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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

POINTE II ON SEMIAHMOO OWNERS ASSOCIATION dba SUNSET
POINTE OWNERS' ASSOCIATION,

Appellant,

vs.

CLYNT NAUMAN and JAN NAUMAN, husband and wife and the
marital community comprised thereof,

Respondents,

and

DEAN FRANCIS and ROSEMARIE FRANCIS, husband and wife and
the marital community comprised thereof,

Cross-Appellants.

APPELLANT POINTE II ON SEMIAHMOO OWNERS
ASSOCIATION'S OPENING BRIEF

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I. INTRODUCTION

Pointe II on Semiahmoo Owners Association (the “Association”) seeks relief from the trial court’s bench trial decision granting affirmative relief to Jan and Clynt Nauman (collectively, the “Naumans”). This case is about the authority of a homeowners’ association to exercise its discretion under a broad grant of authority pursuant to restrictive covenants. It is also about the Association’s ability under the architectural control provisions in the covenants to deny the respondents’ request to build a 32-foot tall garage to store a boat within the residential community.

The Naumans sought to build a garage and applied for their homeowners’ association’s approval. The Association denied the application. *Even the trial court would not have accepted the Naumans’ garage as proposed.* The court itself found the height too high, setbacks too small, and the exterior aesthetics unpleasing. Two professional architectural reviewers also rejected the plans as proposed. The trial court nevertheless concluded after a bench trial that the Association had (1) *arbitrarily, capriciously* and *in bad faith* denied the garage proposal and corresponding second access point across common area, (2) failed to properly adopt the guidelines for architectural control, and (3) breached the covenants and its fiduciary duties by allowing landscaping of the

common areas. These conclusions were unfounded, and should be reversed. The trial court failed to recognize the broad authority granted to the Association and substituted its judgment for that of the Association.

II. ASSIGNMENTS OF ERRORS

1. The Association assigns error to the declaratory and injunctive relief granting the Naumans' Boathouse Application in the August 22, 2011 Findings and Conclusions (CP 965–992) (Findings of Fact ¶¶ 16, 24, 25, 27, 29 and Conclusion of Law ¶¶ 9, 11, 12) and the September 23, 2011 Judgment (CP 492–503).

2. The Association assigns error to the declaratory relief holding the Association's *Architectural Guidelines* invalid in the August 22, 2011 Findings and Conclusions (CP 965–992) (Findings of Fact ¶¶ 22, 23 and 27(b); Conclusion of Law ¶ 10) and the September 23, 2011 Judgment (CP 492–503).

3. The Association assigns error to the declaratory relief holding that the Association breached the *Covenants* and a related fiduciary duty in the August 22, 2011 Findings and Conclusions (CP 965–992 (Finding of Fact ¶¶ 14, 29 and Conclusion of Law ¶ 13, 14)) and the September 23, 2011 Judgment (CP 492–503).

4. The Association assigns error to the trial court's summary

judgment rulings (CP 2312–2314 and CP 2162–2165) refusing to dismiss the Naumans’ Fourth and Fifth counterclaims for breach of covenants and breach of fiduciary duty under applicable statutes of limitations.

5. The Association assigns error to the amount of the fees and costs awarded to the Naumans as the prevailing party on three counterclaims, where the Naumans failed to segregate and the trial court abused its discretion by awarding amounts beyond those shown to have been incurred on the three counterclaims in its September 23, 2011 Judgment (CP 492–503; 2770–2783).

III. STATEMENT OF ISSUES

1. Did the Association act within its scope of authority under the *Covenants* when it denied the Naumans’ application to build a garage and access the garage across the gravel access drive? (Assignments of Errors Nos. 1 and 2)

2. Did the Association act within its scope of its authority under the *Covenants* by permitting members to install landscaping enhancements to the common area directly adjacent to members’ lots? (Assignment of Error No. 3)

3. Are the Naumans’ 4th and 5th counterclaims for breach of covenants and breach of fiduciary duty barred by the 3-year statute of

limitations under RCW 4.16.080(2) and RCW 4.16.080(4), respectively, when uncontradicted evidence shows that the Naumans had notice of the claims five years prior to asserting them? (Assignment of Error No. 4)

4. If the Naumans remain the substantially prevailing party on their three counterclaims at the conclusion of this appeal, should the Court remand for segregation and deduction of fees and costs that were not reasonably related to the three counterclaims for which the trial court found that the Naumans were entitled to a prevailing party fee award? (Assignment of Error No. 5)

IV. STATEMENT OF THE CASE

The appellant is a homeowners' association for a small high-end subdivision in Blaine, Washington. (Tr. Ex. 1) The subdivision has only six homes and 12 lots. (*See id.*) The respondents are a couple who live on lots 10 and 11. (RP 121:18–25) The respondents' neighbors, Dean and Rosemarie Francis, are also co-appellants who intervened in the case in 2008 (CP 243–55) The parties' disputes focus on interpretation of a "consent to construct" covenant and the Association's ability to make decisions regarding the landscaping and use of common area.

A. The Association Is Governed By Restrictive Covenants Granting Broad Authority

Recorded restrictive covenants (the "*Covenants*") have dictated

homeowner activity at Sunset Pointe since the inception of the subdivision. (Tr. Ex. 2) The *Covenants* create a homeowners association for the purpose of furthering and promoting the community welfare. (Tr. Ex. 2, p. 9) The Association holds title to all roads, easements, common paths and walkways, and common areas shown on the face of the short plat. (*Id.*) It is also responsible for the regulation, use, care, construction, operation, repair and maintenance of the roads, easements and other common areas. (*Id.*) Each lot owner agrees to be bound by the rules and regulations that the Association adopts. (*Id.*)

All common areas are dedicated for the beneficial use and enjoyment of the lot owners. (*Id.*, p. 6) The *Covenants* provide that the management of the common areas is entrusted exclusively to the Association, and that the Association can make rules and regulations to govern the common area by a vote of its Board. (*Id.*, p. 7)

The *Covenants* also establish an architectural reviewer, who is solely responsible for architectural control on lots and selected by the Board. (*Id.* pp. 10–11; *see also* Tr. Ex. 3) The *Covenants* require lot owners to obtain consent of the architectural reviewer before constructing improvements on their lots. (Tr. Ex. 2, p. 11) To secure that consent, lot owners must submit to the architectural reviewer detailed building plans,

specifications and additional information required by the architectural reviewer. (*Id.*, p. 12) The architectural reviewer must either “approve or disapprove” the proposed project within 30 days. (*Id.*) If the information submitted to the architectural reviewer is incomplete, the *Covenants* direct the architectural reviewer to disapprove the project. (*Id.*, p. 13)

The *Covenants* give exclusive authority to the architectural reviewer to adopt rules to assist in reviewing homes. (*Id.*, pp. 10–13) Under the *Covenants*, the architectural reviewer is given the ability to request additional information from an owner to assist in the completion of the review. (*Id.*) The architectural reviewer is to apply principles of harmony, scale and attractiveness, and wields substantial discretion. (*Id.*) The first architectural reviewer appointed to the subdivision did just that—he created the first architectural guidelines (the “*Architectural Guidelines*”) and used them on homes he reviewed. (*See* Tr. Ex. 22)

In October 2002, at the first owner-run Association meeting, the owners voted to dismiss the first architectural reviewer and create an Architectural Review Committee (the “ARC”) to serve as the contemplated architectural reviewer. (Tr. Ex. 16) The Association requested the *Architectural Guidelines* from the first architectural reviewer, and voted to send these guidelines to all homeowners. (*Id.*; *see*

Tr. Exs. 22–24)¹. The ARC formed in October 2002 has reviewed three proposals for home construction, but has only approved two. The *Architectural Guidelines* were referenced during all three reviews. (Tr. Ex. 40, ¶ 3 [referring to the “check list” containing *Architectural Guidelines* for Lot 8]; Tr. Ex. 33, p. 002471 [referencing the “ARC Guidelines” sections B(3) and B(4) for Lot 12]; Tr. Ex. 45 [referencing sections B(3) and B(4) of the *Architectural Guidelines* for Lot 7])

**B. The Naumans Were The First Property Owners
And Actively Participated In The Association**

In 1998, the Naumans became the first owners of property in the subdivision. (*See* Tr. Ex.74) They received and reviewed the *Covenants*. (*Id.*; RP 273:23–274:4) The Naumans were looking for a place to build an exact replica of a home they had previously lived in. (RP 273:8–19) Their purchase of Lots 10 and 11 was contingent upon the architectural reviewer’s approval of their house plans. (Tr. Ex. 74, p. 4)

The Naumans were active in leadership of the Association when the homeowners took control in 2002 from the developer. (Tr. Ex. 16) They both became members of the Board of Directors, and Clynt Nauman became the President. (*Id.*) When both the Naumans were on the Board,

¹ By the time the ARC took over architectural review, four of the six homes at Sunset Pointe had already been reviewed. (Tr. Ex. 24) The first architectural reviewer did not

the Association: (1) dismissed the Architectural Reviewer; (2) voted to distribute the *Architectural Guidelines*; (3) created the ARC; (4) approved a policy allowing homeowners to landscape the common area next to their lots as long as the owner took the responsibility for maintaining the landscaped area; and (5) approved major landscaping by one lot owner of a substantial section of a common area. (*Id.*)

Clynt Nauman also was on the ARC from October 2002 until October 2003. (*See* Tr. Exs. 26, 28, 29, 34, 36, 37, 38, and 61) During this time, he was present at meetings where the *Architectural Guidelines* were discussed and where the ARC decided, after not receiving all the architectural files from the first reviewer, that each owner should complete the *Architectural Guidelines*² for their homes. (Tr. Ex. 26) In October 2003, the Naumans quit their leadership positions in the Association over a dispute regarding use and maintenance of the common area. (Tr. Ex. 61)

C. The Francis' House Construction Resulted In Conflicts Between The Two Neighbors

In 2006, Dean and Rosemarie Francis sought to build a home on

testify at trial about his practice, but the *Architectural Guidelines* are referenced in his correspondence with home owners. (Tr. Ex. 22, pp. 2-4)

² The *Architectural Guidelines*, Tr. Exs. 5 and 25, is substantively the same document as the *Architectural Checklist*, Tr. Ex. 6. As used throughout this brief, the term *Architectural Guidelines* refers to either the guidelines or checklist.

Lot 7 of the subdivision and submitted plans to the ARC. The Francis's submission to the ARC requested a reduced setback from the neighboring lot and from the common area. (Tr. Ex. 44) The ARC objected to this. (Tr. Ex. 45) It also objected to the size of the structure on a small lot located directly across from the entrance to the community. (*Id.*)

Dean and Rosemarie Francis then purchased Lot 12 and proposed a revised home on that larger lot. (*See* Tr. Ex. 46) The ARC approved the Lot 12 home, subject to several design conditions and contingent upon the Francis's taking the plans to their new neighbors, the Naumans. (Tr. Ex. 48) Soliciting input from neighbors for new construction was a common practice within the Association. (RP 285:7–286:7, 367:18–368:1, 439:1–22) For various reasons that were seemingly unrelated to the Francis's proposed home, the meeting became combative. The Naumans and Francis's began yelling at one another, and the Francis's left with no constructive response. (RP 441:5–448:16)

The Naumans waited more than six-months to express their objections to the project, at which time the construction was well underway. (Tr. Ex. 33) They went to the Board and complained about the structure and the use of the common area to store construction materials, and stated their belief that the ARC had been incompetent in its

application of the *Architectural Guidelines* to the project. (*Id.*) They cited specific paragraphs and quoted the *Architectural Guidelines* in a letter to the Board. (*Id.*) The Francisces, meanwhile, complained to the Board about the Naumans' landscaping. (Tr. Ex. 19)

**D. The Naumans Sought To Build A Tall Garage
And Add A New Access Point To Their Lot**

In the summer of 2007, the Nauman-Francis disputes dominated the agendas at Association meetings. Meanwhile, the Naumans began plans to build a large (40-foot x 26-foot) two-story garage.³ (*See* Tr. Ex. 7) They first took these plans to Whatcom County and obtained its approval. (*See* Tr. Ex. 11) Then in late October 2007, Jan Nauman delivered the plans to the Board and ARC. (Tr. Ex. 7)

The plans were less detailed than the ones submitted to the county; they lacked ground elevation information, and material samples for the exterior of the building. (Tr. Ex. 7; *cf* Tr. Ex. 11) The plans for the driveway were nothing more than a sketch illustrating a significant alteration to the existing "gravel access drive" (the "GAD") depicted on the plat, which provides the only legal access to Lot 12. (*See* Tr. Ex. 7, p.

³ The Naumans incorrectly refer to it as a "boathouse" which connotes a structure on or adjacent to water. As defined by Whatcom County Code § 20.97.160(4), the structure is a "garage."

6) The Naumans' proposal would have re-routed the GAD into a large arc to their proposed garage, with an off-shoot to Lot 12. (*See id.*) Both the structure and the second access point requested by the Naumans were unprecedented in the community.

Because the Naumans previously had expressed dissatisfaction with the ARC, the Board voted to disband the committee and return to an independent architectural reviewer to review the Naumans' proposal. (Tr. Ex. 78, p. 002753–002762; RP 67:7–68:24) Its purpose was to avoid any perception of bias. (Tr. Ex. 78) The Board worried that otherwise, if the ARC denied the proposal, the Naumans would sue, and if it approved the proposal, it faced a lawsuit from the Francises. (*See* Tr. Ex. 98)

The Association retained an architect, Craig Telgenhoff, to be the architectural reviewer. (Tr. Ex 78) Mr. Telgenhoff had no previous dealings with any member of the Association. (RP 1152:25–1153:8) He was not told about the conflicts between the neighbors. (RP 1153:9–1154:23) The Board provided him the *Architectural Guidelines* and the *Covenants*. (*See* RP 1154:24–1155:6) He visited the Naumans to understand their goals for the project, during which time he expressed several concerns about the garage height, being taller than their home, and about the structure being visually shocking due to its proximity to the edge

of the property and the tall blank walls facing the neighboring property. (Tr. Ex. 12) Mr. Telgenhoff also believed that the GAD, as depicted on the plat, was an exclusive easement for the benefit of Lot 12. (Tr. Exs. 12 and 15) He discussed options, such as rotating the structure and using their existing driveway for access to the proposed garage, and discussed the incomplete nature of the application. (*Id.*) He also had a phone conversation with Rosemarie Francis, who called him to voice her concern about the access. On the day he visited the Naumans, Ms. Francis also approached him and provided her view on the plans. No Board Member sought to influence his review. (RP 1154:5–23; RP 1173:20–1174:3)

Mr. Telgenhoff issued a letter decision transmitted to the Naumans, disapproving the application in its current form because it was missing relevant information, including topography, site plan, floor plans and drainage design. (Tr. Ex. 12) He also recommended that the Board deny the request to reconfigure the GAD to provide access, because he believed that Lot 12 enjoyed an exclusive easement that precluded the Naumans' use. (*Id.*) The Naumans requested the Board meet immediately and decide the issue of access, which the Board did. (*See* Tr. Ex. 13) The Board considered the expert advice of the Architectural Reviewer, the exclusive access each other property owner had to their properties, the

tension between the Lot owners, and the requirement from the plat that each lot have an access to Pointe Road North. (*See* Tr. Exs. 12 and 18) The Board then denied the requested access and encouraged the Naumans to use their existing driveway for the new garage. (Tr. Ex. 13)

Before the architectural reviewer completed his review, the Naumans started construction by performing earthwork on their Lot 11 and the common area. The Association initiated the lawsuit on December 7, 2007, seeking to enjoin the Naumans from further construction and to obtain damages to restore the injury to the common areas from the Naumans' transgression. (*See generally* CP 2749–2759)

E. The Naumans' Counterclaims For Wrongful Denial Of Their Application

The Naumans filed counterclaims against the Association for wrongful denial of their garage application. The Francises threatened to sue if the Board changed its decision. A May 20, 2008 letter from the Association shows one of its many efforts to reach a compromise with the parties. (Tr. Ex. 98) No settlement could be reached. (*See* Tr. Ex. 99)

More than two years after denial of their original application, the Naumans submitted an amended design. (Tr. Ex. 93, Tab 103) The amended design still was incomplete. (*See id.*, Tab 104) The Association retained a new architectural reviewer, Doug Landsem, who recommended

changes to the structure that were consistent with Mr. Telgenhoff's review. (*Id.*, Tabs 102–104) The Naumans agreed to the changes. Mr. Landsem concluded that if other missing details were also provided, the accepted changes would make the structure acceptable. (*Id.*) He was not asked about and offered no opinion regarding, setbacks or placement of the structure on the lot. (*Id.*; RP 721:14–722:25) The Naumans proceeded to trial claiming the Association denied their application in bad faith.

F. The Naumans' Counterclaims For Breach Of Covenants And Breach Of Fiduciary Duty

In addition to claims that the Association denied their incomplete application in bad faith, the Naumans brought counterclaims for “breach of covenants” and “breach of fiduciary duty.” (CP 2744–2745) The Association had voted in 2002 that, in order to keep down costs, it would allow easy-to-maintain landscaping enhancements by each member to the common area east of each home. (Tr. Ex. 16, pp. 2–3) The Naumans were present when the Association membership voted in favor of this policy—in fact, they supported it. (*Id.*)

In 2006, the Association passed new resolution granting that same ability to Lot 12, the Francis's lot. (Tr. Ex. 27, pp. 4–5) The resolution allowed Lot 12 to landscape not only to the east, but to the north. (*Id.*) Lot 12 is uniquely situated as the most northerly lot, resulting in a 30-foot strip

of common area to the North of its property. (*See* Tr. Ex. 1) The Naumans disputed these actions by the Association, asserting they demonstrated breaches of the covenants and the Association's fiduciary duty.

G. Trial Court Judgment After A Bench Trial

Following a bench trial, the trial court entered judgment reversing the architectural reviewer's denial of the Naumans' garage application and requiring approval of the garage with the modifications identified by Mr. Landsem. (CP 495–496) The trial court dictated that access be allowed across the GAD, and permitted the setback of five feet requested by the Naumans on the east and independently imposed a setback of 8 feet to the north. (*Id.*) These setbacks are smaller than any other structure in the subdivision. (RP 1174:4–1175:9) Notwithstanding that the denial had been based on an independent architectural review, the trial court ruled that the Association had acted arbitrarily, capriciously and in bad faith. (CP 495)

The trial court also granted some affirmative relief to the Association. (CP 493–94) In a prior summary judgment motion, the court ruled that the Naumans committed a "technical trespass" and awarded the Association \$8,658 in damages. (CP 981) The court also found after trial that the Naumans breached the *Covenants* when they undertook earthwork on the common area. (CP 493)

The trial court awarded attorney fees both to the Naumans and the Association based on the *Covenants*. (CP 981–82 and 990–91, Tr. Ex. 2, p. 17) The trial court found that the Naumans were entitled to attorney fees for prevailing on three (out of five) counterclaims. (CP 990–991) Over the Association’s objections, the trial court awarded the full sum for which the Naumans petitioned, \$331,692.02 in fees and costs. (CP 858–72)

V. ARGUMENT

The Association made reasonable decisions within its authority on issues ranging from adoption of its rules and regulations to use of common areas. The evidence demonstrated that the Association exercised its authority in conformity with the *Covenants* and its statutory obligations under the Nonprofit Corporation Act (RCW 24.03.005 *et seq.*) and the Homeowners’ Associations Act (RCW 64.38.010 *et seq.*). The Association went to great lengths to reach an objective decision on the Naumans’ application. The Association took reasonable actions regarding the common areas that did not conflict with the *Covenants* or the Association’s fiduciary obligations. Washington law protects an association’s authority to manage a community for the benefit of all its residents. The trial court’s judgment should not stand where it is inconsistent with this judicial approach and unsupported by substantial

evidence. Rather than recognize the Association's authority and good faith, the trial court substituted its judgment for that of the Association, usurped its authority and found bad faith based on insubstantial evidence. This Court should reverse the rulings against the Association.

A. **This Court Should Reverse The Trial Court's Judgment That The Association Breached Covenants And Its Fiduciary Duty: As A Matter Of Law And Fact The Association Properly Exercised Its Authority**

The trial court erred when it concluded that the Association failed properly to exercise its authority and control over the common areas by allowing members to enhance the landscaping on common area adjoining each member's lot. The trial court found that allowing such use, available to all members and consented to by them via membership vote, was a breach of the *Covenants* and fiduciary duty. (*See* CP 990) The trial court concluded that by allowing these uses, the Association failed to preserve the common area for the benefit of all members and allowed the common areas to be usurped by certain members. These conclusions were incorrect as a matter of law and unsupported by substantial evidence.

According to the *Covenants*, "the common areas are dedicated for the beneficial use and enjoyment of the lot owners of the Subdivision." (Tr. Ex. 2, p. 6) The common areas serve several purposes: (1) recreation; (2) road systems; (3) access to beach and common facilities; (4) utilities;

and (5) septic systems. (*Id.*) The *Covenants* designate the Association as the owner of the common area, responsible for operation and management for the benefit of the members. (*Id.*; *see also* Tr. Ex. 2 [Art. I.B, and Art. IV]) The *Covenants* grant the Association broad authority over the common areas. “The Association shall be responsible for the regulation, use, care, construction, operation, repair and maintenance and preservation of all common areas, including but not limited to the roads, easements and other common areas.” (*Id.*, p. 9) All of the authority for the operation and management of the Association rests with its Board. (*Id.* pp. 6–7; Tr. Ex. 3 [Bylaws, Art. IV, §2]) Pursuant to this authority, the Association’s conduct regarding the common areas was perfectly valid. It had the authority to enact rules and regulations it deemed necessary or advisable, such as the rules permitting adjacent owners to landscape and maintain the common areas at no cost to the Association.

The interpretation of a restrictive covenant is a question of law reviewed de novo. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). Courts interpret covenants so as not to defeat their plain and obvious meaning. *The Lakes at Mercer Island Homeowners Ass’n v. Witrak*, 61 Wn. App. 177, 180, 810 P.2d 27 (1991), *rev. denied*, 117 Wn.2d 1013, 816 P.2d 1224 (1991). A court will not disturb the decision

of an association so long as the association operates within its defined duties under the covenants. *See generally id.* at 181. Washington courts “place special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.” *Id.*

Contrary to the trial court’s conclusion, the *Covenants* authorized Association to allow landscaping enhancements. The Association proposed a rule regarding enhancements to the membership. The full membership of the Association, including Jan Nauman, approved the rule in October 2002 as follows:

[A]ny enhancements to the master plan in the areas directly to the east of any lot owners property may be enhanced at the cost directly to the lot owner but all enhancements to the community landscape plan must be in accordance with the character, vegetation, flora and fauna of the plan and is subject to the acceptance of the Architectural Reviewer(s). All plan enhancements shall be at the cost of the individual lot owner.

