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No. 73832-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PAUL M. DWIGHT and DONNA J. DETAMORE,
husband and wife, and
JOHN W. ZIMMERMAN and TRACY C. ZIMMERMAN,
husband and wife,

Respondents/Cross-Appellants,

v.

TANYA J. KEPPLER-KNAUS, a single woman, and
RICHARD C. KEPPLER and SUSAN G. KEPPLER,
husband and wife,

Appellants/Cross-Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR ISLAND COUNTY
THE HONORABLE ALAN HANCOCK

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

The parties live in Ledgewood Beach, a community of homes that all share beautiful western views of the Puget Sound and Olympic Mountains and which is controlled by covenants that restrict the height of fences, hedges, and buildings. The appellants are the downhill neighbors of the respondents. Trees border the eastern, northern, and southern property lines of the appellants' property, creating a U-shaped hedge that destroys the respondents' views while leaving the appellants with an unobstructed view.

The trial court properly concluded that these trees violated the covenant prohibiting fences and hedges over 6 feet, and that this covenant was intended to protect the "homeowners' collective interests" of owning properties within a community, whose "primary amenity" and "primary selling point" was its "excellent views." Based on evidence showing a history of enforcement of this covenant by the Association governing the community, the trial court properly concluded that the covenant had not been abandoned.

The trial court could have ordered all of the trees forming hedges to be reduced to 6 feet or removed in order for the appellants to be in compliance with the covenant. Thus, appellants cannot complain that the trial court improperly exercised its discretion by

ordering only 13 of the 27 trees reduced or removed. To the extent the trial court did err, it was in not ordering the appellants to trim back to their property line the portion of their hedge that originates from adjoining property.

II. CROSS-APPEAL ASSIGNMENT OF ERROR

The trial court erred in denying plaintiffs' request that defendants be required to remove all branches forming the hedge on their property, including those that originate from other properties. (CP 11)

III. ISSUE RELATED TO CROSS-APPEAL

Overhanging branches from properties adjacent to the defendants are part of the hedge on their property that violated the covenant. Should the trial court have ordered the defendants to trim those branches that were on their property to effect compliance with the covenant?

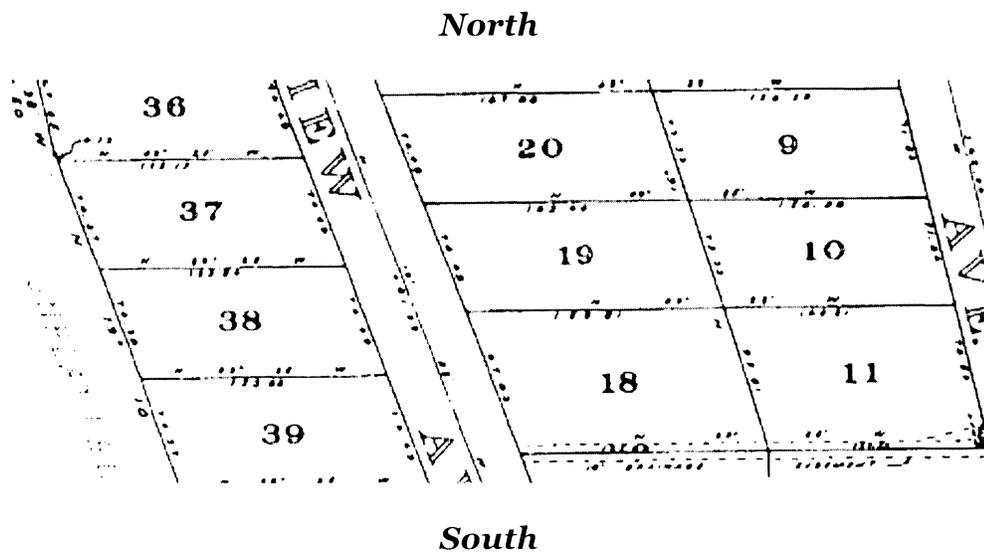
IV. RESTATEMENT OF FACTS

A. The Zimmermans and the Dwight-Detamores reside east and uphill from the Keplers at Ledgewood Beach, a community with expansive western views of the Puget Sound and Olympic Mountains.

Respondents Paul Dwight and Donna Detamore (the "Dwight-Detamores") and John and Tracy Zimmerman (the "Zimmermans"), and appellants Richard and Susan Keppler, and

Tanya Keppler-Knaus (the “Kepplers”) all own property within Block 9 of Division 3 of the Ledgewood Beach Plat, a subdivision located on a slope with western views of Puget Sound and the Olympic Mountains. (CP 337-38, 380, 541-42)

The Zimmerman property (Lot 10) is located east and directly uphill from the Keppler property (Lot 19). The Dwight-Detamore property (Lot 11) is located southeast and uphill from the Keppler property, and directly south of the Zimmerman property:



(CP 500)

Each of the parties’ properties ostensibly have expansive western views.¹ When the Zimmermans purchased their property in

¹ The term “ostensibly” is used because the Zimmerman and Dwight-Detamore views are impacted due to the overgrown hedges on the Keppler property. The Keppler view, however, remains clear and expansive.

1985, the MLS listing described the property as having “unrestricted” and “spectacular views of the west side of Whidbey Island [and] views of the shipping lanes and the majestic Olympic Mountains from all the living areas.” (CP 369) When the Kepplers considered selling their property in 2007, the MLS listing described the property as having “one of the most dramatic views on Whidbey Island, close to the beach with a splendid deck. Featuring expansive, elevated views of the shipping lanes and Olympic Mountains.” (CP 364) When the Dwight-Detamores purchased their property in 2011, the MLS listing described their home as having “huge windows framing views of Olympic Mountains and Admiralty Inlet.” (CP 367)

B. Ledgewood Beach is governed by restrictive covenants, including a 6-foot height restriction on hedges and fences.

The plat for Division 3 of Ledgewood Beach was recorded in April 1962. (CP 499-500) It was the third of three subdivisions of the Ledgewood Beach plat established by Robert and Patricia Keith. (CP 499) The first plat, Division 1 of Ledgewood Beach, was recorded in May 1953. (CP 495-97) Among the restrictions governing the properties in Division 1 was that certain lots were restricted from erecting “high fences or other obstructions which will in any way impair the view” of other lots. (CP 497)

Neither the plats for Division 2 or Division 3, both recorded in May 1962, contain restrictions regarding “fences or other obstructions” (see CP 95, 499), but in July 1963 the Keiths recorded “supplemental restrictive covenants” for Division 3 that provided a restriction similar to the one in Division 1. (CP 502) Rather than merely referring to “high fences or other obstructions which will in any way impair views,” the covenant expressly prohibited fences and hedges taller than 6 feet: “no fences or hedges shall be erected or permitted to grow to a height exceeding 6 feet.” (CP 502) The supplemental restrictive covenants also prohibit any building that exceeds “one story in height above the highest existing ground level,” with the exception of certain lots on the highest and furthest eastern slope of the subdivision. (CP 500, 502) The Ledgewood Beach Property Owners Association (the “Association”) described these covenants as “completed for the benefit of all property owners in Ledgewood Beach [Division 3] to enhance the values of investments made by purchasers of lots and homes therein.” (CP 282)

Starting in the early 1980s, the Association sought to create new restrictive covenants that would govern all three subdivisions of Ledgewood Beach. (See CP 259-64, 504-10) Among the proposed covenants was one prohibiting “fences or walls, shrubs, trees, or

bushes [from being] erected, or allowed to grow to a height which unduly restricts the view from other Ledgewood property.” (CP 506) However, after consulting an attorney, the Association learned that these new covenants were invalid unless agreed to by 100% of the property owners. (See CP 260) To avoid the expense and effort in obtaining a 100% consensus, the Association abandoned the idea of effecting new restrictive covenants (after several years of discussion) that would have controlled all three subdivisions. (See CP 258-64, 512) However, the Association confirmed that absent new restrictive covenants, the existing restrictive covenants for Division 3, including its height restriction for fences, hedges, and buildings, remained “in full force and effect.” (See CP 298-99)

C. The Ledgewood Beach Property Owners Association has generally been able to enforce the covenant restricting the height of hedges and fences through voluntary compliance.

