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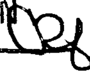

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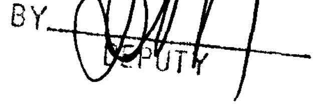

No. 45739-3-II

**SUPREME COURT
OF THE STATE OF WASHINGTON**

HARTSTENE POINTE MAINTENANCE ASSOCIATION, Respondent,

v.

JOHN E. DIEHL, Appellant.

PETITION FOR REVIEW

John E. Diehl pro se
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Shelton WA 98584
360-426-3709

COA record located on T Drive

TABLE OF CONTENTS

I. Identity of Petitioner and Decisions for Which Review Is Sought 1

II. Issues Presented for Review 1

III. Statement of the Case 2

IV. Argument 4

A. The plain meaning of a provision of the governing documents is that owners may appeal decisions of the governing board. 4

B. Board majorities may not exclude board minorities from closed meetings and withhold material information from them 7

C. HPMA's Hazard Tree Policy is invalid. 13

1. HPMA's governing documents require more effective notice to affected owners than provided in the Hazard Tree Policy. 13

2. The policy sets vague, over-inclusive standards for labeling trees as "imminent hazards," conflicting with the county's Resource Ordinance. 15

3. The policy conflicts with the right of all owners under HPMA's governing documents to have benefit of the Common Area on the same terms. 18

V. Conclusion 20

Appendix: (Attachment 1) Court of Appeals decision; (Attachment 2) Court of Appeals order denying motion for reconsideration and request for publication; (Attachment 3) Relevant Excerpts from Mason County's Resource Ordinance. 20

TABLE OF AUTHORITIES

Table of Cases

Barry v. Johns, 82 Wn. App. 865, 920 P.2d 222 (1996) 11, 12

Burton v. Douglas County, 65 Wn.2d 619, 399 P.2d 68 (1965) 4

Colonial Imports, Inc. v. Carlton N.W., Inc., 121 Wn.2d 726, 853 P.2d 913 (1993) 8

Evergreen Sch. Dist. 114 v. Clark County Comm. on Sch. Dist. Org., 27 Wn. App. 826, 621 P.2d 770 (1980) 12

Fairwood Greens Homeowners v. Young, 26 Wn. App. 758, 614 P.2d 219 (1980) 13

Greco v. Parsons, 105 Wn.2d 669, 717 P.2d 1368 (1986) 11

Kelsey Lane Homeowners Association v. Kelsey Lane Company, Inc., 125 Wn. App. 227 (2005) 8

Krein v. Smith, 60 Wn. App. 809, 807 P.2d 906, rev. denied, 117 Wn.2d 1002 (1991) 5

Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561 , 980 P.2d 1234 (1999) . . 9

Mains Farm Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 854 P.2d 1072 (1993) 5

McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 837 P.2d 1000 (1992) 5

McGuire v. Gunn, 133 Kan. 422, 300 P. 654 (1931) 8

Metzner v. Wojdyla, 125 Wn.2d 445, 886 P.2d 154 (1994) 5

Mills Land & Water Co. v. Golden West Refining Co., 186 Cal. App. 3d 116, 230

Cal. Rptr. 461 (1986) 10

Mountain Park Homeowners Ass'n v. Tydings, 72 Wn. App. 139, 864 P.2d 392 (1993), aff'd, 125 Wn.2d 337, 883 P.2d 1383 (1994) 18

Veit v. Burlington N. Santa Fe Corp., 171 Wn.2d 88 (2011) 7

Ware v. Phillips, 77 Wn.2d 879, 468 P.2d 444 (1970) 13

Statutes

RCW 24.03.127 9

RCW 36.70A.030(5) 15

RCW 36.70A.060 15

RCW 36.70A.172 15

RCW 64.38.025(1) 6, 7, 9

RCW 64.38.025(4) 11

RCW 64.38.035 8

RCW 64.38.050 6

Other Authorities

BLACK'S LAW DICTIONARY, Rev. 4th ed. 8

Scott, Jacob, "Codified Canons and the Common Law of Interpretation," GEORGETOWN LAW JOURNAL, Vol. 98:341 7

William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 390 (2d ed. 2006) 7

I. Identity of Petitioner and Decisions for Which Review Is Sought

Appellant John E. Diehl petitions for review of the final decision in this case, filed June 23, 2015, by the Court of Appeals, Division II.. Appellant's motion for reconsideration and request for publication was denied on July 20, 2015.

II. Issues Presented for Review

A. When the governing documents of a homeowners' association provide a procedure by which decisions of its board of directors may be appealed to the board, may a reviewing court disregard the plain meaning of the provision at issue?

B. May the majority of a corporate board of directors use corporate funds to obtain a legal opinion, but refuse to disclose this opinion to a minority of the board and exclude a member from closed board meetings if he is perceived as potentially "adversarial"?

C. May a policy of a homeowners' association be valid if its requirements for notice are ineffective and contrary to what is defined as notice in the association's governing documents?

D. May a homeowners' association set policies for tree removal inconsistent with a county ordinance designed to protect critical areas?

E. If the governing documents of a homeowners' association provide that all owners have benefit of the common area on the same terms, may a governing board set

more lenient standards for itself to remove trees from the common area than it imposes on owner-members who seek tree removal?

Although these are the issues presented to the trial court and Court of Appeals, the reasoning of the latter gives rise to further issues, which will be discussed in the argument pertaining to the issues above. The potential for such reasoning being broadly applied makes these issues at least as important as the substantive issues in this case. These further issues include: May an appellate court decline to consider an issue on the ground that the issue is a new issue, even though it was briefed by an appellant in a trial brief, but was not shown to have been argued orally before the trial court because no verbatim report of proceedings was prepared? May an appellate court decline to consider evidence marked as admitted by the trial court when the appeal is undertaken without a verbatim report of proceedings?

III. Statement of the Case

In a 2009 case, *Diehl v. Hartstene Pointe Maintenance Association*, No. 09-2-01099-8, Mason County Superior Court issued a permanent injunction against a proposed tree-thinning program adopted by the HPMA Board., but allowed HPMA to develop other management policies affecting its Common Area. CP 225-229.

In September 2011, HPMA's Board voted 3-1 (two members absent, and Appellant Diehl, then a Board member, dissenting) to adopt an Interim Hazard Tree

Policy, by which trees in the Common Area would be selected for trimming or removal. CP 4, ¶ 7. Under HPMA's Covenants, Conditions, and Restrictions ("CC&Rs"), no owner may sue to prevent or abate an actual or threatened violation of these covenants without complaint to the association and without having exhausted the remedies available within the Association. Ex. 5, Article X, § 3.[1] HPMA's Rules provide a process for registering and hearing a complaint by appealing decisions of the Board of Directors to the Board. Ex. 9, Article II, § 4.

Concerned that this new policy gave such latitude to decision makers as to permit piecemeal what had been proposed in 2009, Diehl sought a hearing to give an opportunity for internal review of the decision. However, the Board's president, believing Diehl was not entitled to a hearing, sought an opinion from HPMA's attorney. CP 4. When the president proposed to discuss the attorney's opinion in a closed Board meeting, he asked Diehl to recuse himself. Diehl declined, maintaining that he was entitled to disclosure of the attorney's opinion on the question, and to participate in Board discussion of the issue of whether owners were entitled to hearings when they were adversely affected by Board decisions. CP 5-6, ¶¶ 24-29, 102, and 211. The Board

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[1] HPMA has several sets of CC&Rs, applicable to divisions of Hartstene Pointe developed at different times. However, these different sets of CC&Rs are identical so far as they concern the provisions in controversy in this case. References here to the CC&Rs will be to those applicable to so-called "Island Houses," which are duplexes, each half of which is separately owned. These are the CC&Rs applicable to Diehl's residence.

president then determined that the matter would not be considered at the closed meeting. CP 5, ¶ 23. At the Board's next meeting, Diehl was presented with a written demand that he recuse himself, threatening legal action against him if he did not. CP 215. The Board majority subsequently voted to initiate litigation against him. Ex. 48. Diehl filed counterclaims. CP 193-224 and 179-192.

