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No. 67762-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

POINTE II SEMIAHMOO OWNERS ASSOCIATION
dba SUNSET POINTE OWNERS ASSOCIATION,

Appellant,

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,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR WHATCOM COUNTY
THE HONORABLE IRA UHRIG

AMENDED BRIEF OF RESPONDENTS
(RAISING CONDITIONAL CROSS-APPEAL)

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I. INTRODUCTION

The Association appeals the trial court's factual determinations that it wrongfully withheld approval of Nauman's application to construct an accessory structure on their property, and that it breached both the Covenants and its duties under the Covenants by allowing "influential members" to usurp common area to the exclusion of other members. Intervenor Francis – one of the "influential members" – also appeals the trial court's determination that an access drive located within common area was not an easement, exclusive or otherwise, and its ruling restraining both the Association and Francis from interfering with Nauman's reasonable use of the common area. The trial court's decisions are supported by both substantial evidence and the law.

To the extent necessary for a full affirmance, Nauman conditionally cross-appeals the trial court's application of RCW 4.16.080(2) to their claims against the Association for breach of the Covenants, and the trial court's determination that Nauman breached the Covenants by temporarily piling dirt on the common area. This court should affirm and award Nauman their attorney fees on appeal.

II. ASSIGNMENTS OF ERROR FOR CONDITIONAL CROSS-APPEAL

1. The trial court erred in applying the three-year statute of limitations under RCW 4.16.080 to Nauman's claims against the Association for its breaches of the Covenants and its fiduciary duty under the Covenants. (CP 2162-65, 2312-14)

2. The trial court erred in concluding that Nauman committed trespass and breached the Covenants by piling dirt in the common area. (CP 981-82, 2016-17)

III. STATEMENT OF ISSUES FOR CONDITIONAL CROSS-APPEAL

1. Nauman's counterclaims against the Association arise from the Covenants, including both the Association's express obligations and its fiduciary duties owed to its members under the Covenants. Because the Covenants are a written contract, should the trial court have applied the six-year statute of limitations under RCW 4.16.040?

2. Did the trial court err in concluding that Nauman committed trespass and breached the Covenants by temporarily piling dirt on the common area, when the Association regularly permitted members to temporarily store materials on the common area?

IV. RESTATEMENT OF FACTS

A. The Trial Court Found That The Association's Denial Of Nauman's Boathouse Application Was Unreasonable And In Bad Faith. The Trial Court Also Concluded That A Gravel Access Drive In The Common Area Of The Subdivision Was Not An Easement.

Respondents are Clynt and Jan Nauman ("Nauman"), residents of the Pointe on Semamhoo Phase II (the "subdivision"), a 12-lot residential development in Blaine, Washington. (See CP 2749-50) Appellant-Intervenors are Dean and Rosemarie Francis ("Francis"), owners of the lot adjacent to Nauman. (See CP 235) Appellant is the Sunset Pointe Owners' Association (the "Association"), a non-profit homeowners' association whose members, including both Nauman and Francis, own lots within the subdivision. (See CP 2749)

This action was commenced by the Association against Nauman for trespass and violation of the Association's Declaration of Covenants, Conditions, and Restrictions ("CCR's") for work performed by Nauman on their property and on common area of the subdivision after Nauman sought approval to construct a boathouse on their property and to use a common area known as the Gravel Access Drive (GAD) to access the proposed boathouse. (CP 2749-59) Nauman counterclaimed asserting that the

Association's denial of their boathouse application was unreasonable, arbitrary, and capricious. (CP 2731-48) Francis intervened seeking a determination that the GAD was an exclusive easement for Francis' property, which is adjacent to Nauman's property. (CP 234-37)

The parties' claims were tried over 8 days to Whatcom County Superior Court Judge Ira Uhrig. Prior to trial, the trial court had ruled on partial summary judgment that Nauman had committed trespass by depositing soil on the common area located east of their home. (CP 2016-17, 2824-27) After trial to determine whether this trespass also constituted a violation of the CCR's, the trial court found that Nauman's actions, although "technically" trespass, were "reasonable and in good faith," and based on a "mistaken impression that they had the right to do so." (Finding of Fact (FF) 15, CP 971; Conclusion of Law (CL) 1, CP 981) (Appendix A)

The trial court rejected the Association's claims that it "had no choice but to file suit against the Naumans," and found that the Association's actions were "retaliatory against the Naumans in response to prior years of animosity between the parties." (FF 16, CP 972) The court found the "Association's attempt to selectively

enforce other provisions of the CCRs against the Naumans for their actions in the common area [] to be discriminatory, arbitrary, capricious and in bad faith.” (CL 5, CP 983)

With regard to Nauman’s counterclaims, the trial court reiterated its findings that the Association’s actions toward Nauman were retaliatory. (FF 19, CP 973) The court found that the Association had imposed “higher standards” on Nauman’s proposed boathouse by applying the “more restrictive Architectural Guidelines” that had never been formally adopted by the Association, and that had never been previously applied to other applications by members. (FF 22, 23, CP 974-75) The court found that the Association “wrongfully withheld” approval of the Nauman application for “improper reasons,” and that its decision was in “bad faith, arbitrary and capricious.” (FF 27(c), 29, CP 979, 980)

The trial court rejected Francis’ and the Association’s allegations that the GAD was an easement for the Francis property. Based on “its reading and interpretation of the plat map, CCR’s, Bylaws, Statutory Warranty Deeds, and other evidence at trial,” the court concluded that “the GAD to Lot 12 is not an easement, exclusive or otherwise.” (CL 11(b)(i), CP 985-86) The court found that the “Association’s position on the character of the GAD to Lot

12 was adopted purposely, deliberately and in bad faith by the Association, in complicity with and at the urging of the Frances, to improperly deny the Naumans' boathouse application." (CL 11(b)(v), CP 988) The court further found that even if the GAD were a non-exclusive easement, "the proposed frequency of ingress/egress is reasonable and would not constitute an unreasonable interference with the GAD and the Frances' use of the GAD." (FF 27(f), CP 980)

The trial court found that the Association breached the CCR's and its fiduciary duties under the CCR's by failing to preserve the common area for the benefit of all members by allowing the usurping of the common area by "influential members." (FF 29, CP 980-81; CL 13, 14, CP 990)

The trial court awarded attorney fees to the Association for fees incurred to bring suit to enforce the CCR's for Nauman's technical trespass. (CL 2, CP 982; CP 2781-83) The court awarded attorney fees to Nauman for fees incurred on all other issues in which they prevailed, (CL 16, CP 990-91; CP 2775-80), noting that Nauman "had at stake significant and important rights, including the right to use and access their own real property and to make the highest and best use of their property, as well as the right

to not be subject to the arbitrary and capricious conduct of the plaintiff.” (Attorney Fee Findings of Fact (FF) 6, CP 2777)

Both the Association and Francis appeal, assigning error to several of the trial court’s findings of fact. Neither effectively challenge the findings. Accordingly, they are verities on appeal. ***Keever & Associates, Inc. v. Randall***, 129 Wn. App. 733, 741, ¶ 12, 119 P.3d 926 (2005), *rev. denied*, 157 Wn.2d 1009 (2006) (regardless of an assignment of error, if the issue is not argued or briefed by citation to authority or to the record, the argument is deemed waived). Those findings actually challenged by appellants are supported by substantial evidence. “Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it. This is because credibility determinations are left to the trier of fact and are not subject to review.” ***Burrill v. Burrill***, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003).

The following restatement of facts recites the substantial evidence upon which the trial court based its findings, which fully support its judgment:

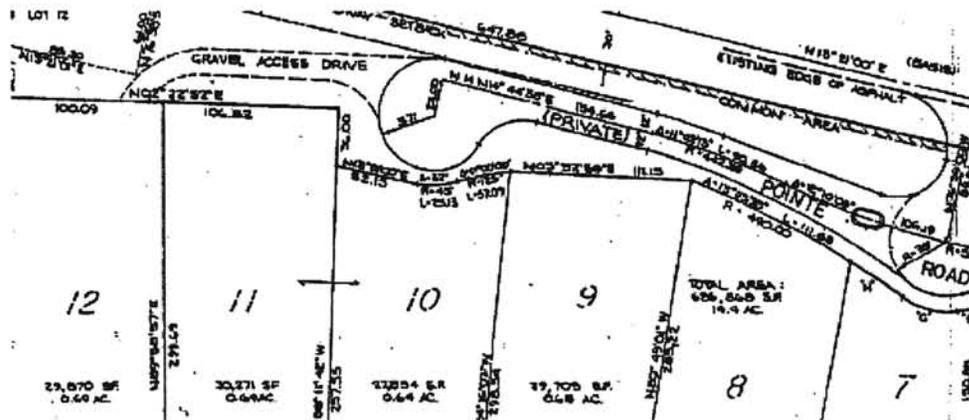
B. Nauman And Francis Are Neighbors In A Subdivision Governed By A Board That Consisted Of Francis And Four Other Members, Not Including Nauman.

Nauman and Francis reside in a “gated and exclusive subdivision.” (See CP 276) There are only six resident owners among the 12 lots. (RP 281, 838) Five are members of the Board of Directors that governs this “small” Association - Alan Williams (President), Barry Marshall (Vice-President), Kim Alfreds (Secretary-Treasurer), Dean Francis (Director), and Jon Lee (Director). (See RP 60, 101, 837-38; Ex. 18, 19, 20, 21, 92(37))¹ Neither Nauman has served on the Board since 2003, when Jan Nauman voiced concerns over the handling of certain financial matters and her concern that certain lot owners were treated more favorably than others. (RP 299-30; Ex. 60, 61)

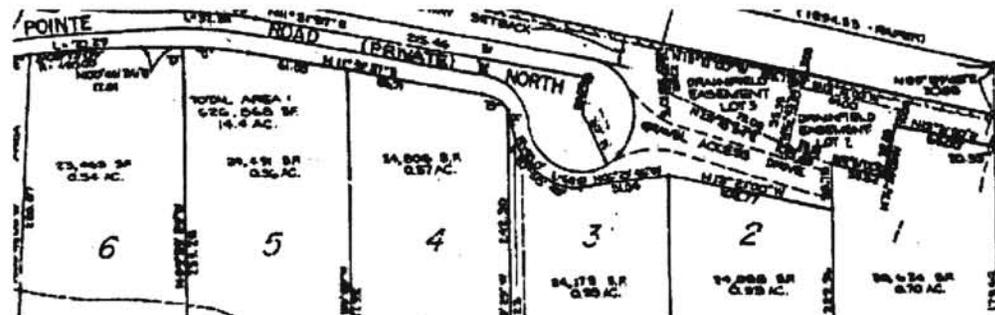
Nauman owns two adjacent lots (Lots 10 and 11) on the north end of the subdivision; their home is located on Lot 11. (RP 114, 122) Francis owns two non-adjacent lots (Lots 7 and 12); their home is located on Lot 12. (RP 276-77; CP 275) Alan and Luanne Williams own Lot 8. (RP 276) Jon Lee owns Lot 9. (RP 276)²:

¹ By the time of trial, there were only three Directors on the Board – Williams, Marshall, and Alfreds. (RP 282-83)

² The pictures throughout this brief are from Exhibit 1 (Plat of the Pointe on Semiahmoo Phase II), attached as Appendix B.



Barry and Susan Marshall own Lots 4, 5, and 6 on the south end of the subdivision. (RP 276) Kim and Lynda Alfreds own Lots 1, 2, and 3 (RP 275):



C. East Of The Nauman And Francis Properties Is Common Area, Including A Gravel Access Drive (GAD). The Covenants Provide That Common Area Is For The Benefit Of All Owners In The Subdivision.

Each lot within the subdivision is accessed by way of a private road – Pointe Road North – which connects the subdivision to Semiahmoo Drive, the adjacent primary arterial in the public road system. (Ex. 1) (Appendix B) Pointe Road North does not directly

The County apparently required the inclusion of these GADs to avoid any direct access to the public road system over the drain field easements that are east of the southernmost and northernmost lots. (See RP 1021, 1039-40; Ex. 1: "All lots shall access onto Pointe Road North the only access to Semiahoo Drive shall be via Pointe Road North")

Neither GAD is described as an easement on the plat. (See Ex. 1; RP 277-79) Instead, the GADs are located within "common area," described by the Association's CCR's as those parcels of real property that "are provided for the use and enjoyment of the owners of the lots of the subdivision." (Ex. 2, §§ I.B, III; CP 228³) To address the County's concern that each lot have access to the private road, the common area is dedicated for, among other purposes, the "maintenance and operation of the road system." (Ex. 2, § III) Like the plat, neither the Association's Bylaws nor CCR's reference the GADs as easements. (See Ex. 2, 3)

When Nauman first acquired their lots in 1998, the developer "had in mind" that the owners of Lot 11 would access their lot over the GAD. (RP 340-42; Ex. 92(9)) Ultimately, Nauman located their

³ In an unchallenged order on Nauman's Motion for Partial Summary Judgment, the trial court concluded that "those areas outside of the platted lots are common area." (CP 226-28)

driveway away from the GAD. (RP 341-42) Nevertheless, Nauman regularly used and maintained the GAD east of their property. (See RP 133, 344-45) Even after Francis constructed their home on Lot 12 in 2006/2007 and started using the GAD to access their home, Nauman continued to use the GAD, as they did all other common areas, at their discretion. (RP 455-56, 461-62)

D. Nauman Sought To Construct A Boathouse On Their Property, And Proposed Using The Common Area GAD To Access The Boathouse.