The restrictive covenants have been actively discussed and enforced among the property owners and the Association over the last 30 years. (See *e.g.* CP 246-53, 256-64, 265, 271, 272, 273, 276, 278, 281, 282-83, 287-88, 291, 292, 294-97, 298-99, 310-11, 312, 313, 317, 320, 322-23, 324) Acknowledging that “trees blocking views” were a “community problem” (CP 265), the Association has enforced the covenant limiting the height of hedges against itself by removing

a number of trees located in the community-owned park that grew to heights that blocked the views of several homes. (CP 265-66)

Although the Association will facilitate enforcement of the restrictive covenants, it is up to the individual lot owners to bring violations to the Association's attention. (CP 340; *see e.g.* CP 275, 312) The Association generally does not enforce the covenants if no homeowner objects to the violation. Nevertheless, most homeowners voluntarily comply with the covenants without being asked. For instance, during the 1990s, the Zimmermans voluntarily removed three evergreen trees that had grown to 25 feet and created a hedge that potentially blocked the views of their neighbors. (CP 342, 370, 373)

When the Association has become involved in facilitating enforcement, it has historically been able to enforce the covenants without bringing legal action. (CP 340-45) However, if the Association is unable to obtain voluntary compliance and legal action is required to enforce the covenants, the Association has taken the position that it is up to the individual property owners to take action, because it "does not have the legal power to enforce [the covenants]" on its own. (CP 320)

D. In 2000, the Zimmermans enforced the covenant against the former owner of the Keppler property, as well as against the property directly north of the Keppler property. In both instances, the homeowners voluntarily complied with the covenant.

The Zimmermans purchased their property in 1985, motivated largely by its “fantastic views [of] northern Puget Sound, Admiralty Inlet, Straits of Juan de Fuca, Port Townsend Olympic Mountain, Keystone (Coupeville) Ferry dock, Fort Casey, and with the right weather conditions, some of the lights of Victoria, B.C.” (CP 337, 338, 361) When they moved in, the Keppler property was owned by Mary Halsen, the mother of Richard Keppler and Tanya Keppler-Knaus. (CP 339) The Kepplers inherited the property from Ms. Halsen after she died in 2006.² (CP 349, 541)

When the Zimmermans moved into their home, the backyard of the Keppler property, which abuts the Zimmerman backyard, was “basically barren” of trees. (CP 339) However, the following year, in fall 1986, Ms. Halsen planted a hedge of approximately 12 evergreen trees along her eastern property line between the Keppler property

² The property was deeded to Tanya Keppler-Knaus and Richard D. Keppler on February 16, 2007, after Ms. Halsen’s death. (CP 349, 541-42) In August 2007, the children added Mr. Keppler’s wife Susan to the deed. (CP 542)

and the Zimmerman property.³ (CP 339, 370-77) Over the next two years, Ms. Halsen added more trees to the eastern hedge, and planted additional trees along her south and north property lines.⁴ (CP 339-40) Ms. Halsen also planted trees on then-unoccupied lots directly north and south of the Keppler property (Lots 18 and 20). (CP 340)

Over time, the Keppler hedges exceeded the 6-foot height restriction under the covenants. (CP 345) By 1996, the hedges had grown to the height of the roof line of the house on the Keppler property, and the branches of the individual trees became intertwined, creating a “wall of vegetation” that impacted the Zimmermans’ views. (CP 345-46)

After many unproductive conversations between the Zimmermans and Ms. Halsen, the Zimmermans approached the Association for assistance with enforcing the covenant. (CP 275, 346) The Association agreed that the trees along the eastern border of the Keppler property violated the covenant restricting the height

³ The color pictures of the Zimmerman and Keppler properties during the 1980s and early 1990s attached to the May 28, 2015 John Zimmerman Declaration (CP 370-77) are attached as Appendix A.

⁴ Although Susan Keppler claimed that she believed there were trees on the property as early as 1977, she largely did not deny John Zimmerman’s declaration that Ms. Halsen planted additional trees bordering the property starting in the mid- to late- 1980’s. (See CP 132)

of hedges to 6 feet and told Ms. Halsen that the trees she had planted “now constitute a ‘hedge’ by definition and unduly restrict the view of your neighbors.” (CP 276, 282) The Association sought “action [from Ms. Halsen] to abide by these covenants.” (CP 282) Ms. Halsen then “opted to remove trees that constituted a hedge.” (CP 276, 287) She did not remove *all* of the trees that formed the hedges, but the removal of some trees and the trimming of others did open “pocket views” for the Zimmerman property. (CP 347-48)

Around the same time that the Association sought to enforce the covenant against the Keppler property, it also sought to enforce the covenant against the property directly north of the Keppler property (Lot 20). (*See* CP 292, 296, 342, 500) This was one of the lots on which Ms. Halsen had planted trees to augment the Keppler hedges, before it had been owned and occupied. (CP 342-44) The Association advised the new owner that “the trees on the northeast side of your Lot # 20, Block 9, Div. 3, have grown to such a height they now constitute a ‘hedge,’ by definition, and unduly restricts the view of your neighbors. Other trees on property just south of your lot [the Keppler property], which was a continuation of this hedge, have now been removed. A request for removal of trees, also constituting a continuation of this hedge, has been made to the

owner of lots to the east of you.” (CP 292) As a result of this notice, the owner of Lot 20 voluntarily removed the trees from his property. (CP 294-95, 342-44)

E. In 2012, the Dwight-Detamores successfully enforced the covenant against the lot downhill from their property and directly south of the Keppler property in superior court.

The Dwight-Detamores acquired their home at Ledgewood Beach in 2011. (CP 380) In 2012, the Dwight-Detamores expressed concern that trees from neighboring properties were impacting their views. (CP 332) The Association encouraged the Dwight-Detamores to work directly with the neighbors whose hedges were violating the covenant and impacting their views. (*See* CP 332)

A dispute arose between the Dwight-Detamores and their neighbor Cynthia Johnson, whose property is directly west and downhill from the Dwight-Detamore property. (CP 386-87, 456-57, 500) This lot (Lot 18) is directly south of the Keppler property, and is the other lot on which Ms. Halsen had planted trees in the mid-1980s to augment the Keppler hedges, before it was owned and occupied. (*See* CP 340, 353, 386, 500) After being unable to obtain voluntary compliance from Ms. Johnson, the Dwight-Detamores successfully sued in Island County Superior Court to enforce the

restrictive covenant prohibiting hedges and fences that exceed 6 feet in height. (*See* CP 386-87, 456-57)

In her ruling, Judge Vickie Churchill concluded that the trees constituted a hedge or fence, which violated the restrictive covenant because they exceeded 6 feet and impacted the Dwight-Detamore's views. (CP 457) Judge Churchill rejected Ms. Johnson's claim that the restrictive covenant had been "abandoned" because of the presence of large trees within the community as unsupported by the evidence. (CP 457) Although the trial court did not find it binding, it considered Judge Churchill's ruling in the Dwight-Detamore/Johnson action as evidence of the historic enforcement of the restrictive covenants. (6/11 RP 21-22)

F. By 2014, the Keppler hedges had once again grown to the extent that it violated the covenant and impacted the views from both the Zimmerman and Dwight-Detamore properties.

