

NO. 35517-5-II

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

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' REPLY BRIEF

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I. INTRODUCTION

This is a case in which owners of residential condominiums bought their units in a highly-developed commercial urban center and now decry a modest, if not inconsequential, change to an existing restaurant use. The Pub expansion proposal would not bring a new “barroom” use to this neighborhood, as suggested by the HOA, because the Pub already serves beer, wine, and alcohol to its patrons. Rather, the Pub expansion proposal would allow Parfitt to separate its bar from its restaurant. This would allow families with children to dine at the Pub. RP 53:12-54:9.

It is undisputed that the land on which the Harbourside Condominium, the Harbour Public House, and the Harbour Marina sit was at all times zoned by the City of Bainbridge Island as commercial property. Ex. 49; RP 282:11-285:5. The Harbourside Condominium would not exist but for the commercial uses located on the property now owned by Parfitt. *Id.* Those commercial uses were approved *before* the Development Agreement that lies at the heart of this dispute was executed. RP 243:17-244:18 (marina); Ex. 1, RP 246:4-247:3 (pub). It is not surprising therefore that the Development Agreement declared its purpose to be “development of a residential project to [be] known as ‘Harbourside.’” Ex. 6 § 2.

The trial court effectively read this declared purpose to mean that the non-preferred residential use represented by the condominiums was to

be favored over the preferred commercial uses of the Marina and Pub.¹ It did not do so by enforcing the explicit terms of the Development Agreement. Instead, it did so by using a term that does not appear in and is not defined by the Development Agreement – “character.” Although explicitly declining to find that the Development Agreement contained a “use” limitation, “use” nonetheless figured heavily – and improperly – in the trial court’s determination of what the “character” of this development was intended to be and which was to be protected against changes to an existing commercial use.

The mixed-use structure originally intended to occupy the location where Parfitt now proposes to build the Pub expansion was the second-smallest structure contemplated.² Each of the condominium buildings constructed on the uplands far eclipses this structure in size, height, shape, footprint – *i.e.*, any meaningful measure of its physical attributes. It is illogical to conclude that even the smallest deviation from these physical limitations by the second-smallest structure, whose commercial character was established and permitted, is “material.”

¹ The HOA contends that the trial court expressly found that the covenants contained in the Development Agreement were intended to “protect” the residential use of the HOA from the commercial uses on the Parfitt property. To the contrary, Judge Haberly struck findings proposed by the HOA to this effect. CP 201-215 (specifically Finding No. 42), 301-05.

² Only the Marina Services Building is smaller; both structures are dwarfed by the condominiums.

Because the trial court explicitly declined to find a “use” limitation, it should have considered only those limitations actually imposed by the Development Agreement – size, shape, and location. Further, it should have considered the known or likely purposes of imposing these physical limitations to determine whether differences between the mixed-use structure and the Pub expansion were material. Instead, the trial court relied on “character” to determine that the differences were “material.” In doing so, the trial court violated the rule of strict construction and failed to properly apply the appropriate test – whether Parfitt’s Pub expansion proposal substantially performed the covenants actually stated in the Development Agreement.

When properly applied, the limitations *actually agreed to* are substantially met by the Pub expansion proposal. There is no substantial evidence that any difference in size, shape, or location is material. The judgment should be reversed and the permanent injunction vacated.

II. ARGUMENT

A. **The rule of strict construction applies to this mixed-use development.**

The HOA’s argument that the rule of strict construction should be abandoned is meritless. It has long been the law of Washington that restrictive covenants are to be strictly construed “against ... those claiming

the benefit of the restriction.” *Sandy Point Improvement Co. v. Huber*, 26 Wn. App. 317, 320, 63 P.2d 160 (1980).³ This is the majority rule. See 21 C.J.S. *Covenants* § 26 (2006). The rule in this case requires that limitations be construed against the HOA because the HOA “claims the benefit” of alleged limitations on development on Parfitt’s property. Under the rule of strict construction, restrictive covenants are not extended beyond that which is *clearly expressed*, and any doubts are resolved in favor of the free use of land. *Burton v. Douglas Cty.*, 65 Wn.2d 619, 621-22, 399 P.2d 68 (1965). As discussed below, Judge Haberly extended the covenants beyond those that were clearly expressed in the Development Agreement by considering whether the Pub expansion fit the “character” of the development.