Following Diehl's motion for summary judgment, the trial court invalidated the Interim Hazard Tree Policy. CP 87-88. HPMA subsequently amended its policy, and Diehl amended his counterclaims to challenge the revised policy. CP 89-101. Following trial, the court upheld the revised hazard tree policy, and made several rulings unfavorable to Diehl. CP 3-15. Diehl sought review of the trial court's legal conclusions, but did not challenge the trial court's findings of fact, and so did not order a verbatim report of proceedings. The trial court's conclusions of law were affirmed by the Court of Appeals, and are the subject of this petition for review.

IV. Argument

A. The plain meaning of a provision of the governing documents is that owners may appeal decisions of the governing board.

The court of appeals interpretation of one of HPMA's governing documents conflicts with a long-standing doctrine affirmed by many cases. Where the language of the governing documents of a homeowners' association is unambiguous, it will be given its "plain meaning." *Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68

(1965). Although a court's objective in interpreting restrictive covenants is to determine the intent of the parties, in determining intent, language is given its ordinary and common meaning. *Metzner v. Wojdyla*, 125 Wn.2d 445, 450, 886 P.2d 154 (1994); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993); *Krein v. Smith*, 60 Wn. App. 809, 811, 807 P.2d 906, review denied, 117 Wn.2d 1002 (1991). Ambiguity is not to be read into a contract that is otherwise clear. See *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992).

HPMA's Rules and Regulations (Rules), Article II, § 4, expressly state, "Any owner adversely affected by a decision of the Board of Directors may appeal to the Board of Directors for a hearing." Ex. 9. Although the trial court acknowledged this provision (CP 7, ¶ 36), it concluded, and the Court of Appeals affirmed, that "[n]o reasonable reading of Art. 2, section 4 of the Rules and Regulations would extend to permit an appeal of an action taken by the Board upon a motion and after a vote for the Board at a Board meeting." CP 11, ¶ 5. Neither court cited any authority for its ruling.

The Court of Appeals, in finding that "the trial court's conclusion of law is supported by the undisputed findings of fact . . . ." (Opinion at 8), said that "the trial court did not find that Diehl was adversely affected." Opinion at 7. If the Court of Appeals meant to say that the trial court might have reached a finding that Diehl was not

adversely affected, it still makes no sense to infer that the trial court's conclusions are supported by undisputed findings of fact, given that the trial court did not find that Diehl was not adversely affected.

To the contrary, it was undisputed that Diehl was an owner, and that he was adversely affected. When the trial court granted a permanent injunction against the Hazard Tree Policy that Diehl attempted to appeal to the HPMA Board, it implicitly acknowledged that Diehl was an owner who was adversely affected. Otherwise, it would have lacked a basis for issuing the injunction.[2]

The Court of Appeals' ruling is especially puzzling, and contrary to case law favoring plain meaning, because even HPMA did not deny that owner-members have a right to appeal Board decisions, but argued that this section "pertains only to decisions of the HPMA Board relating to the enforcement of HPMA's Rules, and specifically, Notices of Violation." CP 200, ¶ 4.6.

However, Article II, § 8, of the Rules provides separately for owner-member appeals of alleged violations. Ex.9. HPMA's reading of Article II, § 8, makes Article II, § 4 redundant (or vice versa). But this is contrary to what has been called "the rule

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[2] Moreover, as Diehl averred in his trial brief, alleging that the Board majority had failed to perform its fiduciary duties under RCW 64.38.025(1), he had been adversely affected as an owner-member entitled under RCW 64.38.050 to a remedy of any violation of the Homeowners' Association Act. Further, as an owner of property at Hartstene Pointe, he personally was adversely affected by removal of trees and tree limbs in the immediate vicinity of his house. CP 78-79. Although HPMA defended its policy, it never denied that Diehl was adversely affected.

against surplusage," a canon of construction. See *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88 (2011), citing William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 390 (2d ed. 2006). See also Scott, Jacob, "Codified Canons and the Common Law of Interpretation," GEORGETOWN LAW JOURNAL, Vol. 98:341, 365-366.

Article II, § 4, of HPMA's Rules should be read in the context of Article X, § 3, of the CC&Rs, which provides that no owner may sue to prevent or abate an actual or threatened violation without having complained and "without having exhausted the administrative remedies available to him within the Association." Ex. 5. Article II, § 4, of the Rules simply spells out how to handle such a complaint procedurally, and provides an opportunity for an administrative remedy. Ex. 9. The rule reasonably allows a procedure by which a complaint may be heard, particularly valuable when owner-members may have received no notice of an impending decision before it was made, and so had no practical opportunity to be heard in advance of the decision. Even though the Court of Appeals gave lip service to case law pertaining to plain meaning, it failed to heed it.

B. Board majorities may not exclude board minorities from closed meetings and withhold material information from them.

Because, under RCW 64.38.025(1), directors of homeowners' associations have a fiduciary duty in performance of their work, they have a duty to disclose material facts

to each other. See *Kelsey Lane Homeowners Association v. Kelsey Lane Company, Inc.*, 125 Wn. App. 227, 242-243 (2005), citing *Colonial Imports, Inc. v. Carlton N.W., Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 (1993). By definition, material information is such that it may be expected to induce action or forbearance.[3] Thus, advice of the corporate counsel is material information. No one disputes that the HPMA corporate attorney's advice regarding the right of owner-members to appeal might have influenced action or forbearance by the directors in this matter.

There appears no statute or precedent that would allow a dominant faction of a board of directors to shut out a minority, even a minority of one, on the ground that the minority is or may become adversarial to the board majority. While RCW 64.38.035(2) allows closed or "executive" sessions of a board of directors under specified circumstances, it does not authorize exclusion of any director from such a meeting.

The trial court granted declaratory judgment that HPMA's Board had the right to exclude Board member Diehl from closed meetings of the Board. CP 14, ¶ 1 and ¶ 3. The trial court did not find that Diehl had a conflict of interest. Indeed, it found that his refusal to recuse himself from two closed Board meetings did not represent any breach of his duties as a Board member. CP 10, ¶ 1. Yet, the trial court approved withholding

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[3] Information is material if it is "important . . . having influence or effect," such as "to influence party to whom made." BLACK'S LAW DICTIONARY, Rev. 4th ed. at 1128, citing *McGuire v. Gunn*, 133 Kan. 422, 300 P. 654, 656 (1931).

the counsel's opinion from Diehl on the basis that "In Diehl's threatened /proposed litigation Diehl was wearing his 'owner member' hat." CP 9, ¶ 61. The trial court cited no authority in support of its conclusion.

The trial court failed to recognize that a director on a homeowners' association board is entitled under the Homeowners' Association Act and the Nonprofit Corporation Act to all the rights and privileges of the office, including attending all board meetings and being informed of any advice provided to board members by corporate counsel, except where he has a conflict of interest regarding his fiduciary duties of loyalty and care, as defined by RCW 64.38.025(1) and RCW 24.03.127.

