No. 47022-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARK C. LEWINGTON, a Washington Resident; NOEL P. SHILLITO and LAURIE A. SHILLITO, Husband and Wife and Washington Residents; DANIEL P. OSTLUND and MARIE F. OSTLUND, Husband and Wife and Washington Residents; and ELIZABETH T. WIGHT, a Washington Resident,

Respondents,

v.

FRANK I. PARSONS and NANCY A. PARSONS, Husband and Wife and Washington Residents,

Appellants.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The facts of this case are simple. The Restrictive Covenants for the Narrowmoor Third Addition expressly state that height of homes is "***not to exceed two stories***." CP 151. The Parsons acknowledge that they were aware of this Covenant, but they ignored its plain and obvious meaning and constructed an addition to their home that contains two upper stories ***plus*** a daylight basement story. CP 413. The Parsons' third story blocks the views of their neighbors, including Mark Lewington, Daniel and Marie Ostlund, Elizabeth Wight, and Noel and Laurie Shillito (collectively, the "Plaintiffs" or the "Neighbors"). CP 164, 166, 175, 187.

The Superior Court found the language of Covenant A unambiguous. RP 28. The Superior Court determined that regardless of how the Parsons seek to define their daylight basement story, adding two upper stories above it means their home now ***exceeds two stories***. RP 28. Accordingly, the Superior Court rejected the Parsons' self-serving interpretation of Covenant A and protected the collective interests of the community as required by *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997). RP 28. The Superior Court appropriately ordered the remedy set forth in the Restrictive Covenants themselves and enjoined the Parsons' offending third story. RP 28. Therefore, the Superior Court ruling should be upheld.

Since the 1940s, Restrictive Covenants have protected the panoramic views, spacious and uniform neighborhood character, and property values enjoyed by the Plaintiffs and other residents of the Narrowmoor Neighborhood. CP 145-157. These Restrictive Covenants were recorded by Eivind Anderson (the "Drafter") right on the face of the Final Plats for each of the four Narrowmoor Additions, or subdivisions. *Id.* Consequently, the Plat drawings provide context for the Restrictive Covenants – together, their purpose is to establish a uniform design for the neighborhood that preserves the sweeping panoramic views of Puget Sound and the Olympic Mountains for each platted lot. CP 143, 159, 475-476. All four sets of Restrictive Covenants begin with the primary mechanism for protecting the viewshed – Covenant A – a height limit that restricts each home to no more than two stories. CP 145-157.

In the Narrowmoor Third Addition ("Narrowmoor Third"), where the Parsons' property is located, Covenant A expressly states that homes are "***not to exceed two stories***" in height. CP 151. The plain and obvious meaning of Eivind Anderson's language has always been clear to the Narrowmoor Third Community, as evidenced by the manner in which their distinctively low-profile homes have been built-out and maintained over the past sixty-six years. CP 142, 159. From the time Eivind Anderson platted the lots to the present day, the Narrowmoor Third

Community has ***always*** interpreted Covenant A's two-story height limit to apply to ***all*** of the stories of their homes, including daylight basement stories. CP 142, 159.

For sixty-six years, under the Narrowmoor Third Community's interpretation of Covenant A the average height of homes in Narrowmoor Third has remained about eighteen feet, despite the twenty-five to thirty-five foot heights that have been allowed by Tacoma's Zoning Code. CP 161. Generations of Narrowmoor Third homeowners have protected the neighborhood's viewshed by adhering to their common interpretation of Covenant A – counting ***all*** stories, including daylight basement stories, when implementing Mr. Anderson's two-story height limit. CP 142, 161.

Over the years, the Narrowmoor Community has vigilantly enforced Covenant A, allowing only three violations of the two-story height limit to occur in the entire history of Narrowmoor Third and ***never*** on a downhill lot where it would affect neighbors' views. CP 160-161, 421. Thus, the Community has never acquiesced in violations of Covenant A. Nor has the Community ever abandoned Covenant A. Covenant A remains in full force and effect since 1948.[1]

[1] The only Covenant that the Narrowmoor Third Community has abandoned is the illegal and abhorrent discrimination clause at Covenant F, which was removed from all reprints of the Restrictive Covenants decades ago and which is severable from the other Covenants by their own terms. CP 151-152. All other Covenants remain in full force and effect. *See Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 522 (2005).

Sixty-six years later, Frank and Nancy Parsons came along with their own interpretation of Covenant A – one that would allow ***their*** home to have ***more than two stories***. Although the rest of the Community has adhered to the two-story height limit since 1948, the Parsons purchased a home in Narrowmoor Third last year and began constructing a ***three***-story addition – two upper stories over a daylight basement story. CP 164, 166, 175, 187. The Parsons' construction plans and photographs of the Parsons' construction site clearly show three stories. CP 75, 400 (Ex A, B).

The Parsons acknowledge that they were aware of the Restrictive Covenants before they began construction. CP 413. The Parsons assured their Neighbors that they would comply "absolutely" with the Restrictive Covenants. CP 413. But instead, the Parsons proceeded to construct a home that ***exceeds*** two stories in height. The Parsons continued with construction after their Neighbors raised concerns and sent written warnings, after their Neighbors filed suit, even after their Neighbors won the suit in Superior Court. CP 187.

The Parsons ***knowingly*** proceeded under their own self-serving interpretation of the Restrictive Covenants – one that advances their own interests at the expense of the surrounding Community. This cannot stand. Courts do not interpret restrictive covenants for the advantage of specific individuals; rather, Courts interpret restrictive covenants to protect the

collective interests of the community. *Riss v. Angel*, 131 Wn.2d at 623. Accordingly, the Superior Court rejected the Parsons' self-serving interpretation of Covenant A and enjoined their third story. Allowing the Parsons' offending third story to stand, to the detriment of their Neighbors, would be the ***antithesis*** of the result required by *Riss v. Angel*.

The Plaintiffs all own view homes uphill from and surrounding the Parsons' property and are harmed by the Parsons' third story. CP 164, 166, 175, 187. These Neighbors purchased their homes because of the magnificent views and relied on the Restrictive Covenants protect those views. *Id.* Photographs clearly show that the height of the Parsons' three-story addition projects up into their Neighbors' views. CP 176-183, 400-404, 408-412. It also disturbs the uniform character of their neighborhood and decreases their property values. CP 164, 166, 168, 175, 187. In short, it irreparably harms the Neighbors' enjoyment of their homes. CP 397, 406, 416, 419. Left unchecked, it will also set a dangerous precedent that Covenant A has been abandoned, precipitating a cascade of taller homes across Narrowmoor Third as other property owners seek to build upward in order to retain their views. CP 144, 161, 419.

Because the Parsons insisted upon proceeding with their construction even in the face of this suit, their Neighbors brought a Summary Judgment Motion to expedite Declaratory Judgment to enforce

Covenant A. CP 117. The Superior Court found ***no*** material issues of fact and appropriately ruled that interpretation of Covenant A is a question of law. RP 28. The Superior Court found the meaning of Covenant A unambiguous – the Parsons home cannot ***exceed two stories*** in height. RP 28. The Superior Court found that because the Parsons are building two upper stories over a daylight basement story, their home will exceed two stories and therefore violate Covenant A. RP 28. The Superior Court correctly determined this interpretation was necessary to protect the collective interests of the community, as required by *Riss v. Angel*. RP 28.

Accordingly, the Superior Court applied the remedy set forth in the Restrictive Covenants themselves and enjoined the Parsons' offending third story. RP 28. The Superior Court decision should be upheld.

II. STATEMENT OF THE CASE

A. The Restrictive Covenants.

Narrowmoor is located on the West Slope of Tacoma, with spectacular, sweeping, panoramic, westward views of Puget Sound and the Olympic Mountains. CP 143. Narrowmoor's panoramic 180-degree views are preserved by the unique Plat design and the Restrictive Covenants that were recorded on the face of the Final Plats of the four Narrowmoor Additions by Eivind Anderson, between 1944 and 1955. CP 145-157.

Mr. Anderson's unique Plat drawings for the Narrowmoor

Additions lay out uniformly spaced north-south streets that form terraces of large east-west through-lots. *Id.*, CP 143, 475. The street-to-street through-lots are drawn on an east-west axis with the long sides of the lots running downslope toward Puget Sound and the Olympic Mountains. *Id.* This lot configuration, coupled with the two-story height limit, utilizes the natural slope to create enough vertical separation between homes to preserves a panoramic 180-degree view from each lot. CP 143, 475-476.

Mr. Anderson's Restrictive Covenants for each of the Narrowmoor Additions include height restrictions to prevent tall homes and tall trees from obstructing the panoramic views. CP 145-157. The first and most important Covenant – Covenant A – limits the height of homes across all four Narrowmoor Additions to just two stories. CP 146, 149, 151, 157.

