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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NOCHE VISTA, LLC,
a Washington limited liability company,

Petitioner,

v.

BANDERA AT BEAR MOUNTAIN RANCH
HOMEOWNERS ASSOCIATION, a Washington
Nonprofit Corporation,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Noche Vista LLC ("Noche Vista") seeks review by this Court of the Division III opinion terminating review set forth in Part B.

B. COURT OF APPEALS DECISION

Division III filed its opinion on August 20, 2020. A copy of the opinion is in the Appendix at pages A-1 through A-24. That court denied Noche Vista's motion to publish the opinion by an order entered on October 27, 2020, a copy of which is in the Appendix at page A-25.

C. ISSUES PRESENTED FOR REVIEW

1. Where Division III correctly concluded that a residential community's CC&Rs do not apply to undivided property that is not included in the CC&Rs' legal description and could not be included within the community without formal "annexation," as the CC&Rs require, did it err in concluding that a grantor who had relinquished any interest in the property by a deed in lieu of foreclosure could nevertheless amend the CC&Rs to effectuate an annexation?

2. If the grantor had the right to amend the CC&Rs, despite having conveyed any interest it had to a lender by a deed in lieu of foreclosure, was an amendment to the CC&Rs that nowhere mentioned annexation sufficient to accomplish that result?

3. Did the court err in finding that the HOA, rather than Noche Vista, was entitled to a fee award?

D. STATEMENT OF THE CASE

Division III's opinion accurately sets forth the facts and procedure in this case. Op. at 2-11. Certain facts, however, bear emphasis.

Bandera is a platted subdivision in Chelan County that was the brainchild of developer Jerry Scofield; it was a part of a larger development, Bandera at Bear Mountain Ranch ("BMR"), that had its own development guidelines. Bandera encompassed nearly 93 acres, or 6% of BMR's overall territory. Scofield's general plan of development for Bandera was clearly set forth in its CC&Rs. It was to be developed in three phases. The third phase was not subject to the CC&Rs until it was annexed into Bandera. Br. of appellants at 4-10.

Scofield's dream for Bandera, with excessive restrictions on development, proved to be uneconomic even though it was recreational property in the otherwise hot Lake Chelan real estate market. Scofield lost Phase III to his lender. *Id.* at 13.[1] Noche Vista purchased Phase III. *Id.* at 14-15. Noche Vista has not yet developed Phase III. At issue in this case is whether it is annexed to Bandera and subject to Bandera's restrictive CC&Rs.

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[1] The economic failure of the development is evident in both the Bank taking ownership over Phase III and in the lack of construction in Phases I and II. CP 349, 374. Most lots in Phases I and II remain vacant while development elsewhere in the Lake Chelan area is booming. Reply br. at 4-5. And since Scofield's project went bust, the restrictions in the CC&Rs have become tighter, not looser, because of Scofield's last gasp at control. Any owner of Phase III has an interest in remaining free from Scofield's even more stringent proposed restrictions on development, given the failure of Phases I and II.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case comes to the Court in an unusual posture. The trial court granted summary judgment to the HOA based on its belief that although the covenants stated that Bandera Phase III had to be *annexed* in order to be subject to the CC&Rs' regulatory scheme, the CC&Rs did not mean what they said and annexation was not required. CP 662. Like the HOA, the trial court tried to read "annexation" out of the CC&Rs.

Division III correctly disagreed with that interpretation, holding that formal annexation was required to subject Phase III to Bandera's CC&Rs. Op. at 13-16. This is consistent with contractual interpretation principles that apply to the interpretation of CC&Rs established by this Court in numerous cases, most recently, *Wilkinson v. Chiwawa Communities Ass'n.*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). Op. at 11-13. The primary objective of any interpretation is determining the CC&Rs' drafters' intent. *Wilkinson, id.* at 250; *Riss v. Angel,* 131 Wn.2d 612, 621, 934 P.2d 669 (1997). Moreover, the plain language of the covenants, considered in their entirety, controls. *Wilkinson, id.* at 250; *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 694, 974 P.2d 836 (1999).

Despite Division III correctly realizing that the CC&Rs did not bind Phase III without annexation, Division III decided that Scofield, in fact, annexed Phase III. In so holding, the court upended Washington property

law in critical ways that cry out for this Court's review. First, Division III held that a grantor has a personal right – not a property right that runs with the land – to annex property to new CC&Rs and retains that personal right even after granting an essentially unconditional deed in lieu of foreclosure to the lender. Second, Division III held that a grantor may exercise this personal right of annexation without expressly declaring the annexation or modifying the legal description of the CC&Rs to add the purportedly annexed property to it. Review is warranted. RAP 13.4(b)(1, 2, 4).

(1) The CC&Rs Did Not Apply to Bandera Phase III

The trial court failed to credit the express language in the CC&Rs requiring Phase III's *annexation* before it was subject to those CC&Rs, as Division III discerned. The clearest indicators of the grantor's intent in the CC&Rs were the provisions regarding annexation, and the legal description for the land subject to the CC&Rs' binding provisions.

Neither Phase II nor Phase III of Bandera was divided into individual numbered lots on the original plat. CP 146-54. That original plat referenced a future Phase III of 31.76 acres. CP 123, 149-50. Phase III, now owned by Noche Vista, has never been subdivided into Landholdings, or individual numbered lots.

The word "annex" appears in the CC&Rs' definition of the term "Landholding" and in a procedure for adding properties to the CC&Rs. A

"Landholding" was defined there as "one of the individual numbered lots, each approximately one-third acre in size, designated by Declarant to be a Landholding in Bandera as shown on the Plat." CP 178-79. The CC&Rs tied the term "Landholding" to the term "Owner" when they defined an Owner as "one or more persons or entities who are, alone or collectively, the record owner of fee simple title to a *Landholding*." CP 179 (emphasis added). Every Owner pledged to "abide by the intent and purposes of this declaration." CP 171. With these interlocking definitions of Owner and Landholding, the CC&Rs bound only the individual numbered lots identified on the recorded plat. Phase III did not include individual numbered lots; Phase III had no "Landholdings" that were subject to the CC&Rs. This point was made explicit in the last sentence of the definition of Landholding, where the word "annex" appeared: "The number of Landholdings *may* be increased through annexation of Bandera Phase III." CP 179 (emphasis added). The CC&Rs used the term "annexation" *only* for Phase III. CP 178-79. So, rather than assume that Phase III was subject to their authority, the CC&Rs assumed that Phase II was and could be divided simply by altering the plat. By contrast, the CC&Rs required a formal "annexation" for Phase III. *Id.*

A formal procedure for the "annexation" of property was established in the CC&Rs' Article 10. "[A]dditional real property" could be " annexed

to and become subject to this Declaration," if the "Declarant" recorded "a supplemental (or amended) declaration" with the County Auditor's Office. CP 198. A "Declarant" was defined in the CC&Rs as "Scofield Construction, L.L.C., a Washington limited liability company, and its successors and assigns." CP 178.[2] *Nothing* in this definition evidences an intent to reserve any rights to the Declarant upon the sale of Bandera. In fact, it contemplated that the Declarant's rights could be passed on to a successor in ¶ 12.13 "to the extent specifically designated by Declarant and only with respect to the particular rights and interests specifically designated." CP 202. ¶ 10.2 of the CC&Rs made it clear that a property was not "annexed" and subject to their provisions until the recording with the Chelan County Auditor occurred. CP 198. Thus, the CC&Rs were designed to tightly restrict Phases I and II according to Scofield's vision, but to otherwise maintain flexibility for him to develop Phase III as he chose.[3] Indeed, Scofield himself saw Phase III as a distinct subdivision,

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[2] The Declarant is a grantor, as that term is often used in this Court's decisions.

