothing to alert a prospective purchaser of any diminished rights available to the owner and exercisable in the face of objectionable amendment proposals. Any lot owner within the development, reviewing the covenants, will invariably and reasonably conclude that the owner of that lot and others within the development each has one vote. There is no ambiguity with this simple, straightforward notion.

The restricted definition in the decision creates 'tiers' of voting rights, even though the subject matter of a revision to the covenants may have nothing whatsoever to do with either Tract A or short-platting. Thus, for example, if a sufficient number of owners decided that all homes in the development must be painted black, the owners of short-platted lots, although affected 100% by the decision, would be entitled to only one half of a vote on the question. This is unjust and inequitable and manifestly unreasonable.

Ironically and perhaps unfortunately, the Anderson's short plat approved by the City, and subsequently by Hearing Examiner and Superior Court, provides that the newly-created lot segregated from the original lot that was developed has NO interest in Tract A, reserving

all interest in Tract A with the original parcel. It would therefore follow, given the construction of intent pronounced, that the owner of that newly-created "lot" may have virtually no right to vote upon proposed amendments affecting that lot!

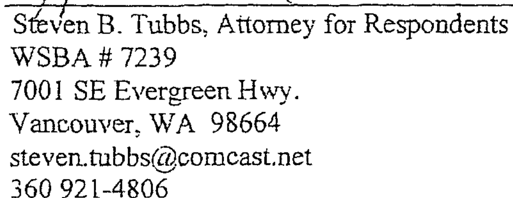
The creation of 'tiered' voting interests, suggesting that some lot owners are 'more equal' than others, is contrary to public policy[1] in that it denies equal status to owners with equal prospective interests, and is also contrary to the determination that, had short-platting been precluded, the original developers would have so provided. Just as it is "inappropriate to imply a restriction in the Covenants against lawful subdivision", it is inappropriate to imply and impose a voting restriction on the owners of lots created thereby.

Accordingly, the first rule enunciated in *Burton v. Douglas County*, 65 Wn.2d 619, 621-622, 399 P.2d 68 (1965), whereby 'clear and unambiguous language will be given its manifest meaning', is dispositive and should be applied.

b. The recital of facts should be clarified. The Respondents have not conceded that the amendment was properly enacted, based upon the signatures on that document, the 'nose count' issue notwithstanding. This appeal arose from and involves review of summary judgment. Not all issues were presented to the Court at summary judgment, and Respondents expressly reserved their right to challenge the adoption of the covenants on other grounds. Thus the recital of facts on page 5, stating, "the respective owners of lots 1,3,5-12, and lot 1(sic) of former lot 13 ... signed an amendment to the Covenants" is subject to further challenge, and was not conceded at any time by the Respondents. This recital should be qualified accordingly, so as to avoid any confusion about issues that remain for further litigation, in the event that the above argument does not prevail.

September 19, 2013.

Respectfully submitted,



Steven B. Tubbs, Attorney for Respondents
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7001 SE Evergreen Hwy.
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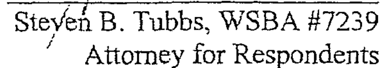
[1] It is the function of the Court to make determinations of public policy. See, *e.g.*, *Frickel v. Sunnyside Enterprises, Inc.*, 106 Wn.2d 714, 717, 725 P.2d 422 (1986).

CERTIFICATE OF SERVICE

I, Steven B. Tubbs, certify that I have emailed a copy of the attached Motion for Reconsideration and Clarification, delivery and read receipt requested, to Mr. Stephen G. Leatham, of Heurlin, Potter, Jahn, Leatham & Holtmann, P.S., at sgl@hpl-law.com; Mr. Cary Cadonau of Brownstein, Rask, Sweeney LLP at crc@brownrask.com; Mr. Alexander Weal Mackie, at amackie@perkinscoie.com; Mr. Brent David Boger at brent.boger@cityofvancouver.us, and said Motion to the Court of Appeals, Division II, at coa2filings@courts.wa. on this 19th day of September, 2013.