Washington courts have deviated from the rule of strict construction in one, and only one, context – when the dispute arises “among homeowners in a subdivision” and the dispute does not involve “the maker of the covenants.” *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997).

Neither criterion is met in this case.

First, this dispute does not arise “among homeowners in a subdivision.” The Parfitt property contains exclusively commercial uses; the sole exception would be the mixed-use structure, were it to be built, which

³ The rule thus is not applied only against the “drafter” of the covenant, as the HOA suggests. Br. at 36-37.

would contain a single residential unit. The balance of the Parfitt property is dominated by a working marina and associated support buildings, the Pub, a large parking lot, and easements granted to the public at large as a condition of the City's approval of the Marina PUD. Ex. 7. The interests involved thus are quite distinct from the interests of a single homeowner against the remainder of a residential subdivision.

Second, this dispute does involve "the maker of the covenants." The HOA named Mr. and Mrs. Evans as defendants; the injunction operates against Mr. and Mrs. Evans. It is far too late in the day for the HOA to argue that this dispute does not involve them.

In sum, neither of the *Riss* conditions is met. This Court will have to make new law if it is to refuse to apply the rule of strict construction as the HOA asks. It should not do so. There is no evidence in the record that the concerns that led the *Riss* Court to abandon strict construction in the subdivision context are present in a mixed-use development dominated by a commercial use (without which the condominiums could not have been built) and having a substantial public use as a condition of approval.⁴

Furthermore, strict construction serves at least four substantial purposes:

⁴ Judge Haberly did speculate in her oral opinion that residential uses in a mixed-use development may require stronger protection, but that speculation did not find its way into her written findings and conclusions and she specifically stated that her written decision superseded her oral decision. RP 644-45. This view, if actually adopted, would have turned applicable law – which favors commercial use – on its head.

to avoid imposing a restriction on the buyer of property that the buyer cannot reasonably be expected to know; to allow full use of property; to reduce litigation by increasing certainty; and to promote the uniform interpretation of like covenants.

21 C.J.S. *Covenants* § 26 (2006); see *Yogman v. Parrott*, 325 Or. 358, 937 P.2d 1019, 1023 (1997). In short, this is not an appropriate case for this Court to make new law by abandoning the rule of strict construction.

Finally, this is not a case where the trial court simply enforced the covenants “as written,” leaving no room for the rule of strict construction. Judge Haberly read into the Development Agreement a term that does not appear there – specifically, that development had to conform to the alleged intended (and undefined) “character” of the development. Accordingly, the rule of strict construction applies.

B. Parfitt was required only to “substantially perform” any covenant.

In its opening brief, Parfitt demonstrated that substantial and reasonable performance of a covenant was all the law required. AB 36-39. The HOA is wrong in arguing that the Development Agreement required *exact* performance for at least four reasons. First, the common law sensibly required only substantial performance and there is no Washington authority to the contrary. Second, the trial court did not find or hold that *exact* performance was required. Third, the Development Agreement

cannot be read to require *exact* performance because the Master Plan did not provide sufficient information from which to measure performance. Fourth, Hunt, Evans, and the Harbourside Partners demonstrated by their actions that only substantial performance was required.

1. The common law required only substantial and reasonable performance of covenants.

The common law required only substantial and reasonable performance of a covenant, when viewed in light of the purposes underlying the covenant. AB 37-38. The HOA dismisses the out-of-state cases cited in Parfitt’s opening brief as “unpersuasive,” but fails to provide this Court with any Washington authority to the contrary.

The approach sanctioned by these cases is not only logical and reasonable, but compelling. Before blindly enforcing the restrictive covenants at issue, the courts sought first to determine the *purpose* underlying them, and found that substantial performance was all that was required. For example, in *Avery v. New York Cent. & Hudson River R.R. Co.*, 24 N.E. 24 (N.Y. 1890), the covenant required the railroad company to maintain a depot entrance “opposite” the hotel. The railroad then moved the entrance to one side and opened a gateway leading to the hotel. In the HOA’s view, this would have entitled the hotel to an injunction. However, the *Avery* court held that the railroad had substantially complied with

the covenant because the new entrance still met the covenant's purpose of providing direct access to the depot.