[3] Consistent with this analysis of maximum flexibility for Scofield, the CC&Rs gave Scofield the general discretion to unilaterally amend the provisions of the CC&Rs during the Development Period. CP 197-98. As the Declarant in the CC&Rs, Scofield's development company was also the Management. CP 178. The CC&Rs exempted Scofield from the pre-construction review process that restricted every Owner. CP 179-81. Although the CC&Rs allowed the annexation of Phase III to create more Landholdings subject to the CC&Rs, the CC&Rs did not require the Declarant or Management to ever annex Phase III into CC&Rs. CP 166-205. Phase III could then be developed freely, subject to the land use regulations that apply to BMR, such as its mitigation agreement with the County, the zoning code, and the conditions of the County's plat approvals. CP 178.

naming it Noche Vista to set it apart from Bandera Phases I and II. Reply br. at 12.

This type of scheme—a phased, flexible development plan with a corresponding "annexation" procedure in the CC&Rs—was not unique to BMR. *See, e.g., Avolio v. Cedars Golf, LLC*, 196 Wn. App. 1063, 2016 WL 6708089 at *1 (2016), *review denied*, 187 Wn.2d 1026 (2017). This option to add Phase III to Bandera at a later date was also confirmed by the fact that the CC&Rs required owners to acknowledge Scofield's right to develop Phase III independently.[4]

In sum, Division III correctly ruled that the CC&Rs have required the formal annexation of Phase III before it was subject to them.

Scofield employed this flexibility. Before hobbling any new owner of Phase III with 70 pages of development restrictions limiting development to single family dwellings, Scofield actively explored multi-family development in Phase III. Br. of Appellants at 4-5.

[4] "Owner acknowledges and agrees that areas of Bear Mountain Ranch will continue to be developed for residential use, for higher density occupation or for any other purpose permitted by law." CP 192. "Owner agrees not to protest or object to any future development of Bear Mountain Ranch." *Id.* The CC&Rs cautioned also that "[p]roperty owners cannot expect views, which exist at the time of purchase, to remain unchanged over time." CP 190. Via the CC&Rs, Scofield was candid with Owners of Landholdings in Phases I and II about his plans: their neighborhood could grow with the annexation of Phase III, but Phase III and BMR as a whole could also grow and change beyond the confines of Phases I and II.

(2) A Grantor's Rights, like the Rights under the CC&Rs, Run with the Land and a Grantor Has No Further Authority Once the Grantor Conveys the Property

The Court of Appeals went askew when it adopted entirely new principles, essentially ones of first impression for this Court.[5] It concluded first that a grantor's interest is a personal right that does not run with the land, op. at 17-18, it further concluded that a grantor's deed in lieu of foreclosure did not relinquish such a personal right to the lender, op. at 17, and it concluded that the CC&Rs Seventh Amendment, designed to remove grantor Jerry Scofield from the management or enforcement of the CC&Rs, constituted a *de facto* annexation of Bandera Phase III as required by the definition of "Landholding," even though the terms "annex" or "annexation" appear nowhere in the Seventh Amendment. Op. at 18.[6]

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[5] Issues of first impression are uniquely suited to review by this Court. First impression statutory interpretation questions, for example, are often the subject of review by this Court either under RAP 4.2(a)(4) or RAP 13.4(b)(4). *E.g.*, *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982) (first impression of 1981 tort reform legislation); *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) (whether a city's response to a Public Records Act request was sufficient to trigger the PRA's statute of limitations); *Birrueta v. Dep't of Labor & Indus.*, 186 Wn.2d 537, 379 P.3d 120 (2016) (interpretation of statute addressing repayment of industrial insurance benefits); *Plein v. USAA Cas. Ins. Co.*, 195 Wn.2d 677, 463 P.3d 728 (2020) (application of RPC 1.9).

[6] Although the trial court erred in its interpretation of "annexation" in the CC&Rs, it firmly rejected the position Division III ultimately took on whether Scofield could annex Phase III:

> The only debatable issue remaining in the case, from the court's perspective, is the effect on plaintiff of the seventh amendment to the CCR's. As argued by plaintiff, at the time Jerry Scofield executed the seventh amendment, he no longer held any legal interest in phase 3,

The novel principles adopted in Division III's opinion would surprise real estate lawyers, lending institutions, title insurers, and the property purchasers across our state. This Court should grant review to address such principles that conflict with Washington authority and represent such an impactful change in Washington law. RAP 13.4(b).

(a) <u>A Declarant's Rights in Connection with the Covenants Run with the Land</u>

In order for the CC&Rs Seventh Amendment at issue here to be effective, grantor Jerry Scofield had to possess the authority to actually amend the CC&Rs. At the time Scofield recorded the Seventh Amendment with the Chelan County Auditor in 2012, *Scofield had lost his interest in Phase III*. CP 115-17. He had already recorded a deed in lieu of foreclosure conveying his interest in Phase III to a local bank. Division III concluded, however, that a declarant's right to amend covenants is personal to the declarant and does not run with the land, op. at 17-18, citing only out-of-

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> having conveyed a deed in lieu of foreclosure to North Cascades National Bank on April 30, 2012. The court is persuaded that, legally, Mr. Scofield retained no interest – development or otherwise – in phase 3 as of that date. The cases cited by plaintiff support this conclusion. Further, it strains reason to suggest that a party could convey away all title to property and nevertheless argue that he still held the right to develop it absent a specific reservation of that right.

CP 662.

state authority for that principle. Division III failed to note countervailing authority from this Court on when interests run with the land.

Plainly, Scofield's interest as the Declarant/grantor ran with the land, and it was conveyed to the lender by the deed in lieu of foreclosure. As long ago as *Lake Arrowhead Community Club, Inc. v. Looney,* 112 Wn.2d 288, 295, 770 P.2d 1046 (1989), this Court made clear the criteria for an interest running with the land:

> (1) the covenants must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds; (2) the covenant must "touch and concern" both the land to be benefitted and the land to be burdened; (3) the covenanting parties must have intended to bind their successors in interest; (4) there must be vertical privity of estate, *i.e.*, privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate, or privity between the original parties. W. Stoebuck, *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861 (1977).

Any right Scofield had under the CC&Rs ran with the land under this rule. *Nothing* in the CC&Rs here evidences an intent to divorce Scofield's right as a grantor from the effective operation of the rights under the CC&Rs. Such a right, like the CC&Rs themselves, ran with the land. *See, e.g., Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 84 P.3d 295 (2004) (covenants, including homeowners' dues, ran with the land).

In any event, the rule adopted by Division III that a grantor's rights automatically are personal to the grantor and do not run with the land represents bad public policy. To divorce a grantor's right to amend covenants from the covenants themselves is a policy fraught with the potential for mischief and confusion. Washington property owners and lenders will be surprised that a grantor who has sold all lots in a subdivision or has sold any rights in the subdivisions to others could be entitled, out of the blue, to amend the covenants *years later* because that was a personal "right." Could the grantor sell such an interest on the open market? Would title insurers be required to note that such a right might be exercised in the future?

Moreover, the covenants here contemplated that any grantor interest ran with the land. ¶ 12.4 of the covenants states in pertinent part:

> Declarant, for itself, its successors and assigns hereby declares that all of Bandera must be held, used and occupied subject to the conditions, covenants and restrictions of this Declaration and the other Governing Documents, and that all such provisions will run with the land and be binding upon all persons who hereafter become the owner of any interest in Bandera.

CP 200-01. Similarly, section 12.5 of the CC&Rs also provided:

> General Scheme. Each Owner and person acquiring any interest in real property subject to this Declaration agrees that this Declaration and the other Governing Documents set forth a general scheme for the improvement, development, operation, management (including

> enforcement and dispute resolution) of the real property covered hereby, and further agrees that all of the Governing Documents run with the land and be binding on all subsequent and future owners, grantees, assignees and transferees.