Nauman decided to build an accessory structure on their property to store their boat. (RP 334-36) Nauman designed a boathouse for their 24-foot Sea Sport with the assistance of the home designer who had also assisted in the design of their residence. (RP 148, 335-36, 608) The boathouse was designed to complement the existing residence, using the same style and color. (RP 336, 383, 611, 612-13)

Nauman's residence is on Lot 11. (RP 121-22) The Board had previously told Nauman that no accessory structure would be allowed on Lot 10 unless there was a primary residence on the lot. (RP 337) Nauman, therefore, decided to locate the boathouse on the northeast corner of Lot 11. (RP 336-37) In this location, the proposed boathouse would face east, requiring access over the

common area and across the GAD. (RP 339, 371, 401) Nauman could not access the proposed boathouse from their existing driveway because of primary and reserved septic fields in that area that would limit the turning radius for a boat trailer. (RP 337-42, 371-73, 406-08, 471-72, 1317-18, 1324-25) The trial court found that the “orientation of the planned boathouse, such that ingress/egress is to the east across the GAD, is the most practical orientation in light of limitations of space, turning radius of boat trailers, and complications posed by the location of Lot [11]’s⁴ reserve drain system.” (FF 27(e), CP 979-80)

During the summer, Nauman use their boat to fish in Alaska, which is where the boat would be located from May through August or September. (RP 269, 335-36, 342-43) During the winter, when the boat is rarely used, the boat would be stored in their proposed boathouse to allow Nauman to maintain and repair the boat. (RP 342-43) Nauman testified that their proposed use of the GAD would not unreasonably interfere with Francis’ use of the GAD. (RP 182, 342-43, 345) The trial court agreed, finding that the

⁴ In the findings, there is a typographical error stating that the reserve drain system was on Lot 12. In fact, all of the evidence showed that the reserve drain system was on Lot 11, not Lot 12. (See e.g. RP 337-42, 371-73, 406-08, 471-72, 1317-18, 1324-25)

“proposed frequency of ingress/egress is reasonable and would not constitute an unreasonable interference with the GAD and the Frances’ use of the GAD.” (FF 27(f), CP 980)

E. By The Time Nauman Presented Their Boathouse Plan To The Board, They Were At Odds With Both The Board And Francis Due To The Board’s Preferential Treatment Of Francis.

The Association’s CCR’s require that members obtain approval from an “Architectural Reviewer” prior to making any improvements on their property. (Ex. 2, § VI) When Nauman presented their boathouse plans in late October 2007, the Architectural Review Committee (ARC) – Williams, Marshall, and Alfreds – met with the Association’s lawyer to discuss the Nauman boathouse plans. (RP 66-67) According to Williams, the Board met with their lawyer because “counsel has been involved for a number of years with problems between the Association and Nauman.” (RP 87)

For the first time since the Board took over Architectural Review in 2003, the Board decided to “outsource” architectural review of the Nauman boathouse. (RP 67-68, 754-55) The decision to outsource architectural review of the boathouse was based on what was described as the “nature” of Nauman, including

Marshall's claim that they were "prone to digging down in minutia" to disagree with the Board's actions. (RP 782) In particular, Nauman had previously expressed concern that the Board favored its "friends," and did not act in the best interests of all of its members. (See Ex. 60; RP 309-11) For example, the Board's approval of the Francis construction on Lot 12 a year earlier had become a source of conflict. In approving Francis' proposal to build a large home on Lot 12, the Board took the position that it was "fine" with the plan since "a large home on Lot 12 affects nobody really except the Naumans." (RP 309, 779, Ex. 92(27))⁵ The Board had previously rejected Francis' earlier plan to build a large home on Lot 7 – which would have been located between the

⁵ The Board informally approved the Francis construction during a "meeting" with Francis on Alfreds' yacht, but the Board did not notify Nauman of this meeting or their planned approval. (See RP 798-99; Ex. 92(32): "Although the house plan was approved on Kim's yacht a couple of months ago, it may be a good idea to get it all in properly in the case that anything [is] challenged by any concerned party") Although the Board "encouraged" Francis to notify Nauman of their plans to build a "large home" (8,600 square feet) on Lot 12, which would "obviously" impact Nauman, the Board did not "require" Francis to do so, nor did the Board make any effort to notify Nauman of Francis' plans. (RP 780-71, 788-89; CP 275)

In fact, Francis made no effort to discuss construction plans with Nauman until just prior to commencing construction. (See RP 316, 317, 799-800) At the conclusion of their one and only meeting, which by all accounts was contentious, Francis advised Nauman "that this building had been approved by Architectural Review Committee and [Francis] had their permit from the county and they were going ahead and there was nothing [Nauman] could do about it." (RP 317)

properties of Board members, Williams and Marshall. (RP 773, 774-75)

In its letter to Nauman advising of the Board's decision to outsource review, the Board expressed that its "first concern" regarding the proposed boathouse was its location and Nauman's proposed use of the GAD to access their boathouse. (RP 74-75) The Board noted that the "professional reviewer may share that concern." (RP 75)

That their use of the GAD was a "concern" for the Board was a surprise to Nauman, as it was common area for the benefit of all members, and Nauman had historically used and maintained the GAD without any objection. (RP 133, 344-45, 455-56, 461-62) The trial court found that "the Association had never previously asserted the GAD to Lot 12 (or the similar GAD to Lot 1) was an exclusive easement prior to the Naumans' boathouse application." (CL 11(b)(iii), CP 987)

The Board's newly adopted position that the GAD was exclusively for the benefit of Francis' Lot 12 was of significant concern to Nauman because it favored two members of the Board – Francis and Alfreds – to Nauman's detriment. Alfreds, who was also a member of the Architectural Review Committee, used a

similar GAD to access his property. (RP 1304) Nauman believed Alfreds' involvement on this issue was a conflict of interest, because if the GAD east of Lots 11 and 12 was determined to be for the exclusive benefit of Francis' Lot 12, then the GAD east of Alfreds' property would also be considered for the exclusive benefit of his lot. (RP 1304) The trial court agreed, finding that "Mr. Alfreds improperly stood to gain from the Association's determination [that the GAD was an exclusive easement] by his ownership of Lot 1 and the GAD to Lot 1. Mr. Alfreds' failure to recuse himself was in bad faith and an abuse of his director responsibilities and duties." (CL 11(b)(iv), CP 988)

F. The Association Sued Nauman For "Minor" Work Performed On The Nauman Property And Common Area While Awaiting Approval For The Boathouse.

On December 6, 2007, while waiting for approval of the boathouse application, Nauman cleaned up the area where the boathouse was proposed to be located because Francis had previously complained that the area was "overrun with noxious weed and grasses." (RP 93-94. 164, 166-67) Nauman also "smooth[ed]" out the ground to better view the area where the boathouse was proposed to be located. (RP 164, 166-67, 206, 404) Nauman "scraped" the area and deposited excess dirt on the

common area in a “tidy” fashion under a tarp, for “temporary storage.” (RP 167, 170-71, 175, 206, 208) Nauman believed this was acceptable as it was the “normal practice” among members of the Association to use the common area when doing work on their property. (RP 171, 207)

The trial court found that Nauman’s “actions and expectations were reasonable and in good faith.” (FF 15, CP 971) The trial court found that depositing dirt in the common area “was consistent with prior similar uses by members that did not require approval of the Association,” was only “temporary,” and did not “unreasonably interfere with other members’ use of the common area.” (FF 15(b), (c), (d), CP 971, *unchallenged*) The trial court found that the “scraping of sod in the anticipated location of the planned boathouse was minor in nature and substantially less in order of magnitude than work performed by other members.” (FF 15(f), CP 972, *unchallenged*)

The Board took the position that Nauman violated the CCR’s by doing ground work on their property and by depositing dirt on the common area. (RP 81-82) Williams described this as Nauman throwing “the gauntlet down,” which made the Board “extremely upset.” (RP 82) The following day, the Board, including Francis,

signed a resolution that the work performed by Nauman was a “flagrant breach” of the CCR’s and directed the Association’s attorney to “take the maximum permissible and/or remedial action that is allowed.” (Ex. 102) The Board also “ratifie[d] and approve[d]” an unprecedented \$10,000 fine against Nauman. (Ex. 102)

Eight days after Nauman’s alleged violation, and despite Nauman’s explanations that they had not intended to violate the CCR’s, the Association sued Nauman in Whatcom County Superior Court. (RP 91; CP 2749) The trial court found that the Association’s initiation of suit against Nauman was “inconsistent with the Association’s handling of prior instances of breaches” by other members, and was retaliatory against Nauman. (FF 17, CP 973, *unchallenged*)

G. Francis And The Board “Improperly Influenced And Prejudiced” The Architectural Reviewer To Deny Nauman’s Boathouse Application.

After deciding to outsource architectural review, the Board hired Craig Telgenhoff⁶ to review the Nauman boathouse plan. (See RP 1049-50) Telgenhoff was aware of the Association’s lawsuit against Nauman. (RP 1056) Prior to commencing his

⁶ The Association twice describes Telgenhoff as an “architect,” (Association App. Br. 11, 34), but at trial, Telgenhoff testified that he was not a “licensed architect.” (RP 1042)

review, Telgenhoff spoke with Francis at length regarding their “concerns” with Nauman’s proposed boathouse, including Nauman’s proposed access over the GAD. (RP 348, 1051-52) The following day, during Telgenhoff’s first site visit, Telgenhoff met once again with Francis to hear their concerns. (RP 1054-55)

At his first meeting with Nauman, Telgenhoff told Nauman that “neither the [Board] or the neighbors were particularly happy that [Nauman] had made this application [and] that there was very little likelihood that it was going to be approved.” (RP 350) It was clear from this discussion that the boathouse plan would not be approved if Nauman wanted to access the boathouse using the GAD. (RP 350-51, 1309-10, 1311) Based on this conversation, Nauman believed that Telgenhoff had already been convinced that the GAD was an exclusive easement that benefitted Lot 12 only. (RP 351) Nauman was concerned that Telgenhoff would not provide a “pragmatic and objective decision” on the boathouse plan, and that he was merely brought into “speak[] on behalf of the board” and Francis, and that Telgenhoff already accepted the “predetermined conclusions” of the Association and Francis. (RP 352, 1307)

In reviewing the Nauman boathouse plan, Telgenhoff applied the Shoreline Management Act to determine setbacks and height restrictions - even though the boathouse is located outside of the shoreline area - based on a document titled "Architectural Guidelines," which was independent of the Association's CCR's, but was provided to Telgenhoff by the Board. (RP 1057, 1058-59, 1154-55) These Architectural Guidelines, as well as the "Architectural Checklist" that Telgenhoff also applied, have never been formally adopted by the Association. (RP 289-91, 1302-03) Furthermore, the application of the Shoreline Management Act was never applied to any other project proposed by members. (RP 1302-03) Telgenhoff himself testified that Francis' accessory garage, which had been approved a year earlier by the Board, did not comply with the setback and height restrictions of the Shoreline Management Act, and had the Act been applied, the Francis construction should not have been approved. (RP 1088, 1108-09, 1181; *see also* RP 794-96)

Nauman believed that Telgenhoff was being "coached or guided" by the Board. (RP 361) Nauman's concern was well-founded, Telgenhoff had met with Williams and Francis at Williams' home to discuss a "draft" decision prepared by Telgenhoff that had

not yet been shared with Nauman. (RP 1059-60) During this meeting, Williams and Francis directed Telgenhoff to look again at the Shoreline Management Act and other county regulations, as they believed there were stricter guidelines for height restrictions and setbacks than Telgenhoff had described in his "draft" decision. (RP 1060-62) Based on this direction, Telgenhoff revised his decision. (RP 1064)

Ultimately, Telgenhoff denied Nauman's proposed boathouse plan, citing the setback and height requirements of the Shoreline Management Act and the fact that Nauman proposed to use the GAD for access. (RP 355, 358; *see also* Ex. 12) Consistent with the Board and Francis' position, Telgenhoff concluded that the GAD was for the exclusive benefit of Francis and Lot 12. (RP 355, 1081, 1134-35; *see also* Ex. 92(83) (email from Williams to Telgenhoff): The Board's "position is ongoing that the access drive is for Lot 12's benefit only. Can't hurt for you to send the board's position on that.")

Nauman did not believe that Telgenhoff provided an independent fair and reasonable assessment of their proposed boathouse plan. (RP 362) The trial court agreed, noting that despite the fact that the Association attempted to avoid an

appearance of bias by appointing an independent reviewer, in fact “Mr. Telgenhoff’s denial of the boathouse application, in whole or in substantial part, was unduly and intentionally influenced by the Association.” (FF 25, CP 976) The trial court concluded that the Association “likely improperly influenced and prejudiced” Telgenhoff’s decision. (CL 11(b)(v), CP 988)

H. Nauman Counterclaimed Against The Association For Denying The Boathouse Application Unreasonably And In Bad Faith.

After several discussions with the Board and Telgenhoff, Nauman determined that the Board would never approve the boathouse plan. (RP 395) The Association asserts that Nauman could have “resubmit[ted] their application to address” the concerns raised by Telgenhoff in his denial (Association App. Br. 30), but Telgenhoff testified that no matter what Nauman did to address issues with the design of the boathouse, the application would not be approved if Nauman insisted on using the GAD for access. (RP 1085) Nauman did not resubmit boathouse plans with any proposed changes seeing “no value” in resubmitting plans when the issue was access. (RP 370-71, 390; *see also* Ex. 92(58): “Basically your boathouse as proposed has been rejected. There is no further ARC or Board action pending on this proposal. Should you wish to

submit a revised boathouse proposal which corrects the problems with the original proposal, the ARC consultant and Board will be glad to review it.”) Nauman counterclaimed in the Association’s trespass suit once the Association made clear that any negotiations on the boathouse would require Nauman to “sign a document which says that the gravel access drive is for the exclusive use of Lot 12 [] and restricted some of [Nauman’s] activity on the common area.” (RP 362)

I. Francis Intervened In This Action After The Association Declined To Take The Position That The GAD Was An Exclusive Easement.

As a Director on the Board, Francis was involved in the governance of the Association. When Nauman made some efforts prior to filing their countersuit to resolve the outstanding disputes, Francis stated to other directors: “We do not believe it is in the best interest of the community to look the other way when it comes to enforcing the rules. We appreciate that the Nauman’s are causing a waste of time and money but I believe the board must stay the course and not allow them to get away with it.” (Ex. 92(56))

After Nauman filed their countersuit, Francis apparently became concerned when the Association’s attorney declined to refer to the GAD as an easement in its initial pleadings. (RP 1295-

96) In an email, Francis stated that “it would be better if the attorneys acknowledged the gravel access drive as an easement and not refer to it as a common area.” (RP 1294) Francis obtained their own attorney and intervened, seeking a determination that the GAD east of their lot was an exclusive easement for the benefit of Lot 12. (RP 1294; CP 234)

V. ARGUMENT

A. The Association Failed To Act “Reasonably And In Good Faith” In Denying The Nauman Boathouse Application.

An Association has the duty to treat members fairly and to act reasonably in the exercise of its discretionary powers, including design-control powers. Restatement (Third) of Property (Servitudes) § 6.13 (1)(b),(c) (2000). Here, the trial court properly invalidated the Association’s refusal to approval the Nauman boathouse application after finding that the Associations’ authority was not exercised reasonably and in good faith. *Riss v. Angel*, 131 Wn.2d 612, 625, 934 P.2d 669 (1997).