Between 1944-1948, when platting the Narrowmoor First, Second and Third Additions, Mr. Anderson phrased Covenant A the same way:

> "no structure shall be erected, placed or permitted to remain on any residential building plot other than one detached single-family dwelling ***not to exceed two stories in height*** and a private garage."

CP 146, 149, 151 (emphasis added). However, in 1955 when Eivind Anderson platted the Fourth and final Addition, he changed the wording of Covenant A to clarify his intent that ***"basement stories"*** count as stories:

> "no structure shall be erected, placed or permitted to remain on any residential building plot other than one detached

single-family dwelling ***not to exceed one story in height, exclusive of a basement story,*** and a private garage."

CP 157 (emphasis added). This evolution in Mr. Anderson's wording of Covenant A mirrors the evolution of the definition of "story" in the local Zoning Code at the time, as discussed below. CP 422, 442, 444.

From Eivind Anderson's time to this day, Narrowmoor has been built-out consistent with Mr. Anderson's intent that basement stories count as stories and that each home is limited to just two stories. CP 142-144, 159-161. The Narrowmoor Community has maintained that same interpretation of Covenant A for sixty-six years, resulting in a uniquely uniform neighborhood of low-profile homes. CP 475-478.

In Narrowmoor Third, where the Parsons live, only three known story violations have ever occurred – at 1526 S. Jackson Ave., 1505 S. Fairview Drive, and 7501 S. Sunray Dr. – all on the top-most terrace of through-lots, at the extreme uphill perimeter of the subdivision, where view impacts were peripheral. CP 160-161, 421. In the entire history of Narrowmoor Third, no story violation has occurred on a downhill lot where it would impact the views of uphill neighbors. *Id.*

B. When the Restrictive Covenants were Drafted Tacoma's Zoning Code Defined Stories to Include Daylight Basement Stories.

The Narrowmoor Third Community's interpretation that Covenant A's two-story height limit includes daylight basement stories is also

consistent with common definitions of "story" at the time Mr. Anderson drafted the Restrictive Covenants, including the definition in the contemporaneous local Zoning Code that governed land use actions like platting. CP 89. In 1948, when Mr. Anderson platted Narrowmoor Third, Tacoma's Zoning Code defined "story" to include basement stories:

> "that ***portion of a building included between the surface of any floor and the surface of the floor next above it . . .***"

CP 89 (CITY OF TACOMA, WA., ZONING ORDINANCE No. 12703, Section 2.16 (1945)) (emphasis added). This definition counts all floors as stories.

In 1953, Tacoma changed its Zoning Code definition of "story" to exclude some basement stories. As the Zoning Code definition evolved, so did Mr. Anderson's wording of Covenant A. When Mr. Anderson platted Narrowmoor Fourth in 1955, he clarified the two-story height limit as allowing "***no more than one story exclusive of a 'basement story.'***" CP 157 (emphasis added). This change preserved the uniformity of his neighborhood design and assured that homes across all four of the Narrowmoor Additions would not exceed two stories.

C. The Parties.

The Parsons and the Neighbors all own view properties in Narrowmoor. The Parsons' home is located at 1502 S. Ventura Drive, in Narrowmoor Third, downhill and across from the Neighbors' homes.

Mark Lewington resides at 1502 S. Karl Johan Avenue, directly uphill and across Ventura Drive from the Defendants' property, in Narrowmoor Third. Noel P. Shillito and Laurie A. Shillito reside at 1274 S. Ventura Drive, immediately across Suspension Drive from the Parsons' property, on the southern edge of Narrowmoor Second abutting Narrowmoor Third. Daniel P. Ostlund and Marie F. Ostlund reside at 1512 S. Karl Johan Avenue, directly uphill and across Ventura Drive from the Parsons' property, in Narrowmoor Third. Elizabeth T. Wight resides at 1510 S. Ventura Drive, adjacent to the Parsons, in Narrowmoor Third.

The Neighbors submitted photographs that starkly reflect how the Parsons' third story projects up into their views. CP 176-183, 400-404 (Ex B-D). The Neighbors submitted Declarations describing the how the loss of their views and the uniform character of their neighborhood has devastated their enjoyment of their homes. CP 164, 166, 175, 187, 406, 416. The Neighbors' regretted having to file suit to enforce Covenant A. *Id.* However, this was the only way to address their injuries.

D. None of the Plaintiffs Were Parties to *Lester v. Willardsen.*

None of the Neighbors were Parties to the earlier enforcement action of *Lester v. Willardsen*, Court of Appeals Div. II, No. 12172-7-II (Unpublished Opinion (1990)), or the underlying case *Lester v. Willardsen*, Pierce County Superior Ct. No. 85-2-04120-3 (Unpublished

Opinion (1988)). The Parsons themselves produced waivers proving that Elizabeth Wight and the Ostlunds' predecessor-in-interest, Signa Simkins, opted out of the *Lester v. Willardsen* litigation. CP 328, 330. The Parsons acknowledge that the Shillitos were not Parties. Therefore, these Plaintiffs, at a minimum, are not bound by *Lester v. Willardsen.*

Only one of the Neighbors, Mark Lewington, is arguably in privity with a predecessor-in-interest who was a member of the class certified in *Lester v. Willardsen.* However, Mr. Lewington should not be bound by *Lester v. Willardsen* either, as that case arose in an entirely different context than this case. At issue in *Lester v. Willardsen* was a story violation at 1526 S. Jackson Ave., in the uppermost tier of lots where there were no uphill neighbors whose views could be impacted by the height. CP 351-353, 427. At issue in this case is the Parsons' story violation on a downhill lot, where its height directly impacts the views of uphill Neighbors. Because the issue in *Lester v. Willardsen* is not identical to the issue here, collateral estoppel does not apply.

Moreover, since *Lester v. Willardsen* was decided, the Washington State Supreme Court has announced a new rule of law for interpreting Restrictive Covenants that changes the outcome of the case. Washington Courts now place special emphasis on reaching interpretations that protect the collective interests of the community. *Riss v. Angel*, 131 Wn.2d 612.

E. The Parsons' Third Story Harms the Neighbors and the Community.

The Parsons' interpretation of Covenant A causes real injury to their Neighbors and gravely harms the collective interests of the Narrowmoor Third Community. CP 164, 166, 175, 187. Photographs clearly show that the Parsons' third story blocks portions of the Neighbors' panoramic views. CP 176-183, 400-404 (Ex B-D). This diminishes the Neighbors' enjoyment of their homes, disturbs the spacious uniform character of the surrounding neighborhood and decreases their property values by as much as thirty percent. CP 168, 397, 406, 416, 419.

Moreover, a three-story precedent on a downhill lot will undermine the enforceability of Covenant A's two-story height limit, causing further harm to the Neighbors and the Community by opening the flood gates to other taller homes in Narrowmoor Third. CP 144, 161, 419. Maintaining Covenant A's two-story height limitation is essential to preventing a cascade of taller homes from further blocking views, altering neighborhood character and harming the Neighbors' property rights.

Enjoining the Parsons' third story is the only remedy that can effectively address these injuries. This remedy is set forth right in Covenant A, which states that structures that exceed two stories ***shall not be permitted to remain*** on Narrowmoor Third lots. CP 151.

F. The Parsons Obfuscated the Full Scope of Their Construction.

The Parsons ***acknowledge*** that they were aware of the Restrictive Covenants before they began construction. CP 413. The Parsons' own words and actions demonstrate that they are not innocent Defendants and have proceeded at their own risk.

The Neighbors' Declarations paint a vivid picture of Defendants who were ***not forthcoming*** with regard to their construction plans. The Defendants obfuscated the full scope of their construction plans when they met with Mark Lewington, Daniel Ostlund and Marie Ostlund. CP 397, 406, 416. The Parsons told Mr. Lewington they were just adding a garage; they did not mention that they were also adding a third floor master suite. CP 397. The Parsons assured Daniel and Marie Ostlund that they would not change their roofline substantially, and that the roof would not extend above the Ostlunds shrubs. CP 406, 416. When the Ostlunds again raised concerns, the Parsons reassured the Ostlunds in an August 4, 2014 letter that they would comply "absolutely" with the Covenants. CP 413.

