

NO. 35517-5-II

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

THE HARBOURSIDE OWNERS ASSOCIATION, a Washington
non-profit corporation,

Respondent,

v.

ROGER JAMES EVANS and JUDITH ANN EVANS, individuals and a
marital community, PARFITT WAY MANAGEMENT CORPORATION,
a Washington Corporation,

Appellants,

and

the CITY OF BAINBRIDGE ISLAND,

Defendant.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION.

Residents of the Harbourside Owners Association (“HOA”) obtained an injunction preventing appellants/defendants Roger James Evans and Judith Ann Evans (“Mr. and Mrs. Evans”) and Parfitt Way Management Corporation (“Parfitt”) from proceeding with a 2004 proposal to remodel and expand a popular restaurant/public house (the “Harbour Public House” or “Pub”) on abutting property on the waterfront on Bainbridge Island based upon a 1989 Development Agreement. The trial court granted injunctive relief despite the fact that the 2004 proposal substantially complied with or conformed to the Master Plan incorporated into the Development Agreement.

In granting injunctive relief, the trial court committed several errors. Primary among them, the trial court (a) failed to apply the rule of strict construction of restrictive covenants; (b) improperly concluded that the 2004 proposal did not substantially comply with the Master Plan; and (c) improperly considered intensification of use – from mixed commercial/residential to restaurant – in deciding that de minimis changes in the physical aspects of the structure were “material.”

In this appeal, Mr. and Mrs. Evans and Parfitt ask that the Court of Appeals reverse the judgment, vacate the injunction, reverse the trial court’s award of attorneys’ fees and costs to the HOA, and direct the trial

court to enter judgment in favor of appellants dismissing the action and awarding appellants their reasonable costs and attorneys fees.

II. ASSIGNMENTS OF ERROR.

Assignments of Error.

1. The trial court erred by concluding that the development proposed by Mr. and Mrs. Evans and Parfitt in 2004 did not substantially comply with or conform to the governing 1989 Development Agreement and Master Plan.

2. Appellants believe that the trial court properly recognized that the Development Agreement and Master Plan do not limit the uses to which Appellants may put their property; to the extent the trial court's findings and conclusions might be read to the contrary, the trial court erred in so finding or concluding.

3. Appellants believe that the trial court did not base its decision upon an implied covenant of quiet enjoyment or covenant to maintain "character"; to the extent the trial court's findings and conclusions might be read to the contrary, the trial court erred in so finding or concluding.

4. The trial court erred when it found in Finding of Fact No. 39 that "[t]he proposed expansion would not fit with the character of this master planned development that was intended by Evans and Hunt when

they entered into the Development Agreement. Adding the Pub expansion instead of the Residence/Office does not conform to the Master Plan that the parties agreed to and that Evans and Harbourside Partners used to market the sale of the condominiums.”

5. The trial court erred when it found in Finding of Fact No. 41 that the proposal “changes the character of the view from the condominium property and was not intended by Evans or Hunt without first obtaining the consent of the other party. In creating the Master Plan, Evans and Hunt intended to maintain a path between the structures, and a set back from the Residence/Office structure to the Pub, and a setback from the east property line as well.”

6. The trial court erred when it found in Finding of Fact No. 46 that “[d]efendants’ proposed expansion of The Pub is a material deviation from the size, shape, and location of the ‘structures to be erected’ that were intended by Evans and Hunt when they executed the Development Agreement and agreed to their Master Plan.”

7. The trial court erred in issuing a permanent injunction because the findings of fact, conclusions of law, and judgment on which it was based are in error.

Issues Pertaining to Assignments of Error.

1. Did the trial court properly conclude that the Development Agreement did not limit appellants to development of a “Marina Owners Residence/Yacht Sales” structure because the Development Agreement did not explicitly limit use and under Washington law restrictive covenants are to be strictly construed?

2. If the Development Agreement contained no such explicit “use” limitation, did the trial court nonetheless err in using changes in “use” to determine that the physical differences between the structure proposed by appellants in 2004 and the structure depicted in the 1989 Development Agreement were material and that the 2004 proposal did not “conform” to the Master Plan?

3. Was the standard for compliance with the 1989 Development Agreement’s restrictions on the physical attributes of development substantial or exact compliance, when the common law rule is one of substantial compliance, the parties demonstrated by their actions that only substantial compliance was required, and the trial court failed to identify any purpose served by exact compliance?

4. Did the 2004 proposal substantially comply with and conform to the Master Plan? Was there substantial evidence that the 2004 proposal did not conform?

5. If the trial court based its decision upon an implied covenant of quiet enjoyment or the notion that the Development Agreement was intended to preserve an undefined neighborhood “character,” does a restrictive covenant applicable to an admittedly mixed use in a commercial zone give rise to an undefined covenant of quiet enjoyment or covenant to maintain “character” so as to give priority to the residential use despite the rule of strict construction of restrictive covenants and despite the statute of frauds?

6. Is Finding of Fact No. 39 supported by substantial evidence?

7. Is Finding of Fact No. 41 supported by substantial evidence?

8. Is Finding of Fact No. 46 supported by substantial evidence?

9. Whether, if the Court of Appeals reverses the judgment of the trial court, it should also vacate the preliminary injunction it entered based upon that judgment?

10. Whether, if the Court of Appeals reverses the judgment of the trial court, it should also reverse the trial court’s award of attorneys’ fees and costs and direct the trial court to enter judgment in favor of appellants for their reasonable attorneys’ fees and costs?

III. STATEMENT OF THE CASE

A. General Background.

Appellants Mr. and Mrs. Evans have long owned property fronting Eagle Harbor on Bainbridge Island. RP 241:1-4. In approximately 1980, they obtained permits to develop and did develop a marina. RP 243:17-244:18. In 1987, Mr. and Mrs. Evans obtained a Shoreline Substantial Development Permit (“SSDP”) and Conditional Use Permit (“CUP”) to convert an existing historic structure on their property to a pub (the “Pub,” also known as “Harbour Public House”). Ex. 1; RP 246:4-247:3. The Harbour Public House has operated continuously since 1991. RP 249:15-24. The marina and Pub are now owned by appellant Parfitt Way Management Corp. Ex. 28; RP 88:2-9.

In addition to the Pub and marina property, Mr. and Mrs. Evans owned substantial abutting uplands. In 1989, John Hunt (“Mr. Hunt”) approached Mr. and Mrs. Evans with a proposal to develop the uplands as a condominium. They entered into a purchase and sale agreement whereby Mr. Hunt would buy the uplands. RP 76:1-12; RP 251:16-252:3; Ex. 2.

