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No. 70746-9-I

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

GEORGE LIGHTNER,

Appellant,

v.

CHAD SHOEMAKER and "JANE DOE" SHOEMAKER, husband and wife and the marital community comprised thereof,

Respondents.

BRIEF OF APPELLANT

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INTRODUCTION

This is a homeowner's action seeking an injunction enforcing the Birch Bay Village covenants restricting the height of trees to protect the beautiful views of the Village, its marina, and Birch Bay. Numerous provisions in the covenants – when their plain language is properly interpreted – are designed to protect the desirability of this community, first and foremost by protecting its views. Indeed, a 2010 regulation adopted by the community's Architectural Control and Maintenance Committee specifically requires that "owners should keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe on neighbors[']views." *See* App. C.

But the trial court found the covenants "unclear and ambiguous," ruling that only one paragraph in the entire covenants (8(h) in App. A) was relevant and that a sentence fragment in that paragraph reflected the drafter's intent for the entire covenants. *See* App. B (FF 21 & 22; CL 3-6). This is not a legally permissible covenant interpretation, failing to place special emphasis on an interpretation that protects the homeowners' collective interests.

The trial judge said that he would like to give Lightner relief, if only he could. 7/26/12 RP 15-16. Legally, he could and should. This Court should reverse, remand, and award Lightner fees on appeal.

ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in concluding that the clear and unambiguous covenants do not apply to certain trees, where the covenant unequivocally requires that "No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be . . . maintained on any of said property." CP 129.[1]

2. The trial court erred in entering its Finding of Fact (FF) 15, which is really an erroneous Conclusion of Law (CL) that the "terms of the Covenant are unclear and ambiguous." CP 125.

3. The trial court erred entering its FF 16, which is really an erroneous CL that the "clear intent" of the covenants is "to preserve natural growth" and not to protect views. *Id.*

4. The trial court erred in entering its FF 21, which is really an erroneous CL construing the covenants. CP 126-28.

5. The trial court erred in entering its FF 22, which is really an erroneous CL that certain trees "are not subject to the six-foot limitation of the Covenants." CP 128.

6. The trial court erred in entering its FF 24, which is really an erroneous CL that neither party substantially prevailed. *Id.*

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[1] The Findings & Conclusions (CP 122-32) are attached as Appendix B.

7. The trial court erred as a matter of law in concluding that "Paragraph 8(h) of the Covenants is the only paragraph that is relevant to this case." CP 128. It further erred in construing the covenant in CL 3 a. through g. CP 128-31.

8. The trial court erred in entering CL 4, 5, 6 & 10. CP 131.

9. The trial court erred in not reaching injunctive relief.

10. The trial court erred in entering its Judgment based on the above erroneous legal conclusions.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err as a matter of law in determining that the covenants are unclear and ambiguous?

2. Did the trial court err in interpreting the entire covenant by looking solely at one sentence fragment, or even at one paragraph?

3. Taking all of the relevant provisions and circumstances into account, did the trial court err as a matter of law in determining that the intent of the drafter was solely to preserve the natural growth?

4. Did the trial court err in failing to reach Lightner's request for injunctive relief?

5. Should this Court determine that Lightner has substantially prevailed and is entitled to reasonable attorney fees here and below?

STATEMENT OF THE CASE

A. When Lightner bought view property for his future retirement home in Birch Bay in 1987, he insisted on having view covenants, self-imposed regulations that prior owners had always respected.

Birch Bay is an unincorporated urban growth area near Blaine, in Whatcom County. The bay is just six miles south of the Canadian border, and connects to the Straights of Georgia. It has a beautiful marina, and the largest tide flat in Washington State.

George Lightner bought unrestricted view property in Birch Bay in 1987, intending to retire there. CP 124 (FF 9);[2] RP 56; Ex 1. He built a home (he was the general contractor) in 2002. RP 56. There still were no trees blocking his views at that time. Ex 2 B.

From the outset, Lightner had insisted on having view covenants. RP 57; CP 124 (FF 9). The Birch Bay Village covenants of 1966 contain several provisions pertinent here. Ex 4. First, they run with the land for the purpose of maintaining its desirability:

> [The covenants] . . . shall constitute covenants running with the land, for the purpose of maintaining the desirability of said land . . . .

Id. at 2. Second, they reserve the Owner's right to enter upon any lot, block, tract, or parcel . . . to trim, cut and remove . . . trees . . . ."

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[2] Unchallenged Findings are verities here. *See, e.g.*, ***Humphrey Indus., Ltd. v. Clay St. Assocs.***, 176 Wn.2d 662, 675, 295 P.3d 231 (2013).

Id. at 3.[3] Third, they established an Architectural Control and Maintenance committee ("ACC") to review and approve various matters, whose mission includes the "furtherance and promotion of the community welfare" through, among other things, "the setting of standards of care and maintenance of lots, parcels and tracts . . . and enforcement thereof." *Id.* at 7-8, 12-13.

Fourth, they limit building height to 18 feet (*id.* at 8) – at least in part – to protect views. RP 160. Similarly (fifth) they regulate the height of trees and shrubs:

> **h) <u>Trees, shrubs</u>.** No trees or natural shrubbery shall be removed unless approved in writing by the architectural control and maintenance committee, it being the intention to preserve natural growth, in accordance with the Owner's plan of development.
>
> No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted or maintained on any of the said property, nor shall any such tree, hedge, shrub or planting be allowed to grow in excess of such height, without written permission of the architectural control and maintenance committee.

Ex 4 at 10 (paragraphing added); attached as App. A; CP 125 (FF 14). As discussed *infra*, this unambiguous language says that (1) permission is required to remove trees or natural shrubbery because

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[3] The "Owner" was Birch Bay Investors, fee simple owner of the land dedicated as Birch Bay Village Division No. 1. Ex 4 at 1. These Owner's rights were to be passed to the community club. *Id.* 3, ¶ 3.

the Owner's plan of development intends to preserve the natural growth; and (2) no trees or other plants "of any kind whatsoever in excess of six feet in height shall be placed, planted or maintained" or "allowed to grow in excess of such height," without permission. *Id.* This too was designed – at least in part – to protect views. RP 161.

Sixth, the covenants create a community club to which all purchasers must belong, upon club approval. Ex 4 at 6-7. The club does many things, including "the setting of standards of care and maintenance of lots . . . and enforcement thereof . . . for the common good." *Id.* at 12-13. The club therefore promulgates Architectural Rules and Regulations. *See* Exs 5 (2010 version), 32 (1999 version). The applicable 2010 standards require approval to remove trees with trunks "greater than nineteen (19) inches in circumference." Ex 5 at 21. They also forbid view infringement (*id.*, emphasis added):

> Trees or shrubs that infringe upon neighbors['] views are to be dealt with between neighbors. This is matter of good reason, judgment, and conscience, and is reciprocal between neighbors. **Lot owners should keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe on neighbors['] views**.