Their Neighbors took the Parsons at their word. It was not until an enormous roof beam was delivered to the construction site that the Neighbors grew suspicious that more was planned than the Parsons had led them to believe. CP 397, 406. Neighbors immediately reminded the Parsons in an August 13, 2014 letter from Mark Lewington's Counsel that

Covenant A limits their home to just two stories and requested a meeting. CP 187, 194. In that letter, Mr. Lewington warned the Parsons that if they persisted in violating Covenant A he would be forced to file suit. CP 194. The Parsons declined to meet, ignored their Neighbors' concerns and written warnings, and proceeded to frame a third story. CP 397. As soon as the Neighbors realized they had been misled and that the Parsons did not intend to comply with Covenant A, they bought suit to enjoin the Covenant violation. CP 397, 406.

The Parsons continued with their three-story construction after their Neighbors filed suit, and even after their Neighbors won the suit in Superior Court. Such defendants are not innocent and not entitled to a balancing of the equities. *Bauman v. Turpen*, 139 Wn. App. 78, 160 P.3d 1050, (Div. 1 2007); *Bach v. Sarich*, 74 Wn.2d 575, 445 P.2d 648, (1968). The Neighbors briefed all of the requisite elements for injunctive relief in the Motion for Summary Judgment. CP 197-144. The Parsons responded in their Opposition. CP 226-228. Therefore, the Superior Court appropriately enjoined the Parsons' offending third story. RP 28.

III. SUMMARY OF ARGUMENT

The Superior Court correctly found the meaning of Covenant A unambiguous - homes in Narrowmoor Third are "***not to exceed two stories***" in height. CP 151. This includes all kinds of stories.

The Superior Court's interpretation is consistent with: the Drafter's intent, the purpose of the Restrictive Covenants, the contemporaneous Zoning Code definition, the Narrowmoor Third Community's long-standing interpretation, and the implementation of Covenant A in the build-out of the Narrowmoor Third Neighborhood. The Superior Court's correctly applied the current rules of law for interpreting Restrictive Covenants and reached an interpretation that protects the collective interests of the Narrowmoor Third Community. The Superior Court's interpretation is consistent with applicable case law.

Twenty-five years ago, the Court of Appeals reached a different interpretation of Covenant A in *Lester v. Willardsen* with regard to uphill lots. However, the Superior Court correctly determined that collateral estoppel does not apply here. The issues and the parties were ***not*** the same. And, binding Plaintiffs who expressly opted out of *Lester v. Willardsen* would be a grave injustice. Those Plaintiffs, at a minimum, are entitled to enforce the Covenant A and to do so under the current rule of law as it has evolved since *Lester v. Willardsen* was decided.

The Superior Court correctly noted that the current rule of law announced in *Riss v. Angel* now requires the Court to reach an interpretation that protects the collective interests of the community. That approach can lead to only one result here – the Narrowmoor Community's

decades-long interpretation of Covenant A must be preserved, and the Parsons' self-serving interpretation must be rejected.

Over six decades of compliance in Narrowmoor Third demonstrate that Covenant A has never lapsed through acquiescence or abandonment. There has ***never*** been a story violation on a downhill lot in Narrowmoor Third. Therefore, the Superior Court correctly found Covenant A to be enforceable.

The Neighbors briefed their request for injunctive relief in their Summary Judgment Motion, placing this issue squarely before the Superior Court. The Parsons had an opportunity to respond. The Superior Court appropriately enforced the remedy set forth in the Restrictive Covenants themselves, by enjoining the Parsons' offending third story.

IV. ARGUMENT

A. Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56. The interpretation of restrictive covenants presents a question of law. *Bauman v. Turpen*, 139 Wn. App. at 86. While the drafter's intent is a question of fact, where reasonable minds can reach but one conclusion it is treated as a question of law. *Wilkinson v. Chiwawa*, 180 Wn.2d 241, 327 P.3d 624 (2014). Washington Courts apply the

context rule to interpreting restrictive covenants, under which "evidence of the 'surrounding circumstances of the original parties' is admissible to determine the meaning of the 'specific words and terms used in the covenants.'" *Id.* at 88-89 (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-696, 974 P.2d 836 (1999); *Riss v. Angel*, 131 Wn.2d 612.

The Superior Court correctly found no disputed material issues of fact in this case. RP 28. Therefore, the Superior Court found interpretation and enforcement of Covenant A appropriate for summary judgment. In reviewing such a grant of summary judgment, the Court of Appeals reviews questions of law *de novo*. *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 854 P.2d 1072 (1993).

B. The Superior Court Correctly Interpreted the Restrictive Covenants to Protect the Collective Interests of the Community.

The Superior Court correctly applied the current approach to interpreting Restrictive Covenants that was announced by the Washington State Supreme Court in *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997). Before *Riss v. Angel*, Washington Courts interpreted covenants by applying a strict construction of the rules of contract, resolving ambiguity in favor of the free use of land. In *Riss v. Angel*, the Court shifted to a new paradigm for interpreting covenants – Courts now seek to give effect to the purpose of the covenants, placing special emphasis on arriving at an

interpretation that protects the collective interests of the community.

As the *Riss* Court explained:

> ***The court's primary objective in interpreting restrictive covenants is to determine the intent of the parties. In determining intent, language is given its ordinary and common meaning. The document is construed in its entirety. The relevant intent, or purposes, is that of those establishing the covenants.***
>
> Historically, Washington courts have also held that restrictive covenants, being in derogation of the common law right to use land for all lawful purposes, will not be extended to any use not clearly expressed, and doubts must be resolved in favor of the free use of land. . .
>
> Washington courts have begun to question whether rules of strict construction should be applied where the meaning of a subdivision's protective covenants are at issue and the dispute is among homeowners. . . .
>
> The premise that protective covenants restrict the alienation of land and, therefore, should be strictly construed may not be correct. . . .
>
> . . .
>
> As indicated, in Washington the intent, or purpose, of the covenants, rather than free use of the land, is the paramount consideration in construing restrictive covenants. Moreover, both this Court and the Court of Appeals have refused to apply principles of strict construction so as to defeat the plain and obvious meaning of restrictive covenants.
>
> ***The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court's goal is to ascertain and give***

> ***effect to those purposes intended by the covenants. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances. The court will place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests."***

Riss v. Angel, 131 Wn.2d at 621-624 (emphasis added) (citations omitted).

The new rule of law from *Riss v. Angel* has been applied in a number of subsequent cases, including *e.g., Bauman v. Turpen*, 139 Wn. App. 78; *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112; and *Wilkinson v. Chiwawa*, 180 Wn.2d 241. Read together, these precedents confirm the Court's current approach to interpreting restrictive covenants: (1) ascertain and give effect to the drafters' intent and the purpose of the covenant; (2) give language its plain and obvious meaning at the time it was drafted; and, most importantly, (3) arrive at an interpretation that protects the collective interests of the community. The Superior Court's interpretation of Covenant A is consistent with these precedents.

1. The Drafter's Intent and Purpose of the Restrictive Covenants was to Protect Views through Uniform Neighborhood Design, Beginning with Limiting the Height of Homes to No More Than Two Stories.

The Superior Court's interpretation of Covenant A is consistent with the ***drafter's intent and the purpose of the covenants***. *Riss v. Angel*, 131 Wn.2d at 623-624. Here, one need not rely solely on the testimony of current residents, the intent and purpose of the Restrictive Covenants is

evident from everything the Drafter, Eivind Anderson, drew and recorded within the four corners of the Narrowmoor Third Final Plat. *See* CP 150-152. That purpose - to create a uniform neighborhood design that would preserve the all-important panoramic views - is evident in the lot configuration Mr. Anderson drew on the face of his Plat as well as the Restrictive Covenants he inscribed thereon. *Id.*; CP 475-478.

Mr. Anderson's plat drawing for Narrowmoor Third lays out uniformly spaced north-south streets forming terraces of large east-west through-lots facing the westward views. CP 143, 150, 475. The street-to-street through-lots are drawn on an east-west axis with the long sides of the lots running downslope to toward the spectacular Sound and Mountain views. *Id.* Consequently, the length of the lots plus the width of the adjacent streets spans enough of the natural slope to create the vertical separation needed to preserve panoramic views from each lot. *Id.*

Mr. Anderson protected those views by inscribing Restrictive Covenants right on the face of his Narrowmoor Third Plat. CP 151-152, 475-478. These include height limits in Covenants A and D that prohibit tall homes, trees and billboards that could block panoramic views. CP 151. In Narrowmoor Third, Covenant A specifically limits each platted lot to just one low-profile home, "***not to exceed two stories in height.***" CP 151, 478. Read together, the Plat drawing and the Restrictive Covenants

for Narrowmoor Third show Mr. Anderson's intent to preserve the all-important viewshed for the Community.

