

NO. 35517-5-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

FILED
BY: [Signature]

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

Respondent,

vs.

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.

BRIEF OF RESPONDENT

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INTRODUCTION

Defendants Roger James Evans and Judith Ann Evans sold the uplands on which Harbourside Condominiums are built subject to restrictive covenants running with the land. The covenants bound both the Evans and the condominium developer John Hunt, and were expressly entered into for the purpose of developing the property. Evans agreed that he would build a future Marina Owners' Residence/Yacht Sales, that he would adhere to the plans, not deviate from the plans, and that the structure would be "sized, shaped, and located as shown on the Master Plan"

Several years later, Evans conveyed the Marina/Pub property to Parfitt Way Management Corporation ("PWM"), which now proposes to build a barroom addition to the Pub 20 to 31% larger than the contemplated future residence, and differing in "size, shape, and location." Judge Karlynn Haberly appropriately interpreted the covenants and held that the barroom expansion was contrary to the intentions of the parties and the language of the covenants. This Court should affirm.

RESTATEMENT OF ISSUES ON APPEAL

1. Does substantial evidence support the challenged findings of fact under any of the standards argued by the appellant?

2. Are restrictive covenants in a residential development interpreted consistently with the intent and purpose of the contracting parties, instead of being strictly construed?

3. When parties have entered into restrictive covenants governing the size, shape and location of future structures, is substantial compliance sufficient or are those covenants applied as written?

4. Even if substantial compliance with covenants is sufficient, does substantial evidence support the trial court's Finding of Fact 46 that 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"?

5. Should the Court affirm the injunction?

6. Is respondent Harbourside Owners Association entitled to an award of fees where the restrictive covenants provide for fees and the trial court awarded fees?

RESTATEMENT OF THE CASE

A. Almost all of the findings of fact are considered verities in this appeal.

After a four day trial and several post-trial hearings, Judge Karlynn Haberly entered 52 findings of fact. (Copy attached as Appendix A). Of these, appellant PWM assigns error only to three findings, F/F 39, 41 and 46. The remaining 49 findings of fact are considered verities on appeal. *In re Welfare of C.B.*, 134 Wn. App. 336, 349, 139 P.3d 1119 (2006).

The statement of the case in PWM's opening brief gives scant attention to the findings of fact. This restatement, accordingly, focuses more closely on the findings.

B. The covenants were part of a combined development of the Harbourside Condominium property and the marina/pub property.

PWM's opening brief emphasizes that Evans and Hunt separately applied to the City of Winslow to develop their respective properties. BA 7-8. But the trial court found, and PWM does not challenge, that the master planned project was a Planned Unit Development ("PUD"). F/F 19, CP 341. The trial court found,

“From the beginning of development, Evans and Hunt intended a coordinated, master planned effort.” F/F 7, CP 338. The trial court also found that the City asked Evans and Hunt to submit separate applications, but processed the applications jointly. F/F 19, CP 341.

Evans’ own testimony reveals that the joint development concept even predated Hunt’s involvement. Evans originally purchased the property in the 1970s, and developed the marina in the late 1970s. RP 241, 244. After the marina was developed, Evans sold the entire property to an individual named Ben Zane. RP 245. Zane’s plan was to convert the marina into a condominium, sell the slips, and then develop the upland area into residences. RP 245-46. Zane defaulted on the real estate contract and Evans regained part ownership of the property by becoming a partner with the company that was to provide Zane’s financing, Space Ventures. RP 246.

Space Ventures lost interest when Evans developed the Pub, and Evans decided to buy out Space Ventures. RP 254-55. To buy out Space Ventures, Evans needed to find a purchaser for the upland portion of the parcel (RP 255):

I had not really had a career in mind as a developer or a pub owner, but we decided we would have to find a developer who was interested in the property, in the uplands, and we created a master plan, which was our idea, then the architect who did that just happened to know Hunt, and introduced him to us, and vice versa, and he was enthusiastic about our idea and prepared a site plan and made us an offer, and that is the site plan he drew, and it kept the basic features we wanted.

In light of Evans' testimony that "we would have to find a developer who was interested . . . in the uplands" (*id.*), development of the Pub would not have occurred without the condominiums. And under the City's zoning, the condominiums would not have occurred without the pub/marina.¹ F/F 19, CP 341.

Evans entered into a Real Estate Purchase and Sale Agreement ("REPSA") to sell the uplands to Hunt for development of the condominiums. Ex 2. In an addendum to the REPSA, Evans and Hunt agreed that "the development of each party's property be coordinated and be in conformance with the attached 'Preliminary Master Plan' and the to be developed 'Master Plan'" Ex 2, Addendum at 1; F/F 7, CP 338. The parties agreed that Hunt would develop a Master Plan showing all structures, to be finalized

¹ PWM's brief attributes to Hunt the "proposal to develop the uplands as a condominium." BA 6. To the contrary, as Evans testified, Evans (or Zane) initially proposed to develop the condominiums.

and signed by the parties as a condition precedent to closing the sale of the property. *Id.* at 1-2.

The present day Pub is labeled on the Preliminary Master Plan as “existing farmhouse.” Ex 2, Addendum, Ex A. But the Addendum is premised on construction of the Pub and a residence/office, providing for sufficient parking spaces for the Pub. Ex 2, Addendum at 2.

C. The plans evolved from the Preliminary Master Plan into the Master Plan attached to the Development Agreement.

By December 1989, the Preliminary Master Plan had evolved into a Master Plan signed by both parties. Ex 6; F/F 9, CP 339. Exhibit 6, titled “Development Agreement And Covenants Running With The Land”, was filed for public record with the County, and recited that the covenants “shall remain binding and enforceable against the parties hereto, their heirs, successors, and assigns, and such covenants shall run with and bind the land” Ex 6, ¶ 27. Evans and Hunt agreed that the covenants would be enforceable by injunction. *Id.* at ¶ 28.

The Master Plan was incorporated into the Development Agreement, and the Master Plan drawings are attached as exhibits.

Ex 6, ¶ 4. The Development Agreement refers to both development covenants and use covenants:

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 that relate solely to the development of the subject real property.

F/F 16, CP 340, quoting Ex 6 at ¶ 6.

The Master Plan site plan labels the disputed building as “Marina Owner’s Residence/Yacht Sales.” Ex 6, Ex C. It is undisputed, and the trial court found, “Evans and Hunt intended to develop a marina owner’s residence/yacht sales office next door to the east of the Pub, and a marina services building next door to the west of the Pub.” F/F 6, CP 338. Although PWM’s brief consistently refers to the residence/office as “the Mixed-Use structure” (e.g., BA 10-12), this term does not appear in the Master Plan or the Development Agreement. The building is consistently referred to as Marina Owner’s Residence/Yacht Sales.

The parties agreed to develop the property “in conformance with the ‘Master Plan’ for the development of the subject property, which Master Plan is incorporated into the provisions of this

agreement together with the Master Plan drawings” Ex 6, ¶ 4. Hunt testified under oath in support of the Evans/Hunt development that, “we went together to do a master plan because it was pretty clear that this parcel needed to be planned comprehensively.” F/F 20, CP 314 (quoting Ex 10 p. 5). Hunt described the “whole master planning exercise to determine the best way to integrate this new residential use with the commercial activities of the pub, the marina, the up-road beach that are all part of the Evans operation.” *Id.* Evans agreed with the assessment that both developments needed to be planned “comprehensively in an integrated way.” RP 92-93. The City Council approved the Evans-Hunt PUD in October 1991. F/F 21, CP 341.

In 1993, Hunt encountered financial difficulties and transferred his interest to Harbourside Partners, composed of Evans and Hunt’s creditors. F/F 22, CP 341. As a result, Evans was the managing partner for the condominium development from January 6, 1993 to September 24, 1994, and from November 17, 1995 until the sale of all condominium units in 1999. *Id.* The Harbourside Partners partnership agreement recited:

In recognition that the [condominiums are] a portion of an overall scheme of development that includes structures to be placed upon real property owned by Evans, Evans shall . . .

construct the 'Residents/Marina Office' . . . in accordance with the Development Agreement previously identified.

F/F 23, CP 342 (quoting Ex 12 at ¶ 7.4(f)). The Harbourside Partners, Evans, and Parfitt Way Associates subsequently executed a recorded amendment to the Development Agreement reaffirming that the rights and interests of the parties in the Development Agreement would not be abridged but are expressly reserved. F/F 24, CP 342.

PWM argues in its brief that, "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." BA 13. To the contrary, the trial court found that these changes were "effectively agreed to by the parties" and were consistent with the Master Plan (F/F 27, CP 343):

During the development of the Marina and Harbourside condominiums, there were changes made to some of the structures from what is shown on the Master Plan drawings. Those changes were effectively agreed to by the parties to the Development Agreement, or their successors. Moreover, the changes were consistent with the Master Plan and did not change any of the uses depicted in the development agreement, or the character of the development, and did not erode the Master Plan. The changes in the height of some of the structures were consistent with the Development Agreement in that the changes were within the limits of the 1989 Winslow Municipal Code. The changes, even if they had not been

agreed to, were not habitual or substantial violations of the Development Agreement.

PWM argues that Evans made changes without Hunt's consent and vice versa. BA 13-15. The following evidence supports finding 27 that the parties effectively agreed to these changes. F/F 27, CP 343. Harbourside Partners and Evans mutually agreed in writing to a site plan and easements. F/F 24, CP 342. The Agreement is included as the last five pages of exhibit 15, and a copy is attached as Appendix B. On the site plan, Parfitt Way lies to the right, or north, of the project, and Wood Avenue is above or to the west. The parking lot for the Pub is at the bottom of the site plan, the east side of the property. To the left, or south of the parking lot, are buildings labeled "Pub" and "Future Residence." The five buildings of the condominium development are arrayed around the central garden area.

The site plan in Appendix B to this brief, to which Harbourside Partners and Evans both agreed, reflects the changes to the development plan identified by PWM at BA 13-15: the expanded footprint of the marina building and the toolshed/dumpster area (BA 13-14); the shortened footprint of the Marina Condominium, which resulted in increasing the height of the

building (BA 14); dividing the condominium buildings on Wood and on Parfitt Way into two buildings, reorienting the parking lots, and failing to develop the common gardens as depicted in the preliminary master plan. BA 14-15.

Moreover, since Evans was the managing partner for Harbourside Partners for several years during the development process, there were times when Evans was in charge of both sides of the development process. Any changes made during that time period were obviously agreed by both parties.

D. The terms of the Development Agreement were incorporated into the condominium declaration and public offering statement, and homeowners relied on the Development Agreement in deciding to purchase their condominium units.

The Harbourside partners agreed to develop the condominium project in two phases. Ex 12, ¶ 5. Phase I was a ten-unit condominium building on the harbor, adjacent to and southwest of the Pub. *Id.* Phase II was the development of 20 condominium units in an L shape fronting on Parfitt Way and Wood Avenue. *Id.* A site plan showing the Marina Condominiums to be developed in Phase I and the four buildings to be developed in Phase II is in Appendix B to this brief.

