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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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Court of Appeals
Division I
State of Washington

KURT NIMMERGUT and EILEEN NIMMERGUT, husband and wife,

Respondents,

vs.

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

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The covenants of the Emerald Hills subdivision define the maximum permissible height of homes in a number of different ways. Most measurements are taken from the center of a lot. Other measurements are taken from defined corners of lots. But for Lots 19-23, the height is simply measured 27 feet from the curb height as the lots face west toward the street.

When Kurt and Eileen Nimmergut first approached the Emerald Hills Homeowners' Association in 2011 to discuss the height restriction for their Lot 23, the Association asserted that heights for Lots 19-23 had "historically and consistently been measured from the *average height of the curb.*"

Yet surveyors hired by the Nimmerguts and surveyors hired by the Association found that two of the four homes already built on the street had been built more than 27 feet above the average curb height. And in the only written record of the Association interpretation, the Association directed a property owner to build his home to a point measured from the *centerline* of the lot, not the average lot height. So despite the Association's assertions of a consistent historical practice of enforcement and measurement from an average curb height, the factual record showed that the height had not been consistently measured or enforced.

After repeated requests to the Association to reconsider their interpretation of the Lot 23 height restriction to permit them to measure from any point on the curb where the lot faced west, the Nimmerguts sought declaratory relief in the Snohomish County Superior Court.

In granting the Nimmergut's motion for summary judgment and declaratory judgment, the superior court judge rejected the Association's efforts to add an "average" or centerline interpretation to the Lot 19-23 height restriction. In her written decision, the trial judge stated:

From the face of the covenants it is plain and obvious that if the (covenant) drafter intended the height measurement to be from a specific point along the curb the drafter (would have) wrote that in the covenant. Specifically, if the drafter intended the height to be measured from the center of the curb the drafter said that as shown by numerous covenants that specifically state that. The covenant that applies to the Plaintiffs' (the Nimmerguts') lot differs from those and does not contain that language.

...What Emerald Hills is trying to do is write the center measurement language found in other covenants into Plaintiffs' covenant that does not contain that language.

...The fact covenants are to be interpreted in a way that protects the homeowners' collective interest does not mean Emerald Hills Homeowners Association under the guise of interpretation can 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.

CP 8-9.

The trial court further held that the plain reading of the height restriction for Lot 23 permits the Nimmerguts to measure 27 feet from any point where Lot 23 faces 12th Avenue West, including the top of the concrete curb at the southerly point where lot 23 faces 12th Avenue West. CP 6.

II. STATEMENT OF CASE

Kurt and Eileen Nimmergut own Lot 23 of the Emerald Hills housing subdivision in Edmonds, Snohomish County, Washington. CP 166. The Emerald Hills development is on the hillside just east of downtown Edmonds. It has views facing west over Puget Sound and north towards Mukilteo. CP 166. Most homes in the development have been there for several decades. The Nimmerguts' lot is one of the last lots in the neighborhood that has not had a home built on it. CP 166-168.

The Emerald Hills Declaration has height restrictions that vary and are worded differently depending on the street, the location of the lot, and the orientation of the home's building site to the potential view:

Section 2. All lots herein not specifically noted shall have no height restrictions except those common to the city of Edmonds standard building code and restrictions. 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:

Lot 12—17 feet maximum height from 135 feet south of the *northern most corner* facing east on Highland Drive

Lot 13—21 feet maximum height *from the southeast corner of lot* facing east on Highland Drive

Lot 14 thru 18—17 feet maximum height *from center of each lot* as facing east of Highland Drive

Lot 19 thru 23—27 feet maximum height *as facing west on 12th Avenue West*

Lot 24 thru 29—17 feet maximum height *from center of each lot* facing on Emerald Hills Drive.

Lot 30 & 33—32 feet maximum height *from center of each lot* facing on Emerald Hills Drive

Lot 36—16 feet maximum height *from center of lot* facing Emerald Hills Drive.

Lot 37—17 feet maximum height *from center of lot* facing on 12th Ave. West

Lot 40—18 feet maximum height *from center of lot* facing on 12th Ave. West

Lot 41—21 feet maximum height *from center of lot* facing on Emerald Hills Drive.

Lot 49—16 feet maximum height *from center of lot* facing on Skyline Drive.

