95877-7

No. 75555-2-I

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

THADDEUS C. PRITCHETT,

Petitioner,

vs.

PICNIC POINT HOMEOWNERS ASSOCIATION,
a Washington non-profit corporation,

Respondent.

PETITION FOR REVIEW

William T. Willard, WSBA #20248
Law Office of William Willard, PLLC
3417 Evanston Avenue N., Suite 529
Seattle, WA 98103
(206) 224-6303

Sidney Tribe, WSBA #33160
Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioner Thaddeus C. Pritchett

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A. IDENTITY OF PETITIONER

Petitioner Thaddeus Pritchett asks this Court to grant review of the Court of Appeals, Division One, decision set forth in Part B.

B. DECISION

Division One issued its opinion on March 19, 2018. A copy of the opinion is at App. A. Division One denied Pritchett's motion for reconsideration on April 17, 2018. A copy of the order is at App. B.

C. ISSUES PRESENTED FOR REVIEW

1. This case involves an issue of first impression on appeal: the interpretation of commonly-used language in a view protection covenant. Resolution of the issue turns on the definition of a term "obstruct" that the trial court concluded was ambiguous. The Court of Appeals reversed the trial court, concluding that the term obstruct is unambiguous as a matter of law, but did not define the term. Should this Court take review because the Court of Appeals failed to define the term in its published opinion on an issue of first impression that effects a broad segment of the public?

2. The trial court here concluded that a homeowners' association board violated multiple procedural provisions of its governing documents, had a conflict of interest, and "manufactured" a reason to deny a homeowner's renovation project. The Court of Appeals reversed, holding that a homeowners' association is a private organization not bound by the constitution, and thus was not liable for violating its governing documents. Should this Court take review to protect homeowners by affirming that quasi-governmental homeowners' association boards with conflicts of interest may not flagrantly violate their own procedural rules and harm homeowners to serve themselves?

3. The Court of Appeals overturned the trial court's findings of fact that were based upon substantial evidence and substituted its judgment for that of the trial court on a pure question

of fact resolved after a trial. Should this Court take review to ensure that the Court of Appeals does not exceed its authority and contravene black-letter appellate procedural law about the separation of roles between triers of fact and reviewing courts?

4. Should the Court of Appeals have resolved the issue of the trial court's decision not to award Pritchett attorney fees?

D. STATEMENT OF THE CASE

(1) Factual Background and Superior Court Judgment

Thaddeus Pritchett has lived in the Picnic Point neighborhood since 1999. Op. at 1-2. The neighborhood is governed by Codes, Covenants and Restrictions ("CC&Rs"). *Id.* One of the covenants involves view protection, and states that no structure may be modified to a "height which would…obstruct the Puget Sound View of any other parcel." Op. at 2. The CC&Rs also mandate procedural rules for reviewing and approving or homeowners' proposed property uses. App. C.[1] They specify that an independent design committee has authority to approve or reject a homeowner's application. *Id.* That committee had to have an architect as a member and keep proper records. App. C at 24.

In 2008, Pritchett sought to remodel his dilapidated house. Op. at 3. After several diligent inquiries to his neighbors and many attempts at redesign, he found a design with which all of his nearby neighbors were

[1] App. C is the trial court FFCL, which is in the record at CP 190-216.

happy. App. C at 4. The design committee, chaired by James McArthur was poised to approve Pritchett's project, finding "no view infringement." Op. at 5. Board President Brian Bookey, who lived a quarter mile uphill from Pritchett, told McArthur that there apparently would not be view impacts from the project "unless you have failed to inquire with someone who might be impacted." Op. at 4.

However, when McArthur later notified that the Bookey committee was about to approve the project, Bookey objected, claiming that houses from his street, including his own, might have a "view issue." *Id.*

Based on Bookey's claim, Pritchett complied with McArthur's request to put stakes on his roof to show the height difference from the project. Op. at 5. McArthur and the other committee members went to Bookey's house to view the stakes. Op. at 6. They could not see the stakes with the naked eye, and only spotted them after using a telescope. *Id.* After photographing Pritchett's house with a telephoto lens using 85 times magnification, they declared that the remodel would "obstruct" Bookey's view. App. C at 10; Op. at 6.

Pritchett filed a declaratory judgment action to determine the meaning of the term "obstruct" in the CC&Rs, and alleged the Association had violated procedural provisions in the covenants. Op. at 6. He stated the term obstruct was ambiguous, and offered evidence that the project

would effect a .076 percent alteration in Bookey's view, an area no larger than the tip of a ballpoint pen." App. C at 12, 19-21. He argued this was not an "obstruction." App. C at 20. He also offered evidence in the form of Bookey's own statement, recorded in board meeting minutes, that the homeowners who voted for the covenants expected that they would be enforced flexibly, not strictly. App. C at 18-19; Op. at 12.

The Association's position was that, according to its "strict" interpretation of the covenants, a homeowner could not even replace his or her roof with thicker roofing materials, because raising a roof one inch would be a view "obstruction." CP 203. It maintained that any alteration in view constituted an obstruction. *Id.*

After a multi-day trial Pritchett prevailed. The trial court concluded (1) the term "obstruct" in the view covenant was ambiguous and provided no measurable standard to judge, (2) "the Pritchett proposals did not present a view obstruction of the Puget Sound," App. C at 19; and (3) the Association violated numerous provisions of the CC&Rs in the way it handled Pritchett's project application, including allowing the Board President to intervene in the independent design committee's decision and "manufacture" a view obstruction claim that benefited his own property. App. C at 24-26.

The Association appealed to the Court of Appeals.

(2) The Court of Appeals Proclaimed the Term "Obstruct" in the View Covenant to Be Unambiguous But Declined to Define It Despite It Being an Issue of First Impression

In its published opinion, the Court of Appeals reversed the trial court's conclusions of law and judgment. It concluded that the trial court erred as a matter of law in concluding that the CC&Rs were unambiguous, and that they should not be strictly enforced to the point of absurdity. Op. at 12. It concluded that a view is either obstructed or it is not, and reversed the trial court's finding an alteration the size of a ball point pen tip – or .076 percent of the total view – was an "obstruction."

However, despite concluding that the CC&Rs were unambiguous as a matter of law, the Court of Appeals did not define the term "obstruct" in its published opinion on this matter of first impression in Washington.

In holding that reasonable minds *could not* disagree regarding the meaning of "obstruct" in the CC&Rs (regardless of the nature of the structure, the extent and size of the view, and the distance and elevation between properties) the Court of Appeals failed to resolve the ambiguity at all. For example, could agree that this is an obstruction:

However, reasonable minds could differ as to whether this is a view "obstruction."

Yet the Court of Appeals' opinion held that the latter example is a view "obstruction" as a matter of law, without even defining the term "obstruct." This is the position the trial court rejected as "absurd," and was the basis for its conclusion that the term "obstruct" in the CC&Rs was ambiguous. App. C at 18-19.

(3) The Court of Appeals Rejected the Trial Court's Conclusion that the Association Was Obligated to Comply with the Procedural Provisions of the CC&Rs When Deciding Whether or Not to Permit Pritchett's Project

The trial court also ruled that the Association – while claiming the importance of obeying the CC&Rs – had itself violated the CC&Rs numerous times, which led to the improper denial of Pritchett's project application. App. C at 25-26. Although the trial court used the term "due process violation," suggesting a constitutional issue, the conclusions of law made it crystal clear that the trial court was finding that the Association

damaged Pritchett by *violating the CC&Rs* and bylaws, not the Constitution. *Id*.

Despite the fact that the trial court clearly based its legal conclusions in the language of the CC&Rs and not the Constitution, the Court of Appeals ruled that the trial court erred because a private association has no constitutional due process obligations. Op. at 15-16. The Court rejected the trial court's conclusion that a homeowners' association can be held accountable for violating its own governing documents, or for allowing Board members with conflicts of interest to usurp the process for reviewing their neighbors' project applications *Id*.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court of Appeals' published opinion fails to address a central issue of first impression, improperly tilts the balance of power between homeowners and neighborhood associations in favor of those governing bodies, and violates one of the most basic tenets of appellate review: the reviewing court must accept the trier of fact findings if they are supported by substantial evidence.

(1) <u>When a Court Announces that an Undefined Term Is Unambiguous – Particularly on an Issue of First Impression – Precedent from this Court and all Three Divisions of the Court of Appeals Demand that the Court Define the Term</u>

The Court of Appeals' published opinion failed to resolve the central issue: the definition of the term "obstruct" in the context of view protection covenants. The Court of Appeals presumed, without defining any CC&R term, that a view is an unambiguous, objective, definable object and such that reasonable minds will always agree on whether it is "obstructed." Op. at 12-13. It claimed that the term "obstruct" as used in the CC&Rs was "facially objective." *Id.* at 13.

It is a fundamental principle of both statutory and contract interpretation that the appellate court defines important terms, particularly when it claims those terms are "unambiguous." *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990, 992 (2007); *Matter of Det. of J.N.*, 200 Wn. App. 279, 286, 402 P.3d 380, 384 (2017), *review granted sub nom. In re Det. of J.N.*, 189 Wn.2d 1031, 407 P.3d 1147 (2018); *State v. Monschke*, 133 Wn. App. 313, 329, 135 P.3d 966, 974 (2006); *State v. Torres*, 198 Wn. App. 864, 885, 397 P.3d 900, 910 (2017), *review denied*, 189 Wn.2d 1022, 404 P.3d 486 (2017). This is particularly important in a published opinion case of first impression, where subsequent courts and litigants will be relying on the opinion for guidance.

View protection covenants such as the one the Court of Appeals reviewed here are commonly used and can be a source of tremendous power to curtail property rights. *See Enforcement of Restrictive Covenant Against*

Obstruction of View, 40 Am. Jur. Proof of Facts 3d 347 (Originally published in 1997, updated April 2018). Homeowners buying property subject to a view covenant, or voting to give associations the power to approve or deny projects, should have clarity and guidance regarding that power.

Following this Court's long-standing precedent on defining terms, Pritchett cited to the Court of Appeals the following definition of "obstruct:"

> A common English dictionary defines "obstruct" in the context of views as "to cut off from sight <*a wall ~s the view*>." *Merriam-Webster's Collegiate Dictionary* at 857 (11th ed. 2014). Black's Law Dictionary defines "obstruct" in this context as "to cut off a line of vision; to shut out <*the new construction obstructs our view of the road*>." *Black's Law Dictionary* at 1246 (10th ed. 2009).

Br. of Respondent/Cross-Appellant at 32; App. D. Because Pritchett's project in no way blocked or cut off Bookey's line of vision, he argued that the trial court ruled correctly. *Id.*

However, the Court of Appeals failed to adopt any definition of the term. This is surprising given the Court's insistence that the trial court erred as a matter of law in concluding that the term was ambiguous, and insisting that everyone knows what "obstruct" means in this context.

The Court of Appeals' failure to define the term "obstruct," despite concluding it was unambiguous, reveals a weakness in the published

opinion that will frustrate application of the decision in other cases, and will give associations too much power to restrict property rights.

When, in a case of first impression that affects large portions of the public, the Court of Appeals fails to offer any actual legal guidance or analysis on the central issue, this Court should take review. RAP 13.4. It should do what the Court of Appeals declined to do: address this issue of first impression and define the term "obstruct" as it is used in CC&Rs across the State of Washington.

(2) The Court of Appeals' Opinion Sanctions the Illegal Conduct of Homeowners' Associations by Holding that Associations Are Not Liable for Violating Procedural Provisions in their Governing Documents in Contravention of the Homeowners' Association Act,[2] Public Policy and Prior Opinions of the Court of Appeals

As the trial court found, the Association's professed concern about "strict" enforcement of the CC&Rs did not extend to obeying that document's procedural provisions, or the Association's bylaws. App. C at 23-26. Instead, the Association simply ignored those provisions, including the procedural strictures of Sections 7.4, 8.1, and 8.3. *Id.* It found that Brian Bookey, the self-interested board President, intervened in the design committee's decision – which the CC&Rs reserved *only* to the design committee – to improperly stop Pritchett's project. *Id.* It also found that

[2] RCW ch. 64.38 ("the HAA").

the design committee was improperly constituted and failed to keep adequate records. *Id.* It labeled the Association's actions "due process" violations, but clearly cited the CC&R violations as the source of legal authority for the ruling. *Id.*

Clearly, the trial court's use of the term "due process" distracted the Court of Appeals, which ruled that the Fourteenth Amendment does not apply to homeowners' associations without addressing the CC&R and bylaws violations. Op. at 12-13. The trial court might have been clearer had it labeled the Association's legal violations as CC&R violations rather than using the term "due process."

