73504-7

Case No. 73504-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EVERETT HANGAR, LLC, a Washington limited liability company,
Plaintiff-Respondent,

v.

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual
Defendants-Appellants.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The trial court's judgment should be reversed. The undisputed facts show that Defendants have never violated Everett Hangar's rights under the CC&Rs. Everett Hangar departs fewer than 1.4 times each week, almost always when the Museum is closed, has never missed a flight, has used both exits to the taxiway successfully, and has never conducted an unsafe flight operation. Everett Hangar's Easement rights have never been violated. Contrary to Everett Hangar's argument, the Easement has *never* been blocked by Museum activities. The trial court erred in granting Everett Hangar 24/7 control of the Museum's ramp even though, out of 168 hours each week, Everett Hangar needs only one hour on average to prepare for its flights. This is an unjustifiable result.

Furthermore, the CC&Rs give Everett Hangar no right to insist that Defendants employ additional safety and security measures not required of other airport tenants. Like all other Paine Field tenants, Everett Hangar is protected by the safety and security measures required by Paine Field itself, which is ultimately responsible for safety and security at the airport. Paine Field—the parties' landlord—has actively funded, and participated in security planning for, the very Museum events Everett Hangar contends are unsafe. Paine Field also supplies the fencing around Lot 13 and Museum events that Everett Hangar claims is inadequate. Everett Hangar contends that the Museum's activities violate Paine Field regulations, but Paine Field does not agree. The CC&Rs—under which Everett Hangar sued—support the Museum's activities. Everett Hangar cannot identify any legal basis for the trial court's erroneous injunction.

The trial court also erred in awarding attorneys' fees to Everett Hangar. Everett Hangar was not the sole prevailing party for purposes of awarding attorneys' fees, and, moreover, the fee award was unreasonable.

This Court should reverse the trial court's rulings against Defendants and remand this case with orders to (1) dismiss all of Everett Hangar's claims with prejudice, and (2) award Defendants their attorneys' fees and costs.

II. ARGUMENT

A. The Museum Has Never Interfered with Everett Hangar's Easement

1. The undisputed facts show that Everett Hangar has always been able to use its two exits

The trial court's sweeping injunction cannot be justified by the facts. The following facts are ***undisputed*** by Everett Hangar on appeal:

- Everett Hangar departs fewer than 1.4 times per week (Exs. 216-231; *see also* CP 458);
- Everett Hangar therefore uses its ramp approximately ***one hour*** each week for departures, and does not need to use its ramp—and certainly not the Museum's—for departures during ***any*** of the other ***167 hours*** each week (*see* CP 458 (each flight requires 30-45 minutes of pre-flight preparations));[1]
- Everett Hangar has never missed a flight because it could not access the taxiway (RP 305, 406-07);
- Everett Hangar claims to recall only a few undocumented 10-15 minute departure delays over the course of six years at Paine Field (RP 98, 171-72);
- Everett Hangar has safely used the exit on the Museum's ramp for one-third of its departures (RP 305); and
- Everett Hangar has ***never*** conducted an unsafe departure using either exit (*e.g.*, RP 305-06, 308-09, 403-04, 406-07).

[1] Everett Hangar must also use its ramp when it returns from a flight, but arrivals are very different from departures and were not a focus of the trial. Everett Hangar uses the exit on its own ramp for 90% of its arrivals, and in six years could identify only one arrival affected by Museum operations. RP 271-72. Everett Hangar admitted that the delay on that occasion was caused by the Museum's permitted use of the Kilo 7 taxiway. *Id.*

These facts do not support a violation of Everett Hangar's rights. Everett Hangar has been able to operate its flights safely and without interference. Injunctions are not entered to protect plaintiffs from "mere inconveniences," *DeLong v. Parmelee*, 157 Wn. App. 119, 150, 236 P.3d 936 (2010), and "should be used sparingly and only in a clear and plain case." *Resident Action Council v. Seattle Housing Auth.*, 177 Wn.2d 417, 445, 327 P.3d 600 (2013) (quotations and citations omitted). The trial court erred as a matter of law in entering injunctive relief.

2. The Easement applies only on *occasions* when its use is reasonably necessary

Contrary to the express language of the Easement, Everett Hangar contends it is entitled to use the Museum's ramp every time it departs, regardless of whether the Easement's use is *reasonably necessary* to access the taxiway. Everett Hangar mistakenly claims its Easement rights are violated if the Museum's ramp is not clear at all times (24/7) in case Everett Hangar wants to fly. Curiously, Everett Hangar also claims Defendants "do not dispute their activities routinely block Everett Hangar's access across the Lot 11 ramp." Resp. at 33. Defendants *do* dispute that misstatement of fact. The Museum does not dispute that it has placed things on its ramp, including aircraft and other items for events, but there is no evidence that the Museum has ever *blocked* access to the taxiway when access was reasonably necessary.