Respectfully submitted,



Steven B. Tubbs, WSBA #7239
Attorney for Respondents

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STATE OF WASHINGTON

BY DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, Trustees of the DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; and RIVER PROPERTY LLC, Respondents/Cross Appellants, v. JAMES W. BROWN; ROBERTA D. DAVIS; KAE HOWARD, Trustees of the KAE HOWARD TRUST; MICHAEL J. and CRISTI D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG, husband and wife; THOMAS J. and GLORIA S. KINGZETT, husband and wife; LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E. MCCLASKEY, JR. and VERONICA A. MCCLASKEY, Trustees of the MCCLASKEY FAMILY TRUST-FUND A; CRAIG STEIN; RICHARD and CAROL TERRELL, husband and wife, Appellants/Cross Respondents.	No. 41201-2-II consolidated with No. 42925-0-II ORDER GRANTING MOTION FOR RECONSIDERATION IN PART AND AMENDING OPINION

On September 19, 2013, the Respondents filed a motion for reconsideration of the September 4, 2013 unpublished opinion. After review of the motion and the files and records herein, we grant the motion and amend the opinion as follows:

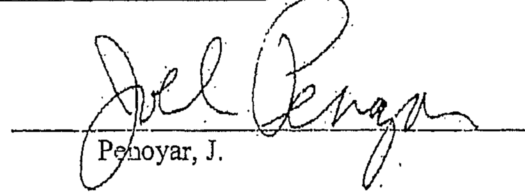
It is ordered that the second full paragraph on page 5 that reads:

> Meanwhile, Rivershore's other lot owners (Neighbors) opposed the Andersons' proposed short plat of lot 2. On September 15, 2008, the respective owners of lots 1, 3, 5-12, and lot 1 of former lot 13 (still owned and occupied by Brown) signed an amendment to the Covenants, adding the following restriction to the end of section 1 and stating that it was effective immediately: "Lots 1 through 13, consisting of the original 13 lots contained in Rivershore, shall not be further subdivided or short platted." CP at 42. The amendment—accompanied by the Neighbors' notarized signatures—was recorded the following month.

is deleted. The following paragraph is inserted in its place:

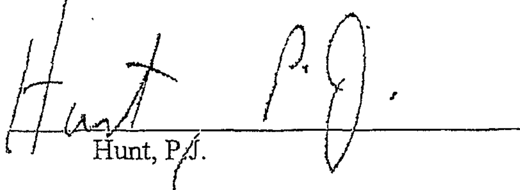
> Meanwhile, Rivershore's other lot owners (Neighbors) opposed the Andersons' proposed short plat of lot 2. On September 15, 2008, signatures purporting to be those of the respective owners of lots 1, 3, 5-12, and lot 1 of former lot 13 (still owned and occupied by Brown) were affixed to an amendment to the Covenants, adding the following restriction to the end of section 1 and stating that it was effective immediately: "Lots 1 through 13, consisting of the original 13 lots contained in Rivershore, shall not be further subdivided or short platted." CP at 42. The amendment—accompanied by notarized signatures—was recorded the following month.

Dated this 10TH day of DECEMBER, 2013.

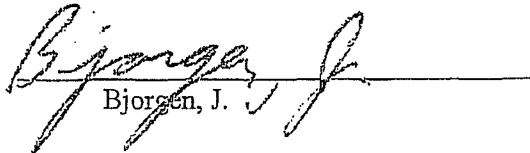


Penoyar, J.

We concur:



Hunt, P.J.



Bjorgen, J.

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STATE OF WASHINGTON
BY ________
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, Trustees of the DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; and RIVER PROPERTY LLC,

Respondents/Cross Appellants,

v.

JAMES W. BROWN; ROBERTA D. DAVIS; KAE HOWARD, Trustees of the KAE HOWARD TRUST; MICHAEL J. and CRISTI D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG, husband and wife; THOMAS J. and GLORIA S. KINGZETT, husband and wife; LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E. MCCLASKEY, JR. and VERONICA A. MCCLASKEY, Trustees of the MCCLASKEY FAMILY TRUST-FUND A; CRAIG STEIN; RICHARD and CAROL TERRELL, husband and wife,

Appellants/Cross Respondents.