However, calling a violation of law by the wrong name does not erase the violation. Even if the trial court was imprecise in the wording of its analysis, this should not result in a published opinion holding that homeowners' associations are not bound by the procedural rules in their governing documents, particularly when Pritchett pointed out that the trial court's ruling did not rest on the constitution, and that the Court could affirm any basis developed in the record. App. E.[3]

Homeowners' associations wield tremendous power over individual property rights. *Concepts of Liability in the Development and*

[3] The COA erroneously stated that Pritchett did not raise the bylaws and CC&Rs as authority in his brief. Op. at 16.

Administration of Condominium and Home Owners Associations, 12 Wake Forest L. Rev. 915, 961 (1976). They are, in essence, quasi-governmental bodies:

> [O]ne clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. As a 'mini-government,' the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. …All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality.

Id. at 918. In addition to these services, these associations have the power "to exert tremendous influence on the bundle of rights normally enjoyed as a concomitant part of fee simple ownership of property." *Id.* at 917.

Our Legislature has made clear, through adoption of the HAA, that the boards of such powerful bodies are not unaccountable. They are subject to the HAA and their governing documents:

> (1) *Except as provided in the association's governing documents* or this chapter, the board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 24.03 RCW.

RCW 64.38.025 (emphasis added). This is simple accountability that is black-letter law. *Restatement (Third) of Property (Servitudes)* § 6.14 TD

No. 7 (1998) (directors and officers of a homeowners' association have a duty to act in compliance with the law and the governing documents).

Although no Washington court has yet acknowledged it, many other states recognize that homeowners' associations are quasi-regulatory bodies with significant power that can harm property rights if they violate statutes and/or their governing documents. *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 475, 102 Cal. Rptr. 2d 205 (2000); *Woodward v. Bd. of Directors of Tamarron Ass'n of Condo. Owners, Inc.*, 155 P.3d 621, 624 (Colo. App. 2007); *Baldwin v. North Shore Estates Ass'n,* 384 Mich. 42, 52, 179 N.W.2d 398 (1970); *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 737 S.W.2d 206, 216 (Mo. Ct. App. 1987); *Adams v. Starside Custom Builders, LLC*, 16-0786, 2018 WL 1883075 at *5 (Tex. Apr. 20, 2018).[4]

Because homeowners' associations are quasi-governmental, their conduct is a matter of public interest. *Damon,* 85 Cal. App. 4th at 479; *Adams,* 2018 WL 1883075 at *5. Just as the constitutional due process violations of a city would be of public interest, so are the procedural violations of CC&Rs committed by a homeowners' association.

Our Court of Appeals has previously held that an association's actions in violation of restrictive covenants are invalid. *Meresse v. Stelma*,

[4] *Adams* is a recently published Texas State Supreme Court decision that has not yet been codified in the official reporter.

100 Wn. App. 857, 866, 999 P.2d 1267, 1273 (2000). In *Meresse,* a majority of members of a homeowners' association voted to amend its covenants to relocate an access road, citing a covenant that allowed road maintenance. *Id.* Minority homeowners filed a declaratory judgment action seeking damages for the diminution of value to their property caused by relocation of the road, arguing that relocating the road was not "maintenance." *Id.* at 862. After a bench trial, the trial court invalidated the covenants, concluding that the "authority to amend restrictive covenants is restricted by the limitation that the amendment may not impose restrictions that are more restrictive or burdensome than those imposed by specific objective covenants." *Id.* at 863. The Court of Appeals upheld the invalidation, concluding that the Association had failed to follow the correct procedure for a major amendment to a restrictive covenant, which required a 100% vote of the homeowners. *Id.* at 866.

Just as in *Meresse,* the trial court here invalidated the Association's denial of Pritchett's project because the Association violated the CC&Rs and bylaws in handling his application. App. C at 23-26. In particular, it found that the Association's Board President intervened in the Design Committee's decision-making process, which the CC&Rs specifically mandate must make the decision. *Id.* Making matters worse, the Board President had a conflict of interest in allegedly preserving his own view. *Id.*

The Association also violated record-keeping and other provisions in denying Pritchett's project. *Id.*

However, unlike in *Meresse,* the Court of Appeals here ruled that the Association's actions were valid in spite of the CC&Rs violations reasoning that the Association was not bound by the Constitution. Op. at 15-16. Although the Court of Appeals acknowledged that the trial court's "due process" analysis was based on provisions of the CC&Rs, the opinion focused on the label "due process" as that term is used in the Fourteenth Amendment. *Id.* It then incorrectly claimed that "the only authority Pritchett cites in support of the trial court's ruling is "*Shelley v. Kraemer,*" despite the fact that Pritchett cited the CC&Rs and the HAA. *Id.* (citation omitted).[5]

Thus, while simultaneously ruling that the Association may "strictly enforce" the CC&Rs against Pritchett, the Court of Appeals excused the Association from strict enforcement of that same document. In doing so, it ignored prior precedent stating that a homeowners' association cannot

[5] Pritchett's appellate brief focused on the Association's CC&R violations and cited numerous provisions of the CC&Rs in support. Br. of Respondent/Cross-Appellant at 45-47; App. E. In fact, Pritchett noted that the Association did not even challenge the trial court's factual findings regarding these violations, making them verities on appeal. *Id.*

violate CC&Rs to detrimentally affect individual homeowners' property rights.[6]

To rule in a published opinion that an Association may freely violate procedural provisions in its governing CC&Rs, motivated by self-interest and malice, conflicts with a prior decision of the Court of Appeals and is a matter of broad public interest.

(3) The Court of Appeals Exceeded Its Authority by Improperly Weighing Evidence and Making New Factual Findings in Violation of This Court's Decisions and Prior Decisions of the Court of Appeals

Based on substantial evidence in the record, the trial court found that the intent of those who voted for the CC&Rs wanted them interpreted flexibly, and to avoid absurd results such as blocking a homeowner from replacing her roof because an increase in roof height of one inch constitutes a view obstruction. Op. at 12.

Although the interpretation of the language of a restrictive covenant is a question of law, the trial court held a trial on this issue because intent

[6] The Court of Appeals ridiculed the trial court's findings regarding the Association's CC&R violations: "the trial court *lamented* what it saw as the *many failings* of the Committee to adhere to the requirements set forth in the CC&Rs." Op. at 15 (emphasis added).

The trial court did not merely "lament…failings" with respect to the Association's CC&R violations. It explicitly found that the Association violated multiple provisions of the CC&Rs. CP 127-29. It read and interpreted the plain language of the CC&Rs and enforced them against the Association. It identified them as legal violations that harmed Pritchett.

of the drafters is a question of fact. *Mariners Cove Beach Club v. Kairez,* 93 Wn. App. 886, 890, 970 P.2d 825 (1999); *Foster v. Nehls,* 15 Wn. App. 749, 750–51, 551 P.2d 768 (1976).

An appellate court is not permitted to jettison a trial court's findings of fact when they are based on substantial evidence. *Blackburn v. State*, 186 Wn.2d 250, 256, 375 P.3d 1076, 1079 (2016); *Campbell v. Bd. for Volunteer Firefighters*, 111 Wn. App. 413, 418, 45 P.3d 216, 219 (2002); An appellate court also may not weigh evidence. *Id. Karanjah v. Dep't of Soc. & Health Servs.*, 199 Wn. App. 903, 916, 401 P.3d 381, 389 (2017).

As this Court has very recently reaffirmed, "[s]o long as this substantial evidence standard is met, 'a reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently.'" *Blackburn,* 186 Wn.2d at 256, quoting *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879–80, 73 P.3d 369 (2003).

Despite the trial court's factual finding that the intent of the voters who adopted the CC&Rs was that they be interpreted flexibly, the Court of Appeals did not review the trial court's findings for substantial evidence. Op. at 12-13. Instead, the Court of Appeals re-weighed evidence and supplanted the trial court's findings of fact with its own judgment, which is it not permitted to do. *Blackburn*, 186 Wn.2d at 256. It explicitly weighed

other extrinsic evidence against the 2000 meeting minutes – which directly addressed the issue of interpreting the CC&Rs – and favored the other evidence. Op. at 12-13. On that basis, the Court of Appeals overturned the trial court's findings despite substantial evidence to support them. Op. at 13 n.3. The Court of Appeals even admonished the trial court for not viewing the evidence "in context," which is also an improper weighing of the evidence. *Id.*

Our appellate courts do not weigh evidence and do not find facts. *Thorndike v. Hesperian 490 Orchards, Inc.,* 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Quinn v. Cherry Lane Auto Plaza, Inc.,* 153 Wn. App. 710, 717, 225 P.3d 266 (2009). They similarly do not substitute their judgment for that of the trier of fact. *Thorndike,* 54 Wn.2d at 575. Whether the facts are as the parties allege is for the trial judge to determine, not this Court. *Id.*

The trial court was empowered to weigh the evidence and did so. It determined that the Picnic Point homeowners did not vote to damage their property values by prohibiting improvement projects like Pritchett's. CP 125, 130.

This Court should take review to reaffirm that appellate courts should not violate the limits of their own authority. It is a dangerous practice that injects uncertainty into the judicial process and can lead to unjust outcomes.

(4) This Court Should Also Review the Trial Court's Legal Error in Determining that Pritchett Was Not Entitled to Attorney Fees at Trial, Which the Court of Appeals Declined to Review

The trial court denied Pritchett attorney fees under the discretionary prevailing party fee provision of the HAA, erroneously concluding that they were not legally available, and hypothesizing that even if they were, an award would not be appropriate because the Association did not violate the business judgment rule. App. F at 2-5.[7]

Pritchett argued to the Court of Appeals that the trial court both (1) erred in describing the scope of its legal authority, and (2) abused its discretion in concluding that the Association obeyed the business judgment rule in denying Pritchett's application.

The Court of Appeals declined to address the attorney fee issue because it ruled against Pritchett on appeal. Op. at 16-17. However, Pritchett raises this issue in this petition because the legal issues are of interest to the public, and the trial court erred in interpreting the laws.

(a) Attorney Fees Under the HAA Are Available to Both Homeowners and Associations

[7] App. F is the attorney fee FFCL, which is in the record at CP 31-37.

The trial court first concluded that Pritchett was not entitled to attorney fees as a matter of law because fees under the HAA were only available associations, not to a prevailing homeowner. CP 47.

RCW 64.38.050, the fee provision in the HAA, allows attorney fees to any "aggrieved party:"

> Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party.

The trial court erred as a matter of law when it concluded a homeowner cannot be awarded attorney fees against a homeowners' association when it violates the Act. The plain language of RCW 64.38.050 allows an award of fees to aggrieved homeowners *and* homeowners' associations.

(b) <u>The Trial Court Abused Its Discretion in Concluding that the Association Did Not Violate the Business Judgment Rule; Its Own Findings Say Otherwise</u>

The trial court also concluded even if fees were available, they were only available if the Association violated the business judgment rule. CP 47. It found that the Association did not. *Id.*

The business judgment rule provides that a board violates the business judgment rule if it does not act in good faith or if it fails to exercise

"care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." RCW 24.03.127.

The trial court abused its discretion in concluding that the Association did not violate the business judgment rule. Among the trial court's findings of fact Pritchett cited in support of this argument were the following:

- The Association made "no inquiry" into matters relevant to the interpretation and enforcement of the CC&Rs, including any records of how the covenant was to be construed or whether Pritchett's project would hurt any property values. CP 210.

- Bookey knew that "strict construction" was inconsistent with the intent of the drafters. CP 210.

- The Association's interpretation of Section 7.4 of the CC&Rs was "manifestly unreasonable," and the Association conceded the result was absurd. CP 210.

- The Association's ostensible concern about "opening the floodgates" was contrary to the evidence and based on "sheer speculation." CP 211.

- The Association, contrary to its duty to act in reasonably and in good faith, "inexplicably" did not. CP 211.

- The Association "manufactured" the view obstruction claim. CP 211.

- The design committee was not properly constituted and lacked the requisite skills laid out in the CC&Rs and the bylaws. CP 213.

- Board members who had conflicts of interest participated in the design committee's deliberations. CP 213.

- Board members intervened in the design committee's independent decision-making authority contrary to the CC&Rs. CP 213-14.

- No records were kept of the design committee meetings, in violation of the CC&Rs. CP 213.

The above findings were made by the trial court. In light of them, it was an abuse of discretion for the trial court to rule that the Association did not violate the business judgment rule.

F. CONCLUSION

This Court should take review. View covenants are commonly used in this state, and homeowners' associations wield substantial power over individuals' property rights. The Court of Appeals gave these matters short shrift and ignored prior appellate decisions. This is a published opinion that will be cited in the future. This case raises important matters of first impression, public policy, and standards for appellate review.