CP 201.

Such a significant change in the treatment of grantor rights as adopted by Division III is one for this Court to address. Review is merited. RAP 13.4(b)(1, 2, 4).

(b) <u>A Deed in Lieu of Foreclosure Transmits a Declarant's Interest in the Covenants to the Lender</u>

Even if Division III were correct that Scofield's rights as grantor were "personal" and did not run with the land, he relinquished any right he had in Bandera generally, and Phase III specifically, when his company granted to the Bank "all of its right, title, and interest in" the property known as Bandera Phase III. CP 115-16. Under Washington property law, any property rights not expressly excluded are included in the conveyance. *Knutson v. Reichel*, 10 Wn. App. 293, 295, 518 P.2d 233 (1973), *review denied*, 83 Wn.2d 1009 (1974) (citing 1 R. Patton, *C. Patton Land Titles* § 161 (2d ed 1957)).[7]

This principle is entirely consistent with the well-understood

[7] This Court has treated property rights broadly. *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 364-68, 13 P.3d 183 (2000), *abrogated on other grounds*, *Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019) (right of first refusal is a property interest subject to taking by the government).

purpose of a deed in lieu of foreclosure. It is the functional equivalent of a non-judicial foreclosure, *Thompson v. Smith*, 58 Wn. App. 361, 366, 793 P.2d 449 (1990), and satisfies the debt the property secures. Marjorie Dick Rombauer, 27 *Wash. Practice Creditors' Remedies-Debtor's Relief* § 2.32.

As the trial court observed, it makes little sense to believe that Scofield did not convey *all* interests he possessed in Phase III, including his alleged "personal rights" as a grantor, by the deed in lieu of foreclosure. It is difficult to believe that the lender here would want Scofield to continue to possess any right in Phase III. Indeed, the usual consideration for a deed in lieu of foreclosure is a release of the borrower's personal liability or indebtedness. John C. Murray, *Deeds in Lieu of Foreclosure: Practical and Legal Considerations*, 26 Real Property, Prob. & Trust J. 459, 469 (1991). A lender would want *all* property interests Scofield possessed in return for the discharge of the debt. When Scofield conveyed all right, title, and interest in Bandera to the lender, the deed was broad, unambiguous, and meant what it said – "all" means "all." *Nationstar Mortgage LLC v. Schultz*, 11 Wn. App. 2d 1042, 2019 WL 6713614 (2019), *review denied*, 195 Wn.2d 1015 (2020) (courts "strive to give effect to every word used in a deed where 'reasonably possible,'"). Pursuant to ¶ 12.13 of the CC&Rs, Scofield's successors, not Scofield, had the right to amend the CC&Rs. *Nothing* in the deed to the lender here evidenced a reservation of any rights by Scofield.

Scofield conveyed any right he once had to annex Phase III or record an amendment applicable to it to his lender. Review is merited on the scope and effect of a deed in lieu of foreclosure. RAP 13.4(b)(1, 2, 4).

(c) <u>The Seventh Amendment Was Not an Effective Annexation of Phase III</u>

This Court has never articulated what is required generally for a grantor to "annex" property so as to bring it under CC&Rs applicable to a subdivision. Plainly, in order for annexation to occur a grantor must express an intent to annex such property and appropriately record that intent.[8] Here,

[8] Division III erred in its failure to properly treat the effect of the CC&Rs' legal description. That legal description for the bound properties only confirms the need for a clear expression of any intent to annex. The legal description for the land bound by the CC&Rs was set forth "on pages 1, 2 and 3." CP 166. There, the CC&Rs described "Bandera Phases I and II," with an *express exception* for Bandera Phase III: "EXCEPT Bandera Phase III." CP 171-73. The CC&Rs separately described the "Bandera Phase III" tract of land on pages 4, 5, and 6, CP 174-76, as well as the whole "Bear Mountain Ranch" property, of which Bandera was a part, on pages 6, 7, and 8, CP 176-78. Read together, these provisions of the CC&Rs show that Phases I and II were subject to the binding provisions of the CC&Rs, and that Phase III was not. The legal definition of Phase III was included only in the definitional section for the CC&Rs' defined words. Unlike the legal definition for Bandera Phases I and II, that legal definition for Phase III was not incorporated into any operative provision of the CC&Rs. If the definition of Phase III was actually meant to subject Phase III to the CC&Rs, then the CC&Rs would have pointlessly provided the express exclusion of Phase III from Phases I and II and the subsequent definition of Phase III. If Phase III were intended to be included from the inception, there would have been no need for those separate definitions.

Construing RCW 65.04.045(1)(f), which requires recorded instruments to include "[a]n abbreviated legal description of the property" on the first page. Division III held that CC&Rs' legal description, incorporated by reference on the CC&Rs' first page was only "arguably evidence" of what the declarant "intends" but could be overridden by separately filed documents. Op. at 19. In other words, the court determined that the legal description mandated by RCW 65.04.045(1)(f) may be overridden by other indicators of intent. That was error. The interpretation of RCW 65.04.045(1)(f) is an issue of first impression for this Court. Review is merited. RAP 13.4(b)(4).

however, assuming Scofield's rights were personal, and they survived his relinquishment of any rights by the deed in lieu of foreclosure, the annexation of Phase III was not accomplished by any CC&R amendment recorded by Scofield. *None* of the first six amendments had *anything* to do with annexation of Phase III. CP 207-08, 217-18, 228-29, 238-39, 249, 259.[9] These first six amendments included Phase III with their "Legal Description," CP 207, 211-14, 217, 221-24, 227-28, 232-35, 238-39, 242-45, 248-49, 252-55, 258-59, 263-66, but such a mere mention of Phase III did not bring it under the CC&Rs. If any of the amendments had intended to "annex" Phase III, presumably they would have used the words "annex" or "annexation." But those words appear *nowhere* in those amendments. CP 207-66.[10]

The Seventh Amendment has a different history, but it, too, did not annex Phase III. Scofield signed that Amendment on behalf of his development companies as "Grantor." CP 441. That Amendment stated that it "modifies the Declaration only to the extent specified herein, and only as

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[9] Each amendment's structure confirms the intent to not amend the CC&Rs' legal description (which referred only to pages 1, 2, and 3 of the CC&Rs) or the term Landholding. CP 207-08, 217-18, 228-29, 239, 249, 258-60. They were expressly intended to create only the amendments that were specifically mentioned in the "Agreement" sections, not to imply any amendments or annexation of land; the CC&Rs' original legal description and definition of Landholding remained unchanged.

[10] Indeed, the legal descriptions also mention BMR as a whole. Obviously, it was not "annexed" either.

to that property described on the attached Exhibit 'A,'" which included Bandera Phases I and II and Phase III. CP 431, 443. It altered the CC&Rs' definitions section, established a homeowners' association, altered the design and construction restrictions, provided for assessments, and altered the procedure for amending the CC&Rs. CP 431-41. But like the first six amendments, the Seventh Amendment did not amend the legal description in the CC&Rs themselves or the definition of "Landholding" that specifically references the need for annexation of Phase III. It would be exceedingly odd to retain that part of the "Landholding" definition if, in fact, the Seventh Amendment annexed Phase III. CP 430-41. Further, the words "annex" and "annexation" appeared *nowhere* in the document. *Id.* Indeed, the Seventh Amendment *nowhere* even mentions article 10 of the CC&Rs relating to annexation. Again, if annexation were the intent of the Seventh Amendment, that section of the CC&Rs would likely be at least mentioned. Rather, like the CC&Rs themselves, the binding effect of the Seventh Amendment awaited Phase III's formal annexation—a condition that has not been met to this day.