In September 1994, Harbourside Partners recorded the condominium declaration for Phase I of the development, the Marina Condominium. F/F 25, CP 342; Ex 15. Copies of the Development Agreement and the September 1994 Agreement To Implement Easements and Covenants were incorporated into the condominium declaration and the condominiums public offering statement. *Id.*

In September 1996, Harbourside Partners recorded the condominium declaration for Phase II. F/F 28, CP 343; Ex 20. Evans signed the condominium declaration as general partner in Harbourside Partners. F/F 28, CP 343. Harbourside Partners, with Evans as managing partner, delivered a Public Offering Statement (“POS”) to each buyer. F/F 29, CP 343. Thus, each buyer received the Development Agreement, the Master Plan and the recorded amendments. *Id.* “The POS did not state that all or any portion of the Development Agreement had been abandoned or terminated.” *Id.*

Condominium owners testified that they relied on the Development Agreement, the Master Plan, and the Site Plan attached to the Agreement To Implement Easements And Covenants. Ron McKinstry, a retired attorney, purchased his unit in

November 1995. RP 154-55; Ex 19. Before purchasing, McKinstry was concerned about the Pub, and carefully reviewed the Findings of Fact, Conclusions of Law and Recommendations of the Hearing Examiner on Evans' application to convert the old farmhouse into a Pub. RP 157. Those findings, which are Ex 1 of this trial, recite that Evans "would neither enlarge the footprint of the building nor change the roofline." Ex 1 F/F VII. (The hearing examiner for the City of Winslow was J. Robin Hunt, now a judge of this Court).

McKinstry reviewed the Development Agreement and the Master Plan that were part of the POS. RP 158-59. It was important to McKinstry that the Development Agreement and Master Plan showed the buildings to be developed, the footprints of those buildings, and required changes to be made in writing. RP 160.

Condominium owner Maradel Gale is a retired law professor who reviewed Ex 24, the public offering statement, before she purchased her condominium unit. RP 133-35. Like McKinstry's POS, Gale's POS includes the Development Agreement, the Master Plan, and the Agreement To Implement Easements And Covenants with the attached site plan. Ex 24. Gale testified that

the material contained in the Development Agreement was a material factor in her decision to buy:

It was very, very much a material factor in my determining whether to buy, because I wanted to know what could be there, what was happening on that property and if anything more could happen there.

RP 137. Gale also testified that it was important to her that the Development Agreement recited that any future buildings must be in conformance with the Master Plan, "sized, shaped and located as shown on the Master Plan unless agreed to by the other party."

RP 141. It was also important to her that these covenants would run with the land (*id.*) and that, "[o]ne of the drawings showed a residence/yacht sales office, another one later showed a future residence." RP 142.

Condominium owner David MacKenzie is a retired bank trust department officer. RP 179-80. MacKenzie spent 32 years in the Bank of America Trust Department in San Francisco, retiring as Executive Vice President and Chief Fiduciary Officer for the bank's worldwide fiduciary activities. RP 179. Exhibit 22 is the POS given to MacKenzie prior to purchasing his condominium unit. RP 180. Like the POS given to McKinstry and Gale, Ex 22 includes the Development Agreement, the Master Plan, and the Agreement To

Implement Easements And Covenants. Having encountered homeowners' disputes in his bank trust department career, MacKenzie, like McKinstry and Gale, relied on the POS and the attached documents. RP 182-83.

E. Harbourside Owners Association brought this action to enjoin the plans of the Pub owners to modify the planned residence/office consistently shown in the Development Agreement into an expansion of the Pub, adding a barroom with a footprint 20-31% larger than the planned residence/office.

In July 2004, PWM applied to the City of Bainbridge Island for a Shoreline Substantial Development Permit And Site Plan Review. F/F 37, CP 344. Instead of building a Marina Owners Residence/Yacht Sales, PWM proposed "to build a barroom expansion structure to the east of, and attached to, the existing Pub, while converting the existing Pub into a family restaurant." *Id.*

The proposed barroom expansion differs from the planned residence/office in a number of ways. First, and most obviously, the addition of a barroom is not the same as an addition of a residence/office. Second, as shown on the plans and agreed by the parties, the residence/office would be separated from the Pub with a pathway and an opening between the two buildings, but the proposed barroom addition would be attached to the Pub. F/F 38,

CP 345. Third, the proposed barroom expansion would be 20% to 31% larger than the plan for the residence/office. *Id.*² Finding 40 recited that the proposed barroom “would expand the footprint of the Pub by 20% to 31%.” CP 345. This is a misstatement, because the addition would almost triple the footprint of the Pub.³

PWM claims that the barroom expansion would only be “a relatively modest increase in square footage” from the planned residence/office. BA 16. PWM bases this claim on total square footage in the planned residence/sales basement, first floor, second floor and garage (Ex 3 at 3), but the footprint of the building itself, which affects the condominium owners, would expand by 31% as discussed above.

PWM claims that the barroom expansion “is actually two feet shorter than the Hunt-designed Mixed-Use structure.” BA 17. The “Hunt-designed Mixed-Use structure” is not the same as the “Marina Owner’s Residence/Yacht Sales” shown on the Master

² The increase in the footprint is calculated as follows. The planned residence/office would have a footprint of 1482 feet (garage plus interior space). Ex 3, p.3. The proposed barroom expansion would add 16 x 18 feet to the front of the Pub and a new structure 52 x 32 feet, a total of 1952 square feet. 1952 square feet is 31% larger than 1482 square feet.

³ The footprint of the Pub is 1002 square feet. Ex 3 at 3, and the expansion would add 1952 square feet as discussed in the prior footnote. Thus, the expansion would virtually treble the footprint of the Pub.

Plan. The Mixed-Use structure was designed with daylight basement, first and second floors. The Master Plan shows the western elevation for the Marina Owner's Residence/Yacht Sales as a two story building, not a three story building. Ex 20, Ex C (Site Plan) (copy attached to this brief as App. E). The condominium buyers were given the Master Plan, not the Mixed-Use design. The fact that Hunt himself designed a higher Mixed-Use Structure does not change the fact that the condominium buyers based their decisions on the elevation in the site plan, not Hunt's subsequent building plan. Accordingly, PWM compares apples and oranges when it compares the proposed barroom expansion with the originally planned Marina Owner's Residence/Yacht Sales building.

Appendix C to this brief is a partial⁴ copy of Ex 41, showing the originally planned residence/office. Appendix D is an excerpt from Ex 42, a site plan for the disputed new plan to add a barroom to the existing Pub. Both drawings are to the same scale, and both show the existing Pub building and the existing deck. Appendix C shows the "proposed owners residence and yacht sales" immediately below (to the east) the existing Pub. Appendix D

⁴ Exhibit 41 is a large picture of the entire original plan. Appendix C shows only the relevant portion – the planned residence/office.

shows in darker outline the new planned barroom expansion to the existing Pub. Comparison of appendices C and D shows the larger footprint of the proposed barroom expansion and the elimination of the open walkway between the Pub and the planned residence/office. Ex 43A is an artist's rendition of how the new barroom addition will appear from the condominium garden area. RP 131-32.⁵

The Harbourside Condominium owners were alarmed by PWM's proposal to convert the planned residence/office into a barroom expansion. Maradel Gale testified, it "doesn't look to me like it fits the character as I see it of my community." RP 144. She also testified that people are sometimes at the Pub as late as 2:30 a.m., and their loud talking awakens her when they leave in the early morning hours. RP 145. Trucks make deliveries as early as 4:30 a.m., "beeping their way down the driveway." *Id.* Gale expressed concern that the late night patronage noise and delivery truck noise would increase if the Pub is expanded as planned. Condominium owner McKinstry testified similarly. RP 166-67, 169-

⁵ Evans testified that his son-in-law Jeff Waite, who manages the Pub, arranged for preparation of Ex 43A. RP 131-32. Waite testified that the exhibit was prepared at the request of the Harbourside Condominium Owners. RP 446-47.

70. The condominium owners also expressed concern about the impact on their view resulting from the elimination of the pathway between the existing Pub and anticipated future residence and the increase in the size of the proposed building. RP 143-44, 149-50, 163-65, 209-14.

When PWM applied to the City of Bainbridge Island to build the disputed barroom expansion, the Homeowners Association concluded that it had no choice but to become involved in the administrative process or risk losing their rights. RP 192-93. The Homeowner's Association also brought this action to enforce the covenants and to enjoin PWM from building the proposed barroom expansion. RP 192. The Association made no claim for damages, seeking only an injunction and attorney fees. RP 192.

⁷ PWM's real objection to finding 39 is that PWM reads a legal conclusion into this finding, accusing Judge Haberly of "arguably recognize[ing] a covenant of quiet use and enjoyment" BR 25. This is a finding of fact, not a conclusion of law. It is supported by the evidence and is correct. In any event, the trial court did not find a use restriction. *Infra*, Argument B(5).

F. The trial court found that the proposed barroom expansion differs from the size, shape and location of the planned residence/office and does not fit with and conform to the character of the master planned development.

After four days of trial, Judge Karlynn Haberly gave her oral decision. RP 575-88. Judge Haberly concluded that, “[t]he Master Plan drawings show the proposed use of the properties, and fall into the category of covenants governing the ongoing use of the subject property.” RP 577. The purpose of the covenants was to provide for the development of the Harbourside Condominiums and to protect the purchasers of the residences. RP 579.

The Court found that it was necessary to continue the covenants into the future in order to give meaning to the purpose and intent of the parties to the Development Agreement. RP 581-82. The Court looked to the circumstances surrounding the Development Agreement, noting that the original concept described by Evans was “a very low-key sophisticated pub” with a maximum capacity of 49 patrons. RP 583. The Court also considered the public offering statement, with the recorded Development Agreement and Master Plan, noting the fact that these were sold as luxury condominiums with view restrictions. RP 584.

Judge Haberly found, and PWM does not challenge, that the size, shape, and location of the proposed expansion was different from the Master Plan. F/F 38, CP 345. Judge Haberly also found that the proposed expansion 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.” F/F 46, CP 346 (error assigned by PWM). Accordingly, Judge Haberly enjoined PWM from proceeding with its planned barroom expansion. CP 306-07. Pursuant to the Development Agreement, she awarded attorney fees to Harbourside Condominium Association. CP 348-49.

ARGUMENT

A. Standard of Review. (BA 23-24).

There are three standards of review at issue in this case. This Court will affirm the challenged findings so long as they are supported by substantial evidence. *In re Marriage of Tostado*, 137 Wn. App. 136, 141, 151 P.3d 1060 (2007).

Interpretation of a contract provision is a question of law, reviewed *de novo*, only when (1) the Court need not look to extrinsic evidence; or (2) there is only one reasonable inference from the extrinsic evidence. *Martinez v. Miller Indus., Inc.*, 94

Wn. App. 935, 943, 974 P.2d 1261 (1999). When there is a question of fact as to the meaning of a contract provision, the Court reviews the trial court's decision for substantial evidence. **Martinez**, 94 Wn. App. at 943. Whether a party has breached a contract is also a question of fact. **Frank Coluccio Const. Co., Inc. v. King County**, 136 Wn. App. 751, 762, 150 P.3d 1147 (2007); see also **Taylor v. Shigaki**, 84 Wn. App. 723, 728, 930 P.2d 340 ("The determination of substantial performance is a question of fact, and we will reverse only if there is no substantial evidence to support the trial court's conclusion"), *rev. denied*, 132 Wn.2d 1009 (1997).