This Court should apply the “substantial and reasonable performance” applied in these cases. Put simply, there is no need to insist upon exact performance if no purpose would be served by it. The notion of “substantial performance” or “materiality” is well-known to Washington courts. Restrictive covenants are contracts. In the construction context, a contractor must “*substantially perform*” its contractual obligations. *See, e.g., Valley Const. Co. v. Lake Hills Sewer Dist.*, 67 Wn.2d 910, 916, 410 P.2d 796 (1965) (contractor must “substantially perform” contract), quoting *White v. Mitchell*, 123 Wash. 630, 213 P. 10 (1923); *see also Goncharuk v. Barrong*, 132 Wn. App. 745, 748-49, 133 P.3d 510 (2006) (“substantial performance” of contract for legal services). In tort, a false statement is actionable only if it is “*material.*” *Holland Furnace Co. v. Korth*, 43 Wn.2d 618, 623, 262 P.2d 772 (1953). Finally, injunctive relief is appropriate only when the “acts complained of are either resulting in or will result in *actual and substantial injury,*” *Tyler Pipe Indus., Inc. v. Dept. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

This is not a case where mathematical exactness is required. The degree of performance required depends upon the purposes underlying the covenants. As Parfitt demonstrated in its opening brief, AB 39-43, no

purpose of any covenant *actually agreed to* is frustrated by allowing substantial rather than exact performance.

2. The trial court implicitly held that any breach had to be “material.”

It is undisputed that the Pub expansion is different in modest respects from the “size, shape and location” of the mixed-use structure depicted on the Master Plan, and Judge Haberly found as much. F/F 38. Judge Haberly did not find or conclude that the Development Agreement required the parties to develop their properties by duplicating the Master Plan with mathematical exactness. Had she concluded that mathematical exactness was required, Judge Haberly would have ended her analysis there. She did not, however. Instead, she addressed whether the Pub expansion fit the “character” of the development, F/F 39, ultimately concluding that the Pub expansion “is a *material* deviation from the size, shape, and location” of the “structures to be erected” pursuant to the Master Plan, F/F 46. Judge Haberly implicitly recognized that deviations had to be *material* before she would hold them to be prohibited. She simply relied upon a criterion – *character* – that was improper.

3. The Development Agreement itself required only substantial performance.

The Development Agreement does not, as the HOA argues, require more than substantial performance. The HOA finds no limitation on the

size, shape, or location of structures on the Parfitt property in the Development Agreement except Section 4. In Section 4, the parties agreed that development would “conform” to the attached “Master Plan.”

As Parfitt noted in its opening brief, the Master Plan was very general in character. AB 10. The HOA does not dispute this characterization. The Master Plan was clearly not a construction drawing from which the details of any building’s shape might be discerned. At most, it depicted footprints of each of the structures anticipated and associated parking areas. The Master Plan also contained a profile of the development as viewed from the east. That profile added no meaningful detail except, perhaps, overall elevation. First, buildings to the west were obstructed by buildings to the east (*e.g.*, the Pub and mixed-use structure block the condominium structures to the west). Second, only the eastern aspect was shown – *i.e.*, the structures were not depicted from the west, north, or south, and that omission made it impossible to discern exactly what “shape” any particular structure was to be. In short, the Master Plan could not meaningfully limit size and shape because it did not identify the size and shape of structures to be built – with the sole exceptions of footprint (location) and maximum height.

Section 4 declared that “development” of the property would “conform” to “the ‘Master Plan.’” The HOA does not dispute Parfitt’s

understanding of the word “conform” to require similarity, not identity. Instead, it accuses Parfitt of failing to account for Section 4’s requirements that the parties “*adhere* to these plans and not to *deviate* from [them],” and that all structures “shall be sized, shaped and located *as shown* on the Master Plan.”