But if the Seventh Amendment were construed to mean that Phase III had implicitly been annexed (it was not), the Amendment would be invalid under this Court's analysis in *Wilkinson*. Without unanimous consent or express authorization in the CC&Rs for new restrictions to be

added by majority vote, Washington law prohibits amendments to CC&Rs adding "new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants." *Wilkinson*, 180 Wn.2d at 256. *See also*, *Meresse v. Stelma*, 100 Wn. App. 857, 866, 999 P.2d 1267 (2000) (striking down an amendment to CC&Rs that changed the location of a road because it was "unexpected").

Scofield was the only signatory to the Seventh Amendment (and, of course, he no longer held any property interest in Phase III). The record does not disclose that any of the Phases I and II Owners approved the Seventh Amendment as it was presented by Scofield. CP 1-930. Plus, the CC&Rs authorized the Declarant to "amend any provision of this Declaration," but not to create new restrictive covenants. CP 51. Under *Wilkinson*, the Seventh Amendment had to be consistent with the general plan of development and relate to existing covenants, but it went *far beyond* the existing covenants, wiping out *all* the construction and design guidelines in the CC&Rs. *Compare* CP 34-38, *with* CP 435-38. It added *70 pages* of new, highly specific design guidelines that had *never* been incorporated into the CC&Rs. CP 450-520.[11]

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[11] As the HOA attorney's noted, "*Scofield's* desire to retain the Bandera vision/characteristics has resulted in extraordinarily detailed design guidelines." CP 419, 425-26 (emphasis added).

Division III erred in concluding that the Seventh Amendment constituted a valid Article 10 “annexation” by its terms. It neglected to analyze it under this Court’s *Wilkinson* decision. Review is merited, where this Court has never before addressed what is necessary to “annex” property subject it to CC&Rs. RAP 13.4(b)(1, 4).

(3) The HOA Was Not Entitled to Attorney Fees

The trial court awarded the HOA its attorney fees in this dispute. CP 842-55, 890-907, 919-21, and Division III affirmed that award. Op. at 21-23.

Even if the Court were to conclude annexation of Phase III occurred here, (and if annexation has not occurred, the HOA is not the prevailing party in any event), the HOA was not entitled to fees because the CC&Rs’ attorney fee provision did not apply to this type of dispute. ¶ 12.16 of the original CC&Rs stated:

> In the event any party employs legal counsel to enforce any covenant of this lease, [sic] or to pursue any other remedy on default as provided herein, or by law, the substantially prevailing party shall be entitled to recover all reasonable attorneys’ fees, appraisal fees, title search fees, other necessary expert witness fees and all other costs and expenses not limited to court action. Such sum shall be included in any judgment or decree entered.

CP 202. The clear intent of this language is that it applies *only* in instances where the HOA is seeking to compel *an Owner* who has failed to comply

with "any covenant" and is in "default" of the covenants to come into compliance; the individual covenants only apply to issues related to construction activities (improvements) which have either been proposed or which are being undertaken on a Landholding.[12] No such issue was present here. As noted *supra*, Noche Vista was not an Owner because the Phase III does not yet have any Landholdings. CP 288, 602.[13]

In ruling on fees, Division III relied on *Roats v. Blakely Island Maintenance Comm'n*, 169 Wn. App. 263, 279 P.3d 943 (2012). That reliance is misplaced. In fact, *Roats* supports Noche Vista's position. The court there held that a fee award was possible under an HOA's bylaws because the action at issue pertained to collection of assessments. The court rejected a fee award under the HOA statute and the CC&Rs. As to the latter,

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[12] The covenants govern only the design, construction, and maintenance of improvements an Owner makes to a Landholding. CP 179-96, 432-41, 450-520. The chief design, building, and maintenance covenants—all pertaining by their terms only to improvements planned for or made to Landholdings—are found in the prebuilding construction review covenants in Article 2, the construction covenants in Article 3, and the general conditions and restrictions in Article 4. The covenants continue through Article 12 with administrative and miscellaneous covenants, similarly focusing on the defined terms Owner, Landholding, and Improvement.

[13] It is only after property has been annexed so as to become a Landholding and only when the Owner of the Landholding engages in some activity which runs afoul of a specific covenant that ¶ 12.16 authorizes enforcement action in order to bring the Owner, the Landholding, and the Improvements into compliance with the covenant with which the Owner is alleged to have violated. In fact, before a parcel of property within Bandera has been annexed into Landholdings, the HOA had no authority to even go on the property, let alone take any enforcement action. CP 040 ("Inspection") ("Management [has] … the right to enter upon and inspect any portion of a *Landholding* and *Improvements* thereon …." (emphasis added).

the fee provision required the HOA to commence the litigation in order to recover fees and, because it had not, a fee award was not merited.

Because a contractual fee provision is an *exception* to the American Rule on fees, the terms of contractual fee provision awarding fees must be viewed narrowly. As noted *supra*, the language of ¶ 12.16 did not support a fee award for this type of litigation. *Meresse*, 100 Wn. App. at 868-69. *See also*, *Ortego v. Lummi Island Scenic Estates Community Club, Inc.*, 2017 WL 11421785 (W.D. Wash. 2017).

Division III's excessively broad interpretation of this fee provision is contrary to *Roats*. Review is merited. RAP 13.4(b)(2).

F. CONCLUSION

This case involves significant legal questions involving the authority of a grantor under the CC&Rs pertinent to a subdivision. Division III's opinion offers a novel, and erroneous, legal analysis of a grantor's rights. This Court should grant review and reverse the trial court's summary judgment and judgments on fees. Costs on appeal, including reasonable attorney fees,[14] should be awarded to Noche Vista.

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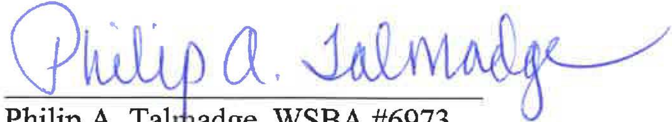
[14] Without waiving its argument on the inapplicability of ¶ 12.16 to this controversy, should this Court reverse Division III on annexation as to Phase III, Noche Vista would be the prevailing party in the case, entitled to fees under ¶ 12.16 at trial and on appeal even if ¶ 12.16 is inapplicable. *Labriola v. Pollard Group, Inc.,* 152 Wn.2d 828, 839, 100 P.3d 791 (2004) (attorney fees are awarded to the prevailing party even when the contract containing the fee provision is invalidated). Under such circumstances, Noche Vista is entitled to an award of its fees. RAP 18.1(a).

DATED this 17th day of November, 2020.

Respectfully submitted,



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APPENDIX

RCW 65.04.045(1)

(1) When any instrument is presented to a county auditor or recording officer for recording, the first page of the instrument shall contain:

(a) A top margin of at least three inches and a one-inch margin on the bottom and sides, except that an instrument may be recorded if a minor portion of a notary seal, incidental writing, or minor portion of a signature extends beyond the margins;

(b) The top left-hand side of the page shall contain the name and address to whom the instrument will be returned;

(c) The title or titles, or type or types, of the instrument to be recorded indicating the kind or kinds of documents or transactions contained therein immediately below the three-inch margin at the top of the page. The auditor or recording officer shall be required to index only the title or titles captioned on the document;

(d) Reference numbers of documents assigned or released with reference to the document page number where additional references can be found, if applicable;

(e) The names of the grantor(s) and grantee(s), as defined under RCW 65.04.015, with reference to the document page number where additional names are located, if applicable;

(f) An abbreviated legal description of the property, and for purposes of this subsection, "abbreviated legal description of the property" means lot, block, plat, or section, township, range, and quarter/quarter section, and reference to the document page number where the full legal description is included, if applicable;

(g) The assessor's property tax parcel or account number set forth separately from the legal description or other text.

