No. 97087-4

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. No. 77365-8-I)

KILO 6 OWNERS ASSOCIATION AND KILO SIX, LLC,

Petitioner,

v.

EVERETT HANGAR LLC,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Kilo 6 Owners Association and Kilo Six, LLC (collectively, "Kilo Six") respectfully ask this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Kilo Six seeks review of the decision of the Court of Appeals, Division I, issued on February 5, 2019 (cited as "Op."). A copy of the decision is set forth in the Appendix. The Court of Appeals issued its Order Denying Kilo Six's Motion for Reconsideration on March 19, 2019. A copy of the order is set forth in the Appendix.

III. ISSUE PRESENTED FOR REVIEW

Defendant Everett Hangar has presented and continues to defend two inconsistent theories, in two different cases (both active), in two different courts. In Snohomish County, Everett Hangar successfully argued (and continues to argue) that John Sessions "controls" and exercises "complete dominion" over the Association because he has "two-thirds" of the Association's votes. But in the case below, in King County, Everett Hangar pursued the opposite theory: that Mr. Sessions is not in control because he only has 20% of the vote. Both theories can't be right.

But Everett Hangar has convinced two different courts to adopt two conflicting theories.

Judicial estoppel prevents a party from advancing a theory in one court, after having achieved a contradictory outcome in another court. The Court of Appeals decision creates a conflict in Washington's treatment of judicial estoppel by misapplying the standard in a manner that effectively eliminates the doctrine altogether. Should the Court of Appeals decision stand, it is unlikely that any party will be judicially estopped from pursuing contradictory theories in separate courts, and the interests that judicial estoppel seeks to protect would go by the wayside.

None of this is theoretical or academic. Everett Hangar is defending both cases in separate petitions for review pending before this Court. Accordingly, the issue presented is whether the Court of Appeals and King County Superior Court committed legal error by failing to apply judicial estoppel to prevent Everett Hangar from gaining an unfair advantage by pursuing inconsistent legal theories in two separate courts.

IV. STATEMENT OF THE CASE

Kilo Six, an LLC owned by John Sessions, and Everett Hangar, an LLC owned by Dean Weidner, are members of the Kilo 6 Owners Association, an entity established to manage three adjacent lots, Lots 11, 12, and 13, at Paine Field Airport ("Paine Field") in Snohomish County.

CP 56 ¶ 2. Since 2014, Kilo Six and Everett Hangar have had a series of disagreements about the Association's Covenants, Conditions & Restrictions ("CC&Rs") and the resultant voting rights of the Association's members. *Id.* ¶ 1, 3.

Mr. Weidner controls the middle parcel, Lot 12. CP 2 ¶ 11. The other two, Lots 11 and 13, are controlled by John Sessions and his company Kilo Six, LLC ("Kilo Six"). CP 60 ¶ 20. Lot 11 is occupied by the Historic Flight Foundation ("Historic Flight"), a 501(c)(3) charitable organization Mr. Sessions created in 2003. CP 2 ¶ 10. Historic Flight has a museum on Lot 11 dedicated to the collection, restoration, and public display of the most significant vintage aircraft manufactured between 1927 and 1957. CP 1 ¶ 10; CP 17 ¶ 10. Mr. Sessions set up a separate entity, Historic Hangars, LLC, to operate the museum, and take over the land lease for Lot 11. CP 60 ¶ 21.

Under the June 2008 version of the CC&Rs, the Association "Members" were the "Owners" of any lessee interest under the Land Lease with Snohomish County. CP 58 ¶ 12. Each "Owner" of a "Parcel," defined as the ground leasehold interest in Lots 11 through 13, automatically became Members of the Association. *Id.* Paragraph 3.3 of the June 2008 CC&Rs provided that "[e]ach Member shall have voting rights equal to the Percentage Interest of its Parcel(s)." *Id.* ¶ 13. The

"Percentage Interest" was calculated by dividing the square footage of the parcel by the total square footage of all three lots. *Id*. Exhibit B to the CC&Rs identified Lot 13's Percentage Interest as 46%, Lot 12's as 34%, and Lot 11's as 20%. *Id*.

A. The Snohomish County Proceedings

1. Everett Hangar files suit in Snohomish County, representing to the Court that John Sessions "controls" the votes of the Association and its Board.

In 2014, Everett Hangar sued Kilo Six, the Association, Historic Hangars, and the Historic Flight Foundation in Snohomish County Superior Court for violating its easement rights and other alleged violations of the CC&Rs. CP 62 ¶ 31. At every step of the Snohomish County litigation, Everett Hangar argued that Mr. Sessions "controlled" the Association (both through its Membership votes and its seats on the Board). CP 71 ¶ 65.

First, in its Amended Complaint in Snohomish County, Everett Hangar represented to the trial court that Mr. Sessions "controlled" the Association alleging that Mr. Sessions owns "approximately two-thirds of the Association's voting rights." CP 71 ¶ 65. Then, at summary judgment, Everett Hangar again represented to the Snohomish County Superior Court that Mr. Sessions controlled two-thirds of the voting interest of the

Association. CP 72 ¶ 66. Finally, at trial Everett Hangar made the same representations:

> Mr. Sessions, through the various defendant entities he controls, owns and exercises complete domination—complete dominion rather over Lot 11 and Lot 13 and *controls the owners association that manages all the lots. That is not in controversy*. Documents are set up to give him control over the association, because voting rights are based on the square footage of the leasehold, and the combination of the Lot 11 leasehold, which is the smallest of the three and Lot 13 vacant lot adds up to 66 percent. *So he has complete control over the owners association, and that will become significant in a moment.*

CP 72 ¶ 67 (emphasis in CP).

