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No. 70746-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GEORGE LIGHTNER,

Appellant,

vs.

CHAD SHOEMAKER and BILLIE SHOEMAKER, husband and wife and the marital community comprised thereof,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR WHATCOM COUNTY
THE HONORABLE CHARLES R. SNYDER

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The parties live in a beautiful wooded community with thousands of trees, hundreds over 60 feet tall. Nothing in the covenants, recorded in 1966, guarantees or protects views for any of the community's members. Instead, consistent with the aesthetics of the community, the stated intent of the covenants is to "preserve natural growth, in accordance with the Owner's plan of development."

Respondents have "naturally occurring" trees, many over 20 feet tall, that existed on their property when it was purchased in 1999. In 2011, appellant sought to enforce a covenant that purported to limit the placing, planting, or maintaining of trees in excess of six feet in height to protect his views. Following a two-day bench trial, the trial court found that this covenant was ambiguous in light of the expressed intent to preserve natural growth. After considering that this covenant has never been enforced, the aesthetics of the community, the fact that reducing respondents' trees to six feet would kill or severely impact the trees, the absence of any covenant to protect views, and the covenant's stated intent to preserve natural growth, the trial court properly found that the covenant limits only the height of trees that were "placed" or

"planted," and does not limit the height of naturally occurring trees. This Court should affirm and award attorney fees to the respondents.

II. RESTATEMENT OF ISSUES

1. The covenants governing Birch Bay, a wooded community with thousands of tall trees, make no mention of any intent to protect the views of its members. The covenants are expressly intended to "preserve natural growth, in accordance with the Owner's plan of development," while stating that "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." Did the trial court properly interpret the covenant to limit the height of only planted trees to six feet, and to allow the "natural growth" of naturally occurring trees?

2. Can and do architectural rules adopted by the board of directors and not by consent of the homeowners, and which provide that view infringing trees should be addressed between neighbors, modify the covenants to require the removal of naturally

occurring trees upon a neighboring homeowner's demand for view protection?

III. RESTATEMENT OF FACTS

A. Shoemaker is the downhill neighbor of Lightner in a beautiful wooded community governed by covenants designed to preserve natural growth.

Respondents Chad and Billie Shoemaker ("Shoemaker") are the adjacent downhill neighbors of appellant George Lightner ("Lightner") in Birch Bay Village ("Birch Bay") in Whatcom County. (*See* RP 55, 103; Exs. 2, 3, 35) Birch Bay was established in 1966. (*See* Ex. 4) The properties within Birch Bay are governed by a Declaration of Rights, Reservations, Restrictions and Covenants of Birch Bay Village ("the covenants") recorded on June 27, 1966. (Exs. 1, 4)

Birch Bay is a "beautiful wooded community" with "trees everywhere." (RP 115; Exs. 26, 27, 28, 29, 36) Birch Bay has "thousands of trees in the village," hundreds of which are over 60 feet tall. (RP 158) There are trees on the golf course and all around the marina. (RP 115) The aesthetics of Birch Bay are consistent with the "Owner's plan of development," as described in the covenants, "to preserve natural growth." (Ex. 4, § 8(h)) This "plan" was also restated in the original Architectural Rules and

Regulations ("the architectural rules") adopted by Birch Bay's Board of Directors in 1999,[1] which had as one of its objectives "to preserve the natural environment." (Ex. 32, § 1.4.2) Both the covenants and architectural rules prohibit the removal of trees with the intent "to preserve natural growth within the Village." (Ex. 4, §8(h); Ex. 32, § 12.11) The architectural rules distinguished between "natural growth" and "plantings" by providing that only "*planted* trees or shrubs that infringe upon neighbors' views should be reduced or removed." (Ex. 32, § 12.11, emphasis added)

B. Lightner purchased his uphill property in 1987. Then and now, no covenant protects his view.

Lightner purchased his lot in 1987 with plans to build on the property when he retires. (RP 56) Lightner testified that he paid more for his lot, because of its views of the water and the marina. (RP 57-58) According to Lightner, he believed that his views would be protected after reviewing the covenants. (RP 57) Nothing in the covenants describes view protection, provides for view preservation, or grants the right to a view. (*See* Ex. 4) The reference to "views" in the 1999 architectural rules was not adopted

[1] It is not clear from the record whether any architectural rules predated those adopted in 1999.

