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NO. 74057-1-I

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

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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STEVEN MARSHALL and DEANNA MARSHALL a.k.a. DEANNA  
NELSON, a married couple,

Appellants,

v.

ROGER RESSMEYER,

Respondent.

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**REPLY BRIEF OF APPELLANTS**

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## I. INTRODUCTION

The CC&R's that are at the center of this appeal provide that vegetation must be kept trimmed to a height not to exceed the "nearest" roof peak/ridge. However, the trial court overlooked that plain language, and concluded that "nearest" did not really mean "nearest." This was a reversible error of law. The trial court also erred when it elevated the CC&R's passing reference to "outlook" into something akin to a Lake Washington view easement. This approach was also inconsistent with the language and context of the CC&R's, including their requirement that vegetation be kept in a "neat and sightly" condition. For these and the other reasons set forth in the opening brief of appellants Steven Marshall and Deanna Nelson ("Marshalls" or "Appellants"), the trial court missed the mark when it concluded that the CC&R's tie vegetation height to a "structure on the same property as the vegetation, regardless of whether a structure on a different property is closer to the vegetation." CP 506. There is no valid legal or factual basis for such a conclusion.

The brief filed by respondent Roger Ressmeyer ("Ressmeyer" or "Respondent") asks this Court to bless the sins of the trial court. Contrary to Ressmeyer's assertions, the CC&R's do *not* tie vegetation height to a structure on the "same property," and there is no valid extrinsic evidence supporting that proposition. Ressmeyer chiefly relies on a declaration

submitted by David Odegard, but the Mr. Odegard that Ressimyer unearthed did not even claim to have a role in drafting the CC&R's.

Altogether, the language, structure, and context of the CC&R's mandate a conclusion that the CC&R's mean what they say when they tied vegetation height to the "nearest" roof peak. The Court should reverse and remand with instructions to enter judgment in favor of the Marshalls.

## II. ARGUMENT

### A. Under the CC&R's, Vegetation Can Grow as High as the "Nearest" Roof Peak/Ridge.

Under the CC&R's, the Marshalls are entitled to grow vegetation as tall as the "nearest" roof peak. There is no way to avoid the plain language of the instrument, which provides as follows:

Section 2. Maintenance of Landscaping and Trees. To protect the outlook from each lot, and to maintain the overall desirability of the subject properties, all owners are required to maintain visible landscaping in a neat and sightly condition. Planted trees (not including the natural large trees on the plat), shrubs, and/or hedges ***must be maintained at a height equal to or lower than the nearest roof peak/ridge height***, unless the owner has secured an instrument allowing a deviation from this restriction signed by all owners of Mariner Cove lots uphill of the lot/owner seeking the deviation.

CP 111 at Art. III, § 2 (emphasis added).

This plain language is not to be ignored. *See, e.g., Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 816, 854 P.2d 1072

(1993) (“[W]e give the language [of the restrictive covenant] its ordinary and common use and do not read the covenant so as to defeat its plain and obvious meaning”).

The beginning, middle, and end of any debate over contract interpretation is that the Marshalls cannot be required to cut vegetation any lower than the “nearest roof peak/ridge height.”

**B. It Is Undisputable that the Ressmeyer Roof Peak Is the “Nearest” to the Vegetation in Question.**

Ressmeyer’s roof peak—not the Marshalls’—is physically “nearest” to the disputed vegetation. As explained in Mr. Marshall’s declaration on summary judgment:

The Ressmeyer Residence was also built nearly as close as possible to our shared property line: an approximate 20-23 foot setback. Accounting for the fact that the [vegetation] is located on our property by a few feet, the [vegetation] is no more than 25-30 feet in horizontal distance from the roof peak of Mr. Ressmeyer’s main residence. On the other hand, due to the fact that our house is set back approximately 46 feet from the shared property line, the [vegetation] is no closer than 40-45 feet in horizontal distance from the roof peak of our main residence. The [vegetation] is therefore closer to Mr. Ressmeyer’s roof peak than any other roof peak or ridge height.

CP 95 ¶ 17; *see also* CP 423 ¶ 4; CP 430.

Ressmeyer does not seriously dispute the fact that the vegetation is nearer to his roof peak than the Marshalls’—and by wide margin. *See* CP 31-32 (arguing only that “the Marshall Residence is the nearest roof peak/ridgeline *on the Marshall Property*”) (emphasis added). There is no

reasonable way to read the CC&R's to say that the Marshalls' roof peak is "nearest" to the disputed vegetation, when as a matter of fact, Ressmeyer's roof peak is actually the "nearest." If the CC&R's are to be read to mean what they say—which they must—the Court should remand with instructions to enter judgment in favor of the Marshalls.