2. The Snohomish County Superior Court concludes Mr. Sessions controls the Association.

Everett Hangar persuaded the Snohomish County Superior Court that Mr. Sessions controlled the Association's Membership vote. CP 72 ¶ 68. In finding Mr. Sessions controlled the Association's Membership vote, the Snohomish County Superior Court stated:

> Mr. Sessions has the controlling votes on [the Association's] Board, by virtue of the number of shares he holds for Lots 11 and 13. Accordingly, the Court finds that Mr. Sessions is functionally in control of all four organizations . . . .

CP 72 ¶ 68.

After agreeing, as a factual matter, with Everett Hangar's theory that John Sessions "controlled" the vote (and thereby decision-making) of the Association, the Snohomish County Superior Court found in favor of Everett Hangar, as a matter of law. CP 62 ¶ 31.

B. The Instant King County Litigation

1. Everett Hangar Argues That John Sessions Does Not Control the Association

Although Everett Hangar succeeded in its claims for violations of the CC&Rs, the Snohomish County Superior Court denied Mr. Weidner's request that he be permitted to build his desired locked gate and fence around Lot 12. *See* CP 62-63 ¶ 32. In his continued pursuit of that fence, Mr. Weidner decided to pursue a new theory: namely, that Mr. Sessions *does not* control the Association. CP 72 ¶ 69.

In December 2015 Everett Hangar requested that the Association conduct an in person meeting to consider Mr. Weidner's proposal to build the perimeter fence around the Lot 12 parking lot. CP 63 ¶ 33. The meeting was scheduled for January 12, 2016. CP 64 ¶ 37. Mr. Sessions exchanged e-mails with Ben Katon, one of Mr. Weidner's employees, who served as Everett Hangar's representative on the Association's Board, about the 2016 budget. CP 63 ¶ 34. Mr. Sessions's proposed budged mirrored all the previous budgets by allocating Base Assessments to all

three Lots based on their percentage interest and allocating other costs between Lots 11 and 12. *Id*. ¶ 34.

After reviewing Mr. Sessions's proposed budget for 2016, Mr. Katon wrote back on January 11, 2016—the day before the scheduled Association meeting. *Id*. ¶ 35. While Everett Hangar was "fine" with the overall numbers, Mr. Katon explained that Everett Hangar's "only comment" was that it now wanted the Special Assessments previously allocated to Lots 11 and 12 to be allocated to all three lots in the same "percentage allocation as the rest of the expenses." CP 63 ¶ 35; *see also* CP 22 ¶ 18. In effect, Everett Hangar wanted these Special Assessments to be treated as Base Assessments, and to make Lot 13 pay 46% of *all expenses*—even for services that did not benefit Lot 13. CP 63 ¶ 36; *see also* CP 58 ¶ 13. In response, Mr. Sessions expressed his preference to continue the parties' practice of charging only those expenses that benefitted all three Lots as Base Assessments. CP 63 ¶ 36; *see also* CP 58-59 ¶ 14.

The next day, during the Association's meeting, rather than argue that Lot 13 should pay more Base Assessments—which was its position as of the day before—Everett Hangar reversed its position, asserting that Lot 13 should not pay *any* Base Assessments, and that Lot 13 was ineligible to vote on Association matters. CP 64 ¶ 37; CP 4 ¶ 25, 28. According to

Everett Hangar, Lot 13 was not substantially complete under Section 9.1 of the CC&Rs. CP 64 ¶ 37.

A week after the Association's meeting, Kilo Six confirmed that none of the lots had been officially certified as substantially complete. CP 65 ¶ 37-38. Kilo Six then issued a certificate declaring all three lots as substantially complete under Section 9.1 of the CC&Rs. *Id*. ¶ 38. Everett Hangar insisted that the certificate was not effective because Mr. Sessions had not gone through with his original plans to build a hangar on Lot 13. *Id*. ¶ 39.

The Association and Kilo Six (which owns the lease on Lot 13) filed this lawsuit, seeking declaratory judgment that Lot 13 is eligible to vote on Association Matters. CP 1-7. Everett Hangar filed a counterclaim against Kilo Six, alleging that the certification violated the duty of good faith and fair dealing. CP 16-26.

2. The King County Trial and the Court's Order

The case proceeded to a bench trial in July 2017 to determine whether Kilo Six properly certified Lot 13 as substantially complete, and was therefore eligible to vote, pursuant to Section 9.1 of the CC&Rs. CP 55, 64-65. The trial court ruled that Lot 13 is not substantially complete. CP 80 ¶ 1-2.

Of most import here, the court rejected Kilo Six's argument that Everett Hangar was judicially estopped from arguing that Kilo Six has no right to vote its shares given Everett Hangar's contrary representations to the Snohomish Superior Court. CP 70-71. The court agreed with Kilo Six that "Everett Hangar represented to the [Snohomish County] trial court that Sessions 'controlled' the Association because Sessions had two seats on the Board and held 66% of the membership vote [Lot 11 and Lot 13]." CP 71. The court even acknowledged that "the position Everett Hangar is taking in this case . . . is inconsistent with the position Everett Hangar took in the Snohomish County Lawsuit." CP 72. Nevertheless, because "Kilo Six's voting rights were not in dispute in the Snohomish County Lawsuit," the court concluded that it would allow Everett Hangar to advance a contrary theory in King County. CP 73.

On September 11, 2017 Kilo Six filed a timely notice of appeal. CP 85.