But the HOA is guilty of reading Section 4 without reference to the Master Plan’s lack of detail. Although Section 4 requires that “structures” be sized, shaped, and located as shown on the Master Plan, the Master Plan itself was inadequate to determine the size and shape of any of the structures. It makes no sense to read Section 4 to require mathematical exactness when mathematic exactness was not possible. It makes no sense to read Section 4 as barring any “deviation” from the plans if those plans did not clearly establish what was being “deviated from.”

Under these circumstances, the Development Agreement can only be read to require, at most, “substantial performance.”

4. The parties’ actions demonstrate that they intended only substantial performance.

It is undisputed that the parties made significant changes to structures and other improvements identified on the Master Plan without obtaining the consent of the other “in writing” as required by Section 4. It is also undisputed that the parties never purported to amend the Master

Plan. In its opening brief, Parfitt argued that this pattern evidenced the parties' understanding that the Master Plan required only substantial, not exact, compliance. AB 13. It is true that Judge Haberly found that these changes were "effectively agreed to" by the parties. Br. at 9; F/F 27. This finding, although unchallenged, does not address and therefore does not preclude Parfitt's argument that the parties' frequent departure from the Master Plan evidenced their intent that only substantial, not exact, compliance with the Master Plan was required. Judge Haberly *did not* find or conclude that Hunt and Evans intended *exact* compliance.

The HOA argues that "Harbourside Partners and Evans mutually agreed in writing to a site plan and easements" it contends depicted all of the changes identified by Parfitt in its opening brief. RB 10. The Agreement to Implement Easements and Covenants to which this argument refers, attached to the HOA's brief as Appendix B, did not purport to amend the Master Plan; indeed, it did not mention the Master Plan at all. The Agreement itself only identified the various easements contemplated by the Development Agreement and addressed the parties' rights and obligations with respect to those easements. Finally, to the extent it depicted structures and parking lots, there is no evidence in the record that the site plan accurately depicted all of the changes alleged.

C. The Development Agreement purported to restrict only the physical attributes of structures to be erected, not their “use.”

The parties agree that Judge Haberly explicitly refused to find that the Development Agreement imposed a “use” limitation. Refusing to find a use limitation, Judge Haberly should have then focused on the limitations actually imposed by that agreement concerning “size, shape and location” (to the extent those could be determined in light of the very schematic nature of the drawings) and the purposes underlying those specific limitations. In determining whether changes in size, shape, and location were “material,” however, Judge Haberly applied a limitation nowhere to be found, and nowhere defined, in the Development Agreement – that structures to be erected “fit the *character*” of the development. F/F 39.

Although admitting that Judge Haberly refused to find a “use” limitation, the HOA urges that the Development Agreement does, in fact, address “use” of the property. Its argument is not persuasive. First, the HOA cites Section 6, which states that covenants relating to “ongoing use of the subject real property” would not terminate. Any reliance on Section 6 is misplaced. Parfitt agrees that the Development Agreement contains covenants relating to use, but not of use of the Pub or the contemplated mixed-use structure. Specifically, the Development Agreement addressed

the establishment of easements (§ 25); availability of utilities (§ 7); construction and allocation of parking (§ 9); establishment of a property owners association (§ 14); marina slips priority (§ 15); and sharing/allocation of parking spaces (§ 26). There were in fact “uses” the parties intended would survive. What the HOA fails to show, and what Judge Haberly refused to find, was that the Development Agreement and attached Master Plan limited the “use” of the property in dispute – the site of the mixed-use structure next to the Pub.

In its opening brief, Parfitt pointed out that the *Master Plan* did not purport to dictate use of the Pub, identifying that structure only by its address. AB 32. The implication was that the Development Agreement did not therefore purport to address “use.” That the *text* of the Development Agreement mentions the “Pub” does not prove otherwise. The key provision of the Development Agreement is Section 4, which declares that “development” – not “use” – of the property would “conform” to the *Master Plan*. The *Master Plan* makes no mention of the “Pub,” identifying the structure only by its address. Any mention of the Pub in the body of the Development Agreement did not purport to limit “use” of that property. *See, e.g.*, Ex. 6 § 17 (allocation of storm water/surface drainage costs); § 23 (requiring Evans to provide covered bicycle parking); § 26 (allocation of parking). The HOA offers no definition of the word

“development” to counter the commonly-accepted meaning, which strictly relates to physical improvements, not uses. AB 31-32. The only reasonable interpretation of Section 4, and of the Development Agreement as a whole, is that it *did not limit “use”* in the sense of requiring the Pub to be operated only as a “pub,” as the HOA defines that term from its narrow perspective, or the mixed-use structure to be used only as a marina owner’s residence/yacht sales office.