Mr. Anderson took a similar approach in each of the four Narrowmoor Addition Subdivisions that he platted. CP 145-157. Each of the Narrowmoor Final Plats include a height restriction in Covenant A limiting each home to no more than two stories. CP 146, 149, 151, 157. In the Restrictive Covenants for the Narrowmoor First, Second and Third Additions, Covenant A's two-story height limitation is phrased exactly the same: "one detached single-family dwelling ***not to exceed two stories in height.***" CP 146, 149, 151 (emphasis added). The Superior Court correctly determined that anything more than two stories exceeds two stories and violates Covenant A. Thus, regardless how the Parsons seek to define their daylight basement story, it exceeds the two upper stories and therefore violates Covenant A.

Tellingly, by 1954 when Eivind Anderson recorded the Plat for the Narrowmoor Fourth Addition, he phrased Covenant A's height limitation differently: "one detached single-family dwelling ***not to exceed one story in height, exclusive of a 'basement story.'***" CP 157 (emphasis added). Mr. Anderson's use of the term "***basement story***" confirms that he considered basements to be stories, and that a basement story plus one upper story count as two stories. Thus, a daylight basement story plus two

upper stories, like the Parsons are building, count as three stories and violate Covenant A.

Read in their entirety, the Final Plats demonstrate that the Drafter intended to preserve views by limiting homes to no more than two stories total. The view preservation purpose of the Restrictive Covenants is also evident in the way the Restrictive Covenants have been interpreted and implemented over the Narrowmoor Third's sixty-six year history, from Mr. Anderson's time to the present day. Over those decades the Tacoma Zoning Code allowed homes of twenty-five to thirty-five feet in this area. Yet, the substantial portion of Narrowmoor Third homes have remained at an average height of approximately eighteen feet. CP 161. This uniformity of development only continues by virtue of the Restrictive Covenants. Since no more than two stories are allowed, there rarely has been any incentive to build up to the heights permitted by the Zoning Code.

2. The Superior Court Found Covenant A Unambiguous - Its Plain and Obvious Meaning is Anything More Than Two Stories "Exceeds Two Stories" and is Not Allowed.

The Superior Court interpreted Covenant A consistent with its plain and obvious meaning. Washington Courts give Covenant language its "***ordinary and common use and will not read a covenant so as to defeat its plain and obvious meaning.***" *Wilkinson v. Chiwawa*, 180 Wn.2d at 250 (citing *Mains Farm v. Worthington*, 121 Wn.2d at 815

(emphasis added). Covenant A of the Narrowmoor Third Final Plat clearly states that the height of homes are "***not to exceed two stories***":

> "[e]xcept as otherwise herein specifically stated, ***no structure shall be erected, place[d] or permitted to remain on any residential building plat other than one detached single-family dwelling, not to exceed two stories in height***, and a private garage."

CP 151 (emphasis added). The Drafter used specific phrasing – "***not to exceed***" – to make clear that anything more than two stories was not allowed. The modifier two stories "in height" is simply another way of saying not to exceed two stories high.

The Superior Court found Mr. Anderson's language clear and unambiguous. RP 28. The plain and obvious meaning is that no more than two stories are allowed. The Parsons' construction plans and photos of the Parsons' home clearly show two upper stories over a daylight basement story. CP 75, 400. Therefore, the Superior Court properly ruled that regardless of what the Parsons call their daylight basement their home now ***exceeds two stories*** and violates Covenant A. RP 28.

The meaning of Covenant A's two-story height limitation has been plain and obvious to the Narrowmoor Third Community since 1948. The current Co-Chair and Treasurer of the WSNC, which helps Narrowmoor neighbors enforce the Covenants, confirm that the Community has always understood that daylight basement stories count as stories. From Eivind

Anderson's time forward the Narrowmoor Community has retained this common understanding, as evidenced by the build-out of their neighborhood and the actions they have taken to enforce this interpretation. CP 159-161. In sixty-six years only three known story violations have occurred in Narrowmoor Third, and never on a downhill lot where it would impact views. CP 160-161, 421. Generations of Narrowmoor homeowners and prospective purchasers have relied on this common interpretation of Covenant A to protect the special qualities and values of their homes. CP 142, 161.

a. If there is Any Ambiguity the Contemporaneous Zoning Code Definition Would Apply.

Even if the Superior Court had found Mr. Anderson's language to be ambiguous, Washington Courts ***apply definitions that were in effect at the time the Covenant was drafted and that give effect to the Covenant's purpose.*** Bauman v. Turpen, 139 Wn. App. 78. This approach would have lead the Superior Court to the same interpretation of Covenant A.

At the time Eivind Anderson drafted the Narrowmoor Third Restrictive Covenants, Tacoma's Zoning Code provided the following definition of "story:"

> ***Story is that portion of a building included between the surface of any floor and the surface of the floor next above it,*** or if there be no floor above it, then the space between such floor and the ceiling next above it.

CP 89 (CITY OF TACOMA, WA., ZONING ORDINANCE No. 12703, Section 2.16 (1945)) (emphasis added). This definition of "story" encompassed ***any*** space, above ***any*** floor. It did not exclude daylight-basement spaces. Thus, the common land use definition in the jurisdiction where the Drafter recorded the Restrictive Covenants, and ***at the time*** he recorded them, counted daylight basement stories as stories.[2]

It is clear from Eivind Anderson's own language that his frame of reference for this land use action was the Zoning Code, and not the technical Building Code as the Parsons contend. This is evident from the evolution of Mr. Anderson's phrasing of Covenant A for the four Narrowmoor Plats from 1948-1954, which mirrors the evolution in the definitions in the contemporaneous Zoning Code from 1945-1953.

When Mr. Anderson drafted the Narrowmoor Third Covenants in 1948 and limited the height of homes to ***no more than "two stories,"*** the 1945 version of the Zoning Code defined "story" to include ***"any space" between floors***. CP 442. However, in 1953, CITY OF TACOMA, WA., ZONING ORDINANCE No. 14783 was changed to include more technical

[2] Contrary to the Parsons' assertions, this definition of "story" from the 1945 Zoning Code controls over definitions in the contemporaneous the Building Code. Section 2 of the Zoning Code expressly states that only: "***words not defined herein*** shall be construed as defined in the Building Code of the City of Tacoma if defined therein." CP 88 (emphasis added). Since "story" is defined in Section 2.19 of the Zoning Code, the Building Code definitions do not come into play.

definitions of "basement" and "cellar" – like the Building Code. CP 442-444. Although the 1953 Zoning Code still referred to both basements and cellars as "stories," the new definitions for these terms implied that such spaces would no longer be counted as stories if more than half of the space was underground.

Therefore, after these technical definitions were added to the 1953 Zoning Code, when Mr. Anderson drafted his final set of Covenants for Narrowmoor Fourth in 1954, he clarified the two-story height limit as allowing "***no more than one story, exclusive of a 'basement story.'***" CP 157 (emphasis added). Thus as the Zoning Code definitions evolved to be less protective of views (and more like the Building Code definitions), Mr. Anderson clarified his height limit so it would continue to limit homes to the same extent and , thereby, continue to preserve views.

The Zoning Code definition is also more appropriate for discerning the Drafter's intent here, because it gives effect to the over-arching purpose of the Restrictive Covenants (and Covenant A in particular) to protect views. Covenant A is a height limitation designed to impose a uniform scale - of just two stories – in order to prevent taller homes from blocking the views from other surrounding homes. Therefore, it makes sense to define "stories" in a manner that counts all of the spaces that could increase the height of homes, so as to give effect to Covenant A's

purpose of protecting views. In contrast, the Building Code's highly technical definitions fail to count certain spaces and therefore allow greater height – more than two stories of height – undermining the view protection purpose of the Restrictive Covenants.

3. *Preserving the Community's Two-Story Height Limit is the Only Interpretation that Protects the Collective Interests of the Community.*

The Superior Court correctly reached an interpretation of Covenant A that "***protects the homeowners' collective interests***," as required by *Riss v. Angel*, 131 Wn2d at 623-624 (emphasis added). As confirmed in the Declarations of Dean Wilson and Mike Fleming, of the WSNC, the Narrowmoor Community has always interpreted Covenant A's two-story height limitation to include basement stories. CP 142, 161. Continuing to interpret Restrictive Covenant A in this commonly-understood and commonly-applied manner is the ***only*** way to protect the Narrowmoor homeowners' collective property interests in maintaining their views, neighborhood character, and property values.

The Narrowmoor community has for decades interpreted, implemented and enforced the two-story height limitation by counting all floors of their homes, including basements and daylight basements, as stories. CP 142, 161. Generations of Narrowmoor homeowners have purchased properties in this community precisely because they

understood this long-standing and common interpretation of the restrictive Covenants would preserve their views, neighborhood character and property values. CP 142-161. Covenant A's two-story height limit has always been the primary mechanism that has safeguarded these collective interests of the Narrowmoor community. CP 143.