No. 41201-2-II
consolidated with
No. 42925-0-II

UNPUBLISHED OPINION

PENOYAR, J. — Dale and Leta Anderson seek to divide a lot they purchased in a Vancouver riverfront subdivision. The other lot owners in the subdivision oppose the division of this lot, having signed an amendment to the subdivision's restrictive covenants that forbids further division of any lot. After the superior court entered a declaratory judgment that the amendment was invalid and that the existing covenants did not expressly forbid or allow further divisions of subdivision lots, the Andersons filed a short plat application with the city that received preliminary approval.

The neighbors filed two separate appeals, one challenging the superior court's declaratory ruling and one challenging the hearing examiner's decision affirming the city's approval of the Andersons' short plat application. These two appeals have been consolidated here and present numerous issues.

We conclude that the amendment to the covenants was valid because, in conformance with the covenants, it was approved by owners holding more than 80 percent of current ownership interest in the lots in the subdivision. This conclusion renders moot issues the neighbors raise of exhaustion of administrative remedies and the propriety of the declaratory judgment proceedings. We also conclude that the Andersons' equitable claims must be remanded for further proceedings. We retain jurisdiction so that, should the Andersons be successful in these proceedings, we may consider whether the Andersons' application will need to be processed as a plat alteration or as a short plat. Finally, the Andersons were not entitled to attorney fees below, nor is either party entitled to attorney fees on appeal, because neither party is of yet the prevailing party in this dispute. Accordingly, we reverse in part, and remand with jurisdiction retained.

FACTS

CASE ONE

I. BACKGROUND

In 1989, the Rivershore phase 1 subdivision (Rivershore) was created along the banks of the Columbia River near Vancouver, Washington.[1] When it was recorded, Rivershore comprised 13 lots and a tract of land called Tract A that, running the length of the subdivision, bordered each lot on one side and the river on the other. Note 4 on the Rivershore plat stated: "Tract 'A'

[1] The City of Vancouver annexed Rivershore and the surrounding area in January 1997.

to be owned and maintained by owners of record of lots 1-13; will be conveyed as an undivided 1/13 interest in, and to tract 'A.'" Clerk's Papers (CP) at 608.

Rivershore's developer created and recorded a declaration of covenants and restrictions for Rivershore (Covenants) at the time of Rivershore's creation. The Covenants' introduction provides for their amendment: "[A]ny modification desired may be made by affirmative vote of 80% of the then owners of lots within this subdivision and evidenced by a suitable instrument filed for public record." CP at 16.

The Covenants also detail the rights, responsibilities, and restrictions associated with Tract A. Mirroring the language of note 4 on Rivershore's plat, the Covenants' section 15 states: "Tract 'A' of tidelands to be owned and maintained by owners of record of lots 1 through 13, and shall be conveyed to each as an undivided 1/13th interest in and to Tract 'A'." CP at 19. In section 16, the Covenants state:

> It is intended that the use and enjoyment of said Parcel "A" be restricted to the owners of Lots 1 through 13 and the future owners of lots contained within the boundaries of Tax Parcels 122364, 122365 and 500742.[2]

CP at 19.

The Covenants' Section 19 addresses the effect of failure to enforce the Covenants:

> The failure on the part of any said parties affected by these restrictions at any time to enforce any of the provisions hereof shall in no event be deemed a waiver thereof, or any thereof, or of any existing violation thereof, nor shall the covenants and restrictions by judgment of court order affect any other provisions hereof, which shall remain in full force and effect.

CP at 20. Section 19 also addresses awarding attorney fees for actions brought to enforce the Covenants:

[2] These tax parcels refer to other subdivisions outside Rivershore.

> Should any suit or action be instituted by any of said parties to enforce any of said reservations, conditions, agreements, covenants and restrictions, or to restrain the violation of any thereof, after demand for compliance therewith or for the cessation of such violation, events and whether such suit or action be entitled to recover from the defendants therein such sum as the court may adjudge reasonable attorney fees in such suit or action, in addition to statutory costs and disbursements.

CP at 20.