The trial court adopted an interpretation that is plainly inconsistent with the Easement's *limited* language:

> Each Owner shall have an ***ingress and egress easement*** over and across such portions of the airplane ramps located on any Lot ***as is reasonably necessary*** to move aircraft to or from any Building and the adjacent properties on which taxiways, runways and airport facilities are located.

APP. 2 § 12.7 (emphasis added).[2] The key phrase "as is reasonably necessary" is limiting, and must be given effect. The trial court's interpretation fails to do that. The trial court interpreted "as is reasonably necessary" to refer only to "the *area* needed to maneuver the aircraft safely over and across" the Lots' ramps. CP 471-72 ¶ 3 (emphasis in original). The trial court's interpretation also assumes that the "portions" of the ramp reasonably necessary to move an aircraft can never be zero, and therefore requires the ramp to remain clear at all times. *E.g.*, CP 471 ¶ 2. The trial court's interpretation thus places no limitation on the Easement, and, as a consequence, substantially and impermissibly expands its scope.

Everett Hangar contends the trial court's erroneous interpretation is entitled to deference because it represents the trial court's "findings on the intended scope of the easement." Resp. at 24 (section heading). It represents no such thing. The trial court made *no* findings with respect to the parties' intent in drafting the Easement. *See* CP 453-484. No such testimony was offered. Instead, the trial court explained that it interpreted the "unambiguous" language of the Easement "in a manner that reflects its plain meaning." CP 470-71 ¶¶ 2-3. Those legal conclusions are not entitled to deference. This Court is as well positioned to interpret the Easement's

[2] Unless otherwise noted, all references to appendices are to the appendices filed with the Brief of Appellants.

plain language as the trial court was. *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979) (trial court made legal conclusion about deed's effect where there was no "finding as to the intent of the parties").

The trial court's interpretation of "as is reasonably necessary" is wrong, and turns the Easement on its head. By granting Everett Hangar a 24/7 right to control the Museum's entire ramp, the trial court severely limits *the Museum's* rights to use its *own ramp*. The court's interpretation is inconsistent with the Easement's limiting language and the CC&R and lease provisions making the whole lot available for the Museum's use. Ex. 5 at Recitals ¶ C, §§ 1.01-.02 (permitting lessees to use the entire leased premises); APP. 2 at Ex. C at 1 & § 2 (permitting Owners to use their property for any aviation-related purpose approved by the Declarant).

Everett Hangar argues this is the only permissible reading of the Easement because the phrase "as is reasonably necessary" modifies only the phrase "such portions." Resp. at 28. The Easement's language does not permit this interpretation. For Everett Hangar to be correct, the Easement would have to cover "such portions of the airplane ramps located on any Lot as ***are*** reasonably necessary to move aircraft." The Easement does not say that. The Easement uses the word "is," not the word "are." The word "is" must relate back to the Easement itself so that the "ingress and egress easement" exists only "as ***is*** reasonably necessary to move aircraft," and then over only portions of the ramp. The word "is" cannot modify the plural word "portions" alone.

Defendants' correct interpretation is not only consistent with the permitted use of the property as an aviation museum, but it also comports with common sense. The owners of Lots 11, 12, and 13 each have direct access to the Kilo 7 taxiway from their own ramps. They can easily move their planes to the taxiway without involving their neighbors in any way. Each owner also has the right to indirect access to the taxiway across a portion of its neighbor's ramp if "reasonably necessary." That indirect access by easement is almost never reasonably necessary because each owner has direct access from its own ramp.

If the Easement were not limited to occasions when its use "is reasonably necessary," the Museum could, for no reason at all, stop using its own exit to the taxiway and move its planes across Everett Hangar's ramp every time a Museum plane left for a flight. Similarly, Kilo Six, LLC could move planes west from Lot 13 across Everett Hangar's ramp, and then across the Museum's ramp, for no reason.[3] None of this was contemplated by the parties in drafting the CC&Rs.

The ramps explicitly are *not* common areas. APP. 2 § 4.1 (excluding ramps from the Area of Common Responsibility). The ramps—unlike common areas over which broader easements exist—are not jointly

[3] Everett Hangar dedicates two pages of its brief to the decision to locate the Museum on Lot 11 instead of Lot 13. Resp. at 5-6. That decision has nothing to do with the issues before the Court. Everett Hangar tries to insinuate there was some kind of fraud or misrepresentation. There was not. Everett Hangar never asserted such a claim in this lawsuit, and each lease relating to Lot 11 permitted it to be used as a site for the Museum. Ex. 1 § 1.02.a; Ex. 5 Recitals at C. Even Everett Hangar's own Lot 12 lease noted that Lot 11 could be used for the Museum. Ex. 6 Recitals at C. Everett Hangar also falsely contends that Kilo Six has kept its interest in Lot 13 "[i]n breach of the lease." The Lot 13 lease recited only that Kilo Six "intend[ed] to assign its interest" in Lot 13 to another entity at some point in the future. Ex. 7 Recitals at D. Plans changed, and neither Everett Hangar nor Paine Field has alleged that Kilo Six has breached its lease by not yet assigning its rights to Lot 13 to another entity.

maintained like sidewalks and parking lots. *See id.*; *see also* APP. 2 §§ 12.4, 12.6 (granting broader easements over common areas). The ramps belong to each individual Lot, and are for other Owners' use only "as is reasonably necessary."