If the club fails to enforce, owners many "take such steps in law or in equity as may be necessary for such enforcement." Ex 4 at 17. The prevailing party is entitled to reasonable attorneys' fees. *Id.*

Residents of Birch Bay generally comply with the standards. *See, e.g.*, RP 67 (discussing Ex 2, photo G, showing numerous rounded tree tops). Indeed, the Shoemakers' predecessor in interest had always trimmed the trees in question here. CP 124 (FF 9); RP 69-71; Ex 2 (*compare* photos A & B *with* photos L-T). A neighbor also testified that prior to the Shoemakers, other residents had always trimmed their trees to protect the view. RP 96-97, 99. As with Lightner, this neighbor found the six-foot limitation on trees one of the main selling-points for his property. RP 96.

Chad Shoemaker purchased the property immediately to the southeast of Lightner's property in 1999. CP 124 (FF 9); Ex 3. He did not read the covenants at that time. RP 117.

B. By 2005, the Shoemakers had allowed their trees to block Lightner's view, as to which Lightner fruitlessly sought the club's assistance over the next six years.

By 2005, the Shoemakers had allowed their trees to begin blocking Lightner's view. CP 125 (FF 12); RP 78; Ex 6. After contacting the Shoemakers directly and receiving no response (*id.*) Lightner contacted Birch Bay's general manager, Meg Grable, in March 2006. RP 79; Ex 7. Grable wrote to Chad Shoemaker on April 7, 2006 (RP 80; Ex 9) directing him to ¶12.11 of the Architectural Rules and Regulations, stating (a) that "maintenance of trees . . . is

a matter of 'good neighbor/neighborhood' policy and is strongly encouraged"; and (b) that "Planted trees or shrubs that infringe upon neighbors' views should be reduced or removed." Ex 32 at 18.

Shoemaker responded to Lightner on April 11, 2006, refusing to cooperate. RP 79-80; Ex 8. On April 23, 2006, Grable asked Shoemaker to meet with Lighter and other neighbors to discuss the view issue. RP 81-82; Ex 10. As a result of this meeting, Shoemaker did some trimming that did not improve Lightner's view. RP 82-84. The other neighbors trimmed their trees nicely. RP 100-01; Ex 12.

Lightner sought further help from the club, but to no avail. RP 84-85. He retained counsel, who wrote to Shoemaker in November 2009. RP 85-86; Ex 14. At a subsequent meeting in the Lightners' back yard, Lightner asked the Shoemakers to trim the trees just to their roof line, but they refused. RP 86; CP 125 (FF 13).

Oddly, the Shoemakers instead sought permission to remove all of their trees. Ex 16. In accordance with long-standing policy, the ACC refused. Ex 19. The club send Lightner a letter quoting some regulations in February 2010, but nothing happened. RP 90; Ex 20. Lightner again asked them to help him, to no avail. RP 91; Ex 21.

C. Respondents Shoemaker admitted in their Amended Answer that their property was subject to the covenants restricting the height of foliage on their property.

In February 2011, appellant George Lightner sued respondents Shoemaker, seeking an injunction mandating that the Shoemakers comply with covenants requiring them to keep their foliage at or below six feet, reasonable attorney's fees, and costs. CP 4, 8. The Shoemakers answered, admitting several crucial factual allegations made in the Complaint. *Compare* CP 5-8 *with* CP 42 (Amended Answer). In relevant summary, the Shoemakers admitted (1) that their property was subject to certain covenants; (2) that those covenants restrict the height of their trees, hedges, shrubbery and plantings to six feet; (3) that the covenants allow Lightner to sue to enforce them; and (4) that the prevailing party in such a suit is entitled to reasonable attorneys' fees. *Id.*

D. The bench trial lasted two days, with the court hearing from eight witnesses, none of whom contradicted the Shoemakers' admissions.

The bench trial lasted two days. RP 3-288. The court heard from eight witnesses. *Id.* None of those witnesses denied the admissions set forth above. *Id.* A brief summary follows.

Lightner was not asking to have any large trees topped at six feet, but rather just to trim them even with the Shoemaker's roof line.

RP 10, 23, 28, 53, 93; Ex 22 (illustrative only) p. 10. Ken Bell, an arborist for 30 years, opined that the Shoemakers' trees that block Lightener's marina and ocean views can be trimmed in this way without harming them. RP 20-21, 25, 27, 30. The trees blocking Lightner's view were trimmed this way in the past. RP 25-26, 30; Ex 22, p. 13. Lightner saw no health problems with the trees that previously had been trimmed. RP 92. Bell recommends bringing them back to that prior level. RP 30.

Some of the largest trees were, however, topped at six feet some 10-to-15 years ago. RP 33, 44. Those (south side) trees are much larger now, so new trimming should occur over two growing seasons. RP 31-32. While topping them at six feet now would kill them, they suffered no harm from cutting at about the Shoemakers' roof line, and doing so again will not harm them. RP 31-32. No trees would be cut lower than 10 feet. RP 51.

The Shoemakers' expert, arborist Paul Hans Thompson, opined at length against "topping"[4] the trees at six feet – an issue not before the court. RP 175-80, 190; Ex 34. He also opined about "topping" them to the Shoemakers' roof line, which could be harmful.

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[4] "Topping" as technically defined – a severe cut – was not recommended by either expert in this case. *Compare* RP 40 *with* RP 184-87.

RP 181-84. But he acknowledged that suitable alternatives exist, including crown reduction and selective removal. RP 184-87. Some of the Shoemakers' trees had been reduced by as much as 25% in the past, without harm. RP 195-96. Thompson conceded that with proper techniques, the height of the trees can be reduced to prior levels without causing significant risk. RP 190-91, 197. Indeed, he recommended quite a bit of pruning. RP 199-202. Ultimately, he agreed that with proper techniques, he could assist the Lightners with their view, while maintaining tree health. RP 207.

The Shoemakers planted a row of arborvitae (also known as hedging cedars) on the Shoemaker/Lightner boundary. CP 125 (FF 11); RP 28, 38, 67-68 (discussing Ex 2, photos H & I), 118; Ex 22, p. 8. When they grow above six feet, some of them block the view from Lightner's lower bedroom window, so he asked that they be kept to six feet. RP 68, 92. It was uncontradicted that they can be trimmed to six feet with no adverse effects. RP 28, 33, 38.

Chad Shoemaker claimed that two years prior to trial he had trimmed the tops of some larger trees to create "view corridors" for Lightner, while admitting, "[o]f course, when you've got four or five trees stacked in front of each other, you're not going to be able to see, but you can move to another window, too." RP 107-10, 127;

see also RP 113 (there are about 20 trees in one such "corridor"). Shoemaker conceded that the two large trees on or near Lightner's property do not block the view, "because the limbs have been trimmed up to where you can see underneath them." RP 110.

Shoemaker testified that "the privacy function" of his trees is "extremely important to my wife and I." RP 120; Exs 30-31 (photos of back deck and hot tub taken from Shoemakers' own property). While Shoemaker said he can see the third level of Lightener's home from his back deck, Lightner testified that he cannot see into the Shoemakers' back area or windows. RP 87, 137-38.

Shoemaker also expressed concern about the safety of the slope behind his home. RP 121. His arborist thought that "topping" the trees could create erosion problems. RP 187-88. But arborist Bell testified that bringing these trees to their prior height at the roof line (lowering them about eight feet) would not remove a substantial portion of the canopy, so it would not affect soil stability. RP 35, 38; Ex 22, p. 9. Indeed, it will eventually create more canopy to protect the ground from rainfall impacts. RP 35.