FILED
AUGUST 20, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

NOCHE VISTA, LLC, a Washington limited liability company, Appellant, v. BANDERA AT BEAR MOUNTAIN RANCH HOMEOWNERS ASSOCIATION, a Washington Nonprofit Corporation, Respondent.	)	No. 36677-4-III UNPUBLISHED OPINION

SIDDOWAY, J. — Noche Vista, LLC appeals the trial court's summary judgment determination that property it acquired for development in 2013 was subject to covenants, conditions and restrictions recorded by a prior owner in 2006. It also challenges the trial

court's refusal to consider declarations filed with a motion for reconsideration and its award of attorney fees and costs to the defendant homeowners association. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In January 2013, John Dwyer "and or assigns" entered into a purchase and sale agreement with North Cascades National Bank to acquire approximately 31 acres of undeveloped property in Chelan County. Clerk's Papers (CP) at 393. The agreement described the property as "Tract 10 Bandera at Bear Mountain Ranch," less a portion of property that had been removed by a boundary line adjustment. CP at 394. The Bank had acquired the property the year before from Bear Mountain Ranch Holdings, LLC, through a deed in lieu of foreclosure. Before closing the purchase, Mr. Dwyer formed Noche Vista, LLC to become the owner of the property.

A preliminary commitment for title insurance from North Meridian Title and Escrow, LLC listed as special exceptions to title a "Declaration of Covenants, Conditions & Restrictions & Easements for Bandera at Bear Mountain Ranch" (Declaration) that had been recorded in January 2006 by Scofield Construction, LLC. CP at 166-203. "Bandera" and "Bandera at Bear Mountain Ranch" were undefined in the Declaration, but "Bandera Phases I and II" and "Bandera Phase III" were defined, and the property being acquired by Noche Vista was referred to as "Bandera Phase III." CP at 171-74. Six amendments to the Declaration were identified as additional exceptions to Noche Vista's title.

Mr. Dwyer reviewed the preliminary title commitment before closing and believed the Declaration encumbered title to the property he was acquiring, which we refer to hereafter as "Bandera Phase III," or "Phase III." He observed that Jerry Scofield, the principal of Scofield Construction, had identified Scofield Construction and its successors and assigns (hereafter collectively "Scofield"[1]) as both "Declarant" and "Management" in the Declaration, reserving considerable authority over property improvements. Mr. Dwyer believed that Scofield's control over development of earlier Bandera phases had hindered its growth and success and he wanted the Declaration amended to eliminate Scofield's control. At the request of Mr. Dwyer and his lawyer, the Bank's chief credit officer worked to get Scofield to execute a seventh amendment to the Declaration that would address Mr. Dwyer's concerns.

A seventh amendment was prepared that would replace preconstruction review and construction covenants in the Declaration and recognize Scofield's agreement to incorporate a homeowners association to which it would relinquish management control. In the course of communications about the seventh amendment, Mr. Dwyer stated in an e-mail to the bank credit officer that "we are on the right track with adding Phase III back

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[1] Scofield Construction added Bear Mountain, LLC as an additional Declarant in a 2006 amendment to the Declaration. Both corporations later changed their names, with Scofield Construction becoming B.M.R. Construction and Development, and Bear Mountain becoming Bear Mountain Ranch Holdings.

to Addendum 7. As you mentioned I do want to be a good neighbor and fully intend to adhere to the CC&R." CP at 415.

On April 9, 2013, a lawyer representing the soon-to-be-incorporated Bandera at Bear Mountain Ranch Homeowners Association (the HOA) notified Mr. Dwyer's lawyer:

> I have confirmation from his attorney that Scofield has signed the 7th Amendment. However, it is unlikely that the Amendment will be recorded before the currently scheduled closing date. It seems that either an extension to the closing date, or an addendum acknowledging the pending "encumbrance" of the 7th Amendment should occur.
>
> I look forward to your thoughts.

CP at 425. Mr. Dwyer's lawyer responded, "My client would like to proceed with the closing on Friday. He would be satisfied with a copy of the signed agreement, plus confirmation that it has been submitted for recording." *Id.* The seventh amendment was recorded on April 12, 2013. Noche Vista acquired title by a deed recorded on April 15. The HOA was incorporated on April 18.

A couple of years into Noche Vista's ownership of Phase III, after Mr. Dwyer says he saw "how things worked (or, rather, didn't work) under the HOA's control," he consulted a second lawyer, asking that he "take a look at the Covenants to see if there was any relief from their Draconian requirements." CP at 644. In May 2015, the lawyer expressed his opinion that the original Declaration never encumbered the Phase III property. The lawyer also opined that the seventh amendment could not apply to Phase III because it was amended long after Scofield transferred all of its right, title and interest

in Phase III. According to Mr. Dwyer, it was only on consulting with this second lawyer that he learned that North Meridian Title's exceptions for the Declaration and its amendments was not a legal opinion, but only reflected a decision about the insurance risk it was willing to take on. In November 2015, Mr. Dwyer informed the HOA of his lawyer's conclusion that Phase III was not bound by the Declaration, forwarding a memorandum his lawyer prepared for that purpose. The HOA was not persuaded.

In April 2016, Noche Vista's new lawyer contacted a title officer for North Meridian with a request that it delete the special exception for the Declaration and its amendments from Noche Vista's final title report. After contacting its underwriter, the title officer declined the request. Mr. Dwyer also approached the HOA in 2016 about possible modifications to the covenants, conditions, and restrictions. Although representatives of the HOA met with Mr. Dwyer several times in 2016 and 2017 about proposed modifications, none were agreed.

In February 2018, Noche Vista brought this action against the HOA, seeking a declaratory judgment that Phase III is not subject to the Declaration and its amendments. In answering the complaint, the HOA not only disputed Noche Vista's construction of the Declaration but also contended that Noche Vista's request for a declaratory judgment was barred by estoppel, waiver, and laches. It sought its own declaratory judgment that Phase III was subject to the Declaration.

Several months later, Noche Vista and the HOA filed cross motions for summary judgment.

Noche Vista's construction of the Declaration and amendments

Noche Vista argued to the trial court that in the "Recitals" section of the Declaration it is "each Owner" who, by purchasing a lot, "agrees to commit to the vision of the Declarant and to abide by the intent and purpose of this Declaration." CP at 171. The defined term "Owner" means:

> one or more persons or entities who are, alone or collectively, the record owner of fee simple title to a Landholding, including Declarant, but does not include a person who only holds a Mortgage on a Landholding. Owner means the vendee, not the vendor, of a Landholding under a real estate contract.

CP at 179.

The defined term "Landholding" means:

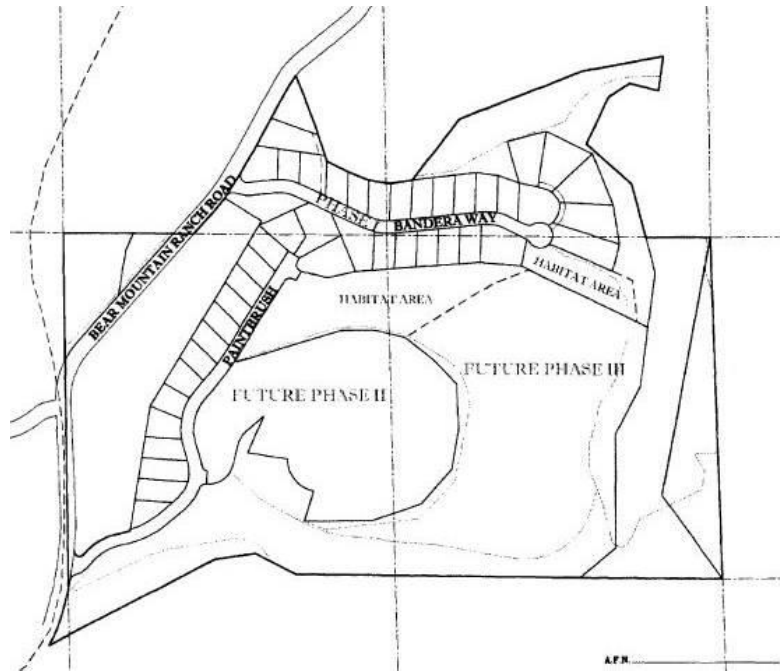
> one of the individual numbered lots, each approximately one-third acre in size, designated by Declarant to be a Landholding in Bandera as shown on the Plat. "Landholding" is not intended to include any lot or tract which is solely Common Use Area. The number of Landholdings may be increased through annexation of Bandera Phase III.