It is evident from Article II, § 4, of HPMA's Rules that **only** owner-members may appeal Board decisions. Ex. 9. So, it may be agreed that Diehl's appeal was undertaken in his capacity as an owner-member. However, it does not follow that he thereby forfeited his right to sit as a director in any review undertaken by the Board, or that he might be denied material information from corporate counsel regarding whether owner-members have a right to seek review of Board decisions.

Consequently, the Court of Appeal's affirmation of the trial court's ruling is inconsistent with the many cases holding that reversal of a trial court ruling is appropriate on the basis that its findings of fact do not support its conclusions of law. See *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

The Court of Appeals contends that Diehl cited "no authority that the Board may not exclude an owner-member in an adversarial position to the Board from such closed executive session in which likely litigation involving that owner-member is discussed." Opinion at 9. This is false, for Diehl did cite a California decision holding that a director, even one who might potentially be an adverse party, "is entitled to attend board meetings where the litigation may be discussed, perhaps with counsel. ... His position makes him potentially privy to privileged information about the litigation."[4] This is authority, even if not controlling authority.

But the Court of Appeal's reasoning is also odd, for it seems to suppose that directors who find themselves in the minority may be excluded from board meetings unless there is an express statutory provision or ruling by a Washington appellate court that prohibits such exclusion. When someone has rights and responsibilities under the law, as directors of nonprofit corporations do, then the presumption is that those rights and responsibilities shall not be abridged without sound authority. But the Court of Appeals has turned this presumption upside down, in effect concluding that anyone contending that his ordinary rights should not be abridged must produce controlling authority to support his claim. On this basis, if there is no specific appellate ruling on

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[4] *Mills Land & Water Co. v. Golden West Refining Co.*, 186 Cal. App. 3d 116, 128, 230 Cal. Rptr. 461 (1986), cited in BRIEF OF APPELLANT at 16

this issue, minorities may legitimately be deprived of their rights if a majority perceives the minority as "adversarial."

Although no Washington court appears to have addressed the exact question posed in this case, a similar question involving members of the boards of municipal corporations has been addressed. City councilmen, like members of the governing boards of incorporated homeowners' associations, are elected governors of corporations. Both have fiduciary duties. Both may be removed from office if their performance is deemed unsatisfactory.[5] In *Barry v. Johns*, 82 Wn. App. 865, 920 P.2d 222 (1996), the court rejected an effort to extend the concept of "beneficial interest" under Ch. 42.23 RCW, the code of ethics for municipal officers, to prohibit participation by city councilmen, who also served as board members of a nonprofit corporation, in a decision by the city council to approve an agreement limiting board members' liability for decisions made in their capacity as board members. The court concluded that the councilmen whose actions were challenged had a right to participate in the decision because "the code seeks only to regulate municipal officers' financial interests in contracts, not the type of non-pecuniary interest involved here. . . ." *Barry*, 82 Wn. App. at 866. The court addressed the role of an elected representative in policy-making situations:

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[5] However, under RCW 64.38.025(4) directors of a homeowners' association may be removed without cause, while public officials may be recalled only after filing of a petition stating with specificity substantial conduct clearly amounting to misfeasance, malfeasance, or violation of the oath of office. *Greco v. Parsons*, 105 Wn.2d 669, 671, 717 P.2d 1368 (1986).

> [I]n a representative democracy, we elect our legislators precisely to carry out agendas and promote causes with full knowledge that 'their own personal predilections and preconceptions' will affect their decisions. . . . As long as these predilections do not lead them to line their pockets or otherwise abuse their offices, we leave the wisdom of their choices to the voters. If the voters do not like their representatives' agendas or voting decisions, they are free to vote them out of office.

Barry, 82 Wn. App. at 870, citing *Evergreen Sch. Dist. 114 v. Clark County Comm. on Sch. Dist. Org.*, 27 Wn. App. 826, 833, 621 P.2d 770 (1980). An elected director of a homeowners' association should have no less freedom to pursue his or her legislative interests without surrender of his rights as a director.

Both issues before the HPMA Board – whether owner-members had a right to appeal Board decisions adversely affecting them and whether the Interim Hazard Tree Policy was in violation of the CC&Rs – were policy issues, and did not involve adjudication of the rights of any individual owner-member. It was neither alleged by HPMA, nor found by the trial court, that Diehl had any beneficial interest at stake when he was denied disclosure of the corporate counsel's advice and denied admission to a proposed closed meeting of the Board to discuss such advice and the issue of whether owner-members have a right to ask for a review of Board decisions. Because he had no beneficial interest in the questions at issue, Diehl was entitled to the same rights of information and participation as any other HPMA director. He was only fulfilling his fiduciary responsibility to represent the interests of all owner-members to the best of his

ability, loyal to their interests, not to any personal interest. Each director in a homeowners' association may have his or her own view of matters before its board; however, when there is serious disagreement, it is unreasonable to suppose that only those who constitute the majority may hear the opinion of counsel and discuss the issue.

C. HPMA's Hazard Tree Policy is invalid.

1. HPMA's governing documents require more effective notice to affected owners than provided in the Hazard Tree Policy.

Notice must be reasonably calculated to apprise a party of the pendency of proceedings affecting him or his property. *Fairwood Greens Homeowners v. Young*, 26 Wn. App. 758, 614 P.2d 219 (1980). It is fundamental that a notice to be meaningful must apprise the party to whom it is directed that his person or property is in jeopardy. *Ware v. Phillips*, 77 Wn.2d 879, 882, 468 P.2d 444 (1970). Moreover, the definitions section of HPMA's Rules provides that "[n]otice may be notice given in person or notice given in writing by first class United States mail addressed to the lot owner at the address on file with the Association." Ex. 9. Thus, HPMA's Rules call for notice to be given in person or by first class mail.

However, HPMA's policy does not provide such notice, shifting to owner-members the burden of investigating to learn when proposed removals of trees may adversely affect them.. It provides merely for posting the manager's recommendations in the clubhouse and on the website for 15 days, and for the HPMA office to respond to

inquiries by owner-members when it receives them. Ex. 1, § 3(f). This imposes on owner-members the need to search the bulletin boards or website, where the postings may not be conspicuous, or to frequently call the office to ask about pending tree removals.

Nonetheless, the trial court held that the posting requirement set forth in the December 2012 Hazard Tree Policy "constitutes reasonable notice." CP 12, ¶ 13. But the trial court did not find that such postings under the policy would be effective in providing notice to owner-members, and it is undisputed that most owner-members are not residents at Hartstene Pointe, and therefore cannot regularly inspect the bulletin boards in the clubhouse. Nor is it credible that most owner-members would receive notice of proposed actions by a posting on HPMA's web site. Reasonable notice cannot be notice requiring unrealistic vigilance, notice that is calculated to fail.

The Court of Appeals declined to reach the merits of this issue, based on its claim that the appellate record did not demonstrate that Diehl argued this issue to the trial court. Opinion at 11. However, Diehl's trial brief argued that the Hazard Tree Policy "failed to provide reasonable notice of decisions that may adversely affect owner-members as required under its CC&Rs." CP at 80; 61-62. While Diehl's trial brief did not mention the definition of "notice" found in HPMA's Rules and Regulations, it was never disputed that this definition was found in the Rules and Regulations, or that this governing document was admitted in evidence, as shown by the sticker affixed to the

copy of the Rules and Regulations introduced at trial, which copy was provided by the clerk of the trial court to the Court of Appeals. The definition in the Rules and Regulations comprises an added reason for holding that 'notice' of the kind provided in the Hazard Tree Policy should not be tolerated in a valid HPMA policy. The policy at issue, by shifting responsibility to owner-members to learn of proposed actions that might adversely affect them, failed to provide effective notice . It also failed to comply with the requirements for notice found in HPMA's Rules and Regulations.