Defendants' interpretation of "reasonably necessary" is also consistent with well-established case law relating to easements established after a single parcel of land is divided into separate parcels. In that context, an easement may exist over a neighboring parcel if (1) there is former unity of title and a subsequent separation (as existed here), (2) a prior quasi-easement existed between the parcels, and (3) a certain degree of necessity exists for the continuation of the easement. *Woodward v. Lopez*, 174 Wn. App. 460, 469, 300 P.3d 417 (2013). An easement need not be absolutely necessary, but the test is whether reasonable alternatives are available. *Id.* at 469-70. Courts characterize this as a test of "reasonable necessity." *E.g.*, *id.* at 470. The same "reasonably necessary" analysis applies when a party attempts to condemn an easement across neighboring property. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 3, 7, 282 P.3d 1083 (2012) (an easement must "be reasonably necessary under the facts of the case, ***as distinguished from merely convenient or advantageous***") (emphasis added, quotations and citations omitted).

Everett Hangar dismisses this case law out of hand, claiming it arises in "inapplicable" contexts. Resp. at 29. This is incorrect. In interpreting this express Easement, it is instructive to consider whether the phrase "reasonably necessary" has been used in similar (even though not

precisely the same) contexts. Courts, in interpreting an undefined term, consider whether that term has been defined elsewhere in case law. *See State v. Duffey*, 97 Wn. App. 33, 38-39, 981 P.2d 1 (1999) (interpreting the phrase "judicial process" and considering its use both in statutes and in case law). Case law makes clear that the term "reasonably necessary" relates to *occasions* when an easement exists, and that an easement exists when "reasonably necessary" only when reasonable alternatives are not available. The trial court erred as a matter of law by misinterpreting and misapplying the phrase "as is reasonably necessary" to exclude the Easement's fundamental limitations.

3. The Easement does not include an unqualified right to move an aircraft under power

The trial court also erred as a matter of law when it concluded that the Easement permits Everett Hangar to operate *under power* in all circumstances. The Easement permits Owners only to "move aircraft" across a neighboring ramp as is reasonably necessary. The Easement does not define "move," and says nothing about "jet blast." Everett Hangar claims Defendants are asking this Court to interpret "move" only to permit Everett Hangar to "tow aircraft to and from the taxiway." Resp. at 29. This is not Defendants' argument. "Move" plainly includes powered movement *or* towing, as appropriate, but it does not guarantee any Owner the unqualified right to move under power—producing jet blast—where or when it would be inadvisable to do so. The trial court erred in concluding otherwise.

In fact, Everett Hangar tows its aircraft safely to the taxiway

whenever necessary to coordinate *its own* activities.[4] Everett Hangar tows its planes *for every flight* from its hangar to its ramp, and tows its planes to the Kilo 7 taxiway whenever it is preparing both its planes for departure at the same time. RP 156, 1206-1210. Everett Hangar can thus safely "move" its aircraft to the taxiway (and beyond) without producing jet blast when beneficial to do so. *Id.*; RP 375-76 (describing that Everett Hangar could have a plane towed farther than Kilo 7 if necessary).

As Everett Hangar acknowledged at trial—and does not dispute on appeal—*the pilot* is responsible for operating a jet safely and managing its jet blast. *E.g.*, RP 296-97. This responsibility is reflected in the Snohomish County Code, which requires a pilot "taxiing into areas where people are standing," to "shut the engine down and push the aircraft" or have it guided by two or more knowledgeable people. Ex. 232 § 15.08.334; *accord* § 15.08.322 (no aircraft shall be operated in a manner such that jet blast might harm people or property). Federal regulations also place the pilot in charge of safely operating his aircraft. 14 C.F.R. § 91.3. The pilot is thus empowered to determine, based on the situation, whether powered movement is safe, or whether an aircraft should be towed. The Easement, which permits an Owner to "move aircraft"—without specifying the method of movement—does not change these fundamental principles.

Even though Everett Hangar safely tows its planes to the taxiway several times each year to account for its own activities, the trial court

[4] Everett Hangar has never had to tow one of its aircraft to the taxiway because of Museum activities. In six years, Everett Hangar has used the Museum's exit, under power, for one third of its departures. It has done so without incident.

inexplicably concluded that the Easement's scope "***must*** include the jet blast zone" associated with each of Everett Hangar's planes. CP 472 ¶ 4 (emphasis added); RP 1206. The trial court concluded that aviation "best practices" compel that result. *Id.* ¶¶ 4, 6. However, even though Everett Hangar uses the term "best practices" *18 times* in its appeal brief, the Easement says nothing about "best practices." Resp. at 1-3. The Easement permits movement only that is "reasonably necessary," and the undisputed evidence at trial demonstrated that, when reasonably necessary, Everett Hangar safely and routinely tows its planes to the Kilo 7 taxiway.