In 1990, Dale and Leta Anderson purchased lot 4 of Rivershore.[3] In 2002, James Brown, the owner of lot 13 of Rivershore, filed an application with the City of Vancouver (City) to short-plat his lot into two separate parcels. The Andersons, along with several of their neighbors, objected to Brown's proposed short plat; the attorney for the Andersons and these neighbors wrote to a City planner delineating their objections. Among these objections was that Brown's short plat would violate sections 1, 15, and 16 of the Covenants.[4] The City planner disagreed: "If the authors of the CC&Rs [the Covenants] had intended to limit the number of lots within Rivershore Phase 1 to the original 13, they could have clearly stated this." CP at 25. Furthermore, the City planner added that "the city does not enforce CC&Rs. These are private restrictions adopted by a developer or homeowners' association." CP at 25.

The City approved Brown's short plat. In the short plat, Brown addressed the 1/13th interest that lot 13 had in Tract A, dividing the interest equally so that the owner of each of the two new lots had a 1/26th interest in Tract A. None of the Rivershore lot owners filed any formal legal objection to the short plat, and the plat became final. After the short plat, Brown

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[3] The Andersons, as trustees, purchased this lot for the Dale E. Anderson and Leta L. Anderson Family Trust.

[4] Another objection was that RCW 58.17.215 required Brown to submit a plat alteration for the changes he had proposed for lot 13.

occupied one of the two new lots and offered the second for sale. The Andersons purchased that second lot in 2005.[5]

In 2008, the Andersons purchased lot 2 of Rivershore.[6] The Andersons intended to short-plat lot 2, employing the services of Planning Solutions, Inc. Under the proposed short plat, lot 2, which already had a single family home on it, would be divided as an "infill" project into two lots, each with a single family home. CP at 84. Before submitting their short plat application to the City, the Andersons submitted their short-plat plans to the City for preliminary review. The City scheduled a pre-application conference for September 18, 2008, to address the proposed short plat.

Meanwhile, Rivershore's other lot owners (Neighbors) opposed the Andersons' proposed short plat of lot 2. On September 15, 2008, the respective owners of lots 1, 3, 5-12, and lot 1 of former lot 13 (still owned and occupied by Brown) signed an amendment to the Covenants, adding the following restriction to the end of section 1 and stating that it was effective immediately: "Lots 1 through 13, consisting of the original 13 lots contained in Rivershore, shall not be further subdivided or short platted." CP at 42. The amendment—accompanied by the Neighbors' notarized signatures—was recorded the following month.

The attorney for one of the Neighbors submitted a letter dated September 18, 2008, to a City senior planner, "to make abundantly clear that the intent has always been for lots within Rivershore not to be subdivided, over 80 percent of the Rivershore lot owners recently amended

[5] The Andersons made this purchase through River Property, LLC, a company they organized and of which they are the sole owners.

[6] The Andersons effectively own three lots within Rivershore: lot 2 personally, lot 4 in trust, and lot 2 of former lot 13 through their LLC. Rather than referring alternately to the trust, the LLC, and the Andersons personally, we use "the Andersons" generally to refer to the owners of these three lots.

the Declaration [the Covenants], as authorized by the original Declaration at page 1." CP at 33. In this same letter, the Neighbors argued that the City's decision to allow Brown's short plat contravened the original Covenants' clear intent and that this prior decision should not impact the City's decision regarding the Andersons' proposed short plat. Accordingly, the Neighbors argued that the Andersons' proposed short plat would violate not only the Covenants' new amendment, but also the original Covenants themselves. Finally, the Neighbors argued that the proposed short plat constituted a subdivision "alteration" under RCW 58.17.215, which mandates that, because this alteration would violate the Covenants, all the lot owners within the subdivision must agree in writing to the alteration.

In December, an assistant City attorney sent a letter to the Andersons' and the Neighbors' respective counsel, summarizing the City Attorney's Office's conclusion:

> [W]e believe the short plat should be denied and the applicant advised to submit a plat alteration application or a plat alteration with a separate short plat application. In order for the plat alteration to be approved, the applicant must obtain the agreement of all of the property owners providing that they agree to terminate or alter paragraphs 15 and 16 of the CC&R's to allow additional undivided ownership of Tract A.

CP at 45. The assistant City attorney noted that he had "advised [the City's] Development Review Services to deny the short plat application." CP at 48.