By the Court of Appeals' reasoning, evidence admitted by the trial court might not be cited on appeal unless the use of the evidence in oral argument could be proved. There is no precedent for an appellate court refusing to consider evidence marked as admitted by the trial court. The issue here was not new. The essential evidence was admitted by the trial court. The Court of Appeals turned a blind eye on the evidence and on Appellant's arguments.

2. The policy sets vague, over-inclusive standards for labeling trees as "imminent hazards," conflicting with the county's Resource Ordinance.

Under the State's Growth Management Act, specifically RCW 36.70A.030(5), .060, and .172, counties must protect "critical areas," which include, among others, wetlands, landslide hazard areas, and fish and wildlife habitat conservation areas. Mason County's Resource Ordinance, designed to implement these statutory requirements,

prohibits removal of most trees from wetlands, landslide hazard areas, and fish and wildlife habitat conservation areas unless the trees are "danger trees," defined as trees with "a high probability of falling" and where there is "a residence or residential accessory structure within a tree length of the base of the trunk, or where the top of a bluff or steep slope is endangered."[6] Hence, trees may not ordinarily be removed unless within a tree length of a residence or accessory structure.

But HPMA's Hazard Tree Policy treats trees "within a tree-length of a target (home, other structure, driveway, parking area, roadway) . . . ."as potentially "imminent hazards." Ex. 1, § 2. The policy also states that trees deemed an imminent hazard need not be limited to those having specified characteristics. *Id.* Consequently, the policy authorizes removal of trees where the only 'targets' are roadways or driveways and where the criteria for determining an imminently hazardous condition may be unstated and potentially subjective.

Although the policy requires the manager to comply with applicable law (Ex. 1, §§ 2(a) and 3(a)), it gives no clue as to what law is applicable, and fails to ensure, by training or otherwise, that the manager is acquainted with applicable law. As a result, the manager may use the policy and ignore the ordinance when selecting trees for removal, allowing trees to be removed in landslide hazard areas even though the ordinance

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[6] See Appendix (Attachment 3), showing the relevant sections of the Resource Ordinance.

requires retention to mitigate the threat of landslides.[7] The discretion granted the manager is allowed to trump the County's ordinance.

The Court of Appeals acknowledges that Diehl's trial brief raised this issue. Opinion at 12, fn. 12. But the court asserts that it "cannot determine if Diehl actually argued this issue to the trial court." *Id.* The court implies that only oral arguments count as presenting an issue to a court. Surely, to present an issue in a trial brief is to argue the issue to the trial court. Because this issue was presented to the trial court, the Court of Appeals should not have dismissed the issue.

The Court of Appeals also reasoned that HPMA's policy is consistent with the Resource Ordinance, given that the policy requires compliance with applicable law. *Id.* Yet, a policy that conflicts with a county ordinance is not saved by a provision that nominally gives priority to the ordinance. By analogy, county development regulations clearly noncompliant with the requirements of the Growth Management Act would not be saved by a provision stating that they did not apply in circumstances where they were noncompliant with the Act. If a policy invites noncompliance by setting different standards than applicable law, it is reason to invalidate the policy. Especially in circumstances where, as with tree removal, evidence of noncompliance may be destroyed in the action, it is important to have policies that actually conform to the law.

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[7] Diehl pointed out that one or more trees near his house, removed by the manager, were within the buffer for a landslide hazard area. CP 78, lines 23-25.

3. The policy conflicts with the right of all owners under HPMA's governing documents to have benefit of the Common Area on the same terms.

HPMA, as successor to the Declarant, is bound by its governing documents to the same extent as every other owner. See *Mountain Park Homeowners Ass'n v. Tydings*, 72 Wn. App. 139, 145, 864 P.2d 392 (1993), aff'd, 125 Wn.2d 337, 883 P.2d 1383 (1994). Article II, § 1(e), of the CC&Rs provides that all owners are entitled to "use, enjoy, and have the benefit of the Common Area **upon the same terms**." Ex. 5, emphasis added. Accordingly, HPMA owes its owner-members equal treatment of proposals for removal of vegetation from the Common Area.

However, the HPMA Board has delegated authority to the manager in such a way that, except where an appeal is timely filed, decision-making is left to the manager, not the Board. Article VI, § 1(e), of the Bylaws, adopted subsequent to the initial invalidation of the Hazard Tree Policy, delegates authority to the manager in a way that conflicts with the requirement in the CC&Rs that the Board be the final arbiter on removal of vegetation. See Ex. 5, Article VI.

The policy also imposes requirements on owner-members that HPMA does not impose on its manager or Board. Although the policy allows owner-members to submit comments (regarding trees proposed for removal that are not deemed imminent hazards) within 15 days following the posting of the manager's recommendations, if owner-

members seek an expert report, they have only 15 days to obtain it **unless** it is obtained from a "professionally qualified arborist," defined as a consulting arborist certified by the International Society of Arboriculture ("ISA"), when they are allowed 30 days. See Ex. 1, § 3(j). But HPMA requires only that the manager use a forester with "urban experience," not an ISA-certified arborist (Ex. 1, § 3(a)). HPMA's Board has imposed a preference on owner-members it is unwilling to impose on itself.

HPMA's Policy allows the manager, operating under the direction of those owner-members on HPMA's Board, to weigh considerations, both stated and unstated, that are denied to owner-members when they seek tree removal.. The manager is allowed a range of considerations not applicable under the Rules when an owner-member seeks permission to remove trees. For example, nothing in the Rules corresponds to the manager's discretion to consider "to the extent practicable," such matters as "wildlife habitat, aesthetics, and cost/resource expenditures." Ex. 1, § 3(e). These vague guidelines allow a range of discretion to the manager that goes beyond anything allowed to owner-members under the Rules when they seek tree removals from the Common Area. Compare Ex. 9, Article IV, § 7(f). The policy creates a double standard, by which HPMA's Board members relieve themselves and their staff from constraints they impose on owner-members, who are unequally burdened with requirements pertinent to requests for tree removal.

V. Conclusion

Appellant asks this court to determine that Diehl had a right to appeal the Board's decision to adopt the Hazard Tree Policy, that HPMA had no right to deny material information to Diehl or to exclude him from Board meetings, and that HPMA's Hazard Tree Policy is invalid. This court is also asked to reject the theories of the Court of Appeals that it is not enough to show that an issue was presented to the trial court to show that it was argued in an appellant's trial brief, and that it is not enough to show that evidence has been admitted by the trial court to present evidence marked as admitted by the trial court.

This case should be remanded to the trial court with instructions to reach legal conclusions and an order consistent with this court's conclusions. Appellant should be awarded costs both on appeal and for substantially prevailing in the matter before the lower courts.

Dated: August 14, 2015 Submitted by: John E. Diehl

John E. Diehl pro se
679 Pointes Dr. W.
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360-426-3709

Appendix: (Attachment 1) Court of Appeals decision; (Attachment 2) Court of Appeals order denying motion for reconsideration and request for publication; (Attachment 3) Relevant Excerpts from Mason County's Resource Ordinance.

