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

(Snohomish County Superior Court #15-2-06896-1)

EMERALD HILLS HOMEOWNERS ASSOCIATION, a Washington
non-profit corporation,

Appellant,

vs.

KURT NIMMERGUT and EILEEN NIMMERGUT,
husband and wife,

Respondents.

APPELLANT EMERALD HILLS HOMEOWNERS ASSOCIATION
OPENING BRIEF

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I. NATURE OF THE CASE

The Emerald Hills Homeowners Association (the “Association”) seeks reversal of the Trial Court’s Order Granting Plaintiffs’ Motion for Summary Judgment and/or Declaratory Judgment in favor of Kurt and Eileen Nimmergut (“Nimmerguts”).

Based on published caselaw from this Court, declaratory judgment is not appropriate. The Nimmerguts are asking for an advisory opinion as to what a height covenant requires in a manner that this Court has already rejected. Until Nimmerguts bring a case that has a mature dispute and that the Court can conclusively resolve, this Court should reject the invitation to issue an advisory opinion and decline declaratory judgment. Even if the Court reaches the merits of interpreting the height covenant, the law supports the Association’s interpretation and application of that covenant.

Further, the Nimmerguts unilaterally took actions on which the Association and its members relied. They will be injured if the Nimmerguts are allowed now to repudiate their actions. Nimmerguts should be equitably estopped from their case as a result of their actions. However, even if the Court believes more evidence is necessary to address estoppel, summary judgment should be denied on the basis of disputed, material facts.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by improperly concluding that Nimmerguts were entitled to declaratory judgment.
2. The trial court erred by improperly concluding that there were no genuine issues of material fact in dispute.
3. The trial court erred by improperly concluding that there was no just reason for delay in entering the Summary Judgment Order as final.
4. The trial court erred by improperly concluding that the Height Covenant, defined below, allow the Nimmerguts to measure maximum height from any location along the street frontage of Lot 23.
5. The trial court erred by improperly concluding that the Association's interpretation of the Height Covenant would add terms not included by the drafters of the restriction.
6. The trial court erred by improperly refusing to rule on Emerald Hills' defense of equitable estoppel on the sole basis that the Nimmerguts did not raise it in their motion.
7. The trial court erred by improperly concluding that the Association's interpretation of the covenant is an attempt to rewrite the covenant to add or correct a forgotten term of limitation.

8. The trial court erred by improperly concluding that the language of the covenant was written to require measurement from the curb center for some lots and not others.

9. The trial court erred by improperly concluding that the Association was attempting to redraft the covenant to add a restriction just because that would be beneficial to the community as a whole at the expense of Nimmerguts.

10. The Trial Court erred by elevating the interests of the Nimmerguts above the Emerald Hills homeowners' collective interests.

11. The trial court erred by disregarding judicial precedent requiring the covenant to be interpreted consistent with the homeowners' collective interests and the purpose of the covenant.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court improperly issue declaratory judgment where there is not a mature dispute that would be conclusively resolved?

2. Did the trial court apply the incorrect rules and standards related to interpretation of restrictive covenants?

3. Should the trial court have denied the motion for summary judgment where Nimmerguts' evidence and argument did not meet Washington Courts' established rules of interpretation for restrictive covenants?

4. Was Emerald Hills entitled to declaratory judgment that its interpretation of the height covenant was proper under Washington Courts' established rules of interpretation for restrictive covenants?
5. Did the trial court err in grant summary judgment where genuine issues of material fact exist and are in dispute?
6. Did the trial court err in granting summary judgment as a final order without ruling on the issue of equitable estoppel?
7. Did the trial court err in failing to rule that equitable estoppel bars the Nimmerguts' claim?

IV. STATEMENT OF THE CASE

A. Emerald Hills' General History and Height Covenant.

Emerald Hills is a planned development residential subdivision that was approved by the City of Edmonds (the "City") in 1969. The Emerald Hills subdivision consists of 61 building lots, greenbelts, planter areas, trails and a park. Nimmerguts own Lot 23 in Emerald Hills, located on 12th Avenue.

Emerald Hills was laid out to provide views of Puget Sound and the Olympic Mountain range. Using topographical mapping, Emerald Hills' developer laid out the streets and lots to balance the views for

property owners.¹ As part of establishing the community, the developer recorded a Declaration of Covenants, Conditions and Restrictions (“CC&Rs”), which govern homes design and construction, including regulating how high homes can be built and reviewing whether the home design is harmonious and consistent with the subdivision’s architectural controls.² The Association is charged with enforcing the CC&Rs.³

View protection is the driving force behind Emerald Hills’ Height Covenants. The section restricting building heights is entitled Preservation of View Rights and Height Restrictions (the “Height Covenant”).⁴ Thirty-two lots in the Association are governed by this Height Covenant, which was designed to give the best view possible to all homes collectively in the Association. Not all lots have the same view window; views are a major component in the assessed land values. The Height Covenant ensures property owners and prospective buyers that they will have a view window from their property regardless of development around them that might otherwise block that view.

In addition to the Height Covenant to protect views, the CC&Rs impose Architectural Controls designed to ensure “harmony of external

¹Declaration of Darrol Haug (“Haug Decl.”), CP 111-116.

²Haug Decl, Attachment A, CP 117-127.

³*Id.*, CC&Rs, Article XIII, Section 1, CP 126.

⁴*Id.*, CC&Rs, Article X, CP 124.

design and location in relation to surrounding structures and topography.”⁵

As a result, a lot owner must submit building plans for review under the architectural controls along with confirmation that the building plans meet any applicable other requirements in the CC&Rs, such as height restrictions.

The particular Height Covenant language governing lots, and Nimmergut’s Lot 23 specifically, provides:

The following lots shall have height restrictions as follows; the roof ridge line or any part of the house, garage or other permitted building, except the chimney or fireplace top thereof, shall not extend above the stated height limit. All measurements shall be made from the top of the concrete street curb at the location noted for each lot: . . .⁶

As provided above, one measures the maximum height for each lot from the top of the concrete street curb. The topography of Emerald Hills undulates significantly. As a result, the concrete curb that runs along each lot’s frontage usually is not flat, but slopes at differing grades from one end of the lot to the other depending on the grade of the road. Therefore, the Height Covenant expressly states that each lot must pinpoint a particular location from which maximum height is measured. In other words, the Height Covenant does not just set a maximum height to be measured from any location along the curb; it must be from the location

⁵*Id.*, Ex. A, Article VII, CP 121.