DATED this 17th day of May, 2018.

Respectfully submitted,

Philip A. Talmadge

Sidney C. Tribe, WSBA #33160
Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

William T. Willard, WSBA #20248
Law Office of William Willard, PLLC
3417 Evanston Avenue North, Suite 529
Seattle, WA 98103
(206) 224-6303

Attorneys for Petitioner
Thaddeus C. Pritchett

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THADDEUS C. PRITCHETT, Respondent/Cross-Appellant, v. PICNIC POINT HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation, Appellant/Cross-Respondent.	)	DIVISION ONE No. 75555-2-I (consol. with Nos. 75598-6-I, 75998-1-I, 75999-0-I) PUBLISHED OPINION FILED: March 19, 2018

DWYER, J. — Thaddeus Pritchett sought to remodel his house and increase the height of his roof by seven feet, obstructing the view of Puget Sound from at least one neighboring house. After the Picnic Point Homeowners Association (the Association) denied his proposal, Pritchett sued. Concluding that the neighborhood's restrictive covenants could not be enforced as written, the trial court reversed the Association's decision and entered judgment in favor of Pritchett for $298,784. Because the plain language of the covenants and the relevant extrinsic evidence supports the Association's enforcement decision, we reverse.

I

The Picnic Point development, located in Snohomish County, is governed by Covenants, Conditions, and Restrictions (CC&Rs) that set forth the standards for development and maintenance of property in the development. The intent of

the community in adopting the CC&Rs is set forth in the document's Statement of Purpose:

> In adopting these Covenants, the homeowners of Picnic Point seek to preserve their community as a panoramic and tranquil alternative to city living. The homeowners seek to create a neighborhood that is safe and hospitable for families and children, where the natural beauty of the common areas is enhanced and where the spectacular views of Puget Sound and the Park areas are maintained. The Picnic Point homeowners understand that the most essential ingredient to a good neighborhood is good neighbors. The legal requirements set forth in this Declaration are therefore not intended to replace good neighborliness as a community ethic, but rather set threshold standards to preserve the proprietary interests of the community as a whole.

The CC&Rs established the Association, a nonprofit corporation governed by a Board of Directors (the Board). The CC&Rs also established the Picnic Point Design Committee (the Committee), which is responsible for ensuring that the construction or modification of any structure in the community complies with the requirements of the CC&Rs and the Picnic Point Design Rules. Accordingly, homeowners in Picnic Point who are seeking to make major improvements on their houses or landscape must first submit design plans to the Committee for approval. Upon compliance with the terms of the CC&Rs and the Design Rules, the Committee must approve the plans or notify the owner in writing that the plans are denied and the reasons for disapproval.

In 1996, the CC&Rs were amended to incorporate Section 7 – View Protection. Section 7.1 incorporated View Control Plans, to "protect the existing Puget Sound or Park views" in Picnic Point. The View Control Plans are parcel-specific plans that established restrictions on the maximum height for structures

built thereon.[1] Section 7.4 of the CC&Rs provides that no structures "may be constructed or modified on any Parcel to a height which would, (i) exceed the height limitations of the View Control Plan, or (ii) obstruct the Puget Sound or Park view of any other parcel."

Thaddeus Pritchett purchased his house in the Picnic Point development in 1999. Pritchett's house is located roughly two blocks east of a bluff above Puget Sound. North of his house is a row of houses, behind which is a large, undeveloped area designated by the County as a native growth protection area. Southeast of Pritchett's house is an area known as the Park Place neighborhood, located on a ridge that provides a panoramic view of Puget Sound and the Olympic Mountains.

In 2008, Pritchett sought to commence an extensive remodel of his house. Pritchett hired an architect and moved to Bothell pending the completion of the remodel. Pritchett initially sought to expand his house southward but scrapped those plans after his neighbors to the east objected. Instead, Pritchett developed plans that, if completed, would increase the height of his roof by approximately seven feet. Pritchett consulted a topographical map and walked around the neighborhood to confirm that no neighboring views would be affected by the height increase.

On May 1, 2009, Pritchett submitted his final design plans to the Committee. The Committee was chaired by James McArthur, an aerospace

[1] Some groups of parcels have no specific height restriction set forth in their corresponding View Control Plans, but all parcels are subject to County regulations and the restrictions set forth in the CC&Rs.

engineer who was capable of reading plans such as those submitted by Pritchett, but who had no experience with land use planning or real property covenants. Upon receipt of the remodel plans, McArthur e-mailed six homeowners, describing the project and seeking comments and concerns. A majority of the homeowners surveyed approved of the remodel. McArthur also personally canvassed houses in the area adjacent to Pritchett's house and determined that the remodel would not impair those homeowner's views.

On May 27, 2009, McArthur e-mailed Brian Bookey, the president of the Association.[2] McArthur stated that he still had to interview two more homeowners but that, so far, he could see "no reason not to approve the remodel." Greg Oliver, the vice president of the Association, replied that the Pritchett remodel was an "easy call" as there were no covenant violations. Bookey replied that the remodel may be subject to maximum height restrictions set forth in the View Control Plan and must comply with Section 7.4 of the Declaration, which would be violated if the height of the roof "impacts another homeowners' view," though he noted that "[a]pparently it won't impact any views unless you have failed to inquire with someone who might be impacted."

The following day, McArthur wrote to Bookey to explain that Pritchett's house—like other houses in that particular area—already exceeded the View Control Plan's height restrictions. This suggested to McArthur that the height restrictions had been ignored when Pritchett's house was built. McArthur stated

[2] The trial court found that Brian Bookey was the president of the Association. The Association asserts that Greg Oliver—not Bookey—was the president. McArthur testified at trial that Oliver was the president of the Association, but the e-mail correspondence relied on by the trial court identifies Bookey as the president.

his belief that "as long as there is no view impact resulting from the remodel I would judge that the Design Committee has no recourse other than to approve the plans. So far we find no view infringement."

Later that evening, Bookey e-mailed McArthur stating that the proposed remodel might obstruct the view from Bookey's own house. Bookey asked McArthur to wait until the next board meeting on June 15, 2009, before making any decisions about the Pritchett proposal. Bookey stated that "I can see the roof of one of the houses on that block from my deck. If it is Lot 55, then there is a view issue from multiple houses on my street if the roof is to be higher than it is now." Bookey's house was located in the Park Place neighborhood, one-quarter mile uphill from Pritchett's house.

Around the same time, McArthur also learned that there was a potential view obstruction from the Phillips house, located near Pritchett's house. McArthur went to observe the potential impact, but it was too hazy outside to see Pritchett's house. McArthur suggested returning to the Phillips house on a clear day to observe the full impact of the remodel. This was never done. McArthur also noted that the view from the Phillips house was already obscured because of trees growing on several properties. McArthur and the Board members agreed that the trees should be trimmed or removed and that, once removed, the Pritchett remodel could not be allowed to block the view of Puget Sound from the Phillips house.

On June 7, 2009, McArthur asked Pritchett if he would be willing to place stakes on the roof of his house to help determine if any houses in the upper parts

of the development would be impacted by the remodel. Pritchett agreed. Three Committee members subsequently went to Bookey's house to inspect the view of Puget Sound and determine whether the remodel would result in a view obstruction. The group was not able to clearly see the stakes with the naked eye. After using a telescope, the group determined that the stakes were "clearly visible" and that the remodel would obstruct the view from Bookey's house.

The Committee took photographs of the stakes using a telephoto lens. The Committee concluded that any increase in height on Pritchett's house would impact views and that *any* view obstruction was a violation of the CC&Rs. The Committee turned over its recommendation to the Board, which denied Pritchett's proposal. Having concluded that any height increase would result in a view obstruction in violation of the CC&Rs, the Committee determined that further investigation into the proposal was unnecessary.

On January 5, 2010, Pritchett submitted a second proposal of a modified set of plans to the Committee for approval. The new proposed plans reduced, but did not eliminate, the increase in roof height. The Committee denied the proposal.

On September 24, 2010, Pritchett filed this action seeking a declaratory judgment that his proposal did not violate the CC&Rs and that the Association had acted unreasonably by denying his proposal. Pritchett also sought awards of damages and attorney fees. Pritchett later amended his complaint, specifically seeking an award of monetary damages for the loss of use of his property and the increased construction costs of the remodel. Following a bench trial, the trial

court entered judgment in favor of Pritchett, concluding that his proposal did not violate the CC&Rs and remanding the proposal to the Association for the issuance of an approval letter, subject to the imposition of other reasonable conditions consistent with other provisions of the CC&Rs. The trial court awarded Pritchett $298,784 in damages. The trial court concluded that Pritchett was not entitled to an award of attorney fees.

II

The Association first contends that the trial court erred by ruling that the CC&Rs could not be strictly enforced to deny Pritchett's proposal. We agree.

The interpretation of a restrictive covenant is a question of law that we review de novo. Wimberly v. Caravello, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). Restrictive covenants are interpreted to give effect to the intention of the parties to the agreement incorporating the covenants and to carry out the purpose for which the covenants were created. Riss v. Angel, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). "The purpose of those establishing the covenants is the relevant intent. . . . Subdivision covenants tend to enhance the efficient use of land and its value. The value of maintaining the character of the neighborhood in which the burdened land is located is a value shared by the owners of the other properties burdened by the same covenants." Green v. Normandy Park Riviera Section Cmty. Club, Inc., 137 Wn. App. 665, 683, 151 P.3d 1038 (2007) (citing Riss, 131 Wn.2d at 621-24). Accordingly, we must place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests." The Lakes at Mercer Island Homeowners Ass'n v. Witrak, 61 Wn.

App. 177, 181, 810 P.2d 27 (1991). "[I]f more than one reasonable interpretation of the covenants is possible regarding an issue, we must favor that interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions." Green, 137 Wn. App. at 683.

In determining the intent of the parties to the agreement incorporating the covenants, we give "covenant language 'its ordinary and common use' and will not construe a term in such a way 'so as to defeat its plain and obvious meaning.'" Wilkinson v. Chiwawa Cmtys. Ass'n, 180 Wn.2d 241, 250, 327 P.3d 614 (2014) (quoting Mains Farm Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993); Riss, 131 Wn.2d at 623). We examine the instrument in its entirety and use extrinsic evidence to "'illuminate what was written, not what was intended to be written.'" Wilkinson, 180 Wn.2d at 250-51 (quoting Hollis v. Garwall, Inc., 137 Wn.2d 683, 697, 974 P.2d 836 (1999)).

At issue here is Section 7.4 of the CC&Rs. That section reads:

> No structures, including fences, hedges or boundary walls may be constructed or modified on any Parcel to a height which would, (i) exceed the height limitations of the View Control Plan, or (ii) obstruct the Puget Sound or Park view of any other parcel. Provided, however, with respect to any vacant parcels, initial or new construction on all such parcels may obstruct views of Puget Sound from other parcels and/or dwelling units within Picnic Point, but such construction on a parcel may not violate any height and/or view restriction imposed by the view control plans and later additions, or modifications to the initial structures may not further obstruct such views.

We first note that the plain language of Section 7.4 is clear and unambiguous. This covenant prohibits the construction or modification of existing structures that would "obstruct the Puget Sound or Park view of any

other parcel." This is an unqualified prohibition, suggesting that *any* obstruction of existing views, no matter how minimal, is prohibited.

Section 7.4 provides an exception for new or initial construction on vacant parcels, which "may obstruct views." Notably, later additions or modifications to initial construction "may not *further* obstruct" views. (Emphasis added.) Thus, a plain language reading of the entirety of Section 7.4 leads to but one conclusion: once built, structures may not be later modified in such a way that would obstruct the existing view of Puget Sound from any other parcel. Partial or de minimis obstructions are not exempted from the scope of the covenant.

The Statement of Purpose helps to inform our understanding of the covenants contained in the CC&Rs and is consistent with our plain language reading of those covenants. The Statement of Purpose provides that the CC&Rs were adopted to "preserve [the] community as a panoramic and tranquil alternative to city living," "where the *spectacular views* of Puget Sound and the Park areas are *maintained*." (Emphasis added.) The Statement of Purpose contemplates that the views of the homeowners, *existing as they were upon the adoption of the CC&Rs*, would be protected from future obstructions.

The extrinsic evidence surrounding the adoption of the view protection clauses also supports this understanding. Prior to the adoption of the view protection clauses, the Board put together a "covenant committee" to communicate with the homeowners, listen to any concerns that they held, and adopt covenants to address those concerns. On June 13, 1995, the Board held a meeting to discuss various matters, including the recommendations of the

covenant committee. The covenant committee told the Board that the "[m]ain interest to [the] community seems to be view protection." Community members at that time were concerned that growing trees would eventually obstruct their views of Puget Sound and that there were no express restrictions on tree height contained in the CC&Rs. The Board was asked "if view protection was a priority of the board" and responded that "this was indeed the direction and priority – maintenance of Puget Sound Views."