Lot 50 thru 54 – 17 feet maximum height *from center of lot* facing on Skyline Drive.

CP 184. (Emphasis supplied).

As seen in this detailed list, some height restrictions are measured from a defined lot *corner* (Lots 12-21), the majority of the restrictions are measured from the *center of the lot* (Lots 14-17; Lots 24-29, 30, 33, 36, 37, 40-41, 49, 50-54), and for just four of the lots, Lots 19-23 (which include the Nimmerguts' lot), the restriction is simply measured "*as facing west on 12th Avenue West.*" CP 184.

The list of height limitations is located in Article X of the Covenants. CP 184. A different portion of the Covenants, Article VII, requires property owners to have plans for buildings and other structures submitted and approved by the Board of Trustees or an architectural control committee. CP 180. The plans and specifications are reviewed for “harmony of external design and location in relation to surrounding structures and topography.” CP 180. It should be noted that although submitted plans must include height information, the review under Article VII is merely for harmony of the design and location. The review Board does not have discretion to expand or restrict the Covenant’s height restrictions.

After they bought their lot in 2011, the Nimmerguts discussed the height restriction with the Emerald Hills Homeowners’ Association leadership (“Association”). CP 19. At the Board’s suggestion, the Nimmerguts erected poles at a height four feet above the maximum height as interpreted by the Board to better visualize the future height of a house on the lot. CP 19. And, again at the Board’s recommendation, the Nimmerguts sent letters to Association residents requesting a modification of the height restriction. CP 19-20. The request was promptly and vigorously rejected by the residents. CP 20.

The Nimmerguts did submit plans to the Association at a lower elevation that conformed to the Association's interpretation of the height limit. However, after submitting the plans to the City of Edmonds, the Nimmerguts let the plans expire without renewing them with the City. CP 139.

In late 2014, the Nimmerguts reexamined the height restriction and sought legal counsel. CP 189. In letters to the Emerald Hills Homeowners' Association from their lawyer, the Nimmerguts pointed out what they thought was the error in the Association's interpretation. CP 189. They sought confirmation that they could measure the height of their home from the highest point of the concrete curb where their lot faces 12th Avenue. CP 189. The difference between what the Nimmerguts have proposed and what has been approved by the Homeowners' Association is 2.95 feet. CP 168.

The Emerald Hills Homeowner's Association rejected the Nimmerguts' request. CP 192. In a response to the Nimmerguts' lawyer, Emerald Hills insisted that the maximum building height must be determined by first calculating the *average* height of the high point and the low point on Lot 23 where it contacts 12th Avenue:

With respect to approving home plans on Lots 19-22, the Association has acted consistently, applying the height restriction in the identical manner based on the

same covenant language. That approach has been to use the average of the curb height since 12th Street slopes along the frontage of Lots 19-23. Lot 23 has remained vacant, and is the last of these five lots to receive plan approval from the Association.

CP 192-193.

After receiving the Emerald Hills' rejection of their request, the Nimmerguts had Tri-County Land Surveying, a Professional Land Surveyor measure the actual heights of the four existing homes built on Lots 19-22 on 12th Avenue. CP 196.

Tri-County's measurements found that three out of the four homes subject to the 12th Avenue restriction had been built to a height that would exceed the height restriction using the average curb/lot height calculation proposed by Emerald Hills:

1. Lot 19: Exceeded by 1.31 feet
2. Lot 20: Exceeded by 2.37 feet
3. Lot 21: Exceeded by .14 feet
4. Lot 22: Within limit (-1.12 feet)

CP 198.

If the Nimmerguts' interpretation of the height restriction were used, all but one of the existing houses on 12th Avenue (Lots 19 through 22) are within the maximum permissible height. CP 198.

The Nimmerguts shared the surveyor's findings with Emerald Hills. CP 200. Emerald Hills then had their own surveyor perform similar

measurements. Emerald Hills' elevation study was performed by the Lovell-Sauerland firm ("LSA"). CP 202-203. Lovell-Sauerland's findings were nearly identical to the study performed by Tri-County Land Surveying Company. The measurements were usually within a .14 foot (1.68 inches) of the Tri-County measurements. CP 196; CP 202-203.