⁶*Id.*, Ex. A, Article X, Section 2, CP 124-125.

identified for each lot. At that identified location along the curb, one then starts the measurement from the top of the concrete curb.

Where the topography slopes significantly along the property's frontage, such as is the case for Lot 23, the location where one starts the measurement is pivotal to the protection of views for the neighboring impacted properties.⁷ Since the purpose of the Height Covenant is to protect views, the location where maximum height is measured at may be critical to ensure the purpose of the Height Covenant is satisfied and adjacent homeowners' interests protected.

The Height Covenant identifies the curb location for each lot depending on their topography. Only two lots, Lots 12 and 13, measure the maximum height from a corner location because those are corner lots where two roads intersect. For the other lots subject to the Height Covenant, the maximum height is measured from the center of the lot; for example "Lot 24 through 29 – 17 feet maximum height from center of each Lot facing on Emerald Hills Drive."⁸ However, unfortunately, the Height Covenant missed identifying the curb location for Lots 19 through 23, stating maximum height without the pinpoint location: "27 feet maximum height as facing west on 12th Avenue West."

⁷ See CP 202-203.

⁸ *Id.*, Ex. A, Article X, Section 2, CP 124-125.

Historically, the Association interpreted the Height Covenant to measure maximum height at the center or average of the property's street frontage. From 1970 to 1976, the CC&Rs required the developer, as declarant, to interpret and apply the CC&Rs and approved construction on properties within the Association. When the Association took over responsibility from the developer, it noted the Height Covenant's lack of location for height measurement for Lots 19 through 23, and discussed that with the developer.⁹ The Associations' Board equitably interpreted the Height Covenant to measure the maximum height for Lots 19 - 23 from center or average of each Lot, roughly the same as for all other lots subject to the Height Covenant except the two corner lots (see discussion of center versus average, below).

As noted above, because Emerald Hills' topography is hilly, roads tend to rise and fall throughout the community. Specifically with respect to Lot 23, 12th Avenue rises as it runs from north to south. Lot 23 also slopes significantly, resulting in an almost 6 foot elevation change from one end of the property to the other.¹⁰ This elevation change is in significant contrast to other lots on 12th Avenue, which are relatively flat, rising only 1 – 2.5 feet. For those other lots, it makes little difference

⁹*Id.* CP 112. The Trial Court struck the developer's response as hearsay.

¹⁰*Id.* CP 113.

whether the Height Covenant is measured from the center of the property's curb or the average, because the slope is minimal.

As a result of topography, the view window for homes on 12th Avenue increases when moving from north to south; while for homes on Highland Drive (east of and directly behind those on 12th Avenue, including Nimmerguts' property), the view window decreases moving north to south. Thus, homes to the east of Lot 23 will be significantly impacted by a taller home on Lot 23. Moreover, measuring maximum height from a different location for Lot 23 than for all the other height restricted lots would be out of harmony with surrounding structures.¹¹

B. Construction Plan Approval Process.

Prior to construction on a property within Emerald Hills, a property owner must obtain architectural approval from the Association and building plan approval from the City. The CC&Rs provide:

No building, fence, wall or other structure shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to, or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Trustees of the Association or by an architectural committee composed of three (3) or more representatives appointed by the Board. In the event said Board, or its designated committee, fails to approve or disapprove such design and location

¹¹Haug Decl., CP 111-116.

within (30) days after said plans and specifications have been submitted to it, approval will not be required and the Article will be deemed to have been fully complied with.¹²

The Association's Board operates as the architectural committee, charged with applying the CC&Rs and reviewing building proposals. Property owners must submit to the Board building plans which include the site topography and elevations, specify such architectural considerations as roof design, building mass, shape, height, and materials to be used. In accordance with the Architectural Controls, the Board evaluates those plans for harmony of external design and location in relation to surrounding structures and topography along with the other elements listed, including height. The Board notes its approval on the submitted plans or by letter, which may then be submitted the City for its review and permitting.¹³

C. Nimmerguts Consented to the Association's Interpretation of Height Covenant, and Submitted House Plans Based on Same.

In late November 2011, Nimmerguts contacted the Association's Board about building on Lot 23, and met with the Association's treasurer, Darrol Haug. The conversation included a discussion of the Height Covenant; the Nimmerguts conceded they had not done their "due

¹²*Id.*, Exhibit A, Article VII, CP 121.

¹³*Id.*, CP 112-113.

diligence” and were not aware of the Height Covenant before purchasing the property.¹⁴

The Association was sympathetic to the Nimmerguts based on their honesty in admitting they had not reviewed the CC&Rs when they bought Lot 23. Because Lot 23 slopes significantly, measuring maximum height from the average elevation of Lot 23’s frontage (rather than at the center) would allow Nimmerguts an extra full foot of height. The Association discussed with the Nimmerguts that such an accommodation could help Nimmerguts’ desire to maximize views yet remain true to the spirit and meaning of the CC&Rs.¹⁵ However, under no circumstances was the Association willing to give Nimmerguts full and sole discretion to measure maximum height at any location along Lot 23’s frontage.

Per the Nimmerguts’ own admission, they would gain at least another *four feet* in height by measuring maximum height at any location along Lot 23’s frontage.¹⁶ Therefore, they sought to amend the Height Covenant solely for their Lot 23. The CC&Rs require agreement of a supermajority of 70% percent of the Association members (43 of 61 lots) for any amendments.¹⁷ The Nimmerguts undertook substantial effort in

¹⁴*Id.*, CP 113.

¹⁵*Id.*, CP 113-114.

¹⁶ CP 131.