To preserve utilities, access, and parking for the Pub, Marina, and other anticipated waterside uses on property they retained, Mr. and Mrs. Evans, for themselves and on behalf of Bar Harbor Associates, a partnership, entered into the Development Agreement and Covenants Running

with the Land, dated December 1, 1989 (the “Development Agreement”). Ex. 6, RP 83:13-25. The deed from Bar Harbor Associates to the Hunts (also dated December 1, 1989) reserved five easements, including an easement for access and parking to serve the Pub and other waterfront interests of Mr. and Mrs. Evans. Exs. 4, 5; RP 81:21-82:22.

Mr. and Mrs. Evans did not intend in 1989 to participate in the development of the uplands beyond the obligations specifically stated in the Development Agreement. In 1993, however, Mr. Hunt executed and recorded a deed in lieu of foreclosure to Harbourside Partners, a general partnership in Mr. and Mrs. Evans were general partners (along with others, including Mr. Hunt). RP 313:1-10; Ex. 13. Harbourside Partners completed the condominium project begun by Mr. Hunt. Mr. Evans acted during certain periods as general partner.

B. Permitting History.

The development of the Pub occurred under an entirely separate permitting process; this aspect of the Evans ownership and development was understood to stand on its own right. Ex. 1; RP 246:4-247:3. When the Hunt development proceeded, Mr. and Mrs. Evans on the one hand, and Hunt on the other, each submitted their properties for permitting approval by the City. RP 278:23-282:3, Exs. 49, 50, 51. The City issued separate SEPA determinations for each of the two properties. RP 279:2-

20. In 1991, the City issued two Planned Unit Development approvals, one for the Harbourside Condominium project, PUD No. 10-27-89-2 (the Hunt property), and one for the Harbour Marina project, PUD No. 10-27-89-1 (the Evans property).

Although the applications were separate, they were related. City ordinances at that time limited the amount of residential use permitted in a PUD situated on land zoned for commercial use (as here). Ex. 49; RP 282:11-285:5. Mr. Hunt could not build the number of residential units he wanted to build without a significant commercial component. Because he did not intend to develop any commercial structures on his own property, Mr. Hunt had to rely on the commercial uses on the Evans property to meet the ratio required by the City's ordinance. Put simply, without the commercial uses on the Evans property, the City would not have permitted the condominiums. *Id.*

C. The Development Agreement.

Nothing in the Development Agreement and attached Master Plan purported to require that the Pub be operated (whether momentarily or in perpetuity) as a Pub. Nothing in the Development Agreement and attached Master Plan purported to require that the structure adjacent to the Pub be used (whether momentarily or in perpetuity) as a "Marina Owner Residence" and yacht brokerage.

Importantly, the parties agreed that covenants relating to development would terminate:

6. Termination of Covenants Relating to Development. Following completion of development, those covenants contained herein that relate solely to the development process, as opposed to the ongoing use of the subject real property, shall terminate. The parties agree that, following completion of development, *all parties shall sign such documents as may be necessary to remove from the record such covenants as relate solely to the development of the subject real property.*

Ex. 6 § 6 (emphasis added).

Nearly all of the provisions of the Development Agreement have absolutely nothing to do with development or use of that part of the Evans property at issue. Much of the agreement deals with construction and control of common amenities and improvements within the various reciprocal easements between the two properties. Ex. 6.

The only arguable limitation on development on the Evans property appears in Section 4. Ex. 6 § 4. In that section, the Development Agreement declared that “development” of the property would “conform” to “the ‘Master Plan’” incorporated into the Agreement as Exhibits C, D, and E. *Id.* The parties agreed not to deviate from the plans “without notification to and receiving *written approval* of the other party.” *Id.*

(emphasis added). “Structures” were to be sized, shaped, and located as shown on the Master Plan unless otherwise agreed. *Id.*

The Master Plan was exceptionally general in character. Exhibit C did no more than depict building footprints and proposed parking. It labeled the existing Pub by its address only; it labeled the structure adjacent to the Pub “Marina Owner Residence/Yacht Sales” – a mixed-use structure containing a significant commercial use. Ex. 6; RP 269:23-270:22. Exhibits D and E did not purport to label that use at all. Ex. 6 (Exs. C, D, and E). Because the Development Agreement (including the Master Plan) was entered into prior to receipt of relevant permit approvals (including building permits), the parties expected that some changes would occur. RP 276:19-23.

The text of the Development Agreement itself conspicuously omitted any explicit limitation on the “use” of either property. Instead, it required that “development” – not “use” – conform to “the ‘Master Plan.’”¹ Section 4 of the Agreement explicitly addressed size (including height), shape, and location, but omitted any discussion of use. No witness testified at trial that the Development Agreement limited “use.”

D. The Mixed-Use Structure.

¹ See discussion at V(C), *infra*, regarding distinction between “development” and “use.”

At trial, Mr. Evans testified without dispute that the Master Plan depicted a “Marina Owner’s Residence/Yacht Sales” structure on the Evans property because, at the time they entered into the Development Agreement, Mr. and Mrs. Evans expected to live in the structure and to rent the lower half to a yacht brokerage that already did business on the Evans property. RP 256:8-257:24; RP 273:2-10. Limiting use of the Mixed-Use structure to a “Marina Owner’s Residence/Yacht Sales” was not necessary to obtain the City’s approval for any other part of the Harbourside Marina PUD or the Harbourside Condominium PUD. RP 288:24-289:5. The City certainly did not limit this structure to these uses.

The original purchase and sale agreement between Mr. and Mrs. Evans and Mr. Hunt contained a schematic drawing in which this Mixed-Use structure was fully attached to the Pub. RP 258:10-15; Ex. 2. Mr. Evans decided to separate the Mixed-Use structure from the Pub to permit deliveries to be made directly to the Pub’s basement storage area. RP 291:25-292:24. At the time, it made sense not to route deliveries further to the east because the property to the east contained a residence. RP 292:11-24. Mr. Hunt expressed no preference for either an attached or detached structure. RP 292:25-293:5.

There were few physical limitations to the Mixed-Use structure. With respect to location, Mr. and Mrs. Evans had to comply with setback

requirements and could not move the structure northward in such a manner as to lose parking spaces. RP 294:8-295:6. There was no square footage limit, nor did the City impose any limits as to the shape of the structure. RP 295:16-17; 296:9-16. The City limited height to 25 feet. 295:18-296:3.

Mr. Evans commissioned Mr. Hunt to provide a detailed conceptual design of the Mixed-Use structure. RP 296:22-297:2; RP 298:19-21; RP 300:3-14; RP 303:8-16; Ex. 53. Mr. Evans applied for and received a building permit to construct. RP 300:3-14; RP 303:21-304:4. At no time did Mr. Hunt object that the design he created for the Mixed-Use structure did not conform to the Master Plan. RP 303:21-25.