3. Court of Appeals Opinion

The Court of Appeals issued its decision on February 5, 2019, affirming the trial court's finding that Lot 13 was not substantially complete under Section 9.1 of the CC&Rs and finding that the trial court did not abuse its discretion by declining to apply the equitable doctrine of judicial estoppel to bar Everett Hangar's challenge. Op. at 1. The Court

of Appeals acknowledged that "[s]ubstantial evidence supports the trial court finding that Everett Hangar asserted an inconsistent position in the Snohomish County Litigation." *Id.* at 7. Nonetheless, The Court of Appeals rejected Kilo Six's argument because "the record does not show that the inconsistency was material to the outcome of the Snohomish County lawsuit or that Kilo Six relied on Everett Hangar's inconsistent position to its detriment." *Id.* at 8. The Court of Appeals arrived at this conclusion despite noting that "[j]udicial estoppel does not require that the previously accepted position be material to the outcome in the later proceeding." Op. at 8. The Court of Appeals went on to conclude that it was appropriate for the trial court not to apply judicial estoppel because Kilo Six also took a position in the Snohomish County lawsuit inconsistent with their position in the instant litigation. On March 19, 2019 the Court of Appeals summarily denied Kilo Six's Motion for Reconsideration. A-23.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case meets the criteria of RAP 13.4(b)(1), (2), and (4), either of which compels granting review. Judicial estoppel is an equitable doctrine, which protects the integrity of the judicial process, and is a matter of "substantial public interest." RAP 13.4(b)(4). The Court of Appeals' interpretation of judicial estoppel—that whether a litigant can be

estopped, primarily depends on the materiality of his or her inconsistent positions taken—carves a new stream of law, which conflicts with this Court's and the Court of Appeals' interpretation of judicial estoppel.

This case lends itself as the ideal vehicle to correct the course of the Court of Appeals' interpretation of judicial estoppel and bring it in line with long-standing precedent, because (1) at every stage of litigation each court has recognized that the positions taken by Everett Hangar in the Snohomish County litigation and in the King County litigation are diametrically opposite; (2) each court has recognized that Snohomish County Superior court accepted Everett Hangar's first position that Kilo Six "controlled" the Association; and (3) Everett Hangar prevailed in both judicial proceedings, using contradictory legal theories.

A. The Court of Appeals' Interpretation of the Judicial Estoppel Doctrine Conflicts With a Decision of the Supreme Court

The Court of Appeals' decision dramatically changes the law governing judicial estoppel, and expressly conflicts with this Court's well-established authority regarding how judicial estoppel is applied. Should the Court of Appeals' decision stand, it will no longer be clear when the doctrine applies, how it applies, or whether it even matters any more.

Years ago, this Court outlined three core factors to guide a trial court's application of judicial estoppel: (1) whether "a party's later

position" is "clearly inconsistent with its earlier position"; (2) whether "judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13, 15 (2007). This Court noted that the core factors are not exhaustive and that the trial court may consider additional factors in reaching its determination. *Id*. However, this Court also explicitly found that "[a]cquiescence in the findings of a court is a ground for an equitable estoppel." *Witzel v. Tena*, 48 Wn.2d 628, 632, 295 P.2d 1115, 1118 (1956) (citation omitted).

The trial court and the Court of Appeals both found the Snohomish County Superior Court "acquiesced" to Everett Hangar's inconsistent position that Kilo Six "controlled" the Association. CP 72; Op. at 7. Thus, the Court of Appeals found that the first factor, taking inconsistent positions in two legal proceedings, was met. Op. at 6-7. However, when analyzing the second factor, the Court of Appeals found that the Snohomish County Superior Court's acceptance of Everett Hangar's inconsistent position did not create a perception that either the Snohomish County court or the trial court in this litigation was misled, because that

position was immaterial to the Snohomish County lawsuit and Kilo Six did not rely on Everett Hangar's inconsistent position to its detriment. *Id.* at 7. This Court's precedent makes clear that acquiescence of the findings alone is a ground for equitable estoppel. Washington case law does not support bending the judicial estoppel doctrine with a materiality analysis when that acquiescence is already found. In effect, the Court of Appeals has created a new judicial estoppel test altogether.

Ultimately Everett Hangar advanced a theory in the Snohomish County Superior court inconsistent with the one it advanced in the instant litigation and it is undisputed that the Snohomish County Superior Court accepted that theory. Under this Court's precedent, the court acceptance was sufficient to show it was misled and the second factor was met.

B. The Court of Appeals' Interpretation of the Judicial Estoppel Doctrine Also Conflicts With Another Court of Appeals Decision

The Court of Appeals' opinion also conflicts with the decisions it has published concerning the application of the judicial estoppel doctrine. The Court of Appeals has unequivocally stated that "[j]udicial estoppel is an equitable doctrine that *precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position*." *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 224–25, 108 P.3d

147, 148 (2005) (emphasis added) (citing *Johnson v. Si–Cor, Inc.*, 107 Wash.App. 902, 906, 28 P.3d 832 (2001); *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778, 782 (9th Cir.2001)).

The Court of Appeals follows this Court and states that the second judicial estoppel factor asks "whether judicial acceptance of the inconsistent position in the subsequent proceeding creates a perception that either the first or second court was misled." *Harris v. Fortin*, 183 Wn. App. 522, 530, 333 P.3d 556 (2014). In *Harris*, the Court of Appeals reasoned that this factor was met where the prior court "implicitly accepted" a position that is now inconsistent with the litigant's position in a later action. *Id*. Like this Court, the Court of Appeals does not deem it necessary that the previously-accepted position be material to the outcome in the other proceeding.

When the Court of Appeals analyzed the second factor and justified focusing on materiality because "the materiality of the position can affect whether the inconsistency creates the perception that either court was misled," despite finding that that the "Snohomish County Superior Court did, in fact, accept Everett Hangar's inconsistent position," the Court of Appeals also contravened its own long-standing interpretation of the judicial estoppel doctrine. Under *Harris*, the Snohomish court's

acceptance was sufficient to show it was misled and the second factor was met. 183 Wn. App. at 530.

When considering the third judicial estoppel factor, the Court of Appeals reasoned that "not applying judicial estoppel to bar Everett Hangar's claims would not provide either party an unfair advantage or cause either party an unfair detriment." Op. at 10. But that reasoning expressly contradicts the Court of Appeals' previous ruling in *Cunningham*, in which it held that judicial estoppel applies if "a litigant's prior inconsistent position benefited the litigant or was accepted by the court. Either of these two results permits the application of judicial estoppel. Both are not required." *Cunningham*, 126 Wn. App. at 230-31.