¹⁷Haug Decl., Ex. A, Article XIII, Section 4. CP 126

an attempt to amend the Height Covenant for Lot 23. sending a letter to the Association members saying:

Due to the significant slope of our lot, we need another four feet to build a good house on the lot. We need your consent to amend the CC&Rs for our lot, only.¹⁸

To help the Association members “visualize what the additional 4 feet would look like” Nimmerguts “installed three poles with a colored string between the polls on our Lot 23. The string is at the 31 foot elevation, which includes the four feet over the current restriction.”¹⁹

Neighbors viewing the Nimmerguts’ proposal were highly concerned that the Nimmerguts’ higher home would encroach on views and that the house would be incompatible with the surrounding homes, i.e. not harmonious.²⁰ It quickly became apparent that Nimmerguts would not obtain the membership vote required to approve the amendment, and on July 27, 2012, the Nimmerguts withdrew their request for the amendment.²¹ The Nimmerguts instead agreed to follow the Height Covenant as the Board representative had previously explained it to them, and went so far as to send an email to the Association membership stating:

¹⁸*Id.*, Ex. B. CP 128-130.

¹⁹*Id.*, Ex. C. CP 130.

²⁰*Id.*; Declarations of McMurray (CP 105-106), Lewis (CP 109-110), Lammersdorf (CP 107-108), Mayer (CP 100-101), and Hoxie (CP 102-104).

²¹*Id.*, Ex. D. CP 132.

*“We will be following the CC&R height restriction for Lot 23 as we move forward to finalize plans and build our house.”*²²

Consistent with their acquiescence that the Height Covenants identify a specific location from which to measure maximum height, the Nimmerguts’ took advantage of the Association’s agreement to let them measure maximum height from the average elevation (a benefit over the center of the frontage). The Nimmerguts submitted plans for a house consistent with that agreement, conceding the Association’s interpretation of Height Covenant and Nimmerguts’ lack of discretion to choose any location.²³ On November 6, 2012, the Association Board unanimously approved the plans.²⁴ On January 15, 2013, Nimmerguts submitted the approved plans with the City to obtain a building permit, which was reviewed by the City in April 2013.²⁵ However, Nimmerguts never commenced construction, and the permit expired on January 14, 2014.²⁶

D. Nimmerguts’ Repudiation of their Agreement to Abide by the Association’s Interpretation of the Height Covenant.

Several neighbors would be impacted if the Nimmerguts were permitted to repudiate their acknowledgement of the Height Covenant

²² *Id.*, Ex. D (emphasis added). CP 132.

²³ Haug Decl. CP 111-116.

²⁴ *Id.*, Ex. E and F. CP 133 & 134.

²⁵ *Id.*, Exs. G and H. CP 135 & 136-138

²⁶ *Id.* Ex. I. CP 139.

interpretation, and use plans other than those submitted by Nimmerguts and approved by the Association.²⁷ One of those property owners, Robert Hoxie, purchased his property after the Nimmerguts' submission of plans in accordance with the Association's interpretation of the Height Covenant, and after having done due diligence as to Lot 23 and the Association's meeting minutes regarding the Nimmerguts' failed attempt to amend the CC&Rs.²⁸

Without explanation as to their change of heart, Nimmerguts subsequently attempted to recant their acquiescence and argue that they should be given complete discretion as to where to measure maximum height, engaging legal counsel and ultimately filing a very simple Complaint requesting only declaratory judgment on the Height Covenant.²⁹ Nimmerguts did not provide building plans to support their interpretation of the Covenant or show how the design would affect other lots. Instead, Nimmerguts asked the Court to advise the parties as to what the Height Covenant requires in the abstract. Nimmerguts then pursued a very cursory summary judgment motion, with this appeal ensuing.

²⁷Neighboring property owners Michael McMurray, Hans Lammersdorf, and Robert Hoxie all submitted declarations to the Trial Court explaining that the Nimmerguts' attempt to obtain a full four feet of maximum height gain would negatively impact their views, enjoyment of their property and values. Declarations of McMurray (CP 105-106), Lammersdorf (CP 100-101), and Hoxie (CP 102-104).

²⁸*Declaration of Hoxie*, CP 102-104.

²⁹*Complaint for Declaratory Relief*, CP 225-227.

V. ARGUMENT

A. Nimmerguts Bear the Burden of Proof and Cannot Satisfy the Necessary Standards of Review for Summary Judgment.

This Court reviews summary judgment *de novo*.³⁰ When reviewing summary judgment, this Court stands in the same position as the trial court,³¹ must consider all facts submitted, and view all facts in the light most favorable to the nonmoving party, here the Association.³² Because Nimmerguts moved for summary judgment, Nimmerguts hold the burden of proof with regard to the issues it raised.

Summary judgment is not properly granted unless the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show there is no genuine issue as to any material fact and that the moving party, Nimmerguts, is entitled to a judgment as a matter of law.³³ Summary judgment may not be granted unless, based on all the evidence, reasonable persons could reach but one conclusion.³⁴ The burden was on the moving party, Nimmerguts, to demonstrate there is no issue of

³⁰*Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007).

³¹*Ruff v. King County*, 125 Wn.2d 697, 703 887 P.2d 886 (1995).

³²*Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

³³CR 56(c); *Wilson*, 98 Wn.2d at 437.

³⁴*Wilson*, 98 Wn.2d at 437.

material fact. The Trial Court should have strictly held Nimmerguts to the summary judgment standards.³⁵

CR 56(c) clearly provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is **no genuine issue as to any material fact** and that the moving party is entitled to a judgment as a matter of law. (Emphasis added)

Washington Courts view issues regarding interpretation of restrictive covenants as involving both questions of law and fact:

Our primary task in interpreting a restrictive covenant is to determine the covenant drafter's intent by examining the clear and unambiguous language of the covenant. *While the interpretation of a restrictive covenant is a question of law, intent is a question of fact.* . . . We must place special emphasis on arriving at an interpretation that protects the homeowners' collective interests. In Washington, the purpose of the covenant is the paramount consideration, rather than the free use of land.³⁶

Nimmerguts failed to sustain its initial burden of proof under summary judgment. As a result, while the Association submitted declarations and evidence in response, denial of summary judgment was proper even had the Association not taken that extra step.³⁷ In addition, because Nimmerguts' motion raised genuine issues of material fact, the Trial Court erred in granting summary judgment.