**C. Ressmeyer Fails to Establish that the Intent of the CC&R's Was to Tie Vegetation Height not to the "Nearest" Roof Peak, but the "Nearest Roof Peak on the Same Property."**

At bottom, Ressmeyer's argument—which the trial court improperly accepted—is that the CC&R's could or should have tied vegetation height not to the "nearest" roof peak, but to the "nearest roof peak on the same property." CP 274. All of the arguments that Ressmeyer marshals in support of this theory fail as a matter of law.

**1. The Odegard Declaration Does not Provide Valid Evidence of Intent.**

Ressmeyer needs this Court to put great stock in the declaration submitted by Mr. David Odegard. However, Mr. Odegard's declaration is not proper extrinsic evidence and it was error for the trial court to rely on it.

For starters, the declaration is from *the wrong Mr. Odegard*. The CC&R's were signed not by David Odegard, but by his father, Alan J. Odegard. David Odegard does state that he "worked on the Mariner Cove

project,” but he does not say what he did precisely.<sup>1</sup> See CP 328 ¶ 3. One thing that is clear is that he did *not draft the CC&R’s*. See CP 328 ¶ 4. David Odegard’s declaration therefore does not shed any light on the drafter’s intent.

The balance of Mr. Odegard’s declaration consists of improper post-hoc opinions that he was apparently fed by Ressmeyer’s lawyers. These wholly subjective statements would have no evidentiary value even if submitted by the drafter, which Mr. Odegard was not. A drafter’s intent must be ascertained from reference to *the instrument itself*. See *Hollis v. Garwell*, 137 Wn.2d 683, 696-97, 974 P.2d 836 (1999) (holding that developer’s intentions with respect to restrictive covenants was not admissible because it would “contradict[] the language of the plat” and would “require this court to redraft or add to the language of the covenant”); *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006) (“Context evidence is not admissible to import into a writing an intention not expressed. . . . The court is to declare the meaning of what the parties wrote, not what they intended to write.”); see also *Leighton v. Leonard*, 22 Wn. App. 136, 142, 589 P.2d 279 (1978); *Weld v. Bjork*, 75 Wn.2d 410, 411, 451 P.2d 675 (1969) (“Restrictive covenants upon the

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<sup>1</sup> We do know that he was very new to the business at the time. Mr. Odegard states that he has over 26 years of experience in the industry, meaning that he began in 1989. CP 328 ¶ 2.

use of real property will not be extended beyond the clear meaning of the language used.”).

Even if Mr. Odegard thinks his father intended to tie vegetation height to the nearest roof peak “on the lot where the vegetation is located,” CP 328 ¶ 7, that is not what they ultimately provided.

**2. Ressmeyer’s Plain Reading Argument Is Misplaced.**

Ressmeyer’s alternative argument—that the CC&R’s can be read his way without the gloss of extrinsic evidence—must be rejected because it would require the Court to ignore the plain and obvious meaning of the CC&R’s. Indeed, as explained in Appellants’ opening brief, Br. at 13-14, Ressmeyer’s interpretation depends on a re-writing of the CC&R’s.

Ressmeyer’s argument also ignores how Article 3, Section 2 fits into the CC&R’s as a whole, and the undisputed facts surrounding the development of Mariner Cove.

Ressmeyer’s position reflects a “zero-sum game” mindset that is not consistent with the larger goals and purposes of the CC&R’s. Ressmeyer wants an expansive view, while refusing to acknowledge that the Marshalls have any legitimate right to peace or privacy. This is contrary to the overall language and structure of the CC&R’s, which are

*protective* of privacy, development, and other property rights, as also explained in Appellants' opening brief. Br. at 16.

Ressmeyer's argument also ignores the way development actually proceeded at Mariner Cove. The homes upslope of the Marshall residence have an average difference in elevation of 11 feet, ranging between 10 and 13 feet CP 92-93 ¶ 10. As a result, all of the upslope properties have partial water views, *but only from their upper level(s)*. Ressmeyer asks much more of the CC&R's than they are intended to give him, considering the context of the CC&R's and the development of Mariner Cove as a whole.