The LSA elevation study showed Lot 20 to be over two feet above the Association's maximum height. CP 205. For an unknown reason, the LSA survey did not provide elevation information about the home on Lot 19, which the Nimmergut's study showed to be more than a foot over the Association's asserted height restriction. CP 196-98. The only material difference between the two elevation studies is that the LSA study shows Lot 21 to be exactly at the Association's maximum height calculation and the Tri-County's study showed Lot 21 to be .14 feet over the Association's height calculation (a difference of only .14 feet or 1.68 inches). Both studies have Lot 22 under the Association's height restriction.

Thus, if the LSA study had included Lot 19, it would only differ from the Tri-County study by finding two of the four homes to be out of compliance instead of three of the four homes out of compliance. Essentially, the two elevation studies lead to the same conclusion: The Association never in fact conducted height reviews of Lots 19-22; if the Association did height reviews, the restrictions were ignored.

The Nimmerguts also requested that Emerald Hills produce any Association records that would support the claim that the Association had calculated the maximum heights of Lots 19-22 with a consistent method of averaging the lot/street elevation points. CP 174. Emerald Hills has provided only one document in response. In a June 17, 1988 letter to the owners of Lot 20, the Association identified the maximum permissible height to be “not be higher than 27’-0” above top of concrete street curb *at centerline* of Lot 20 at 12th Avenue.” (Emphasis supplied.) CP 207. By referencing a centerline location, this letter contradicts the Association’s assertion that it historically used an average curb height.

Despite the lack of historic proof of using the average method, and despite the elevation studies contradicting the “average height” limitation, Emerald Hills has refused to retract its prohibition on the Nimmerguts’ requested calculation. In a letter from the Association’s counsel, the Association’s position was repeated:

The Board has not approved, and does not approve, any height limitation for Lot 23 higher than 27 feet above the average for the lot at the curb, as measured from 12th Ave. N.

CP 211. (Underline in original.)

Superior Court proceedings

The Nimmerguts filed suit on October 29, 2015. CP 223. The Nimmerguts filed a motion for summary judgment seeking declaratory

relief. The motion was heard by the Honorable Anita L. Farris on April 21, 2016.

Judge Farris granted the Nimmerguts motion to strike portions of the Association's supporting testimony because a declaration contained hearsay testimony from an unnamed person purporting to speak about the covenant drafter's intent when the covenants were drafted. CP 5; CP 65-66. Judge Farris granted the Nimmerguts' motion for summary judgment. Judge Farris held that the height restriction permits the Nimmerguts to measure 27 feet from any point where Lot 23 faces 12th Avenue West, including the top of the concrete curb at the southerly point where Lot 23 faces 12th Avenue West. CP 6.

This appeal followed.

IV. ARGUMENT

A. The Collective Interest of the Emerald Hills Subdivision Property Owners is to Have a Predictable and Balanced Height Restriction System.

Both parties to this lawsuit agree that Washington courts strive to interpret restrictive covenants in a way that protects the homeowners' collective interests and gives effect to the purposes intended by the drafters of those covenants to further the creation and maintenance of the planned community. *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 106, 267 P.3d 435 (2011); *Saunders v. Meyers*, 175 Wn. App. 427, 442,

306 P.3d 978 (2013). Washington courts have moved away from the position of strict construction historically adhered to when interpreting restrictive covenants. Washington courts acknowledge that restrictive covenants “tend to enhance, not inhibit, the efficient use of land.” Covenants also tend to enhance the value of the land. *Jensen*, 165 Wn. App. at 106.

The Emerald Hills restrictive covenants are unusually specific in the way they define permissible heights. For each street and for each block of the development, the covenants describe where on a lot an owner may build, as well as the height to which the owner may build. CP 184. The covenants also define front and side yard setbacks. CP 181 (Article VIII, Section 2). Because the declarations terms are specific, by examining the covenants, existing property owners know where future homes will be built and how tall they will be. The buyer of an undeveloped lot knows the specific parameters where a future home may be built.

Based on this level of detail, the intent of the covenant drafters appears to be to provide a predictable set of clearly defined height restriction to balance between the desire to preserve views while simultaneously permitting building within the defined heights. Newer built homes are entitled to maximize their view within the defined

restrictions. The collective interest is not to read the height restrictions in the way that forces new homes to be built as low as possible.

