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COURT OF APPEALS  
DIVISION II

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

**No: 35787-9-II**

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**In re:**

**OAKBROOK 7<sup>th</sup> ADDITION HOMEOWNERS ASSOCIATION  
Appellant/Plaintiff**

**v.**

**MICHAEL NEWHOUSE and KAREN NEWHOUSE,  
Appellees/Defendants.**

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**REPLY BRIEF OF APPELLANT**

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**Respectfully Submitted**

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## I. ARGUMENT

### A. Precedent; Stare Decisis.

The legal issues and trial testimony presented were not complex. Mr. Newhouse testified that he started building a garage in late 2004. (RP 304). He noticed a neighbor's garage, sheds, and other small structures in Oakbrook comforting him into believing he can build one himself. (RP 304). When neighbor saw the walls going up over fence level they called the HOA. (RP 149; RP 221)

The HOA came over and told Mr. Newhouse in writing to stop (twice). (RP 73). Newhouse hired a lawyer to contest the HOA's authority and in the summer of 2005 he started building again. (RP 78; See photographs; Exh. 11) Through the end of 2005, Mr. Newhouse put up the remainder of the walls, the second story, dormers, a roof etc. (RP 81-88 Exh 11-13).

Due to Newhouse's conduct, equitable defenses are unavailable. Equitable principles apply when someone is innocent and others are at fault. The problem with the Newhouse construction arose because of what Newhouse did and what he did not do, not anything the HOA may or may not have done. Newhouse did not look at or ask anyone whether covenants prevented building a large garage in the

Oakbrook 7<sup>th</sup> Addition. Then after being told to stop, he arrogantly continued to build the garage. He must have failed to contact his attorney who would have informed him that he would be taking a risk if he continued to build. How can someone not conceive fault here?

Washington case law, specific to this issue governs the decision here. Wimberly v. Caravello, 136 Wn. App. 327; \_\_\_\_\_ P.3d \_\_\_\_\_ (2006); Arnold v. Melani 75 Wn. 2<sup>nd</sup> 143, 152, 437 P. 2<sup>nd</sup> 908 (1968); Mahon v. Haas, 2 Wn. App. 560; 468 P.2<sup>nd</sup> 713 (1970); Foster v. Nehls, 15 Wn. App 749; 551 P.2d 768 (1976), Hollis v. Garwall Inc. 137 Wn.2d 683; 687, 974 P.2d 836 (1999); Wilhelm v. Beyersdorf, 100 Wn. App. 836, 999 P.2d 54 (2000) .

Consistency in the application of law to fact is a guiding rule of law. Allstate Ins. Co. v. Peasley, 131 Wn.2d 420, 433, 932 P.2<sup>nd</sup> 1244 (1997) citing to State v. Ray, 130 Wn.2<sup>nd</sup> 673, 677-78, 926 P.2d 904 (1996). To find otherwise would cripple the protections provided by covenants. Public policy should never permit someone to knowingly continue to build something that they know violates covenants. Especially, an exception should not be permitted for a violator who testifies at trial he did not know anything about any covenants, and

then ask the Court to balance his time, costs, and efforts against costs and benefits to an HOA.

The cases seem pretty clear, for example Hollis v. Garwall Inc. 137 Wn.2d 683; 687, 974 P.2d 836 (1999). There, the Court reviewed the general rule of law regarding covenant enforcement via injunction, then applied the specific rule of law, honed through time, precluding the equitable defense where the violator took a calculated risk by building after notice to stop. It is not relevant that sheds and other out buildings are in Oakbrook, but potentially relevant is that the Oakbrook 7th HOA protects and defends the covenants with vigor. (see Oakbrook 7<sup>th</sup> Newsletters). The Court specifically found that the Oakbrook HOA had not abandoned the Covenants. Case law provides a builder is responsible for knowledge of recorded covenants and a person is never permitted to build knowing the HOA objects to the continued construction.

B. Reliance.

First, Mr. Haun and Mr. Vandersheer did not testify at trial. The Court ruled that Mr. Newhouse testimony about what Mr. Haun might have told him ten years prior was used only for what Newhouse

understood, not for the accuracy of anything Mr. Haun might have indicated. (RP 360)

Second, Newhouse indicates HOA delays harmed him. The first assumption is members of the HOA should have noticed trucks going down the road, and then run outside to follow these trucks down an alley to a destination at Newhouse's home. (RP 101, 104, 372). That is not what happened, what happened is a neighbor saw walls coming up over Newhouse's fence level and called the HOA. (RP 149; RP 221).

Third, Newhouse also related that the HOA should have filed a lawsuit sooner than July 2005. That makes no sense because the HOA sued directly after Newhouse went back to work on the project and after Mr. Newhouse had legal representation to inform him he cannot continue to build without risk. (RP 78, 82, 84, & 357). There could be no harm caused by HOA conduct, because the HOA never sat on any right.