The trial court's erroneous "jet blast" addition to the Easement dramatically expands its scope beyond all reasonable limits. The Museum's ramp is 188 feet long. Everett Hangar's planes have jet blast zones extending 200 and 240 feet behind the planes. The trial court's "jet blast" addition to the Easement thus converts the Easement from a limited easement covering "portions" of the ramp available when reasonably necessary to a 24/7 prohibition on the Museum's placement of anything on its own ramp in case Everett Hangar decides it wants to fly. This interpretation finds no support in the Easement itself, which permits "move[ment]" over only "portions" of the ramp.

Moreover, the trial court's "jet blast" addition to the Easement means the Museum's ramp must be clear *even when Everett Hangar is using its own east exit*. Everett Hangar's ramp is 322 feet long, far longer than the longest 240 foot jet blast zone. APP. 2 Ex. D. Nevertheless, Everett Hangar claims (and the trial court has endorsed) a right to prepare its jets for flight

near the west end of its property so that it must direct its jet blast across the Museum's ramp before traveling east to its own exit. *See* Resp. at 31 n.18. Thus, under the trial court's injunction, the Easement is no longer simply an "ingress and egress" easement to "move aircraft" "over and across" "portions" of the Museum's ramp. The trial court has converted this straightforward Easement into a "jet blast" easement that entitles Everett Hangar to make its flight preparations next to the Museum (rather than further east on its own ramp) before making use of its own east exit. This interpretation is inconsistent with any common sense reading of the limited Easement. The Court should vacate the trial court's injunction in its entirety.

4. The trial court erred by refusing to enforce the cooperation requirement imposed by the CC&Rs

All of the conflicts Everett Hangar alleges (but which find no support in the record) disappear with neighborly cooperation. Cooperation is ***required*** by the CC&Rs. APP. 2 at Ex. C § 1 (requiring that each owner "cooperate and communicate with the other Owners in good faith," and requiring that the CC&Rs' Rules and Regulations be "interpreted and applied, in a manner designed to achieve such purpose").

Even though Everett Hangar describes its flight schedule as "fluid" (and claims it requires "frequent on-demand travel"), Resp. at 4, 7, Everett Hangar does not dispute that it has significant advance notice for all its flights. Thirty to forty percent of its flights are scheduled the year before, and no flight has ever been scheduled with less than two days' notice. RP 155, 396-97, 402. This provides ample time for Everett Hangar to communicate with the Museum about potential conflicts, and the parties

have successfully communicated about potential conflicts many times over the years. *E.g.*, Exs. 202-204, 206-214.

The trial court erred in refusing to enforce the CC&Rs' communication and cooperation provision. The trial court concluded that Everett Hangar's recent refusals to share flight information with the Museum have been justified by Everett Hangar's "legitimate security concerns about Defendants' operations." CP 477 ¶ 24. But neither the trial court nor Everett Hangar can identify *any* evidence in the record showing that the Museum ever mishandled flight information provided by Everett Hangar. The trial court's conclusion is unsupported by substantial evidence.

Nor is there evidence the Museum would refuse to cooperate if given advance flight notification. Everett Hangar continues to complain about its flight during the Museum's Christmas event two years ago, Resp. 31 n.18, but on that occasion the Museum did nothing more than park a plane on its ramp more than 300 feet behind Everett Hangar's idle jet (well beyond the jet blast zone) in order to make room in the Museum's hangar for children greeting Santa, RP 312-16, 330-33. Those concurrent activities (which resulted in Everett Hangar safely leaving through its east exit as planned) are *not* evidence of a lack of commitment to cooperation.

Cooperation would not be burdensome. Even without coordinating with the Museum, Everett Hangar has safely used the Museum's exit for one third of its flights. This is not surprising. Everett Hangar's infrequent flights—fewer than 1.4 each week—almost never occur when the Museum

is operating.[5] Ninety to ninety-five percent of Everett Hangar's flights depart around 7:30 a.m. (before the Museum opens) and arrive between 7:00 p.m. and 11:00 p.m. (after the Museum closes). RP 261. The Museum hosts occasional outdoor events during the summer flying season, *see* Exs. 205, 274, 275, but Everett Hangar had never flown on an event day until after it filed this lawsuit, RP 242. Everett Hangar also rarely has a reasonable need to cross the Museum's ramp, since use of the Museum's westerly exit is called for only when the wind blows from the west at 15 knots or higher—something that occurs at Paine Field *fewer than four days every ten years*.[6] CP 463; RP 623-24, 1035-36; Ex. 283. On other occasions, Everett Hangar should be able to use its 322 foot ramp to prepare for flights, start its engines more than 240 feet away from the Museum's property, and access the taxiway by using its own east exit. The need for coordination should therefore be rare, and on the occasions when coordination might be necessary, there is no evidence in the record suggesting it would fail to solve any legitimate problems Everett Hangar claims exist.