On October 12, 1995, the Association held a general meeting. The covenant committee introduced themselves to the homeowners in attendance and offered an explanation of the intent and language of the proposed covenants. The committee "[s]tated that a goal was to achieve view protection" and that the committee "could find nothing recorded with the Snohomish county to provide this to the Picnic Point homeowners." The obstruction of views caused by trees continued to be a concern of the homeowners in attendance. The committee explained that the goal of the proposed covenants was to "maintain views, not create views" and that, accordingly, the intent of the Board was not to destroy existing trees but, rather, to ensure that those trees are trimmed at the point that "the need to maintain a view enters."

The view protection covenants were approved by the Board and were adopted after the homeowners voted 120 to 4 in favor of the covenants. Although one of the specific concerns of the community at the time was view obstruction caused by tree growth, the overarching concern of the community was clearly *the maintenance of existing views*. It is not difficult to infer that the

homeowners, concerned about growing trees obstructing their existing views of Puget Sound, were equally concerned about the permanent obstruction of those views from house modifications.

The CC&Rs plainly prohibit construction that would "obstruct the Puget Sound or Park view of any other parcel." The Statement of Purpose and the extrinsic evidence surrounding the adoption of the covenants is consistent with the understanding that Section 7.4 prohibits *any* view obstruction, no matter how minimal. Such an interpretation also acts to protect the homeowners' collective interests, Witrak, 61 Wn. App. at 181, and "avoids frustrating the reasonable expectations of those affected by the covenants' provisions." Green, 137 Wn. App. at 683. Were homeowners permitted to marginally obstruct the views of other homeowners, existing views would not be maintained. Accordingly, we conclude that the Association did not err by enforcing the restrictive covenant as written.

The trial court reached a different result. The trial court first found that Section 7.4 was ambiguous because the phrase "obstruct the Puget Sound or Park view of any other parcel" referred to "no objective standard against which it can be measured." The trial court then turned to extrinsic evidence to determine the intent of the drafters of the covenant. The trial court considered the minutes from a 2000 Board meeting in which a former Board member stated that the CC&Rs were not intended to be enforced "to the letter" and that the view of Puget Sound was not intended to be "100% of the Sound."

Based solely on the 2000 Board meeting minutes, the trial court determined that the drafters of the covenants did not intend for the view protection clauses to be applied literally. The trial court determined that the Association was "required to use a flexible approach on a case-by-case basis in applying its terms to avoid absurd results." The trial court noted that the Board applied a "flexible approach to the enforcement of view encroachments from trees" and concluded that Section 7.4 must be interpreted to provide the same flexibility. Accordingly, the trial court concluded that the Board's rejection of Pritchett's proposal was manifestly unreasonable and inconsistent with the intent of the drafters of the covenants. The trial court ordered the Association to approve Pritchett's proposal and further ordered that the Association could not strictly enforce Section 7.4 unless it amended the CC&Rs to create "objective, measureable standards."

The trial court's analysis was flawed and its ruling erroneous. First, the trial court improperly imputed a de minimis standard into the phrase "obstruct the Puget Sound or Park view of any other parcel." Contrary to the trial court's analysis, there already exists an objective standard against which the prohibition, as written, can be measured. A homeowner's existing view is either obstructed or it is not obstructed. Silence as to the *extent* of an obstruction does not create an ambiguity—"'[i]t is the duty of the court to declare the meaning of what is written, and not what was intended to be written.'" Wilkinson, 180 Wn.2d at 252 (internal quotation marks omitted) (quoting Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)). By assuming that a minimal view obstruction could

not possibly violate the covenant, the trial court introduced subjectivity to a standard that was otherwise facially objective. Moreover, the trial court's analysis ignored the Statement of Purpose—an integral part of the CC&Rs that is helpful for illuminating the purpose of the covenants contained therein. See Nelson v. Duvall, 197 Wn. App. 441, 453, 387 P.3d 1158 (2017) ("[I]n determining legislative intent, the 'preamble or statement of intent can be crucial to interpretation of a statute.'" (quoting Towle v. Dep't of Fish & Wildlife, 94 Wn. App 196, 207, 971 P.2d 591 (1999))).

Second, the trial court's analysis eschewed relevant extrinsic evidence and considered only statements made by select former Board members *four years after* the view protection clauses were adopted.[3] But the intent of the homeowners who voted to adopt the covenants cannot be discerned through the post-hoc statements of individual Board members. See W. Telepage, Inc. v. City of Tacoma Dep't of Fin., 140 Wn.2d 599, 611, 998 P.2d 884 (2000) ("A noncontemporaneous understanding of legislative intent is not reflective of the Legislature's rationale for enacting a 1981 statute."); see also In re F.D. Processing, Inc., 119 Wn.2d 452, 461, 832 P.2d 1303 (1992) ("[T]he comments of a single legislator are generally considered inadequate to establish legislative intent."); State v. Leek, 26 Wn. App. 651, 657-58, 614 P.2d 209 (1980) (statements made by individual legislators five years after bill's enactment were

[3] Moreover, the trial court's analysis ignored the context in which the statements were made. The topic of discussion at the 2000 Board meeting was the obstruction of existing views by trees and whether the Association should be flexible in requiring the trimming and removal of trees, *not* whether the Association should be flexible in applying the view protection covenants generally.

not competent to prove legislative intent). Neither can the court consider evidence that varies, contradicts, or modifies the written word. Bloome v. Haverly, 154 Wn. App. 129, 138, 225 P.3d 330 (2010). Rather, the appropriate epoch for consideration was the period of time leading up to the adoption of the view protection clauses. It was during this time that the covenants were drafted, the drafters explained the proposal to the homeowners, and the homeowners who voted "yes" formed their reasons for so doing.

Third, the trial court's order directing the Association to apply the CC&Rs flexibly and on a case-by-case basis ignores that the Association has already made case-by-case determinations regarding structure height by adopting the parcel-specific View Control Plans. The CC&Rs will cease to be generally applicable to all homeowners if the Association is required to apply the covenants therein on a case-by-case basis, prohibiting some view obstructions while permitting others. The Association reasonably believes that applying the CC&Rs flexibly will result in the inconsistent application of the covenants and will allow homeowners to "nibble away [at views] 2 feet at a time." The trial court recognized that this was a possibility, but dismissed the Association's concerns because they have yet to come to fruition.

Finally, the trial court's conclusion that the CC&Rs could not be reasonably interpreted to prohibit Pritchett's proposal is belied by its order directing the Association to amend the CC&Rs and *add language* to conform to the court's interpretation. Rather than interpreting the writing to declare what was written, the trial court declared that which it believed the drafters *intended* to

write and then required the Association to amend the CC&Rs to conform to the court's vision. "A court may not create a contract for the parties which they did not make themselves. It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties." Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 288, 654 P.2d 712 (1982).

The plain language of Section 7.4 prohibits homeowners from constructing or modifying structures if doing so would "obstruct the Puget Sound or Park view of any other parcel," regardless of the severity of the obstruction. This plain language understanding is supported by the statement of purpose and the extrinsic evidence surrounding the adoption of the covenants. By ruling otherwise, the trial court erred.

III

The Association also contends that the trial court erred by ruling that it had violated Pritchett's procedural due process rights. We agree.

The trial court ruled that, in addition to the Association's substantive error in denying Pritchett's proposal, its decision was "based on a flawed process, which resulted in the denial of due process . . . during the consideration of the Pritchett proposals." The trial court captioned this section of its analysis as "Procedural Due Process Violation." But the trial court did not analyze or otherwise discuss procedural due process in its decision. Rather, the trial court lamented what it saw as the many failings of the Committee to adhere to the requirements set forth in the CC&Rs. The trial court concluded that "procedural

due process does apply" and that, accordingly, the Association's decision denying Pritchett's proposal should be reversed.

The Fourteenth Amendment's due process clause limits the activities of state actors. Shanks v. Dressel, 540 F.3d 1082, 1087 (9th Cir. 2008). The Association is a private entity that could not have violated Pritchett's procedural due process rights by denying his proposal. Instead, due process was provided to Pritchett during the judicial proceeding. Pritchett tacitly concedes that this "may be true in the strictest sense," Br. of Resp't/Cross-Appellant at 45, but nevertheless asserts that the trial court's ruling was correct.

The only authority Pritchett cites in support of the trial court's ruling is Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). In that case, the Supreme Court considered a challenge to covenants that prohibited non-whites from owning or occupying property. Shelley, 334 U.S. at 4-8. The Court held that the judicial enforcement of such covenants violated the Fourteenth Amendment's requirement of equal protection of the laws. Shelley, 334 U.S. at 20. The state court was the state actor therein. In addition, the Court explicitly declined to consider whether the due process clause applied to the disputed action. Shelley, 334 U.S. at 23. Shelley does not support the trial court's ruling.

IV

Pritchett cross-appeals, contending that the trial court erred by denying him an award of attorney fees pursuant to RCW 64.38.050. That statute provides, in pertinent part, "Any violation of the provisions of [the statutes

governing homeowners' associations, chapter 64.38 RCW] entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonably attorneys' fees to the prevailing party."

Because we reverse the trial court, Pritchett is no longer the prevailing party and is not entitled to an award of attorney fees pursuant to RCW 64.38.050.

Reversed and remanded.[4]

Dwyer, J.

We concur:

Leach, J.

Becker, J.

[4] Because we reverse the trial court's declaratory judgment, we necessarily also reverse the court's order entering a $298,784 judgment in favor of Pritchett.

APPENDIX B

FILED
4/17/2018
Court of Appeals
Division I
State of Washington

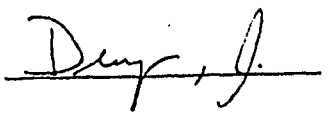
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THADDEUS C. PRITCHETT, Respondent/Cross-Appellant, v. PICNIC POINT HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation, Appellant/Cross-Respondent.	DIVISION ONE No. 75555-2-I (consol. with Nos. 75598-6-I, 75998-1-I, 75999-0-I) ORDER DENYING MOTION FOR RECONSIDERATION

The respondent/cross-appellant, Thaddeus Pritchett, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

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

FOR THE COURT:



APPENDIX C

10-2-08134-6
CTD
Court's Decision
497130

FILED

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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN THE COUNTY OF SNOHOMISH

THADDEUS C. PRITCHETT,

Plaintiff,

v.

PICNIC POINT HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation,

Defendant.

CASE NO: 10-2-08134-6

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECISION

This matter came before the Court for trial on the Plaintiff's request for a declaratory judgment, damages and attorney's fees. The Court bifurcated the issues of declaratory relief and liability, reserving on the issue of damages to be decided by a jury of six persons in the event that the Plaintiff prevails. A bench trial was held over the period March 21-28, 2016. Rand Koler of Rand L. Koler & Associates, P.S. appeared as counsel for Plaintiff, Thaddeus C. Pritchett. Michael Hunsinger of The Hunsinger Law Firm appeared as counsel for Defendant, Picnic Point Home Owners Association.

At trial, the Court heard the testimony of the following six witnesses presented by Plaintiff: Thaddeus Pritchett, Michael Woodbury, David Connelly, Randal Ehm, Jesse

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Everett, Washington 98201

Villanueva, and James McArthur. The Court also heard testimony from the following six witnesses presented by Defendant: James McArthur, Brian Bookey, Renee Bookey, David Gross, Douglas Pedersen, and Deryk Wager.

Having considered the testimony, evidence and arguments of the parties, and being fully informed in the matter, the Court enters the following FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION:

I. FINDINGS OF FACT

1. Mr. Pritchett purchased his home in the Picnic Point development in Snohomish County in 1999. The Pritchett residence is located at 6614 136th Place Southwest, Edmonds, Washington. It is located in a relatively flat area roughly two blocks east of a bluff above Puget Sound. North of his home across 136th Place is a row of houses, behind which is a large undeveloped area designated by Snohomish County as a Native Growth Protection Area. This is a steeply sloping, heavily forested area extending from the bluff above Puget Sound eastward far beyond the Pritchett house. *(See Exhibit 321)*

2. Within the Picnic Point subdivision, southeast of the Pritchett home, is a neighborhood located on a ridge known as Park Place. The homes at the top of the ridge have a panoramic view of Puget Sound and the Olympic Mountains over the tops of houses, bounded on the south by trees and to the north by the trees in the Native Growth Protection Area ("NGPA") (known as Tract 998 on the plat map). *(Exhibit 214)*

3. By 2008, an extensive remodel of the Pritchett home could not be put off any longer. The Mr. Pritchett and his family moved to a house in Bothell while Mr. Pritchett engaged an architect

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to design a remodel to meet the family's needs. The plan was to stay in Bothell until the remodel was finished, then return to their home. During this period Mr. Pritchett worked full time at Microsoft and shuttled between the two houses, sometimes working at the Picnic Point house. In late 2008, the architect was designing a remodel that would expand the house to meet the family needs. They would then sell or rent the Bothell house, depending on circumstances at that time. Mr. Pritchett's first idea was to expand the house southward but the neighbors to the east of the house, the Vu family, after initially saying that this would be ok, told Mr. Pritchett that this was objectionable. Mr. Pritchett understood that the neighbors felt that moving the rear of the house southward would intrude on their southwesterly view of Puget Sound. The initial set of plans involved working within the existing footprint of the house, but this proved unworkable.