When Ms. Halsen originally removed and trimmed trees from her hedges on the Keppler property in 2000, the Association expressed "concern" that two of the cedar trees that she opted not to remove will eventually "grow together, thus restricting the view of your neighbors." (CP 291) The Association stated that it had assured the Zimmermans that Ms. Halsen "will not allow that to happen, as

you have indicated to me in our conversations that they will be thinned or trimmed as necessary.” (CP 291)

Despite the assurances from Ms. Halsen that she would trim and thin the trees on the Keppler property to prevent the cedars from growing together and creating a new hedge, she did not. (CP 348) Further, because Ms. Halsen did not remove all of the trees that formed a hedge, those trees too grew up and out, once again blocking the views from the Zimmerman property. (CP 348) The Zimmermans were unable to enforce the covenant because Ms. Halsen was in poor health and they did not want to compound her already difficult situation by pursuing enforcement. (CP 349)

Meanwhile, the previous owners of the Dwight-Detamore property complained of the growing hedges on the Keppler property to the Association in 2004. (See CP 312-13) It is unclear what efforts were made during this time to enforce the covenants against Ms. Halsen, who was still in ill health. Ms. Halsen eventually died in 2006, leaving the property to the Keplers, without resolution to the covenant violations on the property. (CP 349, 541-42)

Over the ensuing years, various efforts were made by the Association, the Zimmermans, the previous owners of the Dwight-Detamore property, and ultimately the Dwight-Detamores when

they purchased the property in 2011, to bring the Keppler property in compliance with the covenant. The Association first reached out to the realtor when the Kepplers initially planned to sell the property after Ms. Halsen's death, and then directly to the Kepplers when they decided to live on the property, starting in 2007.⁵ (CP 320, 322-23, 350, 542) Despite these efforts, including offers of financial assistance to remedy the violations of the covenant, the Kepplers declined to comply with the restrictive covenant. (See CP 349-52)

By 2014, there were 27 trees on the Keppler property that exceeded the height of six feet.⁶ (CP 170, 189-90, 194-95) The majority of these trees were planted along the east, south, and north border of the Keppler property, creating what is essentially a U-shaped hedge (See CP 189, 194-95) (See Appendix B)⁷ that effectively blocked the views from the Zimmerman and Dwight-Detamore properties while leaving an unobstructed westerly water and mountain view from the Keppler property. (CP 171) Notably, the

⁵ Richard and Susan Keppler live on the Keppler property. Tanya Keppler-Knaus holds an interest in the property, but does not live there. (CP 542)

⁶ The color pictures attached to the May 28, 2015 Paul Dwight Declaration (CP 188-190, 193-226) are attached as Appendix B to this brief.

⁷ The Keppler property is located in the upper left hand corner on CP 194, and in the upper right hand corner on CP 195. The graph on CP 189 shows the location of individual trees on the Keppler property.

views from the Keppler property have also remained preserved because their neighbors to the west have complied with the restrictive covenants. (CP 171-72)

The Keplers denied that the trees formed a hedge because they claim that the trees are 10 to 48 feet apart.⁸ (CP 543-44) Regardless of the distance between the trunks, it is the fact that the trees are aligned along the borders of the Keppler property and that the branches have become so intertwined to impact the views from the Zimmerman and Dwight-Detamore properties that make it a “hedge” that violates the covenant. (CP 171) The trees have been allowed to grow so tall and so wide that they create a “wall of vegetation” along the east, south, and north borders of the Keppler property. (See CP 196-202, 208-10, 212-15, 218-21) (Appendix B)

G. The trial court concluded that the Keplers’ trees violated the covenant restricting the height of hedges and fences that was intended to protect views, and rejected the Keplers’ claim that the covenant had been abandoned.

On December 16, 2014, the Zimmermans and Dwight-Detamores sued the Keplers to enforce the restrictive covenant

⁸ On appeal, the Keplers repeat their claim made below that the trees were necessary for the “bluff and drainage issues in this area.” (App. Br. 9; CP 544) The Keplers have never presented any evidence showing that their property has either bluff or drainage issues. This is merely a red herring manufactured by the Keplers.

prohibiting fences or hedges from being erected or permitted to grow to a height exceeding 6 feet. (CP 652) The Keplers moved for summary judgment on May 14, 2015, asking the trial court to dismiss the complaint by claiming that their “large mature trees” could not be a “hedge” or “fence” under the restrictive covenant, and that in any event, the covenant had been abandoned because there were other similar trees throughout the community. (CP 622-23)

In response, the Zimmermans and Dwight-Detamores asked for summary judgment that the trees on the Kepler property did violate the restrictive covenants, and for an order requiring the Keplers to remove or reduce all of the trees over six feet on their property, as well as the overhanging branches from adjacent properties, that formed the hedges. (CP 489) Both parties conceded that there were no “genuine issues of material fact” and the case was “ripe for summary judgment.” (6/19 RP 3; 6/11 RP 30, RP 63-64)

The parties appeared before Island County Superior Court Judge Alan Hancock on June 11, 2015 on the parties’ cross-motions for summary judgment. The trial court denied the Keplers’ motion for summary judgment, and granted summary judgment in favor of the Zimmermans and the Dwight-Detamores. (CP 6-13)

The trial court concluded that there were “trees over six feet in height that constitute a fence or hedge [on the Keppler property] for purposes of the subject covenant and thereby violate that covenant.” (CP 9) The trial court concluded that it was “evident” the trees that were planted along or close to the east, north, and south boundaries of the Keppler property were hedges. (6/19 RP 15) The trial court ruled that “the trees along the eastern, northern, and southern boundaries of the [Keppler] property are hedges within the meaning of that term as used in the subject covenant and they have been permitted to grow to heights substantially exceeding six feet,” thus violated the restrictive covenant. (CP 9)

The trial court also concluded that the Keppler hedges impacted the views from the Zimmerman and Dwight-Detamore properties, thus violated the underlying purpose of the restrictive covenant, which was to protect views. (6/19 RP 17) The trial court ruled that due to “the nature of the trees in question, and particularly the cedars, pine, fir, hemlock, and maple trees [] they almost completely obscure the view to the west from the Zimmerman property and part of the view to the northwest from the Dwight/Detamore property.” (6/19 RP 15) The trial court ruled that “allowing the [Kepplers’] hedges to remain as they are would vitiate

the meaning and intent of the covenant prohibiting fences and hedges over six feet in height.” (6/19 RP 18) In making its decision, the trial court also commented that it was “interesting to note that the [Keplers] have not erected tree fences or hedges to the west of their home. They have largely preserved their own westward-facing views but are fighting to prevent the plaintiffs from enjoying such views.” (6/19 RP 18)

The trial court rejected the Keplers’ claim that the restrictive covenants had been abandoned because there were large trees throughout the community. The trial court concluded that “the subject covenant has not been abandoned, nor has there been such a change in the character of the neighborhood that the covenant should not be enforced. No equitable doctrine prevents the granting of an injunction in this situation.” (CP 9)

The trial court concluded that the Zimmermans and the Dwight-Detamores have “proven a clear legal and equitable right and have a well-grounded fear of invasion of that right, in that [the Keplers have] trees on their property that violate the subject covenant prohibiting fences or hedges from exceeding six feet in height.” (CP 10) Of the 27 trees that exceed the height of 6 feet, the trial court ordered 13 to be reduced to 6 feet or removed. (CP 10-11,

13) The trial court denied the plaintiffs' request for an order requiring the Keplers to trim the overhanging branches on their property that were part of their hedges, which originated from adjacent properties. (CP 11)

The Keplers appeal, and the Zimmermans and Dwight-Detamores cross-appeal.