As Parfitt noted in its opening brief, the undisputed evidence was that 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. AB 35. Parfitt also demonstrated that the label “Marina Owner’s Residence/Yacht Sales” was used simply because a yacht broker had expressed to 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 Hunt to limit the structure to those uses. *Id.*

The HOA does not challenge this evidence except to argue that it “ignores” the fact that individual owners allegedly relied upon marketing materials designating the mixed-use structure as a “future residence.” But those individual owners also acknowledged receipt of copies of the

Development Agreement, under which Judge Haberly *refused to find a use limitation*. RP 136:19-137:13 (Gale); 159:5-7 (McKinstry); 202:15-22 (MacKenzie). In Washington, the interpretation given to a restrictive covenant by subsequent purchasers is simply not relevant. Instead, the court's function is to determine and give effect to the intent of the *original parties to the covenant*. See, e.g., *The Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 179, 810 P.2d 27 (1991) ("The primary objective in interpreting restrictive covenants is to determine the intent *of the parties to the agreement*." (emphasis added)); *Logan v. Brodrick*, 29 Wn. App. 796, 631 P.2d 429 (1981) ("In determining the permissible scope of an easement, we look to the intentions of the parties *connected with the original creation of the easement*, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied." (emphasis added)).

This case was brought and tried on the theory that Parfitt had breached the Development Agreement, not that it had misrepresented its intentions with respect to use of the mixed-use structure. The interpretation of the Development Agreement by condominium owners is simply irrelevant. Had this case been tried on a theory of fraud or misrepresentation, moreover, there was no evidence of any misrepresentation of "fact" as required for such an action to succeed. See, e.g., *West Coast, Inc. v.*

Snohomish Cty., 112 Wn. App. 200, 206, 48 P.3d 997 (2002) (statement of intent not actionable). The marketing materials to which the HOA refers were at most statements of intent, and there is no evidence that those statements were false at the time made. *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 396, 457 P.2d 535 (1969) (statements of intent actionable if made for purposes of deceit with no intention to perform). The last of the Harbourside condominiums was sold by 1999. RP 353:12-354:1. Parfitt did not study options for the location in dispute other than the mixed-use structure until 2001, when the HOA took the position that Parfitt did not have the right to construct **anything** on the property. RP 360:19-363:24.

Finally, as Parfitt argued in its opening brief, interpreting the Development Agreement to allow only a “Marina Owner’s Residence/ Yacht Sales Office” was unreasonable not only because it was unnecessary to do so but because such a narrow limitation would sharply and unnecessarily reduce the value of the mixed-use property. In response, the HOA suggests that Evans had to agree to such a specific limitation to regain control of the Pub property. RB 5, 35. There is in fact no testimony from which such a conclusion can reasonably be drawn.

D. The trial court’s use of “character” to determine whether the Pub expansion substantially performed the Development Agreement’s covenants relating to “size, shape and location” violated the rule of strict construction.

In concluding that the differences between the 1989 Hunt-designed structure and the Pub expansion proposal were “material,” Judge Haberly failed to analyze the purposes underlying the specific covenants relied upon by the HOA here – those relating to size, shape, and location. Instead, she relied upon a criterion – “character” – that does not appear anywhere in the Declaration. Judge Haberly clearly considered “uses” under the guise of “character” in determining that the differences were “material,” despite explicitly refusing to find a “use” limitation.