E. Development of the Evans Properties.

Little development was required on the Evans property following execution of the Development Agreement. The Pub had been approved in 1987 and opened for business by 1991. Ex. 1; RP 246:4-247:3. The Marina had operated since at least the early 1980s under a separate approval from the City. RP 243:17-244:18. With the exception of the Mixed-Use building, the structures and improvements located on the Evans property and depicted on the Master Plan were all constructed not later than 1996.

The Mixed-Use building adjacent to the Pub was never built. Mr. and Mrs. Evans sought and obtained a building permit for the Mixed-Use building adjacent to the Pub relying upon a design by Mr. Hunt. RP 296:22-297:2; RP 300:3-14; RP 303:21-304:4; Ex. 53. However, Mr. and Mrs. Evans' plans changed. They had intended to use the building as their residence, but upon retirement decided to live elsewhere, and the yacht brokerage that had expressed interest in 1989 had been acquired by a person Mr. and Mrs. Evans did not want to do business with. RP 304:10-23.

F. Changes Made to the Development.

After signing the Development Agreement, the parties routinely ignored the Master Plan and never amended it, indicating the parties' understanding that the Master Plan required only substantial, not exact, compliance.

On the Evans side of the ledger, the unrebutted testimony at trial was that significant changes were made without Mr. Hunt's consent and without amending the Master Plan. First, with respect to the marina office, the Master Plan and drawings rendered by Mr. Hunt at the time depicted a two-story structure with bathhouses and laundry on the lower floor and an office on the upper floor. RP 287:2-4. Instead, Mr. Evans constructed a single-story structure, increasing the footprint by approxi-

mately 60-70%. RP 287:5-13. Mr. Evans did not seek Mr. Hunt's approval and the Master Plan was not amended. RP 287:14-22.

Second, the tool shed/dumpster area depicted on the Master Plan was enlarged considerably, almost doubling in size. RP 287:23-288:9. Again, Mr. Evans did not seek Mr. Hunt's approval and the Master Plan was not amended. RP 288:10-15.

Significant changes were also made on the Hunt property. One of the most significant changes was Mr. Hunt's decision to change the location and height of the Marina Condominium. Specifically, Mr. Hunt increased the height of the marina condominium building from twenty-eight to thirty-five feet (causing shadows to fall on the Pub's deck earlier in the day) and reducing the length of that structure by twenty-five feet. RP 309:15-311:16. He also eliminated a two-story hexagonal deck structure on that building. *Id.* Mr. Hunt did not seek, and Mr. Evans did not give, consent to the changes. There is no dispute that the Master Plan was not amended to reflect these changes. RP 311:17-21.

Other substantial changes on the Hunt property were made, indicating that the parties intended only substantial, not exact, compliance with the Master Plan. These changes included (a) reorienting the condominium buildings (on one side, constructing two freestanding structures rather than the single structure depicted; on the other side, again

constructing two freestanding structures rather than the single structure depicted); (b) reorienting parking lots; and (c) failing to develop the common gardens as depicted. RP 319:5-330:7. The Master Plan was never amended to incorporate any of these changes. *Id.*

G. The Proposed Remodel and Expansion of the Pub.

In 2002, Parfitt, as owner of the Evans property, sought an interpretive ruling from the City to determine whether it still had a right under the PUD to construct the Mixed-Use structure. RP 368:9-371:11; Exs. 56, 57. The City ruled that the PUD had expired – nothing could be built on that location until a new application was submitted and approved – because final PUD approval was not obtained within five years of the date the PUD was approved. *Id.* In a settlement with the HOA in this action, the City has acknowledged that the condominiums were constructed pursuant to validly-issued permits.

Therefore, in 2004, Parfitt submitted an application to the City for a Shoreline Substantial Development Permit and Site Plan Review, seeking approval of a substantial remodel and expansion of the Pub. RP 394:17-395:6; Ex. 30. The proposed remodel included construction of an addition to the Pub on that portion of the Evans property where the Master Plan once depicted the Mixed-Use structure.

The size, height, and location of the proposed expansion were substantially similar to the Mixed-Use structure permitted by the Master Plan. To begin with, the proposed structure would occupy the same space as that originally intended for the Mixed-Use structure. RP 399:9-21. The principal difference was that, as proposed, the Pub expansion would close the alley Mr. Evans proposed for receipt of deliveries. There would also be a relatively modest increase in square footage. RP 463:5-23 (architect testifying that the square footage of Hunt-designed Mixed-Use structure “is about the same as the square footage we’re dealing with” in Pub expansion proposal); 465:21-466:7 (approximately 3,000 square feet in Hunt-designed structure versus 3,200 square feet in 2004 proposal). The proposed structure retained the same setback as the Mixed-Use structure on the east and south (waterward) sides. Ex. 30. Although the structure was moved slightly to the north, there would be no impact on the adjacent parking lot. RP 399:22-24.

The HOA’s principal objection to the physical attributes of the 2004 proposal was that it its members would lose views, primarily by the joining of the two structures and closing of the alley. The evidence submitted by the HOA at trial on this score, however, is fatally flawed because none of the witnesses could testify how this alleged loss of view was any more severe than the loss of view the HOA would have suffered

had Mr. Evans simply built the Mixed-Use structure depicted in the Master Plan as designed by Mr. Hunt. Maradel Gale, for example, admitted that she had done nothing to determine how much of her view would have been obstructed by the Mixed-Use structure. RP 148:12-15; *see also* RP 151:1-6. Ronald McKinstry admitted he had no knowledge of Mr. Hunt's design, RP 165:12-166:15, and so could not testify concerning how it compared to the 2004 proposal. David MacKenzie admitted that he knew something would be built on the site, RP 202:15-203:3; that the structure could rise to a height of 25 feet, RP 203:18-204:7; but was otherwise unaware of the features of the Hunt design, RP 204:10-23.

The 2004 proposal would result in a structure that is actually two feet shorter in height than the Hunt-designed Mixed-Use structure. RP 400:2-8; 466:8-21. Because the Mixed-Use structure designed by Hunt included an east-west roofline at maximum height, views from the north would have been fully obstructed. By contrast, the 2004 proposal from the north presented a triangle, allowing views on either side. *Compare* Ex. 53 (Hunt design north elevation) with Ex. 30 (proposed Pub expansion north elevation); RP 403:19-24; 404:5-8 (Pub expansion proposal not as "block-ish"). "The condominiums' view is essentially unchanged ... from what was proposed in the Master Plan, and in fact improved a little bit better ... because of the [clerestory], what view that some of the units have between

the peaks will remain.” RP 412:9-13; 486:1-6 (view would potentially be blocked more under Master Plan when compared to 2004 proposal).

