

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

No: 35787-9-II

In re:

OAKBROOK 7th ADDITION HOMEOWNERS ASSOCIATION
Appellant/Plaintiff

v.

MICHAEL NEWHOUSE and KAREN NEWHOUSE,
Appellees/Defendants.

BRIEF OF APPELLANT

Respectfully Submitted


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I. INTRODUCTION

Michael and Karen Newhouse (Newhouse) live in Oakbrook 7th Addition, Lakewood, WA. In late 2004, Newhouse started building a large two story garage in his back yard. On January 14, 2005, the Oakbrook 7th Addition Homeowners Association via its Architectural Committee chairperson (HOA) directed him to stop construction primarily because he never sought approval from the HOA and his plans were not in harmony with the neighborhood. When the HOA saw Newhouse return to work on his garage in July 2005, the HOA filed a lawsuit seeking an injunction on July 27, 2005. Mr. Newhouse continued working on the garage which at the time of trial was structurally complete.

The trial court applied the doctrine called “balancing the equities” because the HOA failed to prove Mr. Newhouse had actual notice of the covenant protections. The court then applied equitable estoppel citing the same facts discussed in balancing of the equities. In balancing the equities, the Court evaluated the relative costs and benefits of taking the building down. The Court also incorporated a review of many other outbuildings in Oakbrook 7th Addition that the court related led Newhouse into believing he would not need to inquire about the covenants. The Court related that the HOA should have directed

Newhouse to stop sooner because trucks had been coming to his house and men were hammering. The Trial Court declined to enjoin the project, a Motion for Reconsideration was argued and denied and this appeal followed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in not granting an injunction mandating removal of a structure admitted to be in violation of protective covenants.
2. The trial court erred in not granting Plaintiff's Motion for Reconsideration.
3. The trial court erred in entering judgment against the homeowners association.
4. The trial court erred in permitting equitable defenses of balancing hardships and equitable estoppel.
5. The trial court erred in not adopting Plaintiff's findings of fact and conclusions of law.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should a Homeowners Association have to prove a covenant violator had actual notice of covenants to avoid balancing hardships when seeking to enforce covenants? (Error in Finding 7 - CP 47)

2. Is a covenant violator permitted to balance hardships to avoid an injunction when the violator continued to violate covenants after formal written notice the behavior violated the covenants and litigation progressed?

3. May a covenant violator use equitable estoppel defense when the HOA made no statement to the covenant violator inconsistent with their current position? (Error in Finding 32 CP - 51)

4. May a covenant violator use estoppel by silence when the HOA acted immediately upon notice of the covenant violations?

5. Should a court distinguish between actual reliance and reasonable reliance when a covenant violator had actual knowledge of the covenants (not necessarily the actual verbiage), had constructive knowledge via recording of the covenants, knew the HOA existed, knew the HOA enforced the covenants, received 30 communications from the HOA pertaining to Covenant enforcement, yet still decided not to investigate covenants prior to violating these covenants while acting as his own contractor?

III. STATEMENT OF THE CASE

Newhouse and his family moved into their home located at 7715 99th Ave. SW Lakewood, WA, in the Oakbrook 7th Addition, Pierce County, Washington around September 1997. (RP. 28 1.21- RP. 29 1.13).

Oakbrook 7th Addition consists of 392 homes subject to protective covenants (Ex. 1; RP. 108 l. 3-8)(RP. 74 l. 1-2).

Shortly after Newhouse moved in, a neighbor, Mr. Haun told Newhouse there were covenants governing Oakbrook 7th. Addition (RP.299 l. 3-4) However, Newhouse believed covenants were rules designed to treat people fairly, but not to restrict construction. (RP. 30. l.12-19.) Newhouse believed in 1998 that another neighbor was on the HOA Architectural Committee or was otherwise involved with enforcement at the HOA. (RP.368 l.21-25). Newhouse knew there was a HOA enforcement committee, but he did not know what the Committee did. (RP. 391 l.8 – 392 l.3). Newhouse recalled the HOA had done some work with RVs, but recalled nothing about it evaluating structures. (RP. 95 l. 18-22). Newhouse never attempted to learn about the covenants, check title, or check with the county Auditor before building because he did not know the process. (RP.392 l. 9-24).

Denise Copeland, a neighbor and defense witness could have informed Mr. Newhouse about the covenants because changes to her home needed approval by the HOA Architectural Committee. (RP. 59 l. 2-4)(RP. 59 l. 19-24). She also testified that she has a shed on bricks which was not an issue with the HOA (RP. 58 l. 16-18). It is a wood

shed like everyone has, one so small that a person cannot stand up in it and can touch both sides while inside the shed. (RP. 62 l. 4-17).