Attachment 1

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HARTSTENE POINTE MAINTENANCE ASSOCIATION, Respondent, v. JOHN E. DIEHL, Appellant.	No. 45739-3-II UNPUBLISHED OPINION

MELNICK, J. — John Diehl appeals the trial court's orders in a declaratory judgment action. He argues that because the trial court's findings of fact do not support its conclusions of law, the trial court erred when it granted Hartstene Pointe Maintenance Association's (HPMA) request for declaratory judgment and ordered that HPMA's governing instruments do not grant owner-members a right to appeal decisions of the HPMA Board of Directors (Board). He also argues that the trial court erred when it ordered that HPMA could exclude Diehl from closed executive sessions when he acted in his capacity as an owner-member and threatened litigation against HPMA. Finally, he argues that the trial court abused its discretion when it denied Diehl's request for declaratory judgment that HPMA's hazard tree policy is invalid. Because the trial court's conclusions of law are supported by its findings of fact, we affirm.

FACTS

I. SUBSTANTIVE FACTS

John Diehl owns two lots within the community of Hartstene Pointe, located in Mason County. HPMA is a nonprofit corporation and the homeowner's association for Hartstene Pointe. At all times relevant to this appeal, Diehl had dual roles as an owner-member and a Board member of HPMA.[1]

The governing instruments of the HPMA are the Covenants, Conditions, and Restrictions (CC&Rs) and the Rules and Regulations. Article 2 of the Rules and Regulations is entitled "Interpretation, Administration, and Enforcement of these Rules and Regulations." Clerk's Papers (CP) at 7 (findings of fact (FF) 35). Article 2, § 4 provides that an owner adversely affected by a Board decision may appeal to the Board for a hearing.[2] No other provisions in the governing instruments grant an owner-member a broad right to appeal Board decisions.

In September 2011, the Board adopted an interim hazard tree policy, applicable to common areas within Hartstene Pointe. Diehl cast the lone dissenting vote. The Board subsequently adopted additional hazard tree policies, with a final policy adopted on December 15, 2012. This policy provides that the HPMA manager shall generate a "Manager's Notice of Proposed Action" regarding tree removal from common areas and that notice, along with an arborist's report, shall be posted in the HPMA clubhouse and on the HPMA website for 15 days. CP at 8 (FF 47).

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[1] The Board derives its authority from the governing instruments of the HPMA and is bound to carry out duties and manage HPMA pursuant to the governing instruments. Ch. 64.38 RCW; Ch. 24.03 RCW.

[2] CC&R article 9 is titled "Interpretation, Administration, and Enforcement of Covenants." CP at 6 (FF 30). Article 9, § 3 allows any owner to complain of an actual or threatened violation of the CC&Rs to the Board and demand that HPMA prevent or abate the violation.

The policy provides "considerable specificity" regarding the manager's directives and duties, and the manager may consult with the Board with questions arising under the policy. CP at 8 (FF 51). No manager "felt confused or inadequately guided" by the policy. CP at 8 (FF 52). The "non-imminent hazard" section of the policy allows owner-members to "submit [to the Board] any written comments, objections, related information, or written alternative proposal" that the owner chooses. CP at 8 (FF 49). Additionally, under this section of the policy, an owner-member "may file a written notice of intent that the owner is retaining an independent, professionally qualified arborist" to prepare a second opinion. CP at 8 (FF 48).

Diehl sought to appeal to the Board its decision to adopt the September 2011 policy. As an owner-member, he claimed a right to appeal under CC&R article 9 and Rules and Regulations article 2. The Board president reviewed the governing instruments, discussed the issue with other Board members and legal counsel, and believed that Diehl had no right to appeal. The president drafted a summary of his meeting with legal counsel and forwarded it to all Board members except Diehl. The president believed Diehl and the Board held adversarial positions.

In October 2011, the Board met and asked Diehl to recuse himself from the portion of a closed executive session meeting during which the Board planned to discuss Diehl's request for an appeal. Diehl did not recuse himself and the Board did not discuss the issue.

II. Procedural History

In November 2011, HPMA filed a declaratory judgment action in Mason County Superior Court to determine whether the governing instruments vested a right to appeal the Board's adoption of the hazard tree policy or other management and policy decisions; whether HPMA may convene in closed executive session to consider legal communications, consult with legal counsel, and discuss likely or pending litigation threated by Diehl against HPMA; and whether Diehl is

required to recuse himself from such closed executive sessions. Diehl filed numerous counterclaims against HPMA, including that the hazard tree policy was invalid.

Diehl filed a motion for summary judgment, which the trial court granted in part by invalidating the hazard tree policy adopted in September 2011. The trial court denied the remainder of Diehl's motions for summary judgment. Diehl filed amended counterclaims challenging the revised hazard tree policies, including the final policy adopted on December 15, 2012. The matter proceeded to trial.

Following a five day bench trial, the trial court entered findings of fact and conclusions of law. It concluded that article 2, § 4 relates to the interpretation, administration, and enforcement of the Rules and Regulations and no reasonable reading would permit an owner to appeal a policy the Board validly adopted. The trial court concluded that the governing instruments as a whole "do not vest an owner . . . with any right to appeal to the Board the Board's adoption of the interim hazard tree policy or similar Board decisions."[3] CP at 11(conclusions of law (CL) 6).

Additionally, the trial court concluded that during the times at issue, Diehl was acting in his capacity as an owner-member and was likely to initiate litigation against HPMA.[4] And, pursuant to former RCW 64.38.035(2) (1995), HPMA had the authority to convene in closed executive session to consult with legal counsel and discuss likely or pending litigation.

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[3] The trial court also concluded that no reasonable reading of CC&R article 9 would permit an owner to appeal a policy validly adopted by the Board.

[4] In 2013, the legislature amended RCW 64.38.035. RCW 64.38.035(2) became (4) but remained substantively consistent. LAWS OF 2013 ch. 108, § 1.

The trial court concluded that the hazard tree policy adopted on December 15, 2012 was not invalid or defective in any manner relating to the delegation of duties to the manager and did not grant unreasonable discretion or overly broad powers to the manager. The trial court also concluded that the posting requirement constitutes reasonable notice, and the hazard tree policy was not unreasonably vague or biased. Finally, the trial court concluded that the "[n]on-imminent hazard" section of the policy was broad enough to enable owner input and did not limit an owner to any source of additional information. CP at 12 (CL 15).

The trial court granted HPMA's request for declaratory judgment that its governing instruments did not grant owner-members a right to appeal Board policy decisions and that the Board is and was authorized to convene in closed executive session excluding Diehl. The trial court denied Diehl's request for declaratory judgment that the hazard tree policy was invalid. Diehl appeals.

ANALYSIS

I. Standard of Review

We review a trial court's dismissal of a declaratory judgment action for abuse of discretion. *Wash. Fed'n of State Emps. v. State,* 107 Wn. App. 241, 244, 26 P.3d 1003 (2001). And ordinary rules of appellate procedure apply to an appeal from a declaratory judgment. *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 223, 232 P.3d 1147 (2010) (a declaratory judgment is an appealable final judgment). We review declaratory judgments the same way as any other civil action. RCW 7.24.070.