The crux of the Association’s appeal is its claim that it acted reasonably in denying the Nauman’s boathouse application. But the reasonableness of the Association’s actions is a question of fact. *Green v. Normandy Park*, 137 Wn. App. 665, 693, ¶ 65, 151 P.3d

1038 (2007), *rev. denied*, 163 Wn.2d 1003 (2008). “In a bench trial where the court has weighed the evidence, this court’s review is limited to determining whether substantial evidence supports the trial court’s findings of fact and whether the findings of fact support the trial court’s conclusions of law.” **Day v. Santorsola**, 118 Wn. App. 746, 755, 76 P.3d 1190 (2003), *rev. denied*, 151 Wn.2d 1018 (2004). This court “reviews all reasonable inferences in the light most favorable to the prevailing party. Though the trier of fact is free to believe or disbelieve any evidence presented at trial, appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact.” **Jensen v. Lake Jane Estates**, 165 Wn. App. 100, 104-05, 267 P.3d 435 (2011) (*citations omitted*).

Here, the trial court heard eight days of testimony and considered hundreds of exhibits and found as matter of fact that the Association acted unreasonably and in bad faith in denying the boathouse application. The trial court properly invalidated the Association’s denial of the Nauman boathouse application, and this court should affirm.

1. The Association Improperly Imposed “More Restrictive Guidelines And Standards” On The Nauman Boathouse Application Than It Had On Other Applications.

The Association's denial was unreasonable because the standard applied to Nauman's boathouse application was not enforced consistently. *Riss*, 131 Wn.2d at 625. The Association “wrongfully and purposely applied more restrictive standards and protocols” to Nauman's boathouse application by imposing Architectural Guidelines, which were never formally adopted by the Association, and which had not “historically been applied by the Association to applications by other members.” (FF 22, 23, 27(b), CP 974-75, 978)

The Association never formally adopted the Architectural Guidelines. (RP 290-91) Instead, it only sought to ratify the Architectural Guidelines *after* Nauman filed their counterclaims. (See Ex. 92(74); RP 291) Nevertheless, the Association applied these Guidelines, which are more specific and rigorous than the provisions set forth in the CCR's, to the Nauman boathouse application in order to deny it. (See Ex. 12; *Compare* Ex. 5 with Ex. 2, § II, VI) See *Riss*, 131 Wn.2d at 625 (“a consent to construction covenant cannot operate to place restrictions on a lot which are

more burdensome than those imposed by the specific covenants”); **Green**, 137 Wn. App. at 694, ¶¶ 70 (Association acted reasonably when it did *not* “attempt to impose more burdensome setback requirements than those imposed by the specific setback provisions of the covenants themselves”).

The Association claims that “formal adoption” of the guidelines was not necessary because the CCR’s provide that 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*.” (Association App. Br. 24, *citing* Ex. 2, *emphasis added*) But the Architectural Guidelines imposed greater restrictions than those set forth in the CCR’s by mandating the setback and height restrictions under the Shoreline Management Act even though the boathouse was not proposed to be located within the zone contemplated by the statute. (Ex. 5) This was a “significant change” from anything set forth in the CCR’s, which contains no setback or height restrictions, and went beyond merely “accomplishing” the “objectives” of the CCR’s. (See RP 290; Ex. 2, § VI)

Because the Architectural Guidelines imposed greater restrictions than those set forth in the CCR’s, the guidelines served to

amend the CCR's, thus requiring formal adoption in an "instrument [] signed by not less than eighty percent (80%) of the owners of the lots in the Subdivision [and shall] be filed with the Whatcom County Auditor." (Ex. 2, § XIII) See *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 792-93, ¶ 17, 150 P.3d 1163 (2007) ("In order for an amendment to be valid, it must be adopted according to the procedures set up in the covenants and it must be consistent with the general plan of the development.")

Further, because the guidelines "limit[ed] the manner in which [Nauman] may use [their] land," it was also a restrictive covenant that was only enforceable if it "satisf[ie]d the statute of frauds." *Dickson v. Kates*, 132 Wn. App. 724, 731, 733, ¶¶ 14, 21, 133 P.3d 498 (2006) (homeowners were not bound to a restrictive view covenant when the deed lacked a sufficient legal description, thus violating the statute of frauds); (RP 289-90). Thus, any adoption of the Guidelines had to be in writing.⁷

⁷ The need for written evidence of adoption of the Architectural Guidelines was especially appropriate here when it is unclear whether these more restrictive guidelines were intended to be applied by the original developers. The unsigned Architectural Guidelines are dated February 1, 1989. (See Ex. 5) The CCR's were recorded three years later, on February 20, 1992. (Ex. 2) Had the original developer intended for the more restrictive Architectural Guidelines to apply, the developer could have incorporated it into the CCR's, but it did not.

In any event, the trial court did not find that the Association acted unreasonably solely because the Architectural Guidelines were not formally adopted. Instead, the trial court found it unreasonable that the Association applied the more restrictive provisions of the Architectural Guidelines only to the Nauman boathouse application. As the Association acknowledges, “an unreasonable denial of a project by an association exists [] where property owners were treated inconsistently.” (Association App. Br. 29, *citing Riss*, 131 Wn.2d at 627-28) The Association cites to evidence where the “guidelines” or “checklists” are referenced for prior applications, but fails to establish that it required any other applicant to meet the restrictive standards of the Shoreline Management Act when the proposed structure is outside of the shoreline zone, as mandated by the Architectural Guidelines. (See Association App. Br. 7, *citing Ex. 33, 40, 45*) Even the building designer who assisted Nauman in the design of their home and boathouse, and who also assisted in the design of the Alfreds, Lee, and Marshall homes, was unaware of the existence of the Architectural Guidelines. (RP 608-09, 622)

2. The Association's Denial Of Nauman's Boathouse Application Was Retaliatory "In Response To Prior Years Of Animosity," And "Showed Favoritism To Influential Members" Who Would Benefit Most From A Denial Of The Application.

As the Restatement of Facts show, there was substantial evidence that the Association's denial of the Nauman boathouse application was "retaliatory." (FF 29, CP 980-81) (See Restatement of Facts § F) Clynt Nauman asserted that the Association denied the boathouse application in retaliation, in part, for the limited work that was performed on their property and in the common area on December 6, 2007. (RP 347-49) The trial court agreed, finding that the Association's actions following this event reflected the "Association's prejudice and retaliation against the Naumans." (FF 16, 18, CP 972, 973)

The Association's denial of the Nauman boathouse application was unreasonable and in bad faith, especially to the extent it was based on its claim that Nauman was excluded from using the GAD, because it "showed favoritism to influential members" (FF 29, CP 980), who were "adamantly opposed" to Nauman's plans. See *Day*, 118 Wn. App. at 761-62 (Committee breached its duty of good faith when one of its members was "adamantly opposed" to the plan and "could not be an objective

Committee member”). Both Francis and Alfreds, who were members of the Board, benefited from a determination that the GADs were exclusive easements. An exclusive easement would fit Francis’ “vision” for their property. As Rosemarie Francis stated in a declaration, “when we purchased the lot we wanted a very high end home with an exclusive private driveway entrance.” (CP 274)

The trial court rejected the Association’s claim that “it retained an independent architectural reviewer from outside of the membership, precisely to avoid any claim of bias or prejudice in the decision-making.” (Association App. Br. 33) In defense of their decision to deny Nauman’s use of the GAD to access their proposed boathouse, the Association claims that its decision “was informed by the architectural reviewer – an opinion on which they were entitled to rely.” (Association App. Br. 39) But in fact it was the Board and Francis who informed the reviewer’s decision on the GAD, not the other way around. (See Restatement of Facts § G)

This case is different from *Heath v. Uruga*, 106 Wn. App. 506, 24 P.3d 413 (2001), *rev. denied*, 145 Wn.2d 1016 (2002) (Association App. Br. 29) where the court affirmed a denial of a consent to construct by a committee member who had a personal interest in the construction. There, two other members

“independently investigated” and rejected the plans. *Heath*, 106 Wn. App. at 518. Further, the trial court found that the member with a personal interest acted “fairly.” *Heath*, 106 Wn. App. at 517. Here, there was no “independent investigation,” because the trial court found that the Association “improperly influenced and prejudiced” Telgenhoff’s decision to deny Nauman’s boathouse application. (CL 11(b)(v), CP 988; FF 25, CP 976) Further, and more importantly, the trial court here did not find that the interested members – Alfreds and Francis – acted “fairly,” as in *Heath*. Instead, the trial court found that Alfreds acted in bad faith and “abuse[d] his director responsibilities and duties,” by not recusing himself. (CL 11(b)(iv), CP 988) The trial court also found that Francis was “complicit” with the Association in “improperly deny[ing] the Nauman’s boathouse application.” (CL 11(b)(v), CP 988)

The Association’s decision rejecting Nauman’s construction application was also “unreasonable and arbitrary because their decision was made without comparing the proposed home with other homes in the neighborhood.” *Riss*, 131 Wn.2d at 612. As the trial court found, “Telgenhoff failed to consider surrounding structures (such as the mass and height of the Frances’ nearby two (2) story detached accessory building on Lot 12) when he rejected

the boathouse for its 'shock value' on the basis of mass and height." (FF 27(d), CP 979; see RP 1088)

Finally, the Association claims that the fact the trial court agreed with some of the proposed variances recommended by the architectural reviewer who replaced Telgenhoff two years after Nauman filed their counterclaim "underscore[es] the appropriateness of the Association's denials." (Association App. Br. 41) This second reviewer was brought in to review the Nauman boathouse plan for the parties' mediation after Nauman countersued. (RP 649, 675) The fact that the Association finally appointed an architectural reviewer who the trial court found was "unbiased, independent" and who was allowed to make decisions without "undue influence" two years after the countersuit was filed does not absolve the Association of its bad faith prior to commencement of the suit. (See FF 27(b), CP 979)⁸

In any event, a denial of a consent to construct may be unreasonable and in bad faith even if the trial court makes minor

⁸ For example, without the Association's "undue influence," the second reviewer, Landsem, expressed his opinion that there was no evidence that the GAD was an easement. (RP 658-59, 663, 667-68) Landsem also suggested a reasonable reduction in the height of the boathouse originally proposed by Nauman to a little over 28 feet (RP 691), as opposed to Telgenhoff who asserted that Nauman's boathouse could not exceed 15 feet in height. (RP 1076)

modifications to the applicant's original plans. See *Riss*, 131 Wn.2d at 638 (affirming determination that Association's refusal to approve homeowner construction plans was unreasonable and in bad faith even though trial court agreed that the exterior finish proposed by homeowner was not proper); *Day*, 118 Wn. App. at 754, 768-69 (affirming the determination that Association's refusal to approve homeowner construction plans was unreasonable and in bad faith even when the trial court's judgment entitling homeowner to build contained a condition that the height of the structure be less than homeowner originally planned). The Association had tainted the architectural review process up to and through the time Nauman filed their counterclaim, and the trial court properly found that its denial was unreasonable and in bad faith.

B. The Trial Court Properly Concluded That The GAD Was Not An Easement, Exclusive Or Otherwise, And The Association Could Not Prevent Nauman From Using The GAD To Access Their Proposed Boathouse.

1. Nauman Has Standing To Challenge Francis' Assertion That The GAD Is An Easement.

Nauman has standing to challenge Francis' claim that the GAD located within common area east of their property, which they regularly used since first acquiring their property from the original

developers, is an easement for the benefit of Francis.⁹ “A party has standing to raise an issue if it has a distinct and personal interest in the outcome of the case. Stated another way, a party has standing if it demonstrates a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted.” ***Timberlane Homeowners Ass'n, Inc. v. Brame***, 79 Wn. App. 303, 307-08, 901 P.2d 1074 (1995), *rev. denied*, 129 Wn.2d 1004 (1996) (*citations omitted*) (Francis App. Br. 32).

Nauman has a “distinct and personal interest” in the determination of whether the GAD is an easement for the exclusive benefit of Francis. (Ex. 2, § III) Nauman has standing under the CCR’s to enforce their rights to the continued use and enjoyment of the common area, including the GAD, against the Association’s or

⁹ Francis argues that the “trial court erred in failing to grant Francis’ Motion in Limine to prevent the Association from arguing that the GAD was not an easement.” (Francis App. Br. 27-31) However, Francis cites no order in the record reflecting the trial court’s ruling. In its assignment of error, Francis cites only to its motion – not to any order. (See Francis App. Br. 3, *citing* CP 213-14) In any event, in response to the motion, the Association stated it had “no intention of arguing or presenting evidence regarding the character of the gravel access drives at the subdivision.” (CP 1903) Francis fails to show that they are aggrieved.

Francis' claim that the GAD was an exclusive easement to the exclusion of Nauman. (Ex. 2 § X)¹⁰ See **Mack v. Armstrong**, 147 Wn. App. 522, 527-28, ¶ 12, 195 P.3d 1027 (2008) (holding that the Covenant's language allowing owners to enforce covenants in law or equity gave the owners standing), compare **Timberlane**, 79 Wn. App. at 308 (Francis App. Br. 32) (Association had no standing because the Covenants only granted the Association authority to "maintain" common property, not "enforce" members' easement rights). Even beyond the CCR's, "the general rule is that the owners of individual parcels are all individually entitled to enforce the restrictive covenant benefiting their properties." **Mack**, 147 Wn. App. at 528 (citing Restatement (Third) of Property: Servitudes § 5.7 (2000)).