Newhouse started building his garage at the end of 2004. (RP. 304 l. 22-24). The construction work was done by Newhouse's friends from his fire station when they had the opportunity (RP. 76 l.2-7). There were no specific dates regarding any construction done prior to the HOA's letter of January 2005. (See Ex. 9 & 10)

The HOA became aware of the Newhouse project when a neighbor complained to the HOA (RP. 149 l. 2-8); (RP.221 l. 7-25). Another HOA representative heard hammering and asked the chair of the Architectural Committee if Newhouse had permission to build. (279 l. 1-3). The HOA investigated right away and directly sent a letter dated January 14, 2005, to Newhouse directing him to stop building. (Ex. 10) (RP. 204 l. 4-11). The letter clarified the violations for Newhouse. (RP. 71 l.9-14). Newhouse admitted all the violations detailed in the HOA violation letter (RP. 149 l. 16-18).

Once Newhouse got the January 2005 violation notice letter he made arrangements to meet with a HOA representative. (RP.72 l. 16-23) Newhouse acknowledged he received the January 14, 2005 letter from the HOA (Ex. 10) and the February 9, 2005 letter from the HOA (Ex. 9) (RP. 73 l. 21-24). These letters prompted Newhouse to get copies of the

covenants (Ex. 1) from a title company (RP. 74 l. 1-2); (RP. 301 l. 14-17).

Newhouse acknowledged he never contacted the HOA or its Architectural Committee before he started building the garage (RP. 55 l. 1-4). Newhouse also acknowledged the garage violated provisions of the covenants regarding setbacks (RP. 54 l. 1-17). Newhouse learned the building violated the covenants from the January 2005 letter from the HOA (RP. 55 l. 20-23). When Newhouse received the violations letters the garage was rafter height (RP. 100 l.18-22). When Newhouse talked with a representative from the HOA shortly after receiving the January 14, 2005 letter, Newhouse had framed the garage with joists going across, the garage walls were 10 feet 4 inches tall, and the structure had no roof yet. (RP. 357 l. 21-24). When the HOA representative went over to look in January 2005, Newhouse had just started to put up the rafters. (RP. 151 l. 8-16). The HOA acknowledged the walls of the garage were about 10 feet when the HOA directed Newhouse to stop construction. (RP. 181 l. 14-17).

The HOA directed Newhouse to stop construction, to protect the value of the homes in the Oakbrook 7th Addition. (RP. 116 l. 5-15) The representative related that the HOA investigates Covenant complaints and then handles these complaints to keep peace among neighbors

(RP.116 l. 116-23);(RP. 117 l. 2-18). Mr. Carmichael believes that construction being in harmony within the Addition is important, but requires judgment calls and he looks for what is out of place or unattractive and this is part of his duty as a representative of the HOA. (RP. 119 l. 7-18).

Newhouse related that his next door neighbor had a garage so he should be allowed to construct one for himself. (RP. 307 l.7-10) However, his neighbor's (Haun) workshop/garage could not be seen from the street by the representatives of the HOA. (Ex. 82; 83 re: 7709 99th: RP. 37 l. 9-19)(RP. 120 l. 1-10)(RP. 233 l. 8-17). Newhouse identified it as the yellow pin prick on Exhibit 11 (Ex. 11; RP. 369 l. 20-p.370 l.18) Moreover, out of 392 homes in Oakbrook 7th Addition the Haun workshop/garage was the only separate garage in all of the Oakbrook 7th Addition. (RP. 120 l. 17-19). Another representative from the HOA Committee lives three doors away from Newhouse but never saw the Haun building. (RP. 277 l. 12-24). The primary reason one cannot see the Haun garage is because it takes a key to access the garage from the alley (RP. 104 l. 17-20)(RP. 371 l. 21-23).

The HOA representative informed Newhouse there are no separate buildings in Oakbrook that have dormers (RP. 121 l. 5-7). Mr. Newhouse also built an additional driveway to access the garage (RP.

121 l. 10-17). Newhouse's garage appears to be about 1000 square feet on the first floor and another 1000 square feet on the second floor (RP. 122 l. 18-23). It is comparable to a standard home (RP. 122 l. 24-25). The garage is larger and taller than any other out building in Oakbrook (RP. 123 l. 10-13; Finding 14 – CP 48). Few of the other structures were as noticeable from the street as Newhouse's garage. (Finding 14; CP – 48). When the HOA representative wrote the violation letter to Newhouse the HOA related Newhouse's home was the only home in the Addition with another separate driveway, to be corrected later that there are only three homes that have separate driveways (distinguished from an extension of an existing driveway)(RP. 123 l. 21-24)(Ex. 10). Due to its enormous size, the Newhouse garage was not in harmony with the other buildings in the Addition. (RP. 274 l. 17-20). It was specifically felt that crowded lots reduce the desirability of property in Oakbrook. (RP. 248 l. 4-10)