As previously discussed, it is undisputed that the Snohomish County Superior Court accepted Everett Hangar's prior inconsistent theory. Therefore, under *Cunningham*, judicial estoppel should have been applied and prevented Everett Hangar from prevailing on a theory incompatible with the one it advanced. 126 Wn. App. at 230-31.

C. The Issue of Judicial Estoppel Raised by this Case Is of Substantial Public Interest That Should Be Determined by this Court

Judicial estoppel is an equitable doctrine of "substantial public importance." RAP 13.4(b)(4). "The purpose of the rule is to protect the integrity of the judicial process." *New Hampshire v. Maine*, 532 U.S.

742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). The doctrine's purpose is also "to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and . . . waste of time." *Cunningham v. Reliable Concrete Pumping*, Inc., 126 Wn. App. 222, 225, 108 P.3d 147, 148 (2005) (quoting *Seattle–First Nat'l Bank v. Marshall*, 31 Wash.App. 339, 343, 641 P.2d 1194 (1982)).

Review of this decision would provide clarity on a doctrine, which acts a powerful safeguard for judicial integrity. In this case, the Court of Appeals' interpretation of this doctrine has shifted course towards a heavy reliance on materiality, which is unsupported by precedent from this Court and the Court of Appeals.

VI. CONCLUSION

For the foregoing reasons, Kilo Six requests that the Court grant this petition for review and hold that the Court of Appeals erroneously applied the judicial estoppel doctrine,

RESPECTFULLY SUBMITTED this 17th day of April, 2019.

By: *David A. Perez*

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CERTIFICATE OF SERVICE

On April 17, 2019, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Warren J. Rheaume John Goldmark Conner Peretti Thomas J. Wyrich Davis Wright Tremaine LLP 920 Fifth Avenue, Suite 3300 Seattle, WA 98104 Counsel for Respondent	X Via the Appellate Court Web Portal ___ Via hand delivery ___ Via U.S. Mail, 1st Class, Postage Prepaid ___ Via Overnight Delivery ___ Via Facsimile X Via Email

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

EXECUTED at Seattle, Washington, on April 17, 2019.

June Starr

June Starr

No.

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. No. 77365-8)

KILO 6 OWNERS ASSOCIATION AND KILO SIX, LLC,

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; and KILO SIX, LLC, a Washington limited liability company, Appellants, v. EVERETT HANGAR LLC, a Washington limited liability company, Respondent.	No. 77365-8-I DIVISION ONE UNPUBLISHED OPINION FILED: February 5, 2019

LEACH, J. — Kilo 6 Owners Association (the Association) and Kilo Six LLC (collectively Kilo) appeal the trial court's decision that Kilo Six's certification of lot 13 as "substantially complete" under the covenants, conditions, and restrictions (the CC&Rs) governing the Association is null and void. Kilo contends that judicial estoppel bars Everett Hangar's challenge to this certification. Kilo also claims that the trial court's interpretation of "substantially complete" conflicts with the express terms of the CC&Rs and with the parties' course of performance.

First, because Everett Hangar and Kilo both adopted positions in their earlier litigation inconsistent with their current positions, the trial court did not abuse its discretion by declining to apply the equitable doctrine of judicial estoppel to bar Everett Hangar's challenge. Second, the trial court gave the

words "complete" and "completion" their ordinary, usual, and popular meaning by adopting their dictionary definitions and adopted a common industry definition of "substantial completion." Using these definitions, the trial court did not err in finding that lot 13 was not substantially complete. We affirm.

BACKGROUND

Snohomish County (County) owns neighboring lots 11, 12, and 13 at the Snohomish County Airport (Paine Field). Historic Hangars LLC leases lot 11 and Kilo Six LLC leases lot 13. The Historic Flight Foundation (Foundation), a nonprofit entity that runs an aviation museum, subleases lot 11 from Historic Hangars. John Sessions owns all three of these entities. Dean Weidner owns Everett Hangar LLC, which leases lot 12. Historic Hangars and Everett Hangar own the hangars on lots 11 and 12, respectively. Lot 13 remains empty. Kilo Six has used lot 13 periodically for Paine Field and Foundation events and as parking for aircraft and vehicles.

To facilitate separate ownership and operation of the three lots, Kilo Six and the County executed the CC&Rs. The CC&Rs created the Association, which, in turn, enforces them. The Association has three members, Historic Hangars, Everett Hangar, and Kilo Six, each of which has a leasehold interest in one of the three lots. The CC&Rs assign voting rights to each member. These are equal to that member's "Percentage Interest" of the "Property" comprised of

lots 11, 12, and 13. Historic Hangars has 20 percent of the Association's voting rights, Everett Hangar has 34 percent, and Kilo Six has 46 percent. Section 9.1 of the CC&Rs limits voting eligibility:

> The Association is hereby authorized to levy assessments against each Lot for Association expenses as the Board may specifically authorize from time to time. There shall be three types of assessments: (a) Base Assessments to fund Common Expenses for the general benefit of all Lots, allocated in accordance with the respective Percentage Interests of the Lots. . . . [H]owever, no Base Assessments shall be levied against any Lot unless and until Declarant has certified to the Board that development of such Lot is substantially complete, and such Lot's Percentage Interest of Common Assessments shall, until such time, be allocated among the Lots for which such certification of substantial completion has been made by Declarant, pro rata in accordance with such Lots' relative Percentage Interests, and until such certification of substantial completion the Owner shall be a Member, but shall not be entitled to vote on Association matters.

(Emphasis added.) Kilo Six is the "Declarant" that has the authority to certify a lot as substantially complete.

In 2014, Everett Hangar sued Kilo Six, the Association, Historic Hangars, and the Foundation in Snohomish County Superior Court (Snohomish County lawsuit), claiming they violated multiple provisions of the CC&Rs. After a bench trial, the trial court awarded Everett Hangar some injunctive relief. But the court denied Everett Hangar's request to erect a fence around the lot 12 parking lot.