Covenant A has effectively maintained an average height of homes in Narrowmoor of just eighteen feet, despite the fact that Tacoma's Zoning Code allowed heights of thirty-five feet for many years, and currently allows heights of twenty-five feet. CP 161. Because Covenant A has always limited homes to just two stories, there has rarely been any incentive for property owners to build-up to the full height allowed by the Zoning Code. Thus, Covenant A has effectively maintained the low profile character of the neighborhood and protected the views from each lot. If the Parsons are allowed to violate the two-story height limit, all of a sudden there will be an incentive for other homeowners to try to squeeze a third story under a twenty-five-foot roof, and the average height of homes will undoubtedly increase. More and more Narrowmoor homeowners will be forced to either build upward to see over other taller homes or lose their views.

Photographs attached to the Neighbors' Declarations show how dramatically the Parsons' three-story addition departs from the uniform

character of Narrowmoor Third. CP 400-404 (Ex B-C). The photographs starkly confirm that an increase of just a few feet in the height of a ***downhill*** home can have devastating impacts on ***uphill*** neighbors. *Id.*

Continuing to interpret Covenant A as the Narrowmoor Third Community has since 1948 is the only way to protect the collective interests of the community as required by *Riss v. Angel*. If Covenant A is suddenly changed by the Parsons' interpretation, the collective interests of the Narrowmoor community will suffer irreparable harm. The Parsons' third story would have the foreseeable "domino" effect of precipitating similarly tall homes on other lots, which would destroy the character of the entire neighborhood and undo years of neighborhood planning and preservation efforts. CP 144. Thus it would gravely harm the collective interests of the Narrowmoor Third Community. CP 142-144, 159-161.

Rejecting the Parsons self-serving interpretation of Covenant A is the only way to protect the Narrowmoor homeowners' collective property interests in maintaining their views, neighborhood character, and property values. Accordingly, the Superior Court correctly applied *Riss v. Angel* and upheld the Narrowmoor Third Community's long-standing common interpretation of Covenant A.

4. Case Law Supports the Superior Court's and the Community's Long-Standing Interpretation of Covenant A.

The Superior Court decision is also consistent with other Covenant cases decided after *Riss v. Angel*. In an analogous situation in *Bauman v. Turpen*, the Court protected the collective interests of the community by reaching an interpretation of "story" that gave effect to the view-protection purpose of the Restrictive Covenants. *Bauman v. Turpen*, 139 Wn. App. at 92. The *Bauman* Court considered the character of the neighborhood, including its topography, the declining slopes toward the views, and the build-out and height of existing homes, and determined that the purpose of the "story" restriction was to preserve views. *Id.* at 87-91. Accordingly, the *Bauman* Court rejected interpretations of the term "story" that jeopardized views in favor of an interpretation that preserved views from uphill properties. *Id.*

Similarly here, the character of the Narrowmoor Third neighborhood, its unique layout and topography are all oriented toward the views. The low profile build-out of two-story homes serves to preserve those views, particularly the uniform two-story homes on downhill lots. Therefore, just as in *Bauman v. Turpen*, the Superior Court here properly rejected the interpretation that would jeopardize views in favor of the interpretation that preserves views for the Narrowmoor Third Community.

In *Wilkinson v. Chiwawa,* 180 Wn.2d 241, the Court protected the collective interests of the community by reaching an interpretation of "commercial" that was consistent with the Chiwawa community's decades-long interpretation and implementation of their restrictive covenants. The *Wilkinson* Court found that the Chiwawa was a vacation community, which for years had offered their homes as short-term and long-term rentals despite a prohibition on "commercial" uses in their restrictive covenants. *Id.* at 254. Accordingly, the *Wilkinson* Court resisted a new interpretation of "commercial" uses that would upset the settled expectations of the Chiwawa community and upheld the Community's long-standing interpretation.

Similarly here, the Narrowmoor Third Community has for decades interpreted, implemented and enforced Covenant A's two-story height limitation by counting all floors of their homes, including daylight basement stories. Generations of Narrowmoor homeowners, including the Neighbors, have purchased properties in this community precisely because they understood this long-standing and common interpretation of the restrictive Covenants would preserve their views, neighborhood character and property values. CP 142, 161, 164, 166, 175, 187. Therefore, just as in *Wilkinson v. Chiwawa*, the Superior Court here properly rejected the interpretation that would upset the settled

expectations of the Narrowmoor Third Community and their long-standing interpretation of Covenant A.

The Defendants' reliance on *Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190 (Div. I 2003) is misplaced. The facts and the issues in that case differ from those here. The *Day* case concerned an abuse of power on the part of the neighborhood Committee tasked with reviewing the Day's construction plans. The Court found the Committee acted unreasonably and in bad faith because it rejected the Day's plans based upon view impacts, when it had not applied that same standard to other building plans it had reviewed. *Id.* at 755-758. The Committee's previous approvals demonstrated that they interpreted and applied the Covenant to emphasize height not views. The Court found the Committee's sudden emphasis of view impacts in its review of the Day's plans to be unreasonable and in bad faith. *Day v. Santorsola* is simply not on point.

5. The Parson's Interpretation Must Fail Because it Would Eviscerate the Collective Interests of the Community.

Covenant A's two-story height limitation only remains effective in preserving the Neighborhood's views, as long as everyone adheres to the same rule. If one property owner exceeds the two-story limitation, then other uphill neighbors will be forced to either do the same or lose their views. That is why Eivind Anderson recorded Restrictive

Covenants on the face of his Narrowmoor Plats, to ensure that all property owners would be on notice that they must adhere to the same rule. It is also why the Narrowmoor Third Community has been vigilant in its enforcement of Covenant A's two-story height limit.

The Parsons were on notice and were fully aware of Covenant A. Their construction plans and photographs of their construction clearly show three stories. CP 75, 400 (Ex A, B). These images also clearly show that their basement is ***not*** subterranean – that argument is fails – the Parsons' basement is a daylight basement that contributes to the height of their home. *Id.* The Neighbors' photographs show how the foundation of the garage level was built up to meet the ceiling elevation of the daylight basement story. CP 406-412. If permitted to stand, the Parsons' home will commit the first of many two-story violations on a ***downhill*** lot in Narrowmoor Third and open the flood gates to taller homes across the Neighborhood. This result simply cannot be reconciled with the *Riss* Court's rule to protect the collective interests of the community.

C. Collateral Estoppel Does Not Apply.

The Superior Court correctly ruled that collateral estoppel is ***not*** appropriate here. Collateral estoppel only applies when: (1) the identical issue is presented from the earlier proceeding; and (2) the same parties or parties in privity are present from the earlier proceeding, and had a full

and fair opportunity to participate in the earlier proceeding; and (3) collateral estoppel would not work an injustice on that party. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). None of these requisite factors are satisfied here. This case does not present the same issues or the same parties as *Lester v. Willardsen*, Court of Appeals No. 12172-7-II, and binding parties who did not participate in that case would cause a grave injustice. Moreover, a new rule of law for interpreting Restrictive Covenants has evolved since *Lester v. Willardsen* that changes the outcome. At a minimum, the Plaintiffs who were not parties or in privity with parties to *Lester v. Willardsen* are entitled to enforce Covenant A under the current rule of law.

1. Different Issue.

This case arises in an entirely different context than the earlier case of *Lester v. Willardsen*. At issue in our case is construction of a three-story home on a ***downhill*** lot where it blocks Neighbors' views. While at issue in *Lester v. Willardsen* was the construction of a three-story home on an ***uphill*** lot in the uppermost terrace of properties in the Narrowmoor Third Addition, where it would not impact views.

Unlike the Parsons' property, the Willardsens' property backed on Jackson Ave., a busy arterial street. Therefore, there were no uphill neighbors whose views would be affected by the offending third story.

The facts of our case are very different. At issue here is the construction of a three-story home on a ***downhill*** lot, where the height and bulk of its third story will directly impact the panoramic views of uphill neighbors. CP 176-183, 400-404 (Ex B-D). Because the Parsons' home blocks panoramic views of uphill Neighbors the issue of interpreting Covenant A arises in an entirely different context here than in *Lester v. Willardsen.*

The fact that no uphill neighbors' views were impacted by the Willardsens' third story was clearly pivotal to the Court of Appeals' decision in *Lester v. Willardsen*, as shown in Footnote No. 1. There, the Court of Appeals specifically stated that:

> ***The offending home, as modified, is located on the topmost street (Jackson) of the Addition. Consequently, it does not obstruct the view from any lot in the Addition.***

CP 351 (*Lester v. Willardsen*, Court of Appeals No. 12172-7-II, p. 4, n. 1 (emphasis added)). The issue of protecting views was not evident in the extreme ***uphill*** location where *Lester v. Willardsen* arose, leading the Court of Appeals to overrule the lower Court.