The trial court agreed with the Nimmerguts, and held: “The fact covenants are to be interpreted in a way that protects the homeowners’ collective interests does not mean Emerald Hills Homeowners Association under the guise of interpretation can 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 (Nimmergut) homeowners.” CP 9.

B. The Plain Language of the Lot 19-23 Height Restriction Does Not Need Additional Terms to be Applied.

The interpretation of the language in restrictive covenants is a question of law. *Day v. Santorsola*, 118 Wn. App. 746, 756, 76 P.3d 1190 (2003). A court’s 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. *Saunders v. Meyers*, 175 Wn. App. 427, 439, 306 P.3d 978 (2013). The court must give effect to all the words of the covenant and not read some words out of covenant. *Ross v. Bennett*, 148 Wn. App. 40, 49, 203 P.2d 383 (2008). While ascertaining the drafter’s intent or purpose behind a restrictive covenant is a question of fact, “where reasonable minds could reach but one conclusion, questions

of fact may be determined as a matter of law. *Wilkinson v. Chiwawa Cmty. Ass'n.*, 180 Wn.3d 241, 250, 327 P.3d 614 (2014).

Washington's context rule is applicable to the interpretation of restrictive covenants. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999). Extrinsic evidence is admissible to determine the meaning of specific words and terms used in the covenant. But admissible extrinsic evidence does not include (1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; (2) evidence that would show an intention independent of the instrument; or (3) evidence that would vary, contradict, or modify the written word. *Id.*

In its entirety, the Lot 23 height restriction reads 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: ... Lot 19 thru 23: 27 feet maximum height as facing west on 12th Avenue West."

As noted above, the height restrictions of other lots identified a specific point on the referenced lots. CP 184. Lot 12 was measured from a point "135 feet south of the northern most corner facing east on Highland Drive." Lot 13 is measured from "the southeast corner of lot facing east." The majority of the lots are measured "from center of lot"

facing a defined direction. In contrast, for Lots 19-23, the measurement is simply taken from the top of the concrete street curb “as facing west on 12th Avenue West.” CP 184.

Giving the Lot 19-23 language its plain meaning permits the measurement to be taken from any point, including the highest point, where Lot 23 faces west on 12th Avenue West. A plain reading does not suggest that the elevation of Lot 23 must be derived from the *average* of the highest point and the lowest point where a lot faces the road. To add “average” to the definition would add language to the restriction that does not already exist. No other restrictions use an average. And to add “center of lot” to the covenant would be to modify the language when the drafter did not.

The Utah Supreme Court addressed similar language when resolving conflicting interpretations of a height restriction in a deed. The deed at issue stated that the “roof level or highest portion of any building or permanent structure placed or constructed upon said land shall not be higher than 32 feet. Measured from the existing street lying west and adjacent to said land.” *Panos v. Olsen and Associates Const. Inc.*, 123 P.3d 816 (Utah 2005). No other specifications were contained in the deed. The adjacent road in the *Panos* case, like 12th Avenue North in the Emerald Hills development, was sloped. The complaining neighbor

asserted that the height restriction was ambiguous because the words could be understood to reach two or more plausible meanings. Measurements could be taken from a high point or from a low point resulting in a building being in compliance or in violation of the height restriction.

The *Panos* court rejected the argument that the language was ambiguous. The court found that the terms “existing street lying west and adjacent to said land” mean the portion of the road lying west and adjacent to the lot. “As no other words are used to narrow the precise location on Elm Ridge Road where the measurement is to originate, *any point of measurement originating on the portion of Elm Ridge Road, lying west and adjacent to Lot 29, satisfies this part of the height restriction.*” *Id.* The court stated: “We will not rewrite a [deed] to supply terms which the parties omitted. (Citation omitted). Although the terms are broad in their application, it does not mean the terms are ambiguous.” *Id.* at 821.