2. The Trial Court Properly Concluded That The GAD Was Not An Easement, Exclusive Or Otherwise, For The Benefit Of Lot 12.

a. The Plat Did Not Establish An Easement For The Benefit Of Lot 12.

The "Gravel Access Drive" described on the plat for the subdivision did not create an easement for the benefit of Lot 12. An easement is an interest in land and is therefore subject to the

¹⁰ Under the CCR's, the Association is prohibited from "subdivision or partition of the common areas." (Ex. 2, § III(A))

statute of frauds. **Berg v. Ting**, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). “Under RCW 64.04.010, every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed. Every deed shall be in writing, signed by the party bound thereby, and acknowledged.” **Berg**, 125 Wn.2d at 551 (*citations omitted*).

Here, it is undisputed that there is no deed conveying the GAD to Lot 12 as an easement. Instead, Francis argues that the plat “created an exclusive easement for Lot 12.” (Francis App. Br. 35) Francis asserts that “a private easement can be created simply by drawing and indicating the route on the face of the plat.” (Francis App. Br. 35, *citing M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 145 P.3d 411 (2006), *rev. denied*, 161 Wn.2d 1012 (2007); **Moore v. Clarke**, 157 Wash. 573, 289 Pac. 520 (1930)) But in order to create an easement, the grantor must specifically intend to create an easement. **Zunino v. Rajewski**, 140 Wn. App. 215, 222, ¶ 28, 165 P.3d 57 (2007). No particular words are required, but there is no question that “words which *clearly* show an intention to give an

easement” must be used.¹¹ **Zunino**, 140 Wn. App. at 222, ¶ 28, (citing **Beebe v. Swerda**, 58 Wn. App. 375, 379, 793 P.3d 442, rev. denied, 115 Wn.2d 1025 (1990)) (*emphasis added*); RCW 58.17.165 (if plat is subject to dedication, “the certificate or a separate written statement shall contain the dedication of all streets”).

In **Zunino**, Division Three held that a “private road and utility easement” document did not create an easement because the document “did not show an intent to convey an easement.” 140 Wn. App. at 222, ¶ 29. While the documents had words to the effect that “this easement was created as medium of ingress and egress,” and was signed by an “owner of record of the property involved with the easement,” the “documents failed to convey an easement because the words do not demonstrate a present intent to grant or reserve an easement.” **Zunino**, 140 Wn. App. at 222, ¶ 29; See also **McPhaden v. Scott**, 95 Wn. App. 431, 434, 975 P.2d 1033 (1999), (recorded map titled “Access Easement – Lots 251-256,” which included language describing the easement, but no

¹¹ Francis claims that the trial court should have applied a “preponderance of evidence” standard (Francis App. Br. 36), but they cite no authority for this proposition, and their claim is inconsistent with **Zunino**, 140 Wn. App. at 222, ¶ 28.

dedication language, was not sufficient to create an “express easement”), *rev. denied*, 138 Wn.2d 1017.

Francis’ reliance on *M.K.K.I., Inc. v. Krueger* is misplaced. There, the court held that the plat had “appropriate dedication language” that the owners “hereby grant and reserve the easements as shown hereon for uses indicated.” *Krueger*, 135 Wn. App. at 654, ¶ 21. On the face of the plat, certain areas were marked “access ease, utility ease, well access ease.” *Krueger*, 135 Wn. App. at 655, ¶ 26. Accordingly, the court held that the dedication language coupled with the description of the marked areas on the plat as “ease” was “sufficient to establish” easements for the benefit of the plaintiff. *Krueger*, 135 Wn. App. at 656, ¶ 28.

Here, to the contrary, there is no “dedication language” on the plat to convey an easement. (See Ex. 1) At most, the legal description on the face of the plat merely states that it is “subject to restrictive covenants and easements of record. AF 920220046.” But it is undisputed that the only “easements of record” are the “drainage easements” described in the CCR’s recorded at 920220046, and on the face of the plat.

Further, the GAD is not described as an “easement,” exclusive or otherwise, on either the plat or in the CCR’s. If the

original developers intended for the north and south GADs to be easements, they could have described them as “easements,” as they did for the drain field and drainage easements. See *e.g. Moore*, 157 Wash. at 578 (easement encumbering servient estate existed when the plat showed dotted line marked as “sewer easement,” and holding that sale can be set aside when purchaser was unaware of encumbrance on title). In any event, even if the word “access” in “Gravel Access Drive” implies that it is an “easement,” without the requisite dedication language showing an intent to convey the easement, no easement was created, and certainly not an exclusive easement. See *Zunino*, 140 Wn. App. at 222, ¶ 29.

Francis claims that the word “easement” is not necessary to create an easement, and that in *Rainier View Court Homeowners Ass’n, Inc. v. Zenker*, 157 Wn. App. 710, 238 P.3d 1217 (2010), *rev. denied*, 170 Wn.2d 1030 (2011), “an easement was found by indication of an area on a plat map as nothing more than ‘Tract B’ and the word ‘park.’” (Francis App. Br. 37-38) But that is not true. Division Two held that an easement was created by the dedication, which specifically stated an intent to convey an “easement.” *Rainier*, 157 Wn. App. at 721, ¶ 20.

b. The Trial Court Properly Determined That There Was Insufficient Evidence To Support A Determination That The GAD Was An Easement.

Whether a grantor intended to create an easement must be determined from the language of the instrument. A court should only resort to extrinsic evidence if intent cannot be determined from the instrument. *Sunnyside Valley Irrigation Dist. v. Dicke*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Here, by its silence, the plat is unambiguous in that an easement for Lot 12 was neither created nor conveyed. Extrinsic evidence cannot be used to establish a contrary result. *Selby v. Knudson*, 77 Wn. App. 189, 194-95, 890 P.2d 514 (1995).

Although under the circumstances the trial court should not have considered extrinsic evidence, it in fact did, and in any event, properly reached the conclusion that the GAD was not an easement. It is the province of the trial court to weigh the evidence. So long as its findings of fact are supported by substantial evidence this court should "not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently." *Sunnyside Valley Irr. Dist.*, 149 Wn. 2d at 879-80.

After weighing the evidence, the trial court properly discounted the testimony of Richard Prieve, who had apparently been involved in preparing the plat for the subdivision, because it was not consistent with the language of the plat. Prieve did not explain what was written on the plat. Rather, he described what he alleges was *intended* to be written. Prieve not only claimed that the GAD was intended to be an easement, but that it was an easement for the exclusive benefit of Lot 12.¹² But the court must focus on the objective manifestation in the agreement, rather than on the subjective intent of the parties. ***Hearst Communications, Inc. v. Seattle Times Co.***, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). In other words, the court declares the meanings of what was written, not what was intended to be written. ***Hearst***, 154 Wn.2d at 504.

The trial court recognized that Prieve's interpretation would require the court to "add words to the Sunset Pointe plat," which it

¹² Although Prieve initially testified that the GAD was an exclusive easement because it was intended to be an "individual driveway" that could not be shared (RP 1015-16), he also testified that the GAD was required by the County to ensure that those lots on the furthest end of the subdivision had access to the private road to avoid any access directly to the public road over the drainfield. (RP 1021-22) The latter point was consistent with the written language of the plat that "all lots shall access onto Pointe Road North the only access to Semiahoo Drive shall be via Pointe Road North" (Ex. 1), but this did not create or convey an exclusive easement.

properly declined to do. (FF 27(a), CP 978) Instead, the trial court determined that the words, "Gravel Access Drive," did not create an exclusive easement "and the reference appears to be simply to show the extended access drive necessary to access the Lots 1 and 12 at the extreme northern and southern ends of the Sunset Pointe development." (CL 11(b)(ii), CP 986) This finding is supported by substantial evidence. (See Ex. 1; RP 1021-22)

Furthermore, as the court elicited in questioning Prieve, his claim that the GAD's were private driveways that could not be shared made no sense in light of the fact that Lot 2, like Lots 1 and 12, was separated from the private road. (See Ex. 1) If Lot 2 could not share the GAD with Lot 1, it would essentially be landlocked, and would somehow have to "make [do]" on its own:



As the trial court noted, "how in the world is Lot 2 [] going to have access to their property [if the GAD is only for Lot 1]?" (RP 189)

Also, the trial court properly found that the decision on preliminary plat approval was not conclusive on the question of whether the GAD was an exclusive easement for Lot 12. (Francis App. Br. 41) As a purported condition of approval for the final plat, the County required that “a blanket easement or a series of specifically located easements shall be established to ensure that each lot has legal and physical access to the private road through the common area.” (Ex. 71) But the final plat did not include a “blanket easement” or “specifically located easements.” (See Ex. 1) Instead, the common area is shown on the plat, the face of the plat states that “all lots shall access onto Pointe Road North the only access to Semiahoo Drive shall be via Pointe Road North,” and the CCR’s provided that among the purpose of the common area is “maintenance and operation of the road system.” (Ex. 1, 2)

The trial court noted, Prieve “acknowledged that he did not have personal knowledge of any changes that may have been agreed to by the County and the original developer between the preliminary plat approval and final plat approval.” (FF 27(a), CP 978) Accordingly, based on this evidence, the trial court determined that the developers’ dedication of common area for the “operation of a road system” was acceptable to the County in lieu of

the creation of easements. **Jensen v. Lake Jane Estates**, 165 Wn. App. at 104-05 (this court reviews all reasonable inferences in the light most favorable to the prevailing party).

The trial court properly concluded that there was insufficient evidence that the GAD was an easement, and certainly not an exclusive easement. “[A]n exclusive easement is an unusual interest in land; it has been said to amount to almost a conveyance of the fee. The grant of an exclusive easement conveys unfettered rights to the owner of the easement to use that easement for purposes specified in the grant to the exclusion of all others. Because an exclusive grant in effect strips the servient estate owner of the right to use his land for certain purposes, thus limiting his fee, exclusive easements are not generally favored by the courts.” **Latham v. Garner**, 105 Idaho 854, 856, 673 P.2d 1048 (1983). “No intention to convey such a complete interest [of an exclusive easement] can be imputed to the owner of the servient tenement in the absence of a clear indication of such an intention.” **Latham**, 673 P.2d at 1051; see e.g. **Hoffman v. Skewis**, 35 Wn. App. 673, 675-76, 668 P.2d 1311 (1983) (an order granting a “permanent easement as private way of necessity for his private

use” was not sufficient to create an exclusive easement), *rev. denied*, 101 Wn.2d 1001 (1984).

Finally, the trial court properly concluded that even if the GAD were an easement, the Association could not prevent Nauman's reasonable use of the GAD, which other members of the Association were entitled to use as beneficiaries of the common area (the servient estate), so long as their use did not unreasonably interfere with Francis' use. See *Thompson v. Smith*, 59 Wn.2d 397, 407-08, 367 P.2d 798, 803 (1962) (“the rule is that where a right of way is established by reservation, the land remains the property of the owner of the servient estate and he is entitled to use it for any purpose that does not interfere with the proper enjoyment of the easement”). As the trial court found, Nauman's “proposed frequency of ingress/egress is reasonable and would not constitute an unreasonable interference with the GAD and the Frances' use of the GAD even if the GAD were a non-exclusive easement.” (FF 27(f), CP 980)

3. It Was Within The Trial Court's Discretion To Make Orders To Ensure Enforcement Of Its Judgment.

Without citing any authority, Francis complains that the trial court erred in ordering the Association to allow Nauman

“reasonable access” over the GAD to reach their proposed boathouse (Francis App. Br. 43); in failing to impose a limit on the number of times Nauman could use the GAD (Francis App. Br. 43); and in ordering that the easement recorded by the Association after trial, but before the trial court issued its ruling, is subordinate to the injunctive relief granted in its judgment¹³. (Francis App. Br. 48) These contentions are frivolous. The trial court has discretion to ensure that its judgment will be enforced in the future without the need for further litigation. **Sorenson v. Pyeatt**, 158 Wn. 2d 523, 531, 146 P.3d 1172 (2006) (trial courts have broad discretionary power to fashion equitable remedies); see e.g. **Bushy v. Weldon**, 30 Wn.2d 266, 272, 191 P.2d 302 (1948) (affirming trial court’s order requiring the parties to share in the cost of maintenance after quieting title to an easement, “it applied a proper rule of simple justice, and precludes litigation in the future”).

¹³ In an apparent attempt to circumvent any ruling by the trial court, the Association purported to convert the GAD to Lot 12 into a non-exclusive easement for the benefit of Lot 12, even though the character of the GAD was an issue squarely before the trial court. (See CP 690, 721)

C. The Trial Court's Determination That The Association Breached Covenants And Its Fiduciary Duty By Allowing "Influential Members" To Usurp Common Area Is Supported By Substantial Evidence.

1. Nauman's Claims Against The Association For Breach Of The Covenants And Breach Of Fiduciary Duty Were Timely. (Raising Conditional Cross-Appeal)

Nauman's claims against the Association for allowing the common area to be usurped by influential members to the exclusion of other members were timely. Relying on the three-year statute of limitations under RCW 4.16.080(2), the Association claims that Nauman's claims are time-barred because the alleged injury – the resolution allowing members to landscape the common area east of their lots – occurred in October 2002, more than three years before Nauman filed its counterclaims in May 2008. (Association App. Br. 43-45) But Nauman's challenge was not to the resolution itself, but to the way that the Association handled the subsequent taking over of the common area by Alfreds starting in 2003 and continuing with Francis in 2006 and beyond. The Association sanctioned the work and allowed it to move beyond "enhancement" to exclusion of other members from the common area. In other words, the Association, through a pattern of conduct, breached its duties and allowed the character of the common area

to no longer be “common.”

The Association’s misconduct is similar to a “continuing trespass,” where the “event” that commences the statute of limitations “happens every day the trespass continues. Every moment, arguably, is a new tort. Thus, the statute of limitations does not prevent recovery for a continuing trespass that ‘began’ before the statutory period.” **Woldson v. Woodhead**, 159 Wn.2d 215, 219, ¶ 9, 149 P.3d 361 (2006).