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[5] Finding of Fact 25, which Defendants challenge on appeal, suggested there are now "daily conflicts" between Everett Hangar and the Museum. CP 459 ¶ 25. That cannot be the case, since Everett Hangar flies little more than once a week.

[6] Everett Hangar claims that it must use the Museum's exit whenever the wind blows from the west, regardless of velocity. Resp. at 7 & n.3. That is not what the trial court found based on undisputed testimony. CP 263 ¶ 38. The trial court found that Everett Hangar must have access to both exits "depending on the direction *and speed* of the wind." *Id.* (emphasis added). The trial court also found that the manuals for Everett Hangar's jets "caution against starting the aircraft with a tailwind exceeding 15 knots." *Id.* This finding is based on the evidence presented at trial. *E.g.*, RP 623-24, 1035-36; Ex. 283. Everett Hangar does not dispute that the wind blows from the west at 15 knots or higher fewer than four days every ten years.

5. The trial court's injunction has no legal basis and is not narrowly tailored

Because the Museum has never interfered with Everett Hangar's easement rights, the trial court erred as a matter of law in entering an injunction at all. Even if it had a basis to enter an injunction, the trial court erred because the injunction is arbitrary, overly broad, and unsupported by the facts. *King v. Riveland*, 125 Wn.2d 500, 520, 886 P.2d 160 (1994). This Court should vacate it.

Everett Hangar does not dispute that the trial court's injunction requires the Museum's ramp to be clear at all times in case Everett Hangar decides to use it. *See* Resp. at 41-45; *accord* APP. 3. The breadth of this injunction is utterly unjustifiable. An injunction must be "narrowly tailored to remedy the specific harms shown." *King*, 125 Wn.2d at 520. The trial court's injunction is not so tailored. Even though Everett Hangar requires its ramp, and either exit to the taxiway, on average only ***one hour out of 168*** each week—and knows its schedule days in advance—the trial court does not permit any of the other 167 hours to be used for Museum activities. And, given the trial court's "jet blast" addition to the Easement, the trial court leaves no "portions" of the Museum's ramp untouched by what was plainly drafted to be a *limited* Easement.

The court's injunction strips the Museum of its right to use its property in accordance with its lease, the CC&Rs, and Snohomish County Code. *E.g.*, Ex. 5 (lease) at Recitals ¶ C, §§ 1.01-.02 (permitting lessees to use the entire leased premises); APP. 2 (CC&Rs) at Ex. C at 1 & § 2 (permitting Owners to use their property for any aviation-related purpose

approved by the Declarant); Ex. 232 (Code) § 15.08.065 (specifying that ramps can be used for parking aircraft). It also prevents the Museum from using its property for the events Paine Field—the parties' landlord—has approved and sponsored since the Museum's inception. *E.g.*, CP 476; RP 242-44, 248, 765-70, 845, 878-80. The trial court's injunction is thus inconsistent with any reasonable reading of the Easement and impermissibly prevents the Museum from making use of its own leased property. *Thompson v. Smith*, 59 Wn.2d 397, 407-08, 367 P.2d 798 (1962) (property owners subject to an easement are entitled to use their property "for any purpose that does not interfere with the proper enjoyment of the easement").

The injunction is also imprecise. As explained in the Brief of Appellants, even if an injunction were called for, the trial court's injunction fails to make exceptions for the Museum's own maintenance and flight activities, or for any other aviation-related activities expressly permitted by the CC&R. Br. of Appellants at 33-35. The injunction also reaches beyond Lots 11 and 12—which are the only properties subject to the Easement—to include activities on the surrounding Paine Field property. *Id.* Everett Hangar claims these are minor defects, and that neither Everett Hangar nor the trial court would dispute, for example, the Museum's right to conduct its own flights. Resp. at 42. But the fact that a plain reading of the injunction language would prevent the Museum from using its own ramp—even for its own flights—illustrates the incorrect interpretation of the Easement and the impermissible breadth of the injunction. The Museum is entitled to a narrowly tailored, clear, and

specific injunction. CR 65(d); *King*, 125 Wn.2d at 520. The trial court's injunction was wrongfully issued and should be vacated.

B. Defendants Have Not Violated Any CC&R Obligations with Respect to Safety and Security

1. The CC&Rs do not impose specific safety and security obligations on Lot Owners

Everett Hangar dramatically claims Defendants take a "dangerous position" that denies any responsibility for conducting safe and secure operations. Resp. at 34. Defendants take no such position, and take their obligations to conduct safe and secure operations seriously.