Diehl affirmatively accepts the trial court's findings of fact.[5] He argues only that the trial court's legal conclusions and order are not supported by its findings of fact. Br. of Appellant at 3. Generally, we treat unchallenged findings of the trial court as verities on appeal, and our review is limited to determine whether the findings support the conclusions of law. *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 110, 267 P.3d 435 (2011); *SAC Downtown Ltd. P'ship v. Kahn*, 123 Wn.2d 197, 202, 867 P.2d 605 (1994). Where, as here, the facts are undisputed and the only issues are questions of law, the standard of review is de novo. *SAC Downtown Ltd. P'ship*, 123 Wn.2d at 204.

Diehl is a self-represented litigant (SRL) who is held to the same standard as an attorney and must comply with all procedural rules on appeal and failure to comply may preclude review. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). Arguments that are not supported by any reference to the record or by any citation of authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We are not required to search the record to locate the portions relevant to a litigant's arguments. *Mills v. Park*, 67 Wn.2d 717, 721, 409 P.2d 646 (1966). And, the party seeking review is responsible for perfecting

[5] Diehl attempts to argue matters outside the findings, but he did not produce any portion of the Verbatim Report of Proceedings (VRP) on appeal. The appellant bears the burden of complying with the Rules of Appellate Procedure (RAP) and perfecting the record on appeal so the reviewing court has before it all the facts necessary to decide the issues. *In re Marriage of Haugh*, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990). We may decline to reach the merits of an issue if this burden is not met. *See State v. Wheaton*, 121 Wn.2d 347, 365, 850 P.2d 507 (1993).

Diehl also cites to several trial exhibits; however, from the record it is impossible to determine if the trial court admitted these exhibits. Without the VRP or any other affirmative proof of admission, we decline to consider these documents.

the record, including designating the necessary clerk's papers. RAP 9.6; *Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 612, 937 P.2d 1148 (1997).

II. OWNER-MEMBER RIGHT TO APPEAL VALIDLY ADOPTED POLICIES

Diehl argues that the plain language of Rules and Regulations article 2, § 4 gives owner-members a right to appeal the Board's adoption of the hazard tree policy to the Board.[6] He seems to argue his right to appeal exists because the hazard tree policy violates the CC&Rs. We disagree.

The governing documents of a homeowners' association are interpreted in accordance with accepted rules of contract interpretation. *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 273-74, 279 P.3d 943 (2012); *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). The primary objective in contract interpretation is to determine the drafter's intent. *Wilkinson*, 180 Wn.2d at 250. Generally, the drafter's intent is a question of fact, "'[b]ut where reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.'" *Wilkinson*, 180 Wn.2d at 250 (quoting *Ross v. Bennett*, 148 Wn. App. 40, 49-50, 203 P.3d 383 (2009)). In determining the drafter's intent, we give language "'its ordinary and common use' and will not construe a term in such a way 'so as to defeat the plain and obvious meaning.'" *Wilkinson*, 180 Wn.2d at 250 (quoting *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993).

Rules and Regulations article 2, § 4 allows owner-members to appeal to the Board if they are "*adversely affected*" by a Board decision. CP at 7 (FF 36) (emphasis added). The trial court found that there is nothing in the governing instruments that give owner-members a broad right to appeal all decisions of the Board. Here, the trial court did not find that Diehl was adversely affected by the adoption of the hazard tree policy but did conclude as a matter of law that this

[6] Diehl makes no argument regarding an appeal under CC&R article 9 in his appellate brief.

section "do[es] not vest an owner member with any right to appeal to the Board the Board's adoption of the interim hazard tree policy or similar Board decisions." CP at 11 (CL 6). Under the plain language of article 2, § 4, the trial court's conclusion of law is supported by the undisputed findings of fact and Diehl has no right to appeal to the Board. We hold that the trial court did not err by granting HPMA's declaratory judgment that "HPMA's governing instruments do not grant owner-members a right to appeal decisions of the HPMA Board." CP at 14 (Order 2).

III. EXCLUSION OF DIEHL FROM CLOSED EXECUTIVE SESSION

Diehl argues the trial court erred by ruling that HPMA may exclude Diehl from its closed executive sessions. We disagree.

Diehl assigns error to the trial court's order "granting HPMA's request for declaratory judgment that its Board has the right to exclude a Board member when it meets in closed sessions to discuss likely or pending litigation, when its majority believes that the member may be an adversary in litigation." Br. of Appellant at 1. Diehl additionally assigns error to the trial court's denial of his "request for declaratory judgment that he as a Board member was entitled to disclosure of communications from the corporate attorney." Br. of Appellant at 1.

However, the trial court did not enter a general order that HPMA has the right to exclude a Board member from closed executive sessions. Rather, it ordered that "in this particular case, the HPMA Board had and has the right to exclude Diehl from such closed executive session." CP at 14 (Order 3). The trial court correctly ruled that because Diehl was acting in his capacity as an owner-member and not a Board member,[7] and because he was likely to bring litigation against

[7] We accept as a verity on appeal the trial court's unchallenged findings that Diehl acted in his capacity as an owner-member and not a Board member and that he was likely bring litigation against HPMA. *Jensen*, 165 Wn. App. at 110. We do not consider Diehl's argument that he acted in his capacity as a minority board member.

HPMA, the Board could exclude him from a closed executive session while they consulted with legal counsel regarding the subject of the potential litigation.

To the extent that Diehl is arguing that HPMA was not authorized to meet in closed executive session, his argument fails. Former RCW 64.38.035(2) (1995) provides that "[u]pon the affirmative vote in open meeting to assemble in closed session, the board of directors may convene in closed executive session to . . . consult with legal counsel or consider communications with legal counsel; and discuss likely or pending litigation. . . ."[8] The Board could meet in a closed executive session to consult with legal counsel regarding Diehl's likely litigation pursuant to former RCW 64.38.035(2).

Diehl cites to no authority that the Board may not exclude an owner-member in an adversarial position to the Board from such closed executive session in which likely litigation involving that owner-member is discussed. An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). Arguments that are not supported by any reference to the record or by any citation of authority need not be considered. *Cowiche Canyon Conservancy,* 118 Wn.2d at 809.

Diehl also seems to argue that the trial court erred when it ordered that HPMA did not discriminate against Diehl when it failed to disclose to Diehl the advice of legal counsel and legal communications. Because the trial court found that Diehl was acting as an adversarial and in his

[8] The trial court entered a finding of fact that former RCW 64.38.035(2) (1995) provides that "upon the affirmative vote in opening meeting to assemble in closed session, the board of directors may convene in closed executive session to consider personnel matters, consult with legal counsel, or consider communications with legal counsel and discuss likely or pending litigation, matters involving possible violations of the governing documents of the association, and matters involving the possible liability of an owner to the association." CP at 7 (FF 39).

capacity as owner-member during the times at issue, he was not a Board member entitled to such information. This argument is without merit.

III. HAZARD TREE POLICY

Diehl argues that the trial court's conclusion of law that the hazard tree policy is valid is not supported by its findings of fact. Specifically, he argues that the policy is invalid because it does not provide sufficient notice to owner-members prior to manager action, it sets vague standards for labeling trees as imminent hazards, it improperly grants authority to the manager, it does not contain an adequate appeal process, and it is inconsistent with the CC&Rs. We hold that because the policy both provides sufficient notice and for an adequate appeal process, the trial court did not abuse its discretion when it denied Diehl's request for declaratory judgment that HPMA's hazard tree policy is invalid. We decline to consider Diehl's remaining arguments for the reasons we previously articulated.[9]

A. The Policy Provides Sufficient Notice

Diehl first argues that the trial court's conclusion that the hazard tree policy provides sufficient notice to owner-members of proposed tree removals is not supported by its findings of fact.[10] He argues that because the policy shifts the burden of notice of removal of non-imminent hazard trees to owner-members, it does not provide sufficient notice prior to action. Additionally,

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[9] While Diehl now attempts to argue matters outside the findings, our review is limited to only whether those facts pertaining to the hazard tree policy support the trial court's conclusions of law and orders. *See SAC Downtown Ltd. P'ship*, 123 Wn.2d at 202.