(Tr. Ex. 16, p. 3) The Association extended the application of this rule to the area north of Lot 12 and reiterated the Association’s continued authority over the common areas, by resolution in September 2006 (*see* Tr. Ex. 27, pp. 4–5) These rules remained consistent with the Association’s authority under the *Covenants*. (*See* Tr. Ex. 2, pp. 6–7) The rule does not establish relinquishment of control or dominion over any part of the common areas to any member. The rule, as adopted and

implemented, maintained Association oversight and control at all times.

The evidence does not show conduct at odds with the Association's obligations. Substantial evidence is the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 104, 267 P.3d 435 (2011), citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The conduct presented by the Naumans did not establish a breach of the *Covenants* or fiduciary duties. By authorizing the landscaping enhancements, the Association acted in a manner that protected the homeowners' collective interests. The Naumans' own expert, William T. Follis, testified that the landscaping was well done ("very, very nicely landscaped part of the entire subdivision") and added to the attractiveness of the subdivision. (RP 580:13–21) The enhancements benefitted the Association and the membership (RP 579:23–580:3; 593:4–11) No member was ever prevented from using, or excluded from, the common areas. (RP 580:13–581:2) Clynt Nauman acknowledged this fact in his testimony. (RP 503:15–504:10) That members were permitted temporarily to store materials in or use the common areas is not inconsistent with the *Covenants* or the welfare of the community. The Association maintained oversight and control at all times. (See Tr. Ex. 27,

p. 5) The evidence presented was insufficient to establish any breaches.

The trial court's conclusion that the Association breached its duties with regard to the common areas was unsupported by substantial evidence and incorrect as a matter of law. This Court should reverse the trial court's holding imposing liability and declare that the Association's actions were a reasonable and a valid exercise of its authority.

This Court Should Reverse The Trial Court's Judgment That The Association Acted In Bad Faith: The Record Shows The Association Acted Within Its Scope Of Authority And In Good Faith When It Denied The Naumans' Application To Build A Garage And Access The Garage Across The Gravel Access Drive

The evidence demonstrates that the Association acted in good faith and exercised its discretion granted by the *Covenants* to deny the Naumans' application to build the garage and to deny access to the garage across the GAD. The trial court overrode the Association's decision, substituting its own judgment to require approval of the application. (CP 985, CP 989) The trial court also found the Association acted in bad faith. (CP 985) The trial court's conclusions are contrary to law and not supported by substantial evidence. This Court should reverse.

Here, the *Covenants* empower the Association to adopt rules and regulations, exercise architectural control and determine the use of the

common areas. (Tr. Ex. 2, pp. 10–13) This authority is augmented by the Homeowners’ Associations Act, chapter 64.38 RCW, which authorizes associations to “adopt and amend bylaws, rules and regulations;” “regulate the use, maintenance, repair, replacement and modification of common areas;” and “grant easements, leases, licenses, and concessions through or over the common areas.” RCW 64.38.020(1), (6) and (9).

As noted above, this Court reviews de novo the interpretation of a restrictive covenant. *Wimberly*, 136 Wn. App. at 336. When interpreting restrictive covenants, courts attempt to give meaning to the intention or purpose the covenants serve. *Riss v. Angel*, 131 Wn.2d 612, 623, 934 P.2d 669 (1997). In such circumstances, a court does not strive to protect an individual’s free use of land, but to enforce the covenants as intended for the good of the community. *Id.* Washington courts enforce covenants that require consent before construction, even where such covenants vest broad discretion in a homeowners association, so long as that authority is exercised reasonably and in good faith. *See id.* at 624 (citations omitted). An association’s discretion can apply to determining aesthetic standards, such as “conformity and harmony of external design” and “location of the building with respect to topography and finished ground elevations.” *Id.* at 625. “‘Design’ [subject to an association’s approval] commonly involves

the whole of a structure, including size, configuration and height.” *Id.* at 626 (citations omitted). Bench trial evidence is evaluated by determining whether substantial evidence supports the findings and whether the findings support the conclusion of law. *Jensen*, 165 Wn. App. at 104. Substantial evidence is the “quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Id. quoting Sunnyside*, 149 Wn.2d at 879.

Pursuant to this case law, the Association’s denial of the garage proposal should have been upheld. The record does not contain substantial evidence of the Association’s bad faith. To the contrary, the Association twice referred the application to an independent architectural reviewer to obtain a decision free from perceived bias. The Association’s reliance on the determinations of the architectural reviewer was proper and free from bad faith. This Court should overturn the contrary findings and reverse the declaration and injunctive relief requiring approval of the garage.

1. The Architectural Reviewer Properly Adopted The Architectural Guidelines As The Association’s Rules For Architectural Control, Which Have Been Carried Through By The Association

The trial court incorrectly concluded that the Association’s *Architectural Guidelines* was not properly adopted by the Association. (CP 494; CP 985) There is no legal basis to require formal adoption. The

Association's and the architectural reviewer's conduct was sufficient to support application of the guidelines. To reach the contrary conclusion, the trial court either ignored the clear provisions of the *Covenants* or disregarded the substantial evidence demonstrating the Association's adoption of the *Architectural Guidelines*.

Under the *Covenants*, the architectural reviewer is given exclusive responsibility for architectural control over improvements and landscaping on lots. (Tr. Ex. 2, pp. 10–11; see Tr. Ex. 3, p.7) The *Covenants* also state, "The architectural reviewer may from time to time adopt such additional rules and regulations to allow for the reasonable accomplishment of the objectives and purposes stated herein." (Tr. Ex. 2, p. 13) This provision, therefore, expressly authorizes the *Architectural Guidelines*.

Neither the *Covenants* nor the bylaws require any particular procedure for adoption of the *Architectural Guidelines*. (*Id.*; Tr. Ex. 3, p. 7) The architectural reviewer first employed by the developer instituted use of the *Architectural Guidelines* at issue. (Tr. Ex. 22) The evidence demonstrated that in October 2002, when the residents of Sunset Pointe replaced the developer's architectural reviewer with the ARC, they resolved to send the *Architectural Guidelines* to all members. (Tr. Ex. 16, p. 3) Their continued reliance on these *Architectural Guidelines* was

reinforced at the first meeting of the ARC, where Clynt Nauman was present as an ARC member. (Tr. Ex. 26, p. 1) The Association then used and relied on the guidelines for other projects. (See Tr. Ex. 22) The evidence demonstrated the Naumans themselves were aware of the guidelines, familiar with their content, and considered them binding.⁴

The trial court misinterpreted the *Covenants* and/or ignored this substantial evidence supporting the Association's adoption of and reasonable reliance on the *Architectural Guidelines*. The *Covenants* give the architectural reviewer substantial discretion and latitude to adopt "rules and regulations." (Tr. Ex. 2, p. 13) There is no requirement for any vote by members or recording the guidelines against property titles. While the *Covenants* provide authority for the guidelines to be modified "from time to time," in fact these same guidelines have existed and been applied since the beginning of the subdivision. Such consistency of use is reasonable and serves the members' interests. The *Architectural*

⁴ The Naumans admitted their knowledge that the first architectural reviewer with the Association had developed guidelines. Jan Nauman was at the first member meeting, when the Association voted to direct the ARC to "review the Architectural Guidelines." (Tr. Ex. 16, p. 3) Clynt Nauman served on the Board and as President of the Association and was on the ARC when the Association's Secretary sought *Architectural Guidelines* used by the developer's architectural reviewer. (Tr. Ex. 23) He was present at the meeting when the Association agreed to continue to use the guidelines. (Tr. Ex. 26) He was on the committee when lot owners agreed to look at the guidelines in comparison to as-built structures. (Tr. Ex. 40) Mr. Nauman also spoke at an Association meeting regarding another structure in the Association where he specifically cited paragraphs from the *Architectural Guidelines* and opposed approval of the structure as inconsistent

Guidelines were valid and applicable to the garage application.

2. The Denial Of The Naumans' Application Based On The Decision Of An Independent Architectural Reviewer Was Proper

The Association referred the Naumans' application to an independent architectural reviewer. (RP 819:21–820:18; Tr. Ex. 8) His decision was consistent with the *Architectural Guidelines*, as the trial court itself found, stating that the Naumans' project “did not technically comply with the *Architectural Guidelines*.” (CP 984–985) The results of the first architectural reviewer were confirmed by the second ~ the garage was an unacceptable proposal. The Association, through the architectural reviewer, therefore properly denied the Naumans' project.

a. The Naumans' Project Was Denied In Accordance With The Architectural Guidelines

The record does not establish any incorrect conduct by the architectural reviewer. As stated, the *Covenants* entitle the architectural reviewer to adopt *Architectural Guidelines* at any time. (Tr. Ex. 2, p. 13) No action by the Board or Association members is necessary for adoption. Craig Telgenhoff's reliance on and use of the *Architectural Guidelines* alone was sufficient for “adoption” even had these guidelines not had a

with the Guidelines. (Tr. Ex. 33, p. 002471; CP 2016-2018)

long history of use. Mr. Telgenhoff relied upon and used the *Architectural Guidelines*, which he communicated to the Naumans. (Tr. Ex. 12)

The proper inquiry is not whether the guidelines were adopted through any formal procedure, but whether the guidelines were consistent with the *Covenants* themselves. They were. Their use, moreover, was not unreasonable or prohibited. The trial court erred, therefore, when it rejected the Architectural Guidelines and refused to affirm the denial.

b. The Denial Also Was In Accord With The Covenants And Case Law Without Regard For The Architectural Guidelines

Even if the *Architectural Guidelines* were not applicable to the Naumans' project due to a failure of proper adoption, which conclusion should not be affirmed, each basis used by the architectural reviewer to deny the Naumans' application also is identified in the *Covenants*. The denial of the proposed garage was within the Association's discretion and justified by the record under the *Covenants* alone.

The *Covenants* confer broad discretion on the architectural reviewer. Decisions about harmony, appropriate size, and natural feel are subjective decisions. (See Tr. Exs. 2 and 5) A trial court may not substitute its judgment for that of the architectural reviewer, "particularly where a consent to construction covenant permits a decision based upon standards

such as aesthetics and harmony with the neighborhood.” *Riss*, 131 Wn.2d at 629, 632 (“[A] court will not substitute its judgment for that of corporate directors ‘[u]nless there is evidence of fraud, dishonesty, or incompetence (i.e., *failure to exercise proper care, skill, and diligence*).’) *citations omitted*. Yet the trial court did just that.

Washington courts have upheld decisions by associations that denied consent before construction, even when the covenants vests broad discretion in the homeowners association authority for architectural control, so long as the authority to consent is exercised reasonably and in good faith. *Green v. Cmty. Club*, 137 Wn. App. 665, 694, 151 P.3d 1038 (2007); *Heath v. Uruga*, 106 Wn. App. 506, 516, 24 P.3d 413 (2001). Whether a decision to deny consent for a proposed building plan is reasonable is determined by focusing on “the process employed and the facts considered” by decision-maker in reviewing the application. *Green* at 695. Whether that decision-maker acted reasonably in denying a building application is a question of fact, for which this court reviews the trial court’s findings on reasonableness to determine if substantial evidence supports them. *See id.* at 692.

In *Green*, the court held that it was reasonable for the decision-maker to obtain input from neighboring property owners. *Id.* at 694. Its

review of the proposed building project was “objective and thorough,” noting that the association did not attempt to impose more burdensome setback requirements than those imposed on other structures in the neighborhood. *Id.* Similarly, the *Heath* court held that the individual charged with architectural control acted reasonably in withholding consent, because he conducted an objective investigation over several days that included a thorough review of the proposed plans and site visit. *Heath*, 106 Wn. App. at 517–18. Both *Green* and *Heath* concluded that the potential bias of the decision-maker by itself is not sufficient to render unreasonable the decision to deny consent when the decision was supported by a thorough and objective review of the plans. *Green* at 695.

In contrast, an unreasonable denial of a project by an association exists when the denial was insufficiently investigated, not based in fact, based on inaccurate statements made by interested parties where property owners were treated inconsistently, or made without input from other members of the association. *Riss*, 113 Wn.2d at 627–28. In *Riss*, the court found that a decision to deny a project was unreasonable when the decision-makers did not visit the site or make objective comparisons with existing homes, the decision was based largely on inaccurate representations regarding the impact of the proposed structure made by

two of the board members, and the association ultimately imposed more burdensome requirements than those imposed by covenant provisions requiring compliance with specific size and setback guidelines. *Id.* None of these events occurred here.

Mr. Telgenhoff's treatment of the Naumans' proposed project was reasonable. He provided a thorough and detailed review, critiquing the project based on objective criteria that formed the basis of his decision. (Tr. Ex. 12) He considered the neighborhood, observing site lines for setbacks, view corridors, and the "feel" of the subdivision. (RP 1166:11–18; 1174:22) In the end, he disapproved the project because the Naumans' application was incomplete.⁵ (Tr. Ex. 12, pp. 1–2; RP 1160:22–1161:23) He expected the Naumans to resubmit their application to address several of his concerns, such as height, massing and landscaping. (RP 1163:14–21) Rather than resubmitting their application to address these concerns, the Naumans initiated the construction without consent from the architectural review. (CP 981)

That Mr. Telgenhoff's review of the Naumans' project was reasonable is confirmed by the results of the second architectural review

⁵ Under the *Covenants*, the Architectural Reviewer may only "approve or disapprove" a project. He must "disapprove" a project "if the plans and specifications submitted are incomplete." (Tr. Ex. 2, pp. 12–13)

by Doug Landsem. Mr. Landsem found that the proposed project was too tall: “the proposed building is taller than a three-story house.” (Tr. Ex. 93, Tab 104; RP 728:5–21) He recommended that the Naumans employ landscaping to “help reduce the scale and height of the building.” (*Id.*; RP 677:6–14) As with Mr. Telgenhoff, Mr. Landsem asserted that setbacks needed to be greater than those proposed by the Naumans. (Tr. Ex. 93, Tab 104; RP 728:13–729:4) And, like Mr. Telgenhoff, he proposed changing the orientation of the garage so that access could be achieved from the Naumans’ existing driveway. (RP 731:2–733:18) Finally, he concluded that more information from the Naumans was needed to complete his review: “[T]he drawings are lacking in dimension and detail. From my experience, there should have been more drawings showing these essentials.” (Tr. Ex. 93, Tab 104) The two architectural reviewers reached the same conclusions, supporting the conclusion that the denial was reasonable. *See Heath*, 106 Wn. App. at 518 (reasonableness of denial supported where two reviews independently reached same conclusion).

The record demonstrates that the denial of the Naumans’ proposed garage was within the Association’s discretion and properly exercised pursuant to the *Covenants* and Washington case law.

c. No Evidence Supports The Trial Court's Conclusion That The Denial Decision Was Made In Bad Faith

The trial court erred by concluding the decision to deny the Naumans' project was done in bad faith, because no evidence was introduced to support such a conclusion.

A court reviewing a homeowners association's decision under a consent to construct covenant is obliged to determine “whether *that* decision was properly made.” *Riss*, 131 Wn.2d at 629–30 (ital. added) *citing* ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS §5.2 t 173 (1989). In *Riss*, the court reviewed the conduct of the Association at the meetings where the decision was made. *Riss*, 131 Wn.2d at 629–30. Similarly, in *Day v. Santorsola*, 118 Wn. App. 746, 762, 76 P.3d 1190 (2003), the court looked at what information was gathered by the architectural reviewer to determine whether the actions were in bad faith. In *Santorsola*, because the decision was made based upon a clearly incomplete report drafted by an individual adamantly opposed to the project, the court found bad faith. The *Heath* decision provides further clarification, where the court found that the individual charged with the authority to consent had acted reasonably in withholding that consent, even though he may have had a personal interest in

prohibiting the proposed construction. *Heath*, 106 Wn. App. at 517.

This Court should make the same inquiry here and conclude that the record shows reasonable conduct by the Association in arriving at the denial. The Association retained an independent architectural reviewer from outside of the membership, precisely to avoid any claim of bias or prejudice in the decision-making. (RP 819:21–820:18) The architectural reviewer, Craig Telgenhoff, identified specific areas in which the Naumans’ application was “incomplete” and offered reasonable recommendations to fix the design elements that were inconsistent with other structures in the neighborhood. (Tr. Ex. 12) No evidence established that Mr. Telgenhoff was biased or influenced by any party.

All of the relevant factors for “good faith” were shown by the Association and uncontested by the Naumans. Good faith is defined as, “A state of mind consisting in (1) honesty in belief or purpose; (2) faithfulness to one’s duty or obligation; (3) observance of reasonable commercial standards of fair dealing in a given trade or business; or (4) absence of intent to defraud or to seek unconscionable advantage.” BLACK’S LAW DICTIONARY, p. 693 (6th ed. 1991); *see Whaley v. DSHS*, 90 Wn.App. 658, 669, 956 P.2d 1100 (1998)(defining good faith as “a state of mind indicating honesty and lawfulness of purpose.”). The evidence supports

the Association's and Mr. Telgenhoff's good faith.

Mr. Telgenhoff was an architect with experience in architectural control for homeowner associations. (*See* RP 1149:4–1152:7) He had no prior relationship with any member of the Association. (*See* RP 1152:25–1153:4) He was retained by the Association to provide an “objective design review process.” (*See* Tr. Ex. 78; RP 1154:2) As he testified, the Board neither interfered with his review of the Naumans' project nor tried to influence his decision. (*See* RP 1173:19–1174:3) The Naumans could provide no evidence that Mr. Telgenhoff was biased by the Association.⁶

The trial court incorrectly found that Mr. Telgenhoff's denial of the Naumans' project was inconsistent with others within the subdivision, stating: “The Association, directly or through its designated Architectural Reviewer, Mr. Telgenhoff, imposed setback requirements beyond those imposed on other members in similar circumstances...” (CP 989) This is unsupported. Mr. Telgenhoff looked at the setbacks throughout the community and observed that all of the properties with shared lot lines had 15-foot sideyard setbacks so as to maintain view corridors between homes.

⁶ The trial court recognized the tenuousness of its Conclusion of Law No. 11(v) by stating, “The Association's position likely improperly influenced and prejudiced Mr. Telgenhoff's decision as the designated Architectural Reviewer for the Naumans' boathouse application.” (CP 988) The trial court's lack of conviction in its conclusion echoes the lack of substantial evidence.

(RP 1174:4–1175:9)⁷; cf. *Green*, 137 Wn. App. at 694 (concluding that a denial was reasonable when the setback requirements were no more burdensome than those imposed by the covenants). The Naumans’ insistence on a 5½-foot setback on their shared lot line with the Francises would be the only exception to this rule and would negatively impair the 30-foot wide view corridors between structures in the subdivision.

The record demonstrates that Mr. Telgenhoff provided a thorough, objective review of the Naumans’ project. He met with the Naumans to discuss their proposed garage and applied the *Architectural Guidelines* faithfully. (RP 351:10–22) Noting the proposed building’s height and negative impact on neighboring property, he made well-reasoned recommendations, as follows:

Keep the height of the garage below the existing home. Provide more relief on the East and North façades to eliminate large blank walls. By providing more relief in the façade, the building scale will be reduced and it will provide for a more attractive building face for the neighbors and community.

(Tr. Ex. 12, p.4) He found that the Naumans’ proposed setback was inconsistent, and made a reasonable recommendation:

The existing house has a sideyard setback of

⁷ The reduced setback on the northern sideyard of the Francises’ Lot 12 adjoins a 30-foot wide common area, not a shared lot line with another member.

about 15 ft. The proposed building has a 5-1/2' building setback. As a result, the view corridor is reduced/restricted from the common area directly East of the proposed building. Recommendation: match the building setback of the existing house. By doing so, the building will have less impact on the site line views over the bluff from lots and common areas.

(*Id.*, p. 6) Most importantly, his decision to deny their application was because the application was incomplete in a number of material ways, requiring him to “disapprove” it in accordance with the *Covenants*. (See Tr. Ex. 2, p. 13; *see also* Tr. Ex. 12)

Nothing shows bad faith. At best, the evidence supports that an unbiased independent architectural reviewer evaluated the proposal and consulted with neighbors, such as the Francises, who were known to be opposed to the Naumans' construction. Consultation with neighbors is a “reasonable method by which to determine the impact of the proposed construction on the neighborhood.” *See Green*, 137 Wn. App. at 694; *see also Riss*, 131 Wn.2d at 629 (objections of neighbors often aid in the enforcement of restrictive covenants). Such evidence cannot support the trial court's holding. This Court should reverse the bad faith finding because the evidence does not support it.

3. The Association's Denial Of Use Of The Gravel Access Drive Was Proper And Should Have Been Upheld

The Association legally denied the Naumans' request to use the GAD on the common area. The denial was reasonable, made in good faith, and consistent with the *Covenants* and the character of properties in this subdivision. This Court should reverse the trial court's substitution of its judgment for that of the Association.

The common area is that area within the subdivision but outside the platted lots. (*See* Tr. Exs. 1 and 2, p. 3) The common area is owned by the Association in fee. (Tr. Ex. 2, p. 6) Any lot owner has the right to apply to the Association to construct improvements on the common area, but the Association also has the right to deny the application, as long as that decision is consistent with the *Covenants* and the applicable law, as set forth in the *Covenants*: "The Association shall have the sole and exclusive responsibility for the operation, management and preservation of such common areas." (*Id.*); *cf. Heath*, 106 Wn. App. at 515 ("Only a properly nominated person may exercise the authority granted the decision-maker by the covenants").

The Naumans' proposed use of the GAD required substantial alteration to the common area and realignment of the existing GAD, which

was the Francises only available access. (See Tr. Ex. 7 [sketch entitled “Proposed Access w/ Berm Enhancements[,] Realign gravel access.”]) The proposal would have a material impact on the Francises’ access to their property. No other property within the subdivision enjoyed a separate access point across the common areas for an accessory structure, and no other lot owner was required to share a driveway with another lot owner. (RP 1015:4–9) Sunset Pointe is a gated community in which the *Covenants* establish high design standards. (See Tr. Ex. 2) The plat envisions sufficient separation between dwellings, where each lot is more than a half acre. (See Tr. Ex. 1) The Association considered the character of its high-end neighborhood and concluded that the proposed use of the common area was not within this character. (RP 831:12–25) Also, shared driveways were unprecedented. (*Id.*)

The Naumans refused to consider other reasonable alternatives proposed by the Architectural Reviewer, such as changing the orientation of the garage to allow access from their existing driveway. (See RP 824:11–14); *cf. Heath*, 106 Wn.App. at 519 (holding that “the paucity of information” provided and the “lack of cooperation in remedying” identified deficiencies by the homeowner were sufficient bases for denying his application). When meeting with Mr. Telgenhoff in December

2007, the Naumans did not provide any reason to demand access across the GAD instead of from their own driveway, even when Mr. Telgenhoff expressed concern about the orientation and the access point. (*See* RP 351:10–22) Mr. Telgenhoff recommended the Naumans use their existing driveway to access the garage. (Tr. Ex. 15) The Naumans responded that they did not need to provide any reason why the access point should involve the GAD and offered no additional information. (Tr. Ex. 92, Tab 52) When the Board met on January 16, 2008 to make its decision, it concluded that the Naumans failed to provide justification for the need to reroute the GAD when their driveway could provide access. (Tr. Ex. 92, Tab 54) This conclusion was reasonable. The trial court had no legal authority to overturn it.