CP at 178-79.

"Plat" is defined to mean "Chelan County Plat No. P-2004-005," an eight-sheet plat filed for record on January 9, 2006. As shown by the simplified portion of sheet 2 of the plat that was included as the last page of the Declaration, and as borne out by sheets 3

and 4 of the plat, the only "individual numbered lots" designated in the plat were in

Bandera Phase I:



CP at 204 (partial).

Annexation was addressed by article 10 of the Declaration, which provides:

> 10.1 Annexation Approval. During the Development Period additional real property may become annexed to and become subject to this Declaration by the recording of a supplemental (or amended) declaration executed by, or on its face approved by, the Declarant.
>
> 10.2 Effect of Annexation. The recording of a supplemental declaration with the Chelan County Auditor will effectuate the annexation of the described real property. The annexed property will be subject to this Declaration and the other Governing Documents. The annexed property will be part of Bandera. The supplemental declaration should incorporate by reference all of the covenants, conditions, restrictions, easements and other provisions of this Declaration, and may contain such complimentary additions or modifications of the covenants, conditions and restrictions in

> this Declaration as may be reasonably necessary to reflect the different character, if any, of the annexed property as are not inconsistent with the plan of this Declaration.

CP at 198.

Noche Vista argued that the Declaration plainly provides that Phase III was not intended to be subject to the Declaration unless annexed, and it was never annexed.

The HOA's construction of the Declaration and amendments

The HOA advanced a different construction of the Declaration, but it led by arguing at the summary judgment hearing that "if the seventh amendment is a good amendment that Mr. Scofield had the ability to sign . . . the case is . . . over for Noche Vista." Report of Proceedings (RP) at 24. The seventh amendment contained a new article 2 that recognized Scofield was concurrently incorporating a homeowner's association to assume management of Bandera. Its first section, captioned "Purpose," states:

> The Association shall be incorporated by the Declarant, or the Declarant's agent, for the purpose of managing the Common Use Areas located within Bandera Phases I, II, and III only, and common amenities such as common area landscaping, private road, curbs, entrance gates and other components shared by all Landholdings within Bandera Phases I, II and III, and enforcing the Declaration. The Association's management and enforcement authority shall be confined to Bandera Phases I, II and III.

CP at 308-09 (underlining omitted).

The amendment states that it modifies the Declaration "only as to that property described on the attached Exhibit 'A,'" and exhibit A includes Phases I, II and III

without qualification. CP at 307 (underlining omitted). Its section 7, captioned "Inconsistencies," states, "To the extent any other provision in the Declaration is inconsistent with the above provisions, the Declaration is hereby amended to eliminate such inconsistencies so as to be consistent with this Amendment." CP at 317 (underlining omitted).

The HOA argued that Scofield's 2012 transfer of its right, title and interest in Phase III did not divest it of its right to amend the Declaration because the right to amend was not predicated on ownership of Phase III. It was predicated instead on the fact that Scofield was authorized by the 2006 Declaration to make the amendment, and Phase III was encumbered by the Declaration.

Turning to the Declaration, the HOA emphasized the need to construe it as a whole, and in favor of protecting Scofield's intent and the homeowners' collective interests, citing *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 250, 327 P.3d 614 (2014). It pointed out that the Declaration includes the legal description for the 92.9 acres comprising all three phases of Bandera. The Declaration begins by noting that it is being made by the owner and developer "of certain real property . . . commonly known as Bandera at Bear Mountain Ranch, which property is more specifically described herein." CP at 171.

The Declaration recites:

> Declarant's intent and vision is to impose covenants, conditions, restrictions and easements on Bandera which will create a planned community development and provide for its overall maintenance and preservation. This Declaration is intended to provide a set of standards consistent with the vision of the Declarant, which is to maintain Bandera in its natural state as much as reasonably possible.

CP at 171.

The HOA also pointed to section 12.4, captioned "Binding," which speaks of "persons," not Owners, "bind[ing] themselves and their heirs, personal representatives, successors, transferees and assigns to all of the provisions now or hereafter imposed by this Declaration or other Governing Documents and any amendments thereto." CP at 200 (underlining omitted).

The trial court rejected the HOA's arguments based on the seventh amendment, finding that it presented issues of disputed fact. It was persuaded that the plain language of the Declaration supported the HOA's position and granted its cross motion for summary judgment, denying Noche Vista's motion.

Noche Vista filed a timely motion for reconsideration supported by the declarations of two individuals who had worked on aspects of the Bandera development for Jerry Schofield prior to 2006. (Mr. Scofield had died in 2014.) According to the declarations, Scofield had been exploring development options for Phase III that would not have complied with restrictions contained in the Declaration. Noche Vista argued that this explained why Phase III was excluded from the operation of the covenants,

conditions, and restrictions unless and until it was annexed. The trial court entertained argument of the motion but denied it, stating it was electing not to consider the new declarations.

Noche Vista appealed. After the trial court awarded attorney fees to the HOA, Noche Vista filed a motion for reconsideration of the fee award. It too was denied. Noche Vista amended its notice of appeal to challenge that reconsideration decision as well.

ANALYSIS

Noche Vista appeals the trial court's order granting and denying summary judgment, its refusal to consider the declarations filed in support of its motion for reconsideration, and the trial court's award of the HOA's attorney fees. We address the issues in the order presented.

I. SUMMARY JUDGMENT WAS PROPER, ALBEIT ON A GROUND REJECTED BY THE TRIAL COURT BUT SUPPORTED BY THE RECORD

We review an order on cross motions for summary judgment de novo, engaging in the same inquiry as the trial court. *Wilkinson*, 180 Wn.2d at 249. Summary judgment is appropriate when there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). We may affirm a trial court's disposition of a motion for summary judgment on any ground supported by the record. *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 753 n.9, 310 P.3d 1275 (2013)

(citing *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994); *Rawlins v. Nelson*, 38 Wn.2d 570, 578, 231 P.2d 281 (1951)).

The court's primary objective in interpreting restrictive covenants is to determine the intent of the parties. *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). The relevant intent, or purposes, is that of those establishing the covenants. *Id.* (citing ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS § 2.5, at 61 (1989)). The drafter's intent is a question of fact. *Wilkinson*, 180 Wn.2d at 250. We apply the rules of contract interpretation. *Id.* at 249.

We examine the language of the restrictive covenant and consider the instrument in its entirety. *Id.* at 250 (citing *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 694, 974 P.2d 836 (1999)). "'An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective.'" *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 135, 317 P.3d 1074 (2014) (quoting *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985)).

Extrinsic evidence will be used to illuminate what was written, but not if it would vary, contradict, or modify the written word or show an intention independent of the instrument. *Wilkinson*, 180 Wn.2d at 251 (citing *Hollis*, 137 Wn.2d at 697). Such evidence "includes 'the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties' respective

interpretations.'" *Id.* at 269 (Madsen, C.J., dissenting) (quoting *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 275, 883 P.2d 1387 (1994)).