Finally, this Court reviews for an abuse of discretion the order granting an injunction and the injunction's terms. **Kucera v. Dept. of Transp.**, 140 Wn.2d 200, 209, 995 P.2d 63 (2000); **City of Bremerton v. Sesko**, 100 Wn. App. 158, 162, 995 P.2d 1257, *rev. denied*, 141 Wn.2d 1031 (2000). The trial court "necessarily abuses its discretion if the decision is based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary." **Kucera**, 140 Wn.2d at 209. The appellate Court gives "great deference" to the trial court. **Sesko**, 100 Wn. App. at 162.

B. Substantial evidence supports the challenged findings of fact under any of the standards argued by appellant. (BA 23, 30-36, 39-45).

Appellant PWM's lengthy discussion of strict construction, substantial compliance, and use restrictions, while academically interesting, is unnecessary to deciding this appeal. Strict construction does not apply and Harbourside prevails even if the covenants are strictly construed; parties must comply with covenants, but even if substantial compliance were sufficient, the barroom expansion does not substantially comply with the Master Plan; and the trial court did not find a use restriction in the covenants, so the issue is not presented on review.

The trial court properly considered Evans' and Hunt's intent when they entered into the Development Agreement as well as the Agreement's context. This evidence supports the trial court's interpretation of the Development Agreement and the trial court's findings of fact. Judge Haberly's findings of fact are easily sustained under any standard of interpretation.

1. The trial court properly considered the parties' intent in entering into the Development Agreement and the context of the Agreement. (BA 23-24).

The Court applies the "context rule" of *Berg v. Hudesman* in judicially interpreting restrictive covenants. *Hollis v. Garwall, Inc.*

137 Wn.2d 683, 693, 974 P.2d 836 (1999) (citing **Berg v. Hudesman**, 115 Wn.2d 657, 801 P.2d 222 (1990)). When there is a question of fact as to the meaning of a contract provision, the Court reviews the trial court's decision for substantial evidence. **Martinez**, 94 Wn. App. at 943.

Strict construction is "not of significance" because the Court can and should give the size, shape and location covenant its ordinary and common meaning. **Mains Farm Homeowners Ass'n v. Worthington**, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993). The **Mains Farm** Court refused to apply strict construction where it could give the covenant's language its ordinary and common meaning. 121 Wn.2d at 815-16. Here too, the Court should give the covenant its ordinary meaning: the structure "shall" be the same size and shape, and placed in the same location, as depicted on the Master Plan.

2. **The Court should affirm because it is undisputed that the barroom expansion is not the same size, shape, and location as the structure depicted in the Master Plan. (BA 39-43).**

The Development Agreement provides that all structures "shall be" the same size, shape, and location as depicted in the Master Plan:

The parties agree to adhere to these plans and not to deviate from such plans without notification to and receiving written approval of the other party. Structures to be erected by either party shall be sized, shaped and located as shown on the Master Plan unless otherwise agreed to by the other party.

Ex 6, ¶ 4. The parties did not “otherwise agree[],” nor is there any dispute about the proper execution or clarity of the size, shape and location covenant.

In fact, PWM does not challenge finding 38 that the proposed barroom expansion is not “sized, shaped and located as shown on the Master Plan” as required by section 4 of the Development Agreement:

The “size, shape and location” of the expansion proposed in SSDP/SPR 12755 is different than the “size, shape and location” of the Residence/Office structure and the Pub structure that were contained in the Master Plan. The Master Plan shows the Residence/Office set away from the Pub with a path between the two structures. The footprint of the Residence/Office, including the garage, was to be 1,482 square feet. The proposed expansion would extend to the east property line, and the footprint of the proposed barroom portion of the expansion would be 20% to 31% larger than the plan for the Residence/Office. The barroom/restaurant expansion would be attached to the Pub, creating one large structure rather than the two smaller structures separated by a path as envisioned by the Master Plan.

F/F 38, CP 345. As discussed in the Statement of Facts, the condominium owners relied on the Master Plan and the proposed residence plan when they purchased their homes.

It is undisputed that the barroom expansion is not the same size as the Master Plan – it has a 20 to 31% larger footprint. Statement of the Case § E fn 2, *supra*. Even if the covenants are “strictly construed,” by which PWM seems to mean that the covenants will not be extended beyond their clear meaning (BA 26-27), a 31% larger footprint violates the covenant’s plain meaning that all structures “shall be sized, shaped and located as shown on the Master Plan” Ex 6 ¶ 4.

It is also undisputed that the proposed barroom expansion is not the same shape or in the same location as that depicted on the Master Plan. The barroom expansion would attach to the Pub, creating one large structure as opposed to the two smaller structures with a pathway located between the Pub and residence, as in the Master Plan. F/F 38, CP 345.

PWM asks for strict construction, yet cannot prevail under that standard in light of the size, shape, and location covenant and unchallenged finding 38. Strictly construed or otherwise, the barroom expansion, which is 20-31% larger, attaches to the existing Pub, and extends to the boundary line, does not satisfy the plain language of the size, shape and location covenant. F/F 38, CP 345. The Court should affirm.

3. Substantial evidence supports challenged findings 46 that the barroom expansion is a material deviation from the Master Plan. (BA 44).

The trial court found that the proposed expansion “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.” F/F 46, CP 346. Challenging that finding, PWM argues that it need only substantially comply with the size, shape and location covenant. BA 39-43. The covenants’ plain language requires more than substantial compliance, and there is no Washington case law that supports PWM’s theory. Argument D, *infra*. In any event, the proposed expansion does not substantially comply with the size, shape and location covenant.

It makes no difference whether the Court interprets the covenants strictly or liberally, looking for substantial compliance or strict compliance – finding 46 that PWM’s plans are a “material deviation” from the Master Plan is overwhelmingly supported by the evidence. It is a dubious argument at best that a footprint 31% larger than the Master Plan is not “substantially” larger, and a finder of fact can surely conclude that a 31% increase is a substantial increase.

It is also beyond dispute that the proposed expansion is not “shape[d] and locat[ed]” as shown on the Master Plan. The grossest change would take the master-planned structure from two detached structures to one larger structure. F/F 38, CP 345. Indeed, the most casual glance at the appendices to this brief shows “material” changes in the shape and location of the building. PWM’s argument calls to mind the old Groucho Marx line, “Who are you going to believe – me or your own eyes?”

4. Substantial evidence supports findings 39 and 41 that the proposed expansion does not fit the character of the Master Plan. (BA 43-44).

Substantial evidence supports finding 39 that the proposed expansion does not fit the character of the master planned development and “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 345. Finding 39 is amply supported by undisputed finding 38 – that the barroom expansion is 20-31% larger than the footprint of the residence/office and would create one large structure instead of two detached structures separated by a pathway. This material increase in size and change in shape and location no doubt changes the “character” of the development. F/F 39, CP 345.

Moreover, the statement in finding 39 that the proposed expansion “would not fit with the character of this master planned development” is amply supported by finding 40 (CP 345), to which PWM does not assign error:

The expansion would increase the gross sales by approximately 20 to 70 percent, increase noise levels, add more delivery trucks, foot and auto traffic, additional patrons, and would expand the footprint of the Pub by 20% to 31%.

Increased noise, commercial traffic, and patronage would obviously change the character of a jointly planned upscale condominium project. For example, resident David MacKenzie purchased his condo in 1999 and began noticing increased noise and commercial traffic in 2002 as the Pub’s business increased. RP 492-93, 494-95. The proposed barroom expansion would increase “everything,” which is not consistent with the type of community MacKenzie bought into. RP 495-96. The master-planned residence/office would have preserved the neighborhood’s peace and quiet, in contrast to the greatly expanded traffic and noise generated by the proposed barroom expansion.⁷

Substantial evidence also clearly supports challenged finding 41, that the barroom expansion would change the character of the view and is contrary to Hunt’s and Evans’s intent to maintain a

pathway between the Pub and the master-planned expansion. F/F 41, CP 345. PWM does not disagree that the Master Plan depicts the expansion as a detached building separated from the Pub by a pathway that leads to the water. BA 40-41. In fact, while the expansion was originally intended to be attached to the Pub, the parties agreed to a detached structure. *Id.* PWM's barroom expansion would attach the expansion to the existing Pub and close the existing pathway.

Since PWM concedes that the parties agreed that the master-planned expansion would be detached from the Pub (BA 40-41), it cannot dispute the trial court's finding that "changing from two separate structures to one structure . . . was not intended by Evans or Hunt." F/F 41, CP 345. Nor can PWM seriously dispute that the proposed barroom expansion would change the character of the view from the condominiums by closing the pathway – a view corridor. *Id.* Resident Maradel Gale testified that if the expansion were built in accord with the Master Plan, she would keep a water view through the pathway between the Pub and expansion. RP 150. Resident Ron McKinstry also testified that his view would be affected by closing the pathway between the Pub and proposed barroom expansion. RP 163. As such, substantial evidence

supports the finding that building one structure instead of two would change the views from the Harbourside condominiums. F/F 41, CP 345. This correct findings does not extend the covenants beyond their original meaning, it implements the covenants' clear meaning.

5. The trial court did not impose a use restriction. (BA 30-36).

Although PWM correctly argues that the trial court refused to enter findings on a use restriction, it argues at length that the Court should not infer a use restriction from finding 39. BA 30-36. Harbourside agrees that this Court should not reach the issue of a use restriction, and the Court need not consider this argument.

PWM's argument about use restrictions is a red herring. Harbourside does not need a use restriction to prevail, but prevails on the covenant's clear language and the trial court's correct findings that the proposed barroom expansion materially deviates from the size, shape and location covenant in the Master Plan and would change the character of the master-planned community the parties intended and agreed to.

Judge Haberly refused to enter any finding that the use of the proposed expansion would be absolutely restricted to

residential use, focusing instead on size, shape and location, and the character of the overall development:

THE COURT: And, what I meant was to restrict the size, shape, and location, and I excised the word "use." That's a broader concept. And I guess I am not ruling what might happen in the future, but conceivably there could be another use proposed for that site that the Homeowners would agree to. I don't know what it would be, but it wouldn't have the impacts that this expansion of the Pub had, because expansion of the Pub had very large impacts. You have got my wording in here what it was. I will get the right wording on here. "The proposed expansion would not fit the character," and I had some numbers in there about how I determined that it was a large expansion over what was originally planned at that site.

RP 639-40. The court explained that she "did not make a finding that no use could ever be made of that property other than marina owner's residence or yacht sales." RP 641. Instead, she found that the proposed barroom expansion was outside the parties' intent when they entered into the covenants:

THE COURT: And I think in the context of land use law, that that would not have been an appropriate conclusion, but when I look at the covenants, I have to look and see whether this proposed use is outside the intent of the parties, and of course that's what the lawsuit was about. I made a lot of findings about that, and found it was outside the intent of the parties to have an expansion that size and that impact because of the commercial development aspect of it.