After the trial, Everett Hangar asked that the Association hold a membership meeting to vote on its proposal to build a perimeter fence. The day before this meeting, Everett Hangar e-mailed Sessions, stating that it wanted the

Association to apportion the common expenses previously allocated only to lots 11 and 12 to all three lots in the "same lot percentage allocation as the rest of the expenses." Sessions rejected this request. He stated that because lot 13 was undeveloped, Kilo Six should not be required to share in costs for services that it did not use, including landscape maintenance, parking maintenance, and garbage collection.

On January 12, 2016, during the meeting, Everett Hangar asserted that lot 13 was ineligible to vote on Association matters because Kilo Six had not certified it as substantially complete under section 9.1 of the CC&Rs. Kilo Six had not declared any of the lots substantially complete. Sessions adjourned the meeting without a vote on the fence proposal. On January 21, Sessions sent a letter to the Association board members, certifying lots 11, 12, and 13 as substantially complete under section 9.1 of the CC&Rs. Everett Hangar responded that the certificate was ineffective because Kilo Six had not yet built a hangar on lot 13.

Kilo then filed this lawsuit, asking the court to declare that lot 13 is eligible to vote on Association matters. Everett Hangar filed a counterclaim, asking the court to declare that Kilo Six is not eligible to vote on Association matters until the development of lot 13 is substantially complete as required by the CC&Rs. Everett Hangar also asserted that Kilo Six violated its duty of good faith and fair

dealing by issuing the certificate of substantial completion for lot 13.

After a bench trial, the trial court (1) denied plaintiffs' request for declaratory relief, (2) declared the Association's lot 13 certification null and void because lot 13 is not substantially complete, (3) concluded that judicial estoppel did not bar Everett Hangar from challenging Kilo Six's right to vote, (4) held that the Association breached the duty of good faith and fair dealing it owed to Everett Hangar by certifying lot 13's development as substantially complete, and (5) awarded Everett Hangar attorney fees. Kilo appeals.

ANALYSIS

Judicial Estoppel

First, Kilo claims that the trial court abused its discretion by not applying judicial estoppel to bar Everett Hangar's challenge to Kilo Six's right to vote. We disagree.

The equitable doctrine of "[j]udicial estoppel 'precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.' It is intended to protect the integrity of the courts but is not designed to protect litigants."[1] Courts examine three factors to decide whether judicial estoppel applies: (1) did a party assert a position inconsistent with an earlier one, (2) would acceptance of the position create the

[1] Arp v. Riley, 192 Wn. App. 85, 91, 366 P.3d 946 (2015) (internal quotation marks omitted) (quoting Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007)).

perception that a party misled a court in either proceeding, and (3) would the party asserting the inconsistent position receive an unfair advantage or impose an unfair detriment.[2] But these factors are not an "exhaustive formula."[3] "[C]ourts must apply judicial estoppel at their own discretion; they are not bound to apply it but rather must determine on a case-by-case basis if applying the doctrine is appropriate."[4] This court reviews a trial court's decision to apply judicial estoppel for abuse of discretion.[5] A trial court abuses its discretion when it bases its decision on untenable grounds or reasons.[6]

A. Inconsistent Positions

Kilo asserts that Everett Hangar's claim that Kilo Six is ineligible to vote is inconsistent with the position that it asserted throughout the Snohomish County lawsuit. We agree.

In the Snohomish County lawsuit, Everett Hangar sought injunctive relief, claiming that the Association, Kilo Six, Historic Hangars, the Foundation, and Sessions violated an easement and safety and security provisions of the CC&Rs. Everett Hangar asserted in its amended complaint, at summary judgment, and at trial that Sessions controlled two thirds of the Association's voting interest. Everett Hangar, in its opening statement at trial, stated,

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[2] Arp, 192 Wn. App. at 92.
[3] Arp, 192 Wn. App. at 92.
[4] Arp, 192 Wn. App. at 92.
[5] Arp, 192 Wn. App. at 91.
[6] Harris v. Fortin, 183 Wn. App. 522, 527, 333 P.3d 556 (2014).

> Mr. Sessions, through the various defendant entities he controls, owns and exercises complete domination—complete dominion rather over Lot 11 and Lot 13 and controls the owners association that manages all the lots. That is not in controversy. Documents are set up to give him control over the association, because voting rights are based on the square footage of the leasehold, and the combination of the Lot 11 leasehold, which is the smallest of the three and Lot 13 vacant lot adds up to 66 percent. So he has complete control over the owners association, and that will become significant in a moment.

(Emphasis added.)

Here, Everett Hangar claims that because lot 13 is not substantially complete, Kilo Six does not have the right to vote lot 13's percentage interest on Association matters. As a result, Sessions does not have the controlling votes on the Association's board. This position is inconsistent with its previous position that Sessions controlled the Association. Substantial evidence supports the trial court finding that Everett Hangar asserted an inconsistent position in the Snohomish County litigation.

B. Reliance

Kilo next claims that the Snohomish County Superior Court's acceptance of Everett Hangar's inconsistent position creates a perception that either the Snohomish County court or the trial court in this litigation was misled. We disagree.

The Snohomish County Superior Court did, in fact, accept Everett Hangar's inconsistent position. The court concluded that "Mr. Sessions has the

controlling votes on [the Association's] Board, by virtue of the number of shares he holds for Lots 11 and 13. Accordingly, the Court finds that Mr. Sessions is functionally in control of all four organizations." But, here, the trial court found that Everett Hangar's inconsistent position does not create the perception that either court was misled because the record does not show that the inconsistency was material to the outcome of the Snohomish County lawsuit or that Kilo Six relied on Everett Hangar's inconsistent position to its detriment. Judicial estoppel does not require that the previously accepted position be material to the outcome in the later proceeding. But the materiality of the position can affect whether the inconsistency creates the perception that either court was misled.