### **3. Ressmeyer's Elevation Argument Is Misplaced.**

There is no way to compare the relative height of the vegetation and the various structures on this steeply sloped development without reference to elevation. Ressmeyer's argument that elevations should not be considered is as strained as his argument that the Marshalls' vegetation should be limited to a height of approximately 3-4 feet. CP 96.

As a practical matter, the issues in this case simply cannot be understood without reference to elevation. As explained in Mr. Marshall's Declaration on summary judgment:

The listed elevations (and the elevations listed throughout this declaration) are based on a baseline elevation contained in our house plans. I believe, but am not certain, that the "zero" elevation is sea level. That is, Mr. Ressmeyer's house is 87 feet in elevation, not 87 feet in height as

measured from the ground. The steep slopes in the area make this the only practical way to measure relative heights.

CP 92-93 n.2.

Ressmeyer has never challenged the accuracy of any of the elevation measurements. His argument also makes no sense. Assuming arguendo that elevation has no bearing on interpretation of the CC&R's, then the Marshalls should be allowed to grow vegetation anywhere on their property to a height equal to the height of their residence. That is, if the ground to roof peak height of the Marshall residence is 30 feet, then under Ressmeyer's theory, the Marshalls should be allowed to grow trees anywhere on their property to a height of 30 feet.

#### **4. What Ressmeyer Seeks Is Akin to a View Easement.**

Ressmeyer wants the Court to prohibit the Marshalls from growing any vegetation that would have even the slightest effect on his view of Lake Washington. But the CC&R's are not nearly as expansive in their scope as Ressmeyer would have them. As described above and in Appellants' opening brief, Br. at 34-36, the height of physical structures is, for the most part, limited only by the constraints of the Mercer Island City Code. And the maximum vegetation height is tied to the height of those structures. CP 111 at Art. III, § 2. Due to the sloping nature of the property, the practical consequence is to give each upslope property owner

a view from the upper level(s) of their home. But not from their first-story garage.

The language Ressmeyer relies on also does not use the word “view,” and is included as one part of a section of the CC&R’s labeled “Maintenance of Landscaping and Trees.” It is not clear that the term “outlook” is intended to refer to views at all. The reference to “outlook” in Section 2 is manifestly connected to a desire to create an attractive and orderly appearance, as explained above. The term “outlook” must be read in a way that comports with the other provisions of the CC&Rs, all of which show that their essential purpose is to further a desirable appearance on and from the subject properties.

**5. The Factual Record Supports a Conclusion that the Maximum Vegetation Height Was Intended to be Tied to an Anticipated Upslope Garage.**

As explained in the Marshalls’ opening brief, the CC&R’s might be read to find an intended maximum height that correlates to the maximum height of a structure built upslope on the Marshall Property, which would be 75 feet at most. *See* CP 256-62; CP 91-92 ¶ 7 & n.1. This would preserve both Ressmeyer’s upper level view and any reasonable expectation he may have had in having a view.

Notably, the developer’s pre-approved plans anticipated that homes would be constructed to the maximum allowable three stories. CP 91-92 ¶ 7; CP 108 at Art. II, § 1. In the case of the Marshall Property,

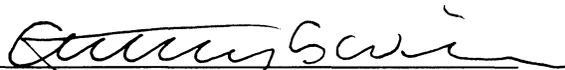
a detached garage was to be constructed along the Marshall/Ressmeyer property line. CP 93 ¶ 12. If those plans had been implemented, the roof peak of the detached garage on the Marshall property would become the “nearest roof peak/ridge height,” and would result in a corresponding maximum vegetation height of approximately 69 feet. CP 93-94 ¶ 13. The height restriction in the CC&R’s was tethered to the expectation that the subject properties would be built to the maximum height and heft. The fact that physical development has occurred somewhat differently should not defeat the CC&R’s reasonable intentions with respect to vegetation height.

### III. CONCLUSION

The Court should reverse the trial court’s order granting summary judgment in Ressmeyer’s favor. The CC&R’s cannot be read to obligate the Marshalls to maintain vegetation at an absurdly low height of 3-4 feet, nor is there any valid evidence that that was their intent.

RESPECTFULLY SUBMITTED this 22nd day of February, 2016.

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Attorneys for Steven Marshall and  
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**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States. I am a resident of the state of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused a copy of the document, to which this certificate is attached, to be served on the following counsel of record by the method(s) shown:

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

DATED at Seattle, Washington this 22nd day of February, 2016.

  
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