Of note, much of the view theoretically available to members of the HOA to the east has already been blocked by a structure built on an adjoining property that is taller than the 2004 proposal. RP 483:15-484:25. And views to the south are already blocked by maturing vegetation in the central garden area. RP 414:12-415:21. Finally, the view through the alleyway between the Pub and the Mixed-Use structure was insignificant to nonexistent. *Id.*

In sum, no witness presented by the HOA could testify that the views afforded by the 1989 Hunt design of the Mixed-Use structure would be any worse than those afforded by the 2004 proposal. To the contrary, witnesses presented by appellants testified that views would be no worse, and potentially better, under the 2004 design. All that can reliably be said is that the views would be “different.”

H. The Litigation.

The HOA filed suit in Kitsap County Superior Court asserting six causes of action: (1) injunctive relief and damages against Parfitt for its alleged violation of the Development Agreement; (2) injunctive relief and damages against Mr. and Mrs. Evans for their alleged violation of the Development Agreement; (3) injunctive relief and damages against Parfitt

for its alleged violation of the Concomitant Agreement; (4) injunctive relief and damages against the City of Bainbridge Island for its alleged violation of the Concomitant Agreement; (5) a declaration that Parfitt could not expand a particular parking lot absent an amendment to the HOA's condominium declaration; and (6) declaratory and injunctive relief arguing that expansion of the Pub would exceed the scope of Parfitt's easement across HOA property. CP 1-15.

Prior to trial, the HOA dismissed its third, fourth, and fifth causes of action. CP 23-24; CP 123-24. Dismissal of the third and fourth causes of action resulted also in dismissal of the City as a party. The trial court dismissed HOA's sixth cause of action at the close of trial. RP 588. The HOA did not appeal dismissal of that claim.

The trial court denied motions by both parties to amend to assert additional claims on the eve of trial; consequently, the matter proceeded to trial on the sole basis of whether the proposed Pub expansion violated the Development Agreement.

I. Findings, Conclusions, and Judgment.

Judge Haberly issued an oral opinion June 2, 2006. She found against Parfitt and Mr. and Mrs. Evans. During subsequent hearings in which the findings, conclusions, and judgment were argued and ultimately entered, Judge Haberly struck from the HOA's proposed findings all

explicit references to any “use” limitation imposed by the Development Agreement. *Cf.* CP 201-15 (Memorandum in Opposition to Proposed Findings and Conclusions), CP 245-54 (Memorandum in Opposition to Proposed Findings, etc.), CP 337-47 (Findings of Fact and Conclusions of Law). The HOA asked that Judge Haberly explicitly find that the Development Agreement limited uses. CP 278-300 (Plaintiff’s Motion for Clarification and Objection, etc.). She refused to do so. The written findings and conclusions ultimately entered represented Judge Haberly’s findings and conclusions in the case and superseded any findings and conclusions previously rendered. RP 644-45 (“I spent a lot of time looking at that issue of development versus use, and I understand the legal implications of both, and my intent was to follow what the Development Agreement was, size – whatever it was – shape, and location.”).

Written findings, conclusions, judgment, and an injunction were entered on September 29, 2006. CP 337-47 (Findings of Fact and Conclusions of Law); CP 348-50 (Final Judgment); CP 306-36 (Order Imposing Permanent Injunction). In relevant part, the findings and conclusions provide:

The proposed expansion would not fit with the *character* of this master planned development that was intended by Evans and Hunt when they entered into the Development Agreement. Adding the Pub

expansion instead of the Residence/Office **does not conform** to the Master Plan that the parties agreed to and that Evans and Harbourside Partners used to market the sale of the condominiums.

CP 337-47 (Finding No. 39) (emphasis added).

Subsequent findings attempted to explain this finding. The proposed expansion, the court found, would increase gross sales 20 to 70 percent, increase noise, add traffic, “and would expand the footprint of the Pub by 20% to 31%.” CP 337-47 (Finding No. 40). The court found that the proposal

changes the character of the view from the condominium property and was not intended by Evans or Hunt without first obtaining the consent of the other party. In creating the Master Plan, ***Evans and Hunt intended to maintain a path between the structures, and a set back from the Residence/Office structure to the Pub, and a setback from the east property line as well.***

CP 337-47 (Finding No. 41) (emphasis added).

Defendants’ proposed expansion of The Pub is a ***material deviation*** from the size, shape, and location of the “structures” that were intended by Evans and Hunt when they executed the Development Agreement and agreed to their Master Plan.

CP 337-47 (Finding No. 46) (emphasis added).

J. Attorneys Fees.

The Development Agreement contains a clause providing for an award of attorneys' fees and costs to the party prevailing in litigation to enforce the agreement. Ex. 6 § 28. Based upon that clause and its conclusion that the HOA was the prevailing party, the trial court awarded the HOA a total of \$138,757.00 in attorneys' fees and costs. CP 348-50 (Final Judgment).

K. Notice of Appeal.

Appellants timely appealed by Notice of Appeal filed and served on October 27, 2006. CP 352-98.

IV. SUMMARY OF ARGUMENT

Before addressing the core issue in this appeal – whether the 2004 Pub expansion proposal substantially complied with or conformed to the Master Plan – it is necessary to first understand the rules applicable to construction of restrictive covenants and the trial court's apparent failure to apply them. The rule in Washington is that restrictive covenants are to be strictly construed. Specifically, covenants are not to be extended by implication to include any use not clearly expressed, with doubts being resolved in favor of the free use of land. None of the exceptions to the rule apply to this case. Without saying it was doing so, the trial court

failed to apply the rule of strict construction and committed error in doing so.

While quite clearly (and properly) refusing to find that the Development Agreement contained a “use” limitation, the trial court improperly considered “uses” in determining whether the changes proposed by Parfitt in 2004 were material.

Finally, the trial court erroneously concluded that Parfitt’s 2004 proposal did not “conform to” or substantially comply with the Master Plan. The trial court appeared to require exact compliance with the Master Plan despite the fact that the Development Agreement does not by its terms require exact compliance, the common law rule is one of substantial compliance, the parties demonstrated by their actions that only substantial compliance was required, and the trial court failed to identify any purpose served by exact compliance.

There is no substantial evidence supporting the conclusion that the 2004 proposal did not substantially comply with or conform to the Master Plan; consequently, the Court of Appeals should reverse and remand with instructions to enter judgment in favor of Appellants.

V. ARGUMENT

A. Standard of Review.

A trial court's findings of fact are reviewed to determine if they are supported by "substantial evidence." "Substantial evidence" exists "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1983). The "substantial evidence" test does not permit the Court of Appeals to reweigh conflicting evidence; the issue instead is whether, disregarding evidence to the contrary, evidence in support of a proposition is deemed "substantial."