The parties did not dispute Kilo Six's voting rights in the Snohomish County lawsuit. In response to Everett Hangar's change of venue request in this litigation, Kilo Six stated, "The [Snohomish County] trial had nothing to do with the parties' voting rights in the Association." In addition, the Snohomish County Superior Court entered the amended permanent injunction against only Historic Hangars and the Foundation based on violations of the easement and the safety and security provisions of the CC&Rs. The court did not enjoin conduct by the Association or Kilo Six. Because the earlier lawsuit was unrelated to Kilo Six's voting rights and the trial court in this lawsuit reviewed de novo whether Kilo Six had the right to vote lot 13's percentage interest, substantial evidence supports

its finding that Everett Hangar's inconsistent position did not create the perception that either the Snohomish County Superior Court or the trial court was misled.

C. Equity

Kilo also claims that Everett Hangar's inconsistent position benefited it. We disagree.

Kilo asserts that Everett Hangar will receive an unfair benefit if this court affirms the trial court's decision because Kilo Six cannot exercise lot 13's voting percentage interest. They claim that this judgment would not have been available to Everett Hangar in the Snohomish County lawsuit in which it successfully asserted that Sessions controlled the Association's votes.

But, consistent with the trial court's finding, Kilo also took a position in the Snohomish County lawsuit that is inconsistent with their position here. There, the parties did not contest that lot 13 remained undeveloped and "vacant."[7] Similarly, in response to the Association's 2016 proposed budget, Everett Hangar e-mailed Sessions, stating that it would like the Association to allocate expenses previously assigned to only lots 11 and 12 to all three lots "in the same lot percentage allocation as the rest of the expenses" because "so much time has passed and . . . Lot [13] . . . has not yet been constructed." Sessions responded

[7] Everett Hangar, LLC v. Kilo 6 Owners Ass'n, No. 73504-7-I, slip op. at 3 (Wash. Ct. App. Aug. 8, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/735047.pdf.

that because lot 13 remained undeveloped, it did not require the same maintenance as lots 11 and 12. But "[w]hen developed, it should participate pro rata as it will cause all of [the maintenance] expenses to increase." By contrast, just 10 days after this e-mail exchange, and after Everett Hangar asserted that lot 13 was ineligible to vote on Association matters because Kilo Six had not certified lot 13 as substantially complete, Kilo Six certified lot 13 as substantially complete. Similar to the trial court, we conclude that because both parties have taken inconsistent positions, not applying judicial estoppel to bar Everett Hangar's claims would not provide either party an unfair advantage or cause either party an unfair detriment.

The trial court did not abuse its discretion by deciding not to apply judicial estoppel to bar Everett Hangar's claim.

The CC&Rs

Kilo next challenges the trial court finding that Kilo Six abused its discretion when it certified lot 13 as "substantially complete." We disagree.

To interpret a restrictive covenant, a court looks to the intent of the drafters.[8] To determine the intent of the contracting parties, a court applies contract interpretation rules.[9] This means it "view[s] the contract as a whole, its subject matter and objective, the circumstances surrounding its making, the

[8] Wimberly v. Caravello, 136 Wn. App. 327, 336, 149 P.3d 402 (2006).
[9] Wimberly, 136 Wn. App. at 336.

subsequent acts and conduct of the parties, and the reasonableness of the interpretations advocated by the parties."[10] A court "generally give[s] words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent."[11] A court may consider extrinsic evidence about the circumstances under which the parties formed the contract to help it decide the parties' intent.[12]

A. Standard of Review

An appellate court reviews challenged findings of fact for substantial evidence.[13] Substantial evidence requires "a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true."[14] This court reviews questions of law de novo.[15] "The parties' intentions [in entering into a contract] are questions of fact, while the legal consequences of such intentions are questions of law."[16] We review de novo mixed questions of law and fact when the parties do not dispute the facts.[17]

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[10] Wimberly, 136 Wn. App. at 336.
[11] Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005).
[12] Wimberly, 136 Wn. App. at 336.
[13] Pardee v. Jolly, 163 Wn.2d 558, 566, 182 P.3d 967 (2008).
[14] Pardee, 163 Wn.2d at 566.
[15] Pardee, 163 Wn.2d at 566.
[16] Pardee, 163 Wn.2d at 566.
[17] Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008).

Here, Everett Hangar asserts that this court should use the substantial evidence standard because Kilo disputes some factual issues. Because Kilo does not dispute the facts underlying the parties' intent or course of performance and this court reviews mixed questions of law and fact de novo, we use the de novo standard.

B. The Plain Language of the CC&Rs

First, Kilo asserts that the trial court's use of a statutory definition of "substantial completion" contradicts express terms in the CC&Rs. We reject this claim.

The CC&Rs do not define "substantially complete." The trial court relied on the dictionary definitions of "completion" and "complete." "'Completion' is defined as the 'act or action of completing, becoming complete, or making complete.'" "'Complete' is, in turn, defined as 'possessing all necessary parts, items, components, or elements'; 'brought to an end or to a final or intended condition'; and 'fully realized' or 'carried to the ultimate.'"[18] Because the trial court found that "substantial completion" was a term commonly used in the construction industry, it also relied on the definition from RCW 4.16.310, a statute about claims arising from construction. RCW 4.16.310 defines "substantial completion" as "the state of completion reached when an improvement upon real

[18] Mattingly v. Palmer Ridge Homes LLC, 157 Wn. App. 376, 394, 238 P.3d 505 (2010) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 465 (2002)).

property may be used or occupied for its intended use." Applying these definitions to section 9.1 of the CC&Rs, the trial court found that a "Lot," as defined in the CC&Rs, is "substantially complete when the improvements have been completed sufficient to allow the property to be occupied for its intended use."