C. Contrasting legal authority cited by Appellee Newhouse.

Holmes Harbor Water Co., v. Page, 8 Wn. App. 600, 508 P.2d 628 (1973), relates an entirely different scenario.

The trial court found that when the defendants' grantor contracted to buy the lot the restrictive covenant

concerning height was not in force. He established that this height restriction was contained in the 1964 covenants which were defective, however, because they were improperly acknowledged and were not recorded until after the defendants' grantor contracted to purchase the property. The defendants built a "chalet type" house on the property which exceeded the height limitation by approximately 2.6 feet when measured from the plaintiffs' claimed high point on the lot and by 4 inches when measured from the defendants' claimed high point on the lot. Further, it was found that the adjoining lot owners did not complain about the height of the house to the defendant until a substantial period after the house was completed.

Id at 602.

Oakbrook on the other hand had valid recorded covenants, the garage was over 1,600 square feet in size, not 4 inches too high as measured by violator, and the HOA did not wait until the garage was finished to notify Newhouse. Here, Newhouse was on notice before construction and during construction.

In Lenhoff v. Birch Bay Real Estate, Inc. 22 Wn. App. 70, 587 P. 2d 1087 (1978) the Court reviewed an entirely different defense, i.e. arbitrary enforcement. The Court held a manufactured home was not distinguishable from the other homes in the area and new technology did not comport with the intent of the covenants to require removal, rather damages were appropriate as a remedy provided in the

covenants. Id. at 74. (Citing to Restatement of Property 564 (1944)). The Court related that there was nothing about the homes that set them apart from the others, making enforcement of the covenants useless. (similar to the abandonment defense). Newhouse's building has nothing to do advances in technology making enforcement of the covenant arbitrary and useless, an issue not advanced on appeal by Newhouse.

MacKay v. MacKay, 99 Wn.2d 344, 347 P.2d 1062 (1959), involves the reversal of an order dismissing a family law modification proceeding, an unrelated issue to the case with Newhouse.

Koch v. Swanson, 4 Wn.App 456, 481 P.2d 915 (1971) argued as not controlling by Newhouse actually supports the legal reality that parties are on notice of legal documents effecting their rights to their property which are recorded.

The general index is an essential part of the record because it imparts notice. Ritchie v. Griffiths, 1 Wash. 429, 25 P. 341 (1890); cf. Jones v. Berg, 105 Wash. 69, 177 P. 712 (1919). A properly recorded mortgage gives notice of its contents to the whole world. Strong v. Clark, 56 Wn.2d 230, 352 P.2d 183 (1960). Subsequent purchasers and encumbrancers take the property with notice of the prior mortgage. RCW 65.08.070.

Id. 458.

Piepkorn v. Adams, 102 Wn. App. 673, 10 P. 3d 428 (2000) remains controlling and Newhouse on page 32 of his brief made a single distinction which actually sides with Oakbrook's position in that the covenant violator in Piepkorn related he provided a letter regarding the construction to the HOA which they related they never received where it was the Oakbrook HOA that provided notice to stop to Newhouse in January and February 2005 receipt of which was acknowledged.

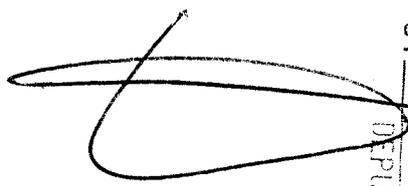
As clear as can be, the quote provided by Newhouse on Page 34 of his brief precludes the benefit of the defense Newhouse seeks. Newhouse acknowledges that he must "proceed without knowledge or warning his activity encroaches upon" protected rights. Newhouse proceeded after constructive and actual notice the construction of his garage violated the covenants, therefore further analysis is irrelevant.

Thisius v. Sealander, 26 Wn.2d 810, 175 P.2d 619 (1946) involved an unjust unlawful detainer action and provides no direction to this Court.

## II. CONCLUSION

Newhouse continued to build despite recorded covenants, notice by HOA 4 times a year of covenant enforcement actions,

receiving two stop work letters from the HOA, and having a lawyer available to advise him. He acted on not a single one of these four protections legally available and presented to him. Washington precedent, specific to this very issue, has stopped the analysis of equitable defenses right here and have gone no farther. Appellee failed to address the specific and governing cases cited by Appellant in its brief. This is because under these facts, a covenant violator is not permitted to profess innocence or a lack of fault when his conduct has previously undergone legal analysis by Washington Courts denying the defense.

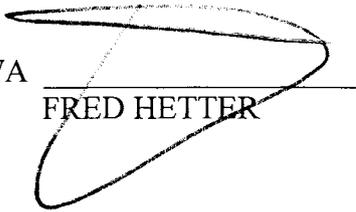


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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT ON JULY 3, 2007, I PERSONALLY DELIVERED A COPY OF THIS BRIEF TO THE ATTORNEY FOR THE APPELLANT ~~AT~~ AT THE LAW OFFICE OF McFERRAN and BURNS, OFFICE OF ATTORNEY

DATED: 7/2/2007 Place: Tacoma WA



FRED HETTER