4. In order to accommodate the Vu family, Mr. Pritchett determined not to move the southern wall of his house further south. Before finalizing the design and presenting it to the Design Committee of the Picnic Point Homeowners' Association, as a courtesy, Mr. Pritchett verified that the new design would not intrude on any views. He consulted a topographical map and walked the surrounding neighborhood to confirm that no view from any nearby residence would be affected by the increased height. The final design had a sloping roof with the ridgeline at the Snohomish County height limitation of 35 feet, an increase of approximately 7 feet in height.

After receiving the Pritchett final design for review under the CC&Rs, on May 22, 2009, Mr. McArthur sent an email message out to six homeowners describing the project and seeking their comments and concerns before May 30th. (Ex. 20) He also personally canvassed homes in

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the adjacent areas, sometimes with other board members, to inform neighbors about the project and to solicit any concerns that they might have had. He determined that the Pritchett remodel would not impair any views. *(Testimony of Mr. McArthur; Exhibit 12-1 and 2)*

A majority of neighbors responded positively, supporting approval of the remodel. They stated:

- The project will be "a great addition to the development," with "minimal impact to our view situation so we do not have concerns in that regard.": Margaret and Same Baty (Ex. 20)
- "We have seen the proposed remodel plans for the house across the street from us and have no reason to disapprove or require changes to the plan. We feel that the view impact is minimal, as it does not affect our water view.": Peg and Amish Robertson (Ex. 21)
- "We are fine with the remodel, thanks.": George Briggs (Ex. 28)
- "Based on the plans we saw for the proposed remodel, we have no reason to assume we would disapprove or require changes.": Meg and Chi Nguyen (Ex. 30)
- "I don't have an issue. I don't think it impacts us but was curious as to the 7 ft. I was pretty sure most homes were at their height limits.": Chris Burdett (Ex.
- "As discussed in person after reviewing the line of sight from our third floor deck to the proposed construction site, our view will not be materially affected by the project in question. We have no objection to the proposed project.": Grant Schuetz (Ex. 36)

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- "Thank you for the overview of Mr. Pritchett's remodeling design. It should not impact our view at all. We see no reason to oppose his request to remodel his home at 6614 136th Pl SW.": John and Freddie McPhee (Ex. 41)
- "I took a look at the covenants and the view protection plan, and their remodel does not impact our view of Puget Sound.": Jeff Kass (Mr. Kaas did raise other concerns that are not at issue in this case). (Ex. 53)

5. However, not everyone was supportive. Mai and Du Vu, Mr. Pritchett's next door neighbors, objected to the project for a number of reasons, including view obstruction. (Ex. 10) However, members of the Design Committee, using a pole to show the southeastern corner of the remodeled house, demonstrated that the view of the Vu family would not be impaired at all by the new footprint of the house. *(Testimony of Mr. McArthur)* Mr. McArthur determined that the Vu's remaining concerns were not items that were protected by the CC&Rs. He notified the Board about these issues, sought their concurrence with his conclusions, and the Board agreed. (Ex. 17)

6. Mr. McArthur testified that Ms. Vu remained extremely upset about the proposal and that they held multiple meetings at her home to discuss her concerns. She wrote letters to the HOA Board, attempted to raise concerns with other neighbors, and made statements about the project that were not true. He confronted her about these misstatements and included her on correspondence relating to the project to keep her in the loop. Mr. McArthur testified that where she did raise a legitimate concern, Mr. Pritchett was very responsive and agreed to nearly everything she wanted.

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7. At the same time that this was going on Mr. McArthur was providing Mr. Pritchett with comments on his plan drawings. All issues identified by Mr. McArthur were resolved to his satisfaction. Up to this point, Mr. Pritchett and Mr. McArthur believed there were no impediments to approving the proposal.

On May 27, 2009, Mr. McArthur emailed the president of the board of directors, Brian Bookey, saying that two more homeowners were yet to be interviewed by him but as yet he had not found that any views were affected by the remodel and he could see "no reason not to approve the remodel." *(Exhibit 12-1 & 2)* Greg Oliver, a board member, sent a message back to him that the Pritchett remodel was an "easy call" as there were no covenant violations. *(Exhibit 17)* Mr. Bookey also sent a message back the same day that the Picnic Point View Control Plan stated that there was a maximum elevation of improvements on Lot 55, the Pritchett lot, suggesting that this should be checked. He added that even if the remodel complied with the View Control Plan it must still comply with Section 7.4 of the Declaration, which would be violated if the elevation of the roof "impacts another homeowners' view." He then said, "Apparently it won't impact any views unless you have failed to inquire with someone who might be impacted." *(Exhibit 12-1)*

8. On May 28, 2009, Mr. McArthur wrote to Mr. Bookey explaining that Mr. Pritchett's house -- like two tall houses across the street -- already exceeded the View Control Plan's suggested elevations for building pad, ground floor, garage and roof ridge. These suggested elevation had been ignored when the Pritchett house was built, as they had been in the construction of other houses in the area. (*See Exhibit 229, lots 54, 55, 56, 61 and 64; compare*

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with View Control Plan) In Mr. McArthur's opinion the designation in the View Control Plan that these houses had no height restrictions was controlling over the language alluded to by Mr. Bookey. He pointed out that the elevations did not make sense and added that "as long as there is no view impact resulting from the remodel I would judge that the Design Committee has no recourse other than to approve the plans. So far we find no view infringement, even for [the Vu family to the east of the Pritchett residence]. We are getting more data from the homeowner to help establish my position." (*Exhibit 17*)

9. At 4:14 p.m. on May 28, 2009, after emailing that there apparently were no view obstructions unless Mr. McArthur had failed to notify someone, Mr. Bookey emailed Mr. McArthur saying that there might be a view infringement from his own home. *(Exhibit 23)* Mr. Bookey asked Mr. McArthur to wait until after the next HOA Board meeting on June 15, 2009, to make any decisions about the Pritchett proposal. (Ex. 23) Brian Bookey was President of the HOA Board. In the email he wrote:

> It may well not be an issue, but I can see the roof of one of the houses on that block from my deck. If it is Lot 55, then there is a view issue from multiple houses on my street if the roof is to be higher than it is now. I'm headed out of town, but will look again before I leave. It may be necessary to run a balloon or something up to be sure. . . .

(Ex. 23) The Bookey home is located in the "Park Place" neighborhood, one-quarter of a mile uphill from the Pritchett home.

10. Around the same time, Mr. McArthur also learned that there were concerns about potential view blockage from the Phillips home, located at 13621 65th Place SW (Lot 1 in the subdivision), near the Pritchett home. (Ex. 54) At that time, the view from the Phillips home was already

partially obstructed by trees growing on the Vu, Pritchett and McPhee properties. Mr. McArthur discussed the tree obstruction with the Board members and determined that generally, trees presented only a temporary obstruction (which should and could be topped or removed as part of a separate HOA enforcement action), and that once removed, the Phillips view could not be blocked by the Pritchett remodel. (Ex. 54)

Mr. McArthur visited the Phillips home on June 9, 2009. Although it was too hazy to fully tell what impact the Pritchett proposal might have on their view, McArthur determined that any increase of the Pritchett roof line, especially the north end of the house, will probably cause an impact on the Phillips view from their upper windows. (Ex. 57) Mr. McArthur proposed that they return to the Phillips' home on a clear day after stakes were put up on the Pritchett roof to demonstrate the new roof height. This was never done. Mr. Pritchett was never advised of these concerns. The Design Committee never concluded the study of the Phillips view, because view issues were raised in the Park Place portion of the subdivision by Mr. Bookey.

In response to the Phillips' claims, Mr. Pritchett testified at trial that he believed there was no view corridor to be protected for the Phillips home (Lot 1), because their view was already blocked by the existing homes on Lots 53, 54 and 55, not just existing trees.

11. Meanwhile, Mr. McArthur asked other members of the Design Committee to investigate the potential for the Pritchett proposal to block views in the Park Place neighborhood because he had to go out of town. They agreed to do so.

12. On June 7, 2009, Mr. Pritchett received the first in a series of emails from Mr. McArthur, containing questions and requesting corrections to the plans, based on requests from the Vu

family. (Exhibit 47) In it, Mr. Pritchett was asked for the first time if he would be willing to put up stakes on the roof to assist in determining if homes in the upper parts of the development would be impacted by raising the roof height. Mr. McArthur also advised Mr. Pritchett that it might be wise to hold off on submitting his plans to the County for regulatory review. He agreed to both requests.

13. In cooperation with this effort, the parties first attempted to view the impact of the roof increase by putting balloons into the air at the Pritchett home to simulate the new height. This effort failed, as the wind pushed the balloons around too much to get a realistic view. Mr. Pritchett next agreed to climb onto his roof and erect poles with flags on top to simulate the new height of the proposed roof. On June 13, 2009, he contacted the Design Committee and told them he was ready for them to view the roof. (Ex. 59)

14. Design Committee members Doug Pederson, David Gross and Robert Norm all went to the Bookey home to inspect the view of Puget Sound, and determine what impact the Pritchett proposal might have on it. They went out onto the deck and tried to locate the Pritchett house. It was a hazy day and the Pritchett roof was difficult to see with the naked eye. The group used binoculars and a telescopic lens to find the roof with the poles and flags. (Ex. 61) They determined with the aid of those items that the Pritchett project would impact the view of the water from the Bookey home. Mr. Pederson also concluded that Pritchett's proposal would also impact views from his own property, given that he lived on an adjacent parcel with very little difference in view, just a different angle toward the Sound. At trial, in contradiction of the other

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witnesses who were present on that day, Mr. Pederson testified that he could see the roof with his naked eye.

15. To document the view obstruction, the Design Committee took photographs using a telephoto lens. (Ex. 68) The photograph is enlarged 85 times from the natural view. The group had a discussion and concluded that it did not matter how much the view was impacted; any impact was a reason for denial. They turned their recommendation over to the Board of Directors, who made the final decision to deny the Pritchett proposal. Mr. Pederson testified that he understood the policy of the HOA to be that no infringement on views was allowed at all, no matter how slight. He admitted that he was an affected property owners but that he tried to remain objective in viewing the potential view impairment. He stated that they used the magnified photos found in Exhibit 66 to document the extent of the view.

16. David Gross testified at trial as a member of the Design Committee. He recounted the same process testified to by other witnesses, that the Design Committee members used to determine the view from the Bookey deck, and whether it was going to be impaired by the Pritchett proposal. He lives behind the NGPA in Tract 998 and is not personally affected by the Pritchett proposal. He stated that he could see the roof of the Pritchett home from the Bookey deck. He stated that they could see the weathervane, but that it was very hazy that day and they used binoculars and a camera with a zoom lens to visualize the flags on the roof. They took pictures to memorialize what they saw. He, too, stated that it was his understanding that any incursion into a view was forbidden by Section 7.4 of the CC&Rs. He stated that they discussed the matter as a group and collectively made a decision to recommend denial. He testified that

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they were afraid that it would open the floodgates to other proposals that might block views, and that it would set a negative precedent for future projects.

17. Mr. Pritchett was notified on June 16, 2009 that his remodel design to raise the roof would obstruct the views of Puget Sound and that this required the Design Committee to reject his proposal. (*Exhibit 64*) On June 17, 2009, Mr. Pritchett asked for pictures of all views that were affected, intending to use this information to redesign his house to avoid or minimize the effect of the elevated the roofline. *(Pritchett testimony; Exhibit 65)* On June 18, 2009, he was sent three magnified photographs. *(Exhibit 66)* On June 19, 2009, Mr. Pritchett received one photograph taken from the Bookey deck with very high magnification. *(Exhibit 68; Testimony of Jesse Villanueva)* The elevation of the roof height of the remodel was marked by a red line on the photograph. Beneath that line and above the existing roof ridgeline was a slice of a water view obscured by trees. *(See Exhibit 68-2)*

18. After photographing the alleged view impingement from the Bookey deck and drawing the red line above the roof all consideration of the Pritchett remodel application stopped. Having been instructed by Mr. Bookey and the board that absolutely any impingement on any view would render the application unacceptable, the Design Committee determined that no further investigation was necessary.