Additionally, the Association’s decision to deny the Naumans their requested use of the GAD to access their proposed garage was informed by the architectural reviewer ~ an opinion upon which they were entitled to rely. The Association is a Washington nonprofit corporation, organized under Chapter 24.03 RCW. (*See* Tr. Ex. 4) Directors of a nonprofit corporation have a duty to serve in good faith, and with ordinary and reasonable care when making decisions:

[A] director shall be entitled to rely on information, opinions, reports, or statements

... prepared or presented by ... (2)
Counsel, public accountants, or other
persons as to matters which the director
believes to be within such person's
professional or expert competence...

RCW 24.03.127 (underline added). The Board, volunteers with limited or no knowledge regarding interpretation of real estate instruments and land use laws, considered Mr. Telgenhoff's recommendations when it denied the Naumans' application. Mr. Telgenhoff recommended that the Board not approve the Naumans' desired use of the GAD. (Tr. Ex. 12 p. 7; Tr. Ex. 15; *see* RP 1081:5–13) The Board's reliance on Mr. Telgenhoff's opinion was reasonable.⁸ The Association was justified in relying on this opinion, which belies a conclusion of bad faith.

This Court should reverse the trial court's judgment requiring approval of access to the garage from the GAD, and its conclusion that the denial was in bad faith.

4. The Trial Court's Remedy Reflects A Result
Similar To That Proposed By The Association,
Further Establishing That The Association's
Conclusions Were Justified

Despite the trial court judgment and award in favor of the

⁸ The testimony of Dick Prieve buttressed Mr. Telgenhoff's recommendation. Mr. Prieve, the engineer who designed the plat, stated that the GADs was created for exclusive use by 12. Although neither the Board nor Mr. Telgenhoff were aware of Mr. Prieve opinion, it nevertheless underscores the reasonableness of the Board's decision. *See* Francis Opening Brief pp. 41-42.

Naumans, the judgment incorporates and endorses the results of Mr. Telgenhoff's review of the Naumans' garage application. Specifically, the trial court's Conclusion of Law, ¶ III.B(12), incorporates the modifications proposed by Landsem, as follows:

The Association shall approve the Naumans' boathouse application in accordance with the modifications testified to by Mr. Landsem, who replaced Mr. Telgenhoff as the Association's designated Architectural Reviewer, as follows:

- a. The side setback of the proposed structure shall be eight (8) feet from the boundary line between Lots 11 and 12;
- b. The height of the structure shall be in accordance with the revised plans submitted and approved by Mr. Landsem, *e.g.*, a height of 28.5 feet;
- c. The exterior aesthetics and height of the structure shall be in accordance with the Naumans' original boathouse application, as modified by Mr. Landsem;
- d. Reasonable access to and from the structure shall be across and through the common area to the east of Lots 10–12, including use of the GAD. This access shall be designed in such a manner as to allow for reasonable access to the Nauman boathouse/garage.

(CP 989) In other words, even the trial judge refused to accept the Naumans' original proposal without modifications, underscoring the appropriateness of the Association's denials.

The plans reviewed by Mr. Landsem, whose modifications the trial court accepted, *differed* from the plans reviewed and rejected by Mr. Telgenhoff. (*Cf* Tr. Ex. 7 and Tr. Ex. 93, Tab 103) In the latter plans, the Naumans lowered the height, which addressed Mr. Telgenhoff's earlier concerns with the height and massing. (*See* Tr. Ex. 12, pp. 3–5) The sideyard setback between Lots 11 and 12 was increased from the Naumans' original proposal of 5½ feet to 8 feet. (*See* CP 989)

The trial court also recognized that the Naumans' original "exterior aesthetics" were unacceptable, as had both Messrs. Landsem and Telgenhoff. (*See* CP 989; Tr. Ex.93, Tab 104; Tr. Ex. 12, pp. 3–5) The Naumans never resubmitted their plans to Mr. Telgenhoff following his review. Instead, the Naumans resubmitted two years later, only then making the substantive changes requested by Telgenhoff. (*See* Tr. Ex. 93, Tab 103 [dated February, 2010]) This evidence further supports error. Contrary to the trial court's rulings but consistent with the relief the trial court entered, the Association's grounds for rejecting at least three aspects of the first proposal (i.e., height, setback and aesthetics) were well-taken.

Finally, the trial court directed the Association to provide "reasonable access" across the common area. (CP 496) The evidence showed, however, that the Association already had offered the Naumans

“reasonable access” across the common areas prior to the Naumans’ filing their counterclaims as follows: “[The Naumans] will be granted an access route, through common area, which will begin at the ‘bulb’ of the existing cul-de-sac.” (Tr. Ex. 98, underline in original) The Naumans, therefore, did not require relief from the trial court on this issue, and the Association cannot be considered to have acted unreasonably when they offered the very access required by the trial court.

C. The Trial Court Should Have Dismissed The Untimely Breach Of Fiduciary Duty And Breach Of Covenants Claims Under The Statute Of Limitations

The trial court erred when it denied the Association’s motion to dismiss the breach claims on statute of limitations grounds. (CP 2422–2591); CP 2312–2314; CP 2159–2165) This was an error of law. This Court should reverse on de novo review.

1. The Period of Limitations

Actions for a breach of fiduciary duty must be brought within three years of discovering the facts constituting the breach. RCW 4.16.130(4); *Viewcrest Coop. Asso. v. Deer*, 70 Wn.2d 290, 295, 422 P.2d 832 (1967) (A claim for breach of fiduciary duty is a claim governed by the statute of limitations for fraud.); *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 784, 496 P.2d 343 (1972) (an action against a trustee for breach of fiduciary

duty must be brought within three years the alleged breach was discovered). The Naumans claim was barred by the three-year statute of limitations in RCW 4.16.080(2).

Although the statute of limitations for bringing a breach of covenants claim is not specifically identified in Ch. 4.16 RCW, the three-year limit under RCW 4.16.080(2) should apply. This statute of limitations is a catchall for “any other injury to the person or rights of another not hereinafter enumerated.” *Id.*; see *Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 709 P.2d 793 (1985). In their counterclaim, the Naumans allege that the Association deprived members of their rights of use and enjoyment of the Common Areas, and suffered injury to their property value. (CP 2744–2745) Such allegations constitute an injury to the person or rights addressed under RCW 4.16.080(2). This is the applicable statute of limitations found by the trial court for breach of *Covenants*.

2. The Naumans’ Claims Were Brought After
The Limitations Period Expired

The Naumans’ claims were untimely. Both the breach of fiduciary duty and the breach of covenants counterclaims are premised on the Association’s policy of allowing homeowners to landscape the common area nearest their homes. There is no dispute of fact that the policy was adopted in October 2002 and first applied in January 2003, and that the

Naumans knew it. (Tr. Ex. 16) This was true despite the Naumans' assertion that "significant issues of fact exist regarding what the Naumans knew, and when they knew it." (CP 2238) They offered no contradictory facts. (CP 2387–2401; CP 2237–2249; CP 2250–2256) The Naumans' deposition testimony established that they were present at the Association's meeting on October 26, 2002 where they voted in favor of the policy. (CP 2330–2340; CP 2437–2517; *see* Tr. Ex. 16) The Naumans were aware of the policy and its implementation in January 2003, when the owner of Lots 1–3 landscaped the common area adjacent from his property, and as each owner in the homeowners association built their homes, they landscaped the adjoining common areas. (*Id.*)

The trial court erred in denying the motion for summary judgment, and a related motion for reconsideration (CP 2312–2314; 2159–2165), when the undisputed facts established that the Naumans were aware of their claims more than three years before they brought suit.

D. The Trial Court Erred In The Amount Of Its Fee Award

This Court should reverse the amount awarded to the Naumans in their fee award. If the Naumans remain the prevailing party on their three counterclaims at the conclusion of this appeal and remain entitled to any fee award at all, this Court should find that the trial court abused its

discretion in setting the award amount. The trial court incorrectly included in the lodestar legal work that did not relate to the claims on which the Naumans were held the prevailing party against the Association. The trial court should have reduced the requested and awarded amounts of \$279,496.25 in fees and \$43,000 in costs to \$120,026.25 in fees and \$7,803.91 in costs where segregation was required and possible. (CP 586–621; CP 2770–2783) Precedent directly on point supports reversal.

Washington courts employ the lodestar method to guide the calculation of “reasonable” attorney fees and costs; the prevailing party seeking fees bears the burden of proving the reasonableness of fees. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149, 859 P.2d 1210 (1993). In arriving at the lodestar amount, the trial court must necessarily exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. *Id.* at 151. “Where fees are recoverable in connection with only some issues, it is the moving party’s burden to segregate time spent on recoverable vs. non-recoverable issues.” *Gaglidari v. Enny’s Restaurants, Inc.*, 117 Wn.2d 426, 450, 815 P.2d 1362 (1991). *See also Smith v. Behr Process Corp.*, 113 Wn. App. 306, 344–45, 54 P.3d 665 (2002) (segregation required where possible); *Bowers v. Transamerican Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

Here, the trial court failed to segregate hours incurred on unsuccessful theories and non-recoverable issues. The trial court awarded the Association fees for its affirmative claims, and the Naumans' fees for prevailing on three of their five counterclaims. (CP 982, 990-991) The basis for the Naumans' fee award, therefore, limited their award to hours expended to prosecute these three counterclaims. The Naumans requested, however, *all* their fees from November 27, 2007 (before the acts at issue in this lawsuit occurred) to September 1, 2011, regardless of whether the fees related to three counterclaims against the Association upon which they prevailed. (CP 965-992; 860-872; 875-952 and 953-964) The Naumans failed to segregate as required.

The trial court summarily approved all costs and fees requested by the Naumans. This was error. In opposition, the Association presented a the line by line segregation showing fees requested for different lawsuits, for claims which the Naumans lost, for claims between the Naumans and the intervenors, or for vague entries that failed to satisfy the movant's burden established by *Scott Fetzer Co.* and *Gaglidari*. (See CP 586-621) For example, the Naumans sought to recover costs for surveys of their home the summer before the dispute emerged, attorney letters regarding snow removal unrelated to issues in this case, and all legal defense work

done on the claims on which *the Association* prevailed. (CP 875–952)

Where the record establishes that segregation was possible, (*see* CP 586–621), this Court should reverse. The findings that segregation was not possible are unsupported by substantial evidence. The trial court's neglect of its duty to segregate fees was an abuse of discretion warranting reversal and remand for segregation. If the Naumans remain the prevailing party at the conclusion of the appeal, this Court should reverse and remand the fee award for a redetermination of a proper amount.

E. Request For Fees And Costs On Appeal

Pursuant to RAP 18.1, the Association requests attorney fees and costs incurred on appeal if it prevails. Attorney fees and costs are awardable to the prevailing party pursuant to Article X of the *Covenants*. (Tr. Ex. 2, pp. 16-17) "A contractual attorney fee provision provides authority for granting fees on appeal." *Mike's Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 71, 975 P.2d 532 (1999); *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989). An award also is proper pursuant to RCW 64.38.050 of the Homeowners' Associations Act. Finally, RCW 4.84.330 also supports the award of fees in favor of the Association. RCW 4.84.330 provides that when a contract contains an attorney fee provision, the prevailing party in "**any** action on a contract"

shall be awarded its attorney fees and costs. "An action is on a contract if the action arose out of the contract and if the contract is central to the dispute." *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991). This dispute arose from the *Covenants*, which are central to the dispute. These authorities support the conclusion that, if the Association prevails, this Court should award it fees and costs.

F. **If The Court Agrees With The Francises That The GAD Is An Easement, The Court Should Reverse The Judgments Against The Association On This Additional Basis**

Co-Appellants Francises have argued that the GAD is an exclusive easement benefitting Lot 12, which supports reversal because the Naumans' desired access to their proposed garage would interfere with this easement. If the Court disagrees, the Association's decisions still were reasonable and within its authority. The Association did not make its denials on the basis that the GAD was an exclusive easement. If the Court agrees with the Francises, the conclusion that the GAD is an exclusive easement for the benefit of the Francis provides another basis to affirm the Association's denials.

VI. **CONCLUSION**

The Association requests reversal of the trial court's judgment in favor of the Naumans on their counterclaims and award of attorney fees.

The Association has broad authority under the *Covenants* and broad discretion to withhold its consent to construction. The evidence demonstrated that the Association exercised that authority in a reasonable manner and in good faith. Additionally, when the Association members desired to enhance the common area landscaping, the Association permitted such enhancements while maintaining its ultimate control over the common areas and its right to demand return of the property to its original condition. The Association at all times adhered to the *Covenants* and satisfied its obligations to its members as provided by Washington case law and statutory authority. The trial court misapprehended the scope of the Association's authority and reached a conclusion contrary to law and the evidence.

Respectfully submitted on this 15th day of March, 2012.

SCHWABE, WILLIAMSON & WYATT, P.C.

By


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*Attorneys for Appellant, Pointe II On
Semiahmoo Owners Association*

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March, 2012, I caused to be served the foregoing revised and re-filed APPELLANT POINTE II ON SEMIAHMOO OWNERS ASSOCIATION'S OPENING BRIEF on the following parties at the following addresses:

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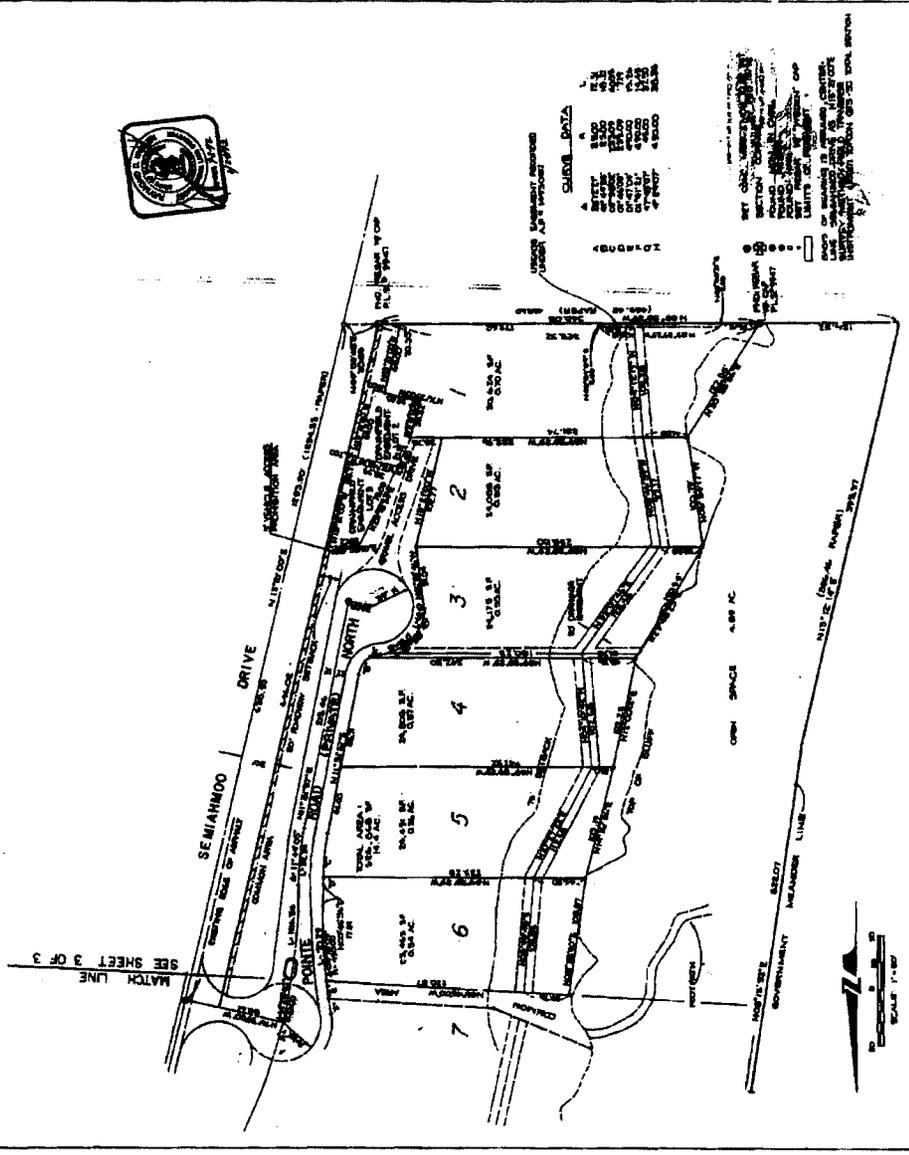
James C. Anderson
Legal Secretary

~~FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAR 15 PM 1:56~~

APPENDIX - A
(Tr. Ex. 1)

9202100-15

THE POINTS ON SEMIAHMOO PHASE II
 WITHIN GOVT. LOT 1, SECTION 21, T40N, R1W, W.M.
 WHATCOM COUNTY, WASHINGTON



RECORD NO. 88040
 SHEET 4 OF 5
 U. I. P. 25

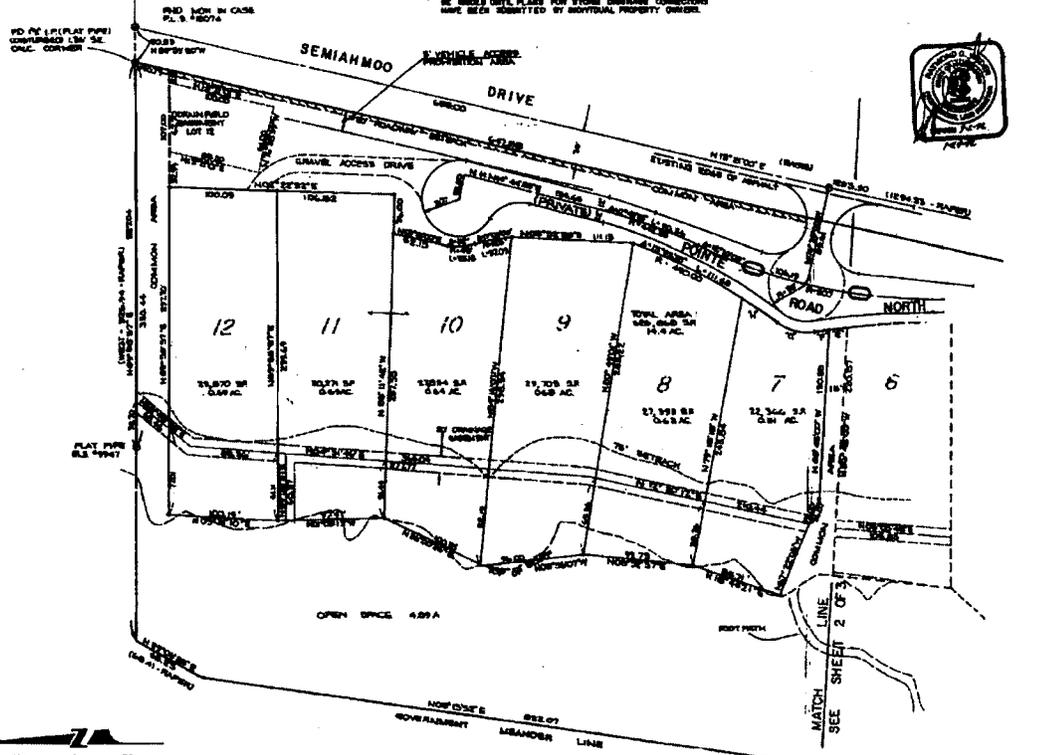
910220045

PLAT OF THE POINTE ON SEMIAHMOO PHASE II

WITHIN GOVT. LOT 1, SECTION 21, T40N, R1W, W.M. WHATCOM COUNTY, WASHINGTON

15-22
16-21

- NOTE:
1. LOTS NO 1-11 WILL REMAIN UNDIVIDED UNTIL A PUBLIC HIGHWAY IS AVAILABLE.
 2. ALL LOTS SHALL ACCESS OVER THE POINTS ROAD NORTH. THE ONLY ACCESS TO SEMIAHMOO DRIVE SHALL BE VIA POINTS ROAD NORTH.
 3. MAINTENANCE & REPAIR OF DRAINAGE STRUCTURES OR IMPOUNDING AND CONDUIT ELEMENTS OF SEWER MAINS, STORM DRAINAGE MAINS, DRAINAGE CANALS AND LINES CONSTRUCTED BY INDIVIDUAL PROPERTY OWNERS TO AND THROUGH LOTS TO BE SERVED SHALL BE AN OBLIGATION OF THE HOME OWNERS ASSOCIATION.
 4. EACH PROPERTY OWNER SHALL ENTER A CONTRACT WITH THE HOMEOWNERS ASSOCIATION TO MAINTAIN & REPAIR ALL DRAINAGE & STRUCTURES ON EACH LOT AND THE LOTS ADJACENT TO THE COMMON STORM DRAINAGE SYSTEM. STORM DRAINAGE STRUCTURES SHALL NOT BE ALLOWED TO FLOW INTO THE SAME UNLESS PERMITS WILL NOT BE ISSUED UNTIL PLANS FOR STORM DRAINAGE CONNECTIONS HAVE BEEN SUBMITTED BY INDIVIDUAL PROPERTY OWNERS.



- SET CONC. MON. - MON. TO BE SET BY PER. 16, 1972
- ⊙ SECTION CORNER
- FOUND MON. IN CASE
- FOUND MON.
- FOUND MON.
- SET BEARING & DISTANCE CAP
- ▭ LIMITS OF PAVEMENT



APPENDIX - B
(Tr. Ex. 2)

OK

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF

THE POINTE ON SEMIAHMOO
PHASE II

THIS DECLARATION of Covenants, Conditions and Restrictions is made this 22 day of January, 1992, by ROBERT E. JONES and ELIZABETH S. JONES, husband and wife, hereinafter referred to as "Developer."

R E C I T A L S:

WHEREAS, the Developer is the owner of the following-described real property situated in Whatcom County, State of Washington, to-wit:

THAT PORTION OF THE LAND DESCRIBED BELOW, PER STATUTORY WARRANTY DEED AS FILED IN VOLUME 79, PAGES 864 TO 865, INCLUSIVE, AUDITOR'S FILE NO. 1613167, WHATCOM COUNTY, WASHINGTON, WHICH LIES WESTERLY OF SEMIAHMOO DRIVE:

PARCEL B

THE NORTH ONE-THIRD, RUNNING EAST AND WEST, OF THE NORTH 545 FEET OF THE FOLLOWING DESCRIBED TRACT, EXCEPT RIGHT OF WAY FOR SEMIAHMOO DRIVE NO. 694: BEGINNING AT THE SOUTHWEST CORNER OF GOVERNMENT LOT 2, SECTION 21, TOWNSHIP 40 NORTH, RANGE 1 WEST OF W.M.; RUNNING THENCE EAST TO A POINT ABOUT 10.61 CHAINS EAST OF THE QUARTER SECTION CORNER BETWEEN SECTIONS 21 AND 22, SAID TOWNSHIP AND RANGE; THENCE NORTH 23.83 CHAINS; THENCE WEST TO THE SHORE OF SEMIAHMOO BAY; THENCE SOUTHWESTERLY WITH THE MEANDERS OF SAID BAY TO THE POINT OF BEGINNING.