A trial court's conclusions of law are subject to de novo review. Contract interpretation is a question of law if "(1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence." *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wash.2d 656, 674, 911 P.2d 1301 (1996).

B. The Rule of Strict Construction Applies; to the Extent the Court Based Its Judgment on a Covenant of Quiet Enjoyment or a Covenant To Preserve Undefined "Character," it Violated the Rule of Strict Construction.

In its findings of fact and conclusions of law, the trial court made no mention of whether it was applying the rule of strict construction

applicable to restrictive covenants.² It is possible to infer from certain of its findings that the court improperly deviated from this rule. In particular, in Finding of Fact No. 39, the trial court found:

The proposed expansion would not fit with the *character* of this master planned development that was intended by Evans and Hunt when they entered into the Development Agreement.

CP 337-47 (Finding No. 39). Nowhere does the Development Agreement state what “character” was intended, nor did the trial court identify the “character” to which it referred. Without explicitly doing so, the trial court arguably recognized a covenant of quiet use and enjoyment or a covenant to preserve an undefined “character” despite the fact that the Development Agreement nowhere identifies such a covenant. The finding is ambiguous, however, because the court then proceeds to state the standard actually employed in the Development Agreement – whether the Pub expansion “conformed with” the Master Plan. *Id.*

In the next finding of fact, despite the trial court’s removing all explicit references to a “use” limitation, the court found that the Pub expansion proposal would increase gross sales 20 to 70 percent, increase

² The court’s initial oral decision indicates that the trial court did not believe it appropriate to apply the rule of strict construction. RP 579:20-580:9 (“need to maintain an atmosphere or character that was compatible with the residential use”). However, the trial court also stated that its decision was as stated in the written findings and conclusions and that its prior rulings or observations were modified accordingly. RP 644-45. The basis for its holding is therefore unclear.

noise, and add traffic. CP 337-47__ (Finding No. 40). This again suggests, but does not explicitly recognize, that the trial court believed that the Development Agreement contained limitations above and beyond the explicit physical limitations it admittedly contained.

To the extent Findings of Fact Nos. 39 and 40 can be read to recognize a limitation not stated in the Development Agreement, the trial court erred. To begin with, such a finding would violate the rule of strict construction. Furthermore, such a finding should violate the statute of frauds. 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL ESTATE § 3.2 (2d ed.) (although characterizing the position in Washington as “unclear,” noting that the majority view is that restrictive covenants are interests in land and that statutes of frauds apply). Because the rule of strict construction underlies other aspects of this appeal, it is necessary to review the current state of the law on restrictive covenants even if the trial court’s decision is ambiguous.

Restrictive covenants, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use *not clearly expressed; doubts must be resolved in favor of the free use of land.* *Burton v. Douglas Cty.*, 65 Wn.2d 619, 621-22, 399 P.2d 68 (1965). “It is well settled ... that words in a deed of conveyance or any instrument restricting the use of real property ... are to be

construed strictly against ... those claiming the benefit of the restriction.”
Sandy Point Improvement Co. v. Huber, 26 Wn. App. 317, 320, 613 P.2d
160 (1980).³

The HOA has repeatedly, and incorrectly, argued that the Washington Supreme Court has abandoned the rule of strict construction of restrictive covenants, relying upon *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997). In *Riss*, however, the Court considered a suit brought *by subdivision lot owners against other subdivision homeowners* challenging the rejection of the lot owners’ plan to build new dwellings. The Court’s holding is quite limited:

The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute [i] not involving the maker of the covenants, but rather [ii] 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.

Riss, 131 Wn.2d at 623 (emphasis added).

³ See also *Miller v. American Unitarian Ass’n*, 100 Wash. 555, 559, 171 P. 520 (1918) (“[T]here must be shown to be a clear and plain violation of [a restrictive covenant] to justify the interposition of a court of equity to restrain.”); *Granger v. Boulls*, 21 Wn.2d 597, 599, 152 P.2d 325 (1944) (“[R]estrictions [will not] be enlarged or extended by construction, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen ...”); *Gwinn v. Cleaver*, 56 Wn.2d 612, 615, 354 P.2d (1960) (“Imposed restrictions will not be aided or extended by judicial construction, and doubts will be resolved in favor of the unrestricted use of property”); *Weld v. Bjork*, 75 Wn.2d 410, 411, 451 P.2d 765 (1969) (well settled in Washington that restrictions on use of land are construed strictly and will not be extended beyond clear meaning of language used).

The Court recognized the limited nature of its holding in *Riss* in *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005), when it first recognized the rule of strict construction, then recognized an exception in the case of ““a dispute not involving the maker of the covenants, but rather among *homeowners in a subdivision.*”” *Id.*, 155 Wn.2d at 119 (quoting *Riss*).

The limited carve-out recognized in *Riss* does not apply here. This dispute patently is not “among homeowners in a subdivision governed by restrictive covenants.” *Id.* Rather, this dispute involves owners of adjacent properties, one of which contains exclusively commercial uses. There is no “subdivision.”

The HOA cannot avoid the rule of strict construction by arguing, as it has, that the rule of strict construction is different in “planned developments” – relying upon *Lakes at Mercer Island Homeowners Ass’n v. Witrak*, 61 Wn. App. 177, 810 P.2d 27 (1991), for the proposition that Washington courts “place special emphasis on arriving at an interpretation that protects the homeowners’ collective interests” over the desires of one individual owner. As amply demonstrated, the Harbourside Marina PUD (under which the Mixed-Use structure was to be built) and the Harbourside Condominium PUD are entirely distinct PUDs and ***this is not a dispute among homeowners living in the same PUD, as Lakes was.*** It is

instead a dispute between owners of vastly different PUDs – one exclusively commercial, one exclusively residential. *Lakes* does not apply.

The wisdom of applying the rule of strict construction to this case is apparent. The Development Agreement declared its purpose to be “development of a *residential* project to [be] known as ‘Harbourside.’” Ex. 6 § 2. The trial court, in its oral decision, despite the fact that this development contained a significant commercial component – indeed, despite the fact that the residential development could not have occurred *but for* the commercial component – speculated that a mixed-use development “probably makes a stronger argument that the covenants are essential to the residential development of the overall development, because there is a need to maintain an atmosphere or character that is compatible with the residential use that’s being made in this PUD.” RP 580:4-9.