The *Panos* court also held that the use of the word “from” in the height restriction does not specify a more precise location on the street where the measurement is to originate. The plain meaning of the word “from” indicates a place as a starting point. The court held the height restriction measurement “need only have a starting point someplace on the portion of the road lying west and adjacent to Lot 29... If the parties

intended a more precise measurement point on Elm Ridge Road, the parties could have so indicated.” *Id.* at 821.¹

The *Panos* court’s admonition that if the parties intended a more precise measurement point they could have drafted a more specific covenant is particularly apt in the present case. As noted above, the drafters of the Emerald Hills covenants used precise points, corners, and centerlines on other lots. Among the twelve different reference points listed by the Emerald Hills covenants, only lots 19-23 are described without reference to either a corner point or a lot center line. Given the level of precision used throughout the development, it is fair to say that if the drafters of the Emerald Hills covenant wanted the measurement to be limited to an average point or a lot center line, they would have. But they did not.

At the trial court below, the court held:

From the face of the covenants it is plain and obvious that if the (covenant) drafter intended the height measurement to be from a specific point along the curb the drafter (would

¹ The Association urges this Court to disregard the *Panos* case because it is an out of state case. Brief of Appellant at 24. But the *Panos* case is not offered as controlling authority or an interpretation of Washington law. Instead, the *Panos* case is cited to show that another court (in fact a state supreme court) reviewed similar height restriction language and, like the superior court below, found no ambiguity and no difficulty in applying the limitation.

have) wrote that in the covenant. Specifically, if the drafter intended the height to be measured from the center of the curb the drafter said that as shown by numerous covenants that specifically state that. The covenant that applies to the Plaintiffs' (the Nimmerguts') lot differs from those and does not contain that language.

Because the language was not ambiguous and because it can be applied as written, the Court granted the Nimmerguts motion for summary judgment and granted them declaratory relief.

C. The Association Concedes Its Interpretation Requires Rewriting the Covenant.

The Association has taken inconsistent positions in this appeal. On one hand, the Association has assigned error to Judge Farris's conclusion that the Association's interpretation of the Height Covenant would add terms not included by the drafters of the restriction. (Appellant's Assignment of Error No. 5). On the other hand, in its opening brief, the Association asserts that the drafter's omission of more precise language was a *mistake*. "[U]nfortunately, the Height Covenant missed identifying the curb location for Lots 19 through 23..." Brief of Appellant at 7. "The failure to specify the height measurement for only one group of lots was, at most, inadvertent." Brief of Appellant at 33. The Association cannot simultaneously say the trial court was wrong when it ruled that the Association was trying to add terms to the covenants when they now argue that the drafter missed including height restrictions for Lots 19 through 23.

As the superior court determined, the height restriction must be read as it was written. If the restriction is not ambiguous, it must be interpreted without resort to extrinsic evidence. The *Panos* court was able to review a similar restriction without ambiguity. In the present case, the superior court was also able to read the height restriction without ambiguity. Because it is not ambiguous and it may be applied as written, no further inquiry is needed.

D. The Homeowner Association’s Extrinsic Evidence is the Type Prohibited by *Hollis*: It is Evidence of Subjective Intent, Independent of the Instrument, Which Modifies the Written Word.

Despite the height restriction’s unambiguous language, the Association urges this court to determine that a drafting error took place in 1969 and interpret the restriction as if it was written the same as different sections of the height restriction. CP 7; CP 33. The Association asks the court to consider extrinsic evidence: “[E]xtrinsic evidence gives meaning to the Height Covenant with respect to the location at which maximum height is measured for Lot 23.” (Brief of Appellant at 29.)

The Association argues that the Association has, in the past, “equitably interpreted” the Lot 19-23 covenant so that it is “roughly the same as the restriction applicable to other lots. Brief of Appellant at 8.

The Association offers declarations from Association members who explain how they interpreted the covenant. CP 111-114.

The Association asserts that the Lot 23 height should be measured like “all the other height restricted lots (from the centerline)” to avoid the Lot from being out of harmony with surrounding structures and to prevent the Nimmerguts from obtaining a “windfall.” Brief of Appellant at 9.

A declaration from Association members about the true (but unwritten) meaning of the covenant and arguments that the covenant should be edited to conform with the measurements of other lot height restrictions are the type of extrinsic evidence deemed inadmissible under *Hollis*. It is evidence of a party’s unilateral or subjective intent as to the meaning of a covenant word or term; evidence that would show an intent independent of the instrument; and evidence that would vary, contradict or modify the written word. *Hollis*, 137 Wn.2d at 695. As such, the extrinsic evidence should not be considered.