[10] The trial court concluded the hazard tree policy "is not unreasonably vague or biased, [and it] provides sufficient notice." CP at 12 (CL 17).

he argues that the notice requirement contained in the policy is inconsistent with the Rules and Regulations.[11] We hold that the trial court's conclusion of law is supported by its findings of fact.

The policy does not shift the burden of notice to owner-members. The trial court specifically found that the policy provides that the "HPMA Manager shall, after reviewing the arborist's report, generate a 'Manager's Notice of Proposed Action'" which, "along with the arborist's report, shall be posted in the HPMA Clubhouse and on the HPMA website for 15 days." CP at 8 (FF 47). This policy places an affirmative duty on HPMA to provide notice to owner-members. Thus, Diehl's argument fails.

Diehl next argues that this notice is inconsistent with the definition of notice contained in the Rules and Regulations definition section, requiring notice by first-class mail or personal service to every owner-member. HPMA contends that the trial court rejected Diehl's claim below. But the trial court entered no findings regarding the definition of notice contained in the Rules and Regulations and its applicability to the hazard tree policy. Because we generally do not consider issues raised for the first time on appeal, and because the appellate record does not demonstrate Diehl argued this issue to the trial court, we decline to reach the merits of this argument. RAP 2.5(a). Diehl bears the burden of perfecting the record on appeal so we can decide the issues presented. *Dash Point Vill. Assocs.*, 86 Wn. App. at 612.

[11] In support of his argument, Diehl contends that HPMA must comply with due process requirements. He cites to numerous cases regarding due process notice required by government and quasi-government agencies. HPMA is a nonprofit corporation and homeowners' association, and therefore not bound by constitutional due process requirements. Ch. 24.03 RCW; Ch. 64.38 RCW. Diehl cites no authority to the contrary.

B. Imminent Hazard Trees

Diehl next argues that the hazard tree policy sets vague standards for labeling trees as imminent hazards. However, Diehl admits that the trial court did not specifically address this issue. The trial court entered no findings of fact, conclusions of law, or orders regarding the policy of labeling of trees as imminent hazards. Again, because we generally do not consider issues raised for the first time on appeal, and because the appellate record does not demonstrate Diehl argued this issue to the trial court, we decline to reach the merits of this argument. RAP 2.5(a). Diehl bears the burden of perfecting the record on appeal so we can decide the issues presented.[12] *Dash Point Vill. Assocs.*, 86 Wn. App. at 612.

Diehl additionally argues that even if the standards for labeling trees as imminent hazards are adequate, the hazard tree policy fails to ensure that the manager acts in compliance with applicable law, including the Mason County Resource Ordinance. But the hazard policy provides that the manager must comply with applicable law in discharging duties under the policy. The community of Hartstene Pointe is in Mason County. Therefore, the Mason County Resource Ordinance is applicable law with which the manager must comply and, pursuant to the policy, the manager may take only action that also complies with the Mason County Resource Ordinance. Diehl's argument fails.

[12] Diehl did raise this issue in his trial brief but because we do not have the verbatim report of proceedings, we cannot determine what action, if any, the trial court took. CP at 69. We also cannot determine if Diehl actually argued this issue to the trial court. We are bound by the trial court's findings of fact. *Jensen*, 165 Wn. App. at 110.

C. Grant of Authority to Manager

Diehl argues that the trial court's conclusion that the hazard tree policy "does not grant unreasonable discretion, and does not grant overly broad powers to the HPMA manager" to discharge its duties is not supported by the findings of fact.[13] CP at 12 (CL 16). We disagree.

RCW 64.38.020(3) provides that an association may "[h]ire and discharge or contract with managing agents and other employees, agents, and independent contractors." The trial court found that the policy has "considerable specificity" regarding the manager's directives and duties, and that the manager may consult with the Board with respect to duties arising under the hazard tree policy. CP at 8 (FF 51). Diehl does not challenge this finding of fact. Because HPMA is authorized to hire a manager to discharge its duties and to provide specific directives and duties to that manager, the policy does not grant unreasonable discretion and overly broad powers to the manager. We hold that the trial court's conclusion is supported by its findings of fact.

D. Owner-Member Appeal of Manager's Decisions

Diehl argues that the trial court's conclusion of law that the hazard tree policy does not limit an owner to any source of additional information regarding trees proposed for removal is not supported by its findings of fact because the policy contains arbitrary time limitations to obtain an expert opinion, which imposes an unreasonable restriction on owner-member challenges to tree removal. The trial court found that under the "non-imminent hazard" section of the hazard tree policy, "'any owner may submit any written comments, objections, related information, or written

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[13] Diehl entitled a subsection of his opening brief "The Policy grants powers to HPMA's manager inconsistent with HPMA's Rules and the county's Resource Ordinance." Br. of Appellant at 33. However, he provides no argument in support of his assertion that the manager's powers are inconsistent with the Mason County Resource Ordinance. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). We decline to reach the merits of this issue.

alternative proposal' the owner wishes." CP at 8 (FF 49). Diehl does not assign error to this finding, and our review is limited to determining whether the findings support the conclusions of law. *See SAC Downtown Ltd. P'ship*, 123 Wn.2d at 202.

The trial court then concluded that this section "does not limit an owner to any source of additional information, and is broad enough to enable any owner input." CP at 12 (CL 15). This conclusion is clearly supported by the finding because an owner may submit *any* additional information the owner *wishes*, and the owner is therefore not unreasonably limited. Furthermore, Diehl fails to provide any citation to the record or to authority to support his argument. Arguments that are not supported by any reference to the record or by any citation of authority need not be considered. *Cowiche Canyon Conservancy,* 118 Wn.2d at 809. Diehl's argument fails.

E. Right to Have Benefit of the Common Areas

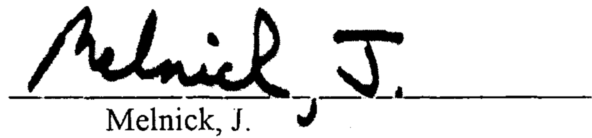
Finally, Diehl argues that the hazard tree policy is invalid because it allows HPMA more discretion than owner-members to remove trees from common areas, contrary to the right of all owner-members to use, enjoy, and have benefit of the common areas established by CC&R article 2, § 1(e). However, Diehl concedes that "[t]he trial court did not directly address" this question. Br. of Appellant at 38. The trial court entered no findings of fact regarding CC&R article. 2, § 1(e). Again, because we generally do not consider issues raised for the first time on appeal, and because the appellate record does not demonstrate Diehl argued this issue to the trial court, we decline to reach the merits of this argument. RAP 2.5(a).

Because the trial court's findings of fact support its conclusions of law that the hazard tree policy provides sufficient notice to owner-members of proposed tree removals, does not grant unreasonable discretion and overly broad powers to the manager, does not limit an owner to any

source of additional information, and is broad enough to enable any owner input, it did not abuse its discretion when it denied Diehl's request for declaratory judgment that the policy is invalid.

We affirm.