If necessary to affirm, Nauman raises a conditional cross-appeal and assigns error to the trial court’s application of the three-year statute of limitations under RCW 4.16.080(2) to Nauman’s claims against the Association for its breaches of the CCR’s and its fiduciary duty under the CCR’s. (CP 2162-65, 2312-14) See **Syrovoy v. Alpine Resources, Inc.**, 80 Wn. App. 50, 54-55, 906 P.2d 377 (1995) (this court may affirm on any ground supported by the record), *rev. denied*, 129 Wn.2d 1012 (1996).

The Association breached specific provisions of the CCR’s and its duties under the CCR’s by failing to maintain the common areas for all members. (See e.g. Ex. 2 § III: “All common areas are hereby dedicated for the beneficial use and enjoyment of the lots owners of the Subdivision;” § IV: “Association shall be responsible

for the [] maintenance and preservation of all common areas.”)

The Association's breach arose from its duties to its members under the CCR's – a written contract – for which the applicable statute of limitations is six years under RCW 4.16.040. See **Foley v. Smith**, 14 Wn. App. 285, 293-94, 539 P.2d 874 (1975) (statute of limitations for breach of covenants of warranty and quiet enjoyment is RCW 4.16.040); see also **Country Estates Homeowners Ass'n, Inc. v. McMillan**, 276 Mont. 100, 102, 915 P.2d 806, 807-08 (1996) (applying statute of limitations for breach of contract to claim for breach of restrictive covenants); **Cutujian v. Benedict Hills Estates Assn.**, 41 Cal. App. 4th 1379, 1385, 49 Cal. Rptr. 2d 166, 171 (1996) (same). Applying the appropriate statute of limitation of six years, there is no dispute that the Nauman's claims raised in their May 2008 counterclaim are timely.

2. The Trial Court Properly Concluded That The Association Breached Its Duty To Maintain The Common Area For The Benefit Of All Its Members. (Raising Conditional Cross-Appeal)

As the Association acknowledges, the deference granted to the trial court's determination that the Association breached its duty by allowing certain influential members, such as Alfreds and Francis, to usurp common area is great, and dependent upon

whether substantial evidence supports the trial court's determination. (See Association App. Br. 20, *citing Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 104, 267 P.3d 435 (2011)). Alfreds' and Francis' actions, which were sanctioned by the Association, went beyond allowing them to "enhance the landscaping on common area adjoining each member's lot" as the Association claims. (Association App. Br. 17) Francis and Alfreds "subsume[d]" the common area as part of their own property because it was no longer clear where the boundary between the common area and their lots stopped and started, which was "exclusionary" to other members. (RP 490-91, 503-05, 550, 558-59)

Further, as a direct result of the Association-sanctioned actions, for example, Francis has taken the position that the GAD is for their exclusive use. As Francis states in their opening brief: "The Association's consistent treatment of the GAD as an easement, it[s] allowance by Francis to use it as their only access to their home, and allowing Francis to improve the GAD. Allowing Francis to pave the GAD for their only access route is in and of itself a basis to conclude that the GAD is an easement for the benefit of Francis." (Francis App. Br. 42)

There was also evidence that Francis “absorbed” the common area when they took it over during the multi-year construction of their home by storing dirt, materials, equipment on the common area. (RP 807) The Association claims that the fact 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.” (Association App. Br. 20) This is a rather remarkable statement in light of the fact that this litigation was commenced because the Association sued Nauman for breach of CCR’s for taking similar actions. If this court holds that the Association did not breach the CCR’s by allowing Francis and Alfreds to take over common area, this court should also reverse the trial court’s determination that Nauman committed trespass and breached the CCR’s for their work on the common area on December 6, 2007. (CP 2016-18)

D. Nauman Was Entitled To All Of The Fees Awarded To Them Under The Lodestar Method.

An appellate court reviews an award of attorneys’ fees and costs for an abuse of discretion. *Rettkowski v. Department of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996). An appellate court will correct a trial court’s determination of attorney fees only if

the court utilized an improper criteria or method for computation of such fees. See ***Progressive Animal Welfare Soc. v. University of Washington***, 114 Wn.2d 677, 689-90, 790 P.2d 604 (1990). Here, there were no improper criteria or methods for computation of the fees awarded here, and this court should affirm. Further, the Association has not assigned error to any of the trial court's attorney fee findings of fact (CP 2775-79) (Appendix C), and they are thus verities on appeal. ***Keever & Associates, Inc. v. Randall***, 129 Wn. App. 733, 741, ¶¶ 12, 13, 119 P.3d 926 (2005), *rev. denied*, 157 Wn.2d 1009 (2006).

The Association does not dispute that Nauman was entitled to those attorney fees incurred for issues on which Nauman prevailed, nor does the Association dispute that the amount of the fees were reasonable. Instead, they complain that “the trial court failed to segregate hours incurred on unsuccessful theories and non-recoverable issues.” (Association App. Br. 47) But in unchallenged findings, the trial court found “that the attorney's fees claimed by Defendants and awarded by the Court as specified in the Conclusions of Law below *arise out of and are reasonably related to either the prosecution or defense of claims upon which*

*the Defendants prevailed at trial,*¹⁴ and that there were no “unwarranted charges.” (Attorney Fee Finding of Fact (FF) 3, 5, CP 2776, 2777, *unchallenged*) (*emphasis added*) These are verities.

In any event, no further segregation was warranted because Nauman was the substantially prevailing party and should have been entitled to all of their attorney fees. ***Hawkins v. Diel***, 166 Wn. App. 1, 10, ¶ 18, 269 P.3d 1049 (2011) (award of attorney fees to the plaintiff was warranted as the substantially prevailing party regardless of the fact that defendant successfully defended on one claim). The trial court’s award of attorney fees was well within its discretion based on a proper application of the lodestar method, and this court should affirm.

E. This Court Should Award Attorney Fees On Appeal To Nauman.

A prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. ***Wiley v. Rehak***, 143 Wn.2d 339, 348, 20 P.3d 404 (2001). This court should award Nauman attorney fees for having to defend this

¹⁴ Nauman’s counsel had already segregated out those fees that were unrelated to the issues on which Nauman prevailed prior to filing their fee request. (CP 522: “[F]ees have already been discounted and segregated for work not related to the issues upon the Nauman prevailed in this suit”) The fees that were requested and awarded were related to those issues on which Nauman prevailed.

appeal under the CCR's:

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.

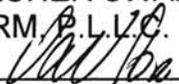
(Ex. 2, § X) RCW 4.84.330 (prevailing party entitled to attorney fees if provided for under a contract); RAP 18.1.

VI. CONCLUSION

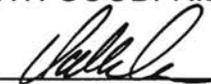
Substantial evidence supports the trial court decision holding the Association accountable for its actions in wrongfully withholding consent to Nauman's construction plans, and in breaching the CCR's and its duties under the CCR's by allowing influential members to usurp common area. The trial court also properly concluded that the GAD was not an easement, exclusive or otherwise. This court should affirm and award attorney fees to Nauman.

Dated this 29th day of May, 2012.

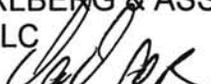
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Attorneys for Respondents/Cross-Appellants Nauman

DECLARATION OF SERVICE

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

That on May 29, 2012, I arranged for service of the foregoing Amended Brief of Respondents, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Lawrence A. Costich/Jamila Johnson Schwabe, Williamson & Wyatt, PC 1420 Fifth Avenue, Suite 3400 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Peter R. Dworkin Belcher Swanson Law Firm, P.L.L.C. 900 Dupont Street Bellingham, WA 98225	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Kenneth L. Karlberg Karlberg & Associates PLLC 909 Squalicum Way, Suite 110 Bellingham, WA 98225	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Mark J. Lee Brownlie Evans Wolf & Lee, LLP 230 E Champion St Bellingham, WA 98225-4548	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Jill Smith Roy, Simmons, Smith & Parsons, PS 1223 Commercial Street Bellingham, WA 98225	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 29th day of May, 2012.



Tara D. Friesen

Appendices

- Appendix A: Findings of Fact and Conclusions of Law (CP 965-992)
- Appendix B: Exhibit 1- Plat of the Pointe on Semiahmoo Phase II
- Appendix C: Findings of Fact and Conclusions of Law In Support of Entry of Judgment for Attorney's Fees and Costs (CP 2775-2780)

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

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

Plaintiff,

v.

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

Defendants,

and

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

Intervenors.

NO. 07-2-02983-1

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

JUDGE IRA UHRIG

I. INTRODUCTION

The parties came before the Court for a bench trial commencing on
February 15, 2011. The Court heard eight (8) days of lay and expert testimony,
made three (3) site visits to the disputed properties, reviewed the trial exhibits
and transcripts of testimony, all prior records and files in this case, and the
~~Court's trial notes, and sent the parties an opinion email, dated June 13, 2011, a
true and correct copy of which is attached as Ex. 1 hereto.~~

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II. FINDINGS OF FACT

The Court enters findings of fact regarding the Association's claims of trespass and violation of the CCRs, the Naumans' counterclaims and affirmative defense, and the Francises' Intervenor claim(s) as follows:

- 1) The Sunset Point development is comprised of twelve (12) individual lots and separate common areas as depicted on the plat map, Defendants' Tr. Exh. 1 (recorded at Whatcom County Auditor's File No. 92022045, Volume 17, Pages 33-35). The Association is the fee simple owner of the common areas. The applicable CCRs provide that the Association has sole and exclusive responsibility for the operation, management, and preservation of the common areas for the benefit, use and enjoyment of all owners.
- 2) The Naumans are fee simple owners of Lots 10 and 11, which abut common area to the east. During all times material to the Court's decision, the Naumans were members of the Association. The Court recognizes that the Naumans formerly served in certain capacities for the Association, however, their former service on the Association's behalf was not material to the Court's decision.
- 3) The Francises are fee simple owners of Lots 7 and 12. Lot 12 adjoins the northern boundary of Lot 11 and abuts common area to the east and north. During all times material to the Court's decision, the Francises were members of the Association, and Mr. Francis

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became a member of the Association's Board of Directors in 2006, during which period of time the Association's decisions relating to the Naumans' boathouse application were made.

- 4) The Alfreds are fee simple owners of Lots 1, 2, and 3, which abut common area to the east and south. During all times material to the Court's decision, the Alfreds were members of the Association, and Mr. Alfreds was the Secretary and Treasurer of the Association and a member of the Board of Directors.
- 5) The Marshalls are fee simple owners of Lots 4, 5 and 6, which abut common area to the east. During all times material to the Court's decision, the Marshalls were members of the Association, and Mr. Marshall was Vice-President of the Association and a member of the Board of Directors.
- 6) The Williamses are fee simple owners of Lot 8, which abuts common area to the east. During all times material to the Court's decision, the Williamses were members of the Association and Dr. Williams was President of the Association and a member of the Board of Directors.
- 7) Jon Lee is fee simple owner of Lot 9, which abuts common area to the east. During all times material to the Court's decision, Mr. Lee was a member of the Association.
- 8) The rights and responsibilities of the Association and its members are set forth in the CCRs, Defendants' Tr. Exh. 2 (recorded at

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Whatcom County Auditor's File No. 92022046, Volume 236, Pages 662-681), the Association's Bylaws, Defendants' Tr. Exh. 4, the Plat of the Pointe on Semiahmoo Phase II, Defendants' Tr. Exh 1 (recorded at Whatcom County Auditor's File No. 920220045), ("Plat"), and any properly adopted resolutions and amendments to CCRs and Bylaws, if any, by the Association's Board of Directors and/or membership. The parties do not dispute that the CCRs and Bylaws were properly adopted by and govern the Association's actions, subject to any rights, limitations and interests set out in the Plat. ~~Section II, Section III, Section IV and Section VI of the CCRs are the primary CCRs provisions applicable to this dispute. Articles~~

~~III, IV, V, VI and VIII are the primary Bylaws applicable to this~~

9) The structure the Naumans seek to build is referred to both as "dispute" a "boathouse" and a "garage". The court finds the term "garage" to be the most accurate, but both terms are acceptable for purposes of these findings and conclusions, solely for the sake of convenience.

A. FACTS APPLICABLE TO ASSOCIATION'S CLAIM OF BREACH OF CCRS BY THE NAUMANS

- 9) The parties' characterization of the events on December 6, 2007 differs greatly; however, the facts of what occurred that day are uncontested for the most part.
- 10) The Naumans initially believed that they submitted their boathouse application, Defendants' Tr. Exh. 41, to the Association's President, Dr. Williams, on October 26, 2007, which triggered the thirty (30) day architectural review process under Section VI of the CCRs ("AR Process"). Pursuant to the applicable provision of the CCRs, if

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~~the Association did not approve or deny the Naumans' boathouse
by November 26, 2007, the application is deemed to be approved.~~

11) The time of service of the Naumans' boathouse application later became the subject of discourse between the parties' counsel. See Defendants' Tr. Exh. 42-44, 49. The time of service became material because the Naumans' boathouse application was neither approved nor denied within thirty (30) days of October 26, 2007. Ultimately, the parties agreed to October 29, 2007 as the date of service for purposes of the AR Process, however, the Court finds that the Naumans' initial belief as to the time of service on October 26, 2007 was in good faith.

12) By letter dated November 16, 2007 from the Association's President, Dr. Williams, the Association ^{invoked} ~~sought~~ an additional thirty (30) days under Section VI to the CCRs to respond to the Naumans' boathouse application. ~~Defendants' Tr. Exh. 42. Dr. Williams' letter was not a model of clarity, however, the spirit of the letter was to trigger the Association's right to an additional thirty (30) days as part of the AR Process.~~ Any ambiguity in Dr. Williams' letter was later clarified by the Association's counsel on November 26, 2007 and again on November 29, 2007. Defendants' Tr. Exh. 43, 44. The events of December 6, 2007 occurred, therefore, with knowledge by all parties that the Association has not yet approved or denied the Naumans' boathouse application.

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13) The parties vigorously disputed the nature, scope and intent of the work performed on December 6, 2007 by Mr. Schouten on Lot 11 and in the eastern common area. The testimony by Mrs. Nauman, Mr. Schouten, Mrs. Francis, and the Association's Board Members was inconsistent and contradictory; however, the Court finds that the differences are reconcilable. The Court rejects the Association's contention that the limited excavation performed that day was intended by the Naumans as defying the Association and the AR Process of the CCRs. ~~If the Naumans intended to start construction of their planned boathouse that day, the typical advance planning and sequencing of construction materials, labor, permitting, etc., would have been arranged.~~ The testimony was uncontroverted that no construction materials had been delivered to the site and none of the expected planning and sequencing was pre-arranged.