Shoemaker also put on a geotechnical engineer who opined – based on the Shoemakers' false assertion that Lightner was asking to cut all of the trees to six feet – that such extreme cutting would

create a slide hazard and that county regulations would not allow even trimming for view purposes in this area. RP 227, 232. But the supervisor of Whatcom County Planning and Development Services natural resources division testified that this area generally would be exempt from such restrictions, and that even if a slide hazard existed, view trimming could be allowed with proper mitigation techniques. RP 242-43, 244-45. Mr. Lightner – a contractor with a degree in geology – sees no potential problems with the slope stability behind his home. RP 55, 63-66, 92; Ex 2, photos F & G.

The Birch Bay Village Community Club's general manager, Ken Hoffer, agreed that the covenants, rules, and regulations pertaining to protecting views are "alive and well." RP 165. But the club is neutral on enforcing the rules. *Id.* Healthy thinning and trimming require no club permission. *Id.*

E. The trial court entered Findings strongly supporting the Lighters, but it indulged in a rather strained interpretation of the covenants.

The trial court entered extensive Findings and Conclusions that are attached as App. B. CP 122-32. As noted above, the Findings largely support the Lightner's case. CP 122-28. But as discussed in the argument *infra*, the trial court so pruned and hedged the covenants as to render them unrecognizable.

ARGUMENT

A. Standards of review.

The primary issue on appeal is whether the trial court erred in interpreting the covenants – a legal question, reviewed *de novo*. ***Jensen v. Lake Jane Estates***, 165 Wn. App. 100, 105, 267 P.3d 435 (2011) (citing ***Wimberly v. Caravello***, 136 Wn. App. 327, 336, 149 P.3d 402 (2006)). The "'primary objective in interpreting restrictive covenants [protective covenants are equally descriptive] is to determine the intent of the parties . . . .'" ***Mains Farm Homeowners Ass'n v. Worthington***, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993) (quoting ***Lakes at Mercer Island Homeowners Ass'n v. Witrak***, 61 Wn. App. 177, 179, 810 P.2d 27, *review denied*, 117 Wn.2d 1013 (1991) (footnote omitted)); *accord* ***Saunders v. Meyers***, 175 Wn. App. 427, 438-439, 306 P.3d 978 (2013) (citing ***Bauman v. Turpen***, 139 Wn. App. 78, 88-89, 160 P.3d 1050 (2007)). The Court examines the protective covenants as a whole, considering all provisions. ***Ross v. Bennett***, 148 Wn. App. 40, 49, 203 P.3d 383 (2008) (citing ***Bauman***, 139 Wn. App. at 89). Unless the entire covenant clearly demonstrates a contrary intent, the Court gives the words in a covenant their ordinary, usual, and popular meaning. ***Jensen***, 165 Wn. App. at 105 (citing ***Hearst Commc'ns,***

Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005)). In short, courts will not read a protective covenant so as to defeat its plain and obvious meaning. ***Viking Props, Inc. v. Holm***, 155 Wn.2d 112, 120, 118 P.3d 322 (2005).

Yet the trial court here erroneously concluded that covenant paragraph 8(h) "is the only paragraph that is relevant to this case" (CP 128) and found that it is "unclear and ambiguous" (CP 125). Aside from the obvious problems with focusing on a single paragraph, to be ambiguous "a covenant must be uncertain or two or more reasonable and fair interpretations must be possible." ***Jensen***, 165 Wn. App. at 105 (citing ***White v. Wilhelm***, 34 Wn. App. 763, 771, 665 P.2d 407 (1983)). But protective covenants are favored, so the courts' interpretation must take care not to frustrate the homeowners' collective interests:

> Subdivision covenants tend to enhance the efficient use of land and its value. The value of maintaining the character of the neighborhood in which the burdened land is located is a value shared by the owners of the other properties burdened by the same covenants. ***Riss v. Angel***, 131 Wn.2d [612,] 622-24[, 934 P.2d 669 (1997)]. Thus, we must place "'special emphasis on arriving at an interpretation that protects the homeowners collective interests.'" ***Riss***, 131 Wn.2d at 623-24 (quoting ***Lakes at Mercer Island Homeowners Ass'n v. Witrak***, 61 Wn. App. 177, 181, 810 P.2d 27 (1991)). Accordingly, if more than one reasonable interpretation of the covenants is possible regarding an issue, we must favor that

> interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions.

Green v. Normandy Park Riviera Section Cmty. Club, Inc., 137 Wn. App. 665, 683, 151 P.3d 1038 (2007), *review denied*, 163 Wn.2d 1003 (2008); *see also* ***Viking Props., Inc.***, 155 Wn.2d at 124 ("Allowing private property owners to protect their rights by entering into restrictive covenants has long been favored in this state").

Beyond this, basic rules of contract interpretation apply. ***Wimberly***, 136 Wn. App. at 336. The Court avoids forced or strained constructions that lead to absurd results. ***Viking Props., Inc.***, 155 Wn.2d at 122 (citing, *e.g.*, ***State v. Stannard***, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987); ***Eurick v. Pemco Ins. Co.***, 108 Wn.2d 338, 341, 738 P.2d 251 (1987)). And the Court may consider extrinsic evidence to discern the intent of the covenants only where that evidence gives meaning to the words used. ***Hollis v. Garwall, Inc.***, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999) (adopting in the context of covenants the analytic paradigm of ***Berg v. Hudsman***, 115 Wn.2d 657, 801 P.2d 222 (1990)). Under this paradigm, while extrinsic evidence may be relevant if it gives meaning to the words used, other extrinsic evidence is not admissible:

> Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term;

> Evidence that would show an intention independent of the instrument; or
>
> Evidence that would vary, contradict or modify the written word.

Hollis, 137 Wn.2d at 695-96 (citing ***In re Marriage of Schweitzer***, 132 Wn.2d 318, 326-27, 937 P.2d 1062 (1997); ***U.S. Life Credit Life Ins. Co. v. Williams***, 129 Wn.2d 565, 569-70, 919 P.2d 594 (1996); ***Nationwide Mut. Fire Ins. Co. v. Watson***, 120 Wn.2d 178, 189, 840 P.2d 851 (1992); ***Lakes***, 61 Wn. App. at 181-82 (extrinsic evidence admissible re the word "fence" in a restrictive covenant)). In short, extrinsic evidence may be used to illuminate what is written, not what was intended to be written. ***Hollis***, 137 Wn.2d at 697 (citing ***Nationwide***, 120 Wn.2d at 189).

B. The trial court failed to apply the correct legal analysis in interpreting the covenants, so its conclusions – including those labeled as Findings – are legally insupportable.

The trial court failed to properly interpret the covenants. It entered a series of legal conclusions (CL 3-6, CP 128-31) (some of which were designated as Findings)[5] that violate the fundamental law of covenant interpretation set forth above. Conclusions that are improperly designated as Findings are analyzed as what they are –

[5] *See* AOE, *supra*, re FF 15, 16, 21 & 22 (CP 125-28).

conclusions. *See, e.g.*, ***Para-Medical Leasing, Inc. v. Hangen***, 48 Wn. App. 389, 397, 739 P.2d 717 (1987).