Newhouse ignored the violation letters and started construction again about 12-16 weeks after the HOA issued the notices to stop construction. (RP.84 l. 10-16). Newhouse hired legal counsel to oppose the HOA shortly after being told to stop construction. (RP. 357 l. 2-9). Needless to say, Newhouse refusal to comply with the directive to stop construction forced the HOA to take legal action. (RP.285 l. 10-13). In

the summer of 2005, Newhouse continued to work on the garage and added the rafters (RP. 82 l.19-21) (Ex. 11) (RP.78 l. 1-11). Admitted photos show Newhouse working on other areas of the garage in the summer of 2005 (Ex. 12; RP. 83 l.12-17)(RP.223 l.1-7)(RP. 223 l. 11-18). Exhibit 12 shows Newhouse working on the garage through to the end of 2005. Newhouse finished the roof in late 2005 (Ex. 12; RP. 81 l. 14-19). At the time of trial the building was dried in. (RP. 87 l. 3-5). The Newhouse garage is now 28 feet by 32 feet for a total of 896 square feet downstairs. (RP. 52 l. 8-11). There is another 600 square feet of usable space upstairs. (RP.53 l. 4-5).

There were many reasons why the HOA felt Newhouse had notice of the Covenants, but two major reasons were the covenants were recorded and the HOA mailed notice of Covenant enforcement actions to each homeowner 4 times a year, (RP.128 l.18-21) i.e. newsletters were provided to Newhouse quarterly (RP. 133 l. 5-9). The HOA has done extensive enforcement of the Covenants evidenced by the many violation notices issues and corrective action taken by the HOA. (RP. 141-147). Not only were aggressive actions taken by the HOA, but the actions taken were published and received by Mr. Newhouse 3-4 times a year which he admitted he sometimes read. (RP. 45 l. 7-11). He also wrote an article for the HOA newsletter. (RP.45 l.22-24). He also let a

neighbor, Bob Haun write a couple of articles using his name. (RP.48 l. 12-14). He received all of the newsletters mailed to him since 1997. (Ex. 84) (RP. 50 l. 14-20). Mr. Newhouse also noticed the names of Committee members on the back page of the newsletter (RP.52 l.1).

The HOA representatives act on every covenant complaint (RP. 148 l. 18-20). It is undisputed that the HOA representatives act with no bias, honestly and in good faith. (RP. 285 l.14-21). However, the HOA representatives do not go into people's yards without permission to search for violations of covenants (RP. 148 l. 8-17). HOA representatives undisputedly performed the enforcement responsibility with integrity (RP. 215 l. 8-22)

Newhouse related that he felt he was being singled out for enforcement and provided 80 or so photographs of buildings and driveways that he felt were similar to his garage and garage access. (RP. 309 l. 6-10) In the photograph collection, Newhouse incorporated a large number of woodsheds, greenhouses, tree houses, and tool sheds in his neighbor's yards because they by definition could be considered a building. (RP. 365, l. 2-11) HOA representatives allow most sheds (RP. 124 l. 21-23) HOA believes that people need a place to put their lawnmower, gasoline, tools, etc. (RP. 125 l. 4-16) HOA prefers the non permanent 10'x12' sheds or smaller. (125 l. 17-20). It is acceptable

if a homeowner uses a shed and keeps it tucked away in a corner of the lot; also dog houses are permitted (RP. 126 l. 3-17). The representatives follow tradition in believing sheds are beneficial to Oakbrook and should thus be permitted. (RP. 271 l. 2-16). Plans are presented to HOA for buildings, but sheds as a practical matter generally have no plans to be submitted and approved. (RP.272 l.3-18). The committee consistently made a distinction between moveable and permanent structures. (RP. 210 l. 14-18). The HOA permit residents to extend driveways, but have not normally allowed a second driveway separate from the original driveway. (RP. 270 13-25). The reason a separate driveway is disfavored is because it crowds the lots, thus reducing the desirability of property in Oakbrook 7th Addition. (RP. 248 l. 4-10)

Many examples of outbuildings provided by Newhouse were difficult to notice from normal access (RP. 127 l. 5-11). Newhouse never indicated during his direct testimony that the photos he took were purported to show the structures were visible or noticeable to the public, but Newhouse needed to hold the camera up; (RP. 375 l. 3-4; 379 l. 18) take pictures from neighbor's property; (RP. 373 l. 6-7; p. 377 p. 4; p. 380 l. 21-22) and/or otherwise use telephoto lenses to get the view he wanted (RP. 379 l. 19-20; p. 382 l. 12-13.) HOA representatives took

photos from the best position that a person would normally encounter from the street. (Ex. 82, 83, 90, and 91; RP. 357 l. 15-22)

After trial, certain findings and conclusions should be highlighted. The parties acted in good faith (RP. 463). Newhouse violated the protective Covenants, i.e., he failed to submit plans to the HOA prior to building and violated two additional covenants, (Newhouse violated Article 1, Sections 2, 4, and 7 RP. 464 CP 46; Finding 4a). The building was already 10 feet high when the HOA notified Newhouse and the HOA feared immediate invasion, meeting the elements necessary for an injunction. (RP. 466).