14) Mrs. Nauman testified that limited work performed by Mr. Schouten was intended (i) to address concerns expressed by the Association regarding alleged untidy conditions in the northeast corner of Lot 11 and (ii) to scrape sod in the location of the planned boathouse in anticipation the project would be approved. Mrs. Nauman further testified that she was unaware that the limited work performed on Lot 11 may be considered an "improvement" under Section VI of the CCRs or that the limited work performed in the common area

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may be considered trespass or a breach of the CCRs. The Court finds Mrs. Nauman's testimony to be credible.

15) Mrs. Nauman's actions and expectations were reasonable and in good faith in light of the extensive testimony of multiple witnesses, including Mr. Williams and Mr. Marshall, regarding the history of the Association's actions and policies in similar circumstances:

- a. Similar applications of the nature and scope of the Naumans' application had been routinely approved for other members, subject only to the normal collaborative process with the ARC (e.g.; the construction of Alfreds, Lee, Williams', and Francises' residences and landscaping, Defendants' Tr. Exh. 15-19; 23-27, 29-32);
- b. The piling of dirt in the common area was consistent with prior similar uses by members that did not require approval of the Association;
- c. The piling of dirt in the common area was intended to be temporary;
- d. The piling of dirt in the common area did not unreasonably interfere with other members' use of the common area ~~or present an unsightly condition;~~
- e. ~~The scraping of sod in the northeast corner of Lot 11 reasonably addressed earlier concerns of the Association regarding the state of the northeast corner, and~~

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f. The scraping of sod in the anticipated location of the planned boathouse was minor in nature and substantially less in order of magnitude than work performed by other members on their respective lots and adjacent common areas without prior approval;

16) The Association testified through Dr. Williams and Mr. Marshall that the Naumans' actions on December 6, 2007 were in defiance of the Association's rights and the AR Process—that the Naumans had "thrown down the gauntlet," that the Naumans were playing a game of "gotcha," and that the Association had "no choice but to file suit against the Naumans."The Court does not find this testimony to be credible. The Association's actions were retaliatory against the Naumans in response to prior years of animosity between the parties, including without limitation:

- a. Mrs. Nauman's questioning of the Association's finances and expenditures and failure to follow governance formalities required by the CCRs and Bylaws;
- b. The Naumans' complaints to the Association about allowing the usurpation of common area by the Alfreds and the Frances and appearance of favoritism; and
- c. The Association's filing of liens against the Naumans' properties and threats of foreclosure.

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17) The Association's action by filing suit against the Naumans is inconsistent with the Association's handling of prior instances of ~~undisputed~~ breaches of Section VI of the CCRs, for example, by Mr. Lee and the Francises during construction of their respective residences. Mr. Lee was admonished verbally and in writing after-the-fact, while the Francises were neither admonished nor penalized in any fashion for performing work on Lot 12 and in the northern and eastern common areas without prior approval. The Francises, in particular, were allowed to proceed with certain aspects of construction of their residence on Lot 12 and common areas without fully complying with the AR Process.

18) The Association's prejudice and retaliation against the Naumans is further reflected by Mr. Alfreds' attempt after the events of December 6, 2007 to cause the Association to retroactively adopt a fine schedule for breaches of the CCRs and to impose a \$10,000 fine against the Naumans for their actions on December 6, 2007.

B. FACTS APPLICABLE TO THE NAUMANS' COUNTERCLAIMS AND AFFIRMATIVE DEFENSES AND THE FRANCISES' INTERVENOR CLAIMS

19) The Court incorporates herein the findings of fact above, and finds the following additional facts applicable to the Naumans' and Francises' claims and defenses.

20) Prior to the Naumans' boathouse application, applications by members to undertake "improvements" to their respective lots or in

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the common area were reviewed by an architectural review committee ("ARC") comprised of members of the Association's Board of Directors. The only exception to this process was early in the Association's history when Mr. Aujla served briefly as the Association's architectural reviewer.

21) The Williams, Lee and Francis residences were all evaluated and approved, in substantial part, through the ARC and the AR Process. Testimony was consistent by all witnesses that the AR Process through the ARC had historically been a collaborative, neighborhood-friendly process, in which concerns or deficiencies in the initial applications were addressed through suggested minor changes and the projects were approved. See e.g., Defendants' Tr. Ex. 15-19, 23-27, 29-32. The Naumans submitted their boathouse application based Section VI of the CCRs and their understanding of prior applications by other members. The Naumans expected that the AR Process through the ARC would be similarly collaborative. The Court finds that their expectation was reasonable in light of the Association's prior history of dealing with applications.

The Francis' application to construct a house on lot 7 was denied by the ARC because the proposed house was found to be too large for the size of the lot.

22) The Naumans' boathouse application did not comply with the disputed, more restrictive Architectural Guidelines, Defendants' Tr. Exh. 10, the Architectural Review Checklist, Defendants' Tr. Exh. 8, or the Shoreline Management Act ("SMA"). The Naumans testified

1 that these guidelines and standards had not been previously
2 adopted by the Association or used by the Association in the AR
3 Process. The Court agrees. The exhibits tendered by the
4 Association to show formal adoption of these guidelines and
5 standards in 2002 or before, *see e.g.*, Defendants' Tr. Exh. 10, 12-
6 14, discuss guidelines and a checklist, but none establish formal
7 adoption by the Association. Moreover, there was no direct, first-
8 hand testimony that the Architectural Guidelines or Architectural
9 Review Checklist had even been mailed to members. To the
10 contrary, the subsequent course of dealing by the Association is
11 inconsistent with its position taken in this lawsuit. In particular,
12 applications by the Williams and Mr. Lee in 2003 to build
13 residences on Lots 8 and 9 were approved, however, neither
14 application included or referenced these more restrictive guidelines
15 and standards.

18 23) The Court concludes, therefore, that the Association's handling of
19 the Naumans' boathouse application sought to apply higher
20 standards for approval in the AR Process than was historically
21 applied by the Association to applications by other members.

22 24) In response to the Naumans' boathouse application, the
23 Association further appointed an Architectural Reviewer, Mr.
24 Telgenhoff, to evaluate the Nauman's application. The Association
25 had not previously appointed an Architectural Reviewer as part of
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the AR Process in the history of the Association's existence. The Association's stated position at trial that it wanted to avoid an appearance of bias in the AR Process was undermined by its conduct and handling of Mr. Telgenhoff's involvement. Mr. Telgenhoff was instructed by the Association that the disputed, more restrictive Architectural Guidelines, the Architectural Review Checklist, and SMA were applicable to the Naumans' application. Mr. Telgenhoff was further informed by and aware of the Board of Directors' and Mrs. Francis' position that the Gravel Access Drive ("GAD") to Lot 12 was an exclusive easement. See e.g., Defendants' Tr. Exh. 48. The GAD is an approximately 15 foot wide route shown on the face of the Plat, that has one end connecting to the Pointe Road North, and the other end connecting to Lot 12. Mr. Telgenhoff, having been formally retained after the events of December 6, 2007 and the filing of the lawsuit by the Association against the Naumans, see e.g., Defendants' Tr. Exh. 46- 47, was additionally aware of the litigation during his evaluation of the Naumans' application.

25) The Court finds that Mr. Telgenhoff's denial of the Naumans' boathouse application, in whole or in substantial part, was unduly and intentionally influenced by the Association. ~~The Association and Mr. Telgenhoff denied this conclusion at trial, but the Court does not find their testimony on this factual issue to be credible.~~

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~~Mr. Telgenhoff's review of the Naumans' boathouse application was not separate, independent and unbiased.~~

- 26) The factual bases for denial of the Naumans' boathouse application was for a host of reasons that appeared to shift depending on the issue discussed, including without limitation:
- a. The Association and Mr. Telgenhoff asserted that the GAD to Lot 12 was an exclusive easement, such that the Naumans had no right to ingress/egress from the planned boathouse across the GAD regardless of how reasonable and infrequent the Naumans' proposed use of the common area and GAD would be (*i.e.*, testimony was undisputed that anticipated use would be less than once a month on average);
 - b. The boathouse application did not comply with the setback requirements set forth in the more restrictive Architectural Guidelines, the Architectural Review Checklist, or the SMA;
 - c. Mr. Telgenhoff concluded the planned boathouse was not in harmony with the overall Sunset Pointe development, e.g., it had "shock value" due to its height and mass; and
 - d. More reasonable alternatives were available to the Naumans to re-position or re-orient boathouse such that ingress/egress would be to the west or to the south, instead

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of east through the common area and across the GAD to Lot 12.

- 27) The Court disagrees with the factual basis for the Association's denial of the Naumans' boathouse application, because it finds:
 - a. The GAD is only an access road to Lot 12. The evidence, including the GAD-related Trial Exhibits fails to show a clear intent to create an easement, exclusive or otherwise. Mr. Prieve's testimony was not only inconsistent on the easement issue, but his testimony sought to add words to the Sunset Pointe plat, CCRs, and Bylaws that do not exist. Further, he acknowledged that he did not have personal knowledge of any changes that may have been agreed to by the County and the original developer between the preliminary plat approval and final plat approval.
 - b. The Association wrongfully and purposely applied more restrictive standards and protocols to the Naumans' boathouse application, *i.e.*, the Architectural Guidelines, Defendants' Tr. Exh. 10, the Architectural Review Checklist, Defendants' Tr. Exh. 8, and the SMA, which had not been formally adopted by the Association. If these more restrictive standards and protocols had not been applied and if the Association was not prejudiced against the Naumans, the Court is convinced that a "collaborative, neighborhood

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friendly" AR Process would have resulted in the approval of the Naumans' project. The testimony by Mr. Landsem is the best indicator of what an unbiased, independent designated Architectural Reviewer would determine if allowed to make determinations without undue influence.

c. If the Association had not been pre-disposed to deny the Naumans' boathouse application for improper reasons, the modest variance needed by the Naumans for the northern boundary line of Lot 11 would ordinarily be granted, just as the Frances were granted a similar variance for their northern boundary line with the northern common area. The Court finds that the Association's denial of the Naumans' request for such a variance was wrongfully withheld based on the Association's prior handling of earlier requests by other members.

d. Mr. Telgenhoff failed to consider surrounding structures (such as the mass and height of the Frances' nearby two (2) story detached accessory building on Lot 12) when he rejected the boathouse for its "shock value" on the basis of mass and height;

e. The orientation of the planned boathouse, such that ingress/egress is to the east across the GAD, is the most practical orientation in light of limitations of space, turning

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radius of boat trailers, and complications posed by the location of Lot 12's reserve drain system; and

f. The proposed frequency of ingress/egress is reasonable and would not constitute an unreasonable interference with the GAD and the Frances' use of the GAD even if the GAD were a non-exclusive easement.

28) The Court finds the testimony of Mr. Landsem to be particularly compelling. As the Association's appointed replacement for Mr. Telgenhoff Mr. Landsem reviewed the Naumans' boathouse application when it was resubmitted to him by the Naumans, as well as the Frances' application, *inter alia*, to pave the GAD to Lot 12. Mr. Landsem concluded that the design and aesthetics of the planned boathouse was acceptable, subject only to a reduction of height to 28.5 feet. He further offered his opinion that a setback of eight (8) feet from the northern boundary line of Lot 11 was appropriate under the totality of the circumstances. Although not binding on the Court, he concluded from his review of the GAD-related Trial Exhibits (as part of his review of the Francis application to pave the GAD) than no easement existed.

29) In sum, based on the totality of the testimony and exhibits introduced at trial, the motives of the Association in denying the Naumans' boathouse application and the decision itself was in bad faith, arbitrary and capricious. The Association had allowed other

1 members to usurp portions of the common area to the south, east
2 and north, and showed favoritism to influential members—
3 particularly to the Alfreds and the Francisese in approving projects in
4 the common areas under Section III of the CCRs and on individual
5 lots under Section VI of the CCRs. The Association's actions
6 against the Naumans was retaliatory and discriminatory.
7

8 9 III. CONCLUSIONS OF LAW

10 The Court enters the following conclusions of law with respect to the
11 Association's claims of trespass and breach of the CCRs, the Naumans'
12 counterclaims and affirmative defenses, and the Francisese's Intervenor claim(s) as
13 follows:
14

15 A. ASSOCIATION'S CLAIMS

- 16 1) The Court's earlier rulings on the Association's motion(s) for
17 summary judgment are reaffirmed. The Naumans committed a
18 technical trespass by piling dirt in the common area on December
19 6, 2007, despite that their actions were in good faith and based on
20 a mistaken impression that they had the right to do so and were
21 permitted to do so by the Association by virtue of the Association's
22 prior history of permitting similar acts by other members without
23 approval.
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- 25 2) The Association shall be compensated in the amount of \$8,658.00
26 for the cost to repair the damage to the common area caused by
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The Association is entitled to be compensated for its attorney fees the Naumans' trespass. ~~No statutory or contractual basis exists for incurred in bringing suit to enforce Section III of the CCRs, and shall submit an award of attorneys' fees to the Association arising from the its application for fees and costs within ten days of entry of the Findings and conclusions. Naumans' trespass and, therefore, none are awarded.~~

3) The piling of dirt by the Naumans in the common area ~~did not constitute a violation of Section III of the CCRs~~ breach the CCRs. First, ~~Section VI of the CCRs does not apply to the common area. Only Section III of the CCRs does.~~ Second, the Association had an extensive history and unwritten policy of permitting members to use the common area without approval in a similar manner as the Naumans' actions on December 6, 2007. Other members were allowed to pile landscaping materials such as bark, tree limbs and other debris, and construction materials in the common area on a temporary basis without approval. The Naumans' actions were consistent with this unwritten policy, and as such, ~~the Naumans did not violate Section III of the CCRs.~~

4) ~~Further, to the extent that the Association now claims a right to prohibit the Naumans' actions in the common area, this prior history constitutes a knowing and willful waiver of the Association's rights under Section III of the CCRs for minor temporary uses of the common area without the Association's approval, such as the Naumans' actions. The Association is therefore estopped from enforcing its rights under Section III of the CCRs against the Naumans for their actions that day~~

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- 5) Under the totality of the evidence introduced at trial, the Court finds the Association's attempt to selectively enforce ^{other provision of} the CCRs against the Naumans for their actions in the common area on December 6, 2007 to be discriminatory, arbitrary, capricious and in bad faith.
- 6) For similar reasons, the limited work performed on Lot 11 by the Naumans on December 6, 2007 did not breach the CCRs. Under Section VI of the CCRs, the definition of "improvement" may technically include actions of the Naumans on that day because the definition is so broad as to include mowing the lawn or tree trimming as an "improvement" that requires a member to submit the "improvement" to the architectural review processes of Section VI. However, the testimony at trial established that the Association, in its discretion, did not construe the definition of "improvement" as broadly as written. Prior to the situation arising in the instant case, the Association never interpreted and/or enforced the CCRs to require architectural approval of a minor "improvement" such as that done by the Naumans.
- 7) Moreover, modest transgressions by members, of Section VI of the CCRs involving physical alterations more significant than the Naumans' actions were seldom acted upon by the Association beyond doling out verbal admonishments. In many instances, the Association chose to not enforce Section VI of the CCRs at all, particularly against favored members (such as against members of

1 the Board of Directors) for similar minor acts in prior years. To the
2 extent that the Association now claims a right under Section VI of
3 the CCRs to prohibit the Naumans' actions on Lot 11 without prior
4 approval under the CCRs' AR Process, this prior history of lack of
5 enforcement constitutes a knowing and willful waiver of the
6 Association's rights under Section VI of the CCRs for changes
7 made by members to their lots that are in the nature of minor
8 "improvements," such as the Naumans' acts. The Association is
9 therefore estopped from enforcing its rights under Section VI of the
10 CCRs against the Naumans for their actions that day.