The HOA blandly asserts that there is “nothing inappropriate” about Judge Haberly’s use of “character” to determine the materiality of any deviation from size, shape, or location. RB 33. It then distinguishes a “quiet, peaceful community” from “a loud community wracked by noisy patrons and large delivery trucks.” *Id.* This comparison is false. There is no evidence that the Pub as it exists now or as it would operate with the Pub expansion gives rise to “a loud community wracked by noisy patrons and large delivery trucks.” The Pub is an established use *in a commercial zone*; members of the HOA knew this at the time they bought. The changes wrought by the Pub expansion would be modest, given that

increases in deliveries would be minimal and that the Pub expansion was designed to encourage families to patronize the re-designed restaurant. RP 43:17-25 (deliveries would not increase); 430:8-21 (no increase in recycling pickups); 430:22-431:8 (garbage pickup corresponds to garbage pickup for condominiums); 431:9-433:19 (maximum of eight deliveries per week).

More to the point, in adopting “character” as the governing criterion, Judge Haberly read into the Agreement a covenant the parties *did not agree to*. This violated the rule of strict construction, under which restrictive covenants are not extended beyond that which is clearly expressed, and any doubts are resolved in favor of the free use of land. *Burton v. Douglas Cty.*, 65 Wn.2d 619, 621-22, 399 P.2d 68 (1965).

The problems with using “character” to judge adherence to the Development Agreement’s actual limitations are obvious. The Development Agreement does not define the term. Washington courts have never defined the term in the land-use context. The AMERICAN HERITAGE DICTIONARY (2006) defines the term unhelpfully to mean “[t]he combination of qualities or features that distinguishes one person, group, or thing from another.” Using such an amorphous concept as “character” undermines the policies the rule of strict construction is intended to advance. *See* 21 C.J.S. *Covenants* § 26 (2006); *Yogman v. Parrott*, 325 Or. 358, 937

P.2d 1019, 1023 (1997). How can a buyer of the Parfitt property possibly be expected to know what he or she will be allowed to do with the property? How can Parfitt or its successors make full use of the property with the threat of “character” hanging over it? How does the use of the undefined term “character” reduce litigation by increasing certainty? How does “character” promote uniform interpretation of covenants relating to size, shape, and location? It is obvious that use of “character” defeats the purposes underlying the rule.

Rather than relying on “character,” Judge Haberly should have considered the purposes underlying the *specific limitations* on the size, shape, or location of any structure on the Parfitt property. Having failed to do so, the trial court had no basis on which to conclude that any particular change was “material.”

E. The Pub expansion substantially performed the Development Agreement’s covenants relating to “size, shape and location.”

In its opening brief, AB 39-43, Parfitt identified the known and likely purposes underlying the size, shape, and location limitations imposed on the mixed-use structure – again, the second-smallest structure governed by the Declaration and Master Plan – and demonstrated that strict adherence to the Master Plan was not required to effectuate those purposes. The HOA largely fails to discuss those purposes except in the

most general way, preferring to rest its case on the proposition that Parfitt could not modify the structure *in any way at all*, or on general invocations of “character.”

The HOA focuses, because it must, on the modest changes proposed by Parfitt. What should not be lost in this process, however, is the fact that the mixed-use structure (now proposed to be replaced by the Pub expansion) was the *second-smallest structure*, tucked away into a corner of the overall development. Understood in this fashion, it is even more difficult to understand how the modest changes proposed affect any purpose underlying the development as a whole.

Getting to specifics, the HOA’s first objection is that “the addition of a barroom is not the same as an addition of a residence/office.” RB 15. The HOA cannot argue this as a material difference because the trial court refused to find that the Development Agreement limited “use.” As Parfitt made clear at trial, the Pub expansion will allow it to convert the existing Pub to a family restaurant. RP 53:12-54:9. Although this means relocating the “bar” section to the location in dispute, there is no evidence that that portion of the Pub devoted to a “bar” would increase.

Second, the HOA objects to the closure of the alleyway originally to be located between the Pub and the mixed-use structure. RB 15. As Parfitt noted in its opening brief, the alleyway was not intended as a

“view” corridor, but simply to allow deliveries to be made to the Pub’s basement. AB 11. Under the Pub expansion proposal, deliveries would be made on the eastern edge of the property, as the neighboring property is no longer occupied by a residence. The “purpose” of isolating deliveries to the Pub is unaffected. The HOA does not contest these facts.