V. ARGUMENT

A. **The trees planted along the borders of the Kepler property violated the covenant that restricts the height of hedges and fences to 6 feet.**

This Court should affirm a trial court's order granting summary judgment "if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 249, ¶ 10, 327 P.3d 614 (2014). Here, there are no genuine issues of material fact. While appellants now claim that "at the very least the Keplers established a dispute of material fact" (App. Br. 23), they conceded below that there was no genuine issues of material fact.

Appellants cannot now claim on appeal that there are genuine issues of material fact, which precluded summary judgment when they waived that argument below. When the trial court inquired whether the parties agreed that there were no genuine issues of

material fact, the appellants responded that despite the parties' disputes over interpretation of the covenants and interpretation of the photographs presented by the parties, the trial court could make its determination as a matter of law:

I do [agree there are no genuine issues of material fact], your Honor. I believe the parties have disputed, perhaps, the interpretation of the recorded documents, and perhaps the interpretation of the photographs, but I believe the Court can make all of those determinations as a matter of law at summary judgment. I suppose that the sole issue would be if your Honor believed he needed to make a site visit or take testimony regarding a photograph. That would be the only situation that I could envision, but I don't believe that's necessary here.

(6/11 RP 30-31) Thus, after considering the evidence before it, the trial court properly concluded as a matter of law that the trees on the Keppler property violated the restrictive covenant that provides that "no fence or hedge shall be erected or permitted to grow to a height exceeding 6 feet" because those trees formed hedges that indisputably exceeded the height of 6 feet. (CP 9-10)

1. The trees on the Keppler property form "hedges" that exceed the height of 6 feet and violate the covenant.

In determining that the trees on the Keppler property were "hedges" under the restrictive covenant, the trial court properly relied on the "plain meaning" of "hedge." (App. Br. 24, *citing Hearst*

Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005)) The trial court defined hedge as “a fence or boundary formed by a row of shrubs or low trees planted close together [or] any fence or wall marking a boundary or forming a barrier.” (6/19 RP 14, *citing* Webster’s Third New International Dictionary) This definition is no different than the definitions offered by the Kepplers on appeal. (*See* App. Br. 25-26) Based on these definitions, the trial court properly concluded that the Keppler trees formed a hedge.

The trees are hedges because together they form a “boundary” around the Keppler property. As the trial court recognized, the trees were “planted close enough together that they form a boundary.” (6/19 RP 15) While the trees were “not all planted in a completely straight line, many of them are, [and] it is apparent that they form boundaries forming a U-shaped barrier around the back of the [Keppler] property.” (6/19 RP 15) The trial court noted that while there were gaps between the “hedge of trees along the north and south borders” and “the trees along the back [east] of the [Keppler] property” that “does not mean that the trees along the north and south borders do not constitute a hedge within the definition of that term. The trees in question are not scattered all over the [Keppler]

property, but rather they exist either on or close to the boundaries of the property.” (6/19 RP 15-16)

The Keplers argue that the trees do not create a “boundary” because they “do not form an impenetrable wall or fence of vegetation.” (*See* App. Br. 27) But a “boundary” does not have to be “impenetrable.” A boundary by definition is merely “something that indicates bounds or limits; a limiting or bounding line.” Webster’s New Universal Unabridged Dictionary 247 (2nd ed. 1996). This is exactly what the trees do here as shown in photographs at CP 194-95, included in Appendix B. The trees align along the northern, southern, and eastern lines of the Kepler property, forming a U-shaped boundary. (*See* CP 194-95; *see also* CP 189)

The Keplers also claim that the trees are not a hedge because they are purportedly not “dense” and there are “large gaps” between the trees. (App. Br. 27) But as the trial court noted, that argument “fails to account for the fact that the trees have grown up in such a manner that their branches have grown together, clearly forming a barrier or boundary. Closeness is a relative term and while, say, English laurel plants spaced 15 to 20 to 25 feet from each other might not fill in over time, when we are talking about cedar trees, they

branch out in such a manner that they readily fill the gaps between them.” (6/19 RP 16)

In other words, regardless of the distance between the trunks of the trees, the trees have been permitted to grow not only up, but out, which has created density among the branches. This density is best illustrated by photographs shown at CP 196-202, 208-16, 219, included in Appendix B. These trees and their branches create a “wall of vegetation” as seen from the Zimmerman and Dwight-Detamore properties, regardless of the space between the trunks of the individual trees as seen from the Keppler property.

The Kepplers also claim that the trees are not a hedge because they have not “intentional[ly] [] “maintained, manipulated, trimmed, or shaped” them into a hedge. (App. Br. 26) But it does not matter whether the Kepplers intended their trees to act as a hedge, or even whether Ms. Halsen intended to create a hedge when she planted the trees. “A [hedge] of trees is a [hedge] regardless of the landowner’s intent in planting it.” *Town of Clyde Hill v. Roisen*, 111 Wn.2d 912, 921, 767 P.2d 1375 (1989) (discussing violation of an ordinance restricting the height of naturally grown fences).

Further, it does not matter that the trees were planted by the Kepplers’ predecessor, their mother. The covenant prohibits both

the “erecting” of hedges that exceed 6 feet and “permitting” them to grow above 6 feet. (CP 502) As the trial court noted, it would be illogical to permit property owners “to circumvent the clear intent of the covenant by arguing that they themselves did not plant the trees.” (6/19 RP 17) By refusing to remove or reduce the height of their hedge, the Keplers have “permitted” the hedge to grow to a height exceeding 6 feet, and thus violated the covenant.

2. The trees on the Keppler property form a “fence” that exceeds the height of six feet and violate the covenant.

The Keplers’ claim that any interpretation that the “drafters intended no rows or groups of trees over six feet tall” is a “forced and strained interpretation” (App. Br. 36-37) is wholly undercut by the courts’ decisions in both *Town of Clyde Hill v. Roisen*, 111 Wn.2d 912 and *Lakes at Mercer Island Homeowners Ass’n v. Witrak*, 61 Wn. App. 177, 810 P.2d 27, *rev. denied*, 117 Wn.2d 1013 (1991), which separately upheld an ordinance and restrictive covenant that prohibited rows of trees from exceeding 8 and 6 feet. While the trial court here relied on the definition of “hedge” to conclude that the trees on the Keppler property violated the restrictive covenant, the trees also formed a “fence,” which is also prohibited by the covenant.