³⁵*Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992).

³⁶*Saunders v. Meyers*, 175 Wn. App. 427, 439, 306 P.3d 978 (2013) (internal citations omitted) (emphasis added).

³⁷*White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 169-70, 810 P.2d 4 (1991).

B. Nimmerguts Did Not Present a Mature, Justiciable Controversy that the Court Can Conclusively Resolve by Declaratory Judgment.

Nimmerguts' sole relief requested as in their Complaint is declaratory judgment.³⁸ Nimmerguts merely asserted that "an actual justiciable controversy exists" and that they had "a question regarding the construction of the Covenants,"³⁹ simply asking for judicial advice as to what the Height Covenant requires in the abstract. Nimmerguts have failed to prove a prima facie case for declaratory judgment; hence the Superior Court's grant of summary judgment was in error.

Issuance of declaratory judgment is a discretionary action on the part of this Court.⁴⁰ Nimmerguts must satisfy the following elements for the Court to even consider whether to issue declaratory judgment:

(1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement. (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.⁴¹

Nimmerguts' briefing at the Trial Court did not provide meaningful evidence or legal argument addressing each of the above

³⁸ Plaintiffs' Complaint, Section 3.7, and Plaintiffs' Motion p.7. CP 227 and 155.

³⁹ *Id.*

⁴⁰ *Bloome v. Haverly*, 154 Wn. App. 129, 225 P.3d 330 (2010)

⁴¹ *Benton Cty. v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (2015).

requisite elements, in particular the first, second and fourth elements. As discussed below, there is not a mature controversy, with the parties clearly having opposing interests and which declaratory judgment would conclusively address.

Absent Nimmerguts' clear satisfaction of all of these elements, this Court risks issuing an advisory opinion rather than a true judgment that would resolve a controversy.⁴²

...the UDJA also provides that a court "may refuse to render or enter a declaratory judgment or decree where such judgment or decree ... would not terminate the uncertainty or controversy giving rise to the proceeding."⁴³

This Court of Appeals has already rejected the approach that Nimmerguts attempt here, namely to have an abstract advisory opinion on a height covenant.⁴⁴ *Bloome* similarly involved lot owners who disputed the requirements of a view covenant. As here, the downhill property owner, Bloome, had not submitted building plans for the Court to review under the covenant. This Court held that without building plans, there was no mature dispute that the Court could resolve conclusively.

However, the record does not contain facts necessary for a court to resolve the apparent underlying dispute between the parties: to what extent does the covenant limit development of the downhill parcel? The answer to this question depends on facts not contained

⁴²*Bloome*, 154 Wn. App. at 141.

⁴³*Id.*, at 140.

⁴⁴*Id.*, generally.

in the record. **Bloome has not put forth any construction plan over which the parties have had the opportunity to litigate as to its conformance with the covenant.** Nor has he established that it is, in fact, impossible to construct a building on the downhill parcel without interfering with the view from the uphill parcel. **In the absence of a dispute over whether actual building plans satisfy the covenant or of other evidence establishing a necessary minimum degree of interference with the view from the uphill property, a declaratory judgment as requested by either party would not conclusively settle the controversy between them.**⁴⁵

The *Bloome* Court went on to explain:

Bloome's failure to set forth facts over which the parties could litigate as to whether a particular construction plan violates the covenant makes this case unlike those cases in which our Supreme Court concluded that the issuance of a declaratory judgment was proper. ... **As there is no disputed building plan that a court can rule as being either in conformance with or in violation of the covenant, a judgment interpreting the scope of the covenant's restriction on development rights in the estate of the downhill parcel would constitute nothing more than an advisory opinion.**⁴⁶

Without building plans to actually evaluate for compliance under the covenant, “Bloome essentially seeks declaratory judgment in a vacuum.”⁴⁷ The *Bloome* Court determined that the absence of building plans meant “the record does not establish the existence of an actual, mature dispute that could be conclusively resolved by the requested

⁴⁵*Id.* at 141-142 (emphasis added).

⁴⁶*Id.* at 145-146 (emphasis added).

⁴⁷*Id.* at 145.

relief...”⁴⁸ The Court noted that it was particularly necessary to have building plans for Bloome to make its case in support of how it interpreted the covenant. That is significant in the instant case, since Nimmerguts are in the same position as Bloome, i.e. both being the downhill property owners wishing to build a house that would impact views of other residents.⁴⁹

Like in *Bloome*, Nimmerguts are requesting declaratory judgment in a vacuum. Nimmerguts have not submitted building plans in support of their interpretation of the Height Covenant. Therefore, like in *Bloome*, this Court has no good reason to issue an advisory opinion and should reject Nimmerguts’ declaratory judgment.

The facts in the instant case are even more compelling for denial of declaratory judgment than in *Bloome*. Here, Nimmerguts have actually submitted and received approval of building plans which *comply* with the Height Covenant as interpreted by the Association.⁵⁰ Leaving the approved plans on record with the Association is useful evidence to see how important it is for the Association and this Court to have actual building plans to review for compliance with the CC&Rs.

⁴⁸*Id.*, at 147.

⁴⁹*Id.*

⁵⁰Haug Decl. CP 111-116; CP 132 (Nimmergut email agreeing to comply with CC&Rs as Association interpreted them); CP 135 (approved building plan sheet based on CC&Rs as Association interpreted them).

As in Bloome, this Court has no way to determine whether any new building plans Nimmerguts might submit would comply with the Height Covenant. Without building plans, Nimmerguts' assertion to the Court that declaratory judgment would conclusively resolve the dispute is pure conjecture. Even though Nimmerguts wish to retract their approved plans, they have not submitted new plans for the Court to consider. This is particularly problematic as the Nimmerguts nonetheless argued that whatever they would build under their interpretation of the Height Covenant would be the same heights, bulk and scale of house as the surrounding homes.⁵¹ There is no way for either the Association or this Court to determine whether the Nimmerguts' assertions are true without building plans or to evaluate those against the homeowners' collective interest under the law addressed below.