Newhouse had constructive knowledge of the Covenants because they were recorded, but he did not have actual knowledge. (RP. 466). HOA needed to prove Newhouse had actual notice of the Covenants to defeat the doctrine of balancing of the equities (RP. 467)(Asserted Error CP 47). The Court went on to refer to examples from numerous photographs of sheds and outbuildings, and found none of the nonconforming structures are as large or as tall as Newhouse's garage. (RP. 469). There is no evidence regarding whether any of these structures were reviewed, approved, or investigated by the HOA. (RP. 469). (By nonconforming structures it is assumed the Court is referring

to violations of the set back provisions by many sheds and other outbuildings.)

The court continued for the next few pages to evaluate the potential hardships and affects the Court's decision might have on the parties. In evaluation of the hardships, the Court indicated the monetary cost of requiring Newhouse to take down the structure outweighed any benefit to the HOA.

The court moved on to evaluate the doctrine of equitable estoppel. (RP. 474). The Court held that the HOA allowed numerous and substantial violations and failed to act even though there was obvious construction going on. (RP. 474). The court stated that HOA's silence or failure to act (estoppel doctrine) comprised the same analysis set forth in the balancing of the equities. (RP. 474). HOA had not abandoned the covenants. (RP. 475)

The Court never addressed what affect Newhouse continuing to build after notice would have had on the Court's decision. The Court never addressed how constructive knowledge would permit reasonable reliance. The Court never entered Mr. Newhouse's conduct or knowledge to evaluate whether he could qualify as an innocent party or a party without fault for what occurred. Therefore, Plaintiff submitted a Motion for Reconsideration focusing on the issues raised in this brief i.e.

that there is no case in Washington where a party is allowed to continue to build after being notified to stop, and when applying equitable principals, recorded notice is equal to actual notice. The Court summarily denied the Plaintiff's Motion. (CP 101: Assigned Error)

IV. ARGUMENT SUMMARY

A significant irony of this case is that Defendant Newhouse relied on Hollis v. Garwall Inc. 137 Wn.2d 683, 974 P.2d 836 (1999) to support the defense theory. However, Hollis specifically states that anyone who continues to act in violation of a covenant after being informed their conduct violates covenants is not entitled to balance hardships. All case law mandates that equitable defenses applicable to covenant violations require innocent actors whose own actions cannot have contributed to the situation under review.

V. ARGUMENT

A. Enforcement as Legal and Equitable Right: Restrictive covenants are designed to make subdivisions more attractive for residential purposes. Hollis v. Garwell, Inc., 137 Wn.2d 683, 699, 974 P.2d 836 (1999); Viking Properties Inc., v. Holm, 155 Wn.2d 112, 118 P.3d 322 (2005). Recorded Covenants are enforceable against each person affected because notice is imputed to those who claim ignorance. Kock v. Swanson, 4 Wn. App. 456; 481 P.2d 915 (1971). The Court

places special emphasis on arriving at an interpretation of covenants that protects homeowner's collective interests. Id at 120; Piepkorn v. Adams, 102 Wn. App. 673, 10 P. 3d 428 (2000).

In Piepkorn v. Adams, 102 Wn. App. 673, Defendant Adams submitted plans for a fence and the HOA disapproved in March 1998. Defendant Adams built the fence in May 1998 anyway. Id at 678. There were two violations at issue 1) a covenant prohibited construction absent approval and 2) construction violated set back provisions. Id. 676. In November 1998, the HOA sent Mr. Adams a letter requesting him to remove the fence because it had not been approved. Id at 678.

The court granted Summary Judgment in favor of the Defendant and the Plaintiff appealed. The Court held that Mr. Piepkorn was entitled to an injunction as a matter of law. Id at 677; 685. The Court held that the HOA is empowered to review plans and construction to evaluate size, set backs, and aesthetics. Id. at 680. The owner also knew he violated the covenants because the HOA informed him via letter and he continued to build after notice. Id at 685. The Court held that there was a right violated, it had already been invaded, requiring an injunction. Id.

B. Balancing of Equities/Hardships. In Wimberly v. Caravello, 136 Wn. App. 327; _____ p. 3d _____ (2006) , the Martin Creek

community is governed by covenants requiring well proportioned structures. Id. at 331. The Caravellos decided to build a 27 foot garage with an office above and submitted plans to the Association Board. Id. The Wimberlys notified the Caravellos that the garage was not a well proportioned structure and wanted it taken down even though it was almost complete. (Id at p. 341)

The Court went on to explain that a Court may decline to grant an oppressive injunction if the offending party “did not simply take a calculated risk, act in bad faith, or negligently, willfully, or indifferently locate the encroaching structure.” Citing to Arnold v. Melani 75 Wn. 2nd 143, 152, 437 P. 2nd 908 (1968). Id at 341. The Court held:

Mr. Caravello forfeited the benefit of balancing relative hardship by proceeding with construction after receiving notice he was invading the property rights of his neighbors, Hollis v. Garwall Inc. 88 Wn. App at 16, (citing Bach v. Sarich, 74 Wn.2d 575, 445 P.2d. 648 (1968)). Mr. Carvello was warned of impending objections as soon as the planned dimensions of his structure became known. He further added to the costs of complying with the injunction by ignoring the Summons and Complaint.