In *Clyde Hill*, our Supreme Court held that the defendant's fir trees planted near his property line was a "fence" in violation of a town ordinance that prohibited fences that exceed 8 feet. The Court considered both the "plain" meaning of fence and its definition under the ordinance, which defined fence as a means of "confinement" or "protection" or used as a "boundary." *Clyde Hill*, 111 Wn.2d at 920. The Court held that the "defendant's planting of 13 potentially enormous trees near his property line in the fashion he did logically indicates a purpose of confinement or use as a boundary," thus violated the ordinance. *Clyde Hill*, 111 Wn.2d at 922. The Court held that these "tall, bushy trees" created a "dense, wooded wall" and was "legally and factually [] a fence and, as such was prohibited by a valid town ordinance." *Clyde Hill*, 111 Wn.2d at 922.

Similarly, this Court in *Lakes at Mercer Island*, held that the defendant's planting of fir trees, ranging in heights between 25 and 30 feet, adjacent to the boundary line of her property arguably violated the covenant prohibiting fences from exceeding a height of 6 feet, and reversed summary judgment by the trial court concluding that the trees did not constitute a fence as a matter of law. The covenant provided that "fences, walls, or shrubs are permitted to delineate the lot lines of each lot [but] in any event, no fence erected

within the subdivision shall be over six feet (6') in height." *Lakes*, 61 Wn. App. at 179.

This Court defined "fence" as "a barrier [or] hedge, structure, or partition, erected for the purpose of inclosing a piece of land, or to divide a piece of land or to separate two contiguous estates." *Lakes*, 61 Wn. App. at 182 (*citing* Webster's Third New International Dictionary 837 (1969) and Black's Law Dictionary 745 (4th ed. 1968)). This Court held that the "literal meaning of fences does not exclude a row of trees along a property line." *Lakes*, 61 Wn. App. at 182.

This Court rejected an argument, similar to the one made here by the Keplers, that trees could not be governed by a covenant restricting the height of fences. This Court noted that "in view of the overall purposes and the specific control of 'fences, walls and shrubs' delineating a boundary, it is almost inconceivable that the developer had any actual intent to allow a row of trees immediately adjacent to a property line without any control. If such is the meaning, it surely was not deliberate." *Lakes*, 61 Wn. App. at 181-82. This Court went on to note, "what is the difference for these purposes between a line of 15-foot cedar trees and line of 15-foot laurel shrubs? Given the covenant's clear concern with height and obstruction of neighbors'

light and view, it would be a strange reading indeed that would require prior approval of relatively low shrubbery delineating a lot line but allow a property owner to plant large trees along the same lot line without ACC approval.” *Lakes*, 61 Wn. App. at 182-83.

Likewise here, it would make no sense for the drafters of the covenants to restrict the height of hedges and fences and then be indifferent towards the height of individual trees that effectively act as either a fence or hedge by bordering a homeowner’s property. This is especially true because, as addressed below, the underlying intent of the restrictive covenant was to protect the views of the properties within the subdivision. Because the trees on the Keppler property form hedges or a fence, exceed the height of 6 feet, and impact the views from the Zimmerman and Dwight-Detamore properties, the trial court properly concluded that the trees violated the restrictive covenant.

B. The purpose of the covenant restricting the height of hedges and fences was to protect views.

- 1. The underlying intent of a restrictive covenant need not be stated for the Court to enforce it when the surrounding circumstances support that a specific purpose was intended.**

The trial court also properly concluded that the trees on the Keppler property were hedges under the covenant because their

height exceeding 6 feet impacted the views from the Zimmerman and Dwight-Detamore properties, which the restrictive covenants intended to protect. (6/19 RP 17) In construing covenants, “the primary objective is to determine the intent of the parties to the agreement.” *Greenbank Beach & Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 522, ¶ 14, 280 P.3d 1133, *rev. denied*, 175 Wn.2d 1028 (2012). If the intent is unclear from a plain reading of the covenants, the Court may consider “the surrounding circumstances that tend to reflect the intent of the drafter and the purpose of a covenant that runs with the land.” *Bauman v. Turpen*, 139 Wn. App. 78, 89, ¶ 17, 160 P.3d 1050 (2007). Among the “surrounding circumstances” that the Court may consider are the “topography” of the subdivision, as well as other covenants imposed within the same subdivision. *Bauman*, 139 Wn. App. at 89-90, ¶ 18.

- a. **As the “primary selling point” for all of the properties within the subdivision was its views, the trial court properly concluded that the covenant was intended to protect views.**

The Keplers argue that “right to a view is significant” and courts will not “imply rights to views absent specific, enforceable agreements providing such rights.” (App. Br. 27) But neither of the cases cited by the Keplers deal with properties within a subdivision

burdened by restrictive covenants. See *Pierce v. Northeast Lake Washington Sewer and Water, Dist.*, 123 Wn.2d 550, 870 P.2d 305 (1994) (inverse condemnation action against a municipal district erecting a water storage tank) (App. Br. 27); *Collinson v. John L. Scott, Inc.*, 55 Wn. App. 481, 778 P.2d 534 (1989) (nuisance action against developers building condominiums) (App. Br 28).

Restrictive covenants are favored, the courts' interpretation must take care not to frustrate the homeowners' collective interests. "Subdivision covenants tend to enhance the efficient use of land and its value. The value of maintaining the character of the neighborhood in which the burdened land is located is a value shared by the owners of the other properties burdened by the same covenants." *Green v. Normandy Park Riviera Section Community Club, Inc.*, 137 Wn. App. 665, 683, ¶ 40, 151 P.3d 1038 (2007), *rev. denied*, 163 Wn.2d 1003 (2008).

In *Bauman v. Turpen*, 139 Wn. App. 78, for instance, this Court concluded that a covenant limiting the height of buildings to one story for lots on the lower end of a slope in a subdivision that provided western and northern views of Puget Sound and the Olympics was intended to protect views. This Court rejected an argument, similar to the one made here, that because the restriction

“does not mention view preservation [], the trial court erred as a matter of law by construing intent not found in the covenant’s express language.” *Bauman*, 139 Wn. App. at 88, 89, ¶¶ 16, 18 (citing and following *Foster v. Nehls*, 15 Wn. App. 749, 551 P.2d 768 (1976) (one story height restriction intended to protect views regardless of the absence of the stated intent), *rev. denied*, 88 Wn.2d 1001 (1977)). This Court noted that “preserving neighboring views is a recognized interest and is not per se unreasonable.” *Bauman*, 139 Wn. App. at 91, ¶ 22. Accordingly, this Court held that in light of the “surrounding circumstances,” including the topography of the subdivision and the views afforded to those lots on the upper slope, that the one-story height limit was intended in part to protect those views even if it not specifically stated. *Bauman*, 139 Wn. App. at 91, ¶ 22.

Similarly, in *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006), the court concluded that a restrictive covenant requiring that “buildings on residential lots shall be simple, well-proportioned structures” was intended to protect views of neighboring properties, regardless of the absence of this stated intent within the covenants. The *Wimberly* court reasoned that the community burdened by the restrictive covenant “overlook[s] Lake Roosevelt. The scenic location and views are an intrinsic part of the

aesthetic and monetary value of the lots. We agree with the trial court that to interpret the garage covenant as permitting a multi-story, multi-purpose structure, considerably taller than the house [] would defeat the drafters' manifest purpose [of protecting views]". *Wimberly*, 136 Wn. App. at 337, ¶ 31. The *Wimberly* court went on to note that the "only plausible reason to restrict the number and size of buildings here was to preserve the spectacular views of Lake Roosevelt." *Wimberly*, 136 Wn. App. at 338, ¶ 34; *see also Saunders v. Meyers*, 175 Wn. App. 427, 442, ¶ 34, 306 P.3d 978 (2013) ("there is no apparent reason to impose restrictions on trees except to protect views").