11
12 8) Under the totality of the evidence introduced at trial, the Court finds
13 the Association's attempt to selectively enforce the CCRs against
14 the Naumans for their actions on Lot 11 on December 6, 2007 to be
15 discriminatory, arbitrary and capricious, and in bad faith.
16

17 **B. NAUMANS' COUNTERCLAIMS AND AFFIRMATIVE DEFENSES**

18 9) The Naumans' boathouse application to the Association (more
19 properly characterized as an application to construct a garage to be
20 used to store a boat) was completed and submitted in material
21 compliance with Section VI of the CCRs based on the requirements
22 of Section VI and the prior history of similar applications by other
23 members.
24

25 10) The Naumans' boathouse application did not technically comply
26 with the Architectural Guidelines, Defendants' Tr. Exh. 10, the
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1 Architectural Review Checklist, Defendants' Tr. Exh. 8, or the SMA.
2 However, the Court finds and concludes that neither the
3 Architectural Guidelines, nor the Architectural Review Checklist
4 were properly adopted by the Association at times pertinent to this
5 lawsuit. Further, the Court finds and concludes that the
6 Architectural Guidelines and/or Architectural Review Checklist do
7 not incorporate and apply the SMA to lands outside those subject to
8 the SMA by County Ordinance.

10 11) The denial of the Naumans' boathouse application was arbitrary,
11 capricious, and in bad faith, and the Association's consent was
12 unreasonably withheld on multiple bases, including without
13 limitation as follows:

14 a. The Association required the Naumans' boathouse
15 application to comply with the more restrictive Architectural
16 Guidelines, the Architectural Review Checklist, and the SMA
17 despite that no member has previously been required to
18 comply with these application protocols and standards in
19 similar circumstances and none of these protocols and
20 standards had been properly adopted by the Association.

21 b. The Association's denial of the Naumans' boathouse
22 application was based in substantial part on a legal position
23 adopted by the Association's Board of Directors that the
24 GAD to Lot 12 through the eastern common area was an
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exclusive easement for the benefit of Lot 12 that the Naumans had no right to impede. The Francises intervened based on the same legal position. As a matter of law, the Court finds that the Association and the Francises are wrong for the following reasons:

- i. The Court finds that the GAD to Lot 12 is not an easement, exclusive or otherwise, based on its reading and interpretation of the plat map, CCRs, Bylaws, Statutory Warranty Deeds, and other evidence at trial including related exhibits (collectively, "GAD-related Trial Exhibits"), and including the testimony of Richard Prieve, which the Court found to be inconsistent and inconclusive on the GAD/easement issue.
- ii. The evidence, including the GAD-related Trial Exhibits, establishes that no owner was granted greater access rights to their respective lots than other owners. The reference to "Gravel Access Drive" for Lots 1 and 12 did not create an easement by these words, and the reference appears to be simply to show the extended access drive necessary to access the Lots 1 and 12 at the extreme northern and southern ends of the Sunset Pointe development.

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~~The Court notes that the distance from Pointe Road North to Lot 2 is only slightly less than the distance to Lot 1 and yet the plat does not show a similar GAD to Lot 2, which further underscores that the reference to "Gravel Access Drive" was not intended to grant greater access rights to Lot 1 or, by logical extension, to Lot 12.~~

iii. The Court finds that the Association had never previously asserted the GAD to Lot 12 (or the similar GAD to Lot 1) was an exclusive easement prior to the Naumans' boathouse application. Nor had the Alfreds, as owners of Lot 1, ever previously asserted that the GAD to Lot 1 was an exclusive easement. The Alfreds had previously been approved by the Association to extensively landscape and improve the common area adjacent to their lots at their expense, including the paving and curbing of the GAD to Lot 1 and the entrance to Lot 2. These earlier actions by the Association and the Alfreds are inconsistent with the legal position later taken by the Association in denying the Naumans' boathouse application with respect to the legal character of the GAD to Lot 12

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iv. As a member of the Association's Board of Directors, Mr. Alfreds had a duty to recuse himself from any decision as to the character of the GAD to Lot 12 on the basis that he had an irreconcilable conflict-of-interest in the Board's determination. When Mr. Alfreds voted to deny the Naumans' boathouse application based in substantial part on the Association's assertion that the GAD to Lot 12 was an exclusive easement, Mr. Alfreds improperly stood to gain from the Association's determination by virtue of his ownership of Lot 1 and the GAD to Lot 1. Mr. Alfreds' failure to recuse himself was in bad faith and an abuse of his director responsibilities and duties

v. The Court finds that the Association's position on the character of the GAD to Lot 12 was adopted purposely, deliberately and in bad faith by the Association, in complicity with and at the urging of the Frances, to improperly deny the Naumans' boathouse application. The Association's position likely improperly influenced and prejudiced Mr. Telgenhoff's decision as the designated Architectural Reviewer for the Naumans' boathouse application.

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c. The Association, directly and through its designated Architectural Reviewer, Mr. Telgenhoff, imposed setback requirements beyond those imposed on other members in similar circumstances, and refused to grant variances or to authorize reasonable uses of the common areas that had been freely granted to other members in similar circumstances. The Association's inconsistent and purposely selective enforcement of Section VI of the CCRs against the Naumans was arbitrary, capricious and in bad faith.

12) 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;

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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.

13) The Court further finds that the Association breached Section III of the CCRs by failing to preserve the common areas for the benefit of all members and by allowing the usurping of the common areas by the Francises. The Court specifically directs that neither the Francises nor the Association shall act in such a manner as to impede access to the boathouse/garage structure upon its completion or to block the Naumans' view to the east through the common area

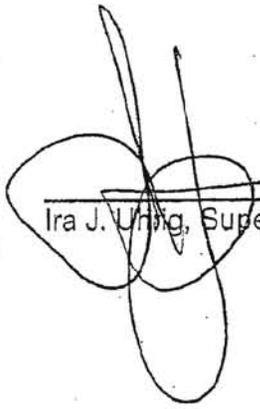
14) The Court further finds that the Association has breached its fiduciary duty imposed through the CCRs to maintain the common areas for the benefit of all members and by allowing the usurping of the common areas by the Frances and Alfreds.

15) The Court retains jurisdiction to enforce this decision. Should there be good cause to consider injunctive relief in the future, it will be granted as necessary and appropriate, as will any requests for punitive damages authorized by the CCRs.

16) The Naumans have prevailed on all issues in the litigation, with the exception of the trespass claim addressed above, and as such,

1 and
they are entitled to recover their reasonable attorneys' fees and
2 and as they relate to claims 1-3 in their pleadings,
costs pursuant to the CCRs. The Naumans shall submit their
3 application for fees and costs within ten (10) days of entry of ~~this~~
4 judgment. *These findings and conclusions,*

6 DATED this 22nd day of August 2011.

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Ira J. Uring, Superior Court Judge

11 PRESENTED BY:
12
13 BELCHER SWANSON LAW FIRM, PLLC
14 
15 PETER R. DWORKIN, WSBA# 30394
16 Attorney for Defendants

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BROWNLEE EVANS WOLF & LEE, LLP

MARK LEE, WSBA# 19339
Attorney for Intervenors

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

SURVEYOR'S CERTIFICATE

I, RAYMOND D. WEDEN, DO HEREBY CERTIFY THAT THIS PLAT, TITLED "PLAT OF THE POINTE ON SEMIAHMOO PHASE II" IS BASED ON ACTUAL SURVEY MADE IN ACCORDANCE WITH THE REQUIREMENTS OF STATE LAW, THAT ALL DISTANCES AND COURSES ARE CORRECTLY SHOWN HEREON; THAT ALL MONUMENTS AND PROPERTY CORNERS HAVE BEEN ACCURATELY PLACED ON THE GROUND, OR WILL BE PLACED UPON COMPLETION OF CONSTRUCTION, THIS PLAT COVERS AND EMBRACES THAT PORTION OF THE FOLLOWING DESCRIBED TRACT OF LAND:

RAYMOND D. WEDEN, P.L.S. NO. 18928



LEGAL DESCRIPTION

THAT PORTION OF THE LAND DESCRIBED BELOW, PER STATUTORY WARRANTY DEED AS FILED IN VOLUME 79, PAGES 884 TO 885, INCLUSIVE, AUDITOR'S FILE NO. 1813167, WHATCOM COUNTY, WASHINGTON, WHICH LIES WESTERLY OF SEMIAHMOO DRIVE:

FARCEL "A"

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. 884;

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.

FARCEL "B"

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 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.

CONTAINING 14.4 ACRES, MORE OR LESS.

BASIS OF BEARING: ASSUMED US40 WEST LINE OF SECTION 21 AS N 89°59'30"W.

SITUATE IN THE COUNTY OF WHATCOM, STATE OF WASHINGTON.

SUBJECT TO RESTRICTIVE COVENANTS AND EASEMENTS OF RECORD. AP # 92-120-0006

DECLARATION

WE, THE UNDERSIGNED, BEING OWNERS IN FEE SIMPLE OF THE LAND HEREIN PLATTED, HEREBY DECLARE THIS PLAT OF THE POINTE ON SEMIAHMOO PHASE II IS MADE WITH OUR FREE CONSENT AND IN ACCORDANCE WITH OUR WISHES.

Robert E. Jones
ROBERT E. JONES

Elizabeth S. Jones
ELIZABETH S. JONES

ACKNOWLEDGMENT

STATE OF WASHINGTON }
COUNTY OF WHATCOM } SS.

ON THIS 21st DAY OF AUGUST 1991, BEFORE ME THE UNDERSIGNED, A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, PERSONALLY APPEARED ROBERT E. JONES & ELIZABETH S. JONES TO ME KNOWN TO BE THE INDIVIDUAL(S) DESCRIBED IN AND WHO EXECUTED THE DECLARATION HEREON, AND ACKNOWLEDGED THAT HE SIGNED THE SAME AS HIS (THEIR) FREE AND VOLUNTARY ACT AND DEED, FOR THE USES AND PURPOSES HEREIN MENTIONED.

WITNESS MY HAND AND OFFICIAL SEAL THE DAY AND YEAR FIRST ABOVE WRITTEN.

Richard E. Prief
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON
RESIDING AT EVERSON



TREASURER'S CERTIFICATE

I, Barbara J. Corp TREASURER OF WHATCOM COUNTY, WASHINGTON, DO HEREBY CERTIFY THAT ALL TAXES REQUIRED BY LAW TO BE PAID UPON THAT PORTION OF THE REAL ESTATE EMBRACED BY THIS PLAT, "PLAT OF THE POINTE ON SEMIAHMOO, PHASE II", ALL THE DELINQUENT ASSESSMENTS HAVE BEEN FULLY PAID, AS SHOWN IN THE RECORDS OF MY OFFICE.

Barbara J. Corp Deputy
TREASURER, WHATCOM COUNTY, WASHINGTON DATE 2-20-92

COUNTY COUNCIL APPROVAL

APPROVED BY ORDER OF THE COUNCIL OF WHATCOM COUNTY, WASHINGTON, THIS 19 DAY OF February 1992.

David M. Warner ATTEST: Ramon
CHAIRPERSON CLERK OF THE COUNCIL

AUDITOR'S CERTIFICATE

I HEREBY CERTIFY THAT THIS PLAT WAS FILED FOR RECORD IN THE OFFICE OF THE AUDITOR OF WHATCOM COUNTY, WASHINGTON, AT THE REQUEST OF Robert E. Jones - Elizabeth S. Jones ON THIS 20 DAY OF February 1992, AT 11:20 O'CLOCK A.M., AND THAT IT IS RECORDED IN BOOK 17 OF PLATS ON PAGE 32-35 OF THE RECORDS OF WHATCOM COUNTY, WASHINGTON.

Stacy S. Sells
AUDITOR, WHATCOM COUNTY, WASHINGTON

HEALTH DEPARTMENT CERTIFICATE

EXAMINED AND APPROVED BY THE WHATCOM COUNTY DISTRICT DEPARTMENT OF PUBLIC HEALTH THIS 19 DAY OF February 1992.

Albert C. Brainerd
DISTRICT HEALTH OFFICER Director of Environmental Health

ENGINEER'S APPROVAL

EXAMINED AND APPROVED BY THE WHATCOM COUNTY DEPARTMENT OF PUBLIC WORKS THIS 10 DAY OF February 1992.