II. PROCEDURE

The Andersons did not proceed with the short plat application and, instead, filed a complaint for declaratory relief in Clark County Superior Court in April 2009. In their complaint, the Andersons specifically sought a "[d]eclaratory judgment that neither the original Covenants nor the alleged 'Amendment' preclude [the Andersons] from short-platting their

properties."[7] CP at 3. After the Neighbors answered and asserted their affirmative defenses,[8] the Andersons moved for summary judgment with respect to their request for declaratory relief.

The Neighbors cross-moved for summary judgment, but they requested a continuance to allow further discovery regarding Rivershore's creators' intentions with respect to Rivershore's original plat and Covenants. The trial court denied the continuance. In April 2010, the trial court granted in part the Andersons' motion for summary judgment, ruling that (1) it had authority under the Uniform Declaratory Judgments Act[9] to grant the declaratory relief requested; (2) the original Covenants and plat of Rivershore "do not address the further subdivision of any lot in Rivershore," adding that "[t]he decisions of this court in this regard are not controlling on any determination that may be made on any particular short plat application that maybe [sic] determined by the City of Vancouver"; (3) the amendment to the Covenants was invalid because 80 percent of the "'then owners of Lots within said subdivision'" had not approved it; and (4) the Andersons' action was not prohibited for failure to exhaust administrative remedies because they did not have a short plat application pending before the City at that time. CP at 267.

The trial court also ruled, however, that (1) under the Covenants' section 19, the Neighbors, having failed to formally object to Brown's short plat, had not waived their rights to challenge the Andersons' proposed short plat; (2) the trial court could not grant the Andersons summary judgment on their claim of estoppel because of insufficient information and a material

[7] The Andersons also sought "[s]uch other relief as the Court may deem to be just and equitable" and an award of legal fees and costs. CP at 3.

[8] Brown defended against the Andersons' action separately from the other neighbors. Unless noted otherwise, however, "the Neighbors" includes Brown.

[9] Ch. 7.24 RCW.

issue of fact; and (3) "[t]he [Neighbors] did not abandon[ ] their rights under the original covenants by permitting or acquiescing to the use and existence of the two Lots created as a consequence of [Brown's] short plat of Lot 13." CP at 268.

The Andersons moved for clarification or reconsideration. The Neighbors also moved for reconsideration. The trial court denied these motions. The trial court also denied the Andersons' request for attorney fees. The Neighbors timely appeal.

CASE TWO

I. BACKGROUND

In September 2010, a little over a week after the Neighbors' first appeal to this court, the assistant City attorney sent a letter to the Andersons' and Neighbors' respective counsel. In the letter, he informed counsel that "[i]n light of the [Superior] Court's decision, the City will accept a short plat application and process it without the requirement of a plat alteration." CP at 763.

II. PROCEDURE

In November 2010, the Andersons submitted an application to the City to short plat lot 2 into two parcels. In April 2011, City staff issued its report and decision, granting preliminary plat approval with conditions. Later that month, the Neighbors timely appealed this decision, arguing, among other things, that the Andersons' application should be processed not as a short plat, but as a plat alteration.

In providing its report and recommendation to the hearing examiner, City staff noted that "[i]n light of the unique nature of this case," in which the examiner would have "to consider the operation of Washington subdivision laws, the effect of CC&R's, and a decision of the Clark County Superior Court," the staff would be "taking a rare neutral position in this appeal." CP at 447. Accordingly, City staff simply recommended the following: "Issue a decision based on the

record giving due consideration to the decision of the Clark County Superior Court dated April 8, 2010, and other materials submitted by the parties to this appeal." CP at 445.

After a hearing, the examiner issued a decision in June 2011 denying the Neighbors' appeal of City staff's decision to grant preliminary plat approval. The Neighbors filed a petition in Clark County Superior Court under the Land Use Petition Act[10] for review of the examiner's decision. The superior court affirmed that decision. The Neighbors timely appeal.