Wimberly v. Caravello, 136 Wn. App. 327 (2006), at 341.

Equitable defenses to stop an injunction are only available for people who “did not simply take a calculated risk, act in bad faith, or negligently, willfully, or indifferently in locating the encroaching

structure.” Arnold v. Melani 75 Wn. 2nd 143, 152, 437 P. 2d 908 (1968). The court in Arnold, at 152 explained that since the denial of a lawful injunction “is exceptional relief for the exceptional case, we further require that the evidence of the elements listed above clearly and convincingly be proven by the encroacher.” Id.

The trial court in this case neglected to evaluate Newhouse’s participation in the problem at hand; otherwise, the Court would likely have come to a different conclusion and issued the injunction. Newhouse had constructive knowledge of the covenants, Newhouse took a calculated risk when ignoring the letter from the HOA, Newhouse continued to build after a lawsuit had been filed making it impossible for him to prove the equitable defenses assigned as error. Since the burden of proof is especially high i.e. clear and convincing evidence, no equitable defense is available to Newhouse.

In Mahon v. Haas, 2 Wn. App. 560; 468 P.2nd 713 (1970), Ms. Mahon attempted to apply the doctrine of relative hardship or balancing the equities to avoid removing a green house she erected. Id at 565. Ms. Mahon argued that the greenhouse cost \$5,000.00 and removal would be expensive, the damage to the neighbor would be negligible, but provided no evidence regarding the cost of removal. Id at 565. The Court held that removal was proper because the balancing of the equities is reserved

for the innocent party who proceeds without knowledge or warning that their structure encroaches on another. *Id.* The Court held that by erecting the greenhouse after receiving a violation letter from a lawyer, she acted either taking a calculated risk and/or acted with indifference to the consequences. *Id.* It may be unfortunate that Mr. Newhouse expended money to start and complete his garage, but that is not a relevant factor in granting or denying the injunction.

In Foster v. Nehls, 15 Wn. App 749; 551 P.2d 768 (1976), neighbors told Mr. Nehls that his plans to build a home might violate the restrictive covenants. *Id.* at 750. The neighbors were concerned that the second floor might obstruct their view in violation of the restrictive covenant. *Id.* The Nehlses proceeded with construction despite knowing the neighbors were concerned. *Id.* The neighbors brought an action as the foundation forms were being built. *Id.* The Nehlses completed the home before the Court could make a ruling. *Id.* The Court ordered Mr. Nehls to remove the second story. *Id.* The Nehlses sought to apply the balancing of the equities defense. The Court held:

Balancing of the equities is available only to an innocent party who proceeds without knowledge or warning that he is acting contrary to another's vested property interest. The Nehlses did knowingly continue in the face of ongoing legal action and, according to Mr. Nehls himself, "assumed the risk" of the outcome, making a balancing of the equities unavailable to them.

Foster v. Nehls, 15 Wn. App 749, 754, 551 P.2d 768 (1976)

Mr. Newhouse became aware of the Covenants no later than January 2005, and litigation started on July 27, 2005. Starting in the summer of 2005 Mr. Newhouse began construction again and did not stop. Newhouse was just starting to get over fence height when notified to stop and now Newhouse has a dried in 2 story roofed garage. As with Mr. Nehls, Newhouse knowingly continued to build and assumed the risk precluding a balancing of the equities defense. Id at 754.

In May 1995, Garwell Inc., cleared land and began a rock crushing operation. Hollis v. Garwall Inc. 137 Wn.2d 683; 687, 974 P.2d 836 (1999). Hollis and another neighbor complained to Garwell that the activities violated the restrictive covenants.. Id. Garwell ignored their requests and continued their activities. Id. When Garwell continued with the operation, Hollis brought an action seeking an injunction against Garwell Inc. The Trial Court found on Summary Judgment that a covenant existed and Garwell Inc. violated the covenant and granted Summary Judgment, issuing an injunction., Id at 688. The Supreme Court Affirmed.

Garwell Inc. argued that even if the covenants were violated the Trial Court must balance the relative equities. Id at 699. Garwell

argued that “a court considering whether to grant an injunction may consider and weigh equitable factors, such as the relative hardship likely to result to the defendant if the injunction is granted and to the plaintiff if it is denied.” Id. The Supreme Court rejected the argument holding:

The Plaintiffs had informed Garwall of the restriction on the use of the land. With this information, and knowing that Plaintiff’s objected to its activities, Garwall proceeded with its mining and rock crushing operation. Garwall was not without knowledge of warning that its activities encroached on the rights of others. Garwall is not entitled to a balancing of the equities prior to the imposition of an injunction.

Hollis v. Garwall Inc. 137 Wn.2d 683; 700, 974 P.2d 836 (1999).