RP 641. Finally, the court concluded, "this lawsuit I guess makes it pretty clear an expansion of the Pub that expands its footprint X amount and its business X amount is not within the intent of the

covenants, and I think that's pretty much the conclusion and that's where the lawsuit ends" RP 642-43.

In short, the trial court made clear that she was not finding a use restriction and she did not find a use restriction.

PWM also attacks the trial court's reference to the Master Plan's "character," again cautioning the Court not to infer a use restriction from "character." BA 30-31 (quoting F/F 39, CP 345). PWM's only argument on this point relates to unchallenged finding 40, which as discussed above, correctly indicates that the proposed barroom expansion would increase noise, commercial traffic and patronage. BA 30-31. There is nothing inappropriate in using "character" to differentiate between a quiet, peaceful community and a loud community wracked by noisy patrons and large delivery trucks.

Finally, PWM argues that the Development Agreement does not contemplate any use limitation. BA 31-36. PWM effectively asks this Court to find that there is no use limitation – in other words, to enter a finding that the trial court did not enter. As the parties agree, the trial court did not find a use restriction – but it also did not find that there were no use restrictions. The Court should also refuse to do so.

In any event, PWM's argument is misdirected because the Master Plan contemplated construction of a residence/office, not a Pub expansion. The Master Plan drawings labeled the planned structure as "Marina Owners Residence/Yacht Sales." Ex 6, Ex C. The parties agreed not to deviate from the plans without written approval of the other party. Ex 6 ¶ 4.

When Evans entered into an agreement with Harbourside Partners to implement the easements and covenants, the parties attached to the agreement a site map showing the unbuilt structure as a "future residence." Ex 16, site plan. Promotional literature for Phase II of the condominium development again showed a "future residence". Ex 18. Evans signed condominium declarations and public offering statements to which were attached the Development Agreement and the Agreement to implement easements and covenants, with the attached map showing "future residence." RP 112-13. Evans obtained a building permit for the residence/office, not for barroom expansion. RP 304. Although the parties made other changes to the Master Plan, they never changed the "Marina Owners Residence" which was consistently shown in the same location and labeled as "Marina Owner's Residence/Yacht Sales" or "future residence." RP 340.

PWM argues that four considerations support its interpretation that the designation “Marina Owner’s Residence/Yacht Sales” is basically irrelevant to interpretation of the covenants. BA 35-36. First, PWM’s argument that the Master Plan designates the Pub by address only (BA 35) ignores the many express references to the Pub found directly in the Development Agreement. Ex 6 ¶ 17 (referring both to the Pub and the Marina Owner’s Residence), ¶ 23, ¶ 26. Second and third, the arguments that labeling the structure “Marina Owner’s Residence/Yacht Sales” was unnecessary to obtain approval for the developments and was used only because it expressed Evans’ intention ignores the considerations in marketing the condominiums and the fact that these drawings were held out to and were relied on by prospective owners. Fourth, the argument that restricting the use of the “Marina Owner’s Residence/Yacht Sales” diminishes the value of the property ignores the fact that development of the condominiums was not only important to Evans, it was necessary in order for Evans to regain control of the Marina and Pub.

In response to PWM’s rhetorical question whether Harbourside seriously argues that the residential portion of the structure could only be used by the Marina owner and nobody else

(BA 36), Harbourside’s counsel advised Judge Haberly that, “there might be some other use that the Homeowners would agree to, and of course they would have to deal with the Parfitt Way Management in good faith and not unreasonably withhold.” RP 642.

C. Restrictive covenants in a residential development are interpreted consistently with the intent and purpose of the contracting parties; they are not strictly construed. (BA 24-30).

This Court should use the same principles followed by the Supreme Court in *Riss v. Angel*: covenants are interpreted in light of the restrictive covenant’s original intent and purpose, and the collective interests of all those living in the community subject to the covenants. 131 Wn.2d 612, 623-24, 934 P.2d 669 (1997). Long before *Riss*, this Court and our Supreme Court questioned whether rules of strict construction should apply where the issue before the court – the meaning of a restrictive covenant – arises in a dispute between home owners. 131 Wn.2d at 622 (citing *Mains Farm*, 121 Wn.2d at 816; *Lakes at Mercer Island Homeowners Ass’n v. Witrak*, 61 Wn. App. 177, 179, 810 P.2d 27, *rev. denied*, 117 Wn.2d 1002 (1991)). Since restrictive covenants derogate from the common law right “to use land for all lawful purposes,” Washington courts have historically strictly construed the covenants (1) against

the drafter; and (2) so that they are not extended beyond that which is clearly expressed, and any doubts are resolved in favor of the free use of land. *Riss*, 131 Wn.2d at 621; *Fairwood Greens Homeowners Ass'n, Inc. v. Young*, 26 Wn. App. 758, 761-62, 614 P.2d 219 (1980).

In *Lakes at Mercer Island*, Division One rejected strict construction, holding instead that covenants should be read in accord with their plain meaning: "it is well settled that a covenant should not be read in such a way that defeats the plain and obvious meaning of the restriction." 61 Wn. App. at 180. The Court refused to construe doubts against the maker of the covenant:

While such a rule may have some validity when the conflict is between a homeowner and the maker of the covenants, it has limited value when the conflict is between homeowners. In such a case the court should place special emphasis on arriving at an interpretation that protects the homeowners' collective interests.

Id. at 180-81 (footnotes omitted).

The *Mains Farm* Court also questioned the "premise" that covenants should be strictly construed because they restrict the alienation of land. 121 Wn.2d at 816. But the Court did not resolve the issue, holding instead that strict construction was "not of

significance” because the Court gave the covenant’s language its ordinary and common meaning. *Id.*

The Supreme Court took up the issue in ***Riss***. 131 Wn.2d at 623. There, the restrictive covenants governed minimum square footage, minimum setback requirements, and maximum roof heights, and gave the HOA authority to “refuse to approve the design, finishing or painting of any construction or alteration.” *Id.* at 616. The HOA rejected the Riss’s building plans, based on the height, width and depth of the structure, the exterior finish, and proximity to neighboring houses. *Id.* at 618.

The Supreme Court held that the HOA’s decision was unreasonable and arbitrary. 131 Wn.2d at 615. The ***Riss*** Court applied the following maxims to interpret the covenant at issue:

- ◆ The court’s primary objective in interpreting restrictive covenants is to determine the intent of the parties.
- ◆ The relevant intent, or purposes, is that of those establishing the covenants.
- ◆ In determining intent, language is given its ordinary and common meaning.
- ◆ The document is construed in its entirety.

131 Wn.2d at 621. The Court held that the “intent or purpose of the covenants, rather than free use of the land, is the paramount consideration in construing restrictive covenants.”⁸ *Id.* at 623.

Consistent with the principle that the paramount concern is the intent of the covenants, the Court rejected strict construction in favor of protecting the “homeowners’ collective interests”:

The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court’s goal is to ascertain and give effect to those purposes intended by the covenants. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances. . . . The court will place “special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.”

Id. at 623-64 (citations omitted).

In short, restrictive covenants are no longer disfavored as violative of the common law right to use land for any lawful purpose. ***Lakes at Mercer Island***, 61 Wn. App. at 179. Rather, “modern courts have recognized the necessity of enforcing such

⁸ The Court has subsequently reiterated that “the primary goal in interpreting covenants . . . is to determine the intent or purpose of the covenants.” ***Hollis v. Garwall, Inc.***, 137 Wn.2d at 695; see also ***Viking Props., Inc. v. Holm***, 155 Wn.2d 112, 118 P.3d 322 (2005).

restrictions to protect the public and private property owners.” *Id.*; see also *Riss*, 131 Wn.2d at 623-24.

PWM argues that *Riss* and *Lakes at Mercer Island* should not apply because “[t]his dispute patently is not ‘among homeowners in a subdivision,’” but among “adjacent properties, one of which contains exclusively commercial uses.” BA 27-28. PWM also argues that the Marina PUD, in which the Pub is located, is “exclusively commercial” and “entirely distinct” from the Condominium PUD. BA 28-29. These arguments ignore two key points: (1) the condominium and marina projects were developed in conjunction with one another (F/F 6-7, CP 338; F/F 19, CP 341, discussed in the Restatement of Facts, *supra*); and (2) the Marina PUD was intended to be “Mixed-Use” – residential and commercial. BA 8, 10-12, 28; Ex 3 at 4; RP 270, 296.

Moreover, PWM’s distinction is without a difference. The covenants in the Development Agreement were designed specifically to protect the condominium purchasers. F/F 11, CP 339 (quoting Development Agreement ¶ 2). Both the condominium property and the marina/pub property were developed jointly, with interrelated easements. Statement of the Case § D, *supra*. The developments were intertwined by the Master Plan. *Id.* The

concerns that illuminated the decision of the Supreme Court in **Riss** are the same as the concerns that informed Judge Haberly's decision.

Further, although Evans was a "maker of the covenants", he transferred the property to Parfitt Way Associates. BA 27; Ex 28. Parfitt Way Associates quit claimed property to the current owner, PWM in 2003, 14 years after the Evans, Hunts, and Bar Harbor Associates entered the covenants. *Compare Ex 6 with Ex 28.*

Although Evans is an owner of PWM, he no longer has an active role in the pub's operations. Evans relinquished management of the pub to his daughter Jocelyn Waite in 1992. RP 237-38. Evans has not had any role in the management of the pub since then (RP 238), and he and his wife currently reside in Seattle and Hawaii. RP 69. As such, this dispute does not involve a maker of the covenants. **Riss**, 131 Wn.2d at 623.

Riss is applicable because the parties here are similarly situated to the parties in **Riss** – they are bound by the covenants and did not participate in drafting them. **Riss**, 131 Wn.2d at 623. PWM's attempt to limit **Riss** to "homeowners in a subdivision" reads **Riss** far too narrowly. BA 27-28. Nothing in **Riss** suggests that there is something unique about a subdivision such that the

Riss Court intended its holding to be limited to subdivisions and not any other type of development. Nor does **Riss** indicate that there is something unique about homeowners as opposed to an owner of any other type of property. The point is that the parties involved in the dispute are “governed by the restrictive covenants” such that they have a common interest, and did not participate in drafting them such that they should shoulder the consequence of any ambiguity. 131 Wn.2d at 623.

Limiting **Riss** to residential subdivisions is not in keeping with the interests **Riss** seeks to protect. Since **Riss**, decided in 1997, more and more properties, including this development, are mixed residential and commercial developments. The concerns here are the same as in **Riss** – the intent of the covenants and the collective interest of those bound by the covenants. 131 Wn.2d at 623.

D. The covenants’ plain language requires more than substantial compliance. (BA 36-39).

The covenants require the parties to adhere to the Master Plan and to erect structures that “shall be” the same size, shape and location as those depicted in the Master Plan. Ex 6 ¶ 4. This plain language contradicts PWM’s argument that it need only

substantially comply with the restrictive covenants.⁹ The Court need not consider this argument because the judgment can be upheld even under a substantial compliance test as discussed in Argument B, *supra*.