Defendants simply, and rightly, contend that their safety and security obligations flow from sources *other* than the CC&Rs, and are enforced by entities *other* than Everett Hangar. This is not unusual. To the contrary, it would be unusual, at an airport, for safety and security standards to be supplied by CC&Rs enforced by neighbors rather than, for example, county or federal regulations enforced by government entities. The CC&Rs in this case do not impose independent safety and security requirements.

The trial court identified only two CC&R provisions to support its injunction. First, the court cited § 5 of the CC&R Rules and Regulations which merely *authorizes*—and does not require—the Kilo 6 Owners Association to address security on the Property. CP 457 ¶ 16, 475 ¶ 16 (citing APP. 2 at Ex. C § 5). Everett Hangar repeats this provision in its appeal brief, but does not (and could not) contend it requires the Association to take action. *E.g.*, Resp. at 34 (quoting only a portion of § 5 of the Rules and Regulations).

Second, the trial court cited a provision in the Rules and Regulations relating to "Noxious Activities," which prohibits any activity

> which emits foul or obnoxious odors, fumes, dust, smoke, or pollution outside the Lot or which creates noise, unreasonable risk of fire or explosion, or other conditions which tend to disturb the peace or threaten the safety of the occupants and invitees of other Lots.

CP 457 ¶ 16, 475 ¶ 16 (citing APP. 2 at Ex. C § 3(i)). As described in the Brief of Appellants, this provision provides no support for the trial court's injunction because, under the *ejusdem generis* rule of contract interpretation, the provision plainly relates only to conditions similar to fumes, smoke, and fire. Br. of Appellants at 37-38. No such conditions were at issue in the trial.

Everett Hangar argues this rule of interpretation applies only when "the general terms suggest items similar to those designated by the specific terms," but that is precisely the case here. Resp. at 38. In *Lombardo v. Pierson*, the case cited by Everett Hangar, the Washington Supreme Court interpreted an insurance provision relating to "[d]efects, liens, encumbrances, adverse claims or *other matters* . . . not known to the Company and not shown by the public records but known to the insured claimant." 121 Wn.2d 577, 583, 852 P.2d 308 (1993) (emphasis added). The Court held that "other matters" related to matters "which affect title" because the other items in the list were matters that affected title. *Id.* Similarly, the "noxious activities" provision prohibits activities causing, for example, smoke, fire, fumes, odors, or "other conditions which tend to disturb the peace or threaten the safety of the occupants and invitees of other Lots." Those "other conditions" must,

like the "other matters" in *Lombardo*, be similar to the "conditions" listed before it (*e.g.*, smoke, fire, fumes).

Everett Hangar essentially concedes this point. After weakly defending its reliance on the CC&Rs' "noxious activities" provision, Everett Hangar contends it is "irrelevant" because "the trial court's ruling did not depend on it." Resp. at 38. Instead, Everett Hangar claims for the first time that it is entitled to enforce the Lot 11 and Lot 13 *leases with Paine Field*, which require tenants to comply with applicable laws relating to safety and security. Resp. at 38-39. Everett Hangar has no right to enforce Defendants' leases with Paine Field. Everett Hangar cites § 13.6 of the CC&Rs, which requires Owners to comply with the terms of the "governing documents," but the term "governing documents" does not include the lot leases. APP. 2 § 1.14. Everett Hangar also cites a CC&R provision generally prohibiting activity inconsistent with the leases, *id.* Ex. C § 2(g), but that provision can be waived by the Association Board, *id.* Ex. C § 2, which, as Everett Hangar alleges, is controlled by Defendants, CP 573-74.

Most importantly, however, *Paine Field* is the landlord responsible for determining whether its leases have been breached. If *Paine Field* identifies a lease violation that has harmed other Lot Owners, those other Lot Owners may be entitled under the CC&Rs to some corrective action—or damages—from the violating Owner. But that has not happened here. Everett Hangar is claiming its own standing to interpret and enforce Paine Field's leases and is relying on that authority for its claims in this lawsuit.

This is not a valid legal basis for the injunction, and the trial court erred by intervening where Paine Field did not.

The following *undisputed* facts flatly contradict Everett Hangar's safety and security claims on appeal:

- Paine Field is ultimately responsible for safety and security at the airport (RP 243, 556);
- Paine Field is the landlord for Lots 11, 12, and 13 (CP 254);
- Paine Field sponsors, supervises, and plans security for the activities that are the subject of Everett Hangar's complaints, including allowing guests to attend events without special identification, allowing guests to enter and park on Lot 13, and allowing the Museum to place vehicles and temporary fencing on its ramp for events (*e.g.*, RP 242-44, 248, 766-68, 845-47);
- Paine Field supplies the bicycle fencing used for Museum events and to surround the interior of Lot 13 (RP 243, 767-68, 845; CP 476 ¶ 23);
- Everett Hangar complained more than once to Paine Field about the Museum's activities and Paine Field took no action in response (RP 223, 253-54); and
- No people or property have ever been harmed at Everett Hangar by third persons (CP 393, 403-04).