Nimmerguts' assumption that the Association will reject building plans is also conjecture, since no building plans exist for review. Conversely, Nimmerguts have no building plans they can point to in order to support their interpretation of the Covenant.⁵² Nimmerguts simply have

⁵¹ *Reply Declaration of Kurt Nimmergut*, CP 22.

⁵² Nimmerguts assert that their planned home's elevation would be at 287 feet and that the home would be 2600 square feet in size. *Reply Declaration of Kurt Nimmergut*, Page 4, Paragraphs 12-13. Nimmerguts never provide any plans that substantiate these assertions, without which the concept of elevation and total square footage are useless:

not shown a mature, justiciable controversy or that the Court's determination "will be a final judgment that extinguishes the dispute."⁵³

The Superior Court erred in granting declaratory judgment. The Association now respectfully requests this Court to dismiss the case for not presenting a mature, justiciable controversy that would conclusively resolve the dispute.

C. Restrictive Covenants Must Be Interpreted in a Manner Consistent with Their Purpose and to Protect Homeowners' Collective Interests.

Washington Courts have moved away from strict construction of restrictive covenants to a more pragmatic view.⁵⁴ In interpreting covenants, Courts "do not apply rules of strict construction; rather, we determine a covenant's intent by looking to the purposes sought to be accomplished by it."⁵⁵ Courts have moved away from viewing restrictive covenants as restraints on free use of land, instead now concluding they "tend to enhance, not inhibit, the efficient use of land."⁵⁶ As a result, the

there is no means of knowing if the roof would be pitched or flat; how many stories the home would be; if there would be roof gables etc.

⁵³*Nelson v. Appleway Chevrolet, Inc.*, 160 Wash.2d 173, 186, 157 P.3d 847 (2007).

⁵⁴*Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 106, 267 P.3d 435 (2011).

⁵⁵*Fawn Lake Maint. Comm'n v. Abers*, 149 Wn. App. 318, 324-25, 202 P.3d 1019 (2009) (internal citations omitted); accord *Saunders*, 175 Wn. App. at 439.

⁵⁶*Jensen*, 165 Wn. App. at 106, citing *Viking Props.*, 155 Wash.2d at 120, 118 P.3d 322 (quoting *Riss v. Angel*, 131 Wash.2d 612, 622, 934 P.2d 669 (1997)).

Court “must place special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.”⁵⁷

The Supreme Court has analyzed restrictive covenants at length.⁵⁸ In *Viking Properties, Inc.*, the Court adopted two significant rules governing interpretation of restrictive covenants. First, covenants are not to be strictly construed against the grantor or in favor of free use of land. Second, the Court will interpret a covenant to protect the homeowners’ collective intent:

More recently, however, we have indicated that “where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but *rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable.*” This is because “[s]ubdivision covenants tend to enhance, not inhibit, the efficient use of land... In the subdivision context, the premise [that covenants prevent land from moving to its most efficient use] generally is not valid.”

As such, “[t]he court's goal is to ascertain and give effect to those purposes intended by the covenants.” In ascertaining this intent, we give a covenant's language its ordinary and common use and will not read a covenant so as to defeat its plain and obvious meaning. Moreover, “[t]he court will place ‘*special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.*”⁵⁹

⁵⁷ *Saunders*, 175 Wn. App. at 439, citing *Riss v. Angel*, 131 Wn.2d 612, 623-624, 934 P.2d 669 (1997).

⁵⁸ See *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005); *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 327 P.3d 614 (2014).

⁵⁹ *Id.*, 155 Wn.2d at 120 (internal citations omitted and emphasis added).

Consistent with *Viking Properties*, this Court of Appeals has explained that it will “interpret restrictive covenants in such a way that protects the homeowners’ collective interest and gives effect to the purposes intended by the drafters of those covenants *to further the creation and maintenance of the planned community.*”⁶⁰

The Supreme Court recently reaffirmed the foregoing rules:

Rather than place a thumb on the scales in favor of the free use of land, “[t]he court’s goal is to ascertain and give effect to those purposes intended by the covenants.” Courts “place ‘special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.’”⁶¹

As the foregoing demonstrates, Washington common law contains ample precedent for interpreting covenants. However, because that precedent does not support their position, Nimmerguts relied heavily on a State of Utah case in argument to the Trial Court.⁶² That out of state caselaw has no value where there is ample precedent in Washington law.⁶³

⁶⁰*Saunders*, 175 Wn. App. at 438-39 (emphasis added).

⁶¹*Wilkinson*, 180 Wn.2d at 250, citing *Riss v. Angel*, 131 Wn.2d 612, 623-624, 934 P.2d 669 (1997) (remainder citations omitted).

⁶²*Panos v. Olsen & Associates Const., Inc.*, 123 P.3d 816 (Utah Ct. App. 2005).

⁶³Further, the *Panos* case cannot be used as precedent for interpreting the Height Covenant because of the doctrinal differences in how Utah courts interpret deeds and covenants versus Washington Courts. Washington Courts interpret covenants consistent with their original purposes and in a manner that will protect the “homeowners’ collective interests.” *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005). This was not the standard used by the Utah Court in *Panos*. *Panos* was inconsistent with Washington case law, which covers the applicable legal standards for interpreting covenants, and simply cannot be relied on as precedent.

D. The Association's Interpretation of the Height Covenant is Consistent with its Purpose and is the Only Interpretation Which Protects the Homeowners' Collective Interest.

The purpose of the Height Covenant is to protect the community's views and limit the maximum height of any structure, based on a specific measurement from a particular location for each lot: "All measurements shall be made from the top of the concrete street curb at the location noted for each lot."⁶⁴ The clear purpose and intent of the Height Covenant is to mandate the methods for height measurement for each lot and for the Association to enforce a specific location for that measurement, rather than leaving that the discretion of a lot owner.