ANALYSIS

I. AMENDMENT TO THE COVENANTS

The Neighbors argue that the trial court erred when it ruled on summary judgment that the 2008 amendment to the Covenants was invalid. The Andersons maintain that the trial court's ruling was correct because the Neighbors failed to muster the 80 percent vote required to amend the Covenants. In light of the ambiguity in the Covenants' language that allows amendment, we look to the Covenants document in its entirety and to surrounding circumstances to interpret this language. The intent of the Covenants was to make voting rights directly proportionate to ownership of the original 13 lots. Therefore we conclude that a one-half vote should be allocated to each of the two lots within former lot 13. As a result, the 2008 amendment is valid, having received 10.5 of 13—or 80.7 percent—of the votes.

We review de novo a ruling granting summary judgment. *Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn. App. 665, 681, 151 P.3d 1038 (2007). Interpreting a covenant's language is a question of law. *Green*, 137 Wn. App. at 681. Courts do not strictly construe covenants but, instead, look to the purpose a covenant seeks to accomplish to determine

[10] Ch. 36.70C RCW.

the covenant's intent. *Fawn Lake Maint. Comm'n v. Abers*, 149 Wn. App. 318, 324, 202 P.3d 1019 (2009). Three rules in particular govern the court's interpretation of covenants:

> (1) The primary objective is to determine the intent of the parties to the agreement, and, in determining intent, clear and unambiguous language will be given its manifest meaning. (2) Restrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of the free use of land. (3) The instrument must be considered in its entirety, and surrounding circumstances are to be taken into consideration when the meaning is doubtful.

Burton v. Douglas County, 65 Wn.2d 619, 621-22, 399 P.2d 68 (1965) (citations omitted). In this case, the second rule does not apply because we are determining how the voting rights of lot owners should be allocated under the Covenants; we are not determining whether the restriction against subdivision on which the lot owners voted was substantively invalid. The Andersons make no argument that the restriction, if properly enacted, was substantively invalid.

Whether the 2008 amendment to the Covenants is valid, then, hinges on how votes are allocated among the lot owners. Again, the Covenants' language allowing amendment states: "[A]ny modification desired may be made by affirmative vote of 80% of the then owners of lots within this subdivision and evidenced by a suitable instrument filed for public record." CP at 16. "[C]onsistent with the original intention to restrict the ownership in Rivershore to 13 single-family dwelling lots," the Neighbors propose that the total number of votes is 13, even though the result of Brown's short-platting lot 13 was 14 lots within Rivershore. Appellants' Br. at 18. Whereas the respective owners of lots 1 through 12 each have a full vote, each owner of the two smaller lots created from former lot 13 should be given a one-half vote. Allocating the votes in this way means that 10.5 of 13—or 80.7 percent—of the votes were cast in favor of the amendment, and so the amendment was valid.

The Andersons counter that the trial court properly allocated one full vote to each of the 14 lots within Rivershore in determining whether the amendment had been enacted by a sufficient percentage of votes. Allocating the votes in this way means that 11 of 14—or 78.5 percent—of the votes were cast in favor of the amendment, and so the amendment was not adopted. The Andersons point out that any amendment to the Covenants must be enacted according to the amendment language set forth in the Covenants. The Andersons read this language to mean that "[v]oting rights extend to all 'owners of lots' within the subdivision," and nothing in the Covenants or plat supports treating each of the two lots within former lot 13 as half of a lot for voting purposes. Resp'ts' Br. at 13.

Additionally, the Andersons ask us to disregard the Neighbors' proposed manner of allocating votes because the Neighbors have not provided any supporting authority for that proposal. But the Andersons themselves have provided no authority for their contention that each of the 14 lot owners should be entitled to one full vote; they simply refer us to the Covenants' language concerning amendment as supposedly clear evidence of a "one lot-one vote" rule. Resp'ts' Br. at 14. And yet the Andersons also admit an ambiguity in the language exists when they point out that "[t]here is nothing in the covenants or the plat . . . determining what constitutes a 'lot'." Resp'ts' Br. at 14.

Indeed, "lot" is never defined in the Covenants, nor do the Covenants provide any other express clarification on how votes are to be allocated among "then owners of lots within this subdivision." CP at 16. In addressing the lack of authority provided on this issue, the Neighbors rightly emphasize that "[t]his is a very fact-specific situation." Appellants' Reply Br. at 8. Thus, to determine how to allocate votes under the Covenants, we must determine the Covenants' creator's intent by considering the entire document and the surrounding circumstances.