The HOA notified Newhouse to stop early in 2005 placing Newhouse on notice that his activities encroached on the rights of others. As a result of knowingly violating the rights of others Newhouse is not entitled to balance the equities prior to granting an injunction. Id.

In Wilhelm v. Beyersdorf, 100 Wn. App. 836, 999 P.2d 54 (2000), neighbors litigated the location and validity of an easement and the placement of a well head. Id. at 841. The Court granted reformation of the easement and required the Beyersdorfs to incur all costs associated with expansion of the road to meet Plaintiff’s future plans or remove the wellhead. Id. The Beyersdorfs were upset because the Court did not consider the hardship imposed by the costs of the potential

widening of the road next to their wellhead and home. Id at 846. The Beyersdorfs appealed, contending that the trial court should have at the least balanced the equities. Id at 846. The Court stated that the doctrine of balancing the equities is reserved for the innocent defendant who proceeds without knowledge that he is encroaching on another's property rights. Id at 847. The Court rejected the equitable defense holding:

Due to their actual and/or constructive knowledge that their property was encumbered by an easement on an existing road, the Beyerdorfs were not innocent defendants when they built on the established road's surface. The filed easement gave notice that it was 40 feet in width. Under these circumstances, the Beyerdorfs were not innocent defendants and consequently were not entitled to a balancing of the equities before the court granted the reformation.

Wilhelm v. Beyersdorf, 100 Wn. App. 836, 847, 999 P.2d 54 (2000)

Newhouse had legally imputed knowledge of recorded covenants. The filing of covenants is sufficient of itself to prevent any balancing of the equities. The purpose of recording documents serves to protect property rights. Ellingsen v. Franklin County, 117 Wn. 2d 24, 30, 810 P.2d 910 (1991). (Briefed at CP 35)

Newhouse may not balance equities because he acted negligently in placing the encroaching structure. Arnold v. Melani 75 Wn. 2d 143, 152, 437 P. 2d 908 (1968). Here, Mr. Newhouse knew there were

covenants when he moved into Oakbrook. Newhouse's neighbors with whom he associates knew about the covenants. Newhouse knew there was a homeowners association that enforced violations. Newhouse knew that HOA published newsletters that came out four times a year. Newhouse knew how to locate the Committee representatives. Newhouse just did not know how to go about getting a copy of the Covenants. However, Newhouse found a copy right away after HOA contacted him. What more can be expected of a HOA than to inform Newhouse and others that there is a Covenant Enforcement Committee enforcing covenants? Newhouse received 30 newsletters from the HOA each discussing covenants.

Newhouse relates he received these newsletters, but accepts no responsibility for not taking notice of their contents. What more could the HOA have done but bombard the residents in the addition with information about the covenants. Newspapers, newsletters, and other media are designed to inform and educate, just as these were.

Another factor to consider would be what if a contractor had constructed the garage without obtaining a copy of the covenants. It would be negligent for a builder not to locate covenants and incorporate them into construction plans. Newhouse would believe that another contractor would have breached a duty to him if he did not at least make

an effort to see if covenants might force the building to be removed. Some type of effort would be prudent and the failure to investigate is negligent.

It is a potential but mistaken assumption that if a Court will balance the equities when a HOA seeks to enforce a covenant, a covenant violator will benefit by continuing to build because that will increase the detriment to the violator. A violator will benefit from self induced ignorance. In this case, both of these assumptions and the resultant consequences have serious public policy concerns. A violator cannot be encouraged to increase costs and risks of construction by continuing to build after being told to stop. Furthermore, public policy would benefit from persons being presumed to be aware of filed and recorded documents, and if they are not, they certainly should be held accountable for not having checked public records before acting. The public policy should be to reward those who investigate before building rather than benefit those who bury their heads in the sand.

C. Equitable Estoppel. There is little more that the HOA could have done to inform its residents of the Covenants. The HOA recorded the Covenants and even provided 30 mailed newsletters to Newhouse. There was no action on their part inconsistent with their position as

reflected in each and every newsletter. This leads to a discussion of why equitable estoppel is also inappropriate and disallowed in this situation.

Equitable estoppel requires:

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

Peckham v. Milroy, 104 Wn. App. 887, 892, 17 P. 3d 1256 (2001);

Wilhelm v. Beyersdorf, 100 Wn. App. 836, 849, 999 P.2d 54 (2000).

Each element must be proven by clear, cogent, and convincing evidence. Id. Equitable estoppel is not favored. Id. Citing to Robinson v. City of Seattle, 119 Wn.2d 34, 82, 830 P.2d 318 (1992). "Additionally, the party asserting the doctrine must be free from fault in the transaction at issue." Rhodes v. City of Battle Ground, 115 Wn. App. 752, 769, 63 P.3d 142 (2002).