Fortunately, Judge Haberly’s written findings and conclusions do not reflect this speculation. But Judge Haberly’s speculation begs at least the following questions: *What* “covenants”? *What* “atmosphere”? *What* “character”? What is *compatible* and what is not? How do we measure whether development properly “preserves character” or “preserves atmosphere”? The Development Agreement is devoid of any such covenants. It does not define the “atmosphere” to be preserved. It does not define the “character” to be preserved. It does not define what is “com-

patible” or not. To impute such covenants into the Development Agreement would invite endless litigation, as neither side would be secure in knowing what it could do with its own land. Fortunately, no Washington authority even remotely supports Judge Haberly’s radical speculation. This court should not be the first.

In short, to the extent the court’s findings are to be read as recognizing any restriction not stated with reasonable certainty in the Development Agreement, the trial court erred by failing to apply the rule of strict construction; the finding would also violate the statute of frauds.

C. There Are No Use Limitations.

In the process of entering findings and conclusions, the trial court struck findings proposed by the HOA that the Development Agreement restricted “use” of the Evans property. *See* V(I) *supra*. No explicit finding of such a limitation remains. In light of the trial court’s refusal to find an explicit use limitation, no use limitation should be inferred from any of the remaining findings.

Finding of Fact No. 39 states that the proposed Pub expansion “would not fit with the *character* of this master planned development.” CP 337-47. The finding does not explicitly state that “character” includes “use,” although that result might be inferred. Finding of Fact No. 40 then goes on to state that the Pub expansion proposal would increase gross

sales 20 to 70 percent, increase noise, and add traffic – all references to how “use” of the property might impact the HOA and its members. CP 337-37. However, the trial court failed to explicitly link this finding relating to “uses” to its conclusion that the Pub expansion would not “conform to” the Master Plan. To the extent the trial court relied upon such “uses” in its evaluation, however, the trial court improperly relied upon a “use” limitation that simply does not exist. The trial court’s striking of any explicit reference to a “use” limitation was entirely proper.

The Development Agreement did not purport to limit “use.” To begin with, the Agreement declares that “development” – not “use” – of the property would conform to “the ‘Master Plan’” incorporated into the Agreement as Exhibits C, D, and E. Ex. 6 § 4. Nowhere does the text of the Agreement state that “use” of the property would conform to uses depicted in the Master Plan. Because the Agreement does not itself define “development,” this court should consider the commonly-understood meaning of that term.

A clear distinction exists between “development” and “use.” “Development” relates strictly to physical improvements, not uses:

A human-created change to improved or unimproved real estate, including buildings or other structures, mining, dredging, filling [*sic*], grading, paving, excavating, and drilling.

BLACK'S LAW DICTIONARY 482 (8th ed. 1999) (definition of "development"). By contrast, "use" is "[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted." *Id.* 1576 (definition of "use"). At most, therefore, the Development Agreement can only be considered to limit the physical attributes of improvements, not uses.⁴

The Master Plan identified the structure at issue as "Marina Owner's Residence/Yacht Sales," but identified the existing Pub simply by its address, not its use. Ex. 6. It was far more plausible therefore to interpret this phrase as simply a label, not a use limitation, particularly when the text of the Development Agreement itself did not purport to limit "uses" of any structures depicted on the Master Plan.

That this designation was meant as a label, and not a use limitation, is also evident from the fact that far more explicit language was certainly available to the parties, but they chose not to use it. This lack of specificity distinguishes this case from the cases cited by the HOA, and also strengthens the reasonable inference that no use limitation was intended:

⁴ On an analogous note, courts have taken care to distinguish "use" restrictions from "building" restrictions. *See, e.g., Schulman v. Serrill*, 246 A.2d 643 (Pa. 1968); *Jones v. The Park Lane for Convalescents, Inc.*, 120 A.2d 535 (Pa. 1956) (restriction against erection of any building except private dwelling did not preclude later use of dwelling structure as convalescent and nursing home); *Burton v. Douglas Cty.*, 65 Wn.2d 619, 399 P.2d 68 (1965) (single-family dwelling building restriction did not preclude use for parking lot purposes where no building was erected).

In *Metzner v. Wojdyla*, 125 Wn.2d 445, 886 P.2d 154 (1994), for example, owners of property in a residential subdivision brought action to enjoin their neighbors' use of property as a day-care facility. The Washington Supreme Court held that operation of licensed child day-care facility violated covenants restricting use of property to residential purposes only. The covenant was very explicit: "Said property shall be used for residential purposes only. No building shall be erected, placed, altered, or permitted to remain on any lot other than one detached single-family dwelling with a private garage for not more than three cars without the consent of the grantor." *Id.* at 447.

The residential limitation upheld in *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 854 P.2d 1072 (1993), was also very explicit. In *Mains Farm*, a homeowners association brought an action alleging that an adult family home violated a covenant that the property would be used for single-family residential purposes only. The covenant reads: "(1) All lots or tracts in MAINS FARM shall be designated as 'Residence Lots,' and shall be used for single family residential purposes only. ... No structure shall be erected, altered or placed on the plat of MAINS FARM which shall serve as other than a single family dwelling unit." *Id.* at 813-14.

And in *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999), the subdivision plat contained a restriction on its face stating: “This plat is approved as a residential subdivision and no tract is to have more than one single family residential unit. Conversion of any lot to other than its authorized occupancy must be in accordance with authorizations associated with separate application and procedure.” *Id.* at 687.

In contrast to these very explicit use limitations, neither the Development Agreement nor the Master Plan incorporated by that Agreement contains anything similar. To the contrary, Section 4 of the Agreement (the section requiring conformance to the Master Plan) conspicuously omitted any reference to “use.” Ex. 6 § 4. The section explicitly addressed size (including height), shape, and location, despite the fact that at least size, shape, and location were identified in the Master Plan. In other words, by explicitly addressing size, shape, and location, but omitting any discussion of use, the most reasonable interpretation of Section 4 is that it does not restrict use. *See Port Blakely Mill Co. v. Springfield Fire & Marine Ins.*, 59 Wash. 501, 110 P. 36 (1910) (applying doctrine of *expressio unius est exclusio alterius* to a contract).

At the very least, interpreting this phrase as a label and not as a use restriction does no damage whatsoever to the Agreement, permitting consideration of extrinsic evidence under *Berg v. Hudesman*, 115 Wn.2d

657, 801 P.2d 222 (1990), which applies to restrictive covenants pursuant to *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999). Among the relevant, and admissible, considerations supporting appellants' interpretation of the Agreement:

First, the Development Agreement as a whole does not purport to limit "use" of this structure, and the Master Plan fails to address the "use" of the Pub at all, since it designates the Pub by address only. *Berg*, 115 Wn.2d at 667 (considering the contract/covenant as a whole one of *Berg* factors).