until 12 years after Lightner purchased his lot. (*Compare* Ex. 1 *and* Ex. 32)

When Lightner purchased his lot, as now, the section of the covenants that described the "owner's plan of development" as "preserv[ing] natural growth," also provided that "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:"

> 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, § 8(h); RP 57)

At the time Lightner purchased his lot, there were already "two big cedar trees" over forty feet tall on or near his property. (RP 59, 173) One tree was on the Lightner property and the second tree straddled the property line between the Lightner and Shoemaker property. (RP 59, 169-70) At trial, these trees were over 66 feet in height. (RP 172) Lightner testified that he never

attempted to reduce the height of the pre-existing tree on his property to 6 feet, as would be required under his interpretation of the covenants, although he had previously "pulled some of the bottom branches down." (RP 59-60)

C. When Shoemaker purchased his downhill property in 1999, there were already 45 trees on the property that were at least 20 feet tall. They provide safety for the downhill slope and privacy for the Shoemaker property.

Shoemaker purchased and moved into his home in Birch Bay in 1999. (Ex. 3) When Shoemaker moved in, Lightner's lot was still vacant as Lightner did not start construction on his home until 2002. (RP 56) With the exception of a row of arborvitae that Shoemaker later planted along the boundary line, the current trees already existed on his property at the time of Shoemaker's purchase. (RP 118, 121)

At the time of trial, there were forty-five trees on the Shoemaker lot that were mostly cedar trees that pre-existed Shoemaker's ownership. (*See* FF 10, CP 124) These trees "were all at least 20 feet tall" at the time Shoemaker purchased his home. (RP 118) According to Lightner, at the time of Shoemaker's 1999 purchase, none of those trees were impacting Shoemaker's view, because the former owners regularly trimmed the trees. (RP 69, 71)

The "two big cedar trees" that existed on the parties' properties in 1987 when Lightner purchased his property were the "parent trees" to the Shoemaker trees. (RP 169) In the process of "natural regeneration," the seeds from the parent trees fell to the ground, germinated, and established new trees. (RP 169, 171) These established cedar trees were between 29 and 37 years of age at the time of trial. (RP 172)

Shoemaker likes the trees on his property as they serve both a privacy and a safety function. (RP 120, 121) Without those trees, Lightner would be able to look down directly into Shoemaker's master bedroom, bathroom, Mrs. Shoemaker's dressing room, and hot tub. (RP 120; Exs. 30, 31) The trees act as a natural screen. (*See* RP 120)

The trees also stabilize the steep downhill slope of the Shoemaker property, which rises up 20 feet at a 50-70 percent incline. (RP 121, 219, 221-22) Under the Whatcom County Code, any slope with an incline of more than 35 percent and over 10 feet in height is designated a potential landslide area.[2] (RP 222) It was undisputed that the trees' root system supports the slope and prevents slides. (RP 34, 121)

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[2] Whatcom County Code 16.16.310

The canopy of the trees also prevents rainwater impact on the ground. (RP 34, 187, 221-22)[3] As Lightner's arborist described, "rainwater will fall onto the canopies and dissipate the water [ ] so that the rain drops do not hit the ground directly, but it's filtered or perforated through the canopy and falls gently to the ground rather than having the raindrops fall directly on the ground as an impact." (RP 34) A geologist testified that reducing the canopy "would decrease the stability of that soil" and "potentially chang[e] the overall stability of that slope." (RP 222, 228; *see also* Ex. 37)

D. Shortly after Lightner began constructing his house in 2002, he asked Shoemaker to cut down all his trees to six feet.

Lightner began construction of his home in 2002, and completed it in 2005. (RP 56, 73) During construction, Lightner demanded that Shoemaker "cut down" all of his trees to maintain "top dollar" for his home. (RP 122-23) Shoemaker explained to Lightner that the trees provide privacy for his home, and asked why should he "devalue [his] home for [Lightner's] financial gain?" (RP 122) Dissatisfied, Lightner abruptly turned and walked away, and

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[3] The canopy is the crown of the tree - the portion of the tree that contains the branches and leaves and serves as an "umbrella" for the ground below. (RP 34, 191)

the parties failed to reach any resolution after this initial conversation. (RP 122)