First, FF 15 states that the "terms of the Covenant are unclear and ambiguous." CP 125. It arrives at this conclusion, however, by limiting its analysis solely to one paragraph (CP 128, "Paragraph 8(h) . . . is the only paragraph that is relevant to this case") and even says that a portion of a sentence within that paragraph is irrelevant (*see* CP 126, ¶ 21.a.: "The Court finds that this language [in a portion of the first sentence of ¶ 8(h)] is not relevant to the legal rights of the parties"). Such analysis flies directly in the face of the fundamental principles discussed above, particularly that the covenants must be construed as whole and to avoid absurd results.

The terms of these covenants are clear and unambiguous.[6] Paragraph 8(h) first states (App. A):

> No trees or natural shrubbery shall be removed unless approved in writing by the architectural control and maintenance committee, it being the intention to preserve natural growth, in accordance with the Owner's plan of development.

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[6] Ambiguity is a question of law for the court. ***Lenhoff v. Birch Bay Real Estate, Inc.***, 22 Wn. App. 70, 72, 587 P.2d 1087 (1978) (citing ***State Bank v. Phillips***, 11 Wn.2d 483, 119 P.2d 664 (1941); ***Beedle v. General Inv. Co.***, 2 Wn. App. 594, 469 P.2d 233 (1970)).

This sentence solely refers to removal of trees or natural shrubbery. Permission is required to remove because – rather than removal – the intention was to preserve the natural growth. There is nothing unclear or ambiguous about this sentence, taken as a whole.

The second sentence of ¶ 8(h) says (App. A):

> No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted or maintained on any of the said property, nor shall any such tree, hedge, shrub or planting be allowed to grow in excess of such height, without written permission of the architectural control and maintenance committee.

As relevant here, this sentence unequivocally forbids maintaining trees "of any kind whatsoever in excess of six feet in height." *Id.* It goes further, saying that no "such tree [shall] be allowed to grow in excess of such height," without permission. *Id.* It cannot be clearer from this language that no tree of any kind is allowed to grow to over six feet under the covenants, absent appropriate permissions.

Since there is no ambiguity in this language, that should have ended the trial court's analysis. Instead, the trial court pruned off the first half of the first sentence (calling "irrelevant," "No trees or natural shrubbery shall be removed unless approved in writing by the architectural control and maintenance committee"); it then grafted the middle of that sentence ("it being the intention to preserve natural

growth") onto the second sentence. The result of these operations bears no fruitful resemblance to the original.[7]

Similarly, FF 16 erroneously concludes that the intent of the covenants is that fragment from ¶ 8(h) – "to preserve natural growth":

> The Covenant does not contain language requiring residents to maintain trees so as not to interfere with their neighbor's views. The Covenant does not provide for "view protection," "view preservation" or "view rights." There is no mention of view in the Covenant whatsoever. The clear intent of the Covenants is expressly stated in the first sentence of 8(h): "to preserve natural growth."

CP 125. This somewhat ambiguous Finding (which is really a Conclusion in the end) would be an absurd interpretation of the covenants, if taken literally. It is ambiguous because it moves back and forth between "Covenant" (singular) and "Covenants" (plural). While it is true that ¶ 8(h) (singular) says nothing about views, the "clear intent of the Covenants" (plural) obviously is not stated solely in that one sentence fragment.

On the contrary, in addition to the second sentence of ¶ 8(h) that expressly forbids maintaining trees above six feet, the covenants contain numerous additional provisions protecting views. Generally

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[7] This is not to say that the court must order all trees cut down to six feet. As discussed *infra*, this is an equitable action, in which trial courts have broad discretion to fashion equitable remedies. ***Ehsani v. McCullough Family P'ship***, 160 Wn.2d 586, 589, 159 P.3d 407 (2007) (citing ***In re Foreclosure of Liens***, 123 Wn.2d 197, 204, 867 P.2d 605 (1994)).

speaking, the covenants run with the land for the purpose of maintaining its desirability:

> [The covenants] . . . shall constitute covenants running with the land, for the purpose of maintaining the desirability of said land . . . .

Ex 4 at 2. The desirability of this property is – first and foremost – its views. *See, e.g.*, CP 124 (FF 9, discussing the "virtually unobstructed view" that Lightner enjoyed and relied upon in purchasing his property); RP 96-97 (neighbor also relied on views); RP 165 (community manager agrees that the covenants, rules, and regulations pertaining to protecting views are "alive and well").

More specifically, they permit no buildings above 18 feet – at least in part – to protect views. RP 160; Ex 4 at 8. This is consistent with this Court's decision in ***Bauman***, which interpreted the term "one story" as a view covenant; the Court rejected a claim that because the covenant did not say "view," it could not be intended to protect views. 139 Wn. App. at 88-90 (citing and following ***Foster v. Nehls***, 15 Wn. App. 749, 551 P.2d 768 (1976) (one-story restriction intended to protect views)).

And while the court expressly found that the 2009 Architectural Rules and Regulations require "[t]rees or shrubs that infringe upon neighbors' views should be reduced or removed" (CP

126, FF 17), in FF 16 the court completely ignored this direct evidence of the community's collective will as to views. It would be an absurd reading to suggest that these covenants – read as whole – are not intended to protect the glorious views at Birch Bay Village.

On the contrary, courts must "strive to interpret restrictive covenants in such a way that protects the homeowners' collective interests and gives effect to the purposes intended by the drafters of those covenants to further the creation and maintenance of the planned community." ***Jensen***, 165 Wn. App. at 106 (citing ***Lakes***, 61 Wn. App. at 181). In ***Lakes***, for instance, this Court determined that a restriction of "fences" to six feet included trees because the "overall purpose" of the covenants was to "protect the aesthetic harmony of the community, preserve an open and natural appearance, and maintain the view and light of each property owner." 61 Wn. App. at 181. Since the fence restriction specifically cited height, it was reasonable to disallow tall trees. *Id.* at 181-82.

Similarly, this Court recently noted that "there is no apparent reason to impose restrictions on trees except to protect views." ***Saunders***, 175 Wn. App. at 442. The Court there confronted a plainly ambiguous covenant (*id.* at 439):

> No trees of any type, other than those existing at the time these restrictive covenants ... are filed, shall be allowed to grow more than twenty (20) feet in height, provided they do not unnecessarily interfere with the view of another residence.

The Court determined that the phrase "no trees" encompassed every tree in the development, while the limiting phrase ("other than those existing at the time these restrictive covenants . . . are filed") seems to exempt pre-existing trees. *Id.* at 442. But because this covenant is concerned with preserving views, the proviso ("provided they do not unnecessarily interfere with the view of another residence") must apply to all trees, not just to new trees:

> Preserving neighboring views is a recognized interest and is not per se unreasonable. Covenants preserving views will be upheld when substantial evidence supports them. Substantial evidence supports the conclusion that Somerset's scenic views are an intrinsic part of the aesthetic and monetary value of the lots.

Id. at 443 (citations omitted).