Second, limiting use of the Mixed-Use structure to "Marina Owner's Residence/Yacht Sales" was not necessary to obtain approval for any other part of the Harbourside Marina PUD or the Harbourside Condominium PUD. RP 288:24-289:5; *Berg*, 115 Wn.2d at 667 (circumstances surrounding the making of the contract one of *Berg* factors).

Third, the label "Marina Owner's Residence/Yacht Sales" was used simply because a yacht broker had expressed to Mr. Evans an interest in remaining on the property and Mr. and Mrs. Evans intended to reside in the structure, not because the uses were dictated by the City or any desire by Mr. Hunt to limit the structure to those uses. *Id.*

Fourth, limiting use of the Mixed-Use structure to “Marina Owner’s Residence/Yacht Sales” would severely diminish its utility and therefore the value of the property – an irrational result, given that the limitation was not necessary. RP 273:17-274:25; *Berg*, 115 Wn.2d at 667 (reasonableness of each party’s interpretation one of *Berg* factors). Taken literally, does the HOA seriously argue that the residential portion of the structure could only be used by the marina owner, and nobody else?

D. Alleged Physical Limitations Require Only Substantial Compliance.

Given that restrictive covenants are to be construed strictly and that the Development Agreement contains no “use” limitation, the trial court erred in finding that the 2004 Pub expansion proposal did not substantially comply with or conform to the Master Plan. The proposed expansion of the Pub was substantially similar in location, scope, size, and height to the Mixed-Use structure depicted on the Master Plan, even if it did not exactly duplicate it. In concluding that the proposal did not substantially comply with or conform to the Master Plan, the trial court erred by insisting upon exact, rather than substantial, compliance, and improperly considering intensification of “use” in deciding that de minimis changes in the physical aspects of the design were “material.”

Under the Development Agreement, Parfitt’s obligation was to develop “in conformance with the ‘Master Plan.’” Ex. 6 § 4. In its proposed expansion/remodel, Parfitt substantially complied with this obligation. Substantial compliance was all that was required by the Development Agreement.

First, the text of the Development Agreement itself supports this reading. Parfitt’s obligation was to develop “in *conformance* with the ‘Master Plan.’” Ex. 6 § 4. Words are to be given their “ordinary, usual, and popular meaning.” *Hearst Comms., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.2d 262 (2005). WEBSTER’S NINTH NEW COLLEGE DICTIONARY 276 (1988) defines “conform” to mean “to be *similar* or identical.” The word itself admits of ambiguity, but under the rule of strict construction of restrictive covenants, the less onerous definition – similarity (not identity) – is the only one this court can enforce.

Second, under the common law, substantial and reasonable performance of the covenant was sufficient, when viewed in light of the purposes underlying the covenant. *See* 21 C.J.S. COVENANTS § 40 (1990); *Saphir v. Neustadt*, 413 A.2d 843 (Conn. 1979); *Melson v. Ormsby*, 151 N.W. 817 (Iowa 1915).

Equity looks not to the exact letter of the
contract, but to the spirit and purpose of it
... .

[B]efore a strict literal performance of the restriction will be exacted by a court of equity, ***it must affirmatively appear that this is necessary to effectuate the purpose, scheme, or intent of the parties in making the restriction,*** and where the purpose and intent of the parties is made effectual by a substantial compliance with the restriction, such a compliance will satisfy the requirements of those rules of equity upon which the right to enforce compliance is based. ***Courts of equity will not strictly enforce, according to the letter, mere naked legal rights against a party who has substantially performed the conditions, and, in so doing, has made effectual the scheme and purpose and intent to be accomplished through the instrumentality of the restrictions and conditions.***

Therefore courts of equity have recognized the necessity of looking beyond the mere printed restriction, to the parties themselves, the subject-matter of the restriction, the conditions, as they exist, surrounding the subject-matter of the restriction; the topography of the country surrounding the place affected by the restriction; the scheme and purpose, to accomplish which the restriction was made; and this in order to ascertain the intent of the parties in respect to the property conveyed.

Melson, 151 N.W. at 820 (emphasis added); *see also Avery v. New York Cent. & Hudson River R.R. Co.*, 24 N.E. 24 (N.Y. 1890) (substantial compliance sufficient). Nothing in the Development Agreement purports to change this common-law rule.

Third, the parties or their predecessors in fact several times departed from strict compliance with the Master Plan without executing and recording a written amendment, as allegedly required by Section 5 – extrinsic evidence that they intended substantial, but not exact, compliance with the Master Plan. *See* III(F) *supra*.

Substantial compliance was all that was required.

E. The 2004 Pub Expansion Proposal Substantially Complied with the Master Plan.

Applying the “substantial compliance” test, the 2004 Pub expansion proposal conformed to the Master Plan. Parfitt was not required to develop a structure that met the dimensions and location of the Hunt-designed Mixed-Use building because such exactitude was not “necessary to effectuate the purpose, scheme, or intent of the parties in making the restriction.” *Melson v. Ormsby*, 151 N.W. 817, 820 (Iowa 1915). In concluding that the differences between the 1989 Hunt-designed structure and the 2004 Pub proposal were “material,” the trial court failed to analyze the purposes underlying the covenants relating to the physical attributes of the Mixed-Use structure to determine whether exact compliance was necessary to effectuate that purpose. It therefore had no basis whatsoever to determine whether any particular difference was “material.” Finally, when the known and likely purposes of these limitations are considered, it

becomes clear that the 2004 Pub expansion proposal substantially complied. This court should not only reverse the trial court's judgment; it should remand with instructions to enter judgment in favor of appellants.

1. Location.

The Master Plan established, at least in general terms, where the structure adjacent to the Pub would be located. The underlying purposes for doing so were not explicitly stated in the Agreement, nor did the trial court identify any such purpose. Logically, such purposes might include a desire that the location of structures not interfere with other planned improvements, including structures and parking, easements, and other amenities. In addition, Mr. Evans testified without contradiction that there were few but certain physical limitations to location of the Mixed-Use structure. The structure had to comply with setback requirements from the water and eastern boundary to comply with City law, and Mr. Evans could not move the structure northward in such a manner as to lose parking spaces. RP 294:8-295:6.

The much-discussed planned alley between the Pub and the Mixed-Use structure was intended not for a "view" corridor to benefit the HOA, but rather simply to provide a means for allowing deliveries to the Pub's storage area in its basement. As noted above, *see* III(D) *supra*, the schematic attached to the original purchase and sale agreement showed the

Pub and the Mixed-Use structure as connected with no path. The change was made at Mr. Evans' request; Mr. Hunt was indifferent as to either option. Under the 2004 proposal, deliveries would be made from the east – where a commercial structure on the adjacent property has replaced the residence that once concerned Mr. Evans. RP ___.