PARCEL C

THAT PART OF GOVERNMENT LOT 1 OF SECTION 21, AND OF THE NORTH HALF OF THE NORTHWEST QUARTER OF SECTION 22, TOWNSHIP 40 NORTH, RANGE 1 WEST OF W.M., MORE

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PARTICULARLY DESCRIBED AS FOLLOWS, TO WIT: COMMENCING AT THE NORTHEAST CORNER OF THE NORTHWEST QUARTER OF SECTION 22, AFORESAID RUNNING THENCE SOUTH ALONG THE EAST LINE OF QUARTER SECTION TO A LINE WHICH DRAWN EAST AND WEST THROUGH SAID QUARTER SECTION AND GOVERNMENT LOT 1, SECTION 21, AFORESAID, PARALLEL TO THE NORTH LINE OF SAID SECTIONS, WOULD CONTAIN 100 ACRES OFF THE NORTH SIDE OF SAID TRACTS; THENCE WEST ALONG SAID LINE TO THE MEANDER LINE OF THE GULF OF GEORGIA; THENCE UP SAID MEANDER LINE TO THE NORTH LINE OF SAID SECTION 21, THENCE EAST TO THE PLACE OF BEGINNING.

SITUATE IN WHATCOM COUNTY, WASHINGTON; and

WHEREAS, the Developer has concurrently herewith and as a part hereof declared a subdivision of the real property described above, denominated as "THE POINTE ON SEMIAHMOO PHASE II," (hereinafter referred to as "Subdivision"); and

WHEREAS, the Developer desires to declare THE POINTE ON SEMIAHMOO PHASE II to be subject to the covenants, conditions, and restrictions set forth in this Declaration.

NOW, THEREFORE, the undersigned Developer does hereby declare that the land described above is and shall be held and conveyed upon and subject to, and there is hereby established, confirmed and impressed upon said land the covenants, conditions, and restrictions hereinafter set forth, and the same shall run with the land and shall be binding on all parties having any right, title or interest in the Subdivision or any part thereof.

I. LAND CLASSIFICATIONS AND DEFINITIONS.

A. Lot. As used herein, the term "lot" means any parcel of real property within the boundaries of the Subdivision identified by Arabic numerals and designated for the location and construction of a single family residence.

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B. Common Area. As used herein, the term "common area" identifies parcels of real property shown on the plat map and identified by use of the designation "common area", which are provided for the use and enjoyment of the owners of the lots of the Subdivision and owned, operated and managed for their benefit by the community association, The Pointe On Semiahmoo Phase II Owners Association, discussed below.

C. Person. As used herein, the term "person" shall include any individual, firm, corporation, partnership, association, unincorporated association or organization, or political subdivision thereof.

II. GENERAL USE RESTRICTIONS AND REQUIREMENTS.

A. All lots within the Subdivision shall be used exclusively for permanent residential purposes.

B. No business activities of any kind or type shall be conducted on any lot or common area within the Subdivision.

C. All water, electrical, T.V., telephone, sewer and drainage lines within the boundaries of each lot shall be maintained in good order and repair by the owner thereof, and any work respecting the repair or maintenance of such lines shall be performed with diligence and without any undue disturbance to the occupants of other lots or tracts in the Subdivision except as may be reasonably necessary to accomplish such repair or maintenance work. No overhead utility facilities are permitted.

D. All boats, utility trailers, trucks of more than one-ton capacity, campers, travel trailers, motor homes and similar items or vehicles, shall not be operated, maintained or kept upon any lot or common area, but shall at all times be kept in a garage or other storage facility completely screened from view.

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E. No firearms, fireworks or explosives shall be discharged within the boundaries of the Subdivision.

F. No animals, livestock or poultry of any kind shall be raised, bred or kept on any lot, except dogs, cats or other household pets may be kept provided that they are not kept, bred or maintained for any commercial purposes.

G. No signs or billboards shall be placed upon any lot except that one identification sign bearing the owner's name may be placed upon the owner's lot if the design, sign and configuration thereof is first approved by the Architectural Reviewer. This subparagraph shall not be deemed to preclude the Developer from displaying and posting signs, billboards and other advertising materials in or about any unsold lots or common area until all lots in the Subdivision have been sold by the Developer.

H. No lot owner shall deposit or permit the accumulation of any trash, ashes, garbage or other refuse or debris on or about the Subdivision, but shall deposit the same in covered trash receptacles.

I. No outside incinerators or other equipment for the disposal of rubbish, trash, garbage or other waste material shall be used within the Subdivision. This subparagraph shall not prohibit burning of leaves in a manner which is not a nuisance or obnoxious to neighbors and in accordance with county regulations.

J. Each lot owner shall keep his lot neat and orderly in appearance and shall not cause or permit any noxious, odorous or tangible objects which are unsightly in appearance to exist on the premises. No lot owners shall discharge, deposit, inject, release, or dump any hazardous substances, meaning any dangerous or extremely hazardous waste as defined in R.C.W. 70.105.010 (5) and (6), or any dangerous or extremely

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hazardous waste defined by rule pursuant to Chapter 70.105, Revised Code of Washington. No lot owner shall conduct or permit any offensive activities on his lot, nor shall any activity be conducted or permitted which annoys or disturbs the surrounding lot owners in the Subdivision.

K. All automobiles and all other permitted vehicles, if kept or parked on any lot, shall be in good order and working condition. Partially wrecked vehicles, discarded vehicles or vehicles which are in a state of disrepair, shall not be kept on any lot. Maintenance or repair work on any vehicle may be performed only in a garage or other area completely screened from view. The common area shall not be used to perform maintenance or repair work on any vehicles.

L. No television, radio antennas or satellite dishes of any kind shall be permitted on any lot unless properly screened and after approval by the Architectural Reviewer prior to installation, provided, no satellite dishes shall be allowed at such time as cable television is available for connection.

M. Further subdivision of lots is hereby prohibited except (1) where lots of equivalent or larger size are created; or (2) if area is exchanged between adjoining lots without the creation of an additional lot.

N. To minimize view blockage and restriction, no buildings, improvements, structures, fences, planters, hedges, shrubs, trees or other flora that are more than thirty (30) inches in height from ground level or that otherwise unreasonably restrict the view of adjoining lot owners shall be constructed, maintained or allowed on any lot westerly of the building set-back line as shown on the face of the short plat map; provided, that existing trees, meaning those trees existing as of the date of this Declaration of Covenants, Conditions and Restrictions of The Pointe On Semiahmoo Phase

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II, may be allowed to be maintained upon determination of the Architectural Reviewer that any such trees do not otherwise unreasonably restrict the view of adjoining lot owners.

III. COMMON AREA.

The common area is designated on the plat map. Also included in the designation of common area for purposes of this paragraph are the drainage easements as shown on the face of the plat whether situated within or outside the common areas, and the storm drainage system within the drainage easements shall be maintained by The Pointe On Semiahmoo Phase II Owners Association as provided for the common areas herein. All common areas are hereby dedicated for the beneficial use and enjoyment of the lot owners of the Subdivision.

The common areas are dedicated to several purposes, as follows: recreation for the lot owners and their guests, maintenance and operation of the road system, drainage system and water system; operation and maintenance of access to the beach and other common facilities and amenities which may be established within the common areas; installation maintenance and operation of utilities and facilities to serve the lots within the Subdivision; and any common elements of a sewage disposal system, including pumps, drainfields and lines connecting individual septic tanks to any common drainfields which may be constructed.

Common areas shall be maintained and managed by The Pointe On Semiahmoo Phase II Owners Association, sometimes referred to herein as the "Owners Association" or simply the "Association". The Association shall have the sole and exclusive responsibility for the operation, management and preservation of such common areas. In exercising this responsibility, the Association shall have the authority to

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adopt reasonable rules and regulations for the purpose of management operation and maintenance of the common areas of the Subdivision. Such rules and regulations shall be adopted by a majority of the Board of Directors of the Association, or such other number as the Association may determine in their bylaws approved by a majority of its members. At a minimum, these rules and regulations shall prohibit:

- (a) Subdivision or partition of the common areas;
- (b) Access to the beach by motor vehicles;
- (c) Pipes which discharge towards or directly onto the cliff face;
- (d) Rain water leaders which are not run into drains running east and collected into the communal system;
- (e) Rain water falling on patios or other impervious areas which is not directed into drains as specified in Item (d) above; disruption of vegetal cover on the cliff face, except for dangerous trees with the approval of the Association Board. (This prohibition does not exclude reasonable trimming or removal of vegetation for view enhancement with approval of the Architectural Reviewer or Board in accordance with Article VIII below); and
- (f) Construction of pathways or stairs to the beach from individual lots.

When the Developer has sold eighty percent (80%) of the lots platted herein ((eighty percent (80%) representing nine (9) of the twelve (12) lots herein platted)), then the Developer will convey the common areas to The Pointe On Semiahmoo Phase II Owners Association, or at any time sooner at the election of the Developer.

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IV. THE POINTE ON SEMIAHMOO PHASE II OWNERS ASSOCIATION.

The Pointe On Semiahmoo Phase II Owners Association, the "Association", is hereby established as an unincorporated association of individuals composed of all purchasers of any lot located in the Subdivision or any parcel annexed thereto. The Association or the Developer, may at any time if deemed advisable in the exercise of its sole discretion, cause such unincorporated association to be converted to a non-profit corporation under the laws of the State of Washington. There shall be one (1) membership for each lot in the Subdivision and one (1) vote for each membership. Each membership shall be appurtenant to and run with each lot giving rise to such membership, and shall not be assigned, transferred, pledged, hypothecated, conveyed or alienated in any way except upon the transfer of said lot, and then only to the transferee of said lot. Any attempt to make a prohibited transfer shall be void. The Developer or contract purchaser of each lot shall exercise that vote.

Notwithstanding the foregoing, the Developer shall designate and appoint the Board of Directors of the Association or non-profit corporation, as the case may be, until such time as the Developer has sold eighty percent (80%) ((nine (9) of the twelve (12) platted lots subject to this Declaration of Covenants, Conditions and Restrictions of The Pointe On Semiahmoo)), at which time the control of the owners association shall be turned over to the members and the members may elect from its number at large, as provided in the bylaws or articles of incorporation, the Board of Directors. The Developer may at any time sooner turn over control of the Association at the option and election of the Developer. The Association shall adopt from time to time such bylaws and rules and regulations as it deems necessary or advisable for the

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transaction of its business and the performance of its responsibilities.

Among the objectives and purposes of said Association shall be the furtherance and promotion of the community welfare of the purchasers of any lot, tract or parcel of said land including the holding of title to all roads, easements, common paths and walkways, and common areas as shown on the face of the short plats.

The Association shall be responsible for the regulation, use, care, construction, operation, repair and maintenance and preservation of all common areas, including but not limited to the roads, easements and other common areas. The Association shall be responsible for the construction, upkeep and maintenance of any community pathways and stairs to the beach. In addition, the Association shall be responsible for maintaining all of the storm drainage system and equipment, entry gates and/or emergency access gates, and any fences installed along the boundary of the plat.

Each lot owner agrees to be bound by the bylaws and such rules and regulations of the Association as may be adopted, and to remain a member of the Association while retaining ownership of said lot, and in the event a non-profit corporation is formed under the laws of the State of Washington, to be bound by the articles of incorporation, the bylaws and rules and regulations thereof.

V. DUES AND ASSESSMENTS.

The Association shall be empowered to establish and collect dues and assessments upon its members for the common benefit of such members including but not limited to the protection of property, landscaping, maintenance and improvement of common areas, payment of taxes and for such

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other common purposes as the Association may deem appropriate pursuant to its bylaws, rules and regulations or articles of incorporation, as the case may be. Such assessments shall constitute a personal obligation as well as a lien upon each lot as of the date due. Such lien may be foreclosed by the Association in the same form and manner of procedure as the foreclosure of a real property mortgage lien under the laws of the State of Washington. Each person obligated to pay dues or assessments herein agrees and recognizes that expenses of title examination, costs of attorneys, court costs and interest at the maximum legal rate on the date judgment of foreclosure is entered shall be included with the amount of any delinquent assessment in the judgment of foreclosure of such lien.

The authority to establish assessments and liens therefor against lots within the Subdivision or parcels annexed thereto, shall first arise when the lot is first sold by deed or real estate contract from the Developer, their successors or assigns, as developer of the Subdivision, to a grantee or contract purchaser thereof. Dues and assessments shall be assessed and collected on a fair and uniform basis.

VI. ARCHITECTURAL CONTROL.

In order to preserve and protect against improper use of building sites; to preserve and protect the value of the property to the extent possible; to guard against construction of buildings using improper or unsuitable materials; to insure the reasonable development of the property; to encourage erection of attractive buildings thereon; and in general to maximize the type and quality of improvement on said property there is hereby designated an Architectural Reviewer. The Architectural Reviewer shall be designated in writing by the Developer and at such time as eighty percent (80%) of the lots

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have been sold and the control of the Association has been turned over to the property owners as provided in these amended covenants, the Architectural Reviewer shall be designated by the Association.

These covenants shall and do hereby provide that no improvements shall be erected, placed or altered on any building site or lot in the plat until the buildings, landscape or other improvement plans, specifications, and plot plans showing the location of such improvement on the particular lot shall have been submitted to and approved in writing by the Architectural Reviewer as to conformity and harmony of external design with these covenants and with existing structures in the development, and as to location of the improvements on the building site, giving due regard for the use of the anticipated improvements, protection and preservation of the view of adjoining lot owners, and the location of the improvements with regard to topography, grade and finished ground elevations.

Improvements shall mean and include without limitation buildings, out buildings, roads, driveways, parking areas, fencing, retaining walls, swimming pools, screening, ornamentation, stairs, decks, hedges, wind breaks, planters, planted trees, shrubs, lighting and all other structures or landscaping. In addition, improvements shall be construed to mean and architectural review shall extend to any excavation, clearing or tree removal or any other work that in any way alters the exterior appearance of the property from its theretofore natural or improved state. All approvals as required herein shall be requested by submission to the Architectural Reviewer all plans and specifications, in duplicate, showing the following:

- (a) Existing and proposed land contours and grades;

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- (b) All buildings, and other improvements, access drives, and other improved areas, and the location thereof on the site;
- (c) Floor plans, cross sections and elevations;
- (d) All landscaping, including existing and proposed tree locations and planting areas (and species thereof), mailboxes and exterior ornamentation;
- (e) Exterior lighting plans;
- (f) Walls, fences and screens;
- (g) Patios, decks, pools and porches;
- (h) Parking areas;
- (i) Samples of materials to be used as may be reasonably requested by the Architectural Reviewer; and
- (j) Such other information, data and drawings as may be reasonably requested by the Architectural Reviewer.

Specifications shall describe types of construction and exterior materials to be used including without limitation the colors and manufacturer thereof.

The Architectural Reviewer shall approve or disapprove plans, specifications and details within thirty (30) days of the receipt thereof, or shall notify the person submitting them that an additional period of time, not to exceed thirty (30) days, is required for such approval or disapproval. Plans, specifications and details not approved or disapproved within the time limits set forth herein shall be deemed approved as submitted. One set of plans and specifications and details with the approval or disapproval endorsed thereon shall be returned to the person submitting them, and another copy shall be retained by the Architectural Reviewer for his permanent files.

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The Architectural Reviewer shall have the right to disapprove any plans, specifications or details submitted to him in the event the same are not in accordance with all of the provisions of these covenants; if the design or color scheme of the proposed building or other structure is not in harmony with the general surroundings of such lot or with the adjacent buildings or structures; if the plans and specifications submitted are incomplete; or in the event the Architectural Reviewer deems the plans, specifications or details or any part thereof, to be contrary to the interests, welfare or rights of all or any part of the real property subject hereto or to the owners thereof. The decisions of the Architectural Reviewer shall be final.

Any approval by the Architectural Reviewer may be conditioned upon compliance by the applicant with any reasonable conditions which the Architectural Reviewer may deem appropriate, including but not limited to the posting of bonds or other acceptable security to assure performance by the applicant in accordance with the plans and specifications approved.

Neither the Architectural Reviewer nor any person who succeeds him shall be liable to any party for any action or for any failure to act under or pursuant to the provisions of these covenants provided only that the Architectural Reviewer or his successor shall have proceeded hereunder in good faith and without malice..

The Architectural Reviewer may from time to time adopt such additional rules and regulations to allow for the reasonable accomplishment of the objectives and purposes stated herein; and the Architectural Reviewer may charge a fee in addition to any other assessments provided herein for the review provided herein in an amount not to exceed \$200.00 per

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set of plans reviewed.

VII. PRESERVATION OF VIEW AND NATURAL SHRUBBERY.

It is the purpose and intent of these covenants and restrictions to the extent possible to preserve and protect the trees and natural shrubbery to the extent the same do not unreasonably interfere or obstruct the view of each of the lots. In order to obtain conformity and harmony with these competing purposes, no trees or natural shrubbery shall be removed unless approved in writing by the Architectural Reviewer in accordance with the Developer's plan of development and landscape theme. It is the further purpose and object of these covenants and restrictions to maintain the privacy between the existing lots and to this extent, all trees within ten (10) feet of the side yard boundary line of each lot shall be maintained to the extent possible and any landscape plan or scheme so long as the same does not present a danger or hazard or unreasonably restrict and interfere with the view of the adjoining lot. Further, the Architectural Reviewer shall have the responsibility of determining whether trees or other natural vegetation on any lot in the Subdivision unreasonably interferes with the view of other residents in the Subdivision, and the Architectural Reviewer, as a condition of approval of any such landscape plan or scheme, may require the removal of such trees. In addition, the Architectural Reviewer, subject to appeal and review by the Board of Directors of the Association, shall have the responsibility of determining whether trees or other vegetation on any lot in the Subdivision unreasonably interferes with the view of other residents regardless of whether any landscape plans have been submitted for review or approval.

When it is determined that a view is unreasonably

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obstructed, notice thereof, in writing, shall be sent to the owner of the land upon which the obstruction is located. The notice shall set forth the extent to which trees or other natural shrubbery or vegetation shall be pruned or removed and if in thirty (30) days after receipt of such notice the lot owner does not cause the trees or other vegetation to be pruned or removed to the extent required in the notice, the Association may perform said work at the lot owner's expense. The resulting cost shall be treated as an assessment of the Association and be subject to foreclosure in the manner provided elsewhere herein.

The Association shall be responsible for the trimming or removal of trees or vegetation in the common areas, including the vegetation on the face of the cliff; provided, vegetation of the face of the cliff shall only be removed when stability of soils on the face of the cliff is not endangered.

VIII. CONSTRUCTION.

Construction of all buildings shall be prosecuted diligently from commencement of work until the exterior of said building is completed and painted, and all sanitation and health requirements have been fulfilled. The maximum time limit for completion of the building shall be twelve (12) months from the date construction commences, which is defined as the date building materials are delivered to the property. Construction shall not be deemed completed until lawn and shrubs have been properly seeded.

No building shall be erected, maintained or moved onto any lot prior to the erection of the dwelling house, except such building as may be necessary for the shelter and housing of tools and building equipment during the period of actual construction of said dwelling house. No mobile homes, trailers

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or pre-fabricated structures of any nature shall be permitted or placed on or about any lot and used in any manner for temporary or permanent living arrangements.

IX. PROTECTION OF MORTGAGE OR DEED OF TRUST HOLDER.

No violation or breach of any restriction, covenant or condition contained in these covenants or any supplemental covenants, and no action to enforce the same shall defeat, render invalid or impair the lien of any mortgage or deed of trust taken in good faith and for value or the title or interest of the holder thereof or the title acquired by any purchaser upon foreclosure of any such mortgage or deed of trust. Any such purchaser shall, however, take subject to these covenants and any supplemental covenants, except only that violations or breaches which occurred prior to such foreclosure shall not be deemed breaches or violations hereon.

X. ENFORCEMENT.

If any lot owner in the Subdivision, or their heirs and assigns, or any person or persons, firm or corporation deriving title from or through them, shall violate or attempt to violate any of the covenants, conditions and restrictions herein, it shall be lawful for any other person or persons, firm or corporation owning any interest in the real property situated within the bounds of the Subdivision to prosecute and proceed at law or in equity against such person or persons, firm or corporation, violating or attempting to violate said covenants and restrictions, or any of them and either to prevent them or him from so doing or to recover damages for such violation, notwithstanding the fact that such errant lot owner may no longer hold title to a lot in the Subdivision. The enforcement powers provided in these covenants extend to the Pointe

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On Semiahmoo Phase II Owners Association as provided herein.

The covenants, restrictions and conditions contained in these covenants or any supplemental covenants shall be enforceable by proceeding for prohibitive or mandatory injunction. Damages shall not be deemed an adequate remedy for breach or violation, but, in an appropriate case, punitive damages may be awarded. In any action to enforce any such covenant, restriction or condition, the prevailing party or parties in the action shall be awarded costs, including reasonable attorney fees.

XI. GRANTEE'S ACCEPTANCE.

The grantee of any lot subject to the coverage of these covenants by acceptance of a deed conveying title thereto, or the execution of a contract for the purchase thereof, whether from the Developer or a subsequent owner of such lot, shall accept such deed or contract upon and subject to each and all of the covenants and agreements herein contained, and also the jurisdiction, rights and powers of Developer, and by such acceptance shall for himself, his heirs, personal representatives, successors and assigns, covenant, consent and agree to and with Developer, and to and with the grantee and subsequent owners of each of the lots within the Subdivision, and any tracts annexed thereto, to keep, observe, comply with and perform said covenants and agreements.

Each such grantee also agrees, by such acceptance, to assume, as against Developer, their successors or assigns, all the risks and hazards of ownership and occupancy attendant to such lot, including but not limited to its proximity to any

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parks, including children's recreational facilities, and public paths, streams or other water courses.

XII. ANNEXATION OF SUBSEQUENT PARCELS.

Developer, or their successors in interest, may from time to time and in their sole discretion, annex to the real property subject to these covenants, all or any part of the real property presently or hereafter owned by Developer which is adjoining, contiguous or adjacent thereto. Such annexation shall be effective upon the recordation of declarations designating the property subject thereto and indicating the intention that said property shall be impressed by these covenants, conditions and restrictions. In the event of annexation, these covenants, conditions and restrictions shall thereupon become binding upon the annexed property to the same extent and duration as the property subject to this declaration. The rights and obligations conferred upon the lot owners, The Point On Semiahmoo Phase II Owners Association and the Developer shall extend to the annexed parcels to the same extent as if the annexed parcel was subject to this declaration.