The Kepplers' reliance on *Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190 (2003), *rev. denied*, 151 Wn.2d 1018 (2004) (App. Br. 32-33) to argue that absent language regarding views the trial court could not conclude the covenant protected views, is misplaced. In *Day*, this Court reasoned that the building height restriction was not intended to protect views in part because the Association never interpreted it as such. 118 Wn. App. at 758. There was substantial evidence in *Day* that the Association regularly granted approval for the construction of buildings that negatively impacted the views of its neighbors.

Here, however, the Association has regularly interpreted the covenant restricting the height of hedges and fences as protecting the views of properties within the subdivision. (See § III.C., D., *supra*) Thus, this case is far different from the situation in *Day*. See *Bauman*, 139 Wn. App. at 90, ¶¶19-20 (providing a similar analysis regarding *Day*). Instead, it is more similar to *Bauman*, 139 Wn. App. 78 and *Wimberly*, 136 Wn. App. 327 (*discussed supra*).

Like *Bauman* and *Wimberly*, the restrictive covenant in this case does not mention “views,” but it is clear from the “surrounding circumstances,” including the “topography” of the subdivision that the drafters intended to protect the views of the homeowners. As the trial court acknowledged, “the subdivision is located on a western-facing slope with excellent views of the water and the Olympic Mountains.” (6/19 RP 17) It is “patently obvious” that these views would be the primary “amenity” and “selling point” for the property owners within the division. (6/19 RP 17) Thus, the trial court properly concluded that to allow the trees that border the Keppler property to exceed the height of 6 feet, would vitiate the meaning and intent of the covenant. (6/19 RP 18)

b. The covenant restricting the height of buildings within this same subdivision supports the trial court's conclusion that the restrictive covenants as a whole intended to protect views.

The trial court's conclusion that the restrictive covenant was intended to protect views is also bolstered by the language of other restrictive covenants the drafters imposed. *See Bauman*, 139 Wn. App. at 89-90, ¶ 18 (holding that other restrictive covenants imposed by the drafters should be considered in determining intent). The Court must examine the restrictive covenants in its entirety, considering all provisions. *Bauman*, 139 Wn. App. at 89, ¶ 17.

Here, in addition to the covenant restricting the height of fences and hedges, the drafters included a covenant restricting the height of buildings to one story in height above the existing ground level, "except for those lots at the eastern boundary of the subdivision at the farthest upslope part of the subdivision." (6/19 RP 22; CP 502) As the trial court noted, this too was intended to protect views because the point of excluding the eastern most properties was that there was "no need for a one-story height restriction where no one's view would be affected." (6/19 RP 23) In other words, the drafters only imposed height restrictions on buildings on those lots that

would impact the views of their neighbors, thus the intent of the covenant was to protect views.

The Keplers argue that had the drafters intended to protect views with its height restriction for hedges and fences, it would have excluded the properties on the upper slope from that restriction, just as it had for buildings. (App. Br. 30, 36-37) But a restrictive covenant could have more than one purpose. *See e.g. Bauman*, 139 Wn. App. at 90, ¶ 21 (height restriction was intended to protect views and promote conformity among the properties). The height restriction on fences and hedges in this case is for both view protection and, as the Keplers acknowledge, protection of the “appearance and aesthetic quality throughout the subdivision, which would have equal application to all lots within the development.” (App. Br. 30)

After considering the “surrounding circumstances,” including the topography and other restrictive covenants controlling the subdivision, the trial court properly concluded that the underlying intent of the covenant restricting the height of fences and hedges was to protect the homeowners’ views.

2. The trial court’s interpretation of the covenant protects the “homeowners’ collective interests” in preserving their views.

In interpreting covenants, the Court must “place special emphasis on arriving at an interpretation that protects the homeowners’ collective interests,” as there is no longer a “thumb on the scales [] favor[ing] the free use of land.” *Wilkinson v. Chiwawa Communities Ass’n*, 180 Wn.2d 241, 250, ¶ 12, 327 P.3d 614 (2014). This is due to the fact that restrictive covenants “tend to enhance, not inhibit, the efficient use of land.” *Wilkinson*, 180 Wn.2d at 250, ¶ 12. “If more than one reasonable interpretation of the covenants is possible regarding an issue, we must favor that interpretation which avoids frustrating the reasonable expectations of those affected by the covenants’ provisions.” *Green v. Normandy Park*, 137 Wn. App. at 683, ¶ 40.

The “homeowners’ collective interests” here is evident from the manner in which the Association has interpreted the covenant over the last 20-30 years, and is relevant in determining the underlying intent of the covenant. *See e.g. Day*, 118 Wn. App. at 758 (holding that the Association’s failure to treat a restrictive covenant regarding building heights as protecting views leads to the conclusion that view protection was not the intent) (*See App. Br. 35*)

In this case, the Association has consistently treated the covenant as one that protects views, and has regularly confirmed that interference with views is a “community problem.” (CP 265)

The protection of views was also favored by the developers as evidenced by the restrictive covenants they effected for an earlier subdivision of the Ledgewood Beach plat, which expressly prohibited “high fences or other obstructions which will in any way impair [] views.” (CP 497) The Keplers argue that this is evidence that the drafters intended to *not* protect views because they did not include similar language in the covenants for Division 3. (App. Br. 31-33) But as the trial court noted, “in the overall context of a sloping subdivision with panoramic views of the water and mountains, the drafters more probably thought it unnecessary to make specific references to views in the 1963 covenant where a specific six-foot limitation was imposed.” (6/19 RP 22)

Likewise, the failure of later attempts to effect additional restrictive covenants that more specifically addressed the protection of views from “fences or walls, shrubs, trees, or bushes” is irrelevant. (App. Br. 34) As reflected in the records from the Association, it would have been difficult to obtain 100% consensus from the property owners to enact new restrictive covenants. (*See* CP 259-64)

Thus, the Association chose to continue to rely on the existing restrictive covenants, which already protected views from oversized fences, hedges, and buildings.

The trial court properly concluded that the intent underlying the covenant restricting the height of fences was to protect the views of the property owners.

C. The Keplers failed to prove that the restrictive covenant prohibiting hedges and fences that exceed 6 feet was abandoned.

The Keplers' argument that Division 3 of Ledgewood Beach has abandoned the restrictive covenant limiting the height of fences and hedges to 6 feet is wholly without merit. The fact that the covenant has not been abandoned is plainly evidenced by the history of enforcement by the Association and property owners, including against the Keplers' predecessor. It is also evidenced by the Dwight-Detamores' successful enforcement of the covenant against another property owner, in which the court there also rejected the defense of abandonment.