E. The Association Has Not Consistently Applied the Height Restriction for Lots 19-23.

From the elevation studies performed by both the Nimmerguts and the Association, it is evident that at least half of the four previously built homes on Lots 19-22 have been built over the height restriction as it is now being interpreted by the Association. If a covenant which applies to

an entire tract has been habitually and substantially violated so as to create an impression that it has been abandoned, equity will not enforce the covenant. *Sandy Point Improvement Co. v. Huber*, 26 Wn. App. 317, 319, 613 P.2d 160 (1980); see *Reading v. Keller*, 67 Wn.2d 86, 90, 406 P.2d 634 (1965). Where a “common plan” has broken down due to substantial unchecked prior violations of the restrictions within the subdivision, the covenants may be deemed to have been terminated by abandonment. See e.g. *Mount Baker Park Club v. Colcock*, 45 Wn.2d 467, 275 P.2d 733 (1954); *St. Lukes v. Hale's*, 13 Wn. App. 483, 534 P.2d 1379 (1975). A minor violation that is immaterial to the overall purpose of the covenant is insufficient to find abandonment. *Mountain Park Homeowners Association v. Tydings*, 125 Wn.2d 337, 342, 883 P.2d 1383 (1994). However, a Washington court held that when more than 25 percent of the improved properties had been permitted to disregard restrictions, they had been abandoned. *Tindolph v. Schoenfeld Brothers*, 157 Wash. 605, 611-612, 289 P. 530 (1930).

To the extent Emerald Hills asserts that the “average height” interpretation has been routinely followed, it has not in practice been enforced, and such an interpretation has been waived by nonenforcement. Even if the Association’s extrinsic evidence were to be considered, it would not support the Association’s position.

F. The Association Seeks To Grant Itself Discretion to Interpret Covenants.

In an effort to justify the rewriting of the language, the Association attempts to show that the *Association* should have authority to interpret the covenants (Brief of Appellant at 26) and that the superior court decision would, in comparison, permit the Nimmerguts to subjectively measure the height from any location they choose. *Id.*, at 26

The Association asserts that its interpretation, unlike the Nimmerguts' position, "determines the height consistently with the rest of the lots subject to the height restriction." *Id.* at 25. The Association asserts that it is the Association's duty to interpret the height under the authority of its architectural control committee. *Id.* The Association asserts that it was "equitably interpreting" the covenant when it worked with the Nimmerguts in 2011-2012. *Id.* at 8, 11.

The Association complains that adopting the Nimmerguts' interpretation:

- Will "let a lot owner decide the location where he or she subjectively wishes to measure the maximum height." (Brief of Appellant, p. 26)
- Allow them to build a taller home at the expense of others. *Id.*

- Enable them 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.” *Id.*, at 27.
- They would “reap a windfall.” *Id.*, at 27
- Their reading “emphasizes free use of Lot 23 over the homeowners’ collective interest.” *Id.*, at 28.

Despite the parade of horrors listed by the Association, it must be noted that the Nimmerguts are not requesting the authority to build their home to any height they choose or to ignore the height restriction. They are simply seeking to build their home to the height expressly granted by the Covenants: 27 feet above the curb as Lot 23 faces 12th Avenue West. This is not unfettered discretion. There is a less than a three-foot difference between a measurement from the average curb height and a measurement to the highest curb height. CP 168, ¶ 10. Permitting the Nimmerguts to apply the height restriction as written rather than as it has been wrongly interpreted will not send the Association into chaos. It is not a windfall for the Nimmerguts to be able to build a home consistent with a height restriction that has been in place for 47 years.

Additionally, to vest the Association with the authority to “equitably interpret” the covenants would be in improper expansion of the Association’s architectural review process. As noted, the Association’s

architectural review process is limited to ensuring “harmony of external design and location in relation to surrounding structures and topography.” CP 180. But the height restrictions are defined in a different section of the CC&Rs and are not reviewed by the architectural control committee. CP 184.