By their own terms, the original Covenants do not directly address the future division of lots within Rivershore. And because we will not imply a restriction in the Covenants against lawful subdivision of one's own land where the Covenants do not expressly prohibit such an activity, the original Covenants do not prevent the Andersons—or any of the other Neighbors—from subdividing their lots. But affirming the trial court on this point does not determine the voting rights of any newly created lots.

We have closely examined Rivershore's plat and Covenants for any indication of the creators' intent about how to allocate voting rights after division of a lot within Rivershore. But because it appears that the creators did not anticipate divisions of the original lots, any specific intent regarding voting rights following such divisions is simply lacking. For instance, both the plat in note 4 and the Covenants in section 15 grant an undivided 1/13th interest in Tract A to the respective owners of lots 1 through 13. Granting a specific 1/13th interest in this tract of tidelands, as opposed to a general right to use the tidelands as a common area, strongly suggests that Rivershore's creators did not anticipate that any additional lot would be added to Rivershore. Furthermore, section 16 of the Covenants reads, "It is intended that the use and enjoyment of said Parcel 'A' [Tract A] be restricted to the owners of Lots 1 through 13 and the future owners of lots contained within the boundaries of Tax Parcels 122364, 122365 and 500742." CP at 19. These tax parcels refer to other subdivisions outside Rivershore.[11] If the Covenants' creators had intended future additional lots within Rivershore, it seems likely that the obvious question of what rights these lots' owners would have in Tract A would have been addressed, just as the

[11] The Andersons posited at oral argument that reference to these tax parcels was to land within Rivershore. Because these parcels are outside Rivershore, it appears that the intent was that lots in future plats adjacent to Rivershore would also have rights in Rivershore's tidelands.

Covenants specifically addressed the interests that intended future owners of lots outside Rivershore could have in Tract A.

There is a difference between expectation and intent. The language of the Covenants shows that the creators did not expect that there would be divisions of the lots within Rivershore. But the language does not show that the creators intended that such divisions not be allowed. Because of this difference, we are no closer to resolving how voting rights are to be allocated when a Rivershore lot is divided. We cannot resolve the voting rights issue by using the first *Burton* rule because here the Covenants' language regarding the creators' intent is not clear and unambiguous. Having noted that the second *Burton* rule is inapplicable in this case, we thus turn to the remaining rule looking to the entirety of the Covenants and the surrounding circumstances to resolve this issue.

The entirety of the Covenants supports the notion that voting rights are proportionate to ownership of the original 13 lots. At purchase, each buyer received ownership of a lot and a fractional interest in the tidelands. Each buyer also received certain rights (along with obligations) under the Covenants. One of these rights was the right to vote for or against any proposed amendment to the Covenants. And each original buyer knew that he or she had one vote, or 1/13th of the voting power, to approve or reject a proposed amendment. Thus a lot owner knew that if he or she could find two other like-minded lot owners, together they could stop an amendment to the Covenants. A lot owner also knew that if he or she could find ten other supporters for an amendment, together they could pass it. We see no reason to think that the Covenants' creators (or the buyers of the original lots for that matter) would have expected that the proportionate voting calculus would change if a lot was further divided. But under the Andersons' theory, a lot owner now needs the support of eleven other lot owners to pass an

amendment and only two other owners to stop one. This allocation of voting power is clearly inconsistent with the rights each individual lot owner received upon buying an original lot, and thus it is inconsistent with the creators' intent on how to apportion votes. The Covenants' original and continuing intent is that voting rights are to be directly proportionate to ownership of the original 13 lots. It would be inconsistent with this intent to allow a lot owner to increase their (and their successor's) proportionate voting rights by the simple expedient of subdivision.

Surrounding circumstances support this interpretation as well. Notably, when Brown subdivided lot 13, the two resulting lots each received a 1/26th interest in Tract A—that is, the 1/13th interest that lot 13 had in Tract A was divided equally between the two new lots. It seems reasonable to also apportion between these two lots the one vote that lot 13 had rather than to create two votes out of one. Dividing the vote would make the voting power of each of the two new lots commensurate with the interest each lot has in Tract A.