The trial court viewed the CC&Rs holistically and concluded that the circumstances surrounding the drafting of the CC&Rs, including evidence about why the parties incorporated "substantially complete" into the CC&Rs, support using the ordinary and usual meaning of "substantially complete." The court also concluded that witness testimony, the lot 13 lease, and other governing documents discussed below also show that lot 13 is substantially complete only with a hangar.

First, the trial court relied on the testimony of Roger Collins, cofounder and former comanager of Kilo Six. Collins testified that he asked Sessions to add the "substantially complete" language to section 9.1 when Sessions stated that he did not believe that lot 13 should have to pay for certain base assessments as long as it remained undeveloped. Collins told Sessions that because the project was undeveloped, Sessions should be free from paying dues, but, consequently, Sessions could not vote those shares on Association business. Sessions did not dispute this testimony.

Collins also testified that he and Sessions leased the lots from Paine Field to build three separate hangars, including one on lot 13. He stated that at no point during his tenure as coowner and comanager of Kilo Six did the development of lot 13 contemplate a lot without a hangar on it. And he stated that Everett Hangar purchased the lot 12 hangar, in part, based on the promised construction of a hangar on lot 13. Collins testified that as it sits today, lot 13 is not substantially complete.

Additional witness testimony and the lot 13 lease also show that the parties intended lot 13 to be substantially complete only with a hangar. Weidner testified that Kilo Six repeatedly represented to him that lot 13 would be developed with a hangar. Similarly, Sessions and the witnesses for Paine Field testified that the lot 13 lease requires Kilo Six to build a hangar on it, and Paine Field expects Sessions to do so. Although the lot 13 lease gives Kilo Six the right to decide when to construct the hangar, it requires Kilo Six to build a hangar on the lot when economically feasible to do so.

In addition, a number of other governing documents show that Kilo Six intended lot 13 to have a hangar:

1. The original lease between Kilo Six and the County shows a hangar on what is now lot 13.

2. The purchase and sale agreement between Weidner and Kilo 6 for Weidner's purchase of the lot 12 hangar states, "[Kilo 6] intends to improve the leased property so that there will be three separate hangars on the leased property."

3. The CC&Rs state, "Because of the nature of the anticipated use of the Property as an aircraft hangar facility for working aircraft, safety and security are of particular concern."

4. Kilo Six's amended operating agreement states, "[Kilo Six] shall continue to pursue efforts to construct an aircraft hangar on Lot 13, and thereafter shall operate or lease Lot 13 and the hangar constructed thereon, or shall sell and transfer such Lot 13 Lease and hangar."

Kilo contends that the trial court's interpretation of "substantially complete" conflicts with two express CC&R provisions. First, Kilo notes that the CC&Rs do not say that a building must be constructed on lot 13 for it to be substantially complete and do not limit the Association's sole discretion to certify lot 13 as substantially complete. But the CC&Rs do limit the Association's discretion to certify a lot as substantially complete until the lot is actually substantially complete. And the CC&Rs do not define "substantially complete." So the trial court followed contract interpretation principles to "define substantially complete." It adopted the phrase's ordinary meaning by relying on both the dictionary

definitions of "completion" and "complete" and the common industry definition of "substantial completion." We find Kilo's claim of conflict unpersuasive.

Second, Kilo maintains that the CC&Rs state that the Association need certify only a lot, not a building, as substantially complete. The CC&Rs define "Lot" as the "ground leasehold interest in such Lot." They define "Building" as "[a]ny building, aircraft hangar, storage shed, or other improvement on the Property that has one or more walls and a roof or overhead cover." Section 9.1 states, "[N]o Base Assessments shall be levied against any Lot unless and until Declarant has certified to the Board that development of such Lot is substantially complete." (Emphasis added.) Kilo asserts that the CC&Rs assignment of different definitions to "Lot" and "Building" means that the Association need certify only a Lot as substantially complete to levy base assessments on it and that it need not have a hangar on it to qualify for this certification. But, again, because the CC&Rs do not define "substantially complete" and the provisions that Kilo relies on do not establish what the drafters intended it to mean, this argument is unpersuasive.

Kilo does not show that the definitions the trial court relied on or the court's finding that lot 13 is not substantially complete conflict with any provisions of the CC&Rs.

C. The Parties' Course of Performance

Kilo also asserts that the trial court misapplied the parties' course of performance doctrine. We disagree.

A court may explain or supplement contractual terms with the parties' course of dealing, usage of trade, or course of performance.[19] The parties' "'course of performance' refers to '[a] sequence of previous performance by either party after an agreement has been entered into, when a contract involves repeated occasions for performance.'"[20] "[T]he express terms of an agreement and any applicable course of performance . . . must be construed whenever reasonable as consistent with each other."[21] If unreasonable, "[e]xpress terms prevail over course of performance."[22]

The trial court concluded that the parties' course of performance did not support Kilo Six's claim that all members accepted lot 13 as substantially complete or that Kilo Six has the right to vote. Kilo claims that the trial court improperly disregarded the parties' course of performance. It notes that lot 13 paid some base assessments that it would not have done if the parties did not consider it substantially complete.

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[19] Morgan v. Stokely-Van Camp, Inc., 34 Wn. App. 801, 805, 663 P.2d 1384 (1983).

[20] Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County, 164 Wn. App. 641, 661, 266 P.3d 229 (2011) (alteration in original) (quoting BLACK'S LAW DICTIONARY 405 (9th ed. 2009)).

[21] RCW 62A.1-303(e).

[22] RCW 62A.1-303(e)(1).

Kilo relies on Everett Hangar's answers to certain allegations in their complaint to show that Everett Hangar admitted that Kilo Six paid some base assessments and not others with Everett Hangar's permission. Kilo alleged in their complaint,

> Since the Association's inception, each Member has paid Association base assessments. With Everett Hangar's consent, Kilo Six paid Association base assessments only for services Kilo Six consumed, such as mowing and irrigation. With Everett Hangar's consent, Kilo Six did not contribute to assessments for other services, such as landscaping and garbage collection, that were not consumed by Kilo Six. This was true even under Association budgets originally prepared and proposed by Everett Hangar.