Citing the covenants, Lightner continued to demand that Shoemaker trim all his trees down to six feet. (RP 123, 136-37) It is undisputed that trimming the pre-existing trees on Shoemaker's property to six feet would kill many of the trees and severely impact others. (RP 33, 177) While Shoemaker declined to remove any of his trees or reduce them to six feet, he "trimmed several trees" to accommodate "view corridors" to the bay and mountains for Lightner. (RP 105-14; *see also* Ex. 35) Shoemaker's efforts failed to satisfy Lightner. (RP 105) Shoemaker stated, "I tried working with him. We can never come to an agreement. It's either, you know, everything mowed down to six feet or one branch here and one branch there is just never, we just haven't been able to come to an agreement." (RP 105)

At one point, Lightner suggested that Shoemaker reduce the height of the trees to Shoemaker's roofline instead of six feet. (*See* Exs. 6, 7) However, Shoemaker explained that due to the position of his home and the slope, reducing the height of the trees to his roofline "would cut half of my trees off across my backyard, and then the trees on the, on the right side of this picture up towards his

house would be about four or five feet tall, stumps." (RP 134-35; Ex. 30, 31)

E. The governing board overseeing the community declined to enforce the covenants, asserting that tree trimming for view purposes was a matter between neighbors based on a "good neighbor policy."

The Birch Bay community has never enforced the six-foot height limit for trees. (RP 152) The general manager testified that until this dispute, no one in fact had ever sought to enforce a six-foot height limit under the covenants. (RP 152) Nevertheless, Lightner asked the Birch Bay Village Community Club (the "Club") to require Shoemaker to reduce his trees to preserve Lightner's views. (*See* Exs. 12, 21)

The Club declined to get involved, noting that the architectural rules provide that issues regarding the height of trees should be decided between neighbors. (RP 154, 162-63; Ex. 9) The architectural rules cite a "good neighbor/neighborhood policy" and state that tree trimming should be a matter "of good reason, judgment, and conscience, and is reciprocal between neighbors." (Ex. 32, § 12.11; *see also* Ex. 5, § 10.4.2) The general manager testified that the rules regarding trees was designed in part to protect views, but also to protect the "natural growth" of trees for

the benefits that trees provide, including "provid[ing] shade, soak[ing] up storm water, whatever." (RP 155, 161)

While the Club acknowledged that the covenants were "still functional," it declined to take a "stand" on the dispute between the parties. (RP 163-64) The covenants provide that if the Club fails to enforce the covenants, an owner "may take such steps in law or in equity as may be necessary for such enforcement." (RP 162; Ex. 4, § 14)[4]

Shoemaker sought approval from the Club to remove all of his trees that interfered with Lightner's view. (*See* Exs. 16, 19) Not surprisingly, the Club denied the request, noting that "the long standing principle with the ACC and tree removal has been that the trees must be dead or dying, or be of a safety hazard to acquire ACC permission to remove. [ ] According to the Covenants Section 8(h) and also with the long standing ACC Rules & Regulations that trees and issues with neighbors is a matter of 'good neighbor/neighborhood policy' the trees must remain." (Ex. 19)

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[4] Lightner has not appealed the trial court's conclusion that the Birch Bay Village Community Club is not a necessary party to this case, as the covenants allow for suits to enforce the covenants between private individuals. (Conclusion of Law (CL) 1, 2, CP 128)

In July 2010, while the parties were disputing the trees on the Shoemaker property, Birch Bay's Board of Directors adopted new architectural rules. Those architectural rules include a new provision for "view infringement," that counsels: "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 to not infringe on neighbors' views." (Ex. 5, § 10.4.2)

F. Demanding "strict compliance" with the covenants, Lightner sought an injunction to compel Shoemaker to trim all his trees to six feet.

On February 15, 2011, Lightner filed suit against Shoemaker. (CP 4) Lightner sought injunctive relief "requiring the Defendants to top and trim their trees/shrubs in strict compliance with the Covenants, together with a permanent injunction prohibiting the Defendants from allowing their trees, hedges, shrubs and/or plantings from growing to heights in excess of six feet in height, all per the terms of the Covenants." (CP 8)

At trial before Whatcom County Superior Court Judge Charles Snyder ("the trial court"), Lightner modified his position and no longer sought Shoemaker's "strict compliance" with the

covenants. (*See* RP 10, 28, 53, 93, 133-34) With the exception of the planted arborvitae, which Lightner asked be limited to six feet in height, he wanted all other trees to be reduced to Shoemaker's roofline, which would still cause many of the trees to be reduced to "stumps." (RP 68-69, 134)

Shoemaker's arborist testified that topping the trees at the roofline would "remov[e] a substantial portion of the crown," increasing "rainfall through those trees" that may cause "surface erosion." (RP 187-88) The arborist also expressed concern that topping would cause "rapid regrowth," requiring repeated maintenance that could cause internal problems for the trees, including "dieback internally within the foliage." (RP 187, 198-99)

G. The trial court found that the six-foot height restriction applied only to planted trees and not to Shoemaker's naturally occurring trees.