There is no evidence that the alleyway was intended to afford views from the condominiums. As this Court is aware, “[t]he right to an unobstructed view does not exist, absent an agreement, statute or governmentally imposed condition affirmatively creating that right.” *Pierce v. Northeast Lake Washington Sewer and Water Dist.*, 123 Wn.2d 550, 559, 870 P.2d 305 (1994). Nothing in the Development Agreement purports to grant an unobstructed view.

To the extent the alleyway in fact offered views between the buildings, those views are not significantly changed, if they are changed at all, by the Pub expansion. The unrebutted testimony was that the Pub expansion proposal would actually be *shorter* than the mixed-use structure identified in the Master Plan. The HOA produced no substantial evidence that the Pub expansion had any more severe impact on views than the mixed-use structure – none of its witnesses were competent to compare or did compare the obstruction allegedly caused by the proposal compared

with the 1989 Hunt-designed mixed-use structure.⁵ AB 16-17. To the contrary, the evidence is that the Pub expansion would have less of an impact on views because it was shorter and the clerestory preserved views that would otherwise be blocked by the Master Plan design. AB 17-18.

The HOA’s principal objection to the Pub expansion proposal is that it would be larger than the mixed-use structure originally intended – again, the second-smallest structure contemplated by the Development Agreement. But the HOA cannot justify its objection to the increase in size without relying on the fact that the Pub is a pub – *i.e.*, without relying on the intended *use* of the property – something Judge Haberly explicitly refused to do. Once this is understood, the HOA’s “not in my backyard” motives are exposed.

The trial court found that the footprint of the proposed expansion would be 20% to 31% larger than that envisioned for the mixed-use structure. F/F 38. But Judge Haberly offered no explanation for why this increase might be “material” except that the proposed expansion “would not fit the character” of the development. F/F 39. Her reasoning is clarified in Finding of Fact No. 40, in which she found that the Pub expansion

⁵ The HOA complains that Parfitt’s reference to the Hunt-designed structure means that Parfitt is comparing apples and oranges. RB 16-17. This is a red herring. There is no evidence that the Hunt-designed structure is taller than the structure depicted in the flawed Master Plan. The testimony, moreover, was that the Pub expansion would be two feet shorter than the structure depicted in the Master Plan. RP 400:2-10.

would “increase gross sales by approximately 20 to 70 percent, increase noise levels, add more delivery trucks, foot and auto traffic, [and] additional patrons” – impacts that depend entirely on the *use* of the structure.

To be clear, an increase in size does not by itself result in increased sales, increased noise levels, or increased traffic, whether by vehicles, pedestrians, or patrons. For example, if Parfitt, rather than proposing to expand the Pub as a pub, proposed instead to construct the very same building but to convert the entire structure to a reading room for the Bainbridge Island Historical Society, neither Judge Haberly nor the HOA could claim that the increase in size was material based upon “increased noise levels,” “more delivery trucks, foot and auto traffic,” and “additional patrons.”

The modest increase in size of the second-smallest structure in this development is simply not material, and Judge Haberly committed error in so finding.

F. Finding of Fact No. 46 is not supported by substantial evidence.

Finding of Fact No. 46 that the Pub expansion “is a *material* deviation from the size, shape, and location of the ‘structures to be erected’” is simply not supported by substantial evidence for the reasons addressed above.

G. Finding of Fact Nos. 39 and 41 are not supported by substantial evidence.

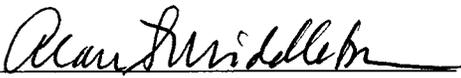
Finding of Fact Nos. 39 and 41 that the Pub expansion would not “fit the character” of the development is simply not supported by substantial evidence for the reasons addressed above.

III. CONCLUSION

For all of these reasons, the judgment should be reversed, the injunction should be vacated, and this matter should be remanded to the trial court with directions to enter judgment in favor of appellants, together with an award of fees on appeal and below.

RESPECTFULLY SUBMITTED this 27th day of August, 2007.

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CERTIFICATE OF SERVICE

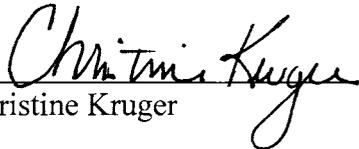
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action,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

On this date I caused the foregoing document to be served via messenger on the following attorneys:

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DATED this 27th day of August, 2007.


Christine Kruger