Further, the Keplers reliance on out of state authorities to support their argument is wholly disingenuous based on their false claim that there are "relatively few published Washington cases analyzing the abandonment of real covenants." (App. Br. 38) In fact,

our courts have considered this issue a number of times as set out here. While those decisions largely support the respondents' position that the Keplers failed to prove abandonment, that is no reason for this Court to have to consider the cases from other jurisdictions that the Keplers rely upon. (*See* App. Br. 38-40)

- 1. The covenant restricting the height of hedges and fences has not been “habitually and substantially violated,” nor are any violations “material to the overall purpose of the covenant,” which is to protect views.**

To prove abandonment, the Keplers must show that the covenant has been “habitually and substantially violated so as to create an impression that it has been abandoned.” *Green v. Normandy Park*, 137 Wn. App. 665, 697, ¶ 77, 151 P.3d 1038 (2007). A few such violations, however, do not constitute abandonment. *Green*, 137 Wn. App. at 697, ¶ 77 (holding that restrictive covenant for setback requirements was not abandoned when there was history of enforcement, and the few violations shown by defendants did not constitute abandonment). “The defense of abandonment requires evidence that prior violations by other residents have so eroded the general plan as to make enforcement useless and inequitable.” *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 342, 883 P.2d 1383 (1994) (holding that defendants failed to prove

abandonment of a restrictive covenant prohibiting outdoor antennas); *see also Mt. Baker Park Club, Inc. v. Colcock*, 45 Wn.2d 467, 471, 275 P.2d 733 (1954).

The Keplers argue that the covenant has been abandoned because they presented evidence of “large, mature trees” throughout the community. (App. Br. 40) But as the trial court noted, the “covenants restrict fences and hedges, not individual trees.” (6/19 RP 27-28) Further, the plaintiffs presented evidence that to the extent there were any “groups” or “rows” of large trees, it was over a small percentage of lots and no enforcement was sought because many were either on, or opposite, undeveloped lots that did not impact views. (6/19 RP 28; *See* CP 179-85) Those few violations did not prove a “substantial modification of the restricted plan” to warrant a conclusion that the covenant had been abandoned. *See Mt. Baker Park Club, Inc.*, 45 Wn.2d at 471.

In *Mt. Baker Park Club*, our Supreme Court considered a claim that a setback requirement for garages in a restrictive covenant was abandoned because the defendant presented evidence of other garages that were within the restricted area. The Court rejected the defense of abandonment, after recognizing that the “number of such garages, their location and manner of construction is not sufficient

to create any substantial modification of the restricted plan [], they do not show [] an intent to abandon the restrictive covenants [], nor do they show substantial changes in the neighborhood as originally planned and carried out by the above plan.” *Mt. Baker Club*, 45 Wn.2d at 472.

Here, the photos presented by the Keplers do not show a “substantial modification of the restricted plan” that prohibits hedges and fences from exceeding 6 feet. Further, any violations do not show an “intent to abandon the restrictive covenant” when it was relatively undisputed that any hedges or fences that did exceed 6 feet did not impact any views, which is the purpose of the covenant. “Violations must be material to the overall purpose of the covenant, and minor violations are insufficient to find abandonment.” *Mountain Park Homeowners*, 125 Wn.2d at 342. As the trial court stated from its own examination of the photographs, “it is evident that a great many properties within Division 3 continue to have an excellent view of the water and the mountains.” (6/19 RP 29)

Enforcement of the covenant restricting the height of fences and hedges based solely on a few violations that do not undermine the purpose of the covenant would not be “useless and inequitable.” *Mountain Park Homeowners*, 125 Wn.2d at 342. Instead,

enforcement would be consistent with the homeowners' collective interests in preserving the views that is the "primary amenity" of the subdivision and was the "primary selling point."

2. The Association's decision to limit its pursuit of violations to those that undermine the purpose of the covenant by impacting views is not abandonment of the covenant.

The fact that the Association does not independently enforce the restrictive covenant if no one complains is not evidence of abandonment. In fact, a similar argument was rejected by our Supreme Court in *Town of Clyde Hill v. Roisen*, 111 Wn.2d 912, 767 P.2d 1375, 1379 (1989). There, the defendant sought to avoid compliance with a town ordinance prohibiting his trees, which formed a fence, from exceeding the height of 8 feet due to "ad hoc enforcement." The Supreme Court rejected that argument noting that the town, like the Association here, relies on others to bring violations to their attention. The Court held that the defendant could not avoid compliance simply because the town did not address violations not brought to its attention. The Court noted that the town's actions (or inaction as is the case) was a "wise decision to use its resources efficiently for the benefit of all citizens, by avoiding court procedures unless absolutely necessary." *Clyde Hill*, 111 Wn.2d at 921.

Such is the case here. The Association does not unilaterally enforce the restrictive covenant if no homeowner complains. This makes sense, particularly when the purported violations are on undeveloped lots that do not interfere with views. To do otherwise, would require the Association to waste time and resources reducing or removing trees that have no impact on the property owners. As the trial court noted, “why would someone sue someone else unless his or her view was being obstructed? And does it really mean that a covenant has been abandoned, thereby precluding others from enforcing it, if some property owners might decide not to go to the time, expense, and headache of suing the offending property owner?” (6/19 RP 29-30)

3. The Keplers’ claim of abandonment is wholly undermined by the history of enforcement of the covenant against their own property over the last 15 years.

Finally, the Keplers’ argument on abandonment is particularly not well taken here, since the restrictive covenant has consistently been sought to be enforced against their property for the last 15 years. As the trial court pointed out, the Keplers’ “predecessor in interest planted trees which grew up to form a dense hedge obstructing her neighbors’ views and where her neighbors tried for years to get her and her successors, the [Keplers], to

comply with the covenant, and where she actually admitted that the trees formed a hedge and agreed to take mitigating action, but where the trees grew back and obstructed her neighbors' view as bad as ever. It would by no means be equitable to apply the abandonment or changed neighborhood doctrine in this case." (6/19 RP 30) The trial court properly concluded that the covenant restricting the height of hedges and fences to 6 feet was not abandoned, and the Keplers' argument otherwise is meritless.

D. It was well within the trial court's discretion to order removal of 13 of the trees that formed a hedge on the Keppler property.

The trial court's injunction ordering the removal of 13 trees from the Keppler property was well within its discretion. "A trial court's decision to grant an injunction and the terms of that injunction are reviewed for an abuse of discretion. A trial court abuses its discretion if its ruling is manifestly unreasonable or it exercises discretion on untenable grounds or for untenable reasons. A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard, or if the facts do not meet the requirements of the correct standard. When a trial court orders injunctive relief, there is no abuse of discretion unless no reasonable judge would take the position

adopted by the trial court.” *Bauman v. Turpen*, 139 Wn. App. 78, 93, ¶ 26, 160 P.3d 1050 (2007).