19. Mr. Pritchett reviewed the view control plan for this lot. He saw that the elevated roof of his remodel was authorized by the View Control Plan. (S*ee Exhibit A to the CC&Rs)* The designation "NHR" is defined on the View Control Plan as meaning "no height restriction" and

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the County height restriction is 35 feet. *(See Exhibit 320)* The rejected design met the County's 35 foot height restriction.

20. At trial, Mr. Pritchett submitted photographs taken by his own photographer, Jessie Villanueva, from the Bookey deck. The unmagnified view is shown in Exhibit 213, which is a composite photo of five separate photos taken and "stitched" together to give a 180 degree view. He used a 50 mm lens to obtain the photos. The Pritchett home appears in the photograph downhill near the water, but is only visible as a small dot of color, no larger than the tip of a ballpoint pen. (Ex. 213)

21. Mr. Villanueva also took a magnified photo from the Bookey deck and drew a dashed line on it outlining the water view using the Photoshop CS5 program. Using this program, he was able to calculate the number of pixels present in that view. (Ex. 214). He determined that the view contained 540,890 discreet pixels. He further magnified the photo to show the location of the Pritchett proposed roofline. He determined that the amount of view impairment was 453 pixels or .084 percent of the existing water view. (Ex. 216) In making his calculations, he noted that he did not count the existing view impairment caused by large trees.

22. Randall Ehm, architect for Pritchett, testified that the Bookey home was one-quarter of a mile away from the proposed project site, and that there is a 75-foot elevation difference between the two properties. He prepared a video showing a "fly over view" of the distance between the two properties using the Google Earth program. (Ex. 300) To create this video, he used both the Givens Survey of the area (Ex. 229, 298) created in 2014 and 2016. He used the tree heights found in 2014. He noted that the trees shown in Ex. 298 had grown for five additional years from

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the time that the Pritchett proposal was denied by the HOA, and were therefore larger than they would have been at the time the Design Committee considered the view impingement.

23. Michael Woodbury, a consulting arborist, also testified for Pritchett at trial. He prepared a report (Ex. 224), in which he determined that the Bookey views that would be impaired by the Pritchett proposal, will be blocked eventually by trees growing in the NGPA in Tract 998.[1] Using a medium growth rate of 10-12 inches per year, he determined the view would be obscured within the next five years, regardless of the Pritchett proposal.

24. David Connelly, a certified real estate appraiser, also testified for Pritchett at trial. He prepared an Appraisal Report using eight comparable properties. (Ex. 230) In it, he determined that the Pritchett property is currently appraised at $425,000. The property was in fair or "fixer" condition. He noted that the property has existing western views overlooking Puget Sound and Admiralty Inlet. The property is subject to a view corridor restriction on the south half of the lot, which protects the view of the Vu family. The property has deferred maintenance items including, a failed and leaking cedar shake roof, mold and water damaged interior drywall on the second floor, and structurally unsound, water-damaged and dry-rotted decks. (Ex. 230 at p. 3). In addition, the exterior siding is badly in need of repair and/or replacement. (Ex. 230 at p. 20). The proposed remodel would cure these items and add approximately 1,800 square feet to the property, and raise its value to approximately $1.2 million. Mr. Connelly testified that it is very hard to discern value from the existence of views from a property using data. It is a very subjective exercise.

[1] NGPAs are protected critical areas under county regulations and the trees within them cannot be removed.

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25. On July 6, 2009, the Design Committee prepared a letter to Plaintiff wherein they communicated to him that his proposed remodel plan encroached on views from other parcels in the development in violation of Section 7.4 of the CC&Rs. Therefore, Mr. Pritchett's request to approve the remodel plan was denied. (Ex. 90)

26. In the days after the HOA denied his proposal, Mr. Pritchett worked with Mr. McArthur to understand how the HOA interpreted the restrictive view covenants and attempted to re-design his proposal to lower the roofline, while still achieving some increase in height. Mr. McArthur explained to Mr. Pritchett that the HOA's determination was that not even a one-inch increase in elevation to the roof line would be approved above the existing height.

27. Board member Greg Oliver confirmed Mr. McArthur's interpretation in an email dated November 20, 2009, stating his thoughts as to view encroachments: "We can't allow 172 homeowners to nibble away 2 feet at a time." (Ex. 113) The Board determined that any new proposal from Pritchett would be judged using the same exacting standard. (Exs. 114, 115, 117)

28. On November 23, 2009, David Gross acknowledged that the proposed remodel would have a minimal impact on views, stating: ". . . I would have to agree that he can't go up at all (*even though the real impact is minimal*, it would set a precedent). . . . " (Emphasis added; Ex. 119)

29. At trial, Board President Brian Bookey, whose view impact formed the basis of the denial of the Pritchett proposal, conceded that the view impact was not large enough to present a personal concern to him, and that he had no issues to present. However, the board felt that regardless of how much of an encroachment a remodel proposal presented, it is too difficult to

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quantify and administer a policy uniformly in every case, so the Board chose to go with a "zero tolerance" approach to view encroachments. However, the Board treated view encroachments from trees differently than structures. Mr. Bookey testified that this was because a tree could be easily removed, and a structure was viewed as a permanent view impact.

30. On September 24, 2010, Mr. Pritchett filed the instant action seeking a declaratory judgment that his remodel proposal does not violate any height restriction or view control and ordering the HOA to approve his plans. He is also seeking damages and attorney's fees to be proven at trial.

31. On January 5, 2010, Mr. Pritchett submitted a second request for approval of a modified set of remodel plans, which reduced, but did not eliminate the increased roof height for the home. (Ex. 125) On January 22, 2010, Mr. McArthur forwarded the proposal Design Committee for comment. David Gross responded that he believed the roof height increase still violated the CC&Rs and therefore voted again to disapprove the request. (Ex. 141) Greg Oliver and Brian Bookey agreed. (Ex. 143) On January 28, 2010, the Design Committee again denied the remodel proposal in an email written by Mr. McArthur. (Ex. 149)

32. On March 20, 2012, Mr. Pritchett filed an Amended Complaint, adding unreasonable delay and improper decision-making procedures as additional grounds for the Court to enter a declaratory judgment in his favor. Mr. Pritchett filed a Second Amended Complaint on February 1, 2016, seeking an award of monetary damages for "loss of use of his property" and "increased construction costs of the remodel."

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Numerous motions for summary judgment were argued and denied, and the case proceeded to trial on March 21, 2016.

I. CONCLUSIONS OF LAW

Enforcement of Restrictive Covenants

1. In *Riss v. Angel,* 131 Wn.2d 612 (1997), the Washington State Supreme Court held that covenants providing for consent before construction or remodeling will be upheld, even where they vest broad discretion in a homeowners association or a committee or board through which it acts, so long as the authority to consent is exercised reasonably and in good faith. The Court of Appeals has similarly reasoned that consent to construction covenants must be reasonable and reasonably exercised to be valid. *Thayer v. Thompson*, 36 Wn. App. 794, 797, 677 P.2d 787, *review denied,* 101 Wash. 2d 1016 (1984); *cf. Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 883 P.2d 1387 (1994), *review denied,* 127 Wn.2d 1003, 898 P.2d 308 (1995).

2. In the present case, the parties agree that Section 7.4 of the CC&Rs is the controlling covenant with respect to view encroachments from structures. It provides:

> No structures . . . may be constructed or modified on any Parcel to a height which would, (i) exceed the height limitations of the View Control Plan, or (ii) obstruct the Puget Sound or Park view of any other parcel. . . . *(Exhibit 193-10)*

The enforcement of this provision is vested in the HOA's Design Committee according to the Design Rules set forth in Exhibit E to the CC&Rs, at Section 2. It states:

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The Design Committee shall have the authority to consider all elements of any proposed improvements regarding the effect of such construction on the character of Picnic Point, which elements may include, but shall not be limited to:

. . .

1.5 The effect or impairment the proposed improvement will have on the views from surrounding building sites. *(Exhibit 193-20)*

In *Flying H Ranch Homeowners Ass'n v. Geary*, 153 Wn. App. 1009, (2009), *rev. denied* July 6, 2010, the Court of Appeals held that restrictive covenants are enforceable promises regarding the use of land. Interpreting the language in restrictive covenants is a question of law. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). The Court's primary objective in interpreting the covenants is determining the parties' original intent. *Viking Props.*, 155 Wn.2d at 120; *Riss v. Angel,* 131 Wn.2d 612, 621, 934 P.2d 669 (1997). To determine this, we apply the basic rules of contract interpretation. *Wimberly*, 136 Wn. App. at 336. "We give words in a covenant their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates contrary intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). We may resolve any ambiguity as to the parties' intent by considering evidence of the surrounding circumstances." *Angel v. Riss,* 131 Wn.2d at 623. A covenant is ambiguous when its meaning is uncertain or two or more reasonable and fair interpretations are possible. *White v. Wilhelm*, 34 Wn. App. 763, 771, 665 P.2d 407, review denied, 100 Wn.2d 1025 (1983). The court's goal is to ascertain and give effect to those purposes intended by the covenants. *Riss*, 131 Wn.2d at 623.

Interpretation of the View Covenant

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3. In the present case, the Court finds that the view covenant set forth in Section 7.4 is ambiguous. The phrase "(ii) obstruct the Puget Sound or Park view of any other parcel" is vague. It refers to no objective standard against which it can be measured. The phrase inherently requires the use of subjective discretion to determine what view exists and whether it is obstructed. Two or more fair and reasonable interpretations are clearly possible when determining whether a parcel's view is obstructed. As such, the Court will ascertain and give effect to the purposes intended by the original drafters of the covenant.

4. The only record of the intention of the drafters of this covenant is contained in the minutes of a board of directors. *(Exhibit 197)* In grappling with the issue of how the view covenant should be enforced in 2000, the HOA Board of Directors invited former board members (referred to in the board minutes as "FBMs"), to come to a meeting and discuss the original intent of the view covenants. Relevant portions of the HOA Board Minutes from the June 14, 2000 meeting recorded their intent:

> . . . According to the FBMs, the board's obligation is to protect the view of the water. Some [homeowner's] feel that they should be guaranteed a view of the pond, which according to the FMBs is "an absurd, literal interpretation." . . . Fredi asked the FBMs, "Did you intend that the CC&Rs be enforced to the letter?" Rick felt that there had to be a certain amount of flexibility. "Did you intend that the view of the Sound be 100% of the Sound?" No, not necessarily. (Exhibit 197-1)

These minutes state that the "current existing views" needed to be protected "[i]n order to retain property values." A former board member criticized one interpretation of the view covenant as being absurdly literal. At the same meeting, Mr. Bookey stated that if the covenants had been presented as "hardliners" (strictly construed) they would not have been approved by the

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homeowners. When asked whether the covenants were intended to be enforced to the letter, Rick Perrigo said that there would have to be "a certain amount of flexibility." *(Exhibit 197-1)* 22.

5. As noted above, the Court's primary objective in interpreting the covenants is determining the parties' original intent. *Viking Props.*, 155 Wn.2d at 120; *Riss v. Angel,* 131 Wn.2d 612, 621, 934 P.2d 669 (1997). Based on the statement of intent presented by the drafters of the CC&Rs, the court concludes that the strict construction approach adopted by the current HOA Board with respect to Section 7.4 of the CC&Rs is inconsistent with the intent of the drafters—and they knew as much back in June of 2000. Clearly, the original intent of the CC&Rs with respect to the view restriction was that it was not to be literally and strictly construed. The Design Committee is required to use a flexible approach on a case-by-case basis in applying its terms to avoid absurd results.

6. In this case, the Court finds that the Pritchett proposals did not present a view obstruction of the Puget Sound to properties within Picnic Point based upon the investigation performed by Mr. McArthur and the responses received from the surrounding property owners. The only parties claiming such a view obstruction live uphill, more than one-quarter of a mile away from the project site, at an elevation 75 feet *higher* than the Pritchett home. Investigation revealed that the change in roof height by 7 feet is too small to be detected with the naked eye from that distance. It was only discovered when the Design Committee used the assistance of a telescopic lens and binoculars, viewing it from a Board member's deck. The so-called view encroachment amounted to a reduction in view that is the size of the tip of a ballpoint pen when applied to the

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photographs taken without magnification. Mr. Pritchett's evidence proved this much more specifically.