The location of the 2004 Pub expansion proposal does not threaten any of these purposes, and there are no facts suggesting to the contrary. It would occupy the same space as originally intended for the Mixed-Use structure. RP 399:9-21. Although there would also be a relatively modest increase in square footage, RP 463:5-23, there is no evidence that this modest increase itself threatens any purpose underlying the covenant relating to location. The proposed structure retained the same setback as the Mixed-Use structure on the east and south (waterward) sides and does not impact the parking lot to the north. RP 399:22-24.

Even if the purpose of the alley were to be considered a “view corridor,” the 2004 proposal still does not threaten such a purpose. As noted above, the HOA produced no substantial evidence that the 2004 Pub expansion proposal had any more severe impact on views than the Hunt-designed Mixed-Use structure – none of its witnesses were competent to compare or did compare the obstruction allegedly caused by the 2004 proposal compared with the 1989 Hunt-designed Mixed-Use structure.

See III(G) *supra*. To the contrary, the evidence is that the 2004 Pub expansion proposal would have less of an impact on views. *Id.*

2. Size/Shape.

The Development Agreement also required that structures be sized and shaped as depicted on the Master Plan and that heights be no greater than that permitted by the Winslow Municipal Code. The Master Plan itself did not identify the size or shape of any structure, except with respect to footprint. The trial court failed to identify any underlying purpose of this requirement; presumably, however, height restrictions were intended to prevent blockage of views. The City did not impose any square footage or shape limitations, RP 295:16-17; 296:9-16, although it did limit heights to 25 feet. RP 295:18-296:3.

There is simply no evidence that any change in the shape, size, or height of the 2004 Pub expansion proposal threatens any purpose underlying the limitation. As noted previously, there is no evidence that the 2004 proposal will impact views any more than the 1989 Hunt-designed Mixed-Use structure. And there is no evidence that the very limited expansion in square footage (from approximately 3,000 to 3,200 square feet) has any impact at all.

The 2004 Pub expansion proposal substantially complied with or conformed to the Master Plan. That was all that was required.

3. Use.

Oddly, despite removing all explicit references to a “use” limitation from its findings and conclusions, the trial court apparently believed that the “use” impacts of the 2004 proposal – increased noise, traffic, and such – made de minimis physical differences between the 1989 Hunt-designed Mixed-Use structure and the 2004 Pub expansion proposal “material.” In other words, the trial court effectively applied a “use” limitation it refused to find explicitly. If there is no use limitation, impacts relating to use are logically irrelevant to the determination of whether the 2004 proposal substantially complied with those limitations that did exist. They should be ignored in determining whether the 2004 proposal substantially complied with the Master Plan.

F. Specific Findings Are Not Supported by Substantial Evidence.

1. Finding of Fact No. 39.

Finding of Fact No. 39 provides:

The proposed expansion would not fit with the character of this master planned development that was intended by Evans and Hunt when they entered into the Development Agreement. Adding the Pub expansion instead of the Residence/Office does not conform to the Master Plan that the parties agreed to and that Evans and Harbourside Partners used to market the sale of the condominiums.

CP 337-47. For the reasons stated in V(B), (C), (D), and (E), Finding of Fact No. 39 is not supported by substantial evidence.

2. Finding of Fact No. 41.

Finding of Fact No. 41 provides that the 2004 proposal

changes the character of the view from the condominium property and was not intended by Evans or Hunt without first obtaining the consent of the other party. In creating the Master Plan, Evans and Hunt intended to maintain a path between the structures, and a set back from the Residence/Office structure to the Pub, and a setback from the east property line as well.

CP 337-47. For the reasons stated in V(B), (C), (D), and (E), Finding of Fact No. 41 is not supported by substantial evidence. In short, Mr. Evans and Mr. Hunt routinely did not seek each others consent, and because the test for meeting a restrictive covenant is “substantial compliance,” there is no reason to believe that Mr. Evans and Mr. Hunt intended to require consent to non-material changes such as those at issue here.

3. Finding of Fact No. 46.

Finding of Fact No. 46 provides:

Defendants’ proposed expansion of The Pub is a material deviation from the size, shape, and location of the “structures to be erected” that were intended by Evans and Hunt when they executed the Development Agreement and agreed to their Master Plan.

CP 337-47. For the reasons stated in V(B), (C), (D), and (E), Finding of Fact No. 46 is not supported by substantial evidence.

G. The Court Should Not Only Reverse the Judgment of the Trial Court; It Should Vacate the Permanent Injunction.

The permanent injunction entered by the trial court was based on the findings, conclusions, and judgment demonstrated in this brief to be wrongly entered. CP 306. Assuming that the Court of Appeals reverses the trial court's judgment, it should also vacate the preliminary injunction.

H. If the Court Reverses the Trial Court's Judgment, It Must Also Reverse the Trial Court's Award of Fees and Costs, with Direction to Award Fees and Costs to Appellants.

It is undisputed that the Development Agreement awards fees and costs to the prevailing party in litigation brought to enforce its terms. Ex. 6 § 28. If this court reverses the trial court's judgment, it must also reverse the trial court's award of attorneys' fees because there is simply no way to characterize the HOA as the "prevailing party" in that context. *See Meenach v. Triple E Meats, Inc.*, 39 Wn. App. 635, 694 P.2d 1125 (1985) ("A prevailing party is one who receives a favorable final judgment."). Should this court direct the trial court to enter judgment in appellants' favor, RCW 4.84.330 requires an award of fees in appellants' favor. *Kofmehl v. Steelman*, 80 Wn. App. 279, 908 P.2d 391 (1996) (statute

requiring that attorney fees be paid to prevailing party is mandatory with no discretion except as to the amount).

VI. CONCLUSION

For the foregoing reasons, Appellants ask that the Court of Appeals reverse the judgment of the trial court, as well as its award of attorneys' fees and costs to the HOA, and remand with directions to enter judgment in favor of Appellants.

RESPECTFULLY SUBMITTED this 29th day of March, 2007.

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COURT OF APPEALS
STATE OF WASHINGTON

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STATE OF WASHINGTON
BY _____
DEPUTY

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

THE HARBOURSIDE OWNERS)
ASSOCIATION, a Washington)
non-profit corporation,)

No. 35517-5-II

Respondent,)

**CERTIFICATE OF
SERVICE**

v.)

ROGER JAMES EVANS and)
JUDITH ANN EVANS, individuals)
and a marital community, PARFITT)
WAY MANAGEMENT)
CORPORATION, a Washington)
Corporation,)

Appellants,)

and)

the CITY OF BAINBRIDGE)
ISLAND,)

Defendant.)

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein

mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of the document entitled

APPELLANTS' OPENING BRIEF

on the following:

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DATED this 29th day of March, 2007.