Contrary to PWM's claim, the Development Agreement does not support PWM's substantial compliance argument. BA 37. The Development Agreement provides:

- ◆ That "development of the subject property shall be in conformance with the 'Master Plan.'";
- ◆ "The parties agree to adhere to these plans and not to deviate from such plans"; and,
- ◆ all structures "shall be sized, shaped and located as shown on the Master Plan."

Ex 6 ¶ 4; BA 37. PWM focuses exclusively on the provision that "development . . . shall be in conformance with the 'Master Plan,'" arguing that strictly construed, "conformance" requires only "similarity (not identity)." BA 37 (citing WEBSTER'S NINTH NEW COLLEGE DICTIONARY 276 (1988)). But the Court must read the covenant in its entirety. ***Fairwood Greens Homeowners Ass'n***,

⁹ The trial court did not enter a finding on substantial compliance (BA 36) – it found that the Pub's "proposed expansion . . . is a material deviation from the size, shape, and location" of the structure anticipated in the Master Plan. F/F 46, CP 346.

Inc. v. Young, 26 Wn. App. at 761. The language the Pub ignores clarifies any ambiguity PWM attempts to read into the term “compliance.” Compare Ex 6 ¶ 4 with BA 37.

The parties agreed to “adhere” to and “not to deviate” from the Master Plan. Ex 6 ¶ 4. To adhere means “to agree to join; bind oneself to observance (as of a treaty).” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 25-26 (1993). To deviate means to “to diverge or turn aside : veer esp. from an established way or toward a new direction” WEBSTER’S, *supra* at 618. As such, the parties agreed to be bound to the Master Plan and not to move away from it in a new direction; e.g. by building a larger, attached barroom instead of the anticipated residence. Moreover, the covenant requires that all structures “shall be sized, shaped and located as shown on the Master Plan.” Ex 6 ¶ 4. PWM’s proposed interpretation would improperly insert the word “similar” into the size, shape, and location covenant. BA 37.

Finally, although PWM asserts that the “common law” requires only substantial compliance, it cites no Washington common law to support its argument (BA 37-39) nor has Harbourside found any. Instead PWM cites three foreign cases, which are readily distinguishable:

- ◆ **Melson v. Ormsby**, 151 N.W. 817, 818-21 (Iowa 1915): In **Melson**, the covenant limited the height of the first floor in a yet-to-be constructed house to not more than four feet above the established grade of the sidewalk. When the defendant Ormsby purchased the lot, the only sidewalk was on the east side of the lot. The city subsequently built a sidewalk in front of the lot. After the sidewalk was built, but before the city passed an ordinance fixing the grade, Ormsby began building. The house floor is just under two feet above the eastern sidewalk, over four feet above the front sidewalk, and less than four feet above the average grade of both sidewalks. The court found substantial compliance where (1) the covenant did not fix the point from which the grade was to be measured; and (2) plaintiff Melson had abandoned the original intent of the covenants.
- ◆ **Saphir v. Neustadt**, 413 A.2d 843, 848-49 (Conn. 1979): In **Saphir**, defendant Neustadt's obligation under the covenant was to maintain roads in a development he owned in a "reasonably safe condition." The trial court found that Neustadt had substantially complied with the covenant, no one challenged the substantial compliance standard, and the court did not discuss it. *Id.* at 848-49. The **Neustadt** court affirmed, based on the mountainous, steeply sloped and wooded topography of the area, and the trial court's reasonable conclusion that since the area was seasonal in nature, the defendants were obligated to maintain roads carrying seasonal traffic. *Id.* The court's great deference to the trial court was based in large part on the trial court having conducted a site visit to observe the roads' condition. *Id.*
- ◆ **Avery v. New York Cent. & Hudson River R.R. Co.**, 24 N.E. 24 (NY 1890): In **Avery**, the covenant at issue required a railroad company to maintain a depot entrance "opposite" the hotel. The railroad company subsequently moved the entrance to the hotel's west side and opened a gateway leading directly to the hotel. The court held that the railroad company had substantially complied since the entrance west of the hotel satisfied the covenant's purpose, which was to secure the hotel direct access to the depot.

In short, the Court should reject PWM's substantial compliance argument because it is inconsistent with the covenants' plain language, there is no Washington case law supporting the argument, and the foreign cases upon which PWM relies are unpersuasive.

E. The Court should affirm the injunction. (BA 45).

PWM does not offer any argument against the injunction other than to ask the Court to reverse the injunction if the Court reverses the findings, conclusions and judgment. BR 45. Thus, PWM tacitly concedes that if the trial court correctly found that the proposed barroom expansion violates the covenants, the injunction was proper.

F. The Court should affirm the award of attorney fees to Harbourside and award fees on appeal. (BA 45-46).

PWM acknowledges that the Development Agreement provides for an award of attorney fees to the prevailing party. BA 45. PWM does not contest the award of fees to Harbourside unless the Court reverses the judgment and injunction. *Id.* The Court should affirm the trial court's fee award and award fees to Harbourside on appeal. ***George v. Fowler***, 96 Wn. App. 187, 193, 978 P.2d 565 (1999), *rev. denied*, 139 Wn.2d. 1024 (2000).

CONCLUSION

By any standard, the proposed barroom expansion is contrary to the Master Plan and the trial court properly enjoined PWM from proceeding with the expansion. Respondent Harbourside asks this Court to affirm.

RESPECTFULLY SUBMITTED this 13th day of June 2007.

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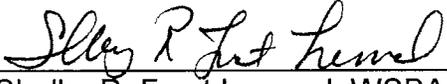
I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF RESPONDENT postage prepaid, via U.S. mail on the 13th day of June 2007, to the following counsel of record at the following addresses:

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RECEIVED AND FILED
IN OPEN COURT

SEP 29 2006

DAVID W. PETERSON
KITSAP COUNTY CLERK

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

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

Plaintiff,

vs.

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

Defendants.

No. 05-2-00380-6

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

ORIGINAL

This case came before the Court for a non-jury trial from May 23 – 26, 2006, before the Honorable M. Karlynn Haberly. Bruce Babbitt and Matt Adamson of Jameson Babbitt Stites & Lombard, P.L.L.C. appeared as counsel for plaintiff. Alan Middleton of Davis Wright Tremaine LLP appeared as counsel for defendants. This Court, having heard the testimony, having examined the evidence offered by the parties, having heard the arguments of counsel, and having made its oral decision on June 2, 2006, now makes the following Findings of Fact and Conclusions of Law:

A. FINDINGS OF FACT

1. Plaintiff Harbourside Owners Association (the HOA) is the owners' association for the Harbourside Condominiums on Bainbridge Island. The HOA is a valid, active Washington not-for-profit corporation and has paid all fees necessary to maintain

FINDINGS OF FACT AND CONCLUSIONS OF LAW - I

JUDGE M. KARLYNN HABERLY
Kitsap County Superior Court
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

APPENDIX A

1 this action. The HOA was authorized to bring this suit on behalf of two or more
2 condominium owners to enforce the covenants in the Development Agreement.

3 2. Defendant Parfitt Way Management Corporation (PWM) is a Washington
4 corporation that owns real property and does business in Kitsap County.

5 3. Defendants Roger and Judith Evans (Evans) are a married couple residing
6 part of the year in King County, Washington, and part of the year in Hawaii. Mr. and Mrs.
7 Evans are shareholders of PWM, and Mr. Evans is president of PWM.

8 4. In the 1980s, defendants Mr. and Mrs. Evans owned approximately 3 acres
9 of land located on Eagle Harbor on Bainbridge Island. In 1986, Mr. and Mrs. Evans
10 submitted applications for development permits to convert an historic farmhouse located on
11 their property into an "English style Pub." The Pub was an established use on this property
12 prior to the Harbourside developments.

13 5. In 1989, Mr. Evans met an architect, John Hunt, and the two of them
14 undertook to implement a master plan for the development of his property.

15 6. Mr. Evans and Mr. Hunt got together and went through a "master planning
16 exercise" to create a plan for the land owned by Evans. The plan was to divide Evans's
17 property into separate ownership, one part owned by Evans and one by Hunt. Evans's
18 property already contained a marina and a pub. Evans and Hunt intended to develop a
19 marina owner's residence/yacht sales office next door to the east of the Pub, and a marina
20 services building next door to the west of the Pub. They also intended for Hunt to develop
21 condominium units on his to-be-purchased property in essentially an "L" shape around
22 Evans's three, separate waterfront structures (the residence/office, Pub, and marina office).

23 7. From the beginning of development, Evans and Hunt intended a
24 coordinated, master planned effort. The purchase and sale agreement incorporated a
25 "preliminary master plan" and "addendum" providing for a coordinate development
26 between the two owner's parcels.

27 8. On December 1, 1989, Evans' limited partnership, Bar Harbor Associates,
28 granted a statutory warranty deed to John and Denice Hunt, husband and wife, recorded in
29 Kitsap County under recording number 8912050063, and later re-recorded under recording

30 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 2

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1 number 9001250130. The deed was signed by Mr. and Mrs. Evans as president and
2 secretary of PWM, the general partner for Bar Harbor Associates. The deed conveyed
3 approximately 2.3 acres of land to Hunt, upon which Hunt would build the condominium
4 units. The deed was expressly made subject to covenants contained in a concurrently
5 executed Development Agreement between Bar Harbor Associates, Evans, and Hunt.

6 9. The "Development Agreement and Covenants Running with the Land"
7 ("Development Agreement" was also executed on December 1, 1989. The parties to the
8 Agreement were again Mr. and Mrs. Evans as individuals, and as president and secretary of
9 PWM (the general partner of Bar Harbor Associates LP), Bar Harbor Associates, and John
10 and Denise Hunt. It was acknowledged and recorded in Kitsap County on December 5,
11 1989 under Kitsap County Recording Number 8912050064 and later re-recorded under
12 recording number 9001250131.

13 10. In the Development Agreement, Evans and Hunt intended to and did impose
14 restrictive covenants on the development of their respective properties within their master-
15 planned development. In particular, they intended to and did agree to restrict the size,
16 shape, and location of the structures to be erected immediately to the east of The Pub, and
17 also agreed upon the parties' obligations with regard to repair, maintenance and
18 management of the development's common areas, including parking areas, pedestrian
19 access, and a garden.

20 11. Section 2 of the Development Agreement says that the "purpose of these
21 covenants is to provide for the development of a residential project" to be known as
22 "Harbourside."

23 12. The Development Agreement was intended and did benefit and burden both
24 the land owned by Evans and the land owned by Hunt.

25 13. Section 4 of the Development Agreement specifies:

26 The development of the subject property shall be in conformance
27 with the Master Plan for the Development of the subject property,
28 which Master Plan is incorporated into the provisions of this
29 agreement together with the Master Plan drawings, a copy of
30 which is attached as Exhibits "C", "D" and "E." The parties agree
to adhere to these plans and not to deviate from such plans

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 3

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1 without notification to and receiving written approval of the other
2 party. Structures to be erected by either party shall be sized,
3 shaped, and located as shown on the Master Plan unless otherwise
4 agreed to by the other party. Heights of structures shall be limited
5 to the height allowed by the zoning code in effect in the City of
6 Winslow as of September 19, 1989. The exterior architecture,
7 color and material of any development and/or improvement shall
8 be reviewed and approved by the other party to enhance overall
9 project character, consistency, and marketability.