After hearing two days of testimony and considering 34 exhibits, the trial court rejected Lightner's claim that the covenants guaranteed his property a view. (Finding of Fact (FF) 16, CP 125;

FF 21(f), CP 126)[5] The trial court found that the covenants recorded in 1966 were enforceable against the Lightner and Shoemaker properties, and had not been abandoned. (FF 5, 6, CP 124; Conclusion of Law (CL) 7, CP 131) The trial court also acknowledged that when Lightner purchased his property he "enjoyed a virtually unobstructed view" of the marina and Birch Bay and that Lightner and his wife believed "that their view would be protected." (FF 9, CP 124)

The trial court concluded, however, that Lightners' subjective belief was not controlling. The trial court found that the covenants do "not contain language requiring residents to maintain trees so as not to interfere with their neighbors' views. The Covenant does not provide for 'view protection,' 'view preservation' or 'view rights.' There is no mention of view in the Covenant whatsoever." (FF 16, CP 125; CL 3(a), CP 129)

Instead, the trial court found that the "clear intent of the Covenants is expressly stated in the first sentence of 8(h): "to

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[5] Because Lightner's trial counsel prepared and proposed the Findings of Fact and Conclusions of Law ultimately signed by the trial court (*See* CP 69-70, 122-32), this Court should reject his complaints about the form of those findings and conclusions, including his complaint that some of the trial court's findings are actually conclusions of law, and that the findings and conclusions inconsistently refer to the covenants as either singular or plural. (*See* App. Br. 17-18, 20, 24)

preserve natural growth." (FF 16, CP 125) The trial court found that "the expression of the intent in the covenants [is] that the natural growth in the areas of Birch Bay Village needs to be preserved and is 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." (FF 21(b), CP 126-27; CL 3(a), CP 129)

The trial court found that the second sentence, "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," made the provision as a whole "unclear and ambiguous." (FF 15, CP 125; FF 21(c), (e), CP 127; CL 3(c), CP 129) The trial court noted that "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 trees, and in some cases would kill them." (CL 4, CP 131)

Accordingly, the trial court interpreted the covenant "to mean that naturally occurring trees and shrubbery are to be

preserved. Human-planted or placed items are limited to six feet at the inception, and they may not be allowed to become taller than six feet without approval." (FF 21(g), CP 127-28; CL 3(g), CP 131) In other words, "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 [in] height." (FF 21(c), CP 127; CL 3(b), CP 129) The trial court further concluded that only "planted or placed items" cannot be "maintained" at a height of six feet or more. (FF 21(d), CP 127; CL 3(c), CP 129; CL 3(g), CP 131)

The trial court found that Shoemaker's cedar trees are "natural trees," because 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." (FF 20, CP 125) It found "no credible evidence that anybody planted those trees." (FF 22, CP 128) Because Shoemaker's trees were "naturally occurring," the trial court found that they were not subject to the six-foot height limitation. (FF 22, CP 128; CL 5, CP 131) However, the trial court found that the arborvitae planted by Shoemaker was subject to the

height restriction, and ordered that those trees must be "trimmed at no more than six feet in height." (CL 9, CP 131; CP 134)

After finding that neither party substantially prevailed, the trial court denied both parties' request for attorney fees. (FF 24, CP 128; CL 10, CP 131-32; CP 134) In particular, the trial court noted that while Lightner "won something," the "greatest part of [his] complaint" was that the cedars blocked his view of the bay. (CP 101) The trial court found that Lightner did not prevail on that issue, and did not substantially prevail at trial. (CP 101-02)

The trial court denied Lightner's motion for reconsideration. (CP 154-55) Lightner appeals. (CP 156)[6]

IV. ARGUMENT

A. As the covenants do not protect views, the trial court properly interpreted the covenant consistent with its stated intent to preserve natural growth, to limit the height of only introduced trees, and not to limit the height of naturally occurring trees.