The Association's interpretation of the height covenant is the one which reflects the homeowners' collective interest and furthers maintenance of the planned community as anticipated under the CC&Rs. The Association's interpretation of the Height Covenant ensures that all properties within this planned community respect the collective interests of its members by fairly protecting the community's view corridors in an equitable manner. The Association's interpretation and application of the Height Covenant determines the maximum height for Lot 23 consistently with the rest of the lots subject to the Height Covenant.

⁶⁴*Id.*, Ex. A, Article X, Section 2, CP 124-125.

Emerald Hill's interpretation of the Height Covenant is also consistent with its duty under the CC&R Architectural Control requirements. Architectural Controls were adopted to achieve harmony in the design and location of new homes in relation to surrounding structures.⁶⁵

In contrast, Nimmerguts' position conflicts with the Height Covenant's stated purpose and is inconsistent with homeowners' collective interest and maintenance of the planned community. Nimmerguts' interest in this case is to maximize their own view as much as possible, irrespective of the homeowners' collective interest or how Nimmerguts' interpretation would adversely affect many other properties' views. There is no evidence in the CC&Rs or elsewhere that the purpose of the Height Covenant is to let a lot owner decide the location where he or she subjectively wishes to measure maximum height from. Nimmerguts' argument that the Court should interpret the Height Covenant to allow them to build a taller home at the expense of others is diametrically opposed to the Emerald Hills homeowners' collective interest.

⁶⁵Haug Decl., Ex. A, Article VII. CP 121.

Nimmerguts argue that they should be allowed to measure maximum height from the highest point anywhere along the frontage of Lot 23. This would enable Nimmerguts to add several feet more height to their single home at the expense of their neighbors and in a manner uniquely different from all other lots in the Association. Nimmerguts' unilateral and subjective intent is not evidence that this Court may rely on to interpret the Height Covenant.⁶⁶

As noted above, neither the Association nor the Court has received proposed building plans from Nimmerguts. However, when Nimmerguts erected the poles with string between to demonstrate the increased height, it was readily apparent to their neighbors that Nimmerguts' attempt to obtain the highest possible structure would have a significantly detrimental impact on the views of existing, surrounding homes.⁶⁷ The windfall Nimmerguts would reap under their interpretation could be considerable and have a significant adverse impact on the adjacent lot owners in a manner not contemplated by the Height Covenant. While Nimmerguts have not submitted specific building plans, their abstract arguments indicate that their intent is to obtain a height increase of *several*

⁶⁶ *Saunders*, at 439 (a party's unilateral or subject intent is not permissible evidence to support interpretation of a restrictive covenant).

⁶⁷ Declarations of McMurray (CP 105-106), Lewis (CP 109-110), Lammersdorf (107-108), and Hoxie (102-104).

feet than if their Lot 23 were treated the same as all other lots subject to the Height Covenant.

Finally, Nimmerguts' reading emphasizes free use of Lot 23 over the homeowners' collective interest. As discussed in the caselaw, above, Washington Courts consistently reject the Nimmerguts' type of argument elevating their private interests and free use over the homeowners' collective interest. There is no basis here to deviate from that authority.

E. The Height Covenant Interpretation Necessitates Determinations as to Material Facts in Dispute.

Nimmerguts' motion raised several issues that present unresolved disagreements over material facts. Those facts must be viewed in the light most favorable to the Association, as the nonmoving party. These rules collectively require the Court to deny Nimmerguts' request for summary judgment.

1. *Nimmerguts' attempt to insert terms into the Height Covenant renders it ambiguous, requiring review of surrounding facts and circumstance, evidence that is in material dispute.*

Nimmerguts argued to the Trial Court that the Association's position adds language to the Height Covenant that does not already exist.⁶⁸ However, it is Nimmerguts' interpretation of the Height Covenant is the one that would add language that does not exist. Nimmerguts would

⁶⁸*Id.* CP 149-163.

add the phrase “from any point” or “from the highest point” for where to measure maximum height. Not only does such language not exist in the Height Covenant, that language would conflict with the purpose of the Height Covenant and the homeowners’ collective interest as discussed above.

The foregoing reveals that Nimmerguts’ motion raises a question as to whether the Height Covenant is ambiguous or unclear. While interpretation of a restrictive covenant is a question of law, its *intent* involves questions of fact.⁶⁹ Where a covenant is unclear, the Court must consider intent and “the surrounding circumstances that tend to reflect the intent of the drafter and the purpose of a covenant that runs with the land.”⁷⁰ Extrinsic evidence may be relevant to make those determinations.⁷¹ In reviewing this case, the Court views all facts, i.e. the extrinsic evidence, in the light most favorable to the Association, the nonmoving party.⁷²

In the instant case, the extrinsic evidence gives meaning to the Height Covenant with respect to the location at which maximum height is measured for Lot 23. The declarations submitted by both parties reflect

⁶⁹ *Saunders*, 175 Wn. App. at 427.

⁷⁰ *Bauman v. Turpen*, 139 Wn. App. 78, 89, 160 P.3d 1050 (2007).

⁷¹ *Day v. Santorsola*, 118 Wn. App. 746, 756, 76 P.3d 1190, 1197 (2003).

⁷² *Wilson*, 98 Wn.2d at 437.

different interpretations of the Height Covenant and Nimmerguts disputed many of the material facts that the Association brought forward in response to Nimmerguts' motion. Unless Nimmerguts now were to concede all the facts that the Association brought forward, the Nimmerguts' argument that the motion raises a pure question of law without any material facts in dispute fails. It was improper for the Trial Court to rule on the matter by summary judgment when there were clearly genuine issues of material fact on which the questions of law depended.

2. *Nimmerguts' argument as to whether the Association consistently interpreted or enforced the Height Covenant involves disputed material facts.*

In addition to the foregoing, Nimmerguts raised a question of material fact by arguing that the Association did not consistently apply the Height Covenant and method of calculating maximum height.⁷³ Nimmerguts attempted to argue that the Association had given the impression that the Association had not, and would not, enforce the Height Covenant. The Association responded by explaining why it had offered the Nimmerguts the equitable opportunity to measure the maximum height from the curb average rather than curb center. Nimmerguts argued that the Association was inconsistent on using center or average. However, Nimmerguts never were able to show that the Association failed to enforce

⁷³Plaintiffs' Motion, pp. 8 and 13. CP 156-161.

the Height Covenant– because that simply is not the case. Nimmerguts’ argument does not demonstrate any evidence that the Association did not routinely or habitually fail to enforce the Height Covenant.