XIII. AMENDMENTS TO DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS.

The covenants, conditions and restrictions in this declaration shall run with the land, and shall inure to the benefit of the owner of any lot subject to this declaration, including the Developer, their respective legal representatives, heirs, successors and assigns and such other individuals or entities named in these covenants, conditions and restrictions for a term of thirty (30) years from the date

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this declaration is recorded with the Auditor for Whatcom County, after which time such covenants, conditions and restrictions shall be automatically extended for successive periods of ten (10) years each, unless an instrument amending, altering or terminating the covenants, conditions and restrictions, in whole or in part, signed by not less than eighty percent (80%) of the owners of the lots in the Subdivision shall have been filed with the Whatcom County Auditor. In this paragraph the word "owner" shall mean any person, firm, corporation holding either fee title or a vendee's interest under a real estate contract as shown by the records of Whatcom County, Washington, to the exclusion of any lesser interest.

XIV. MISCELLANEOUS PROVISIONS.

A. Severability. Invalidation of any of these covenants, conditions and restrictions by judgment or court order shall in no way affect any of the other provisions which shall remain in full force and effect.

B. Paragraph Headings. The paragraph headings in this instrument are for convenience only and shall not be considered in construing the restrictions, covenants and conditions herein contained.

C. No Waiver. Failure to enforce any restriction, covenant or condition in this declaration or any supplemental declaration shall not operate as a waiver of any such restriction, covenant or condition or of any other restriction, covenant or condition.

IN WITNESS WHEREOF, the undersigned have executed the within Declaration of Covenants, Conditions and Restrictions of

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THIS IS TO CERTIFY that the foregoing is a true
copy of Auditor's File No. 920220046
as the same appears filed of record in Vol. 236
Page 662 in the office of the County Auditor
Whatcom County, Washington.

Dated this 31st day of January 2011

Shirley Fink
Whatcom County Auditor

By: [Signature]
Deputy



APPENDIX - C
(Tr. Ex. 3)

BYLAWS
OF
POINTE II ON SEMIAHMOO OWNERS ASSOCIATION

ARTICLE I – OFFICES

SECTION 1. The registered office of POINTE II ON SEMIAHMOO OWNERS ASSOCIATION (hereinafter referred to as the "Association") shall be at 709 Dupont Street, P.O. Box 1678, Bellingham, Washington 98227, or such other place as the Board of Directors may, from time to time, determine.

ARTICLE II – MEMBERSHIP AND TRANSFER OF MEMBERSHIP

SECTION 1. The Association shall have one (1) class of members.

SECTION 2. There shall be one (1) membership in the Association for each lot located within the Pointe on Semiahmoo Phase II (hereinafter referred to as Pointe on Semiahmoo II). Each membership shall be appurtenant to and run with each lot, and shall not be assigned, transferred, pledged, hypothecated or conveyed in any way except upon the transfer of each said lot, and then only to the new owner of the lot. A membership shall be held by a person of legal age and in order to be eligible for membership, a person must have acquired title or entered into a contract to purchase title to a residential lot in Pointe on Semiahmoo II.

SECTION 3. Each member, regardless whether more than one person or entity is the record owner, shall be entitled to only one (1) vote for every lot which the member owns on each matter submitted to a vote of the members. In the election of Directors by the members, every member entitled to vote shall be entitled to one (1) vote for as many persons as there are Directors to be elected, and only one (1) vote per candidate may be cast and the votes may not be cumulated. The vote of each member may be cast either in person or by proxy. In the event the Developer sooner elects to turn over control of the Association, the Developer will retain one (1) vote for each lot it continues to own.

SECTION 4. Membership in the Association is not transferable or assignable by any member by operation of law or otherwise except in accordance with the provisions of these Bylaws. No member may withdraw except upon transfer of title to

the real property to which his membership is appurtenant as elsewhere provided herein.

SECTION 5. Certificates of membership in the Association shall be in such form as the Board of Directors shall designate. Unless specifically requested by a member, it shall not be necessary that certificates of membership be actually issued.

ARTICLE III - MEETINGS

SECTION 1. The annual meeting of the members of the Association shall be held at such time and place in Whatcom County, Washington, as shall be determined by the Board of Directors and written notice of the annual meeting shall be given to each member in advance, which meeting and notice thereof shall be in accordance with RCW 24.03.075 and 24.03.080.

SECTION 2. Special meetings of members may be called at any time by the President, or by a majority of the Board of Directors, or by not less than twenty-five percent (25%) of the members of the Association, which meetings and notices thereof shall be in accordance with RCW 24.03.075 and 24.03.080.

SECTION 3. The presence, in person or by proxy, of one-third (1/3) of all members of the Association shall constitute a quorum for the transaction of business at any meeting of the members. Each member of the Association shall be entitled to one (1) vote in person or by proxy for every lot which the member owns upon each subject properly submitted to vote. Proxies shall be signed and filed with the Secretary of the Association prior to the opening of any meeting at which they are voted. Proxies shall be effective only for the meeting at which filed unless by their express terms they are given longer duration.

ARTICLE IV - DIRECTORS

* AMENDED 10/10/2002
SECTION 1. The initial Board of Directors shall be appointed by the Developer and shall serve without compensation until the transfer of management and administration of the Association to the members as provided in Section IV of the Declaration of Covenants, Conditions and Restrictions of the Pointe on Semiahmoo Phase II recorded under Whatcom County Auditor's File No. 920220046 (hereinafter referred to as the "CCR's"), that provides that the Developer shall designate and appoint a Board of Directors of the Association during the development period until such time as eighty percent (80%) of the lots in the Pointe on Semiahmoo II are sold or sooner upon the election of the Developer to terminate the development period, at which time control of the Association shall be turned over to its members. Thereafter, the Board shall be elected by the members of the Association annually to serve without compensation for a term of one (1) year, until their successors are elected and qualified. The number of directors of the Association has been initially established at three (3).

SECTION 2. The Board of Directors shall have the general management and control of the business, property and affairs of the Association and shall exercise any and all of the powers that may be exercised or performed by the Association under the law, the Articles of Incorporation and these Bylaws. The Board of Directors may make and enforce such rules and regulations as it deems necessary, conducive, incidental or advisable to accomplish or promote the objectives and purposes of the Association.

AH 10/26/2002
* SECTION 3. Meetings of the Board of Directors shall be held at such times and places in King County, Washington, or elsewhere, as shall be determined by the majority of the Board. Twenty-four (24) hours' notice of each such meeting shall be given to each director, which notice may be given by telephone. *or e-mail*

SECTION 4. A majority of the directors shall constitute a quorum for the transaction of business and a majority of such quorum shall determine any questions except as otherwise provided by law, the Articles of Incorporation and these Bylaws.

SECTION 5. All vacancies on the Board of Directors, whether caused by resignation, incompetency, death or otherwise, shall be filled by the remaining directors.

ARTICLE V – OFFICERS

SECTION 1. The officers of the Association shall be a President, one or more Vice-Presidents (the number to be determined by the Board of Directors), a Secretary and a Treasurer. Such officers shall be appointed by the Board of Directors for a term of one (1) year and until the successor of each is appointed and qualified. The appointment of officers shall take place at the first meeting of each newly elected Board of Directors, usually after the annual meeting of members or any adjournment thereof. Any officer appointed by the Board of Directors may be removed by a majority vote of the Board of Directors.

SECTION 2. The President shall be the executive head of the Association, shall be a member of the Board of Directors, and shall preside at all meetings of the Board of Directors and all meetings of the members. The President, together with the Secretary, shall sign all certificates of membership, contracts, deeds, bonds and other obligations of the Association and other instruments authorized by the Board of Directors.

SECTION 3. In the absence of the President or in the event of the President's inability to act, the Vice-President (or in the event there is more than one Vice-President, the Vice-Presidents in the order of their appointment) shall perform the duties and functions to be performed by the President and when so acting shall have all of the power of and be subject to all the restrictions upon the President. A Vice-

President shall perform such other duties as from time to time may be assigned to him or her by the President or the Board of Directors, and may also perform the duties of the Secretary in the Secretary's absence or inability to act insofar as the same shall pertain to the calling of meetings of members or the directors. A Vice-President need not be a member of the Board of Directors, but if he or she is not, then he or she cannot succeed to the duties of or perform as the President of the Association.

SECTION 4. The Secretary shall be the custodian of all records and documents pertaining to the Association and its property. He or she shall keep fair and correct minutes and records of all meetings of members and of the Board of Directors. He or she shall sign with the President, where appropriate, all certificates of membership, contracts, deeds, bonds and other obligations of the Association, and other instruments authorized by the Board of Directors. He or she shall give notice of all meetings of members of the Association and of the Board of Directors as set forth in these Bylaws. If, at any meeting of the members of the Board of Directors, the Secretary shall be absent or unable to perform his or her duties, the President shall have the right to appoint a Secretary pro tem.

SECTION 5. The Treasurer shall receive and safely keep all moneys and securities belonging to the Association and shall disburse the same under the direction of the Board of Directors. At each annual meeting of the members, and at any other time when directed by the Board of Directors, he or she shall submit a report on the financial affairs of the Association and the status of all moneys, funds and assets then on hand or received and disbursed since the Treasurer's last report.

SECTION 6. The Board of Directors may appoint, employ, terminate, discharge, fix the compensation and provide for the duties and powers of such officers, agents and employees as, in the judgment of the directors, shall be advisable, subject to the requirements and provisions of this Article V, and two (2) or more of any officers, agents or employees may be combined in one (1) person. Any officer of this Association shall perform and discharge such duties, other than those enumerated in this Article V, as the Board of Directors may, from time to time, require.

ARTICLE VI – CHARGES AND ASSESSMENTS

SECTION 1. For the purpose of securing funds to meet the operating expenses, capital outlays and other expenditures required to accomplish the objectives and purposes of the Association as stated in its Articles of Incorporation and as specifically provided in the CCR's, the Board of Directors shall be authorized to determine, equate, establish and levy reasonable charges and assessments against each and every lot, tract or parcel in the Pointe on Semiahmoo II that is sold by deed or real estate contract, which charges and assessments, together with interest thereon and costs of collection thereof, shall constitute liens on the affected

lots and become the personal obligation of the purchaser or owner or owners of such lots as hereinafter provided in this Article VI; provided, however, that the Developer shall establish and collect such charges and assessments from and after the sale of each lot until control of the Association is turned over to the membership. The authority to levy such charges and assessments against lots in the Pointe on Semiahmoo II is derived from these Bylaws, pursuant to that certain Declaration of Covenants, Conditions and Restrictions dated January 22, 1992, and recorded on February 20, 1992, in the office of the Whatcom County Auditor, State of Washington, under Auditor's File No. 920220046.

SECTION 2. Each purchaser of a lot or lots in the Pointe on Semiahmoo II shall, by the acceptance of a deed for such lot or lots or by the signing of a contract or agreement to purchase the same, bind himself, his heirs, personal representatives and assigns to pay all such charges and assessments aforementioned.

SECTION 3. The Developer has established the initial annual assessment against each lot for the calendar year 2000. Each member will be liable for his share of such dues commencing January 1, 2000, or a pro-rated share thereof, based upon the period of his ownership of a lot or lots in the Pointe on Semiahmoo II. Unsold lots in the Developer's initial inventory of lots will not be assessed any Association dues during the development period.

SECTION 4. Within thirty (30) days prior to the beginning of each calendar year of the Association, or as soon thereafter as the Board is able to take action on the budget, the Board of Directors shall establish its budget for the coming year, estimating the net charges to be paid by the Association during the coming year for the purposes specified in these Bylaws, the Articles of Incorporation of the Association and the CCR's of the Pointe on Semiahmoo II, including a reasonable provision for contingencies and replacements and reflecting any expected income and any surplus from the prior year's fund.

SECTION 5. The Board of Directors may levy such other special assessments for capital improvements upon the common area, individual lot assessments or charges for maintenance and upkeep of lots, or for such other purposes and in such manner as shall be provided by these Bylaws, the CCR's of the Pointe on Semiahmoo II or other rules and regulations of the Association.

SECTION 6. The amount of all charges and assessments against any lot, including interest thereon and costs, if any, shall automatically be and becomes a lien upon such lot from and after the time each such charge or assessment becomes due and payable and until all such charges and assessments, including interest thereon and costs, if any, are paid in full. If any assessment is not paid within thirty (30) days after it is first due and payable, the assessment shall bear interest from the date on which it was due at the highest rate permitted by law until paid, or if no limitation is imposed by law, at eighteen percent (18%) per annum. If any owner fails

to pay any assessment within ninety (90) days of its due date, the Association shall have the right to bring an action at law or equity against the person or entity personally obligated to pay the same and obtain a personal judgment against such person or entity; and/or foreclose the lien of the assessment in the manner provided for materialmen's and mechanics' liens pursuant to Chapter 60.04, RCW, or at the election of the Association, foreclose in the manner provided for non-judicial foreclosure of deeds of trust as provided in Chapter 61.24, RCW. In this event, the designated legal representative of the Association will be deemed the trustee or successor trustee for purposes of foreclosure. The Association may elect at its option either alternative remedy or such other remedy legally available at law. In the event of any such action to collect delinquent assessments, the defaulting lot owner shall be liable for the Association's costs, reasonable attorney's fees, title reports and delinquent interest and all such sums shall be included in any judgment or foreclosure.

In addition to the above remedies, the Association reserves the right to suspend members' voting rights and right to use the Common Areas during any period that the lot owner is in default in payment of dues and assessments; provided that any such suspension shall not waive any right the Association has to collect such dues and assessments.

By the acceptance of a deed for any lot or lots whether from the Developer or from a subsequent owner or purchaser thereof, such purchaser or owner shall thereby waive all rights of redemption and homestead in such lot or lots with respect to any foreclosure of such liens. No lot owner may exempt himself from liability for his contribution towards the common expenses by waiver of the use and enjoyment of the common area or by abandonment of his lot.

SECTION 7. The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage or deed of trust now or hereafter placed on any lot. Sale or transfer of any lot which is subject to such first mortgage pursuant to a decree of foreclosure thereof or non-judicial foreclosure of a deed of trust shall extinguish the lien of such assessments as to payments thereof which became due prior to such sale or transfer. No such sale or transfer shall relieve such lot from liability for any assessment thereafter becoming due or from the lien thereof.

ARTICLE VII – BOOKS AND RECORDS

SECTION 1. The Association shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its members, Board of Directors and committees having any authority of the Board of Directors, and shall keep at the registered office a record giving the names and addresses of the members entitled to vote. All books and records of the Association may be inspected by any member by appointment only during business hours on weekdays. The Board of Directors shall provide an annual statement to all members of the

Association; a professional accountant may be employed for the purpose of preparing and maintaining financial records of the Association.

ARTICLE VIII – ARCHITECTURAL REVIEWER

SECTION 1. The Board of Directors shall designate an Architectural Reviewer as provided in Section VI of the CCR's. No improvements shall be erected, placed or altered on any building site or lot in the plat until the buildings, landscape or other improvement plans, specifications and plot plans showing the location of such improvements on the particular lot, as shall be prepared by a licensed architect, shall have been submitted to and approved in writing by the Architectural Reviewer. The Architectural Reviewer shall review and approve said plans as to conformity and harmony of external design with the CCR's and with existing structures in the plat, and as to location of the improvements on the building site, giving due regard for the use of the anticipated improvements, protection and preservation of the view of adjoining lot owners, and the location of the improvements with regard to topography, grade and finished ground elevations as specifically provided in Section VI of the CCR's.

ARTICLE IX – CONDUCT OF BUSINESS

SECTION 1. Robert's Rules of Order shall be recognized as authority governing all meetings when not in conflict with the law, the Articles of Incorporation of the Association and these Bylaws.

SECTION 2. The Board of Directors of the Association shall have the authority to appoint such committees as the Board may desire and to appoint and remove members thereof as the Board shall determine necessary for the efficient conduct of Association business.

ARTICLE X – DISSOLUTION

SECTION 1. In the event of the dissolution of the Association, each person who is then a member shall receive his proportionate share of the property and assets after all of the Association's debts and liabilities have been paid or provided for.

ARTICLE XI – AMENDING OR REPEALING BYLAWS

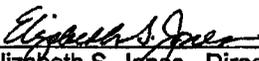
SECTION 1. The Bylaws of the Association may be amended, modified or repealed from time to time by a majority vote of the Board of Directors.

ARTICLE XII – WAIVER OF NOTICE

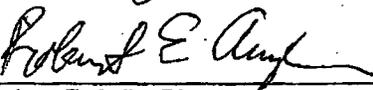
SECTION 1. Whenever any notice is required to be given under the provisions of Chapter 24.03 of the Revised Code of Washington relating to nonprofit corporations or under the provisions of the Articles of Incorporation or the Bylaws of the Association, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice.

The undersigned Board of Directors of the POINTE II ON SEMIAHMOO OWNERS ASSOCIATION consented to and adopted these Bylaws and the effective date of these Bylaws shall be the date of incorporation, September 20, 1999. The undersigned Directors by signing these Bylaws hereby ratify and approve in all respects the prior adoption of these Bylaws.

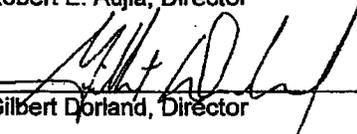
DATED this 17th day of July, 2000.



Elizabeth S. Jones, Director



Robert E. Aujla, Director



Gilbert Dorland, Director

**AMENDMENT TO BYLAWS
OF
POINTE II ON SEMIAHMOO OWNERS ASSOCIATION**

THIS AMENDMENT TO THE BYLAWS of POINTE II ON SEMIAHMOO OWNERS ASSOCIATION is dated this 10th day of October, 2002, and is ratified and approved by the undersigned Board of Directors of POINTE II ON SEMIAHMOO OWNERS ASSOCIATION, representing all of the Directors of said Association.

NOW, THEREFORE, Section 1 of Article IV of the Bylaws, shall be amended to read as follows:

“SECTION 1. The initial Board of Directors shall be appointed by the Developer and shall serve without compensation until the transfer of management and administration of the Association to the members as provided in Section IV of the Declaration of Covenants, Conditions and Restrictions of the Pointe on Semiahmoo Phase II recorded under Whatcom County Auditor's File No. 920220046 (hereinafter referred to as the "CCR's"), that provides that the Developer shall designate and appoint a Board of Directors of the Association during the development period until such time as eighty percent (80%) of the lots in the Pointe on Semiahmoo II are sold or sooner upon the election of the Developer to terminate the development period, at which time control of the Association shall be turned over to its members. Thereafter, the Board shall be elected by the members of the Association annually to serve without compensation for a term of one (1) year, until their successors are elected and qualified. The number of directors of the Association has been initially established at three (3). The number of directors shall be increased to five (5) at such time as eighty percent (80%) of the lots in the Pointe on Semiahmoo II are sold and control of the Association is turned over to its members.”

THIS AMENDMENT TO BYLAWS is dated this 10th day of
October, 2002.

POINTE II ON SEMIAHMOO OWNERS
ASSOCIATION

By Elizabeth S. Jones
Elizabeth S. Jones, Director and President

By Robert E. Aujla
Robert E. Aujla, Director and Vice-President

By Gilbert Dorland
Gilbert Dorland, Director and Secretary/Treasurer

10/26/2002

Motion

Unanimously moved, seconded and carried; that the nomination of following members be elected to their respective positions as Officers and Directors of the Pointe II on Semiahmoo Owners Association by acclamation:

- 1) Clynton Nauman, Director and President
- 2) Barry Marshall, Director and Vice President
- 3) Kim Alfreds, Director and Secretary/Treasurer
- 4) Jan Nauman, Director
- 5) Susan Marshall, Director

Motion

Unanimously moved, seconded and carried; that Article IV, Section 3 of the bylaws be amended to read:

SECTION 3. Meetings of the Board of Directors shall be held at such times and places in Whatcom County, Washington, or elsewhere, as shall be determined by the majority of the Board. Twenty-four (24) hours' notice of each such meeting shall be given to each director, which notice may be given by telephone, fax or eMail.

There being no further business arising from the calling of the meeting, the Chairman asked the members if there was any new business to conduct.

New Business:

Banking

Motion

Unanimously moved, seconded and carried; that the Treasurer open a local bank account in the name of the Pointe II on Semiahmoo Owners Association for the conduct of the Associations financial affairs. The Treasurer is hereby authorized to conduct the financial affairs of the Association on it's behalf. Further, all the Officers of the Association shall be listed as signing officers for the Association.

Landscaping

Jan Nauman presented a master plan concept for landscaping and the re-orientation of split rail fence at the gate.

Motion

Unanimously moved, seconded and carried; that the Ad Hoc member community landscape committee consisting of Lynda Alfreds, Susan Marshall and Jan Nauman be hereby formally asked my the membership to develop a 3 phase common area landscape plan. A) Phase 1 conceptual requirements for common area landscape plan, B) Phase 2 - Develop the master plan, planting guidelines, water, lighting, budget and

APPENDIX - D
(Tr. Ex. 5)

DEC 10 5 57 11:40 FROM: J

RECEIVED

4/11/11

2/1/89

Architectural Guidelines
"The Pointe on Semiahmoo-Short Plats A,B,C."
& Long Plat Phase II

General:

These guidelines are to provide the basis for the architectural review as provided for in the CC&R's for the nine lots in the three short plats A,B, and C and the long plat filed on a preliminary basis.

The intent is not to dictate specific design(s), but to insure an overall quality and sensitivity to the site(s) and to the relationship of the individual residences to one another, in order that they may assure privacy to individual sites but share a unity as a group, or community.

Creativity is encouraged where it does not conflict with the overall unity or inflict or impose itself on neighbors.

A. Items to be submitted for review

1. Survey of lot: showing topography, size & type of existing trees and natural features, utility services, property lines, setbacks and easements (if any), and location of adjacent structures (if any).
2. Site plan: showing location and dimensions of proposed structures, paving, landscaping, patios, drainage grading, retaining walls, fences, setbacks, and floor elevations. Roofs shall be shown in dotted lines. Where existing trees are to be removed, they shall be indicated. The survey may be indicated on this plan.
3. Floor plans and elevations: all at the same scale, either 1/8"=1'-0" or 1/4"=1'-0". Show all structures and their relationship to each other. Indicate exterior materials, heights, and general colors and finishes. Where adjacent to existing structures, indicate distances and heights. Show minimum of front (strt) front & rear elevations and all side elevations from property line to property line.
4. Soil tests and drainage system for structure & site.

B. Architectural character

1. Materials: use of natural materials is encouraged as being most in keeping with the site.

POINTE II 001829

ASHLAND ENTERPRISES INC

2. Colors: natural wood-tones and earth tones are encouraged. Artificial colors and manufactured looks are to be discouraged. These will be considered only in relationships to the scale, mass of their use, and in the structures, relationships and nearness to neighbors.
3. Height, mass, and scale: low scale combined with narrow vertical masses shall be encouraged. Tall height near property lines shall be avoided unless it can be shown that this does not intrude on neighbors or the community appearance.
4. Style: no particular "style" is specified. Low to steep sloping roofs are encouraged. The blending with the forest and protection of the natural vegetation is important. Especially creative designs shall be encouraged as long as they do not impose on their neighbors. In general, the more privacy and less "shock" values, the better.