Restrictive covenants are enforceable promises relating to the use of land. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005). As pointed out by the *Restatement (Third) of Property*:

> There is a wide diversity in the types of land-use arrangements that can be implemented by servitudes. Depending on the nature and object of the arrangement, the parties may create servitudes whose benefits will be held personally, in gross, or appurtenant to another interest in land. . . . In determining what the parties intended, the full range of possibilities should be kept in mind.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.6, cmt. c (AM. LAW INST. 2000).

Applying these principles to the Declaration

We agree with Noche Vista that we cannot treat as meaningless the statement in section 1.15's definition of "Landholding" that "The number of Landholdings may be increased through annexation of Bandera Phase III." CP at 179. The definition of Landholding is critical to the definition of "Owner," and a number of provisions of the Declaration apply only to Owners. It is clear from that statement in section 1.15 and from the separately defined terms "Bandera Phases I and II" and "Bandera Phase III" that lots in Phase III could only become *fully* subject to the Declaration—subject to provisions applicable only to Owners—following annexation.

By the same token, we cannot treat as meaningless Scofield's inclusion of Phase III in the Declaration, particularly where the statement that Landholdings "*may* be increased through annexation of Bandera Phase III" (emphasis added) is most reasonably understood as binding future owners of and within Phase III to being annexed in the manner provided by the Declaration. *Black's Law Dictionary* at 1172-73 (11th ed. 2019) provides the following definition of "may":

> **1.** To be permitted to <the plaintiff may close>. **2.** To be a possibility <we may win on appeal>. Cf. CAN. **3.** Loosely, is required to; shall; must <if two or more defendants are jointly indicted, any defendant who so requests may be tried separately>.

There would be no point in including Bandera Phase III in the Declaration if only to say that there was a "possibility" it could be annexed.

Noche Vista argues that including Phase III in the Declaration

> creat[ed] a placeholder for Phase III to potentially become part of the community with an annexation process . . . creat[ing] a pre-existing framework that would apply to Phase III without the need for future negotiations.

Br. of Appellant at 19. But article 10, dealing with annexation, suffices for that purpose. Including Phase III in the Declaration and binding it to the Declaration's terms[2] is meaningful only because it binds Phase III to a method of annexation.

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[2]The Declaration clearly binds Phase III to something. Among other provisions, it states in section 12.4:

> Declarant, for itself, its successors and assigns hereby declares that *all of Bandera* must be held, used and occupied subject to the conditions,

The Declaration provides that annexation is accomplished by an amendment executed by the declarant. Decl., Section 10.1; CP at 198. The "Declarant" is Scofield. Decl., Section 1.9; CP at 178. Until the end of the development period (defined as 35 years from the date of recording the Declaration, unless earlier terminated by the declarant in writing) the declarant was granted "the absolute right and sole discretion" to amend the Declaration, subject to its express limitations and a requirement to exercise the discretion reasonably, in a manner that would not impair marketability of title or the security of any mortgage. Decl., Section 9.2; CP at 198. Elsewhere, the Declaration provides that

> [f]or the purpose of this Declaration and the easements, dedications, rights, privileges and reservations set forth herein, a successor and assign of Declarant is deemed a successor Declarant and assign only to the extent specifically designated by Declarant and only with respect to the particular rights and interests specifically designated.

Section 12.13; CP at 202.

Jerry Scofield presumably expected his vision to succeed and might not have foreseen losing a portion of Bandera to foreclosure—although perhaps he did. Surely, however, he could have foreseen a possible future need to sell equity in Scofield in order to raise capital for his ambitious development plan. By binding Phase III in the

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> covenants and restrictions of this Declaration and the other Governing Documents, and that all such provisions will run with the land and be binding upon all persons who hereafter become the owner of *any interest in Bandera.*

CP at 200-01 (emphasis added).

Declaration to the annexation provision, he could ensure for himself (and for the Owners of lots in Phases I and II) that annexing Phase III was within his control. This is consistent with Noche Vista's evidence and argument that Scofield wanted maximum flexibility. Including Phase III in the Declaration was not merely a "placeholder" for future annexation as argued by Noche Vista; it ensured that whatever happened to ownership of Phase III, Scofield would have the power to annex it.

To summarize, the Declaration is reasonably understood to create one set of servitudes for "Owners," as defined, and a different servitude for Phase III: permission for the Declarant to annex it by amending the Declaration.

Annexation of Phase III was accomplished by the execution and recording of the seventh amendment. Annexation could be by an amended declaration, and the seventh amendment was "made by the Declarant . . . pursuant to Article 9, Section 9.2 of the Declaration," its "Amendment" provision. CP at 306. The amendment was made "prior to the end of the Development Period." CP at 317. It modified the Declaration "as to that property described on the attached Exhibit 'A,'" which included Phase III. CP at 307. It provided that the HOA, which was being incorporated simultaneously, would manage the common areas and amenities and enforce the Declaration as to "Bandera Phases I, II and III." CP at 308-09. It amended the Declaration to "eliminate [any] inconsistencies." CP at 317.

Noche Vista argues on appeal that the seventh amendment failed to modify the definition of Landholdings or the annexation procedure. But it did not need to. It effected annexation. The definition of Landholdings recognized that Landholdings were "increased through annexation." Decl., Section 1.15; CP at 31-32.

In the trial court, Noche Vista argued that the seventh amendment was ineffective because "a person may only encumber real property which he or she owns or in which he or she has rights," and "when Scofield executed the Seventh Amendment neither he nor any of his entities had an ownership interest" in Phase III. CP at 526. But when Scofield signed the seventh amendment, it was not encumbering Phase III. Phase III was encumbered in 2006, with the execution and recording of the Declaration. Scofield owned Phase III then. With the seventh amendment, Scofield merely exercised its authority under the Declaration to annex it by amendment.

Noche Vista made a related argument in the trial court that Scofield conveyed away its right as declarant to annex Phase III in its deed in lieu of foreclosure. But the deed conveyed Scofield's "right, title, and interest in and to the following described real estate," CP at 381, and Noche Vista cites no authority for the proposition that a declarant's right to annex real estate is itself part of that real estate. "The general rule" in jurisdictions addressing the issue is that "the developer's rights are personal rights and do not run with the land." *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627, 633 (Mo. Ct. App. 2005); *accord Fairways of Country Lakes Townhouse Ass'n v. Shenandoah Dev. Corp.*,

113 Ill. App. 3d 932, 447 N.E.2d 1367, 69 Ill. Dec. 680 (1983); *Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Planning Corp.*, 358 S.C. 460, 596 S.E.2d 51, 60-61 (2004); *Larkin v. City of Burlington*, 172 Vt. 566, 772 A.2d 553 (2001); *Diamondhead Country Club & Prop. Owners Ass'n, Inc. v. Peoples Bank*, No. 2018-CA-00978-SCT, 2020 WL 948324, at *4 (Miss. Feb. 27, 2020).

Viewed differently but with the same result, by virtue of the Declaration, the owners of property in Phases I and II also had an interest in Scofield's authority to annex Phase III—as evidenced by the HOA's position in this action. The Declaration did not provide that Scofield's authority to annex would be lost if it executed a property conveyance.

Extrinsic evidence in the form of the conduct of the parties strongly supports construing the Declaration as permitting annexation of Phase III in the manner effectuated by the seventh amendment. Mr. Dwyer knew he took title subject to a servitude and that the seventh amendment would accomplish annexation. In order to avoid other control he believed Scofield had over preconstruction review and construction in Phase III, he actively sought an amendment to the Declaration that would substitute an HOA and other design review and building covenants. He understood that it would "add[ ] Phase III back" and require Noche Vista to "adhere to the CC&R." CP at 415.