G. Equitable Estoppel Does Not Apply to a Mere Application and the Association Has Not Shown Justifiable Reliance.

To succeed on an equitable estoppel defense, a party must produce “clear, cogent, and convincing evidence” that each of the below elements are “highly probable.” *Kramarevcky v. Dep’t of Soc. & Health Servs.*, 122 Wn.2d 738, 744, 863 P.2d 535 (1993):

- an admission, statement, or act inconsistent with a claim afterward asserted;
- an action by another in reliance upon that act, statement, or admission; and
- injury to the relying party that would result if the first party is allowed to contradict or repudiate the prior act, statement, or admission

Wagner v. Wagner, 95 Wn.2d 94, 102 (1980); *Seattle-First Nat. Bank v. Westwood Lumber, Inc.*, 65 Wn. App. 811, 823, 829 P.2d 1152 (1992).

Equitable estoppel occurs if “a person wrongfully or negligently by his acts or representations causes another who has a right to rely upon such acts or representations to change his condition, to his detriment or prejudice.” *Kessinger v. Anderson*, 31 Wn.2d 157, 169 (1948); *see*

Seattle-First Nat'l Bank v. Westwood Lumber, Inc., 65 Wn. App. 811, 823–24, 829 P.2d 1152 (1992) (“Implicit in [the three factor test for estoppel] is that the assertion on which an estoppel is based must induce detrimental reliance by the other party.”)

The Association asserts the Nimmerguts are equitably estopped from asserting a different interpretation of the height restriction because of the following statement in an email: “We will be following the CCR height restriction for Lot 23 as we move forward to finalize plans and build our house.” CP 132.

It would be unfair to hold that the Nimmergut’s simple email (which did not say anything about agreeing with the Association’s interpretation) should be held against them now when the superior court has concluded that the Association’s reading of the height restriction is wrong. The Nimmerguts should not have to abide by a legally erroneous interpretation given to them by the Association. Washington law requires any encumbrance on real property to be by deed. RCW 64.04.010.

Just as importantly, the Nimmergut’s statement is not the kind of statement or promise that creates an estoppel. “[A]n intention to do a thing is not a promise to do it.” *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 957, 421 P.2d 674 (1966). Fundamentally, a property owner’s submittal of building plans for approval is different from the type of

statement, act or omission that a party would have a right to rely on. There are a multitude of circumstances where applications are made without binding obligations being created: Applications for residential leases, applications for school admissions, applications for building permits that expire over time. These applications do not create an *estoppel* where applicants are then barred from pursuing different actions. Emerald Hills has not produced any authority where a mere applicant (much less the applicant of an expired permit) has been barred by estoppel from pursuing a new or different application.

Courts do not apply estoppel to land development or permit applications. Courts would, under certain circumstances, apply a res judicata analysis. For example, in *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 891 P.2d 29 (1995), a land use permit applicant, after a County Commissioner's denial of its first application, submitted a modified second application. The Washington Supreme Court applied a res judicata analysis, and determined that the second application was sufficiently different from the first application that res judicata did not bar the second. *Id.* at 35. The court did not apply an equitable estoppel analysis.

As noted above, the Nimmerguts' statement they would abide by the height restriction only says they would abide by the limitation; it did

not say they would abide by an erroneous interpretation of the restriction. Unless the specific requirements of equitable or promissory estoppel apply, there is no legal doctrine that binds a party to a position when the original position is based partially developed facts or on an erroneous legal understanding. In fact, the law has many examples where the opposite is true: Parties are freely given leave to amend pleadings when justice so requires. CR 15(a). Parties are permitted to plead matters in the alternative. CR 8(a). Parties are relieved from the consequence of mistakes under certain circumstances: A court may rescind a contract for mutual mistake of fact when both parties are mistaken about a basic assumption underlying the contract and neither party assumed the risk of that mistake. *Denaxas v. Sandstone Court of Bellevue*, 148 Wn.2d 654, 668, 63 P.3d 125, 131 (2003); *Public Util. Dist. No. 1 v. Washington Pub. Power Supply Sys.*, 104 Wn.2d 353, 362, 705 P.2d 1195, 1203 (1985), *corrected*, 713 P.2d 1109 (1986). Similarly, in this case, if both the Nimmerguts and the Association have misread the height covenant in the past, that does not bind them to honor the erroneous interpretation now.

The only evidence of reliance offered by the Association is from the declaration of a homeowner who asserted he bought his home only after he reviewed the minutes of an Association meeting that discussed the Nimmergut's height issue. CP 103. The fact is that the homeowner made

his purchase in December 2015, which was almost a year after the Nimmergut's building permit with the City of Edmonds had expired. CP 57; CP 139. This offer of a factual reliance on the Nimmergut's original planning is insufficient. It is not justifiable reliance.