The lower Court had similarly struggled with the view-protection issue, and noted that the ***uphill*** location of the Willardsens' home would not block any of Narrowmoor's panoramic views:

> ***The Willardsen residence, while it violates the two story restrictive covenant, blocks no panoramic view within Narrowmoor Third Addition.***

CP 427 (*Lester v. Willardsen*, Pierce County Superior Ct. No. 85-2-04120-3 (Findings of Fact and Conclusions of Law, p. 5)) (emphasis added).[3]

Nevertheless, because the lower Court found that the meaning of Covenant A's two-story height limit was clear and unambiguous, and that the Willardsens' home clearly exceeded two stories, it ordered injunctive relief to have the offending story removed.

> ***The Willardsen residence violates the covenant in question, as it is more than two stories in height. The Court finds that the covenant is clear and unambiguous. The Court need not characterize the lowest floor of the Willardsen home as a "basement" or as a "story" in order to interpret and apply these covenants. The topmost floor of the Willardsen residence is conceded to be a story. Similarly, the main floor at the Jackson Street grade is also conceded to be a story. Therefore, the lowest level of the home, which in fact contributes to the height, causes the residence to be in excess of two stories . . . .***

Id. (emphasis added).

Both the lower Court and the Court of Appeals in *Lester v. Willardsen* were clearly troubled by enforcing a view-protection mechanism in an ***uphill*** location where the upper story of the Willardsens' home would not affect the views from other properties. The Court of Appeals found a way out of this dilemma under the rules of law in effect

[3] We note that the Decisions of both the Superior Court and the Court of Appeals in *Lester v. Willardsen* were unpublished. While we are mindful that GR 14.1(a) precludes citation to unpublished opinions, since the Appellants' Brief discusses the reasoning behind the Appellate Court Decision we have cited the underlying Superior Court Decision as well, for context.

at that time. Finding no evidence that the Willardsen home actually blocked any of Narrowmoor's panoramic views, the Court of Appeals applied a pre-*Riss v. Angel* strict construction approach to Covenant interpretation and reversed the lower Court's decision.

The Narrowmoor Community understood that the uphill location was pivotal to the outcome of *Lester v. Willardsen*, as evidenced by the fact that in the twenty-five years since that case was decided they have continued to implement Covenant A's two-story height limit to include basement stories on downhill lots. CP 421-422. The Community has never allowed a story violation on a downhill lot in Narrowmoor Third. *Id.* Since the issue here is not ***identical*** to the issue presented in *Lester v. Willardsen*, collateral estoppel does not apply.

2. Different Parties.

None of the Plaintiffs in this case were parties to the *Lester v. Willardsen* case. Only one of the Plaintiffs, Mark Lewington, is arguably in privity with a predecessor-in-interest who was a member of the class from *Lester v. Willardsen.* The Parsons acknowledge that neither the Shillitos, nor Ms. Wight, nor the Ostlunds' predecessor-in-interest Ms. Simkins were parties to the *Lester v. Willardsen* case. In fact, the Parsons produced waivers documenting that Elizabeth Wight and the Ostlunds' predecessors-in-interest expressly opted out of the class. CP 328, 330.

Therefore, these Plaintiffs, at a minimum, are not bound by the *Lester v. Willardsen* decision. On the contrary, it would be a grave injustice to bind these Plaintiffs to a decision in a case where they expressly opted out.

Because the offending stories in *Lester v. Willardsen* did not affect the views of ***uphill*** neighbors, there was not the same impetus for members of the Community to participate in the suit. *Lester v. Willardsen* did not provide a full and fair hearing of the story issue in a ***downhill*** location where it would block the views of uphill neighbors. Therefore, collateral estoppel does not apply

3. Manifest Injustice.

Despite having found written waivers from Elizabeth Wight and the Ostlunds' predecessors-in-interest expressly opting out of the *Lester v. Willardsen* case, the Defendants argue that they should none-the-less be bound by that Decision. This is inherently unfair. Under the Defendants' reasoning, there would have been no effective way for any resident of Narrowmoor Third to opt out of the *Lester v. Willardsen* litigation. This reasoning directly contradicts the written notices that the residents were provided at the time. Collateral estoppel ***cannot*** be asserted against Ms. Wight, the Ostlunds or the Shillitos. These Plaintiffs, at a minimum, must be allowed their day in Court, particularly since the rule of law for interpreting restrictive covenants has changed since *Lester v. Willardsen*

was decided such that this case is likely to yield a different result.

The *Lester v. Willardsen* case was decided twenty-five years ***before*** the Washington State Supreme Court announced the paradigm shift in *Riss v. Angel*, which requires Courts to reach an interpretation that ***protects the collective interests of the community***. Consequently, the *Willardsen* Court applied the old strict construction approach to interpreting Restrictive Covenants that has since been overruled. Restrictive Covenants are no longer interpreted according to a strict construction approach that favors the free use of land. That strict construction approach was set aside by the *Riss* Court, which announced a new paradigm for interpreting Restrictive Covenants in a manner that ***protects the collective interests of the community***. *Riss v. Angel*, 131 Wn.2d at 623. Applying this new rule of law, the Superior Court correctly determined that stories must be interpreted to include daylight basements, as this is the manner in which the Community has implemented Covenant A on the ground from Eivind Anderson's time to this day.

The *Lester v. Willardsen* case was also decided before the *Bauman* Court ruled that the definitions appropriate for interpreting Restrictive Covenants are those in effect at the time the Covenants were drafted and that give effect to the Covenant's purpose. *Bauman v. Turpen*, 139 Wn. App. at 88-89. In *Lester v. Willardsen*, the Court used a 1969 definition to

interpret the term "story," instead of a definition from 1948 when Mr. Anderson drafted the Restrictive Covenants. As discussed above, at that time Tacoma's Zoning Code defined stories to include daylight basements.

In sum, since the issue in this case arises in a completely different context, collateral estoppel does not apply. At a minimum, the Plaintiffs who were not parties to the *Willardsen* Decision must be given their day in Court to interpret Covenant A under the correct rules of law announced in *Riss v. Angel* and *Bauman v. Turpen*, etc., particularly since the outcome of the case would be different under these new rules of law.

D. No Acquiescence - Covenant A's Two-Story Height Limit Substantially Enforced.

The Superior Court found no acquiescence to defeat the enforceability of Covenant A. Covenant A has been enforced across the substantial portion of Narrowmoor Third.

The fact that *Lester v. Willardsen* concerned a lot on the uppermost tier of Narrowmoor Third, without any uphill neighbors whose views could be impacted, explains why some members of the Community – including Ms. Wight and Ms. Simkins (the Ostlunds' predecessor-in-interest) – opted out of the litigation. There was simply not the same impetus to enforce Covenant A on that uphill lot as there would have been on a downhill lot. In that extreme uphill location, on the uppermost periphery of Narrowmoor Third along Jackson Ave., the offending story simply did not have the same impact on the Neighborhood as it would

have had on a downhill lot. After *Lester v. Willardsen* was decided, there was even less reason for members of the Community to bring enforcement actions to avoid two other story violations on similarly situated properties, at 1505 S. Fairview and 7501 S. Sunray Dr.,[4] as the outcome of additional enforcement actions on uphill lots would presumably have been the same. Like the Willardsen home, both of these homes are located in the topmost terrace of lots at the extreme ***uphill*** periphery along Jackson Ave.

These three violations on ***uphill*** lots, however, do not signal acquiescence with regard to the two-story height limitation on ***downhill*** lots in Narrowmoor Third. The continued record of compliance with the two-story height limitation over the twenty-five years since *Lester v. Willardsen* demonstrates that the Narrowmoor Third Community has always understood that the extreme ***uphill*** Covenant-perimeter location of the Willardsens' home was key to the Appellate Court decision in *Lester v. Willardsen.* Even after that case was decided the Narrowmoor Third Community continued to interpret and implement the Restrictive Covenants' two-story height limit to include basement stories with regard to ***downhill*** lots where taller homes would impact views. There has ***never*** been a violation of the two-story height limit on a ***downhill*** lot in Narrowmoor Third. CP 160-161, 421.

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[4] We note that the other alleged violations identified by the Defendants below are located in other Additions or on Blocks where other Restrictive Covenants apply. The home at 7511 S. 19th Street is incompliance with the Narrowmoor Third Restrictive Covenants even though it may include an additional half-story. This home is located within Block 13 of Narrowmoor Third, where Covenant H expressly states separate Covenants apply. Those Block 13 Covenants allow for larger structures. *See* CP 160-161, 421.