Noche Vista's remaining arguments do not undercut this plain meaning of the Declaration. It points out that while the abbreviated legal description and assessor's tax parcel identification on the first page of the Declaration include all three phases of Bandera, the citation to the "Additional legal" is to only "pages 1, 2 and 3": the legal description of Phases I and II. CP at 166, 171-73. Under RCW 65.04.045(1)(f), which governs the form of recorded instrument that county auditors must require, the first page or a cover page is to include a "reference to the document page number where the full legal description [of the property] is included, if applicable." An erroneous reference in the first page's summary information cannot alter the meaning of the Declaration. But the page number reference is arguably evidence of the property the recording party intends to subject to the recorded document. The problem for Noche Vista, however, is that the summary information on the first page of every amendment to the Declaration referred to an exhibit that contained the legal description of Phases I, II and III. If we treat the lawyers' preparation of summary information on recorded documents as evidence of intent, there is seven times more evidence of an intent to include Phase III than there is evidence to exclude it.

Finally, Noche Vista argues that its construction of the Declaration is supported by its "Future Development" provision, which warns purchasers that "areas of Bear Mountain Ranch will continue to be developed for residential use, for higher density occupation or for any other purpose permitted by law." CP at 192 (underline omitted). It

argues that this conveyed to purchasers that Phase III was not subject to the Declaration's restrictions. What the provision conveys, however, is that the entire 1,500 acre planned development district "Bear Mountain Ranch" (a defined term), within which Bandera is located, is not subject to the Declaration's restrictions. It would have been a simple matter for the Declaration to say that "areas of *Phase III* will continue to be developed for residential use, for higher density occupation or for any other purpose permitted by law," if that was what was intended. The Future Development provision does not say that.

Since the Declaration plainly authorized the annexation effectuated by the seventh amendment, it was proper to grant summary judgment in the HOA's favor.

II. REFUSAL TO CONSIDER THE DECLARATIONS SUPPORTING THE MOTION FOR RECONSIDERATION WAS HARMLESS

Noche Vista argues the trial court erred when it declined to consider the two declarations it submitted with its motion for reconsideration. "The decision to consider new or additional evidence presented with a motion for reconsideration is squarely within the trial court's discretion." *Martini v. Post*, 178 Wn. App. 153, 162, 313 P.3d 473 (2013). The trial court's discretion extends to refusing to consider an argument raised for the first time on reconsideration absent a good excuse. *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012). We review a trial court's denial of a motion for reconsideration for abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Id.*

Assuming without deciding that the trial court abused its discretion, given the basis of our decision, the refusal to consider the declarations was harmless. The declarations and Noche Vista's argument from the declarations that Scofield wanted flexibility for Phase III are consistent with the basis on which we affirm the summary judgment decision.

III. THE ATTORNEY FEE PROVISION APPLIED

Finally, Noche Vista argues that the trial court erred in awarding the HOA its reasonable attorney fees and costs because the Declaration's fee provision does not apply to this type of dispute and alternatively, because the HOA was not a substantially prevailing party.

"Whether a contract or statute authorizes an award of attorney fees is . . . a question of law reviewed de novo." *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). The Declaration's fee provision appears in section 12.16, and provides:

> In the event any party employs legal counsel to enforce any covenant of this lease, [sic] or to pursue any other remedy on default as provided herein, or by law, the substantially prevailing party shall be entitled to recover all reasonable attorneys' fees, appraisal fees, title search fees, other necessary expert witness fees and all other costs and expenses not limited to court action. Such sum shall be included in any judgment or decree entered.

CP at 202. Noche Vista asserts "[t]he covenants govern only the design, construction, and maintenance of improvements an Owner makes to a Landholding." Br. of Appellant

at 44. It does not explain why it perceives this limitation on the meaning of "any covenant."

Black's Law Dictionary, at 457 (11th ed. 2019), defines "covenant" as "[a] formal agreement or promise, usu. in a contract or deed, to do or not do a particular act; a compact or stipulation." This court has described "covenant" as "'[a]n agreement or promise of two or more parties that something is done, will be done, or will not be done. In modern usage, the term covenant generally describes promises relating to real property that are created in conveyances or other instruments.'" *Shafer*, 76 Wn. App. at 274 (quoting 9 MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 60.01[2]). Noche Vista's complaint sought "a Declaratory Judgment that Plaintiff's Property is not subject to the Covenants." CP at 8. The HOA counterclaimed for a declaratory judgment "that Plaintiff's property is subject to the Covenants." CP at 126.

In *Roats v. Blakely Island Maintenance Commission, Inc.*, 169 Wn. App. 263, 285, 279 P.3d 943 (2012), this court construed a much narrower attorney fee provision in the bylaws of a homeowner's association, which provided for payments of assessments to the association and that "the amount of each assessment and the amount of any other delinquent assessments, *together with all expenses, attorney's fees and costs reasonably incurred in enforcing same* shall be paid by the member." The Roatses, members of the homeowner's association, refused to pay a portion of an assessment and, after the association threatened to file a lien against their property, they filed litigation seeking

injunctive relief and an order quieting title. When they lost, they objected to an award of attorney fees to the homeowners' association because it had not brought a collection action to enforce an assessment. This court recognized that there was more than one way to "enforce" delinquent assessments, and one way was by threatening the lien that caused the Roatses to file a lawsuit.

Similarly here, seeking a declaration that Noche Vista was subject to the covenants contained in the Declaration was a means of enforcing the covenants. The trial court did not err by granting a fee award.

Noche Vista also argues that the HOA was not a substantially prevailing party because "[*b*]*oth* the HOA and Noche Vista prevailed on key aspects of the case." Br. of Appellant at 47. In the trial court, it based this argument on a contention that the validity of the seventh amendment was a "major component" of the HOA's defense theory on which the HOA failed to prevail. Our conclusion that the seventh amendment is critical to the HOA's entitlement to summary judgment guts this alternative challenge to the fee award.

IV. FEES ON APPEAL

Both parties argue that if they prevail, they are entitled to an award of attorney fees on appeal under RAP 18.1 and section 12.16 of the Declaration. Noche Vista challenges the HOA's right to recover fees on appeal based on its argument that this was not an action to enforce a covenant, but we have rejected that argument. We award the

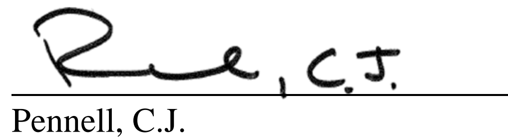
HOA its reasonable attorney fees and costs on appeal subject to its timely compliance with RAP 18.1(d).

Affirmed.

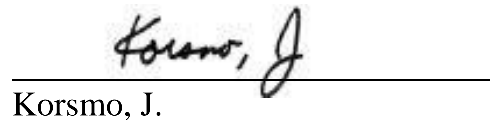
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

I CONCUR:



Pennell, C.J.



Korsmo, J.

FILED
OCTOBER 27, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

NOCHE VISTA, LLC, a Washington limited liability company, Appellant, v. BANDERA AT BEAR MOUNTAIN RANCH HOMEOWNERS ASSOCIATION, a Washington Nonprofit Corporation, Respondent.	)	No. 36677-4-III ORDER DENYING MOTION TO PUBLISH COURT'S OPINION

THE COURT has considered Appellant's motion to publish the court's opinion of August 20, 2020, Respondent's answer and the record and file herein and is of the opinion the motion to publish should be denied. Therefore,

IT IS ORDERED, the motion to publish is hereby denied.

PANEL: Judges Siddoway, Pennell, Korsmo

FOR THE COURT:

REBECCA L. PENNELL,
Chief Judge

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division III Cause No. 36677-4-III to the following:

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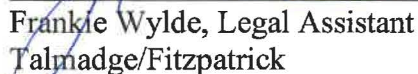
Original electronically delivered by appellate portal to:
Court of Appeals, Division III
Clerk's Office

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: November 17, 2020, at Seattle, Washington.



Frankie Wylde, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

November 17, 2020 - 1:42 PM

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