Edwin G. Heston
ENGINEER, WHATCOM COUNTY, WASHINGTON

HEARING EXAMINER

EXAMINED AND APPROVED BY THE WHATCOM COUNTY HEARING EXAMINER THIS 14 DAY OF February 1992.

Edward J. Good
HEARING EXAMINER

DRAINAGE EASEMENT AGREEMENT

WHATCOM COUNTY SHALL HAVE NO OBLIGATION TO ASSUME ANY RESPONSIBILITY OR COST FOR THE MAINTENANCE OR IMPROVEMENT OF SAID DRAINAGE COURSE WITHIN SAID DRAINAGE EASEMENT.

ROAD MAINTENANCE AGREEMENT

ALL COSTS OF MAINTAINING, REPAIRING, IMPROVING OR OTHERWISE CONNECTED WITH SAID PRIVATE ROAD (POINTE ROAD NORTH) SHALL BE BORNE BY THE HOME OWNERS ASSOCIATION OF THIS PLAT. SAID COSTS SHALL THEREFORE BECOME AN ENFORCEABLE LIEN AGAINST ANY OF THE LOT OWNERS WHO REFUSE OR FAIL TO PAY THE REQUIRED FEES FOR THE MAINTENANCE REPAIRS OR IMPROVEMENTS MADE BY AGREEMENT OF THE HOME OWNERS ASSOCIATION. THIS PROVISION SHALL BE CONSTRUED AS A COVENANT RUNNING WITH THE LAND.

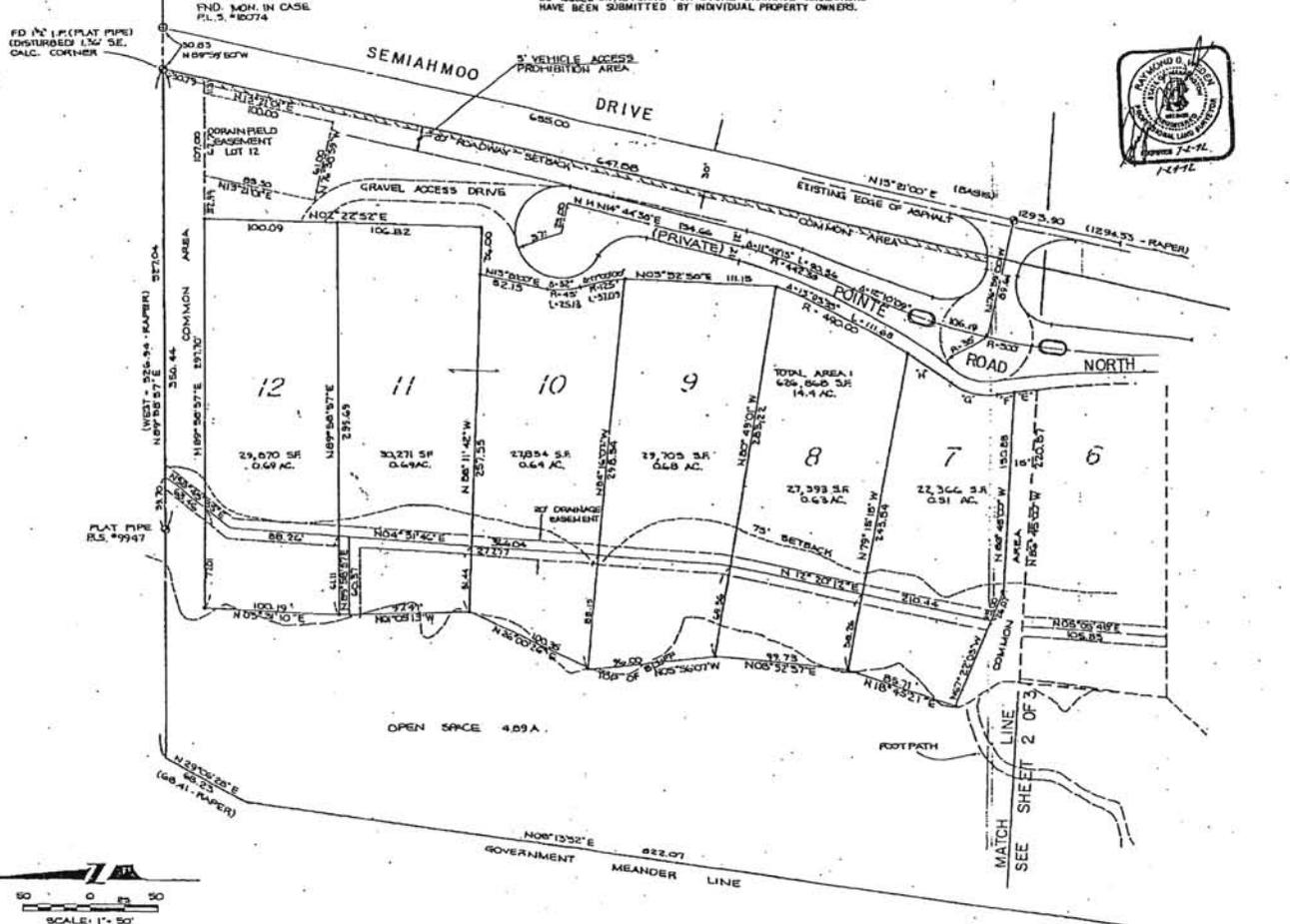
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PLAT OF THE POINTE ON SEMIAHMOO PHASE II

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

15 22
16 21

- NOTE:
1. LOTS 10 & 11 WILL REMAIN COMMONED UNTIL A PUBLIC SEWER IS AVAILABLE.
 2. ALL LOTS SHALL ACCESS ONTO POINTE ROAD NORTH. THE ONLY ACCESS TO SEMIAHMOO DRIVE SHALL BE VIA POINTE ROAD NORTH.
 3. MAINTENANCE & REPAIR OF DRAINAGE STRUCTURES OR FACILITIES AND COMMON ELEMENTS OF SEWAGE DISPOSAL SYSTEM (INCLUDING PUMPS, DRAINFIELDS AND LINES CONNECTING INDIVIDUAL SEPTIC TANKS TO ANY COMMON CONSTRUCTED DRAINFIELD) SHALL BE AN OBLIGATION OF THE HOME OWNERS ASSOCIATION.
 4. EACH PROPERTY OWNER SHALL DESIGN & CONSTRUCT A SYSTEM DIRECTING RUNOFF WATER FROM ALL DWELLINGS & STRUCTURES ON EACH LOT AND THE LOT ITSELF INTO THE COMMON STORM DRAINAGE SYSTEM. STORM DRAINAGE DISCHARGE SHALL NOT BE ALLOWED TO FLOW ONTO THE BANK. BUILDING 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 FEB. 15, 1992
- ⊙ SECTION CORNER
- ⊙ FOUND MON. IN CASE
- ⊙ FOUND KEABAR
- ⊙ FOUND NAIL
- ⊙ SET REBAR W/ "WOOD" CAP
- ▭ LIMITS OF PAVEMENT

THIS IS TO CERTIFY that the foregoing is a true
copy of the original file, **300-300-115**
Produced Pursuant to the provisions of the
Freedom of Information Act, 5 U.S.C. 552, in the possession of the Central Intelligence
Agency, Washington, D.C. 20505.
Classified by: **300-300-115-1000**



1 Smith of Roy, Simmons & Parsons, PS and Jamila Johnson and Lawrence
2 Costich of Schwabe, Williamson & Wyatt, and the Intervenors being represented
3 by Mark Lee of Brownlie Evans Wolf & Lee, LLP, and the Court having reviewed
4 the files and records herein, and having heard oral argument on the same, the
5 Court now enters the following Findings of Fact and Conclusions of Law:

6
7 **I. FINDINGS OF FACT**

8 1. The Court entered Findings of Fact and Conclusions of Law on
9 August 22, 2011 in the above-captioned case outlining that the Defendants, Jan
10 and Clynton Nauman prevailed in the litigation on various claims and were
11 therefore entitled to an award of reasonable attorney's fees and costs.

12 2. Defendants have submitted detailed invoices supported by
13 Declarations and legal memoranda identifying and explaining all of the attorney's
14 fees and costs they have incurred reasonably relating the claims upon which the
15 court has granted attorney's fees and costs, namely: the Declarations and
16 Supplemental Declarations (and attachments thereto) of Peter R. Dworkin,
17 Kenneth L. Karlberg, and Jeffrey J. Solomon.

18
19 3. Upon reviewing the Declarations listed above all the invoices
20 attached, the memorandum explaining the motion, and any and all other
21 documents submitted by Defendants, the Court finds that the attorney's fees
22 claimed by Defendants and awarded by the Court as specified in the Conclusions
23 of Law below arise out of and are reasonably related to either the prosecution or
24 defense of claims upon which the Defendants prevailed at trial. The Court further
25

26 FINDINGS OF FACT AND CONCLUSIONS OF
27 LAW IN SUPPORT OF ENTRY OF FINAL JUDGMENT
FOR ATTORNEY'S FEES AND COSTS- 2

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LAW FIRM, PLLC

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CP 2776

1 finds that the amount of the attorney's fees claimed by the Defendants,
2 independent of the attorney's invoices submitted to substantiate the motion, is
3 reasonable in light of the nature for the legal rights at issue, the legal and factual
4 complexity of the claims, and the extensive motions, discovery, pretrial and trial
5 preparation, particularly in relation to the extensive resources expended and
6 incurred by all parties in the litigation.
7

8 4. Upon reviewing the Declarations listed above and the invoices
9 submitted by Defendants, the Court finds that the costs claimed by Defendants
10 and awarded by the Court as specified in the Conclusions of Law below are
11 reasonable and necessary, and further, arise out of and are reasonably related to
12 either the prosecution or defense of claims upon which the Defendants prevailed
13 at trial.
14

15 5. With respect to the Defendants' attorney's fees, the Court
16 specifically finds that there were no unwarranted charges included in the amount
17 that is awarded by the Court as reflected in Conclusions of Law below as well as
18 the Judgment entered of even date, that the number of hours expended by the
19 various counsel in the case were objectively reasonable, that the hourly rate
20 charged by various counsel was objectively reasonable, and that none of the
21 time expended was unnecessary, duplicative, wasteful, or otherwise
22 unreasonable.
23

24 6. Defendants had at stake significant and important rights, including
25 the right to use and access their own real property and to make the highest and

26 FINDINGS OF FACT AND CONCLUSIONS OF
27 LAW IN SUPPORT OF ENTRY OF FINAL JUDGMENT
FOR ATTORNEY'S FEES AND COSTS- 3

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CP 2777

1 best use of their property, as well as the right to not be subject to the arbitrary
2 and capricious conduct of the Plaintiff. The loss of these rights would have
3 caused substantial detriment to Defendants' ability to enjoy their real property
4 and to continue living in their home, and therefore it was reasonable for
5 Defendants to dedicate the resources outlined in their motion for fees, to the
6 defense of their rights.
7

8 III. CONCLUSIONS OF LAW

9 Based upon the above Findings of Fact, the Court makes the following
10 Conclusions of Law:

11 1. The Court, having reviewed all of the following factors, concludes:

12 A. All of the objective factors reviewed by the Court support a
13 conclusion that the attorney's fees claimed by the Defendants and ultimately
14 awarded by this Court are reasonable and appropriate;
15

16 B. All of the subjective factors reviewed by the Court establish
17 that the amount of fees claimed are reasonable and appropriate;

18 2. Upon review of Defendants' entire motion, the Court further
19 concludes that the amount of fees is reasonable and necessary based on the
20 issues presented, the rights of the parties at stake, and the result obtained.

21 3. Upon review of Defendants' entire motion, the Court further
22 concludes that the amount of costs requested by Defendants is reasonable and
23 necessary based on the issues presented, the rights of the parties at stake, the
24

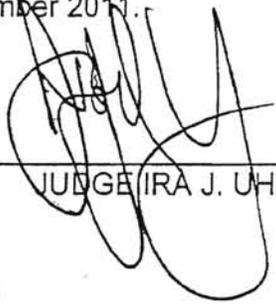
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26 FINDINGS OF FACT AND CONCLUSIONS OF
27 LAW IN SUPPORT OF ENTRY OF FINAL JUDGMENT
FOR ATTORNEY'S FEES AND COSTS- 4

1 result obtained and the CCR's providing such costs may be awarded as part of
2 reasonable attorney's fees.

3 4. Based upon the foregoing, the Court finds that the following
4 amounts of attorney's fees and costs are reasonable and appropriate under the
5 facts and law, and judgment should be ordered awarding the same to
6 Defendants, as follows:

- 7 1. Fees: \$279,496.25
- 8 2. Costs \$ 43,000.00
- 9 3. Total: \$322,496.25

10
11 SIGNED this 4 day of November 2011.

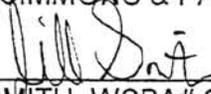


12 JUDGE IRA J. UHRIG

13
14 Presented by:
15 BELCHER SWANSON LAW FIRM, PLLC

16
17 
18 PETER R. DWORKIN, WSBA #30394
19 Attorney for Defendants

20 Copy Received, Approved for Entry:

21 ROY, SIMMONS & PARSONS, PS
22 
23 JILL SMITH, WSBA# 30645
24 BRET SIMMONS, WSBA# 25558
25 Attorneys for Plaintiffs

26 FINDINGS OF FACT AND CONCLUSIONS OF
27 LAW IN SUPPORT OF ENTRY OF FINAL JUDGMENT
FOR ATTORNEY'S FEES AND COSTS- 5

1 SCWHABE, WILLIAMSON & WYATT

2

3

LAWRENCE A. COSTICH, WSBA# 32178
4 JAMILA A. JOHNSON, WSBA# 39349
Associated Attorneys for Plaintiffs

5 BROWNLEE EVANS WOLF & LEE, LLP

6

7

MARK LEE, WSBA# 19339
Attorney for Intervenors

8

FFCL-AttyFees 102111 final

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26 FINDINGS OF FACT AND CONCLUSIONS OF
27 LAW IN SUPPORT OF ENTRY OF FINAL JUDGMENT
FOR ATTORNEY'S FEES AND COSTS- 6