The trial court properly “balanced the equities” in ordering removal or reduction of 13 of the 27 trees on the Keppler property that exceeded 6 feet and formed hedges. (6/19 RP 32) *Green v. Normandy Park Riviera Section Community Club, Inc.*, 137 Wn. App. 665, 698, ¶ 18, 151 P.3d 1038 (2007) (the trial court may balance the equities of the parties in considering whether to grant an injunction). The trial court considered the fact that the plaintiffs had been deprived of their views, which had been the “primary amenity of their properties” and the “primary reason” they purchased their properties. (6/19 RP 33-34) Meanwhile, the trial court acknowledged that the defendants were “not innocent.” (6/19 RP 33) “While it is true that they did not plant most of the offending trees, they were made aware of the problem with the trees violating the covenant early on but did nothing to remedy the problem.” (6/19 RP 33)

The trial court properly ordered the removal or reduction of the most “offending” trees that formed hedges. The Kepplers argue that only some of the trees within the hedges should have been ordered removed or cut. But the Kepplers miss the point, the trees

are hedges and under the covenants they must be reduced to 6 feet (or removed). Asking that only part of the hedge be removed would undermine the plain language of the covenant. For instance, this would be the same if the Keplers had a 12-foot fence. It would be absurd for them to argue in that instance, that only “some” of the slats of the fence be reduced or removed. Instead, the fence as a whole must be reduced to comply with the covenant. (*See also* 6/19 RP 36, noting that it would be “incongruous” if this had been a laurel hedge to order only a few of the bushes reduced to 6 feet while allowing the others to remain at greater heights)

Further, it was also wholly appropriate for the trial court to order the reduction or removal of all of the trees along the eastern border of the Kepler property. (App. Br. 45) The hedge on the eastern border had the greatest impact on the views from the Zimmerman and Dwight-Detamore properties. As evidenced by their predecessor’s removal of only a few trees that formed the hedge in 2000, any remaining trees would continue to grow up and out and will likely create a new hedge in just a short time. In that case, the parties will likely be forced to litigate this issue once again with the Keplers arguing that they are “individual trees” and not a hedge

subject to the restrictive covenant. The trial court's decision, which avoided that result, was well within its discretion.

The Keplers rely on *Clyde Hill v. Roisen*, 111 Wn.2d 912, 767 P.2d 1375 (1989) to claim that the trial court abused its discretion in ordering the removal or reduction of certain trees on their property. In *Clyde Hill*, the trial court ordered the removal of 6 of the 13 trees that formed a fence on the defendant's property. But the issue of whether the defendant should have been required to remove all (or fewer) of the trees was not before the Court on appeal. Instead, the issue was whether the ordinance prohibiting fences exceeding 8 feet was overbroad and whether trees could even form a fence under the ordinance. Thus, *Clyde Hill* is of little use to the Keplers. At best, *Clyde Hill* stands for the proposition that the trial court has discretion to impose an injunction that is equitable and fits within the facts of the case. That is exactly what the trial court did here, it exercised its discretion by ordering that only 13 of the 27 trees that formed hedges be removed.

The Keplers also rely on an unpublished decision to claim that the trial court committed error. (App. Br. 48-49) Our Supreme Court has recently held that it "strongly disapprove[s]" citing unpublished decisions in briefs. *Condon v. Condon*, 177 Wn.2d 150,

166, ¶ 26, 298 P.3d 86 (2013). Even if the Keplers do not rely on the unpublished decision as “precedential authority,” citation of unpublished decisions “for any purpose” is prohibited. *State v. Sanchez*, 74 Wn. App. 763, 765, fn. 1, 875 P.2d 712 (1994), *rev. denied*, 125 Wn.2d 1022 (1995). “Unpublished opinions have no precedential value and should not be cited or relied upon in any manner.” *Skamania Cty. v. Woodall*, 104 Wn. App. 525, 536, 16 P.3d 701, *rev. denied*, 144 Wn.2d 1021 (2001), *cert. denied*, 535 U.S. 980 (2002).

After “balancing the equities,” the trial court properly exercised its discretion by ordering the removal or reduction to 6 feet of specific trees from the Kepler property in order for the appellants to comply with the covenant.

E. The trial court erred in not ordering the removal of branches overhanging the Kepler property from adjacent properties that were part of the hedge on the Kepler property. (Cross-Appeal)

To the extent the trial court made any error, it did so by failing to order the Keplers to trim overhanging branches from adjacent properties back to their property line. Although the trees themselves are on adjacent properties, the branches from those trees have become intertwined with the hedges on the Kepler property. While the trial court has no authority over the adjacent property owners,

who are not parties to this matter, it did have authority over the Keplers and should have ordered them to trim back those branches to their property line. Where branches of trees overlap adjoining property, the owner of the adjoining property may cut them off. *Gostina v. Ryland*, 116 Wash. 228, 232, 199 P. 298 (1921). Because these overhanging branches were part of the hedges on the Kepler property they permitted to exceed 6 feet, the trial court should have ordered the Keplers to trim them back.

F. This Court should award attorney fees to respondents.

RAP 18.9(a) gives this Court authority to award attorney fees to the respondents for having to respond to a frivolous appeal or if the other party fails to comply with the rules. Appellants raise no debatable issues on appeal. Despite conceding below that there were no genuine issues of material fact, the appellants now argue on appeal that there are genuine issues of material fact. Not only is their claim disingenuous, but it is wholly without merit. The trial court properly concluded as a matter of law that the trees planted along the boundaries of the Kepler property created a “wall of vegetation” that blocked the respondents’ views violated the covenant. This decision was based on both the overwhelming support of case law and photographs that were largely not in dispute.

Further, the appellants' claim that the covenant has been abandoned is absolutely without merit in light of its enforcement against their property while owned by their predecessor, the recent enforcement against their next door neighbor, and the undisputed history of the Association seeking to enforce the covenant. Furthermore, their reliance on out of state cases to support their argument by falsely claiming that there were "relatively few published Washington cases" on this issue when in fact there were several Washington cases that did not support their claims also warrants an award of fees.

Finally, in violation of GR 14.1, the appellants cite an unpublished decision to support their arguments on appeal. This Court should award attorney fees to the respondents for having to respond to this appeal.

VI. CONCLUSION

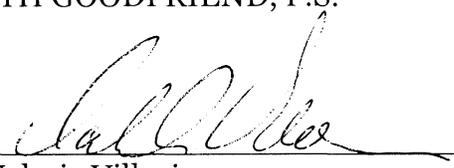
The trial court properly concluded that the trees along the Keplers' eastern, southern, and northern borders violated the covenant providing that "no fences or hedges shall be erected or permitted to grow to a height exceeding 6 feet." The trees acted as both hedges and a fence and indisputably exceeded over 6 feet in height, which impacted the views from the Zimmerman and Dwight-

Detamore properties. The trial court properly concluded that this covenant had not been abandoned based on the history of enforcement of this covenant against the Keppler property and other properties within the subdivision. Finally, it was wholly within the trial court's discretion to order the removal of the most "offending" trees that formed the hedges that violated the covenant.

The only error committed by the trial court was in failing to order the Kepplers to remove the portion of their hedge arising from overhanging branches from adjacent properties. With that exception, this Court should affirm, and award attorney fees to the respondents.

Dated this 19th day of February, 2016.

SMITH GOODFRIEND, P.S.

By: 

Valerie Villacin

WSBA No. 34515

Attorneys for Respondents/
Cross-Appellants

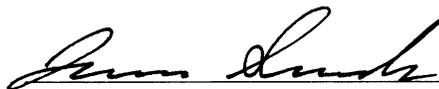
DECLARATION OF SERVICE

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

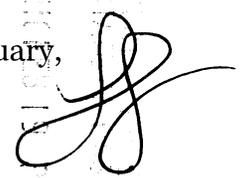
That on February 19, 2016, I arranged for service of the foregoing Brief of Respondents/Cross-Appellants, to the court and to the parties to this action as follows:

| | |
|--|---|
| Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-File |
| Kathryn C. Loring Law Office of Skinner & Saar PS 791 SE Barrington Drive Oak Harbor WA 98277 | <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 19th day of February, 2016.



Jenna L. Sanders


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