Because Paine Field has only approved the Museum's conduct, Everett Hangar's complaints—based exclusively on alleged violations of Paine Field requirements—are baseless.[7] And because the CC&Rs

[7] Defendants also *do not* concede that, if the CC&Rs had prohibited conduct that threatens the safety and security of Everett Hangar personnel and property, the Defendants would have violated that prohibition. *See* Resp. at 39. Paine Field—the entity responsible for safety and security at the airport—has never identified a problem with Museum practices, and the Museum stands by its record on, and commitment to, safety and security. For example, Everett Hangar claims that Museum fencing is inadequate because "[p]hotos show a young child stepping between the bars . . . during a Foundation event." Resp. at 16. Everett Hangar does not point out that the Museum's security worked exactly as intended: the child was stopped from squeezing through the fencing by a uniformed Museum volunteer, one of at least four uniformed volunteers visible in the photograph. Ex. 49.

themselves provide no legal basis for the trial court's injunction, it should be vacated.

2. The trial court's injunction has no legal basis and is not narrowly tailored

Even if the court had properly found that Defendants violated some duty to promote safety and security under the CC&Rs, the court's injunction is wholly inappropriate.

Paragraph 5 prohibits Defendants from "allowing, permitting or suffering" any person to "enter upon" Lot 12 "from its properties." APP. 3 ¶ 5. This plainly conflicts with Defendants' right to an ingress and egress easement across Lot 12's ramp if ever reasonably necessary, and, more importantly, the broader ingress and egress easement across the sidewalks and parking lot on Lot 12. APP. 2 §§ 12.4, 12.7. Everett Hangar ignores the easement right over the parking lot, and claims the easement for aircraft is preserved because the court's injunction relates to "people, not aircraft." Resp. at 43. If the Museum could move a plane across Lot 12 without a person involved, Everett Hangar might be correct. Otherwise, the easement for aircraft plainly requires a person to move across Lot 12 when that easement is being used. Paragraph 5 also inappropriately holds Defendants liable for all trespasses by third parties onto Lot 12 from either Lot 11 or 13. Paragraph 5, like other aspects of the injunction, is thus both imprecise and overly broad.

Paragraph 6 prohibits Defendants from propping open any entrance to Lot 11 or Lot 13 without a security guard present. APP. 3 ¶ 6. At trial, there was no evidence that an entrance to Lot 11 was ever propped open,

or propped open without a monitor present. Everett Hangar does not contend otherwise, so the injunction with respect to Lot 11 has no justification. Resp. at 43-44.

Lot 13 is included in Paragraph 6 because the gate on Lot 13 has a Paine Field sign suggesting it must be closed and locked at all times, but, as described above, Paine Field itself disagrees. Plainly the gate is permitted to be open on occasion, and Paine Field has permitted Lot 13 to be used for parking at Museum events. The trial court has no legal basis to require action on Lot 13 not required by Paine Field.

Paragraph 7 requires "Defendants" to construct a permanent security fence along the interior of Lot 13 until the court grants permission to remove it. APP. 3 ¶ 7. However, the court itself acknowledged in its findings and conclusions that the Lot 11, 12, and 13 lease agreements require Paine Field's approval for "any alteration of the appearance of the premises." CP 480; *e.g.*, Ex. 7 § 1.02(b). The court also held, "There is no evidence that Snohomish County has or would approve additional fencing on Lots 11, 12, or 13." CP 480. The court therefore rejected Everett Hangar's request for a fence on Lot 12, *id.*, but inexplicably ordered a fence on Lot 13. Everett Hangar neither discusses nor refutes this argument. Resp. 44-45. The trial court erred in ordering the fence.

Everett Hangar cannot identify a basis in the CC&Rs for the security measures it demanded in the trial court, and cannot identify any people or property harmed by any so-called security breach. Everett Hangar cannot identify a clear legal or equitable right to the security

measures it requests, or a well-grounded fear that Everett Hangar's safety and security are in jeopardy.

C. The Court Erred in Awarding Attorneys' Fees to Everett Hangar

1. The trial court erred in concluding that Everett Hangar was the "prevailing party"

The trial court erred in concluding that Everett Hangar was the "prevailing party" entitled to attorneys' fees. Everett Hangar mischaracterizes Defendants' argument, and wrongly contends Defendants claim to be the "prevailing party" themselves. Resp. at 45. Defendants claim no such thing. To the contrary, under longstanding Washington law, there is *no* prevailing party in this action except John Sessions, who successfully defended *every claim alleged against him.*[8] *See* Br. of Appellants at 47 n.29 (citing case law). The trial court should have ordered each party to bear its own fees and expenses, and should have found that John Sessions was a prevailing party entitled to all his reasonable fees.