Here too, substantial evidence – including the unchallenged Findings – support a conclusion that Birch Bay Village's scenic views are an intrinsic part of the aesthetic and monetary value of the lots. *See, e.g.*, CP 124 (FF 9, "virtually unobstructed" view that Lightner enjoyed and relied upon in purchasing his property); CP 126 (FF 17, regulation that "Trees . . . that infringe upon neighbors' views should be reduced or removed"); RP 95-96 (like Lightner, neighbor bought

adjacent lot for spectacular views). The trial court erred in failing to recognize this important value to the community as a whole.

Indeed, the trial court's FF 16 is a throwback to the time (frankly, not *that* long ago) when our courts engaged in strict, literal construction of covenants. But those days are over:

> Washington courts have moved away from the position of strict construction historically adhered to when interpreting restrictive covenants. This is due in large part to a shift in perception regarding restrictive covenants. Instead of viewing such covenants as restraints on the free use of land, Washington courts have acknowledged that restrictive covenants "'tend to enhance, not inhibit, the efficient use of land.'" Similarly, covenants also tend to enhance the value of the land.

Jensen, 165 Wn. App. at 106 (citations to ***Viking***, ***Riss***, and ***Green***, all *supra*, omitted). This Court should reject FF 16.

These two Conclusions wrapped in facts clothing (FF 15 & 16) are amplified in the similarly disguised FF 21 & 22. Finding 21 has seven subparts, every one of which is just a conclusion about the meaning of covenant ¶ 8(h). CP 126-28. As noted, FF 21.a. erroneously concludes that the first half of the first sentence of ¶ 8(h) is "not relevant," failing to construe he covenants as a whole. CP 126. Finding 21.b. then elevates a sentence fragment about "natural growth" to serve as the central intent for the covenants as a whole, ignoring every other part of the covenants. CP 126-27.

The trial court then severs what it calls the "operative sentence" in ¶ 8(h), ruling that in the phrase, "No trees . . . of any kind whatsoever in excess of six feet shall be placed, planted, or maintained on any of said property," the sub-phrase "or maintained" means "maintenance of planted or placed items." CP 127 (FF 21.c & d.). This obviously rewrites the sentence, violating the most fundamental rule of interpretation, that words may not be added, subtracted, or modified. *See, e.g.*, ***Hollis***, 137 Wn.2d at 695-96. In plain English, the verb phrase "placed, planted, or maintained," in this context, simply means that no trees over six feet may be put into position,[8] put in the ground to grow,[9] or continued or carried on.[10] The disjunctive "or" means that "maintained" is an alternative to "placed" or "planted," not their modifier. The trial court's reading creates an ambiguity where none exists. This Court should reject it.

Findings 21.e. and f. attempt to bolster 21.c. and d., reiterating the erroneous FF 16 that the covenants do not intend to protect views. CP 127. The court says this reading makes the covenants "most consistent internally," but does not explain how. It does not.

---

[8] WEBSTER'S THIRD NEW INT'L DICT. 1727 (Gore, et al., eds., 1993) ("place").
[9] WEBSTER'S THIRD NEW INT'L DICT. 1731 ("plant").
[10] WEBSTER'S THIRD NEW INT'L DICT. 1362 ("maintain").

Finding 21.g. simply sums up the erroneous conclusions reached above. Borrowing the trial court's own reasoning, but applying it more aptly, nothing in ¶ 8(h) mentions pre-existing, existing, original, aboriginal, or even new (or old) trees, so those ideas cannot be imported into the document in the guise of interpretation. If the original drafter had intended to say what the trial court imagines, it would have been easily done:

> No trees or natural shrubbery [existing at the time these Covenants are adopted] shall be removed unless approved in writing by the architectural control and maintenance committee, it being the intention to preserve natural growth, in accordance with the Owner's plan of development.
>
> [Also consistent with that original plan,] No [new] trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted or maintained on any of the said property, nor shall any such tree, hedge, shrub or planting be allowed to grow in excess of such height, without written permission of the architectural control and maintenance committee.

But where the drafter did not say this, the trial court may not infer it.

Finally on findings, FF 22 is a mixed finding and conclusion. Its findings are that the "Cedar trees that are at issue are natural trees," and that "no credible evidence [exists] that anybody planted" them. CP 128. Frankly, there is no credible evidence either way – no one really knows which trees were planted, grew from seeds, or were there at the outset in 1966, though the Shoemakers' expert

opined that many trees grew from seeds, but were only 29 to 37 years old. RP 169, 172. Few could have been there from the outset.

Be that as it may, these two findings do not support the court's legal conclusion that those "cedar trees are not subject to the six-foot limitation of the Covenants." CP 128. Again, nothing in the covenants refers to old vs. new growth. Nor do they distinguish Cedars from other trees. And nothing in ¶ 8(h) – or anywhere else in the covenants – supports the trial court's strained interpretation.

As for the Conclusions of Law, CL 3.a.-e. essentially parrot FF 21, confirming that those Findings are really Conclusions. *Compare* CP 126-27 *with* CP 128-30. But CL 3.f. and g. are a bit different. CP 130-31. In CL 3.f., the court notes the Rules and Regulations, if only to misinterpret them. *Id.* The crucial language is this (*id.*, with emphasis added, and paragraphing altered for readability):

> The 2006 version addresses views as follows: It again reiterates the intention is to preserve natural growth within the Village when it discusses trees, shrubs, et cetera, and removal of those trees and shrubs. It also provides that "Planted trees or shrubs that infringe upon neighbor's views may be reduced or removed," and then ***they fall back on***, "This is a matter of good judgment, reason and conscience, and is reciprocal between the neighbors."
>
> The 2010 version is somewhat different. In this version, 2010, there is a specific paragraph for view infringement, which reads "Trees and shrubs that," [*sic*] interfere or "that infringe upon neighbor's views are to be dealt with between

> neighbors. This is a matter of good reason, judgment, conscience, and [is] reciprocal between neighbors. Lot owners should keep their trees and shrubs trimmed, limbed or topped so as not to infringe upon neighbor's views."

Two things are key here: first, the trial court erroneously sees the community's desire to use good judgment, reason, and conscience, as a "fall back" position. On the contrary, and as further discussed below, it is sound guidance for interpreting these covenants.

Second, the 2010 regulation – which plainly applies to this action filed in February 2011 (CP 4) – unequivocally states that owners "should keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe upon neighbors views." Ex 5, p. 21, ¶ 10.4.2, **VIEW INFRINGEMENT** (copy attached as App. C). It is difficult to imagine a clearer statement of community intent. This Court should reverse and remand for enforcement of the covenants.

C. A proper interpretation would enforce the covenants and rules, using good judgment, reason, and conscience.

As mentioned immediately above, the 2010 regulations expressly protect views. App. C. But the trial court was troubled that they seemingly "fall back on" good judgment, reason, and conscience. CP 130. That is not a fall-back position. It is sound guidance for the proper interpretation of these covenants.

As explained above, ¶ 8(h) is clear and unambiguous. It requires permission to remove trees or natural shrubbery because the Owner's plan of development intends to preserve the natural growth. App. A. It also provides that no trees or other plants "of any kind whatsoever in excess of six feet in height shall be placed, planted, or maintained," nor "allowed to grow in excess of such height," without permission. *Id.* Common to both of these provisions is one key thing: permission from the ACC.