Nimmerguts’ argument raises a question of material fact as to whether the Height Covenant should require measurement from the curb average or from the curb center point. Nimmerguts were unable to resolve that question of fact in their motion.

3. *Nimmerguts’ dispute as to whether evidence supported equitable estoppel involves a dispute of material facts.*

Finally, with respect to the issue of equitable estoppel, Nimmerguts disputed whether there was reliance by and injury to the Association and adjacent lot owners. In doing so, Nimmerguts disputed material facts as to whether their interpretation of the Height Covenant would affect adjacent lot views and whether there would be actual injury as a result of Nimmerguts’ retraction of their prior admissions and their approved building plans.⁷⁴ The Nimmerguts’ dispute as to whether there was injury or reliance raises material questions of fact that were also not proper for grounds for the Trial Court to grant summary judgment.

⁷⁴*Plaintiffs’ Reply to Defendants’ Response Re: Motion for Summary Judgment and Declaratory Judgment*, CP 75-78.

F. The Trial Court Erred by Failing to Apply the Rules Regarding Interpretation of Restrictive Covenants and Improperly Allocating the Burdens of Proof for Summary Judgment.

The Trial Court failed to apply the rules of covenant construction discussed above. Instead, the Trial Court looked only at older case law that Nimmerguts relied on, without considering the Supreme Court's decisions in *Viking Properties* and *Wilkinson* or this Court's *Saunders* decision. The Trial Court never addressed how Nimmerguts' interpretation was consistent with the purpose of the Height Covenants; the Trial Court certainly failed to follow this Court's and the Supreme Court's instruction to place 'special emphasis' on the homeowners' collective interest.

The Trial Court's analysis reflects its fundamental failure to apply the law as established by these Courts. The Court concluded that the Association was attempting to "redraft this covenant years after it was written to add a restriction just because that would be beneficial to the community as a whole at the expense of the Plaintiff homeowners." The Trial Court failed to recognize that the Association is doing what Washington law *requires*: i.e. interpreting the Height Covenant with special emphasis on the community as a whole, the purpose of the Height Covenant and the common plan for Emerald Hills. The Trial Court's

interpretation of the Height Covenant, negatively impacting neighboring properties without identifying and examining the collective intent, was an error of law.

Further, the Trial Court failed to recognize that Nimmerguts' interpretation added terms to the Height Covenant, as discussed above. The Trial Court opined that the Association was trying to insert 'center measurement language' which the Trial Court believed was against the drafter's intent: "It is plain and obvious from the language in the restrictive covenant that the requirement to measure from the curb center was written in for some lots and not for others." This conclusion is inaccurate and glosses over the crux of the case: the Height Covenant for every lot listed in Article X identified a location for where to measure the maximum height.⁷⁵ The failure to specify the height measurement for only one group of lots was, at most, inadvertent. In no way does that lead directly to a conclusion that Nimmerguts' interpretation is automatically correct. The Trial Court pointed to no evidence that reflected an intention of the drafter to give the Nimmerguts free reign over where to measure maximum height.

⁷⁵Haug Decl., Ex. A, Article X, Section 2. CP 124-125.

Likewise, the foregoing reflects that the Trial Court improperly allocated the burdens under CR 56. Nimmerguts had the affirmative burden to demonstrate that their interpretation is consistent with drafter's intent, the homeowners' collective interest and the purpose of the Height Covenant. The Court failed to require Nimmerguts to meet that burden. Instead, the Court's analysis incorrectly focused on heavily, almost exclusively, on the Association's interpretation as if the Association were the moving party.

The Trial Court also incorrectly perceived the Height Covenant as setting measurement locations for some lots but not others, as if the Height Covenant were rife with inconsistency. The result is that the Trial Court viewed the Height Covenant as deliberately allocating discretion to some lot owners, but not others, despite having absolutely no evidence to support that conclusion. In reality, the Height Covenant sets measurement locations for *all lots* except for the one group of lots at issue. The Trial Court gave no consideration to the argument that this was an inadvertent omission or that the Association (a) consistently enforced the Height Covenant against all listed lots, and (b) always took the position that the Association is the entity charged with enforcing the location from where to measure maximum height, not the individual lot owner at their

subjective discretion. The Trial Court's conclusion without any evidentiary support was also reversible error.

Finally, the Trial Court provided no explanation for interpreting the inadvertent omission of a location for a single group of lots as being some statement of intent to give those lot owners full discretion in a manner that would undisputedly negatively impact the adjacent lots. The Trial Court failed to address how this conclusion is consistent with the Emerald Hills homeowners' collective interests. Reading the Height Covenant to allow Nimmerguts to build a taller home at the expense of others in the Association clearly contravenes the mandate to interpret covenants in a manner that protects the Association's collective interest. The Trial Court's decision upholding the interests of a single homeowner to the detriment of the collective interest was an error of law.

G. Nimmerguts' Case is Barred by Equitable Estoppel.

Nimmerguts are also equitably estopped now from their position.

Equitable estoppel requires: "(1) an admission, statement or act inconsistent with the claim asserted afterward; (2) action by the other party in reasonable reliance on that admission, statement or act; and (3) injury to that party when the first party is allowed to contradict or repudiate its admission, statement or act."⁷⁶

⁷⁶ *Peckham v. Milroy*, 104 Wn. App. 887, 892, 17 P.3d 1256 (2001), *as amended* (2001), *citing Wilhelm v. Beyersdorf*, 100 Wash.App. 836, 849, 999 P.2d 54 (2000).