We hold that each of the two lots within former lot 13 has a one-half vote for purposes of amending the Covenants, and thus the 2008 amendment to the Covenants was approved by an 80.7 percent vote. The trial court's ruling that the amendment was invalid is reversed.

II. The Andersons' Equitable Claims

The Andersons next argue that they are alternately entitled to declaratory relief on the equitable grounds that the Neighbors were estopped from asserting their claims against the Andersons. The trial court denied the Andersons' summary relief on this issue, noting that there was insufficient evidence and a material issue of fact. Equitable estoppel is a factual issue unless only one reasonable inference can be drawn from the evidence. *Shows v. Pemberton*, 73 Wn. App. 107, 111, 868 P.2d 164 (1994). Because the evidence regarding estoppel is underdeveloped in this case, we affirm the trial court's denial of summary judgment for the

Andersons on this issue and remand for further proceedings. The Andersons' success on this issue would permit them to move forward with an application to subdivide lot 2 despite the valid Covenant amendment prohibiting further division of lots within Rivershore. Because the issue of whether that application should be processed as a short plat or as a plat alteration is not ripe, we reserve ruling on that issue. We retain jurisdiction, however, to decide that issue if the Andersons are successful with their estoppel argument. The parties shall promptly advise us of any final ruling on the estoppel issue by the trial court, at which time we will determine the need for an additional briefing.

III. ATTORNEY FEES SHOULD NOT BE AWARDED

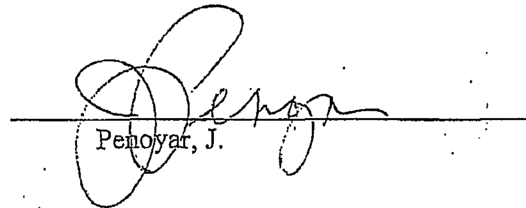
In connection with the trial court's declaratory judgment, the Andersons argue that the trial court erred by denying their request for attorney fees and costs. On appeal, both the Andersons and the Neighbors request attorney fees under RAP 18.1 and section 19 of the Covenants if they are the prevailing party. An attorney fee award must be authorized by contract, statute, or equitable grounds. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 271, 138 P.3d 943 (2006) (quoting *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993)). When a contract provides that attorney fees and costs shall be awarded to one of the parties, "the prevailing party . . . shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements." RCW 4.84.330.

Within the muddled language of section 19, the Covenants—a contract between the Rivershore lot owners—appear to provide reasonable attorney fees for any party successful in enforcing the Covenants or restraining their violation. Under RCW 4.84.330, the court may award these attorney fees to the party that prevails on this action under the Covenants. But here, neither party is the prevailing party; the outcome of this case still depends on whether the

Andersons prevail on their equitable claims on remand (and, if they do, whether they are then able to proceed with their short plat application to divide lot 2). Accordingly, we affirm the trial court's ruling denying the Andersons' request for attorney fees and similarly decline to award attorney fees to either party on appeal.

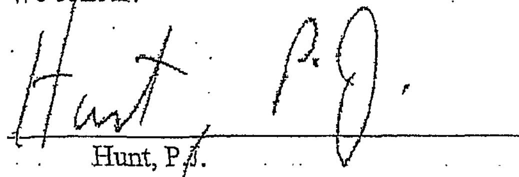
We reverse in part, and remand with jurisdiction retained.

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.

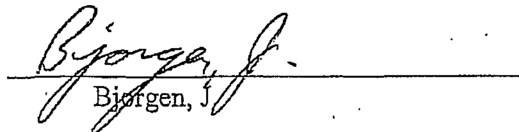


Penoyar, J.

We concur:



Hunt, P.J.



Bjorgen, J.

CERTIFICATE OF SERVICE

I certify that I caused the foregoing BRIEF OF RESPONDENTS to be served on the following:

Ben Shafton
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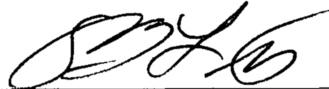
Vancouver, WA 98660

by mailing, by U.S. Mail, First Class postage prepaid, a true copy to the foregoing on the 21 day of May, 2015.

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.



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Of Attorneys for Respondents