It is clear from the record that the ACC has never enforced the six-foot restriction to cut down or remove a tree. RP 152. Otherwise, this is a matter between owners, using good judgment, reason, and conscience, reciprocally between neighbors. App. C. But crucially, "owners should keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe upon neighbor's views." *Id.*

That is how the court should have interpreted the covenants because it is how the community sees the issue. The court should place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests." ***Riss***, 131 Wn.2d at 623-24 (citing ***Lakes***, 61 Wn. App. at 181). The homeowners want to preserve the value of this beautiful place by protecting its views.

But trees are beautiful and important too. So, using good judgment, reason, and conscience, the court should not order "topping" the trees at six feet, or at any other height. That is not what Lightner requested. Rather, case-by-case decisions can and should be made to accommodate the community. It is a matter of equity.

Washington law favors enforcement of residential restrictive covenants, including via injunctions. ***Bauman***, 136 Wn. App. at 92 (citing ***Riss***, 131 Wn.2d at 622-24; ***Metzner v. Wojdyla***, 125 Wn.2d 445, 450, 886 P.2d 154 (1994)). The trial court should consider:

> (a) the character of the interest to be protected,
>
> (b) the adequacy of injunctive relief when compared with other remedies,
>
> (c) the plaintiff's delay in bringing suit,
>
> (d) the plaintiff's clean hands,
>
> (e) the parties' relative hardship caused by denying or granting injunctive relief,[11]
>
> (f) ***the interest of the public and other third parties***, and
>
> (g) the order's enforceability.

Bauman, 136 Wn. App. at 92-93 (emphasis added) (citing ***Lenhoff***, 22 Wn. App. at 74-75 (citing ***Holmes Harbor Water Co. v. Page***, 8 Wn. App. 600, 603, 508 P.2d 628 (1973))).

---

[11] *But see* ***Bach v. Sarich***, 74 Wn.2d 575, 582, 445 P.2d 648 (1968) (balancing equities or relative hardships not applicable where, as here, the defendant proceeds with knowledge that his activity encroaches upon another's property rights); *accord* ***Hollis***, 137 Wn.2d at 699-700.

But here, the trial court never reached this issue. Because it misinterpreted the covenants, the hands of justice were tied:

> I think they [the Lightners] have done what they could. They tried to get help from the community club. They tried to come to court. They've done everything they did, spoke with the Shoemakers and were unable to get satisfaction, and I understand that that is a very frustrating process, and I understand that you have a lot of probably emotional investment in your house and in the view and in all of the things that go along with it, and I think that's very unfortunate that you're in this position that you're in today.
>
> For the Shoemakers, I believe it's still possible, and I think [their arborist] Mr. Thompson's testimony was clear as to this[,] that they can act in such a way to accommodate the Lightners' desire to maintain their view. **Those trees can be trimmed, crown reduced in such a way that the Lightners' view will be, at worst, minimally impacted.**
>
> And I would hope, and in fact, **it's my fervent hope that you would do so**, that you will take it upon yourselves, **not because you're required to**, but as a matter of being a good neighbor and living with the folks who live uphill from you, to find a way to reduce those trees and make the Lightners' view as open as possible, and I think the best way to do that, obviously, would be with the advice of a good arborist and do it in a way that makes sense.
>
> But I think that **although I would like for that to occur, and I'm sure that the Lightners would like that to occur, *I cannot order it*. *I'm not empowered*** under the language of the covenant ***as I'm required to read this*** to require that as an order. [Emphases added.]

7/26/12 RP 15-16. The trial court erred. This Court should reverse.

D. Request for reasonable attorneys' fees.

Under the covenants, a prevailing party in an action to enforce the covenants is entitled to reasonable attorneys' fees (Ex 4 at 17):

> [I]n the event that the community club fails to take appropriate action for the enforcement of the covenants and restrictions hereof within a reasonable time after a violation or threatened or attempted violation is brought to its attention in writing, any person or persons then owning lots within the said property may take such steps in law or in equity as may be necessary for such enforcement. . . . The party prevailing in such enforcement proceeding whether in law or in equity shall have from his opponent such attorneys' fees as the court may deem reasonable.

This Court should reverse, including the trial court's conclusion that neither party prevailed (CP 131-32), and remand for an injunction consistent with the covenants and the trial court's expressed wishes. It should award Lightner attorneys' fees and costs on appeal, and on remand. RAP 14.2, 18.1.

CONCLUSION

This Court should reverse, including the trial court's conclusion that neither party prevailed (CP 131-32), and remand for an injunction consistent with the covenants and the trial court's expressed wishes. It should award Lightner attorneys' fees and costs on appeal, and on remand.

RESPECTFULLY SUBMITTED this 4th day of March, 2014.

MASTERS LAW GROUP, P.L.L.C.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT**, postage prepaid, via U.S. mail on the 4th day of March, 2014, to the following counsel of record at the following addresses:

Counsel for Appellant

Stephen M. Hansen
Law Offices of Stephen Hansen, P.S.
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Counsel for Respondents

Howard M. Goodfriend
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1619 8th Avenue North
Seattle, WA 98109

Kenneth W. Masters, WSBA 22278
Counsel for Appellant

h) Trees, shrubs. No trees or natural shrubbery shall be removed unless approved in writing by the architectural control and maintenance committee, it being the intention to preserve natural growth, in accordance with the Owner's plan of development. No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted or maintained on any of the said property, nor shall any such tree, hedge, shrub or planting be allowed to grow in excess of such height, without written permission of the architectural control and maintenance committee.

SCANNED 11

FILED IN OPEN COURT
6-7 2013
WHATCOM COUNTY CLERK
By _____ Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHATCOM

GEORGE LIGHTNER,

Plaintiff,

vs.

CHAD SHOEMAKER & "JANE DOE" SHOEMAKER, husband and wife and the marital community comprised thereof,

Defendants.

NO. 11-2-00411-9

FINDINGS OF FACT & CONCLUSIONS OF LAW

THIS MATTER having come before the above-entitled Court for trial on July 24, 25 & 26, 2012; and the Court, having heard the testimony of the parties and their witnesses, having reviewed and considered the Exhibits admitted at trial, and having heard and considered the statements and arguments of counsel; now makes the following

FINDINGS OF FACT

1. The Court has Jurisdiction over the parties and over the subject matter of this suit.

2. Plaintiff GEORGE LIGHTNER, is a married individual who owns real property situated in WHATCOM County, Washington, which has a common street address of 8096 Comox Road, Blaine, Washington, 98230. Plaintiff and his wife acquired this property on April 15, 1987 by virtue of a Statutory Warranty Deed. This

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Deed was recorded in the office of the Whatcom County Auditor on May 5, 1987 under recording number 1571435. The legal description of the Property is as follows:

> LOT 31, Birch Bay Village, Division No. 15, as recorded in Volume 14 of Plats, Pages 124 and 125, Records of Whatcom County, Washington.