C. Codes & setbacks:

The designs submitted must conform to county, state, shoreline, and any other codes and ordinances of regulatory agencies applicable.

D. Side-yard treatments:

~~Special attention shall be given to sideyards adjacent to other properties in protection of existing trees, vegetation and in the provision of landscape and structures proposed, so as to maximize privacy between lots and common areas.~~

E. Set-back area along bluff common area:

No structures, paving, landscaping, fences, pools, ponds or other improvements shall be made without approval. The drainage easement(s) and view protection control this area. (A separate study is being made to possibly revise the drainage and easement conditions. When available, it will be attached herein as an addition to this paragraph.)

F. Conflicts in ordinances or requirements:

Where conflicts (if any) occur between existing or future rules, regulations, and restrictions and these guidelines, the most restrictive shall apply. It is recognized that a conflict may already exist on sideyards and height allowed between shoreline and county requirements when the building or buildings fall more than 200' from the water line. The shoreline requirements shall be met unless a special approval is given.

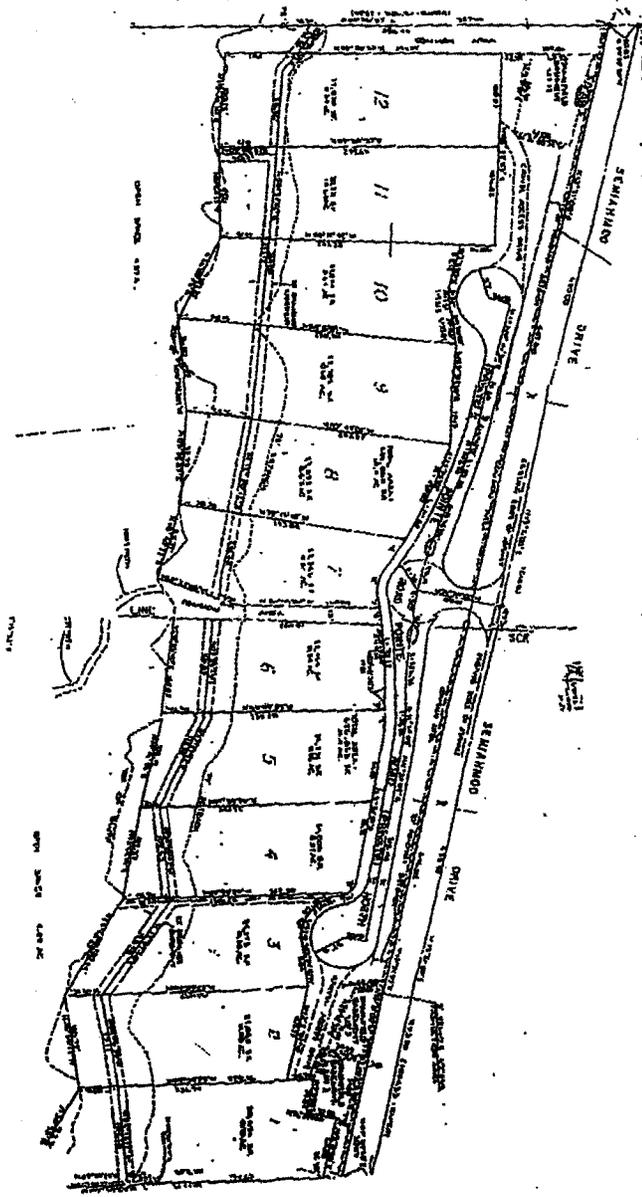
POINTE II 001830

By: Semiahmoo Homes, Inc.;

360 371 3522;

Feb-27-01 1:18PM;

Page 4



POINTE II 001831
Appendix D - Page 3 of 3

APPENDIX - E
(Tr. Ex. 6)

Architectural Review Checklist

Pointe II on Semiahmoo Owners Association

Date File Started: _____

Lot Number (s) _____
 Owners Name _____
 Address _____
 City, State, Zip _____
 Phone Numbers _____

Item Description	Dated Rec'd	OK <input type="checkbox"/>
Survey of lot: showing topography, size & type of existing trees and natural features, utility services, property lines, setbacks and easements (if any), and location of adjacent structures (if any).		
Comments: 		
Site Plan: showing location and dimensions of proposed structures, paving, landscaping, patios, drainage, grading, retaining walls, fences, setbacks and floor elevations. Roofs shall be shown in dotted lines. Where existing trees are to be removed, they shall be indicated. The survey may be indicated on this plan.		
Comments: 		

Architectural Character

Requirement	Comments	OK ✓
<p>Materials: Does this project use natural materials as is encouraged as being most in keep with the character of the site?</p> <p>If not, why is the variance authorized?</p>		
<p>Colors: Does this project use natural wood tones and earth tones as desired?</p> <p>Artificial colors and a manufactured look are to be discouraged. Are the colors artificial? Does the project have a manufactured look?</p> <p>(For colors, this item is to be considered only in relationship to the scale, mass of their use. In the structures, their relationship and proximity to neighbors.)</p> <p>If not, why is the variance authorized?</p>		
<p>Height, Mass and Scale: Does this project feature a low scale combined with narrow vertical masses, which is encouraged?</p> <p>Does this project have any tall height near the property line(s)? If so, can it be shown that this will not impact on the adjacent neighbor or on the overall appearance of the community?</p> <p>If not, why is the variance authorized?</p>		
<p>Style: no particular "style" is specified. Low to steep sloping roofs are encouraged. The blending in with the forest and protection of the natural vegetation is important. Especially creative designs shall be encouraged as long as they do not impose on their neighbors. In general the more privacy, and less "shock" value, the better.</p> <p>Does this project feature a low to steep sloping roof?</p> <p>Does this project blend in with the forest and protection of the natural vegetation?</p>		

<p>Is this project an especially creative design?</p> <p>Does this project have "shock" value or does it have "street appeal"?</p> <p>If not, why is the variance authorized?</p>		
<p>Codes & Setbacks: Does this project conform to all applicable, county, state, shoreline or any other codes or ordinances that apply?</p>		
<p>Side Yard Treatments: Does this project provide for the protection of existing trees, and vegetation?</p> <p>Do the proposed landscape and structures maximize the privacy between lots and common areas?</p>		
<p>Common Area Bluff: Does this project contemplate the construction of anything on the common area bluff?</p> <p>Does this project protect and maintain the site line views over the bluff from its lot(s) and the adjacent lot(s)?</p> <p>Do the landscape plan and any bluff side structures conform to the CC&R's restrictions on height and view restrictions?</p>		

This project conforms to the requirements of the Architectural Review process and is hereby approved:

Date: _____ Signed by: _____

This project does not conform to the requirements of the Architectural Review process and has not passed the Architectural Review Process:

The following items need to be resolved:

Lined area for text entry.

Date: _____ Signed By: _____

APPENDIX - F
(Tr. Ex. 7)

October 26, 2007

Architectural Review Committee
Pointe II on Semiahmoo
c/o Alan Williams
8463 Pointe Rd N
Blaine, WA 98230

RE: Nauman Construction, Lot 11

Dear Sirs,

As per the Pointe II on Semiahmoo CC&Rs, please find enclosed two copies of the following six drawings,
Structure plans labeled A 1.0 and A 2.0
Drainage system and walls
Lighting
Planting
Access

together with comments noted below. I have also included my check for \$200, made payable to Pointe II on Semiahmoo Homeowners Association, in payment for the Architectural Review. As per pages 11 and 12 of the CC&Rs, note

(a) existing and proposed land contours and grades;

Existing berm will be truncated at northern end, spoil material added to proposed extended berm. Final grade of Lot 11 will remain the same (approx 3-7% to WSW)

(b) all buildings and other improvements, access drives, and other improved areas, and the location thereof on the site;

This information is provided on the Northwest Survey, included as part of structure plans and as a sketch map, attached to this letter. Access to this structure maintains the permeable surface (gravel drive) noted on the subdivision plats, but realigns the drive to the east, providing 'Boat House' trailer accessibility to Lot 11 while providing a more private access to Lot 12

(c) floor plans, elevations and cross sections;

Included as drawings A 1.0 and A 2.0.

(d) all landscaping, including existing and proposed tree locations and planting areas (and species thereof) mailboxes and exterior ornamentation;

Proposed changes in landscaping are limited to changes in the berm at the eastern margin of Lot 11. The existing small cluster of trees at the north end of the berm will be moved south and east, (see sketch) to become part of an enhancement of the existing berm. Proposed planting of the new berm will be typical, to include heath, lavender, rhododendron, andromeda, berberis, viburnum, euonymus, juniper, pine and similar, and small trees, such as existing cotinus and dwarf apple.

POINTE II 001346

Appendix F - Page 1 of 7

(e) exterior lighting plans

Lighting will be typical of existing structure, designed to provide safe building access. Recessed lighting will be placed along existing driveway.

(f) walls, fences and screens

A low retaining wall will be constructed along the northern edge of Lot 11, to protect previously approved landscaping.

(g) patios, decks, pools and porches are as shown on submitted plans.

(h) parking areas (none)

(i) samples of materials to be used as may be reasonably requested by Architectural Reviewer

Exterior walls are cedar shingle, typical in design and color to existing structure; similarly, a metal roof will be as existing structure on Lot 11.

(j) such other information, data and drawings as may be reasonably requested by Architectural Reviewer

I am prepared to meet requests for additional information.

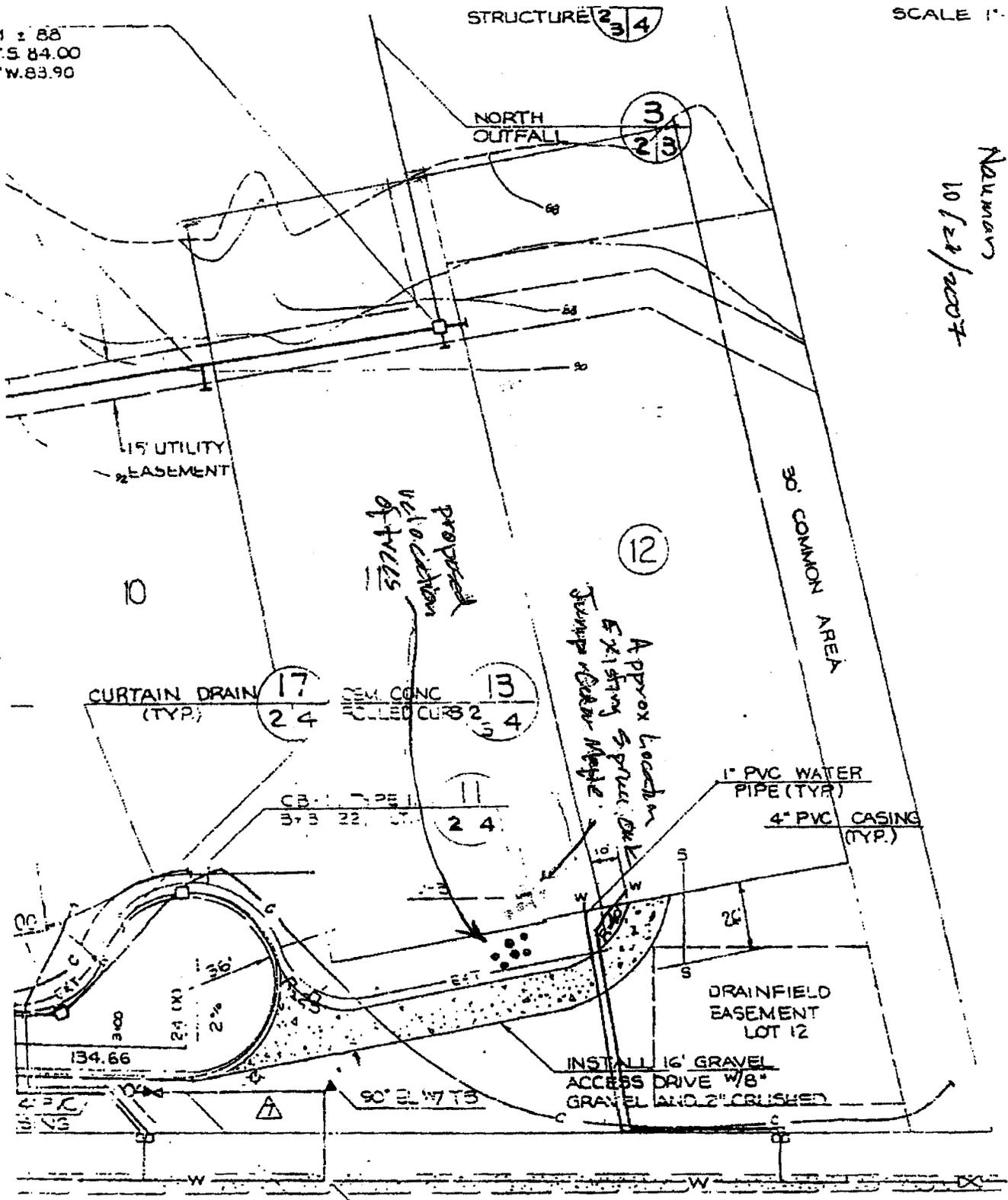
Jan Nauman

1 ± 88
S 84.00
W 83.90

STRUCTURE 2/3/4

SCALE 1" = 10'

Number
10/22/2007



EXIST. 12' x 8" TEE
8" DI WATERMAIN

POINTE II 001348

RELOCATE EXIST.
FH ASSLY
3'-0" DI 16" RT

1 : 88
S 84.00
W 83.90

STRUCTURE 2/3/4

SCALE 1" = 10'

NORTH
OUTFALL

3
2/3

15' UTILITY
EASEMENT

10

Handwritten:
Typo
Handwritten
Light
Detector

12

30' COMMON AREA

Handwritten:
Electric Lighting
November 10-26-2007

CURTAIN DRAIN
(TYP.)

17
2/4

REM. CONC.
ROLLED CURB

13
2/4

CB-1 TYP. 1
3' x 3' 22" LT.

1" PVC WATER
PIPE (TYP.)

4" PVC CASING
(TYP.)

Handwritten:
Security
Light or Motion
Detector

DRAINFIELD
EASEMENT
LOT 12

INSTALL 16' GRAVEL
ACCESS DRIVE W/8"
GRAVEL AND 2" CRUSHED

134.66

24 (X)

24 (X)

2"

90° EL W T/S

15
2/3/4

EXIST. 12" x 8" TEE
8" DI WATERMAIN

POINTE II 001349

RELOCATE EXIST.
FH ASS'LY
3' x 0.7' 16" RT

19
2/3

SCALE 1" = 10'

-7, TYPE I
1 ± 88
S 84.00
W 83.90

STRUCTURE 2/3/4

NORTH OUTFALL

Alman
10/20/2007

30' COMMON AREA

15' UTILITY EASEMENT

Drains to existing
Eve + foundation
Drainage system

Retaining Wall as necessary

CURTAIN DRAIN (TYP.) 17/2/4

CEM. CONC. CURED CURB 13/2/4

CB - TYPE I 3+3: 22, LT 11/2/4

1" PVC WATER PIPE (TYP.)

4" PVC CASING (TYP.)

DRAINFIELD EASEMENT LOT 12

INSTALL 16' GRAVEL ACCESS DRIVE W/8" GRAVEL AND 2" CRUSHED

90° EL W/TB

15/2/3/4

EXIST. 12" x 8" TEE 8" DI WATERMAIN

POINTE II 001350

RELOCATE EXIST. PH ASSEMBLY 19/2/4

1" = ~50'

COMMON
AREA

Lot II

- PAVED

PROPOSED ACCESS

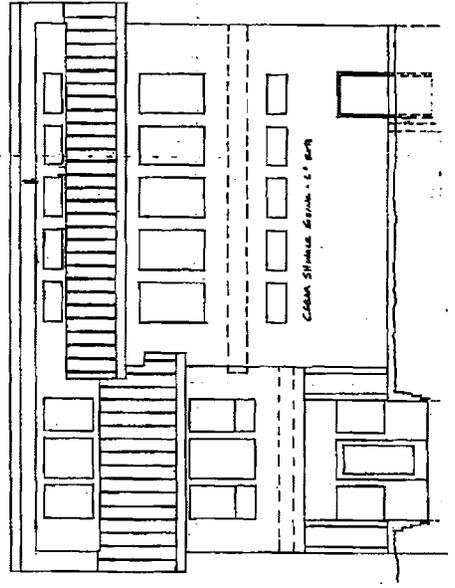
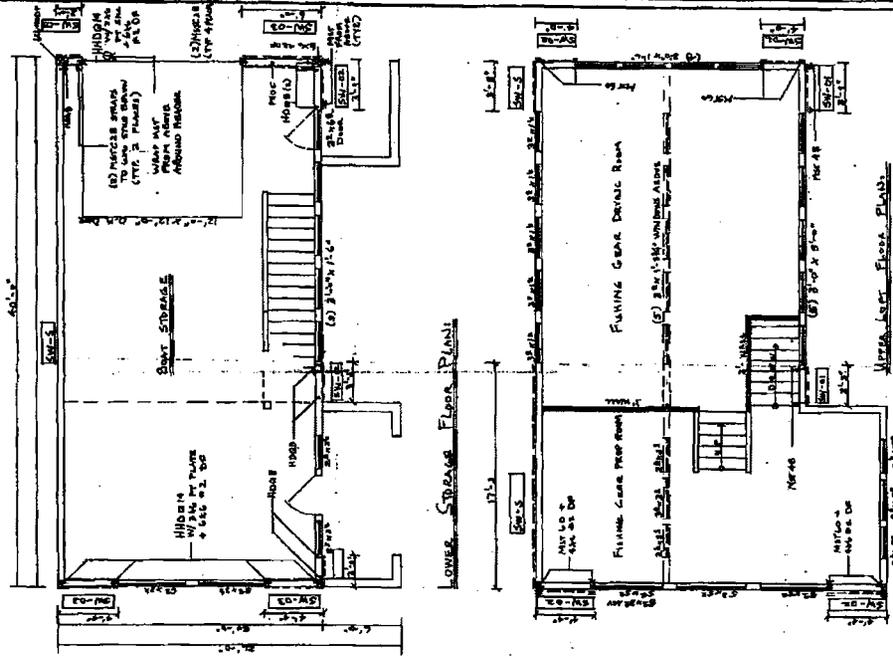
NY DEPARTMENT OF ENVIRONMENT

RE-ALIGN GRAD GRAVEL ACCESS.

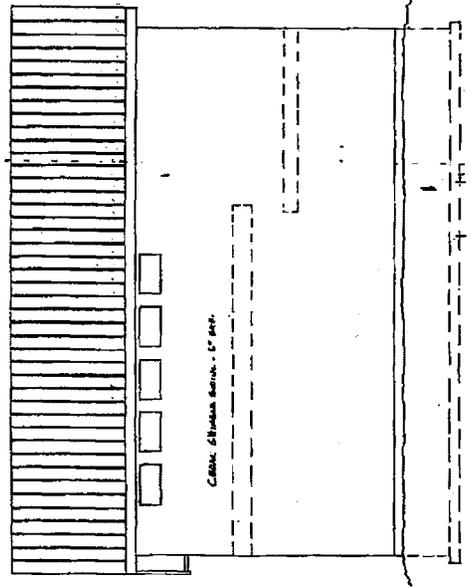
REV	DESCRIPTION
01	AS SHOWN
02	AS SHOWN
03	AS SHOWN
04	AS SHOWN
05	AS SHOWN
06	AS SHOWN
07	AS SHOWN

DATE	08-21-07
SCALE	1/4" = 1'-0"
PROJECT	CONSTRUCTION
NO.	A 20
BY	FORNBERG

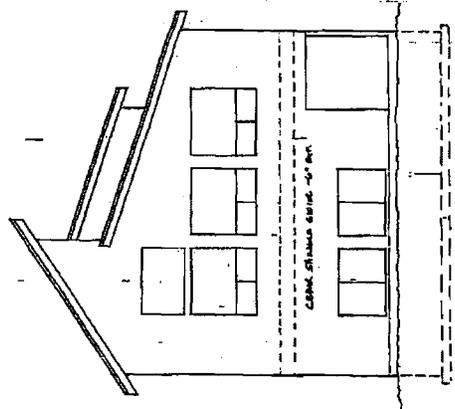
FOURTEEN SHEETS



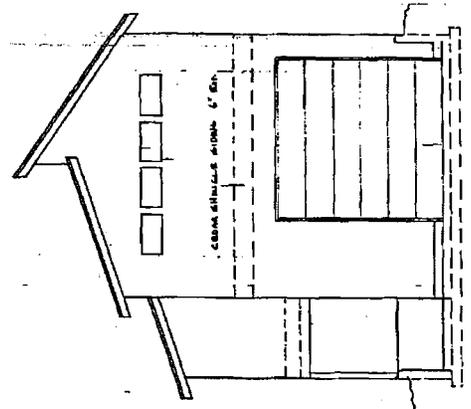
SOUTH ELEVATION



NORTH ELEVATION



WEST ELEVATION



EAST ELEVATION

APPENDIX - G
(Tr. Ex. 12)

Jon Santos

From: Jill Smith
Sent: Monday, December 24, 2007 9:14 AM
To: 'Jeff Solomon'
Cc: 'willstlou@aol.com'; Bret Simmons; 'Craig L. Telgenhoff'
Subject: Sunset Pointe - Nauman ARC report

Importance: High

Attachments: 20071224084101435.pdf



2007122408410143
5.pdf (611 KB)...

Dear Jeff:

As per our previous agreement, I'm emailing you a copy of the Sunset Pointe architectural reviewer's conclusions regarding the Nauman boathouse plans/submissions. Hard copy will follow by mail today, both from the Board to the Naumans and from my office to your office.

To avoid suspense, Mr. Telgenhoff has issued a denial, based on several aspects of the submission. The bases for denial are detailed in the 11-page report, attached.

Once your clients have had time to digest it, I'd encourage you to get in touch with Bret here in my office, to discuss an acceptable plan for remedying the landscaping disturbance, etc...that occurred on December 6-7, and for reimbursing the Association for its legal fees and costs in addressing the violation. The Board may agree to forego any significant discovery/action in the litigation it has filed, as long as we are engaged in productive discussions on those two points. Meanwhile, please instruct your clients, as before, that they are still not to take any further action on self-remedies for the landscaping disturbance and/or the boathouse access/building, unless and until they have an ARC approved plan in place.

This is my last day in office, so your response, if any, should be directed to Bret, not to me. Thanks, Jeff.