The trial court properly held that the covenants do not limit the height of "naturally occurring trees," after finding that the covenants intended to preserve the natural growth of trees for the whole community, and not views for uphill property owners. (FF

[6] Shoemaker has voluntarily dismissed his cross-appeal by motion filed with this brief.

16, CP 125; FF 21(b)-(g), CP 126-28); CL 3(a)-(g), CP 129-31) This Court should affirm its interpretation as consistent with the language of the covenant, its stated intent, and the extrinsic objective evidence.

When interpreting restrictive covenants, the court's primary objective" is "determining the drafter's intent." While interpretation of the covenant is a question of law, the drafter's intent is a question of fact." *Wilkinson v. Chiwawa Communities Ass'n*, ___ Wn.2d ___. ¶ 13, ___ P.3d ___, 2014 WL 1509945 (April 17, 2014) (citations omitted).

"In a bench trial where the court has weighed the evidence, this court's review is limited to determining whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the trial court's conclusions of law." *Day v. Santorsola,* 118 Wn. App. 746, 755, 76 P.3d 1190 (2003), *rev. denied*, 151 Wn.2d 1018 (2004). This Court "reviews all reasonable inferences in the light most favorable to the prevailing party. Though the trier of fact is free to believe or disbelieve any evidence presented at trial, appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact."

Jensen v. Lake Jane Estates, 165 Wn. App. 100, 104-05, 267 P.3d 435 (2011) (*citations omitted*).

1. The trial court's refusal to impose height restrictions on natural trees is consistent with the covenant's intent to preserve natural growth, and is supported by substantial evidence.

In light of the covenant's expressed intent to "preserve natural growth, in accordance with the Owner's plan of development," the trial court properly interpreted the covenant to limit the height of only "planted" or "placed" trees to six feet:

> 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, § 8(h))

Lightner makes much over the fact that the trial court found the covenant to be "unclear and ambiguous." (*See* App. Br. 15, 18-19; FF 15, CP 125) But the "context rule" applies equally to a disputed provision that is clear and to one that is ambiguous. *Roats v. Blakely Island Maint. Com'n, Inc.*, 169 Wn. App. 263, 274, ¶ 23,

279 P.3d 943 (2012). Substantial evidence supports the trial court's interpretation that the covenants restricted the height of only planted and placed trees, and not naturally occurring trees. And Lightner does not argue that the trial court improperly considered extrinsic evidence, "such as the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties' respective interpretations" to interpret the covenant. *See Roats*, 169 Wn. App. at 274.

The plain language of the covenant reflect the intent of the drafters "to preserve natural growth." (Ex. 4, § 8(h); FF 21(b), CP 126; CL 3(a), CP 129) That intent is reflected not just in the words used by the drafters but in undisputed evidence of the community aesthetic: a "beautiful wooded community" with "trees everywhere," and hundreds of those trees being over 60 feet tall. (RP 115, 158) Both parties acknowledged that when they acquired their properties there were already trees in place that were well over 6 feet tall. (RP 59, 118, 173) The trial found that it "would not be practical" to "maintain" naturally growing trees, such as Shoemaker's trees, at six feet, because it is "harmful to the trees, and in some cases would kill them." (CL 4, CP 131)

Lightner assigns error to these findings and conclusions, but provides no meaningful challenge to the substantial evidence supporting them. *Norcon Builders, LLC v. GMP Homes VG, LLC,* 161 Wn. App. 474, 497, ¶ 36, 254 P.3d 835 (2011) (appellant waived challenge for failing to provide analysis or argument for why challenged findings are not supported by substantial evidence). The trial court properly interpreted the covenant to require only planted or placed trees and shrubs to be limited to, and maintained at, six feet, and to allow "naturally occurring" trees to grow taller to both encourage and preserve natural growth. (CL 3 (a), (b), (c), CP 129)

In any event, the trial court properly found that the term "maintained" in the covenant was "questionable" in light of the expressed objective of fostering natural growth, and thus framing the question as "does that mean only the maintenance and maintaining of placed and planted shrubs, or does it mean the maintenance of anything that exists on the lot? And so the court has to figure out what was the intent at the time that was created." (7/26 RP 9) *See Wilkinson*, ___ Wn.2d ___. ¶ 13 (in interpreting restrictive covenants, the "primary objective" is "determining the drafter's intent").