The Association has offered no evidence, much less clear, cogent and convincing evidence, that the Association has relied on the Nimmergut's earlier application or that the Association would be injured if the Nimmerguts are permitted to change their position with their application.

H. The Interpretation of a Restrictive Covenant May be Determined Through a Declaratory Judgment Action.

The Nimmerguts present the precise type of question appropriate for resolution by declaratory judgment. The Uniform Declaratory Judgments Act states:

A person interested under a deed, will, written contract or other writing(s) constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

RCW 7.24.020.

The Nimmerguts meet each of these elements:

1. They are a *person*;

2. Interested *under writings constituting a contract* (the CC&Rs);
3. With a question of *construction or validity arising under the contract*;
4. Requesting a declaration of rights.

A threshold requirement for a declaratory judgment action is that the case present a justiciable controversy: (1) an actual, present, and existing dispute, (2) between parties having genuine and opposing interests, (3) which involves direct and substantial rights, and (4) a judicial determination will be final and conclusive. *Benton City v. Zink*, 191 Wn. App. 269, 278, 361 801 (2015).

Bloome v. Haverly, cited by the appellants, is distinguishable. *Bloome v. Haverly*, 154 Wn. App. 129, 225 P.3d 330 (2010). In the *Bloome* case, parties to a view corridor covenant sought a declaratory ruling. The downhill property owner argued that the covenant was unenforceable because it was entered into before any structures were built on the restricted property and, if the restriction was applied to a structure, it would prohibit any structure from being built on the property. The court's rejection of the case as not justiciable was because the trial court record was insufficient; it lacked evidence of plans and municipal review to prove that no home could be built on the lot.

In contrast, in the Nimmergut's request, there is nothing hypothetical about the measurement of the height restriction. As noted in

the Statement of Facts, above, the Emerald Hills Declarations of Covenants, Conditions, and Restrictions, there is an architectural plan review process through the Homeowners' Association. (Article VII). But the height restriction terms are defined in a different portion of the CC&Rs. (Article X). The architectural control committee or board is not charged with interpreting the height restriction.

There is nothing hypothetical about whether the Association would approve plans submitted using a height measured 27 feet from any point where Lot 23 faces the street. The height restriction issue has been squarely framed by the parties. The Nimmerguts have twice requested confirmation from the Association that they can build to the 27 foot elevation and they have been unequivocally denied both times. CP 189-194; 200; 211. In December, 2014, the Association rejected the Nimmerguts' request:

The Association looks forward to reviewing (the Nimmergut's) updated floor plans and will work quickly to approve them *so long as they are submitted as before with the 27 feet measured from the "average" of the curb height of the lot as facing 12th Avenue.*

CP 192. (Emphasis supplied).

Again in August 2015, the Association rejected the Nimmergut's request:

The Board has not approved, and does not approve, any height limitation for Lot 23 higher than 27 feet above the average for the lot at the curb, as measured from 12th Ave. N.

CP 211-12. (Underline in original.)

Given these repeated rejections, the Association cannot be heard to say that this dispute, and the need for the court to determine the rights of the parties, is hypothetical, premature, or unripe. It would be costly, time consuming, and futile for the Nimmerguts to have plans prepared when the Association has already told them twice that the plans would not be approved unless an “average height” measurement is used. CP 20. Resolution by the court will resolve the only genuine dispute between the parties, which is the interpretation of the height restriction.

V. CONCLUSION

For the reasons stated above, Respondents Kurt and Eileen Nimmergut respectfully request that the decision of the superior court be AFFIRMED.

RESPECTFULLY SUBMITTED this 31st day of October, 2016.

MARSH MUNDORF PRATT SULLIVAN
+ McKENZIE, P.S.C.

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CERTIFICATE OF SERVICE

I, Meghan E. Brown, hereby certify that on the 31st day of October, 2016, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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- US Mail-postage prepaid
- Hand Delivery
- Facsimile
- Electronic Mail
- Overnight Courier

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

EXECUTED this 31st day of October, 2016, at Mill Creek, Washington.

s/ Meghan Brown
Meghan Brown, Legal Assistant