7. After filing this suit Mr. Pritchett undertook an investigation of the alleged "view obstruction." He hired a professional photographer who photographed his house from the same spot on the Bookey deck that was the site from which the marked photograph had been taken. *(Testimony of Mr. Villanueva)* From that spot he took a picture of the Pritchett house and the Bookeys' panoramic view of Puget Sound. With this he determined that the photograph given to Mr. Pritchett by the Design Committee had been hugely magnified and that the view obstruction was not readily discernible with the naked eye. He computed that the percentage of the view of water from the Bookey deck that would be impinged upon was 0.086 percent. *(Testimony of Mr. Villanueva)*

8. Next Mr. Pritchett hired an architect to verify the distance of the Bookey property from the Pritchett property and to verify that there were no other trees between the Bookey residence and the Native Growth Protection Area, which might appear in the marked photograph of the view impingement. This was confirmed and the distance determined to be well in excess of one quarter mile. The architect did an independent evaluation of the percentage of Puget Sound view obstruction and determined that the photographer's estimate was too high because the marked photograph did not accurately show the area covered by the increased height of the roof line. He determined the correct percentage of water view to be affected by the remodel was smaller, 0.076 percent of the total water view from the Bookey Deck. *(Testimony of Mr. Ehm)*

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9. Mr. Pritchett also hired an appraiser to determine the increased value in his property if he were allowed to construct the remodel. The appraiser concluded that the property with the remodel would increase in value by approximately $775,000 and testified that a view impairment of 0.076 percent is too small to be valued. He testified that the remodel would have positive effect on the value of the homes surrounding it. *(Testimony of Mr. Connelly; See Exhibits 230 and 231)*

10. Neither the Design Committee, nor the Board of Directors, made any inquiry into the matters determined by the professionals hired by Mr. Pritchett and they did not consider any of these matters in making their decision.

11. Mr. McArthur testified that it was the Board's position that not even an inch increase in the existing roof height would be acceptable. He testified that he was told to implement the Board's policy decision as to the interpretation of Section 7.4 of the CC&Rs, and that the Design Committee followed that direction with respect to the Pritchett proposals. The Court concludes that such an interpretation of Section 7.4 of the CC&Rs is manifestly unreasonable. Such a literal interpretation of the covenant prohibits even a roof replacement where the new roofing material was thicker than the last. At trial, HOA Board and Design Committee members conceded that this would be an absurd result, but felt it was necessary. Their stated intent was to create a bright line and avoid opening the floodgates to future applications that may encroach on resident's views. The Board appears to be concerned about having to apply the provisions of Section 7.4 of the CC&Rs on a cases-by-case basis, and they desire a firm and consistent approach to the enforcement of the covenant. While the Court appreciates the Board's desire for consistency, the interpretation they chose was unreasonable and, therefore, improper. The Board's expressed

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concern about opening the floodgates to future construction projects lacks any evidentiary support and appears to be based on sheer speculation. Based on the evidence that was presented at trial, there does not appear to be, nor has there been, a large volume of remodels or new construction projects within Picnic Point that threaten the views of its residents.

12. Additionally, the Board has always had the authority to grant variances to height restrictions, but few, if any, have been sought. In addition, the CC&Rs contain view protections in Sections 7.5 and 7.6 that are virtually identical to the language in Section 7.4, but the Board has chosen to interpret those sections very differently. It has applied a flexible approach to the enforcement of view encroachments from trees, and even went so far as to create a neighborhood mediation process which appears to be successful. None of these processes, which involve the reasonable exercise of discretion by the HOA, have led to an opening of the floodgates to a rush of applications for other view encroachment requests from homeowners in Picnic Point. (Exs. 193; 306; 308-311). Accordingly, the Court does not believe this concern is a valid basis for the Board's overly strict construction of Section 7.4 of the CC&Rs.

13. The Court concludes that in applying Section 7.4 of the CC&Rs, the HOA Design Committee and Board of Directors are required to exercise the authority granted to them by the homeowners reasonably and in good faith.

14. Inexplicably, the HOA did not employ that approach in the instant case. Instead, the HOA appears to have manufactured a claim of view obstruction from a property one quarter of a mile away from the Pritchett home, uphill and at an elevation 75 feet above the Pritchett home. Perhaps the Board felt it needed to bow to the extreme pressure it was under from Mai Vu, which

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was evident from the emails and testimony presented at trial, or perhaps they were responding to other concerns. Regardless of the motive, the HOA's position resulted in an absurd, literal application of Section 7.4 of the CC&Rs to the Pritchett proposals, which is inconsistent with the original intent of the view covenant. The Court concludes that the HOA Design Committee erred in applying that strict standard to the Pritchett proposals on July 6, 2009, and again on January 5, 2010, when they determined that the Pritchett remodel proposals violated Section 7.4 of the CC&Rs and constituted a view encroachment. Section 7.4 cannot reasonably be interpreted to prohibit any view obstruction, no matter how trivial. The denial of the Pritchett proposals based on these grounds was error as a matter of law.

Tract 998 NGPA View Obstruction

15. At trial, Plaintiff presented evidence and testimony that trees in Tract 998 (the NGPA) would eventually grow to block the Puget Sound views of certain homeowners, therefore that future view impairment should nullify the application of Section 7.4 to the Pritchett proposal. The Court rejects such an interpretation of the covenants. A future impairment from natural causes must be evaluated at the time such trees grow large enough to actually impair the view, not before then.

Procedural Due Process Violation

16. In addition to the substantive error made by the HOA in reviewing the Pritchett proposals, the Court also finds that the decision of the HOA was based on a flawed process, which resulted in the denial of due process to during the consideration of the Pritchett proposals.

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17. The Design Committee copied at least one neighbor, Mai Vu, who opposed the remodel on communications without copying Mr. Pritchett. In contrast with the neighbor who opposed the project, Mr. Pritchett was not invited to a board meeting where his proposal was discussed, nor was he copied on the messages to this neighbor. (*See e.g. Exhibits 44, 49-1, 53, 54, 60, 62-1)* The Design Committee should have copied Mr. Pritchett on communications shared with the opponent of his remodel. *(See e.g. Exhibits 25, 29, 50, 60, 77, 126)* Similarly, Mr. Pritchett should have had an opportunity to attend board meetings with the opponent of his proposal.

18. The Design Committee was not properly constituted and as a result, delegated its function in part to members of the board of directors. The Covenants require at Section 8.1 (*Exhibit 193-12*) that the Design Committee consist of three members including one board member, but there were five members and no board members among them. The Design Committee was chaired by Mr. McArthur, who was experienced with plans in the aerospace industry and was comfortable reading plans such as those submitted by Mr. Pritchett, but he had no experience with land use planning, nor with real property covenants. None of the members of the Design Committee was an architect, as required by the Bylaws. *(Exhibit 186-9).*

19. Section 8.3 of the Covenants *(Exhibit 193-12)* requires that the Design Committee keep written records of its meetings, but no such records were kept. In the past, the Design Committee had consulted with an architect, however, it chose not to do that for the Pritchett proposals. (*Testimony of Mr. McArthur; See Exhibit 306)*

20. Despite the authority vested in the Design Committee by Section 8 of the CC&Rs, members of the Board of Directors intervened in the decision-making process of the Design

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Committee. Deryck Wager, a Board member during the review of the Pritchett proposal, testified that there was an informal understanding that the Design Committee would handle issues relating to more minor home improvements (such as paint color, roofing materials, etc.), but that more serious issues would be referred to the Board for decisions. He testified that they felt the preservation of views in Picnic Point was very important to the homeowners, and that it was the Board's role to decide such issues. This is an improper interpretation of the authority granted to the Board versus the Design Committee by the homeowners of Picnic Point when they adopted the Amended and Restated CC&Rs. There is nothing in the CC&Rs that authorized the Board to interfere in the Design Committee's independent decision-making authority.

21. Additionally, Board members Bookey and Pederson, who did interfere in the Design Committee's deliberations, had obvious conflicts of interests as to that decision, given that they were claiming the view obstructions. Even if one could interpret the CC&Rs to allow their input, the existence of a conflict of interests required them to recuse themselves from the Design Committee's deliberations regarding the Pritchett proposals. Although the "appearance of fairness doctrine" has not been applied to non-governmental organizations such as homeowners associations when they act in a quasi-regulatory fashion with regard to land use decisions, procedural due process does apply. Here, the flawed process resulted in a conflicted Board of Directors usurping the independent authority of the Design Committee and the result was a denial of procedural due process. The Design Committee's process of reviewing remodel or construction proposals must be fair in both appearance and result. Here, the process resulting in

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the denial of Mr. Pritchett's application was hopelessly flawed by the intrusion of the Board. Accordingly, its decision must be reversed.

22. The decision of the Picnic Point HOA denying the Pritchett proposal based upon a conflict with Section 7.4 of the CC&Rs should be reversed.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED ADJUDGED, AND DECREED:

1. The Court finds in favor of the Plaintiff, Thaddeus C. Pritchett. The requirements of Chapter 7.24 RCW have been satisfied and Plaintiff is entitled to the following declaratory relief:

a. Mr. Pritchett's May 2009 remodel plans do not violate Section 7.4 of the CC&Rs.

b. In order for the view covenant set forth in Section 7.4 of the CC&Rs to be strictly enforced, the covenants must be amended and new provisions creating objective, measurable standards must be adopted by the homeowners of Picnic Point.

2. The decision of the Picnic Point Homeowner's Association denying the Pritchett remodel proposal of May 2009 is reversed.

3. The project proposal is remanded to the Homeowner's Association for the issuance of an approval letter, subject to the imposition of other reasonable conditions consistent with other provisions of the CC&Rs.

4. The Court's written, summary decision on Declaratory Judgment dated May 12, 2016 is replaced by these final Findings of Fact, Conclusions of Law and Decision, which shall be the decision of this Court.

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5. The parties have indicated that they intend to waive their prior demand for a six-person jury. The Court will decide the issue of damages in a bench trial by way of a separate decision.

DATED this 5th day of August, 2016.

Judge Millie M. Judge

The Honorable Millie M. Judge
Judge of the Snohomish County Superior Court
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Everett, Washington 98201

APPENDIX D

No. 75555-2-I

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

THADDEUS C. PRITCHETT,

Respondent/Cross-Appellant,

vs.

PICNIC POINT HOMEOWNERS ASSOCIATION,
a Washington non-profit corporation,

Appellant/Cross-Respondent.

BRIEF OF RESPONDENT/CROSS-APPELLANT THADDEUS C. PRITCHETT

William T. Willard, WSBA #20248
Law Office of William Willard, PLLC
3417 Evanston Avenue N., Suite 529
Seattle, WA 98103
(206) 224-6303

Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Respondent/Cross-Appellant Thaddeus C. Pritchett

authority to apply the CC&Rs in an even-handed and just manner, it can amend the current language and try to get the community members to adopt the "hardline" CC&Rs that the 1996 Association rejected.

Although it asserts a number of reasons why the term "obstruct" can only mean what the Association wants it to mean, it avoids consulting the most common tool for interpreting everyday language. A common English dictionary defines "obstruct" in the context of views as "to cut off from sight *<a wall ~s the view>*." *Merriam-Webster's Collegiate Dictionary* at 857 (11th ed. 2014). Black's Law Dictionary defines "obstruct" in this context as "to cut off a line of vision; to shut out *<the new construction obstructs our view of the road>*." *Black's Law Dictionary* at 1246 (10th ed. 2009). The Association does not mention this definition, because it suggests that, if anything, the term "obstruct" means complete obscurement of a complete view, rather than a *de minimis* reduction in less than one tenth of one percent of a view.

Because there is no Washington authority directly on point and the dictionary does not aid its argument, the Association relies on its bald assertion that the covenant is unambiguous. The Association claims that "'obstruction' is an objective standard – a view is either obstructed or it is not." *Id*. at 19. It claims that the lack of a modifier such as "slight,"

APPENDIX E

No. 75555-2-I

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William T. Willard, WSBA #20248
Law Office of William Willard, PLLC
3417 Evanston Avenue N., Suite 529
Seattle, WA 98103
(206) 224-6303

Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Respondent/Cross-Appellant Thaddeus C. Pritchett

CC&R violations. *Id.* It also recounted actions that cut Pritchett out of the communications loop and favored the interests of his opponents. *Id.*

The Association first responds that it is incapable of engaging in a constitutional due process violation because it is a private organization. Br. of Appellant at 36. While this may be true in the strictest sense, it is not true that a court will sanction the deprivation of a property owner's due process rights through the enforcement of illegal restrictive covenants. *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).