Lightner acknowledges that the Court must "examine the protective covenant as a whole, considering all provisions." (App. Br. 14, *citing Ross v. Bennet,* 148 Wn. App. 40, 49, 203 P.3d 383 (2008), *rev. denied*, 166 Wn.2d 1012 (2009)) But Lightner's argument — that this two-sentence covenant is "clear and unambiguous" and "unequivocally forbids maintaining trees of 'any kind whatsoever in excess of six feet in height'" — is only true if each sentence is read alone and in a vacuum. (App. Br. 18-19) According to Lightner, the second sentence stands alone, and "unequivocally forbids maintaining trees 'of any kind whatsoever in excess of six feet in height,'" while the intent "to preserve natural growth" only relates to the removal of trees. (App. Br. 18-19)

When interpreting a covenant, the court "must place special emphasis on arriving at an interpretation that protects the homeowners' collective interests." *Riss v. Angel,* 131 Wn.2d 612, 624-25, 934 P.2d 669 (1997). In this case, the "homeowners' collective interests" could not be clearer — "to preserve natural growth." (Ex. 4, § 8(h)) The architectural rules, also further this collective interest, stating their "purpose" and "objective" are the "preservation of the natural environment." (Ex. 5, § 1.1(e); Ex. 32, §

1.4.2) That collective interest is reflected in the landscape of this wooded community with large trees.

Lightner's argument that the covenant restricts "any tree whatsoever" to six feet, would undermine the interests of the "collective" solely for the benefit of the uphill homeowners who wish to preserve their views. And as the trial court found, there is nothing in the covenants that protects, preserves, or entitles homeowners to view rights. (FF 16, CP 125; FF 21(e), CP 127)

The Birch Bay community has never interpreted the covenant to "unequivocally forbid maintaining trees 'of any kind whatsoever in excess of six feet in height," as Lightner argues. (App. Br. 19). Thousands of trees in the community exceed six feet in height. (RP 115, 158) The general manager of Birch Bay confirmed that this provision has never been enforced as Lightner interprets it. (RP 152) "If a covenant which applies to an entire tract has been habitually and substantially violated so as to create an impression that it has been abandoned, equity will not enforce the covenant." *White v. Wilhelm,* 34 Wn. App. 763, 769, 665 P.2d 407, *rev. denied,* 100 Wn.2d 1025 (1983). While the trial court held that the covenant has not been abandoned, this court may affirm on any ground supported by the record. RAP 2.5(a). The fact that the

covenant purportedly limiting all trees to six feet in height has never been enforced provides an alternate basis for refusing to order Shoemaker to trim all of his trees to preserve Lightner's view.

2. Substantial evidence supports the trial court's finding that the covenant does not protect views.

The trial court properly interpreted the covenant to preserve natural growth, rather than views. There is "no common law right to a view," *Asche v. Bloomquist*, 132 Wn. App. 784, 797, ¶ 28, 133 P.3d 475 (2006), *rev. denied*, 159 Wn.2d 1005 (2007) (*citing Collinson v. John L. Scott, Inc.*, 55 Wn. App. 481, 485, 778 P.2d 534 (1989)). The covenants do "not provide for 'view protection,' 'view preservation' or 'view rights.'" (FF 16, CP 125; FF 21(e), CP 127; CL 3(d), CP 127; Ex. 4) Substantial evidence supports that decision.

The absence of any language in the covenants stating an intent to protect views makes this case different than *Saunders v. Meyers,* 175 Wn. App. 427, 306 P.3d 978 (2013) relied on by Lightner. (App. Br. 22) In *Saunders,* a covenant provided that "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." 175 Wn. App. at 432,

¶ 3. This Court held that the plain language of the provision exempted a tree that existed at the time the restrictive covenants were filed from the 20 feet height restriction, but not from the view restriction. The stated intent of the covenant in *Saunders* was to "protect views:" with view protection as its "primary concern, it is unlikely that the drafters would have been overly concerned with new, height-limited trees obstructing views, but have no concern whatsoever that existing trees, some already 60 feet high, would become even larger view obstructions." *Saunders,* 175 Wn. App. at 442, ¶ 34.