10 14. The Master Plan drawings, attached to the Development Agreement as
11 Exhibits C, D, & E, include three separate structures to be developed on the property
12 retained by Evans's Bar Harbor Associates: a "proposed marina office & services
13 building," "321 Parfitt Way," and a "Marina Owner's Residence/Yacht Sales" building.
14 The master plan drawings also show the condominiums to be developed by Mr. Hunt.

15 15. Under Section 5 of the Development Agreement, the Master Plan may only
16 be amended "by mutual agreement."

17 16. Section 6 of the Development Agreement states:

18 Following completion of development, those covenants contained
19 herein that relate solely to the development process, as opposed to
20 the ongoing use of the subject real property, shall terminate. The
21 parties agree that, following completion of development, all
22 parties shall sign such documents as may be necessary to remove
23 from the record such covenants that relate solely to the
24 development of the subject real property.

25 17. The Development Agreement also reiterated the scope of the overlapping
26 easements in the Evans-Hunt master planned community. Section 25 states the uses of
27 each easement, including Easement A, which currently allows the Pub and marina
28 customers to access and park on land owned by the HOA, and Easement B, which currently
29 allows the HOA to have a garden on land owned by defendants.

30 18. Under Section 27 of the Development Agreement, "the covenants set forth
herein are and shall remain binding and enforceable against the parties hereto, their heirs,
successors, and assigns, and such covenants shall run with and bind the land."

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 4

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1 19. As a third step to their joint development, Mr. and Mrs. Evans together with
2 Mr. Hunt submitted land use applications to the City of Winslow to develop their master
3 planned project as a Planned Unit Development. At the request of the City, the parties
4 submitted separate applications, although the applications were processed jointly. At the
5 time of the application, the Evans-Hunt properties were zoned commercial. Under the
6 Winslow Municipal Code, the only way to develop residential uses in the commercial zone
7 was to use the entire project to determine whether the project, as a whole, met certain
8 requirements of the City's PUD ordinance. At the time, the Winslow Municipal Code
9 required that a commercial PUD could not contain more than 66% residential square feet.
10 Without including Evans's property, Hunt could not have obtained approval to build his
11 residential project.

12 20. The Evans-Hunt project came before a hearing examiner, Robin Baker, for
13 hearing on May 22, 1991. Testifying under oath at the May 22, 1991 hearing, Mr. Hunt
14 testified:

15 The Evans's and myself joined together about – when I purchased
16 the property actually almost, well, a year and a half ago. And
17 before we purchased it we went together to do a master plan
18 because it was pretty clear that this parcel needed to be planned
19 comprehensively. And so before I even purchased the property
20 we went through a whole master planning exercise to determine
the best way to integrate this new residential use with the
commercial activities of the pub, the marina, the up-road beach
that are all part of the Evans operation.

21 21. On October 17, 1991, the City Council approved the Evans-Hunt PUD.

22 22. In 1993, Mr. Hunt ran into financial difficulties. Due to his financial
23 problems, Hunt executed a Quit Claim Deed transferring his property to a Washington
24 General Partnership called Harbourside Partners. Evans, along with Hunt, Mr. and Mrs.
25 Koh, Mr. Beckwith, and Ms. Matsumoto were all general partners in Harbourside Partners.
26 Mr. Evans was the managing partner from January 6, 1993, to September 24, 1994, and
27 again from November 17, 1995, until after all of the condominium units were sold in 1999.
28

29
30 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 5

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1 23. Section 7.4(f) of the January 6, 1993 Harbourside Partners Partnership
2 Agreement, set out the partnership obligations of Mr. and Mrs. Evans. That section
3 provides: "In recognition that the [condominiums are] a portion of an overall scheme of
4 development that includes structures to be placed upon real property owned by Evans,
5 Evans shall ... construct the "Residence/Marina Office" ... in accordance with the
6 Development Agreement previously identified." The continued development of the
7 condominiums in the master plan provided by the Harbourside Partnership agreement
8 enabled Evans to be paid the remaining sums, \$275,000, that the Hunts owed him for the
9 sale of the land upon which they were to be built, and also to recover a substantial premium
10 over that amount as a partnership distribution of profits.

11 24. On September 1, 1994, Harbourside Partners, Evans, and Parfitt Way
12 Associates executed an amendment to the Development Agreement entitled "Agreement to
13 Implement Easements and Covenants." This amendment was "for the purpose of
14 implementing the Development Agreement and the easements contained therein." In
15 Section 7 of the amendment, the parties agreed: "Unless otherwise specified herein, the
16 rights and interests of the parties, as contained in the Development Agreement, shall not be
17 abridged and are expressly reserved." The amendment was recorded in Kitsap County
18 under recording number 9409020193

19 25. On September 4, 1994, Harbourside Partners as declarant created the Marina
20 Condominium by recording the condominium declaration under Kitsap County recording
21 number 9409020193. Harbourside Partners included a copy of the Development
22 Agreement and the September 1, 1994 amendment in the condominium declaration and
23 condominium's public offering statement. The Marina Condominium building is located
24 close to and to the west of the Pub and Marina Services building, and next door to the south
25 of the HOA's condominiums.

26 26. On August 31, 1996, the Development Agreement was again amended by
27 successors to the original parties to the Development Agreement. The purpose of this
28 amendment was to change the cost sharing responsibility for a garden area within the
29 planned development. Mr. Evans signed the amendment for both parties to the amendment

30 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 6

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1 - as "managing partner of Harbourside Partners" (the condominium developer) and as
2 managing partner of Parfitt Way Associates (the then owner of the Marina Office, Pub,
3 Residence/Office portion of the development). The parties recorded the amendment in
4 Kitsap County under recording number 9609180155.

5 27. During the development of the Marina and Harbourside condominiums,
6 there were changes made to some of the structures from what is shown on the Master Plan
7 drawings. Those changes were effectively agreed to by the parties to the Development
8 Agreement, or their successors. Moreover, the changes were consistent with the Master
9 Plan and did not change any of the uses depicted in the development agreement, or the
10 character of the development, and did not erode the Master Plan. The changes in the
11 height of some of the structures were consistent with the Development Agreement in that
12 the changes were within the limits of the 1989 Winslow Municipal Code. The changes,
13 even if they had not been agreed to, were not habitual or substantial violations of the
14 Development Agreement.

15 28. On September 18, 1996, Harbourside Partners, as declarant, created
16 plaintiff's 20-unit Harbourside Condominiums by recording the Harbourside Condominium
17 Declaration under Kitsap Recording no. 9609180156 (the "Declaration"). Mr. Evans
18 signed the Declaration as a general partner in Harbourside Partners.

19 29. As required by the Washington Condominium Act (RCW ch. 64.34),
20 Harbourside Partners, with Mr. Evans as managing partner, delivered a Public Offering
21 Statement (POS) to each buyer. The Harbourside POS included the Development
22 Agreement, the Master Plan, and its recorded amendments as part of Exhibit F, entitled
23 "Covenants Affecting the Condominium." The POS did not state that all or any portion of
24 the Development Agreement had been abandoned or terminated.

25 30. In marketing the Harbourside Condominiums to the public, Harbourside
26 Partners, with Mr. Evans as managing partner, provided prospective purchasers with a
27 marketing document that showed a site plan containing a "future residence" in the location
28 of the Marina/Office to the east of the existing Pub.

29
30 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 7

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Appendix A

1 31. Exhibit F to the POS was titled "Easements and Covenants Affecting the
2 Condominiums." That section included the Development Agreement between Evans and
3 Hunt, as well as all written amendments and a copy of the Master Plan.

4 32. Mr. Evans or his company never constructed the residence and office
5 building shown on the Master Plan.

6 33. In October 1999, Mr. Evans wrote to an HOA board member in connection
7 with a boundary line adjustment that he was proposing. In that letter he also proposed that
8 as part of the boundary line adjustment, the covenants in the Development Agreement that
9 he considered to deal solely with development should be terminated by agreement. The
10 HOA ultimately disagreed with his proposal after discussions concerning possible purchase
11 of development rights had come to an end.

12 34. In 2002, Jeff Waite, an agent of Parfitt Way Associates (now defendant
13 PWM), continued in negotiations with plaintiff HOA to make a boundary line adjustment
14 to their respective properties. In the course of those negotiations, Mr. Waite argued that the
15 Development Agreement gave his company permission to build the Residence/Office next
16 door to the Pub.

17 35. In April of 2004, Evans, his daughter, Mrs. Waite, and his son-in-law, Jeff
18 Waite, along with Mr. Chester, their architect, held an informational meeting to describe
19 their plans to expand the existing Pub. The agenda for the meeting states that defendants'
20 architect would compare the current site plan to the 1989 Master Site Plan.

21 36. In June of 2004, Parfitt Way Associates, formerly known as Bar Harbor
22 Associates, recorded a Quit Claim Deed for the Pub, marina, Marina Services building, and
23 the Residence/Office portion of this master planned development to defendant PWM.

24 37. On July 1, 2004, PWM submitted its application to the City of Bainbridge
25 Island for a Shoreline Substantial Development Permit and Site Plan Review (city permit
26 number SSDP/SPR 12755). The project proposed in SSDP/SPR 12755 is to build a
27 barroom expansion structure to the east of, and attached to, the existing Pub, while
28 converting the existing Pub into a family restaurant. This expansion would be built instead
29 of the Residence/Office agreed to and made part of the Development Agreement Master

30 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 8

JUDGE M. KARLYNN HABERLY
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Appendix A

1 Plan, which was later shown as a "future residence" in the condominium marketing
2 materials provided to the condominium buyers.

3 38. The "size, shape and location" of the expansion proposed in SSDP/SPR
4 12755 is different than the "size, shape and location" of the Residence/Office structure and
5 the Pub structure that were contained in the Master Plan. The Master Plan shows the
6 Residence/Office set away from the Pub with a path between the two structures. The
7 footprint of the Residence/Office, including the garage, was to be 1,482 square feet. The
8 proposed expansion would extend to the east property line, and the footprint of the
9 proposed barroom portion of the expansion would be 20% to 31% larger than the plan for
10 the Residence/Office. The barroom/restaurant expansion would be attached to the Pub,
11 creating one large structure rather than the two smaller structures separated by a path as
12 envisioned by the Master Plan.

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

18 40. The expansion would increase the gross sales by approximately 20 to 70
19 percent, increase noise levels, add more delivery trucks, foot and auto traffic, additional
20 patrons, and would expand the footprint of the Pub by 20% to 31%.

21 41. Additionally, the change from two separate structures to one structure
22 changes the character of the view from the condominium property and was not intended by
23 Evans or Hunt without first obtaining the consent of the other party. In creating the Master
24 Plan, Evans and Hunt intended to maintain a path between the structures, and a set back
25 from the Residence/Office structure to the Pub, and a setback from the east property line as
26 well.

27 42. The parties intended that the covenants in section 4 of the Development
28 Agreement and in the Master Plan would run with the land and remain intact with an
29 indefinite life, to burden and benefit their successors and assigns.