Equitable estoppel has the effect of precluding one party from offering an explanation or defense that he or she would otherwise be able to assert. The law does not encourage enforcing such silence, and so demands from the party asserting an estoppel the highest possible burden of persuasion. "No party ought to be precluded from making out his case according to its truth . . . [h]ence, the doctrine of [equitable estoppel] must be applied strictly, and should not be enforced unless substantiated in every particular." Stouffer-Bowman, Inc. v. Webber, 18 Wn.2d 416, 428, 139 P.2d 717 (1943). The burden of "clear, cogent, and convincing evidence" serves

to ensure that the party against whom the estoppel is asserted is not unjustly silenced.

Colonial Imports v. Carlton Northwest, 121 Wn.2d 726, 731, 853 P.2d 913 (1993).

In Peckham v. Milroy, 104 Wn. App. 887, 892, 17 P. 3d 1256 (2001), Ms. Milroy obtained a license to operate a daycare in December 1995. Mr. Peckham complained that the children were noisy and the parents would park all around his house and walk across his yard. Id at 890. In July 1996, Mr. Peckham told the original owners family members he objected to the daycare and the daycare violated the restrictive covenants. Id. In November 1997, Mr. Peckham sued to enjoin the daycare. Id.

Mr. Milroy argued the covenants were abandoned, laches, and estoppel prevented enforcement of the covenant. The Court rejected the argument because Mr. Peckham made no statements nor took any action inconsistent with his asserted position. Id at 892. Mr. Milroy also argued that silence can lead to equitable estoppel where a party knows what is occurring and would be expected to speak if he wished to protect his interests. Id. Since Mr. Peckham protested the operation of the daycare, the defense failed. Id. Finally the Court held that since the

Milroy never contacted Mr. Peckham about their operation she did not rely on Mr. Peckham whatsoever in operating the daycare. Id at 893.

Mr. Newhouse never contacted the HOA before construction, but the HOA informed him via Newsletters about the covenants. It is not possible any statement by the HOA could be inconsistent with a current position. Silence also could not apply because prior to notifying Mr. Newhouse to stop the HOA did not know anything about his garage. The HOA went to Newhouse immediately and after two weeks Newhouse provided the HOA the plans showing how huge he intended to build his garage. Then after another two weeks the HOA provided a second letter rejecting the garage. The doctrine of equitable estoppel is available only to an innocent party who was induced to change his position to his prejudice by the HOA. Christman v. General Constr. Co., 2 Wn. App 364, 365, 467 P.2d 867 (1970).

Consolidated Freight Lines v. Groenen, 10 Wn. 2d 678; 677, 117 P.2d 966 (1941), discussed factors similar to whether silence by the HOA can be an element of estoppel. “Estoppel by silence does not arise without full knowledge of the facts, and a duty to speak on the part of the person against whom it is claimed.” Id at 677. In Consolidated Freight Lines v. Groenen there was no evidence that any officer, agent, or representative of the county knew the building was being constructed

until it was completed, precluding an estoppel by silence argument. Id. at 678. Estoppel by silence cannot be shown by Newhouse since there is no evidence anyone in the HOA knew of Newhouse's intentions until after he met with the HOA and gave the plans to the HOA representative.

In Wilhelm v. Beyersdorf, 100 Wn. App. 836, 849, 999 P.2d 54 (2000), the Court addressed the issue of equitable estoppel. The issue was whether the Wilhelms made a statement that they later contradicted (element 1) and whether anyone could have reasonably relied (element 2) on the Wilhelms not having obtained a survey themselves. Id. at 849. The court rejected the estoppel assertion primarily because the Beyersdorf had notice of the easement from the title report and the existence of an established road on the property. Id. at 849.

Having constructive notice of covenants precludes reasonable reliance on another party's conduct asserting otherwise. Wilhelm v. Beyersdorf, 100 Wn. App. 836, 846, provides

If the purchaser had knowledge of facts sufficient to excite inquiry, however, we presume the purchaser had constructive knowledge of all that the inquiry would have discovered. Miebach, 102 Wn, 2d at 175-76. "Inquiry is not limited to searching record title." Kirk, 66 Wn. App at 240. Recording the easement with the county auditor gives constructive notice to any successors in title. Ellingsen v. Franklin County, 117 Wn. 2d 24, 30, 810

P.2d 910 (1991) (citing RCW 65.08.070); Kirk, 66 Wn. App. At 239-40.

Wilhelm v. Beyersdorf, 100 Wn. App. 836, 846

Hollis v. Garwall Inc. 137 Wn.2d 683; 693, 974 P.2d 836 (1999) further supports that purchasers have notice of recorded restrictions to real estate. Id. Recording statutes are intended to provide constructive notice to land possessors who have restrictions burdening their land. See RCW 65.08.070 (race-notice recording act). If a restriction is recorded, any subsequent purchaser is assumed to have constructive notice. Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co., 102 Wash. 608, 619, 173 P. 508 (1918); Murphy v. City of Seattle, 32 Wn. App. 386, 392, 647, P.2d 540 (1982).

Since notice is imputed to Newhouse, he cannot be an innocent party or be free from any fault for building his garage in violations of the covenants. Before he built the garage, Newhouse said he did not know the process to find the covenants, but after Newhouse got the letter from the HOA Newhouse learned the process to obtain the covenants right away.