It is also true that a homeowner's association is not empowered to violate its own governing documents that established the process for evaluating Pritchett's project.[9] The Homeowners' Association Act ("the Act") requires the directors of a homeowners' association to comply with governing documents:

> (1) *Except as provided in the association's governing documents* or this chapter, the board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 24.03 RCW.

[9] To the extent that this Court believes the trial court improperly used the term "procedural due process violation" in describing the Association's actions, it may affirm the finding that the Association violated the law on any ground sufficiently developed in the record. *State v. Hudson,* 79 Wn. App. 193, 194 n.1, 197, 900 P.2d 1130 (1995), *aff'd,* 130 Wn.2d 48, 921 P.2d 538 (1996).

RCW 64.38.025 (emphasis added). It is black letter law that directors and officers of a homeowners' association have a duty to act in compliance with the law and the governing documents, to deal fairly with the association and its members, and to use ordinary care and prudence in performing their functions. *Restatement (Third) of Property (Servitudes)* § 6.14 TD No. 7 (1998).

With respect to the trial court's findings that Association violated of the CC&Rs and bylaws, the Association does not claim that there is not substantial evidence to support them. Br. of Appellant at 38-41. In fact, it concedes many of the trial court's findings and does not challenged them on appeal. CP 212-15 (violated covenants requiring particular composition of design committee, violated bylaws requiring architect to be member of design committee, violated written records covenant).

Instead the Association argues that even if it had complied with the CC&Rs and bylaws, the result would have been the same because of its hardline interpretation of the CC&Rs. Br. of Appellant at 36-37. It claims that the "flaws" in the process did not deprive Pritchett of notice and an opportunity to be heard because board meetings where his opponents discussed his plans were "posted on the Association's website" and because the Association told him how to communicate with it "after his proposal was denied." *Id.* at 39.

The Association thus concedes that it violated its governing documents and made its decision without communicating to Pritchett and allowing him to present his case as to why he believed his efforts complied with the CC&Rs and the View Control Plan. Whether this is characterized as a "due process violation" or a violation governing documents in contravention of the Act, the trial court correctly concluded that the Association illegally violated Pritchett's property rights in denying his project. This Court should affirm.

F. ARGUMENT OF CROSS-APPELLANT

The trial court concluded that Pritchett was not entitled to attorney fees because the Association did not violate the Act in its handling of Pritchett's application. CP 47. The trial court cited two reasons why fees were not available under the Act, that (1) fees were not available to a homeowner against an association under the Act, and (2) even if they were, the Association did not violate the Act because its actions were merely "unreasonable."

(1) Attorney Fees Are Available to Either Prevailing Party in a Case Involving Violations of the Act, Not Just to Associations

The trial court concluded a that violation of the Act by directors is not legally coextensive with a violation of the Act by the Association, and that therefore a homeowner could only recover fees for violation if it sued

APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

THADDEUS C. PRITCHETT,

Plaintiff,

vs.

PICNIC POINT HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation,

Defendant.

NO. 10-2-08134-6

COURT'S ~~DEFENDANT'S PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: ATTORNEYS' FEES AND COSTS

Hon. Millie Judge

A hearing on Plaintiff's Motion for Attorneys' Fees and Costs was heard on September 2, 2016 before the Hon. Millie Judge. The Plaintiff appeared through his attorney, Rand L. Koler of Rand L. Koler & Associates, P.S.; and the Defendant appeared through its attorney, Michael D. Hunsinger of The Hunsinger Law Firm.

Based on the evidence into trial, the Court makes the following:

I. FINDINGS OF FACT

1. The Court has already issued, and hereby incorporated, two sets of Findings of Fact.

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The Westland Building
100 South King Street, Suite 400
Seattle, WA 98104
(206) 624-1177
FAX (206) 624-1178

ORIGINAL

Having made the above Findings of Fact, the Court makes the following:

II. CONCLUSIONS OF LAW

1. The Amended and Restated Declaration of Covenants, Conditions and Restrictions for Picnic Point" ("the CCR's"), adopted by the Picnic Point Homeowners Association ("the PPHOA") in 1996 and applicable to this matter, contains no provision allowing either party to be awarded attorneys' fees or costs in this case. Any authority for Plaintiff's Motion for Attorneys' Fees and Costs ("the Motion") must be found in an applicable statute or published authority.

Attorneys' Fees

2. The only bases for Mr. Pritchett's request for attorneys' fees are the following provisions of the Washington Homeowners' Association Act, RCW 64.38 ("the HOAA") and the Washington Nonprofit Corporation Act, RCW 24.03. ("the NPCA"):

RCW 64.38.050: "Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award attorneys' fees to the prevailing party."

RCW 64.38.025(1): "Except as provided in the association's governing documents or this chapter, the board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 24.03 RCW".

RCW 24.03.127, which states in relevant part:

A director shall perform the duties of a director, including the

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100 South King Street, Suite 400
Seattle, WA 98104
(206) 624-1177
FAX (206) 624-1178

> duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.
>
> In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, . . .

3. RCW 24.03.127 is essentially a codification of the longstanding "business judgment rule" in the state of Washington.

> The BJR [business judgment rule] presumes that corporate officers are acting in the best interest of the corporation. The Rule "immunizes management from liability in a corporate transaction undertaken within both the power of the corporation and the authority of management where there is a reasonable basis to indicate that the transaction was made in good faith." *Schwarzmann v. Ass'n of Apartment Owners of Bridgehaven,* 33 Wash. App. 397, 402, 655 P.2d 1177, 1180 (1982) Courts are reluctant to substitute judgment for that of corporate directors. *Id.* But directors are not immunized from liability when they fail to exercise proper care, skill, and diligence. *Shhinn v. Thrust IV, Inc.* 56 Wash. App. 827, 834-35, 786 P.2d 285, 290 (1990).
> *Fielder v. Sterling Park Homeowners Association,* 914 F. Supp. 1222, 1228 (W. D. Wa 2012)

4. Neither party has produced, and the Court has not found, any case that has awarded attorneys' fees or costs to any plaintiff who has successfully sued an HOA in the state of Washington. The two cases in which appellate courts have discussed the potential of such an award – *Riss v. Angel,* 131 Wn. 2d 612, 616, 934 P.2d 669 (1997) ("*Riss*") and *Day v. Santorsola,* 118 Wash. App. 746, 769, 76 P. 3d 1190 (2003) ("*Day*") – both involved CCR's with provisions allowing an award to the prevailing party, were suits against individual directors and not against an HOA, and involved bad faith conduct by the directors. None of those factors is involved here.

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The Westland Building
100 South King Street, Suite 400
Seattle, WA 98104
(206) 624-1177
FAX (206) 624-1178

5. The Motion also discusses *Waltz v. Tanager Estates Homeowner's Association*, 183 Wash. App. 85, 88–91, 332 P.3d 1133 (2014) and *Casey v. Sudden Valley Community Association,* 182 Wn. App. 315, 329 P.3d 315 (2014). However, neither discusses attorneys' fees and costs, and *Waltz* only holds that individual directors can be held liable to other association members if their actions were negligent. *Waltz,* at page 92.

6. RCW 64.08.025 applies only to the extent to which directors, not the HOA, may be liable for their actions to the HOA or to third parties. RCW 64.38.025(1) describes the duty the individual director owes to the HOA, implicitly granting to the HOA the right to seek recourse against individual directors for breach of that duty. The HOAA does not provide for a homeowner to be awarded attorneys' fees for successfully suing an HOA for actions of its directors.

7. Even if RCW 64.38.050 authorized a court to award attorneys' fees to a homeowner who prevailed in a lawsuit against the HOA, this Court declines to enter such an award here because Mr. Pritchett failed to meet his burden of proving that the PPHOA directors or members of its design committee violated its duties outlined in RCW 24.03.127.

8. In its Findings of Fact and Conclusions of Law and Decision dated August 5, 2016, this Court concluded as a matter of law that the PPHOA's interpretation and implementation of Section 7.4 of the CCR's in denying Mr. Pritchett's proposed remodel was "manifestly unreasonable" [COL 11] and "absurd[ly] literal". [COL 14] It also concluded there were several deficiencies in the process by which the PPHOA evaluated and ultimately denying Mr. Pritchett's proposal. [COL 8 – 10, 17 – 21]

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The Westland Building
100 South King Street, Suite 400
Seattle, WA 98104
(206) 624-1177
FAX (206) 624-1178

9. A director ~~most~~ must do more than make an unreasonable decision in order to have breached his/her duty to an HOA under RCW 64.38; the plaintiff homeowner must also prove that the director failed to exercise proper care, skill, and diligence in doing so.

10. To understand the directors' standard of care under RCW 24.03.127, this Court has reviewed the four cases that specifically described the conduct of the directors in the context of the statute. Two – *Riss* and *Day* – held that the directors had breached their duties to the homeowner, and two – *Green v. Normandy Park,* 137 Wn. App. 665, 151 P.3d 1038 (2007) and *Heath v. Uraga,* 106 Wash. App. 506, 24 P.3d 506 (2001) – where the courts concluded that the directors had complied with it.

11. This Court concludes that the manner in which the PPHOA directors conducted their review of Mr. Pritchett's proposed remodels was much more similar to the acts of the directors in *Green* and *Heath* than in *Riss* and *Day*. In particular, the review of the homeowners' proposals by the directors in the latter two cases was steeped in bad faith because of the strong bias against the homeowners, while the approach taken by the directors in *Green*, *Heath*, and here was substantially more objective and less biased. Moreover, as in *Green*, the fundamental error made by the directors was to interpret a provision which the courts concluded was erroneous on legal grounds.

12. This Court therefore concludes that Mr. Pritchett is not entitled to an award of attorneys' fees under RCW 64.38.050.

Costs

13. Mr. Pritchett seeks costs in excess of those to which he is entitled under RCW 4.84.010 pursuant to two statutes.

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The Westland Building
100 South King Street, Suite 400
Seattle, WA 98104
(206) 624-1177
FAX (206) 624-1178

14. RCW 4.84.190: "In all actions and proceedings other than those mentioned in this chapter [and RCW 4.48.100] where no provision is made for the recovery of costs, they may be allowed or not, and if allowed may be apportioned between the parties, in the discretion of the court." RCW 4.84.010 is the applicable provision for costs here; *Jeffrey v. Weintraub,* 32 Wash. App. 536, 648 P.2d 914 (1982), cited in the Plaintiff's Reply Memorandum, is inapplicable.

15. RCW 7.24.100: "In any proceeding under this chapter [the Uniform Declaratory Judgment Act], the court may make such award of costs as may seem equitable and just." Neither party has produced, and this Court has been unable to find, any case that discusses costs being awarded to a party in a declaratory judgment action.

16. This Court also finds it significant that the prevailing party in a declaratory judgment action is not entitled to attorneys' fees absent support from another statute, and that there is no discussion of RCW 7.24.100 in *Riss* or *Day,* even though both successful plaintiffs were, like Mr. Pritchett, granted declaratory relief – the right to complete the construction of their houses – as well as monetary damages.

17. Finally, this Court concludes that the two cases cited by Mr. Pritchett's counsel during oral argument, *American Civil Liberties Union of Washington v. Blaine School District No. 503*, 95 Wn. App. 106, 975 P.2d 536, and *Johnson v. Horizon Fisheries, LLC*, 148 Wash. App. 628, 201 P.3d 346 (2009), are not relevant. They both involve costs awards based on a separate statute and CR 41(d), respectively, while there is no separate applicable stature or court rule here.

THE HUNSINGER LAW FIRM
The Westland Building
100 South King Street, Suite 400
Seattle, WA 98104
(206) 624-1177
FAX (206) 624-1178

DATED this 28th day of September, 2016.

HON. MILLIE JUDGE

Presented By:

THE HUNSINGER LAW FIRM
Attorneys for Defendant

MICHAEL D. HUNSINGER
WSBA #7662

Approved for Entry By:

RAND L. KOLER & ASSOCIATES, P.S.
Attorneys for Plaintiff

RAND L. KOLER
WSBA #7679

THE HUNSINGER LAW FIRM
The Westland Building
100 South King Street, Suite 400
Seattle, WA 98104
(206) 624-1177
FAX (206) 624-1178

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals Cause No. 75555-2-I to the following:

Howard Goodfriend
Ian C. Cairns
Smith Goodfriend PS
1619 8th Avenue North
Seattle, WA 98109-3007

Michael D. Hunsinger
The Hunsinger Law Firm
6100 219th Street SW #4805
Mountlake Terrace, WA 98043

William T. Willard
Law Office of William Willard, PLLC
3417 Evanston Avenue North #529
Seattle, WA 98103

Original E-filed with:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

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

DATED: May 17, 2018, at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

May 17, 2018 - 10:50 AM

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