Sincerely,

Jill Smith

Architectural Review Checklist

Pointe II on Semiahmoo Owners Association

Date File Started: _____

Lot Number (s)	<u>Lot #11</u>
Owners Name	<u>Clynton & Jan Nauman</u>
Address	<u>8477 Pointe Rd. N.</u>
City, State, Zip	<u>Blaine, WA 98230</u>
Phone Numbers	_____

Item Description	Dated Rec'd	OK <input type="checkbox"/>
<p>Survey of lot: showing topography, size & type of existing trees and natural features, utility services, property lines, setbacks and easements (if any), and location of adjacent structures (if any).</p> <p>Comments:</p> <ol style="list-style-type: none"> 1. Topography is incomplete. 2. Size and type of existing trees and natural features are not shown on site plan. 3. Natural features are not shown on site plan. 4. Neighboring structures are not identified e.g. new home on Lot #12. <p><i>(Applicant is to provide above information.)</i></p>		Incomplete
<p>Site Plan: showing location and dimensions of proposed structures, paving, landscaping, patios, drainage, grading, retaining walls, fences, setbacks and floor elevations. Roofs shall be shown in dotted lines. Where existing trees are to be removed, they shall be indicated. The survey may be indicated on this plan.</p> <p>Comments:</p> <ol style="list-style-type: none"> 1. Site plan does not show proposed paving, patios, drainage, grading, retaining walls, and floor elevations. <p><i>Applicant is to provide above information.</i></p>		Incomplete

Architectural Character

Requirement	Comments	OK ✓
<p>Materials: Does this project use natural materials as is encouraged as being most in keeping with the character of the site?</p> <p>If not, why is the variance authorized?</p>	<p>Standing seam metal roofing is not a natural material. Per Architectural Guidelines, sub heading B. Architectural Character, manufactured looks are to be discouraged.</p> <p>Use of metal roofing will require a variance.</p>	
<p>Colors: Does this project use natural wood tones and earth tones as desired?</p> <p>Artificial colors and a manufactured look are to be discouraged. Are the colors artificial? Does the project have a manufactured look?</p> <p>(For colors, this item is to be considered only in relationship to the scale, mass of their use. In the structures, their relationship and proximity to neighbors.)</p> <p>If not, why is the variance authorized?</p>	<p>No building colors are specified on drawings.</p> <p>Applicant is to provide proposed stain colors.</p>	
<p>Height, Mass and Scale: Does this project feature a low scale combined with narrow vertical masses, which is encouraged?</p> <p>Does this project have any tall height near the property line(s)? If so, can it be shown that this will not impact on the adjacent neighbor or on the overall appearance of the community?</p>	<p>The project does not feature a low scale combined with narrow vertical masses.</p> <p>The buildings height in relation to its footprint and the existing house on site is tall. The proposed building is located on the Northern property line and would have a negative impact on neighboring property.</p> <p>Recommendation: draw the garage in relationship to the existing house and neighboring homes. Keep the height of the garage below the existing home. Provide more relief on the East and North façades to eliminate large blank walls. By providing more relief in the façade, the building scale will be reduced and it will provide for a more attractive building face for neighbors and community.</p>	

If not, why is the variance authorized?		
<p>Style: no particular "style" is specified. Low to steep sloping roofs are encouraged. The blending in with the forest and protection of the natural vegetation is important. Especially creative designs shall be encouraged as long as they do not impose on their neighbors. In general the more privacy, and less "shock" value, the better.</p> <p>Does this project feature a low to steep sloping roof?</p> <p>Does this project blend in with the forest and protection of the natural vegetation?</p> <p>Is this project an especially creative design?</p> <p>Does this project have "shock" value or does it have "street appeal"?</p> <p>If not, why is the variance authorized?</p>	<p>The project overall roof line and building style is complimentary to the existing home.</p> <p>Yes</p> <p>The building does not meld itself into the landscape due to its small footprint and overall height. As a result, the project does not blend in with the forest and community.</p> <p>Refer to Height Mass and Scale above for recommendations.</p> <p>The project is very utilitarian with very little detail shown on plans.</p> <p>The height and massing of the building has shock value. Refer to above recommendations.</p>	
<p>Codes & Setbacks: Does this project conform to all applicable, county, state, shoreline or any other codes or ordinances that apply?</p>	<p>The proposed building shows a 5-1/2' side yard setback along the North East corner of the lot. Per Architectural Guidelines, Item F, "Conflicts in ordinances or requirements: Where conflicts (if any) occur between existing or future rules, regulations, and restrictions and these guidelines, the most restrictive shall apply. It is recognized that a conflict may already exist on sideyards and height allowed between shoreline and county requirements when the building or buildings fall more than 200' from the water line. <u>The shoreline requirements shall be met unless a</u></p>	

	<p><i>special approval is given.</i>" Per Shoreline Management Program, Title 23 Chapter 23.90.60 Table of setbacks, height and open space, the proposed project falls under conservancy, Residential Boat House or Deck. The building set back is 15ft measured from property lines that intersect the shoreline and the maximum building height is 15ft. (see exhibit A, B, C & D attached).</p>	
<p>Side Yard Treatments: Does this project provide for the protection of existing trees and vegetation?</p> <p>Do the proposed landscape and structures maximize the privacy between lots and common areas?</p>	<p>The project site had already been cleared prior to architectural reviewer approval of plans and specifications.</p> <p>Given the proposed 5-1/2' building setback along the North & East side of the property, the proposed landscape and structures do not maximize the privacy between lots and common areas.</p> <p>Recommendation: Increase the building setback to 15' to match the house and provide a landscape buffer between the proposed building and the neighboring property lines on the North and East.</p>	
<p>Common Area Bluff: Does this project contemplate the construction of anything on the common area bluff?</p> <p>Does this project protect and maintain the site line views over the bluff from its lot(s) and the adjacent lot(s)?</p>	<p>N/A</p> <p>The existing house has a sideyard setback of about 15ft. The proposed building has a 5-1/2' building setback. As a result, the view corridor is reduced/restricted from the common area directly East of the proposed building.</p> <p>Recommendation: match the building setback of the existing house. By doing so, the building will have less impact on site line views over the bluff from lots and common areas.</p>	
<p>Do the landscape plan and any bluff side</p>	<p>N/A</p>	

structures conform to the CC&R's restrictions on height and view restrictions?		
--	--	--

This project to conform to the requirements of the Architectural Review process and is hereby approved:

Date: _____ Signed by: _____

This project does not conform to the requirements of the Architectural Review process and has not passed the Architectural Review Process:

The following items need to be resolved:

A variance will be required to allow the proposed boat house to be taller than 15ft. Given the fact that Shoreline regulations prevail, per Architectural Guidelines Item F, garage heights are limited to 15ft.

A variance will be required to allow the building to be placed within 5-1/2' of the North property line. Per Shoreline regulations, the side yard setback within a conservancy zone for accessory buildings is 15ft.

A variance will be required to use standing seam metal roofing.

Proposed building color is to be submitted for approval.

It is recommended that the board of directors determine if it is appropriate for the applicant to use the existing gravel access driveway per plat as a means of accessing the boat house. It is my opinion that access to the proposed building be done from the applicants existing driveway off Pointe II road. The intent of the gravel access road on the original plat was access to lot 12. Granting permission for the applicant to access the proposed project through the neighbors driveway, would place an unfair burden on owners of lot 12, resulting in decreased privacy, safety and potential property devaluation. Granting exclusive access and use of community property is a determination for the Board of Directors.

Date: 12/21/07 Signed By: 

Exhibit A

SHORELINE MANAGEMENT PROGRAM
TITLE 23

CHAPTER 23.90
GENERAL POLICIES & REGULATIONS

23.90.60 SETBACKS, HEIGHT, AND OPEN SPACE STANDARDS FOR SHORELINE DEVELOPMENT

.61 Shore Setbacks

Table 23.90.60 establishes the minimum required shore setbacks for development, including all structures and substantial alteration of natural topography. Shore setbacks shall be measured from OHWM; PROVIDED that, on natural wetlands, such setback shall be measured from the edge of the wetland, and on erosional or otherwise geologically unstable banks more than ten feet high and sloping at more than 30 (thirty) percent, such setbacks shall be measured from the bank rim or crest of such slope; PROVIDED FURTHER that, no shore setback shall exceed the geographic limit of the Act's jurisdiction.

.62 Sideyard Setback

Table 23.90.60 establishes the minimum required sideyard setbacks for development, including all structures and substantial alteration of natural topography. Sideyard setbacks shall be measured from all property lines which intersect the shore side of a lot or tract; PROVIDED that, for development not requiring a wider buffer, five feet of the total required sideyard setbacks may be provided on one side and the balance on the other side; PROVIDED FURTHER that, for a single family residence or duplex on a narrow legal lot of record the Administrator may waive a portion of the sideyard setbacks to allow a fifty (50) foot wide building area, provided the standard zoning setbacks are met and the reduction is otherwise consistent with this Program.

.63 Height Limit

Table 23.90.60 establishes the maximum required building height for all primary and accessory structures. Height is measured according to the definition in Section 23.110(H.5).

.64 Open Space

Table 23.90.60 establishes the minimum percentage of the site which shall be left in open space as defined in Section 23.110 (Definitions); PROVIDED that, this requirement shall not apply to a single family or duplex dwelling on a legal lot of record.

.65 Miscellaneous Provisions

(a) Setbacks, height or open space requirements established in Title 20 or as a condition of permit approval shall apply when more restrictive.

(b) The following development activities are not subject to setbacks:

1. Those portions of approved shoreline dependent development which requires an over-water or water's edge location, provided such development is adequately flood-proofed;
2. Underground utilities, other than septic systems;
3. Accretion bar scalping;
4. Modifications to existing development which are necessary in order to comply with environmental requirements of any agency, when otherwise consistent with this Program;

B

23.90.60 Table of Setbacks, Height and Open Space

The following table provides the minimum requirements for shore and sideyard setbacks, height limits and open space. All figures for setbacks and height denote feet. Letters in parentheses are footnoted below.

SHORELINE AREA						
	URBAN	URBAN RESORT	RURAL	CONSERVANCY	NATURAL	AQUATIC
USE						
Agriculture						
Shore Setback	50	N/A	75	100	N/A	N/A
Side Setback	20	N/A	20	20	N/A	N/A
Height Limit (c/d)	35	N/A	35/75	35/75	N/A	N/A
Aquaculture/Fisheries						
Shore Setback	25	25	50	50	N/A	N/A
Side Setback	10	10	10	15	N/A	N/A
*Height Limit (c/d)	25/35	25/35	20/30	15/25	N/A	10
Open Space %	30	40	50	60	N/A	N/A
Commercial						
Shore Setback (a/b)	30/75	30/75	50/100	75/150	N/A	N/A
Side Setback	5+	5+	10+	15+	N/A	N/A
*Height Limit (c/d)	25/35	25/35	20/35	15/25	N/A	15
Open Space % (e/f)	30/15	40/20	50/25	60/30	N/A	N/A
Marina/Launch Ramp						
Shore Setback (a/b)	30/75	40/75	50/100	75/125	N/A	N/A
Side Setback	10	10	10	15	N/A	N/A
*Height Limit (c/d)	25/35	25/35	20/25	15/25	N/A	N/A
Open Space %	15	30	30	50	N/A	N/A
Mining						
Shore Setback	N/A	N/A	100	100	N/A	N/A
Side Setback/Buffer	N/A	N/A	50	100	N/A	N/A
Open Space %	N/A	N/A	40	50	N/A	N/A
Ports/Industry						
Shore Setback	50	30	100	150	N/A	N/A
Side Setback	20	10	40	60	N/A	N/A
Height Limit (c/d)	35/35	15/25	25/35	25/35	N/A	20
Open Space %	30	40	50	60	N/A	N/A
Recreation						
Shore Setback (a/b)	30/75	30/75	50/100	50/150	50/150	N/A
Side Setback	10	10	15	20	20	N/A
*Height Limit (c/d)	25/35	25/35	20/35	15/25	10/15	15
Open Space % (e/f)	30/25	40/40	50/60	60/75	95	N/A
Residential						
Single Family & Duplex						
Shore Setback	30	30	45	75	N/A	N/A
Side Setback	5	5	10	15	N/A	N/A
*Height Limit (c/d)	30/30	30/30	30/35	30/35	N/A	N/A

C

SHORELINE AREA						
	URBAN	URBAN RESORT	RURAL	CONSERVANCY	NATURAL	AQUATIC
Residential Multi-Family (3/6 units)	50	50/75	70	100	N/A	N/A
Shore Setback (g/h)	5+	5+	15+	20	N/A	N/A
Side Setback	30/40	30/40	30/35	30/35	N/A	N/A
*Height Limit (c/d)	30	40	50	60	N/A	N/A
Open Space						
Residential Multi-Family (7+ units)	75	75/125	100	150	N/A	N/A
Shore Setback (g/h)	5+	5+	15+	20	N/A	N/A
Side Setback	30/40	30/40	30/35	30/35	N/A	N/A
*Height Limit (c/d)	30	40	50	60	N/A	N/A
Open Space						
Residential Boathouse or Deck	20	20	25	25	N/A	N/A
Shore Setback	5	5	10	15	N/A	N/A
Side Setback	15	15	15	15	N/A	N/A
*Height Limit						
Roads/Railways						
Shore Setback:						
Local or Minor Access	25	25	50	100	N/A	N/A
Arterial or Collector	100	100	150	200	N/A	N/A
Signs						
** Shore Setback	5	5	10	15	N/A	N/A
Side Setback	10/15	10/15	6/10	6/10	N/A	10
Height Limit (c/d)						
Utilities						
Shore Setback (a/b)	50/100	50/100	75/125	100/150	N/A	N/A
Side Setback	5	5	10	15	N/A	N/A
*Height Limit (c/d)	20/35	20/35	20/20	20/20	N/A	N/A
Open Space %	30	40	50	60	N/A	N/A
All Other						
Development	50/100	50/100	75/125	100/150	N/A	N/A
Shore Setback (a/b)	10	10	15	20	N/A	N/A
Side Setback	15/25	15/25	25/30	25/30	N/A	N/A
*Height Limit (c/d)	30	40	50	60	N/A	N/A
Open Space %						

- a = Applies to shore dependent structures and development
- b = Applies to development not requiring a shoreline location
- c = Applies to structures within 100 feet of OHWM or wetland edge
- d = Applies to structures more than 100 feet from OHWM or wetland edge
- e = Applies to development that includes overnight lodging
- f = Applies to development that does not include overnight lodging
- g = Applies to structures not more than 35 feet high
- h = Applies to structures more than 35 feet high
- + = Add five feet of setback for each five feet of height over fifteen feet
- * = Maximum height for accessory buildings is 15 feet ** = for Signs Shore Setback see 23.100.160.32(g)
- N/A = Not Applicable

23.100.130 RESIDENTIAL

Residential development in shoreline areas shall be subject to the policies and regulations of this section and Section 23.90.

23.100.130.10 RESIDENTIAL -- POLICIES

.11 Optimum Use

Extensive new residential development should be encouraged to provide substantial shore space for suitable recreation activities by development residents and the public, if such public use is compatible with the size and nature of the development area.

.12 Planned Unit Development

Developments which include common open space and recreation facilities, or a variety of dwelling sizes and types, are to be encouraged at suitable locations as a preferable alternative to extensive single lot subdivisions on shorelines. Planned Unit Development (Chapter 20.85 W.C.C.) may also include a limited number of neighborhood business uses if consistent with County zoning.

.13 Accessory Uses

(a) Structures or development for uses accessory to residential use should preserve shore open space, be visually and physically compatible with adjacent cultural and natural features and be reasonable in size and purpose. Accessory development common to residences includes, but is not limited to, recreational docks and floats, garages and shops, parking areas, water craft storage, shore defense works, fences, cabanas, tennis courts, swim pools, saunas, antennas, decks, walkways and landscaping. Shoreline permits may be required for many types of accessory development which do not meet the intent and definition of an appurtenance under Chapter 23.110.

(b) Such development should be discouraged from locating in required shore setback spaces, and should be prohibited over the water unless clearly shoreline dependent such as docks and floats for recreational or personal use.

(c) Joint or community use of private docks or floats is to be strongly preferred to continued proliferation of docks and floats for individual lots, which has led to unnecessary obstruction of water areas and loss of esthetic values.

.14 Scattered Development

Recognizing that premature scattered development needlessly consumes shore open space, conflicts with other appropriate uses, and causes extra public costs for public services, new development should be encouraged to locate in already developed areas or in areas officially planned for moderate to high density residential uses.

.15 Recreation-oriented Residential

Recreation-oriented residential development should be located only where substantial recreation opportunities are provided on site, where nearby property owners and other

October 26th, 2002 – 10 AM

Pointe II on Semiahmoo Owners Association

Special Meeting of the Members

Attendees:

In person:

Kim & Lynda Alfreds represent lots 1, 2 & 3
Barry Marshall representing lots 3, 4 & 5
Jan Nauman, representing lots 10 & 11

By Proxy:

Elizabeth Jones with proxy to Kim Alfreds for Lot 7
Kathleen A. von Hoffen with proxy to Kim Alfreds for Lot 12

There being the required quorum of members, and the meeting having being duly called for in accordance with the bylaws and applicable state regulations, the meeting was called to order by Kim Alfreds.

Having called for the meeting, for the purposes of the meeting only, Kim Alfreds acted as the Chairman and the recording secretary.

Kim Alfreds reported:

- 1) That he had received duly signed US Mail return acknowledgement forms from 100% of the lot holders thereby acknowledging receipt of the official notice of the meeting.
- 2) That he had received a copy of the Consent to Action form for the resignation of the current Directors and Officers of the association. The copy was blank, unsigned and undated.
- 3) That he had received a duly executed Consent to Action form amending the bylaws of the association to increase the number of Directors from three (3) to five (5).

Business arising from the calling of the meeting:

Motion

Unanimously moved, seconded and carried; that we accept the voluntary and/or involuntary resignation of the current Officers and Directors of the Pointe II on Semiahmoo Owners Association, namely: a) Elizabeth A. Jones, Director and President, b) Robert E. Aujla, Director and Vice President and c) Gilbert Dorland, Director and Secretary/Treasurer.

Motion

Unanimously moved, seconded and carried; that the nomination of following members be elected to their respective positions as Officers and Directors of the Pointe II on Semiahmoo Owners Association by acclamation:

- 1) Clynton Nauman, Director and President
- 2) Barry Marshall, Director and Vice President
- 3) Kim Alfreds, Director and Secretary/Treasurer
- 4) Jan Nauman, Director
- 5) Susan Marshall, Director

Motion

Unanimously moved, seconded and carried; that Article IV, Section 3 of the bylaws be amended to read:

SECTION 3. Meetings of the Board of Directors shall be held at such times and places in Whatcom County, Washington, or elsewhere, as shall be determined by the majority of the Board. Twenty-four (24) hours' notice of each such meeting shall be given to each director, which notice may be given by telephone, fax or eMail.

There being no further business arising from the calling of the meeting, the Chairman asked the members if there was any new business to conduct.

New Business:

Banking

Motion

Unanimously moved, seconded and carried; that the Treasurer open a local bank account in the name of the Pointe II on Semiahmoo Owners Association for the conduct of the Associations financial affairs. The Treasurer is hereby authorized to conduct the financial affairs of the Association on it's behalf. Further, all the Officers of the Association shall be listed as signing officers for the Association.

Landscaping

Jan Nauman presented a master plan concept for landscaping and the re-orientation of split rail fence at the gate.

Motion

Unanimously moved, seconded and carried; that the Ad Hoc member community landscape committee consisting of Lynda Alfreds, Susan Marshall and Jan Nauman be hereby formally asked my the membership to develop a 3 phase common area landscape plan. A) Phase 1 conceptual requirements for common area landscape plan, B) Phase 2 – Develop the master plan, planting guidelines, water, lighting, budget and

time frame. C) Phase 3 – Submission of Bids, timetable and work required for budget approval by the Board. Further, that once the budget has been approved, in accordance with Article VI, Section 1, the costs of the plan to be prorated through a special assessment if required on a pro-rata lot ownership basis. Further, any enhancements to the master plan in the areas directly to the east of any lot owners property may be enhanced at the cost directly to the lot owner but all enhancements to the community landscape plan must be in accordance with the character, vegetation, flora and fauna of the plan and is subject to the acceptance of the Architectural Reviewer(s). All plan enhancements shall be at the cost of the individual lot owner. – MSC

Architectural Reviewer

Motion

Unanimously moved, seconded and carried; that the current Architectural Reviewer, Mr. Robert E. Aujla, be graciously thanked for his past services to the association. Effectively immediately, to form an architectural review committee consisting of the following Officers of the Association to take on the responsibility of the Architectural Reviewer as the Pointe II on Semiahmoo Owners Association Architectural Review Committee, the President, the Vice President and the Secretary.

Motion

Unanimously moved, seconded and carried; that the Pointe II on Semiahmoo Owners Association Architectural Review Committee shall review the Architectural Guidelines of the CC & R's and then send out a summary notice to all the members regarding their obligations under the Architectural Guidelines before the end of the year.

Logging Next Door

Jan Nauman presented a report on the logging activities of Trillium Corp from the meeting that took place at the Rutter residence in Pointe I. Copies are attached to the minutes for future reference.

Treasurers Report

Kim Alfreds, the newly elected Treasurer has started working on auditing the Association books up to date from the dated of registration of the association and following that, will bring the books up to date in the meantime, the Treasurer reported that based on the cursory information that he had received, no invoices went out for Association dues for 2001 and 2002, although it appears that some monies for dues were collected through the property closing processes. The Treasurer reported that he will send out the appropriate invoices for assessments and dues and will have a final report as of 12/31/02 for the next directors meeting.

Next Meeting for the Directors

Motion

Unanimously moved, seconded and carried; that the date for the next directors meeting shall be 10 am January 4th, 2003 at the Alfreds new residence.

Beach Access

Barry Marshall reported on the access for common area access to the beach. Suggested that we look at other access facilities to the beach in the neighborhood. Barry to look at finding a resource to clear the brush on the common area on the bank to the beach, he will have a price for our consideration at the next meeting.

Meeting Adjourned

There being no further business the meeting was adjourned at 12:45 PM.

APPENDIX - I
(Tr. Ex. 26)

**Minutes of Architectural Review Committee
Pointe II on Semiahmoo Owners Association**

January 4th, 2003

In Attendance: 1) Kim Alfreds
 2) Barry Marshall
 3) Clynt Nauman
 4) Jon Lee

There being a quorum of the Architectural Review Committee present, the meeting was called to order.

Motion

Unanimously moved, seconded and carried: that Jon Lee submit an as built plan and a landscaping plan to the ARC.

Motion

Unanimously moved, seconded and carried: that the Alfreds submit a copy of their approved building plans for the ARC files.

Motion

Unanimously moved, seconded and carried: that the Committee sends out ARC forms to all lot owners.

Motion

Unanimously moved, seconded and carried: that the Committee sends out another letter to Bob Aguila.

Motion

Unanimously moved, seconded and carried: that the Directors Meeting is adjourned.

POINTE II 000681

Minutes of Architectural Review Committee
Pointe II on Semiahmoo Owners Association

January 4th, 2003

In Attendance: 1) Kim Alfreds
2) Barry Marshall
3) Clynt Nauman
4) Jon Lee

There being a quorum of the Architectural Review Committee present, the meeting was called to order.