3. The legal description to Plaintiff's Statutory Warranty Deed specifically references that the title in and to the property was being granted subject to certain "Covenants, conditions, restrictions, easements and assessments," which included the following:

   (1) Those contained on the face of the said Plat of Birch Bay Village, Division No. 15; and

   (2) The Declaration of Protective and Restrictive Covenants, Recorded June 27, 1966, under Auditor's Recording No. 1009345

4. Defendant CHAD SHOEMAKER is the owner of certain real property situated in Blaine, Whatcom County, Washington which has a common street address of 8105 Chehalis Road, Blaine, Washington, 98230. Defendant acquired this property on February 4, 1999 by virtue of a Statutory Warranty Deed. This Deed was recorded in the office of the Whatcom County Auditor on February 8, 1999 under recording number 1990201220. The legal description of the Property is as follows:

> LOT 29, Birch Bay Village, Division No. 15, as as per the Map thereof, recorded in Volume 14 of Plats, Pages 124 and 125, Records of Whatcom County, Washington.

5. The legal description to Defendant's Statutory Warranty Deed specifically references that the title in and to the property was being granted subject to certain

> Covenants, conditions, restrictions, easements and assessments recorded under Auditor's file Nos. 1009345 and 920415029; Covenants, conditions and restrictions recorded file No. 1404207 . . ."

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5. There are certain "covenants, conditions and restrictions" (thereinafter referred to as "the Covenants") which impose certain restrictions on Plaintiff's and Defendants' properties. The instrument recorded under Auditor's file No. 1009345 is entitled "Declaration of Rights, Reservations, Restrictions and Covenants of Birch Bay Village."

6. The Covenants apply to both Plaintiff's and Defendants' properties, and the necessary privity has been demonstrated through documents and by admissions made in the context of this litigation.

7. Defendants were placed on notice that the Covenants did exist, and he should have been aware of the Covenants and know the content of the Covenants.

8. The Birch Bay Village Community Club is not a necessary party to this case as it has no stake in the outcome of this litigation.

9. Defendants' property is adjacent to Plaintiff's and situated to the Southeast. Plaintiff's property enjoys a territorial view of the Birch Bay Village, the Birch Bay Village marina, and Birch Bay. When the Plaintiff purchased his property, he enjoyed a virtually unobstructed view. Plaintiff and his wife purchased the property with the understanding that their view would be protected by the Covenants, and they relied upon what they believed the Covenants meant in their decision to purchase and develop their property. There are trees which grew on the Defendants' property near the boundary line common to the two properties. Before Defendants' purchase of Lot 29, Defendants' predecessor in title either topped these trees or granted permission to the Plaintiff to do so in order to preserve the view possessed by Plaintiff from Plaintiff's property.

10. The subject trees consist of (1) a row of Arborvitaes on the property line between the Lightner and Shoemaker properties; (2) an apple tree; (3) two Douglas firs; and (4) forty-two cedar trees.

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11. Since the date of Defendants' ownership, Defendants planted the Arborvitae along the common boundary line and have allowed the Arborvitae to grow in excess of six feet in height.

12. Defendants have also allowed the Cedar trees situated near the common boundary line and other trees planted on their property to grow in excess of six feet in height which obscure the Plaintiff's view.

13. Defendants have refused the requests from the Plaintiff that they trim the trees and shrubbery. Plaintiff's requests began in 2005. Plaintiff made these requests directly to Defendant and also requested assistance through the Birch Bay Village Homeowner's Association.

14. Paragraph 8(h) of the Covenants, located on page 10, sets forth certain restrictions as to the height of trees, hedges, shrubbery and plantings on Plaintiff's and Defendants' properties. This paragraph provides as follows:

> No trees or natural shrubbery shall be removed unless approved in writing by the architectural control committee, it being the intention to preserve the natural growth, in accordance with the owner's plan of development. No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted or maintained on any of the said property, nor shall such tree, hedge, shrub or planting be allowed to grow in excess of such height, without written permission of the architectural control and maintenance committee.

15. The terms of the Covenant are unclear and ambiguous.

16. The Covenant does not contain language requiring residents to maintain trees so as not to interfere with their neighbor's views. The Covenant does not provide for "view protection," "view preservation" or "view rights." There is no mention of view in the Covenant whatsoever. The clear intent of the Covenants is expressly stated in the first sentence of 8(h): "to preserve natural growth."

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17. The Architectural Rules and Regulations for Birch Bay Village were amended on or about December 17, 2009, to additionally provide that

> Trees or shrubs that infringe upon neighbors' views should be reduced or removed. This is a matter of good reason, judgment, and conscience, and is reciprocal between neighbors.

18. Paragraph 14 of the Covenants provides that in the event the Community Club fails or refuses to enforce violations of the Covenants, "any person or persons then owning lots within the said property may take such steps in law or equity as may be necessary for such enforcement." Said paragraph also provides that the prevailing party in such enforcement proceeding "shall have from his opponent such attorneys' fees as the court may deem reasonable."

19. The Covenants are legally enforceable and allow for suits for such enforcement between private individuals such as the Plaintiff and Defendant in this suit.

20. The Cedar trees that are growing into and obstructing Plaintiff's view are "naturally occurring trees" in the sense that they were not planted by humans, and are a natural species. The trees are common and it is the finding of the Court that the trees came from the parent trees or the larger trees which were already on the site.

21. Paragraph 8(h) of the Covenants provides as follows:

    a. The paragraph begins with the "No trees or natural shrubbery shall be removed unless approved in writing by the architectural control and maintenance committee . . ." The Court finds that this language is not relevant to the legal rights of the parties.

    b. The next phrase is important. "It being the intention to preserve natural growth." That is the expression of intent in the covenant, that the natural growth in the areas of Birch Bay Village need to be preserved and is to be preserved in accordance with the owner's

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plans of development, which is intended to preserve natural growth that exists independently of the construction work and improvements done on the property.

c. The operative sentence is "No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted, or maintained on any of said property." With respect to the words "placed or planted," while a homeowner may place or plant a shrub or a tree on the property, such shrub/tree may not be in excess of six feet in height or be allowed to grow in excess of six feet height.

d. With respect to the words "or maintained" in this sentence, the Court concludes that the reading of the Covenants that makes the Covenants most consistent internally is that the term "maintain" in paragraph 8(h) refers to the maintenance of planted or placed items.

e. There is no language regarding view preservation or view rights. The reading of the Covenants that makes the Covenants most consistent internally is that the term "maintain" in the Covenants in paragraph 8(h) refers to the maintenance of planted or placed items.

f. The Covenants do not provide for or even mention the issue of view protection and there is no enforceable right under the covenant to protect views, as the language is ambiguous.

g. Given the above, the Court interprets the paragraph 8(h) to mean that naturally occurring trees and shrubbery are to be preserved. Human-planted or placed items are limited to six feet at the

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inception, and they may not be allowed to become taller than six feet without approval. The term "maintenance" or determining "maintained" as in the Covenants addresses those planted and placed trees and shrubs, not those which are naturally occurring.

22. The Cedar trees that are at issue are natural trees. There is no credible evidence that anybody planted these trees. Those cedar trees are not subject to the six-foot limitation of the Covenants.

23. Defendants have allowed some of the Arborvitae to grow in excess of six feet in height.

24. The parties have incurred costs and attorney fees in this matter. Each side has requested attorneys fees based upon Paragraph 14 of the Covenants which provides, in part, that the prevailing party in such enforcement proceeding "shall have from his opponent such attorneys' fees as the court may deem reasonable." The Court has not granted injunctive relief with respect to the Cedar trees but has granted an Order with respect to the Arborvitae requiring the Arborvitae to be kept trimmed to no more than six feet in height. As a result, neither party has substantially prevailed and neither is entitled to an award of attorney's fees and costs.