Newhouse knew there were covenants, his neighbors knew about the covenants, Newhouse knew there was a homeowners association, Newhouse knew there were newsletters to review four times a year,

Newhouse knew how to locate the Committee representatives etc. This would certainly have been sufficient information to “excite inquiry” and he is held to have known everything the inquiry would have revealed. Wilhelm v. Beyersdorf, 100 Wn. App. 836.

The HOA should not be forced to allow a huge garage that violates the covenants in the addition because Newhouse was too stubborn to look up the covenants, built in violation of covenants, kept building after being told to stop, and kept building even after being sued.

D. Covenant Article IV. Other rules of law govern this situation, although the arguments presented above provide the basis for the Court to remand directing the trial court to issue the injunction.

To protect the general plan and Covenant enforcement, CCR Article IV provides that a failure to enforce a covenant or restriction at a given time “shall in no event be deemed a waiver of the right to do so thereafter”. Therefore, even if the HOA allowed sheds and failed to notice other outbuildings, the language in the CCR follow the holding in Mt Park Homeowners v Tydings, 125 Wn.2d 332, 344, 884 P.2d 1380 (1994) where the “CCR unambiguously mandates separate treatment of each covenant, As a result we hold the terms of the CCR make evidence of violations of other covenants irrelevant to the present case.” Id. At

345. The court in Tydings also held that the defendant could only avoid enforcement with facts supporting a viable defense. Id at 342.

E. Reasonable Interpretation. In Riss v. Angel, 131 Wn.2d 612, 934 P. 2d 669 (1997), the Supreme Court rejected the old adage that covenants are disfavored in favor of free use of land in favor of enforcement of Covenants to protect homeowners. In Homeowners Ass'n v. Witrack, 61 Wn. App. 177, 810 P.2d 27 (1991) the Court reviewed intended application of covenants. Id. At 180. The Court interpreted trees to be within the definition of fences and required approval by the HOA per the CCRs. Id at 181. The Court reasoned that the goal is to arrive at the collective homeowner's interests using reasonable interpretations. Id.

The court related that when looking at covenants the court must look at everything in "the context of the surrounding document, the surrounding circumstances, the subsequent acts and conduct of the parties, and the reasonableness of the respective interpretations of the contract." Id. A factor argued by Newhouse that borders on an absurd interpretation of the Covenants would be that the covenants, although they prevent separate buildings, would prevent homeowners from having tree houses, sheds, car covers, and dog houses. This is where common sense interpretations of contract provisions protect homeowners covered

by covenants. The Court looks to what is more harmonious with the overall purpose of the covenants after considering all relevant evidence. Homeowners Ass'n v. Witrack, 61 Wn. App. 177, at 184.

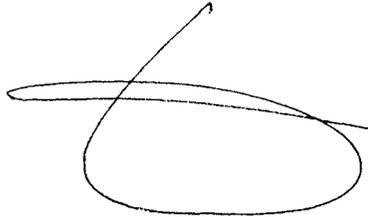
F. RAP 18. Cost and Fees. The Plaintiff/Appellant in this case incurred a filing fee, transcription production costs, and costs to produce records and documents for review. In the event the Appellant prevails, the Appellant seeks the costs incurred in the action, to include statutory attorney fees and other filing fees incurred at the trial level.

VI. CONCLUSION

Oakbrook HOA believed covenants would be binding on the homeowners living in the 7th addition. The current HOA representatives dedicated a fair portion of their lives for the last 7 years to volunteer for HOA and to act on and enforce all reported and known covenant violations within the addition. Then when a resident notified the HOA Newhouse started constructing a large garage the HOA told him to stop. When the HOA learned how monstrous the intended structure would be they again asked him to stop in writing. They watched in virtual disbelief as Newhouse ignored the request and focused on litigation in the hope that by putting a larger amount of money into the structure he could assure that it would seem unfair or too costly to make him tear it down. Then, after the HOA to has prevailed on all the issues regarding abandonment, arbitrary enforcement, and

fairness, the Court applied a defense that contravenes common sense, public policy, and relevant case law. The HOA asks this Court to remand the case with instructions to issue the injunction pursued in the complaint.

5/14/07

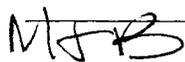


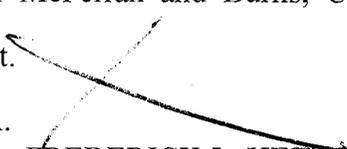
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DECLARATION OF SERVICE

The attorney for Appellant Oakbrook 7th Addition hereby declares under penalty of perjury under the laws of the State of Washington that on or before the 14th day May 2007 he served by personal delivery to the office of McFerran and Burns, Counsel for Respondent, the Brief of Appellant.

DATED: 5/14/2007 at Tacoma WA.

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FREDERICK L. HETTER, 217984
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MAY 14 2007