Moreover, only ***substantial*** violations constitute acquiescence. The Brief of Appellants ***incorrectly*** cites *Tindolph v. Schoenfeld Bros., Inc.*, 157 Wn. 605, 610, 289 P. 53 (1930), for the proposition that just a "slight degree" of acquiescence can defeat Restrictive Covenants. That is ***not*** correct. The actual rule of law from *Tindolph v. Schoenfeld* and the earlier case of *Ronberg v. Smith*, 132 Wn. 345, 232 P.283 (1925) is that a "substantial" degree of acquiescence can defeat Restrictive Covenants. "Where a ***substantial*** part of the property has been improved in violation of Restrictive Covenants . . ., equity will not permit a plaintiff to enforce the restrictions against one who is building in further violation of such restrictions." *Tindolph v. Schoenfeld*, 157 Wn. at 610 (citing the rule of law from *Ronberg v. Smith*, 132 Wn. at 350 (emphasis added).

The quote on page 35 of the Brief of Appellants is from the discussion of early American and English cases surveyed in *Ronberg v. Smith*, 132 Wn. at 354 (discussing *Ocean City Association v. Chalfant*, 65 N.J. Eq. 156, 55 A. 801, 1 Ann. Cas. 601; citing Roper v. Williams, 37 Eng. Rep. (Ch. Book 17) 999; 1 Turn. & Russ. 18, written by Lord Eldon in 1822; and Peek v. Matthews, L. R. 3 Eq. 515; and quoting High on Injunctions (4th Ed.) § 1159). Following this discussion, the *Tindolph* Court applied the actual rule of law from *Ronberg*, finding the Restrictive Covenants at issue were violated by a ***substantial*** number of the platted properties – twenty-five percent – which defeated the enforceability of the Restrictive Covenants. *Tindolph v. Schoenfeld*, 157 Wn. at 611-612.

The *Tindolph* Court considered twenty-five percent to be a

"substantial" degree of acquiescence, which rendered the Restrictive Covenant at issue there unenforceable. In contrast, in Narrowmoor Third only three story violations have ever occurred, and never on a downhill lot where they could block the views of uphill neighbors. CP 160-161, 421. Three out of eighty-five homes in Narrowmoor Third (outside of Block 13 where Special Covenants apply) simply is not a "substantial" number.

E. No Abandonment – Covenant A's Two-Story Height Limit Habitually and Substantially Maintained.

The Superior Court found no abandonment to defeat the enforceability of Covenant A. Since *Tindolph v. Schoenfeld* was decided in 1930, the Washington State Supreme Court confirmed in *Mount Baker v. Colcock* that Restrictive Covenants are only deemed abandoned when they are ***"habitually and substantially"*** violated. *Mount Baker Park Club, Inc. v. Colcock*, 45 Wn.2d 467, 275 P.2d 733 (1954). The Court further explained that a few violations do ***not*** constitute abandonment and will not defeat the enforceability of covenants. *Id.* In this case, for sixty-six years the Narrowmoor Third Community vigilantly enforced Covenant A's two-story height limit. CP 160-161.

Contrary to the Parsons' assertions, only three story violations have ever occurred in Narrowmoor Third, all on the top terrace of through lots on the uphill periphery of Narrowmoor Third, ***never*** on a downhill lot. CP 160-161, 421. Most of the story violations cited by the Parsons

occurred in Additions or Blocks that are subject to other Covenants than the Restrictive Covenants for Narrowmoor Third. With only known three story violations actually in Narrowmoor Third, it cannot be said here that Covenant A's height limit has been habitually and substantially violated.

Applying the current rule of law from *Mount Baker v. Colcock*, the Court ruled in *Sandy Point Improvement Co. v. Huber*, 26 Wn. App. 317, 613 P.2d 160 (Div. I 1980) that two covenant violations did not constitute abandonment; and the Court ruled in *Reading v. Keller*, 67 Wn.2d 86, 406 P.2d 634 (1965) that one covenant violation did not constitute abandonment. Only when violations are so ***habitual and substantial*** to give the impression that restrictive covenants are not followed, are they deemed abandoned. *Mount Baker v. Colcock*, 45 Wn.2d at 471-472; *Green v. Normandy Park*, 137 Wn. App. 665, 697, 151 P.3d 1038 (Div. 1 2007); *White v. Wilhelm*, 34 Wn. App. 763, 665 P.2d 407 (Div. I 1983). That simply cannot be said of Covenant A's two-story rule, which - with just three exceptions on the uppermost tier of lots - has been honored by the Narrowmoor Third Community for sixty-six years. CP 160-161, 421.

F. The Superior Court did not Need to Reach the Issue of the Shillitos' Standing.

The question of the Shillitos' standing was immaterial to the Superior Court decision. Like the other Neighbors, the Shillitos are

undeniably harmed by the Parsons' three-story construction because it projects up into their southwestern view. None-the-less, the Parsons argued that the Shillitos lacked standing because their home is located on the southern periphery of Narrowmoor Second and the enforcement rights of the Restrictive Covenants for Narrowmoor Third strictly convey to other residents of Narrowmoor Third. However, it was unnecessary for the Superior Court to reach the question of the Shillitos' standing since all of the other Plaintiffs live in Narrowmoor Third and clearly have the right to enforce the Restrictive Covenants for Narrowmoor Third.

G. Superior Court Appropriately Ordered Injunctive Relief as Provided in the Restrictive Covenants.

Contrary to the assertions in the Appellants' Brief, the Plaintiffs fully briefed their request for injunctive relief in their Summary Judgment Motion, placing this issue squarely before the Superior Court. CP 137-140. The Plaintiffs also pointed out that injunctive relief was the only effective remedy that could restore their enjoyment of their homes. *Id.* The Parsons had an opportunity to respond in their Opposition Brief. CP 226-228. The Superior Court appropriately ruled on the Parties' briefing and ordered injunctive relief as provided in the Narrowmoor Third Restrictive Covenants themselves. Covenant A states that "***no structure shall be . . . permitted to remain*** on any residential building plat other

than one . . . dwelling, not to exceed two stories in height." CP 151 (emphasis added). The Superior Court Order should stand.

The Neighbors established all three of the necessary elements for injunctive relief in their Summary Judgment Motion: (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) an actual substantial injury. *Bauman v. Turpen* at 93-94 (citing *Lenhoff v. Birch Bay*, 22 Wn. App. 70, 587 P.2d 1087 (1978). The Court ***does not*** balance equities for defendants who are not innocent. *Id.* at 95-97 (citing *Bach v. Sarich*, 74 Wn.2d 575).

1. Plaintiffs' Right to Enforce Two-Story Height Limitation.

The Neighbors' right to enforce Covenant A is a matter of law. The Narrowmoor Third Restrictive Covenants were recorded and run with the land. The Restrictive Covenants state that they impose restrictions and convey rights upon all Narrowmoor Third property owners, including the right to bring suit to enforce Covenants against other property owners who are bound by them. These rights expressly include the right to "prosecute any proceeding in law or in equity . . . against the person or persons violating or attempting to violate any such Covenants . . . to prevent them from doing so." CP 151. Washington Courts have consistently upheld the enforceability of such Covenants, not only by the platter but by each of the benefitted property owners in the plat. *Viking v. Holm*, 155 Wn.2d at 119;

Hollis v. Garwall, Inc., 137 Wn.2d at 690-91; *Riss v. Angel*, 131 Wn.2d at 621; *Mains Farm v. Worthington*, 121 Wn.2d at 815.

2. Violation of Plaintiffs' Rights was Imminent.

There can be no dispute that the injury to the Plaintiffs was imminent. The Parsons admit that they proceeded with construction of two upper stories over a daylight basement story, ***knowing*** of Covenant A. CP 413. The Parsons persisted in building a third story after their Neighbors warned them it would violate Covenant A and threatened legal action. CP 194. The Parsons continued with construction of their third story even after the Neighbors filed suit and won in the Superior Court.

3. Plaintiffs Harm was Substantial.

The Parsons' violation of Covenant A is itself a substantial injury to the Neighbors as a matter of law, because it undermines the Covenants' future enforceability. In addition, the Parsons' three-story addition blocks views from the Plaintiffs' homes and disturbs the spacious, uniform character of their neighborhood. CP 164, 166, 168, 175, 187, 397, 406, 416, 419. Photographs clearly show that the Parsons' third story projects up into their Neighbors' views. CP 176-183, 400-404 (Ex B-D). The loss of views may diminish property values by as much as thirty percent. CP 168-173. Thus, the Neighbors' injury is substantial.