Here, there is no evidence that view protection was a "primary" or even ancillary concern for the drafters of the covenants. Instead, their "primary concern" in imposing the covenants was a "plan of development" that "preserve[d] natural growth." (Ex. 4, § 8(h)) Consistent with that plan of development, the trial court properly determined that the drafters intended to place limits on newly introduced trees and shrubs, including height restrictions, but to place no such limits on naturally occurring trees. (CL 3(a)-(g), CP 128-31)

Lightner is wrong when he claims that the trial court considered only the covenant addressing trees and shrubs in

finding that the covenants as a whole were not intended to protect views. (Compare App. Br. 15, 18 with CL 6, CP 131: "This interpretation is consistent with the remainder of the covenants"; FF 21(f), CP 127: "The Covenants do not provide for or even mention the issue of view protection.") The only other covenants cited by Lightner to support his claim that "numerous additional provisions protect[ ] views" (App Br. 30) state that the covenants run with the land "for the purpose of maintaining the desirability of said land" (Ex. 4, ¶ b) and limit the heights of the building to 18 feet. (Ex. 4, § 8(c))

Maintaining the "desirability of [the] land" does not necessarily "protect[] views." Instead, as the trial court found, the land is desirable if protected by covenants that "preserve natural growth" and maintains the aesthetics of Birch Bay as a wooded community by placing height restrictions on newly introduced trees and prohibiting the removal of trees without approval. (FF 21(b), CP 126-27; FF 21(g), CP 127-28; CL 3(a), CP 129; CL 3(g), CP 131; CL 4, CP 131; RP 115; Ex. 4, § 8(h); Exs. 26, 27, 28, 29, 36)

Likewise, a building height restriction serves purposes other than protecting views. *See Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190 (2003). In *Day,* this Court affirmed the trial court's

determination that a covenant that limited buildings to no more than "two stories in height" without more, "emphasize[d] height not view." *Day*, 118 Wn. App. at 758. This Court held that if the drafters intended for building height to serve as "view protection" they could have stated so, as they did in a covenant that required that trees "not exceed[ ] 20 feet, nor to any height which tends to block the view from other tracts within said premises." *Day,* 118 Wn. App. at 756. This Court agreed with the trial court that there are other reasons for building height restrictions other than view protection, including to "prohibit what one might characterize as a giant home, or a skyscraper, or a tall commercial building structure." *Day*, 118 Wn. App. at 755-56. As in *Day,* the height restriction here was likely intended to avoid "giant homes" and to "maintain harmony of exterior design with existing structures." (Ex. 4, § 8(b)).

Likewise *Bauman v. Turpen*, 139 Wn. App. 78, 160 P.3d 1050 (2007), does not support Lightner's argument that the trial court should have found that a building height restriction was a "view covenant," even in the absence of any language referring to views. (App. Br. 21) In *Bauman*, the covenants bound only downhill lots to height restrictions. This Court affirmed the trial

court's finding that the height limitation on only the downhill lots served as a "view-protection device" favoring the uphill lots. *Bauman*, 139 Wn. App. at 90-91, ¶¶ 19, 21. Here, the covenants equally protect uphill and downhill owners from buildings taller than 18 feet.

Foster v. Nehls, 15 Wn. App. 749, 551 P.2d 768 (1976), *rev. denied*, 88 Wn.2d 1001 (1977) (App. Br. 21) also does not help Lightner, because there was evidence from the original planner and developer in that case that the purpose of the restrictive covenant limiting the size of homes was to prevent view obstructions. The *Foster* court held that evidence of the developer's original intent supported the trial court's decision to order defendants to remove the second story of their newly constructed home because it interfered with the view of their neighbors. 15 Wn. App. at 751-52.

Foster is questionable authority because *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999), decided more than twenty years later, held that the unilateral and subjective intent of one of the original drafters was not admissible to "redraft or add to the language of the covenant." *Hollis*, 137 Wn.2d at 695-96. That Lightner, not a drafter, believed that the covenants should protect

his "virtually unobstructed" view is not the type of extrinsic evidence admissible under *Hollis*. 137 Wn.2d at 695. (App. Br. 23)

Contrary to Lightner's argument, no "additional provisions" in the covenants or other extrinsic evidence support a finding that the drafters intended to protect views. The trial court properly found that 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." (FF 21(f), CP 127)

B. The architectural rules cannot and do not grant view protections that do not exist in the covenants.

The trial court properly found that the architectural rules cannot support an interpretation that adds view protection, when that protection is not already provided for under the covenants. The trial court considered the architectural rules when interpreting the covenants, but accurately noted that "you can't change the language of the covenants by the architectural rules and regulations. The covenants are recorded. They are what they are and can only be changed by the amendment process set forth in the covenants." (7/26 RP 9-10)