In Everett Hangar's answer, it "admit[ted] the allegations in this paragraph."

Kilo also relies on Everett Hangar's answer that to the allegation that

> Everett Hangar took the position on January 12, 2016 that the development of Lot 13—which was originally intended to include an aircraft hangar for Historic Flight Foundation—is not substantially complete, and that Lot 13's Owner, Kilo Six, therefore cannot vote on Association matters pursuant to Section 9.1 of the CC&Rs, even though Kilo Six had been charged and had paid base assessments since the Association's inception.

Everett Hangar responded, "[It] admits the allegations of this paragraph, and further responds that it was Kilo Six who, at the January 12, 2016 meeting, stated and confirmed that development of Lot 13 was not substantially complete."

Further, Kilo alleged in their complaint that "[a]t the January 12, 2016 meeting, Everett Hangar argued that Kilo Six was entitled to a refund of all

Association assessments paid by Kilo Six to date." Kilo relies on Everett Hangar's response:

> [It] admits that, at the January 12, 2016 meeting, it offered to vote in favor of refunding the Association base assessments paid for [by] undeveloped Lot 13 provided that Kilo Six abide by the other consequences of its failure to develop the lot pursuant to Section 9.1 of the CC&Rs. Everett Hangar otherwise denies the allegations in this paragraph.

Everett Hangar's responses show that the Association charged lot 13 some base assessments. But consistent with the trial court's reasoning, the parties' course of performance does not clarify whether the parties' believed that lot 13 was substantially complete; it does not support Kilo Six's position that the parties' course of performance establishes that the parties treated lot 13 as substantially complete for two reasons.

First, substantial evidence supports the trial court finding that the parties' course of performance was inconsistent with the clear and express terms of the CC&Rs. Although whenever possible the express terms of the agreement and the parties' course of performance should be construed as consistent with one another, this is not possible here. The parties agree that Kilo Six first certified lots 11, 12, and 13 as substantially complete on January 21, 2016, after Everett Hangar challenged lot 13's voting eligibility. Even so, as discussed above, the parties annually assessed at least some base assessments to the owners of each lot. This conduct conflicts with section 9.1. Until Kilo Six certified any lot to

be substantially complete, the Association should not have assessed any base assessments against that lot. When the express terms of the CC&Rs and the parties' course of performance cannot be reconciled, the express terms prevail. And, as discussed above, based on the dictionary and common industry definitions of "substantially complete," lot 13 was not substantially complete.

Second, the trial court noted that although lot 13 paid some of the maintenance costs levied against the lots, it refused to pay all of the base assessments that lots 11 and 12 paid. As discussed above, in January 2016, Kilo Six refused to pay for a number of base assessments, including landscape maintenance, parking lot maintenance, storm drain maintenance, and garbage costs. And that same month, Everett Hangar offered to vote in favor of refunding lot 13 the base assessments that it had paid. Because the parties' course of performance shows that lot 13 paid only some base assessments and Everett Hangar was in favor of lot 13 paying more or less base assessments at different periods, the trial court did not err in concluding that the parties' course of performance does not show that all members considered lot 13 substantially complete.

D. The Duty of Good Faith and Fair Dealing

Last, Kilo challenges the trial court decision that Kilo Six violated its duty of good faith and fair dealing by certifying lot 13 as substantially complete.

"[W]hen a party has discretion over a future contract term, it has an implied duty of good faith and fair dealing in setting and performing that contractual term."[23] This court reviews a breach of contract finding, including the implied duty of good faith and fair dealing, for substantial evidence.[24]

Kilo challenges the trial court's conclusion that Kilo Six violated its duty of good faith and fair dealing on one ground—that the trial court erred in concluding that lot 13 must have a hangar to be substantially complete. As discussed above, we conclude that the trial court did not err in deciding that lot 13 is not substantially complete without a hangar. Accordingly, we reject Kilo's claim.

Attorney Fees

Everett Hangar requests attorney fees on appeal under the CC&Rs and RAP 18.1. RAP 18.1 allows a reviewing court to award a party reasonable attorney fees if applicable law grants a party the right to recover them. Here, the CC&Rs state, "In any action to enforce the provisions of this Declaration or Association rules, the prevailing party shall be entitled to recover all costs, including, without limitation, reasonable attorneys' fees and court costs, reasonably incurred in such action." Because this lawsuit concerns whether lot 13 is substantially complete under the CC&Rs, we award Everett Hanger

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[23] Rekhter v. Dep't of Soc. & Health Servs., 180 Wn.2d 102, 115, 323 P.3d 1036 (2014).

[24] Frank Coluccio Constr. Co. v. King County, 136 Wn. App. 751, 762, 764, 150 P.3d 1147 (2007).

attorney fees on appeal as the substantially prevailing party, subject to its compliance with RAP 18.1(d).

CONCLUSION

Judicial estoppel does not bar Everett Hangar's challenge to Kilo Six's voting. The trial court did not err in finding that lot 13 is not "substantially complete" based on the ordinary and usual meaning of the phrase and the parties' intended use of lot 13. We affirm.

Leach, J.

WE CONCUR:

Dwyer, J.

Applewick, C.J.

The Court of Appeals
of the
State of Washington

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CASE #: 77365-8-I

Kilo 6 Owners Assoc, et ano., Apps v. Everett Hangar LLC, Resp

Counsel:

Enclosed please find a copy of the Order Denying Motion For Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson

Court Administrator/Clerk

LAM

Enclosure

c: Reporter of Decisions

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; and KILO SIX, LLC, a Washington limited liability company, Appellants, v. EVERETT HANGAR LLC, a Washington limited liability company, Respondent.	No. 77365-8-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, Kiilo 6 Owners Association and Kilo Six, LLC, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Judge

PERKINSCOIE

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