Motion

Unanimously moved, seconded and carried: that Jon Lee submit an as built plan and a landscaping plan to the ARC.

Motion

Unanimously moved, seconded and carried: that the Alfreds submit a copy of their approved building plans for the ARC files.

Motion

Unanimously moved, seconded and carried: that the Committee sends out ARC forms to all lot owners.

Motion

Unanimously moved, seconded and carried: that the Committee sends out another letter to Bob Aguila.

Motion

Unanimously moved, seconded and carried: that the Directors Meeting is adjourned.

POINTE II 000682

APPENDIX - J
(Tr. Ex. 27)

Minutes of Directors Meeting

Pointe II on Semiahmoo Owners Association

September 19th, 2006

In Attendance:

- In person:
- 1) Kim Alfreds - Director
 - 2) Barry Marshall - Director
 - 3) Alan Williams - Director
 - 4) Dean Francis - Director
 - 5) Jon Lee - Director
 - 6) Lynda Alfreds - Landscape Committee
 - 7) Susan Marshall - Landscape Committee
 - 8) Rosemarie Francis - Landscape Committee
 - 9) Luanne Williams - Landscape Committee
 - 10) Jill Smith - Roy, Simmons & Parsons - Legal Counsel

There being a quorum of Directors present, the meeting was called to order at 1920 hours. This meeting was called in order to be updated by the Association's new legal counsel on the options available to the Association's Board of Directors regarding the matter of the unpaid account to the Association from the owner(s) of Lots 10 & 11 and as such the reading of the minutes of the directors meeting held on May 17th, 2006 and June 27th, 2006 were deferred until after Jill Smith had completed her update to the Board. Following the update, the Board would review the affairs of the Association.

New Business

Legal Options regarding Lots 10 & 11

Jill Smith reviewed in detail the current position regarding Lots 10 & 11. A valid lien has been filed against the title to Lots 10 & 11. If nothing further is done, the lien can be updated annually to reflect the ongoing interest cost, costs and other charges that are accruing against this account. When the property is sold, the Association will be paid in full. Options were discussed, from doing nothing, forgiving the debt, seeking mediation, negotiating binding arbitration and/or foreclosure. It was determined that the only option that would result in payment to the Association would be foreclosure, all other avenues would not in fact change the status quo. It was pointed out that Clynt Nauman is on record in the minutes of an annual general meeting that they would be bound by the decision of an independent third party should that party determine that all the past actions of the Board and the

Association were in fact valid and binding on the members. Such a determination was rendered and the still Nauman's refused to pay their past due assessment which resulted in a lien being filed against their property.

Jill Smith made it clear that foreclosure is a valid and viable option for the Association and estimated that the legal fees for this process should be in the low to mid four figures. Having concluded her update, the Board thanked her for the information and Ms. Smith left the board to deliberate the issue.

Motion proposed by Jon Lee and seconded by Dean Francis:

The Association should hereby forgive and cancel the debt owed to the Association by the owners of Lot 10 & 11, namely the original \$2,200 per lot on Inv 10 & 11, \$500 per lot on Inv 72, \$400 per lot on Inv 74 and the accumulated interest thereon.

A lively discussion ensued and then the Chairman called for a vote:

2 Votes for: Jon Lee & Dean Francis

3 Votes against: Kim Alfreds, Barry Marshall & Alan Williams

The motion was defeated.

Motion

Unanimously moved, seconded and carried: That the Treasurer tabulate the total cost of the legal proceedings experienced by the Association in it's attempt to collect payment from the Nauman's, the owners of Lots 10 & 11 for the following Assessments: \$2,200 per lot on Inv 10 & 11, \$500 per lot on Inv 72, \$400 per lot on Inv 74. Having tabulated that amount, the Treasurer is hereby directed by the Board to issue an invoice to the Owner's of lots 10 & 11 for said such amount of money.

Motion

Unanimously moved, seconded and carried: That the draft letter submitted to the Board to initiate foreclosure proceedings on Lots 10 & 11 owned by the Nauman's be amended to reflect the additional charges for Legal Costs incurred to date and that the letter shall include the Board's response to the letter of July 12th, 2006 addressed to Roger Ellingson and presented to the Board at tonight's meeting. Further that the amended draft then be circulated to the Executive members of the

POINTE II 002503

Board for final approval before transmission to the intended recipient(s) and that the Executive Members of the Board are hereby authorized to approve such amendments to the letter.

The Board having fully discussed and evaluated the options available to the Association and having taken such action as it saw fit to take on this matter, moved on to consider the regular ongoing affairs of the Association

Reviewed the minutes of the directors meeting held on May 17th, 2006.

Unanimously moved, seconded and carried: that the Minutes of Directors Meeting of May 17th, 2006 are adopted as read.

Reviewed the minutes of the directors meeting held on June 27th, 2006.

Unanimously moved, seconded and carried: that the Minutes of Directors Meeting of June 27th, 2006 are adopted as read.

Business arising from the reading of the minutes:

Beach Access

Barry and Dean updated the Board on their progress on the Beach Access project. The permit has been filed with the County for the project and according to the county; the Board is to be complimented on having been able to provide a comprehensive application that they see no problem moving forward through the system. Barry presented the estimate from Mantle Industries that looks to be in the \$30,000 price range. As per previous discussion, Kim will step in to work with Dean when Barry returns to Hawaii for the winter. It is expected that this will become a capital project for 2007 and the Board is targeting to have the beach access in place before the Memorial Day weekend in 2007.

Gabion Baskets

The Sec/Treasurer was reminded that he had not followed up with Sound Slope Strategies for an update on the current condition of the Gabion Baskets.

There being no further business arising from the reading of the minutes, the President acting as the Chairman called for the Treasurers report:

POINTE II 002504

Treasurer's Report

The Treasurer presented his report and it was unanimously moved, seconded and carried: that the Treasurers Report is adopted as presented. The Treasurer's report is attached hereto.

Business arising from the reading of the Treasurer's Report:

Kovalik Bank Stabilization - The treasurer reported that a letter had been received from Christina Farnham of Langabeer & Tull that enclosed a fully executed copy of the agreement between the Association, the Alfreds & the Kovaliks regarding the Kovalik's undertaking of the bank stabilization work in front of their property and in front of lots 1 & 2.

New Business

The Board had received an eMail from Dean & Rosemarie Francis (copy attached); this was discussed in detail by the Board.

Item 1: It appeared that the Francis' had not received the letter that was sent out by the President approving this issue and others from the last ARC meeting. The President agreed to resend the letter.

Item 2: The Board referred the Francis' to a Motion made at a Special Meeting of the Members on 10/26/2002 which says:

Motion

Unanimously moved, seconded and carried; that the Ad Hoc member community landscape committee consisting of Lynda Alfreds, Susan Marshall and Jan Nauman be hereby formally asked by the membership to develop a 3 phase common area landscape plan. A) Phase 1 conceptual requirements for common area landscape plan, B) Phase 2 - Develop the master plan, planting guidelines, water, lighting, budget and time frame. C) Phase 3 - Submission of Bids, timetable and work required for budget approval by the Board. Further, that once the budget has been approved, in accordance with Article VI, Section 1, the costs of the plan to be prorated through a special assessment if required on a pro-rata lot ownership basis. Further, any enhancements to the master plan in the areas directly to the east of any lot owners property may be enhanced at the cost directly to the lot owner but all enhancements to the community landscape plan must be in accordance with the character, vegetation, flora and fauna of the plan and is subject to the acceptance of the Architectural Reviewers. All plan enhancements shall be at the cost of the individual lot owner. - MSC

A motion was then presented to enhance this original motion as follows:

POINTE II 002505

Unanimously moved, seconded and carried: that any enhancements to the master plan for the common area in the areas directly to the east of any lot owners property or lot owners common area easement and with respect to lot 12, this shall include the common area to the north of lot 12, may be made by that lot owner subject to the following conditions: a) All such enhancements are subject in advance to the approval of the Architectural Review Committee (ARC) b) All such enhancements shall be at the sole cost of the lot owner c) All enhancements to the community landscape plan must be in accordance with the character, vegetation, flora and fauna of the plan and if the enhancement requires maintenance above and beyond the maintenance level or schedule envisioned in the community landscape plan, then all such maintenance for the enhanced common area shall be at the expense of that current lot owner d) The Association shall take whatever steps it deems necessary to ensure that all future owners of said lot shall continue with this maintenance otherwise the area shall be restored to the level contemplated by the common area landscape plan at the current owners expense before transferring the property to a new owner e) Should the current owner fail to maintain any enhanced common area, that area at the direction of the Association shall be restored to the level contemplated by the common area landscape plan at the current owners expense. Should any lot owner voluntarily maintain any common area, regardless of responsibility for maintenance or regardless of condition of said common area, he/she shall do so at their own expense.

Item 3: The President agreed to issue a letter to the Nauman's regarding the offensive odor emanating from the Nauman's compost pile.

Item 4: The Board agreed to pass a motion to update all and any common area easements.

Item 5: Yes the fence was approved by the ARC and should comply with the approved plan. Copy to be provided to the Francis'.

Dead Tree Removal

Unanimously moved, seconded and carried: that the Landscape Committee solicits at least three bids for the removal of certain dead trees posing a threat or danger to life and property ion the common area. Having secured said bids, then contract with the best qualified party on behalf of the Association to proceed with said removal.

POINTE II 002506

Common Area Easements

Unanimously moved, seconded and carried: that Jill Smith be retained to ensure that the proper easements contemplated, suggested, requested or required by the plans, permits, plats, CC&R's, Bylaws and/or proceedings of the Association are recorded with the county for the benefit of those easement beneficiaries on the Association's common area property

Unanimously moved, seconded and carried: that the Directors Meeting is adjourned.

The meeting was adjourned at 2200 hours.

POINTE II 002507

APPENDIX - K
(Tr. Ex. 98)

ROY, SIMMONS & PARSONS, P.S.

ATTORNEYS AT LAW
1223 COMMERCIAL STREET
BELLINGHAM, WA 98225

Eric E. Roy
Bret S. Simmons*
Daniel T. Parsons
Jill Smith **

TEL (360) 752-2000
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E-MAIL: mail@royandsimmons.com

* also admitted in Arizona
** also admitted in Oregon

~~June 5, 2008~~ May 20, 2008

Dear Jeff:

We are writing to acknowledge receipt of your May 9 settlement letter, and to offer the Association's final settlement offer, prior to our insistence on an Answer in the pending suit.

We want to say, first, that we have been pleased to be able to keep this negotiation fairly civil, from the beginning of your involvement. However, the demanding tone of your May 9 letter does not accurately reflect how this debacle started--with your clients' knowing and intentional trespass into, and destruction of, the Association's common area.

Late last year, the Naumans acknowledged that their boathouse plans were not yet approved. Nonetheless, for the sake of their own agenda, they had a heavy earth-moving machine come into the community, disturb the peace and the common areas, and "pave the way" for a not-yet-approved boathouse structure. The Naumans removed trees, landscaping, and a portion of a large berm, solely to facilitate an objectionable access route. It is that conduct which required the Association to file suit. And, all of your proposed counterclaims arise out of the Board's responses to that same course of conduct.

Therefore, in our view, the Naumans are not in a position to demand that any of their pending plans be approved, or to use the situation to demand additional concessions from the Association. Instead, the Naumans should be looking for ways to remedy what they have already done, and minimize their liability for it. In addition to paying their pro-rata share of Association legal fees as they accrue, they risk the very real likelihood of reimbursing the Board for its entire legal fees through the conclusion of the suit. As you've seen in the recent budget, the Board estimates those costs at \$60,000 through the end of trial. Given the significant financial risks involved, we respectfully caution the Naumans to carefully consider the below settlement offer.

With that said, you are correct in many aspects of your letter. First, the board is in a "Catch-22" situation. That situation exists because of an ambiguity in the plat map. The map does not clearly delineate the gravel access driveway as "exclusive" to Lot 12, nor does it disprove that fact. That situation came into existence, not through any fault of the current Association members, but as an omission during drafting. Further, all sorts of things could be inferred from the easement's size, location, materials and end points on the plat map. The Naumans assert that it is intended to be held for common benefit, while the Francises assert that it is intended for their exclusive benefit. Both have reasonable arguments to support their position, and both have threatened to sue the Association if the Association does not side with them. Despite your glib dismissal of that dilemma, the Board finds that there is a legitimate dispute with evidence to bolster each position, and likely a long legal battle ahead to establish a "winner." Obviously,

POINTE II 000094

the Association would like to avoid incurring the time and expense to each of the members to determine which outcome would prevail in court.

Second, you are correct that the burden is on your clients to submit an acceptable boathouse plan. The Association welcomes the opportunity to review new plans that are compliant with the height, setback and other restrictions at issue. (The Board's position on "acceptable compromises" is below).

Finally, you are right that the Association "must cooperate." But its cooperation is not in developing a revised Architectural Review report. The Architectural Review report dated December 21, 2007, stands. The Board's duty is, instead, cooperation in reviewing any revised plans that the Naumans may choose to submit, in response to that report.

We have read your proposed Answer and Counterclaims, and do not perceive much, if any, chance of success in proving that this Board engaged in bad faith treatment of your client. The Association's books and records have always been open to your clients' review. Despite their multiple trips through those records, we are confident that there are no facts supporting malfeasance or "bad faith." Instead, we believe the record will show that these volunteer board members have invested huge amounts of time, trying to find ways to be even-handed and fair toward your clients, despite your clients' many demands. Examples of this include referring your clients' boathouse plans to an "outside" reviewer, and having Board member Dean Francis abstain from voting on the access issues. In short, if the Naumans want to have a trial over their claim that the Board has a vendetta against it which has caused members to act in "bad faith", we welcome laying out the facts and disproving this theory.

In the spirit of compromise and in one last effort to put this matter to rest, the Board has authorized us to convey the following settlement proposal.

1. Common Area Repair: Your clients will be responsible for the costs of restoring the common area east of Lots 10 and 11, which was disturbed by their contractors in late fall 2007. The Association will be asking its ARC designee, Craig Telgenhoff, to design an acceptable plan to restore the common area. He may choose to incorporate some of the Naumans' suggestions/wishes as submitted in their recent landscape proposal, but it is entirely within his discretion. The costs of his design work, the labor and the materials will fall to your clients. (As you will see, below, this will have to coincide with Point #6, below).
2. Fence/Retaining Wall: The fence between lots 11 and 12 would be provisionally approved. The height of the combined retaining wall and fence can be no higher than 5 feet at its highest point (directly between the two affected homes). It would need to taper down to a maximum of 3 feet (measured from Lot 12 grade level) for its most easterly portion (the "front yard" areas). According to Telgenhoff, the proposed fence materials are not acceptable--the covenants do not allow synthetic siding material to be used, and T-1-11 is not acceptable. The fence should match the existing clear cedar singles, single reveal, single spacing, shingle grade/quality and color of the existing home and fence.

For final approval of the fence, a drawing showing this re-design must be submitted, showing acceptable materials, compliant dimensions, gradual "step-downs" as the fence moves from 5 feet to 3 feet (moving easterly), and should include a typical section detail drawing (through built-up flower beds, retaining wall drainage system, post detail, block wall and fence detail).

3. Mailbox: The Naumans' mailbox will have to be made to fit with the boathouse access proposal, addressed in Point #6a, below. If they elect to access the boathouse over common area, as the board has agreed to allow, the newly constructed mailbox will have to be moved. It would be approved, in substantially the same form, at a location immediately southwest of their existing driveway. If the box is to be rebuilt, it would need to be similar in size and scale to those within the community, must be downwardly-lit with a single light, and in a low-level wattage (20 watts or less), not "spot-lighted" with high intensity lights. The light and motion sensor is to be placed on the west side of the box and is to be adjusted so as not to turn on when neighbors use the access road to Lot #12. The box and pad is to be situated on the Naumans' own property to the greatest extent possible, so that it does not intrude on common area any more than absolutely necessary, while still allowing for mail delivery.
4. View-obstructing fir trees: The two most westerly fir trees, on the boundary line between Lots 11 and 12, will need to be removed, as they constitute a view obstruction, and were planted without ARC review or consent.
5. Other unapproved fir trees: A request for approval of the additional fir trees in the same line of trees will need to be submitted to the ARC reviewer. (These trees were also installed without ARC approval, and the Naumans were told to remove them previously. As a settlement concession, the Board is willing to approve them remaining in place, as long as a formal request for approval is submitted).
6. Landscaping: The following elements of the Naumans' landscape plan would be formally approved as submitted:
 - (a) Resurfacing brick deck on west side of house with "Old Country Stone" or similar;
 - (b) Surface gravel walkway on north side of house with combination of Old Country Stone (or similar) and existing patio stone;
 - (c) Move blueberry bush from Lot 11/12 lot line to east central area on lot 11/10;
 - (d) Remove rose bushes from garden south of driveway;
 - (e) Install borden garden along western portion of northern property line (with all plants being maintained at 30 inches or less above ground level);
 - (f) Install lawn/garden edging along garden lawn interfaces around lawns on Lot 11;
 - (g) Remove raised bed west of generator, and install "Old Country Stone" or similar around generator pad, to fence, rockery and sidewalk;
 - (h) Paint garden gates;
 - (i) Paint and repaint fence with color similar to existing;
 - (j) Install temporary deer fencing over carpet roses west of front deck;
 - (k) Remove rugosaroses south of front deck;
 - (l) Install blueberry plants south of front deck;
 - (m) Install raspberry, loganberry and tayberry along southern edge of lot 11, west of fence;
 - (n) Install flagstone or old country stone walkway from driveway to proposed boathouse;
 - (o) Improve garden in west center of Lot 10, per proposal; and
 - (p) Continue cleanup around the stump of the large maple;

For all other Lot 10 and 11 elements that were included in the landscape plan submission, but which are not specifically listed in this subsection (a) through (p), the Naumans would agree to

abide by the denial in the Architectural Reviewer's report, attached. Or, for elements that are deemed "incomplete" in the ARC report, the Naumans would agree to submit the additional details that are requested by the Architectural Reviewer's report and await approval before beginning construction. All plan elements for work upon common area would be denied, with the understanding that the Naumans' preferences for common area landscaping near their home will still be considered by the community, just as each neighbors' preferences are considered.

7. Boathouse: Further, if the Naumans still wish to proceed with the boathouse project, the following will apply:

- a. They will be granted an access route, through common area, which will begin at the "bulb" of the existing cul-de-sac. It will need to fit in between the east boundary of their two lots and the existing gravel driveway easement that leads into Lot 12. We will soon provide a concept drawing to illustrate a rough idea of what is being offered.

The Naumans will submit a landscape plan for the eastern portion of Lot 11, which landscapes the previous berm area. The Association will then work with its ARC reviewer to create a landscape plan for the remaining common area between the Lot 12 gravel driveway and the Naumans' new access route, to "buffer" the visual impact of the boathouse on Lot 12 and from Semiahmoo Drive. There will need to be at least a 7 foot buffer between the two driveways to allow for a greenbelt/treed area to buffer the visual impact of the boathouse.

The Association reserves the right to fine-tune the details of exactly where the access route will be, as it works with its ARC reviewer to minimize the visual impact of this additional route.

The access will need to be "invisible," in the sense that the Naumans agree not to install a paved or impervious surface, but instead, will drive over the existing grass, and will not delineate or otherwise attempt to "mark" the edges of the route.

As a result of being given that access route, the Naumans will agree not to make any use of the existing gravel driveway that leads into Lot 12. Instead, they will need to acknowledge, in writing, that the gravel access driveway as shown on the plat map is intended for the private benefit of Lot 12, not for common access, and that they agree not to encroach upon that easement.

PLEASE NOTE: the Board is making this concession to the Naumans solely because of the Naumans' insistence that their boathouse access must come from the vicinity of Pointe Road. The Board continues to *strongly* believe that the boathouse would be much more functional, accessible and attractive if it was rotated 90 degrees and accessed from the existing Lot 10/11 driveway. The Board's architectural reviewer also believes that this access should simply be denied. However, as a show of the Board's good faith, the Board is offering this route solely as a settlement concession. If counterclaims are made and this matter proceeds to additional litigation, this offer is immediately withdrawn and no further consideration will be made for boathouse access over common area.

- b. The Naumans will have to submit a revised, complete boathouse plan that complies with the Association's ARC guidelines dated February 1, 1989, and/or any *approved* variations therefrom. Further, in keeping with the architectural reviewer's input, the Board would be willing to approve plans for a boathouse which stands no more than 15 feet tall, uses a 15 foot setback from the Lot 12 lot line, and a 5 foot setback from the common area (the identical setbacks that were required of the Francis). The plans will otherwise need to comply in full with Telgenhoff's recommendations as found in his December 21, 2007 letter. As you already know, the Naumans' color and roofing materials are approved as submitted.

This is not a guarantee of approval of any resubmitted boathouse plans, should they change in any material way from the submission already made. Instead, it is a good-faith offer to review and approve plans that meet the height and setback standards set out above, and which comply with the purpose and intent of the ARC guidelines.

8. Your clients agree to the validity and controlling nature of the Association's By-Laws, dated July 17, 2000, and the Association's ARC guidelines, dated February 1, 1989. As we've already discussed, both of these documents were generated during a time at which your clients were actively involved in the Board. These are the standards that your clients used and relied on, back when *they* were the Architectural Review Committee, and when they reviewed the plans of new owners, between 1990 and their resignation from the Board.
9. Your clients would need to execute an agreement with the board regarding ongoing document review. The costs to the Association of having Mrs. Nauman conduct her periodic records reviews are extensive. While it is her statutory right to conduct such reviews, the statute also indicates that it is to be restricted by reasonableness. She would need to agree to limit herself to a once-quarterly review, to be conducted at the Unity HR office, under their normal terms and conditions, at their normal cost. (As a recommendation, not a condition of settlement, the Board continues to strongly encourage the Naumans to simply attend association meetings, where all of the association's documents, agendas, budgets, etc... are presented and discussed.)
10. The Naumans agree to be responsible for the Association's legal fees incurred to date, in addressing your client's trespass (including all time spent responding to your various settlement proposals). The amount of those fees, to date, is approximately \$9,000.
11. The Naumans and the Association agree to execute mutual releases of all claims of liability against each other. After the terms of the agreement have been carried out by both sides, the Board will agree to dismiss the pending lawsuit in Whatcom County Superior Court.

Jeff, you previously informed us and Board President Alan Williams that boathouse access from a point other than their existing driveway was a high priority for the Naumans and perhaps the most important issue for them. Despite the Architectural Reviewer's recommendations against allowing access through the common area, the Board is now making the considerable concession to allow this access. If the Naumans reject this settlement proposal, we fully intend to introduce to the court the Board's willingness to allow this unprecedented access as further evidence that the Board has strived to act reasonably and has at all times met its good faith obligations to its members.

Jeff Solomon
May 19, 2008
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We hope that we can work out any unresolved details within the next five days. Please call either of us with any questions.

Sincerely,

Jill Smith
Bret S. Simmons

Cc: Board of Directors