Injunctive relief is the ***only*** remedy that can adequately address the Neighbors' injuries. It is also the only remedy that can restore the Neighbors' views, neighborhood character and property values. It is the only remedy that can ensure the continued enforceability of Covenant A. Without injunctive relief the Neighbors' injury will worsen as the precedent of a three-story home on a downhill lot repeats across Narrowmoor Third. CP 419.

4. No Balancing Equities for Defendants who are Not Innocent.

Finally, the Parsons are ***not*** entitled to a balancing of equities because they are ***not*** innocent – they proceeded at their own risk. *Bauman v. Turpin*, 139 Wn. App. at 94-98; *Bach v. Sarich*, 74 Wn.2d at 582. There is no dispute with regard to the fact that the Parsons proceeded with knowledge of Covenant A - the Parsons acknowledged in their August 4, 2014 letter to the Ostlunds that they were aware of the Restrictive Covenants before they commenced construction. CP 413. The Parsons proceeded with construction despite their Neighbors' warnings of legal actions and continued while the Superior Court case progressed. CP 194. The Parsons thus assumed the risk of violating the Covenant A.

Moreover, the Plaintiffs' Declarations demonstrate that the Parsons were ***not forthcoming*** with regard to the scope of their plans. The Defendants obfuscated the full scope of their construction plans when they

met with Mark Lewington, Daniel Ostlund and Marie Ostlund. CP 397, 406, 416. The Parsons obfuscated their intent to build a third story when they reassured the Ostlunds in an August 4, 2014 letter that they would comply "absolutely" with the Covenants. CP 413. Naturally such repeated assurances calmed the Neighbors' fears. It was not until Neighbors saw an enormous roof beam on site that they suspected more would be built than they had been led to believe. CP 397, 406, 416.

The Parsons continued building their three-story addition after this suit was filed. Indeed, the Parsons continued to build under a Supercedeas Order even after the Neighbors won this suit in Superior Court. Such Defendants assume the risk of their actions and cannot evoke the doctrine of balancing the equities. *Bauman v. Turpin*, 139 Wn. App. at 94-98. "The benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the innocent defendant who proceeds without knowledge or warning that his structure encroaches upon another's . . . property rights." *Bach v. Sarich*, 74 Wn.2d at 582. The Parsons do not qualify.

This is the same situation as in *Bauman v. Turpen*, where the Court held that because the defendants built ***knowing*** that their interpretation of the covenant was in dispute, and continued to build in the face of an ongoing lawsuit, they were not innocent and not entitled to balancing the equities. *Bauman v. Turpin*, 139 Wn. App. at 95. Having proceeded at

their own risk, the Parsons are not innocent and not entitled to balancing the equities. The Superior Court Order, therefore, should stand.

V. CONCLUSION

For all of these reasons, the Neighbors respectfully request that the Court uphold the Superior Court decision. The Superior Court correctly interpreted Covenant A under the new rule of law announced in *Riss v. Angel*. The Superior Court correctly determined that collateral estoppel did not apply. At a minimum the Ostlunds, the Shillitos and Elizabeth Wight are not bound by *Lester v. Willardsen*, and as residents of Narrowmoor Third, the Ostlunds and Ms. Wight clearly have standing to enforce Covenant A. The Superior Court appropriately ruled on the Plaintiffs' briefing and ordered the injunctive relief remedy provided in the Restrictive Covenants themselves to enforce Covenant A. Therefore, the Superior Court decision should be upheld and the Supercedeas Order that has suspended the effect of that decision should be lifted.

The Neighbors also respectfully request an award of costs as permitted under RCW 7.28.100.

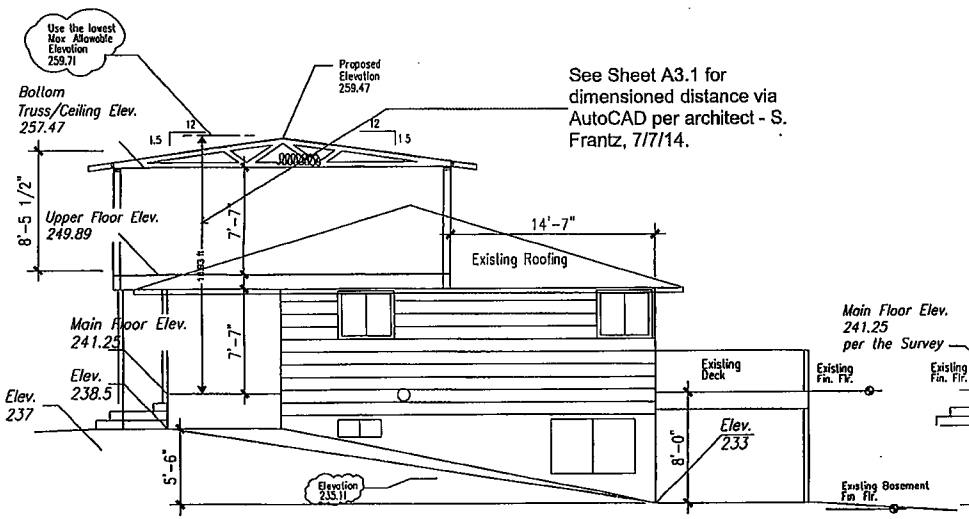
RESPECTFULLY SUBMITTED this 26th day of May, 2015.

LAW OFFICES OF CYNTHIA ANNE KENNEDY, PLLC

By _____
Cynthia Kennedy, WSBA No. 28212
Attorney for Respondents Mark C. Lewington, et al.

APPENDIX

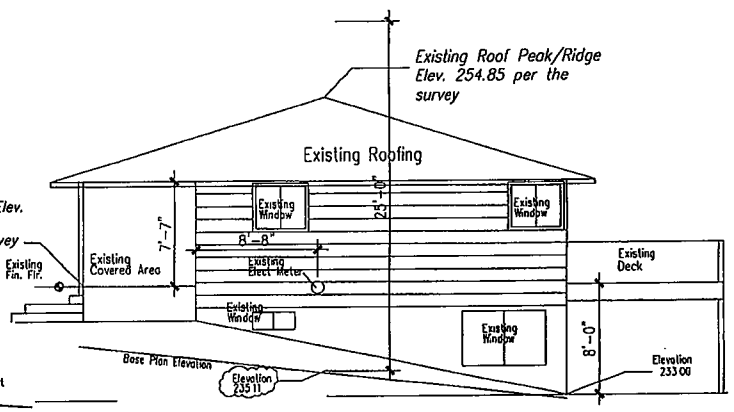
EXHIBIT A



Height Analysis

1/4" = 1'-0"

See Sheet A3.1 for dimensioned distance via AutoCAD per architect - S. Frantz, 7/7/14.



EXISTING NORTH ELEVATION

1/4" = 1'-0"

Architectural Services, Inc.
Planning and Design Development
12181 - "C" Street South
Phone: 253-272-2276
Tacoma, WA 98444
Fax: 253-531-1285

1502 – South Ventura Dr.
Tacoma, WA 98321

5615 REGISTERED ARCHITECT
TROY M. WEHR
STATE OF WASHINGTON

REVISION: 06/10/14
PERMIT SET

A1.2

JOB NO:
DRAWN TW
DATE: 06/13/14

EXHIBIT B

EXHIBIT C

EXHIBIT D

Footprint for 3650 55th

Assessor Property Detail Footprint for 3630 55th

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARK C. LEWINGTON, a Washington Resident; NOEL P. SHILLITO and LAURIE A. SHILLITO, Husband and Wife and Washington Residents; DANIEL P. OSTLUND and MARIE F. OSTLUND, Husband and Wife and Washington Residents; and ELIZABETH T. WIGHT, a Washington Resident,

Respondents,

v.

FRANK I. PARSONS and NANCY A. PARSONS, Husband and Wife and Washington Residents,

Appellants.

No. 47022-5-II

CERTIFICATE OF SERVICE

I, Robert Wells, declare under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of twenty-one years old, not a party to the above-captioned matter and competent to be a witness therein.

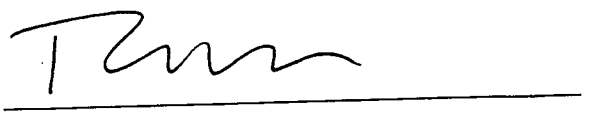
I certify that on the 26^{h} day of May, 2015, I caused the following documents in the above-captioned matter to be filed via legal messenger with the Washington Court of Appeals for Division II:

- BRIEF OF RESPONDENTS
- CERTIFICATE OF SERVICE

and copies to be served via legal messenger on the following Appellants' Counsel:

Mr. Sam Bull
Foster Pepper, PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
Attorneys for Defendants
Frank I Parsons and Nancy A. Parsons

EXECUTED in Gig Harbor, WA on this 26th day of May, 2015.



Robert Wells