With respect to the first element, the evidence shows undisputedly that the Nimmerguts agreed to abide by the Association's interpretation of the CC&Rs and the Association's willingness to let the Nimmerguts use the average rather than center to measure maximum height.⁷⁷ The evidence showed that the Association directly advised Nimmerguts of the requirements of the Height Covenant and the Board's past interpretation and application of the Height Covenant. Nimmerguts attempted to have the CC&Rs amended to change that very Height Covenant for their Lot 23. When they were unsuccessful, Nimmerguts advised the entire Association (not just the Board) that they conceded the matter and agreed to comply with the Height Covenant in the manner the Board interprets it: *"We will be following the CCR height restriction for Lot 23 as we move forward to finalize plans and build our house."*⁷⁸

Nimmerguts' email stating they would follow the Height Covenant based on how the Board applies it, alone, is sufficient evidence to demonstrate that Nimmerguts made an admission and statement in 2012 that they would comply with the Height Covenant as the Board interpreted and applied it. Nimmerguts then compounded their assertions by acting to

⁷⁷ Haug Decl., Ex. D. CP 132

⁷⁸ Haug Decl., Ex. D. CP 132.

obtain approval of building plans based on the Association's interpretation and application of the Height Covenant.

With respect to the second element, the Association acted in reliance on the Nimmerguts' statements by approving the Nimmerguts' building plans on that basis and administering its CC&Rs consistent with Nimmerguts' agreement thereafter. Likewise, the adjacent neighbors relied on Nimmerguts' acquiescence. Lot owners whose views would be affected by a new home on Lot 23 relied on the Nimmerguts' concession to abide by the Association's interpretation of the Height Covenant as that applies to Lot 23.⁷⁹ Going further, one lot owner purchased his home after diligently reviewing and relying on Nimmerguts' representations.⁸⁰

With respect to the third element, the Association and its members, including lot owners who would be directly adversely injured if the Nimmerguts were to build a home much higher than what they agreed to previously by admission and with their approved building plans. A house several feet higher, and the need for the Association to now process and approve building plans that expressly contradict Nimmerguts' prior

⁷⁹Declarations of McMurray (CP 105-106), Lammersdorf (CP 100-101), and Hoxie (CP 102-104).

⁸⁰ *Declaration of Hoxie*, CP 102-104

admission and approved plans would injure both the Association and adjacent lot owners.⁸¹

If this Court allows Nimmerguts to retract their admission and agreement, the Association and impacted property owners unquestionably would be injured in terms of their views and home values.⁸² Other members of The Association also would be injured based on the Nimmerguts' ability to have the CC&Rs interpreted differently for their Lot 23 than for all other lots in the Association.⁸³

H. The Trial Court Erred In Failing to Rule on Equitable Estoppel.

The Trial Court erred by granting summary judgment, and ordering the summary judgment to be entered as a final order, but not issuing a ruling on equitable estoppel. The Court felt it did not have to address equitable estoppel because the Nimmerguts did not raise it in their motion. However, the Court inconsistently then granted summary judgment on the entire case, giving the Association no chance to make its case regarding that very issue. The Trial Court's ruling improperly allocated the parties' respective burdens under summary judgment and improperly terminated review without resolving all claims.

⁸¹Declarations of McMurray (CP 105-106), Lewis (CP 109-110), Lammersdorf (CP 107-108), Mayer (CP 100-101), and Hoxie (CP 102-104).

⁸²*Id.* CP 105-06; 109-110; 107-108; 100-101; 102-104.

⁸³ Declaration of Lewis (CP 109-110); Declaration of Mayer (CP 100-101).

First, the Trial Court gave no explanation for why it felt the Nimmerguts would have raised the Association's affirmative defense, estoppel, as part of the Nimmerguts' motion. The Association properly argued this defense in response, one of several arguments for why summary judgment was improper. The Nimmerguts replied substantively, albeit ineffectively, by disputing material facts as to whether views would be affected and whether there would be actual injury as a result of their attempt to retract their prior admission and approved building plans.⁸⁴

Second, to the extent the Trial Court felt the evidence was insufficient to rule conclusively on equitable estoppel, it should have denied summary judgment due to a dispute over material facts, allowing the Association the opportunity to file their own motion or demonstrate at trial that equitable estoppel bars Nimmerguts' case.

In no event was it appropriate for the Trial Court to grant summary judgment over the entire case without ruling on equitable estoppel. This procedural error necessitates remand on the issue of whether Nimmerguts are equitably estopped from changing their position wherein they agreed with the Association, acquiesced to the Association's interpretation of the Height Covenant and authority to administer it, took advantage of the

⁸⁴*Plaintiffs' Reply to Defendants' Response Re: Motion for Summary Judgment and Declaratory Judgment*, CP 75-78.

opportunity to use the average rather than center location, and obtained approval for building plans consistent therewith.

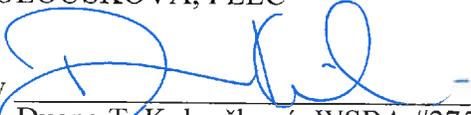
VI. CONCLUSION

Based on the foregoing, the Association respectfully requests the Court to decline declaratory judgment and dismiss the Nimmerguts' case in full. In the alternative, the Association respectfully requests the Court to conclude that Nimmerguts' unilateral actions equitably estop their interpretation of the Height Covenant. Finally, even if the Court feels the Nimmerguts can surmount these obstacles, the Association respectfully requests the Court to rule that summary judgment should have been denied as (i) material facts are in dispute and (ii) the rules of judicial construction for covenants do not support Nimmerguts' interpretation.

In all events, the Association respectfully requests the Court to reverse the Trial Court and deny summary judgment.

DATED this 29th day of September, 2016.

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By 

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DECLARATION OF SERVICE

I, Benita Lamp, am a citizen of the United States, resident of the State of Washington, and declare under the penalty of perjury under the laws of the State of Washington, that on this date, I caused to be served via E-Mail delivery a true and correct copy of the foregoing, APPELLANT EMERALD HILLS HOMEOWNERS ASSOCIATION OPENING BRIEF, upon all counsel and parties of record at the address listed below.

Karl F. Hausmann
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Dated this 29th day of September, 2016, in Bellevue, Washington.



BENITA LAMP