HAVING MADE AND ENTERED its FINDINGS of FACT, the Court now makes and enters the following

CONCLUSIONS OF LAW

1. The Birch Bay Village Community Club is not a necessary party to this case.

2. The Covenants are legally enforceable and allow for suits for such enforcement between private individuals such as the Plaintiff and Defendants in this suit.

3. Paragraph 8(h) of the Covenants is the only paragraph that is relevant to this case. The Court interprets paragraph 8(h) of the Covenants and concludes as follows:

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a. The clear intent of the Covenants is expressly stated ub the first sentence of paragraph 8(h). The Court concludes that the phrase "It being the intention to preserve natural growth" is the expression of intent in the covenant, that the natural growth in the areas of Birch Bay Village to be preserved in accordance with the owner's plans of development which is intended to preserve natural growth that exists independently of the construction work and improvements done on the property.

b. The operative sentence is "No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted, or maintained on any of said property." With respect to the words "placed or planted," while a homeowner may place or plant a shrub or a tree on the property, such shrub/tree may not be in excess of six feet in height or be allowed to grow in excess of six feet height.

c. With respect to the words "or maintained" in this sentence, the Court concludes that the reading of the Covenants that makes the Covenant most consistent internally is that the term "maintain" in paragraph 8(h) refers to the maintenance of planted or placed items.

d. There is no language regarding view preservation or view rights. The reading of the covenants that makes the Covenants most consistent internally is that the term "maintain" in the Covenants in paragraph 8(h) refers to the maintenance of planted or placed items.

e. The Covenants do not provide for or even mention the issue of

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view protection and there is no enforceable right under the Covenants to protect views, as the language is ambiguous.

f. In making its interpretation, the Court has reviewed the Birch Bay Village Architectural Rules and Regulations. The interpretation of Birch Bay Village Community Club provides guidance in interpreting the Covenants. Birch Bay Village Community Club has never enforced the six foot height restriction for trees because it would be too difficult to differentiate between plantings and natural growth. Birch Bay Village Community Club therefore took the position is that protection of views is not mandatory, it is advisory. The Architectural Rules adopted by Birch Bay Village Community Club, anticipate that, consistent with the covenants, views may be infringed upon. There are two versions before the Court as exhibits. The 2006 version addresses views as follows: It again reiterates the intention is to preserve natural growth within the Village when it discusses trees, shrubs, et cetera, and removal of those trees and shrubs. It also provides that "Planted trees or shrubs that infringe upon neighbor's views may be reduced or removed," and then they fall back on, "This is a matter of good judgment, reason and conscience, and is reciprocal between the neighbors." The 2010 version is somewhat different. In this version, 2010, there is a specific paragraph for view infringement, which reads "Trees and shrubs that," interfere or "that infringe upon neighbor's views are to be dealt with between neighbors. This is a matter of good reason, judgment, conscience, and reciprocal between neighbors. Lot owners should keep their trees

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and shrubs trimmed, limbed or topped so as not to infringe upon neighbor's views." In both of these versions of the architectural rules and regulations, views should be preserved. It is not mandatory; it is advisory.

g. Given the above, the Court concludes paragraph 8(h) to mean that naturally occurring trees and shrubbery are to be preserved. Human-planted or placed items are to be limited to six feet at the inception, and they may not be allowed to become taller than six feet without approval. The term "maintenance" or determining "maintained" as in the Covenants addresses those planted and placed trees and shrubs, not those which are naturally occurring.

4. Six feet is not a reasonable height for natural growth, including cedar trees. Maintaining natural growth, such as cedar trees, at six feet would not be practical. In contrast to the expressed intent "to preserve natural growth," maintaining natural growth at six feet is harmful to the trees, and in some cases would kill them.

5. The Cedar trees that are at issue are not subject to the six-foot limitation of the Covenants.

6. This interpretation is consistent with the remainder of the covenants.

7. The Covenants have not been abandoned.

9. The Arborvitae planted by the Defendants are subject to the six-foot limitation of the Covenants and the Defendants must keep the Arborvitae trimmed at no more than six feet in height.

10. Neither party has substantially prevailed in this litigation. No attorney's fees award to ether party is reasonable. Their requests for attorney's fees shall be

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denied.

DONE IN OPEN COURT this 7th day of June, 2013

CHARLES R. SNYDER
Superior Court Judge

Presented By:

Law Offices of STEPHEN M. HANSEN, P.S.

STEPHEN M. HANSEN, WSBA #15642
Attorney for Plaintiff

Copy Received; Approved for Entry

ANDERSON CAREY ALEXANDER

EDWARD S. ALEXANDER, WSBA #33818
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flaggers as they deem necessary.

Contractors are restricted to using the lot on which they are building for storage of materials (including fill), equipment, etc., and will not be allowed to trespass on adjoining lots. The only exception is if a neighboring lot owner has given permission to use their lot. This permission must be given thru the BBVCC management office so they can monitor the exact approval(s) given.

10.3 VACANT LOTS

All vacant lots must remain free of all structures, signage, play equipment, tree houses, etc. except for culverts and catch basins when approved by the ACC and section 10.3.1 below.

10.3.1 LANDSCAPE IMPROVEMENTS

Vacant lots may have landscaping improvements when all of the following conditions are met:

a. Prior to any improvement, a full 15-point height survey must be completed on the property, as set forth in section 3 and the buildable height established with a spike in the street marking the elevation. This buildable height will be used for all subsequent construction on the lot.
b. The owner must submit an ACC Project plan of all landscape improvements to be performed on the property and must receive ACC Project approval prior to any work being commenced on the lot.
c. Improvements are limited to the landscape features of soil, grass, shrubs, retaining walls less than three feet in height, and trees only. Nothing else is allowed.
d. All landscaping projects must meet all AR&R, including compliance with section 9 whenever there is a change in grade or where landscaping will have a potential impact on storm water.

10.4 TREES AND SHRUBS

The planting and maintenance of shrubs and trees is encouraged. The removal of a tree with a trunk greater than nineteen (19) inches in circumference (6 inches in diameter) requires ACC approval. The measurement for circumference is taken twelve (12) inches from the ground. The only trees not requiring ACC approval for removal are Alders, Willows, Cottonwoods, fruit and decorative/hedgerow/foundation type trees such as crabapples, dogwoods, magnolias, and arborvitae. The ACC may require a certified arborist supporting opinion paid for by the lot owner when a trees health is questionable. Unauthorized tree removal shall carry a fine as stated in The BBVCC Schedule of Fines.

10.4.1 SAFETY

Trees or shrubs that block visibility to streets and driveways are a safety hazard. The unsafe condition must be remedied by trimming, topping or limbing as necessary to correct the visibility issue.

10.4.2 VIEW INFRINGEMENT

Trees or shrubs that infringe upon neighbors views are to be dealt with between neighbors. This is a matter of good reason, judgment, and conscience, and is reciprocal between neighbors. Lot owners should keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe on neighbors views.