Everett Hangar incorrectly claims it "prevailed on every claim it brought under the contract." Resp. at 46. For example, Everett Hangar alleged—and lost—all of its claims against John Sessions. CP 578-80. Everett Hangar also claims that its losses on Counts IV and V are irrelevant because those claims "did not arise under the CC&Rs," which provide the "***sole*** source" of any right to attorneys' fees. Resp. at 46-47 (emphasis in original). But Counts IV and V plainly *did* "arise under the

[8] Everett Hangar argues that the claims against John Sessions were trivial veil-piercing claims, Resp. 48-49, but Everett Hangar considered Sessions a key direct target of the lawsuit, alleged every single cause of action against him personally, and describe Defendants in their appeal brief as "one individual, John Sessions, and four entities he controls," Resp. at 4.

CC&Rs." Counts IV and V fault the Association and John Sessions for not enforcing the CC&Rs. CP 580. There is no other basis for those claims. *Id.* Because all the claims were brought to "enforce" the CC&Rs, all are covered by the attorneys' fee provision in § 4.2. APP. 2 § 4.2.

Everett Hangar also claims that the summary judgment dismissal of its damages claims is irrelevant in determining a prevailing party because Everett Hangar "chose voluntarily to forego [sic] damages." Resp. 48. This is not true. It took a summary judgment motion just before trial to dismiss them.[9] CP 676-78. Damages were dismissed on summary judgment because Everett Hangar could provide no proof of damages, *id.*, and Everett Hangar was, until the close of discovery, still making every effort to prove damages, [10] CP 122-25 (deposition testimony explaining, just a few weeks before close of discovery, that Everett Hangar was still gathering evidence for its damages claim). Because Defendants prevailed on many of the key issues in the trial, and because John Sessions prevailed on all issues, the trial court should have ordered all parties to bear their own fees and costs, and should have awarded John Sessions his reasonable attorneys' fees.

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[9] Everett Hangar argues that it sought damages only in its "preliminary pleading," and that the "operative pleading"—the Amended Complaint—did not seek damages. Resp. at 47-48. This is nonsense. Everett Hangar's "preliminary pleading" was its "Complaint for Damages and Injunction," which also requested a jury trial on damages. CP 1028-39. What Everett Hangar calls the "operative pleading" was Everett Hangar's "Amended Complaint for Damages and Injunction," which was filed during the trial, and which, despite its title, did not request damages because they had already been dismissed on summary judgment. CP 569-82.

[10] For example, even though Everett Hangar claims that accounting for Museum activities resulted in its "harming and reducing the life of the jet engines and exposing its own hangar to damage from jet blast," Resp. at 14, Everett Hangar's own trial testimony showed exactly the opposite—that the jet engines on Everett Hangar's planes had always performed better than expected with respect to maintenance, RP 362, and that Everett Hangar's hangar doors had never been damaged by jet blast, RP 564-65.

2. The trial court was required to perform a *Cornish College* analysis

Everett Hangar acknowledges that a court "must employ a 'proportionality approach'" to calculate fees in cases where a party prevails only on some of its claims. Resp. at 46 (citing *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 232, 242 P.3d 1 (2010)). Everett Hangar claims, however, that the "proportionality approach" was unnecessary here because it prevailed "on every claim brought under the contract." *Id.* As explained above, all of Everett Hangars' claims arose from the CC&Rs, and all of its claims were explicitly alleged against John Sessions, who prevailed on all claims against him. Defendants also prevailed on Counts IV and V in their entirety. A proportionality analysis was therefore mandatory under *Cornish College*, and the trial court erred in failing to conduct it.

3. The trial court awarded an unreasonable amount of fees

Everett Hangar makes no attempt to defend its fee award as "reasonable." It simply cites case law suggesting that the trial court's award is owed deference, and quotes the trial court's conclusory statement that it found "that the work that was done was appropriate." Resp. at 49-50. This is insufficient to support Everett Hangar's facially unreasonable fee award. Everett Hangar does not deny that, in awarding *every penny* of Everett Hangar's initial $819,053.57 fee request, the trial court (1) failed to make required findings and conclusions, *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998); (2) failed to subtract hours spent on unsuccessful theories or claims; and (3) failed to subtract hours

unreasonably spent, including, for example, on work that was never actually performed, *e.g.*, CP 188, 199, 98. Resp. 49-50. The trial court certainly cannot have carefully reviewed Everett Hangar's fee request when it awarded deposition fees to a lawyer not in attendance. For all these reasons, the Court should vacate the attorneys' fee award.

III. CONCLUSION

The trial court turned the Easement's limitation of reasonable necessity on its head, and essentially barred the Museum from using its own leased property. The court further ordered Defendants to take security measures neither required by the CC&Rs nor mandated or approved by Paine Field. The Court should reverse and remand with instructions to (1) dismiss all of Everett Hangar's claims with prejudice, and (2) award Defendants their reasonable attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 18th day of February, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be served via email and U.S. Mail to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 18th day of February, 2016, at Seattle, Washington.

Suzanne Powers

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