The architectural rules, which were adopted more than 30 years after the covenants were recorded, cannot place more burdens

(or grant more rights) to the homeowners than the covenants provides. *See e.g., Riss v. Angel*, 131 Wn.2d 612, 625, 934 P.2d 669 (1997) ("a consent to construction covenant cannot operate to place restrictions on a lot which are more burdensome than those imposed by the specific covenants"); *Green v. Normandy Park*, 137 Wn. App. 665, 694, ¶ 70, 151 P.3d 1038 (2007), *rev. denied*, 163 Wn.2d 1003 (2008) (Association acted reasonably when it did *not* "attempt to impose more burdensome setback requirements than those imposed by the specific setback provisions of the covenants themselves"). In other words, as the trial court acknowledged, the architectural rules cannot add view protections in the covenants that do not exist, and cannot standing alone provide a basis to require Shoemaker to trim his naturally occurring trees to accommodate Lightner's views. (7/26 RP 9, 16)

The adoption of the architecture rules by Birch Bay's Board of Directors, and not by consent of the homeowners, cannot amend the covenants to add view protections that do not already exist within the covenants. Although the covenants can be amended to "change (but not increase) the requirements or burdens thereof," it can only be done with the written consent of 66-2/3% of the owners. (Ex. 4, § 15) *See Ebel v. Fairwood Park II Homeowners'*

Ass'n, 136 Wn. App. 787, 792-93, ¶ 17, 150 P.3d 1163 (2007) ("In order for an amendment to be valid, it must be adopted according to the procedures set up in the covenants and it must be consistent with the general plan of the development.")

The trial court instead properly reconciled the 2010 architectural rules and the covenants. The trial court found that both the earlier and current architectural rules leave the issue of views between neighbors, and as "a matter of good reason, judgment, and conscience." (CL 3(f), CP 130; Ex. 5, § 10.4.2; Ex. 32, § 12.11) The trial court reasoned that the provision in the current rules providing that owners "should" trim their trees so as to not infringe views was only advisory, and was not mandatory. (7/26 RP 11) *See State v. Smith,* 174 Wn. App. 359, 368, ¶ 22, 298 P.3d 785 (recognizing that "should" can be interpreted as "strongly encouraging," "permissive," "the weaker companion to the obligatory ought," and "expresses mere appropriateness, suitability, or fittingness."), *rev. denied,* 178 Wn.2d 1008 (2013). Therefore, the trial court properly concluded that the architectural rules do not support enforceable view rights to the homeowners, because the architectural rules "anticipate that, consistent with the covenants, views may be infringed upon." (CL 3(f), CP 130)

The architectural rules did not grant view protection to the Birch Bay homeowners. Consistent with the trial court's interpretation of the covenants, the trial court properly ordered Shoemaker to trim his planted arborvitae to six feet, and rejected Lightner's demands that Shoemaker trim his naturally occurring trees.

C. This court should award Shoemaker fees pursuant to the covenants.

A prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. *Wiley v. Rehak,* 143 Wn.2d 339, 348, 20 P.3d 404 (2001).[7] The covenants provide that a party prevailing in an enforcement proceeding "shall have from his opponent such attorneys' fees as the court may deem reasonable." (Ex. 4) Shoemaker has a right to the attorney fees incurred on appeal in defending the trial court's eminently reasonable judgment. This Court should award Shoemaker those fees. *See* RCW 4.84.330 (prevailing party entitled to attorney fees if provided for under a contract); RAP 18.1.

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[7] In a one-line statement in Lightner's request for attorney fees, he asks this court to "reverse, including the trial court's conclusion that neither party prevailed." (App. Br. 32) Although he assigned error to this finding, Lightner presented no reasoned argument for his challenge in the Argument section of his brief, as RAP 10.3(a)(6) requires. This court should decline to consider this inadequately briefed challenge. *Matter of Guardianship of Atkins*, 57 Wn. App. 771, 775, 790 P.2d 210 (1990) ("An assignment of error not supported by argument or authority is waived.").

V. CONCLUSION

The trial court properly interpreted the covenants. This Court should affirm and award attorney fees to Shoemaker.

Dated this 28th day of April, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 28, 2014, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 28th day of April, 2014.

V. Vigoren

Victoria K. Vigoren