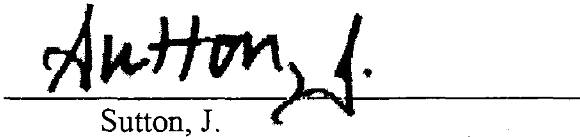
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Melnick, J.

We concur:

Worswick, P.J.



Sutton, J.

Attachment 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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DIVISION II

HARTSTENE POINTE MAINTENANCE ASSOCIATION, Respondent, v. JOHN E. DIEHL, Appellant.	No. 45739-3-II ORDER DENYING MOTION FOR RECONSIDERATION AND PUBLICATION OF OPINION

APPELLANT filed a motion for reconsideration of the Court's **June 23, 2015** opinion and a request for publication of opinion. Upon consideration, the Court denies the motions. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Melnick, Sutton

DATED this 20th day of July, 2015.

FOR THE COURT:

PRESIDING JUDGE

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Attachment 3

ATTACHMENT 3: EXCERPTS FROM MASON COUNTY RESOURCE ORDINANCE RELATING TO DANGER TREES

Below are sections of the Mason County Resource Ordinance pertinent to the definition of "danger tree" and provision for removal of danger trees. The full ordinance – more than 100 pages – is available online at:

https://www.municode.com/library/wa/mason_county/codes/code_of_ordinances?nodeId=TIT8ENPO_CH8.52REMA

The headings in boldface below are inserted for convenience and are **not** in the Resource Ordinance.

Definition of "danger tree"

Danger Tree: A tree with a high probability of falling due to a debilitating disease, a structural defect, a root mass more than 50% exposed, or having been exposed to wind throw within the past 10 years, and where there is a residence or residential accessory structure within a tree length of the base of the trunk, or where the top of a bluff or steep slope is endangered. Where not immediately apparent to the review authority, the danger tree determination shall be made after review of a report prepared by an arborist or forester.

Removal of danger trees within wetlands or their buffers

2. Activities Permitted without a Mason Environmental Permit
The following uses shall be allowed, in addition to those defined in General Exemptions (see Section 17.01.130), within a wetland or wetland buffer to the extent that they are not prohibited by the Shorelines Management ACT of 1971 (Chapter 90.58 RCW), Federal Water Pollution Control Act (Clean Water ACT), State Water Pollution Control Act (Chapter 90.48 RCW), State Hydraulic Code (RCW 75.20.100 - .140), Forest Practices Act (Chapter 76.09 RCW and Chapter 222-16 WAC) or any other applicable ordinance or law and provided they are conducted using best management practices, except where such activities result in the conversion of a regulated wetland or wetland buffer to a use to which it was not previously subjected and provided further that forest practices and conversions from forest land shall be governed by Chapter 76.09 RCW and its rules:

. . .

i. The felling of danger trees within buffers provided the following conditions are met:
(1) When it is demonstrated to the satisfaction of the Mason County Director of Community Development or his or her designee ("Department") that an imminent threat exists to public health or safety, or the safety of private or public property. Landowner shall provide to the Department a written statement describing tree location, danger it poses, and proposed mitigation.

(2) Should the imminent threat not be apparent to the Department (as danger trees are defined in Section 17.01.240), the Department may require the landowner submit a report from a professional forester or certified arborist.

(3) Before a danger tree may be felled or removed, with the exception of an emergency pursuant to Section 17.01.170, the landowner shall obtain written approval from the Department. This approval shall be processed promptly and may not be unreasonably withheld. If the Department fails to respond to a danger tree removal request within 10 business days, the landowner's request shall be conclusively allowed. . . .

Removal of danger trees within landslide hazard areas or their buffers

2. Land Clearing
a. Within this section, "Land Clearing" is defined as the cutting or harvesting of trees or the removing or cutting of vegetation so as to expose the soil and which is not otherwise exempt from this section.

b. Land Clearing in Landslide Hazard Areas or their buffers is permitted when it is consistent with the recommendation and plans contained in the Geotechnical Report and development approval.

c. If there is no Geotechnical Report for the site, land clearing is not permitted: however removal of danger trees, selected removal for viewing purposes of trees less than 6 inches dbh (diameter at breast height) and trimming or pruning of existing trees and vegetation is allowed with the qualifications cited herein.
Danger trees shall be identified with the recommendation of a member of the Association of Consulting Foresters of America, an arborist certified by the International Society of Arboriculture, or with the recommendation of a person qualified to prepare a geotechnical report if removing trees for slope stabilization purposes. Removal of trees less than 6 inches dbh shall be limited to less than 2 percent of the total number of trees of that size or larger in the hazard area. Removal of multiple trees in a concentrated area, i.e. within a distance of 25 feet
of each other, shall be accompanied by replacement by deep rooting native shrubs or other vegetation that serve similar moisture and erosion protective functions to that provided by the removed trees. Trimming and pruning shall be accomplished in accordance with pruning standards of the International Society of Arboriculture, as published in "ANSI A300-95" or subsequent updated versions in order to minimize the potential for long term damage to the trees.

d. Removal of selected trees and ground cover is allowed without a permit for the purpose of surveying and geotechnical exploration activities that do not involve grading, provided that re-vegetation of the disturbed areas occurs immediately afterward.

e. Land clearing for which a permit has been obtained shall not be allowed during the wet season, i.e. from October 15 through May 1, unless special provisions for

wet season erosion and landslide protection have been addressed in the Geotechnical Report and approved by the Director. . . .

Removal of danger trees within fish and wildlife habitat conservation areas or their buffers

F. ACTIVITIES WHICH DO NOT REQUIRE A MASON ENVIRONMENTAL PERMIT
The following uses shall be allowed, within a FWHCA or its buffer to the extent that they are not prohibited by any other applicable law or ordinance, provided they are conducted so as to minimize any impact on the values and functions of the FWHCA, and provided they are consistent with any county approved Resource Ordinance Special Study (such as a Habitat Management Plan or Geotechnical Report) or any state or Federally approved management plan for an endangered, threatened, or sensitive species.

. . .

5. The felling of danger trees within buffers provided the following conditions are met:
a. When it is demonstrated to the satisfaction of the Mason County Director of Community Development or his or her designee ("Department") that an imminent threat exists to public health or safety, or the safety of private or public property. Landowner shall provide to the Department a written statement describing tree location, danger it poses, and proposed mitigation.

b. Should the imminent threat not be apparent to the Department (as danger trees are defined in Section 17.01.240), the Department may require the landowner submit a report from a professional forester or certified arborist.

c. Before a danger tree may be felled or removed, with the exception of an emergency pursuant to Section 17.01.170, the landowner shall obtain written approval from the Department. This approval shall be processed promptly and may not be unreasonably withheld. If the Department fails to respond to a danger tree removal request within 10 business days, the landowner's request shall be conclusively allowed. . . .

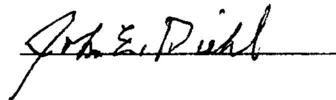
WASHINGTON STATE COURT OF APPEALS, DIVISION II

HARTSTENE POINTE MAINTENANCE ASSOCIATION, Respondent, v. JOHN E. DIEHL, Appellant.	NO. 45739-3-II DECLARATION OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
2015 AUG 18 AM 11:39
STATE OF WASHINGTON
BY DEPUTY

I declare, under penalty of perjury under the laws of the State of Washington, that on August 14, 2015, I personally delivered, faxed, and/or electronically delivered a copy of PETITION FOR REVIEW to the office of Kristin French, attorney for Hartstene Pointe Maintenance Association.

Dated: August 14, 2015



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