30 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 9

JUDGE M. KARLYNN HABERLY
Kitsap County Superior Court
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2. There has been no abandonment of the covenants in section 4 of the Development Agreement.

3. The covenants in section 4 of the Development Agreement have not terminated.

4. The covenants in section 4 of the Development Agreement are currently in effect and burden and benefit the property owned by PWM and the property owned by the individual members of the HOA.

5. The covenants in section 4 of the Development Agreement may be enforced by the HOA against defendants as real covenants and equitable restrictions.

6. The HOA has clear legal and equitable rights that have been invaded by PWM.

7. Defendants are permanently enjoined from expanding the Pub as proposed in City of Bainbridge Island SSDP/SPR 12755, unless and until they obtain the Harbourside Condominium owners' consent to amend the Development Agreement.

8. The HOA is the prevailing party in this lawsuit and is entitled to its attorneys' fees under Section 28 of the Development Agreement. The Court will enter separate findings of fact and conclusions of law for the attorneys' fees.

September
Dated: August ~~29~~, 2006

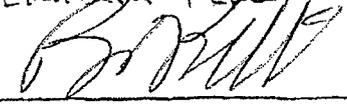


JUDGE M. KARLYNN HABERLY

Approved as to form without waiving any rights as to reconsideration or appeal:

Jameson Babbitt STIKS }
Lambert PLWC

Davis Wright Tremaine
LLP

By: 
Bruce Babbitt, WSPA 4830

By: 
Alan Middleton, WSPA 18118

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 11

JUDGE M. KARLYNN HABERLY
Kitsap County Superior Court
614 Division Street
Port Orchard, WA 98366
(360) 357-7140

A.F.#: 9409020193
REEL 0824 FR 0972

AGREEMENT TO IMPLEMENT EASEMENTS AND COVENANTS

This Agreement is entered into between Harbourside Partners, a Washington General Partnership, and James Evans and Judith Evans, husband and wife, for themselves and on behalf of Parfitt Way Associates (formerly known as Bar Harbor Associates), a Washington Limited Partnership (hereinafter "Evans"). The purpose of this Agreement is to delineate and to specify the rights, interests, duties and responsibilities of each party with respect to the various easements and covenants that exist between the parties.

Whereas Harbourside Partners has acquired certain real property on Bainbridge Island, Washington from John Hunt and Denice Hunt ("Hunt") for the development of a thirty unit (in two phases) condominium;

Whereas Harbourside Partners, as a part of the acquisition of Hunt's real estate interest, also acquired the rights and interest of the Development Agreement and Covenants Running With The Land ("Development Agreement") that the Hunts have entered into with the Evans on December 1, 1989.

Whereas Harbourside Partners has subdivided the development into two condominium projects; a ten unit Phase I Marina Condominium at Harbourside now being completed and a twenty unit Phase II Condominium project to be developed;

Whereas now Harbourside Partners and Evans are desirous of entering into an agreement for the purpose of implementing the Development Agreement and the easements contained therein. There are five easements contained within the Development Agreement and each can be described generally as follows:

Easement A: The parking lot leading to the pub owned by Evans.

Easement B: The central garden area.

Easement C: The parking lot and driveway leading to the Marina condominium and the Marina.

Easement D: Waterfront strip of land that exists between Eagle Harbor and the Marina Condominium property.

Easement E: The pedestrian sidewalk easement leading from Easement A to the Marina.

(See attached Site Plan which provides a pictorial/graphic presentation of the Easements)

SFP 2 1994

KITSAP COUNTY
TREASURER

APPENDIX B

Now therefore, for mutual benefit and consideration, the Parties agree as follows:

(1) Easement "A" (The Parking Lot Leading to the Pub): This easement will be the joint responsibility of Evans and the undeveloped 20 unit condominium. The and the undeveloped 20 unit condominium and the Evans will be responsible for the care, maintenance and management of this easement. Each party will be responsible, proportional to the party's usage of Easement A, for a percentage of the care and maintenance of this Easement. The specific share of responsibility of each party is to be determined upon the construction of the condominium. It is anticipated that the 20 unit condominium will have five (5) guest parking spaces to be located in Easement A.

(2) Easement "B" (The Garden): The yet to be constructed 20 unit condominium will be solely responsible for the care, maintenance and the management of Easement "B." All issues relating to the care, maintenance and the management of The Garden are to be decided by the Homeowner Association of the yet to be constructed 20 unit condominium. This includes but is not limited to actions such as manner of usage, garden design, purchase of insurance, hiring of landscaper/grounds keeper, payment of utilities and passage of rules and regulations governing the use and enjoyment of The Garden. Nothing herein, however, shall prevent the access, use and enjoyment of The Garden by all the condominium unit owners (both phases) and the Marina moorage tenants.

(3) Easement "C" (The Parking Lot and Driveway Leading to the Marina Condominium and the Marina):

(A) Unless otherwise excepted, Evans will be responsible for the following:

(a) Repair, maintenance and management of the brick/concrete driveway/walkway leading to the Marina, including any capital improvement that may be needed from time to time;

(b) The maintenance and management of all the paved portion of Easement C, including the entire parking lot situated on Easement C.

(B) The Marina Condominium will be responsible for the care, maintenance and management of all the landscaping work situated in Easement C, including the lighting for the parking lot and the driveway.

(C) Notwithstanding Paragraph (A) above stated, repair and capital improvement to the paved portion of the Easement C (i.e., resealing or repaving of the parking lot) will be the joint

A. F. #: 9409020193
REEL 0824 FR 0973

responsibility of Evans and the Marina Condominium, with Evans assuming 40% of the responsibility and the Marina Condominium assuming 60% of the responsibility.

(D) It is agreed that the trash collection should be the separate responsibilities of the respective parties. There shall be separate containers and billings for Evans and the Marina Condominium. Evans will be responsible for the trash collection relating to the Marina and the Marina Condominium shall be responsible for the trash collection relating to the Condominium.

(E) It is anticipated that the Marina condominiums will have seven (7) guests parking spaces to be located in Easement C.

(4) Easement "D" (The Waterfront Property): Evans will be responsible for the care, maintenance and management of Easement "D", up to but not including the wooden bulkhead and brick wall not situated in Easement "D." Included herein is the adequate lighting of Easement "D." The wooden bulkhead and brick wall are the responsibility of the Marina Condominium.

(5) Easement "E": (The Pedestrial Sidewalk easement the Parking Lot Leading to the Marina): Evans will be responsible for the care, maintenance and the management of this Easement.

(6) In all the easements, the responsible party or parties for each easement will be responsible for the care, maintenance, management, and the control of each easement. This includes the responsibility for all costs incurred for repair, maintenance, utility charges, insurance, removal of snow, ice, debris, unauthorized parking, etc. If there are two or more parties jointly responsible for an easement, the participating parties of each easement will have a proportional voice in the management authority of the easement, including the establishment of rules and regulations, collection of assessments, purchase of insurance, hiring of employees, etc. The participating parties need not pay any property taxes on the easements since the property taxes follow the property lines and are to be paid by the respective property owners.

(7) Unless otherwise specified herein, the rights and interests of the parties, as contained in the Development Agreement, shall not be abridged and are expressly reserved.

(8) This Agreement, and the terms set forth herein, is and shall remain binding and enforceable against the parties hereto, their heirs, successors, and assigns, and this Agreement shall run with and bind the land described in the Development Agreement and the easements described therein.

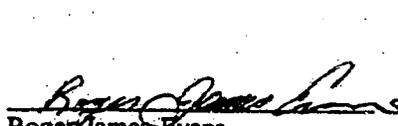
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REEL 0824 FR 0974

(9) This Agreement shall be enforceable by injunction or action for damages, or both. In the event a suit is commenced to enforce any provision of this Agreement, the prevailing party shall be entitled to all reasonable disbursements and reasonable attorney's fees incurred in connection with such action.

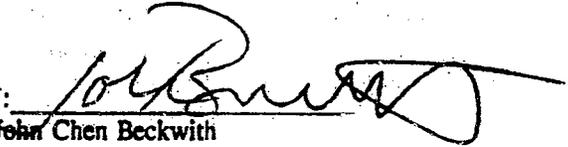
Dated this 15th day of September 1994.

"Evans"

Harbourside Partners


Roger James Evans

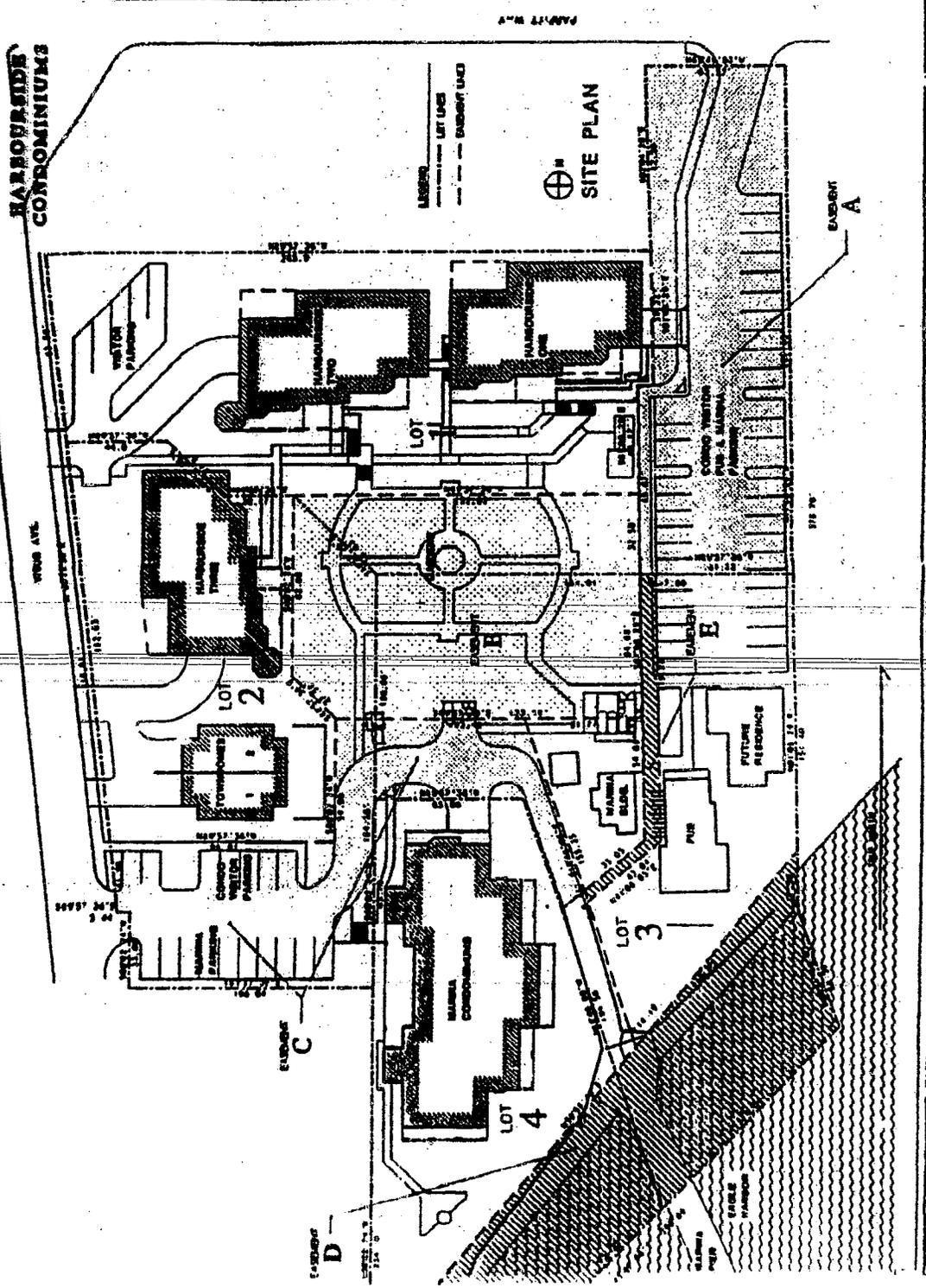
BY:


John Chen Beckwith
Managing Partner


Judith Ann Evans

A. F. #: 9409020193
REEL 0824 FR 0975

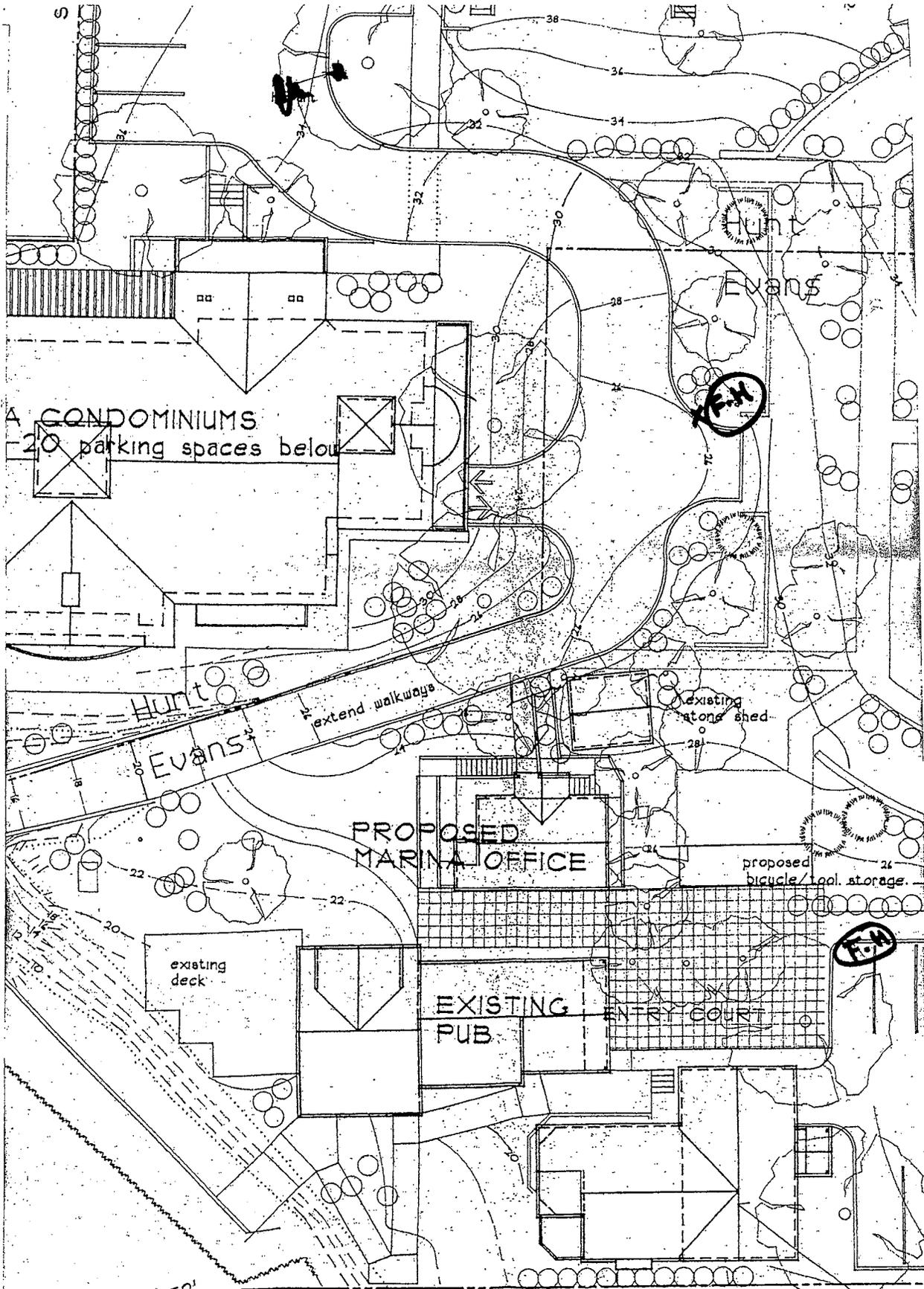
**HARBORSIDE
CONDOMINIUMS**



SITE PLAN

A.F. #: 9409000194
REEL 0824 FR 0777

APPENDIX B



A CONDOMINIUMS
 - 20 parking spaces below

PROPOSED
 MARINA OFFICE

EXISTING
 PUB

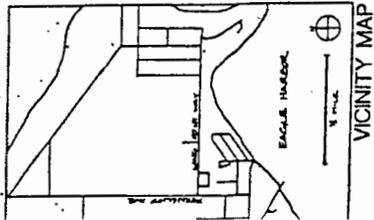
EXISTING
 ENTRY COURT

PROPOSED OWNERS RESIDENCE
 AND YACHT SALES

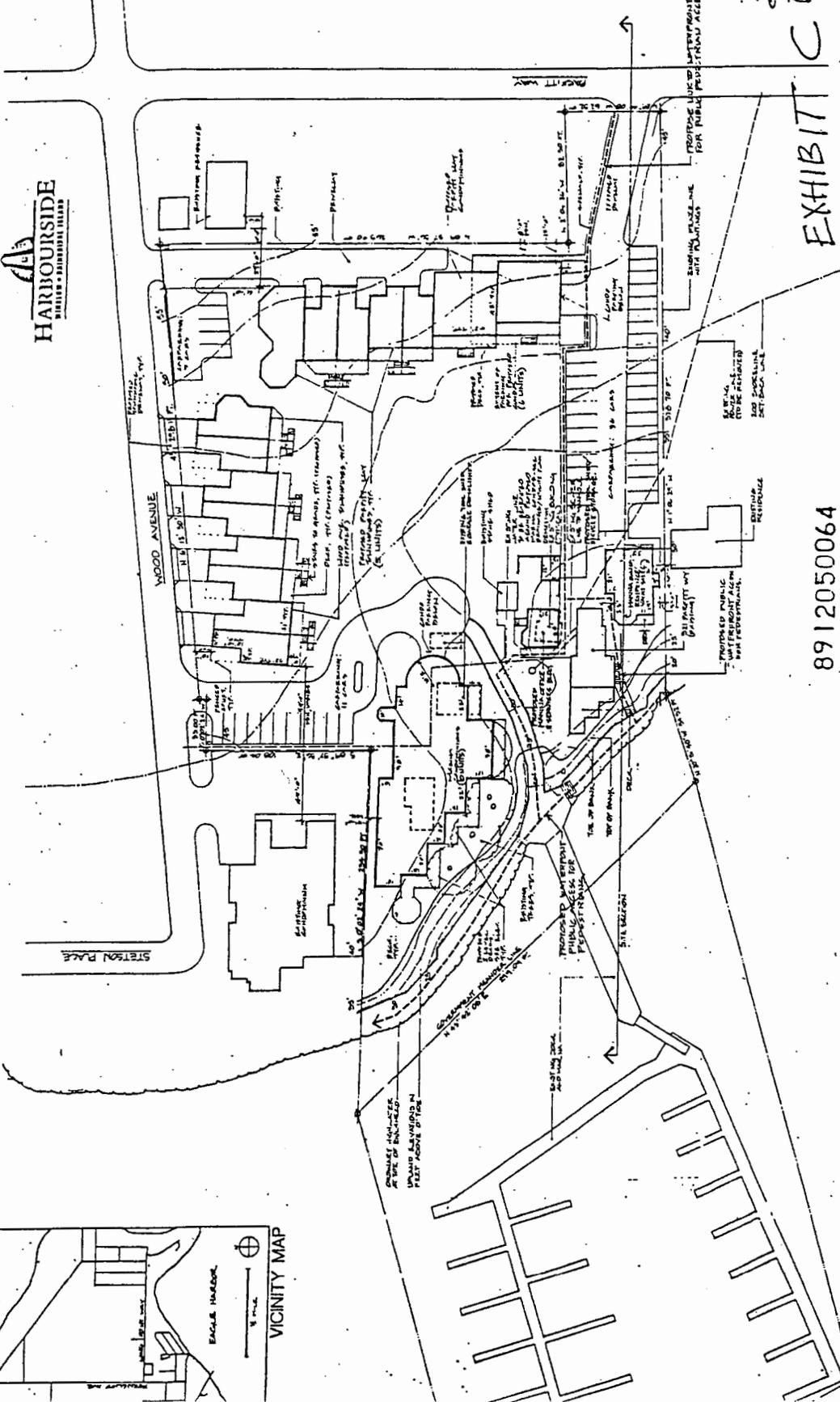
20° 51' 40" W 54.52'

APPENDIX C
 (Partial Copy of Exhibit 41)

Existing
 Residence



HARROURSIDE
 BUILDING & SUBDIVISION PLANNERS



R.V.E.
~~DATE~~
~~DATE~~

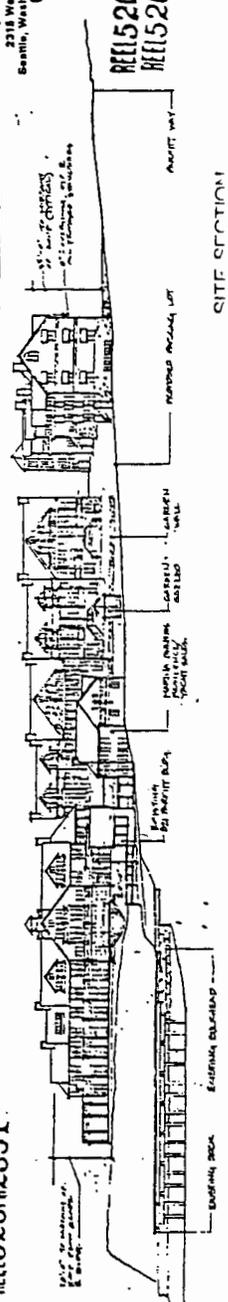
8912050064

ME1520R2615
 ME1526R2391

9001250131

HUNT ASSOCIATES
 ARCHITECTS
 2318 Western Avenue
 Seattle, WA 98122
 (206)728-1824

SITE PLAN
 5/21/15 - 10/15/15



ME1520R2616
 ME1526R2392

APPENDIX E
 (Exhibit 20, Exhibit C)