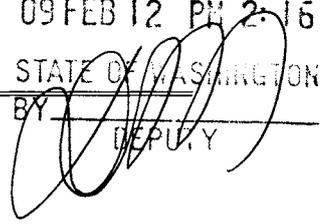


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COURT OF APPEALS  
DIVISION II

No. 37512-5-II

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STATE OF WASHINGTON

BY  DEPUTY

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

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WOLLOCHET HARBOR CLUB, a Washington non-profit corporation,  
Plaintiff/Appellant,

v.

DOREEN KNAPP, a single person; ANTONE MOSICH and BETTY  
MOSICH, husband and wife; RAY JONES and CAROL JONES, husband  
and wife; FRANK MARINKOVICH and LISA MARINKOVICH,  
husband and wife; ESSIE WOLFRAM and/or the Estate of Essie  
Wolfram; TIM POTTER and JORJA POTTER, husband and wife; JOHN  
GINNIS and RUTH GINNIS, husband and wife; STEVE KELLER and  
DEANNA KELLER, husband and wife; DEAN DENNIS and KATHY  
DENNIS, husband and wife; KENT OLMSTEAD and KATHLEEN  
OLMSTEAD, husband and wife; NICK STIMLER and SHELLEY  
STIMLER, husband and wife; TERRY BOWINGTON and CINDY  
BOWINGTON, husband and wife; CARL PETERSON and BEVERLY  
PETERSON, husband and wife; JUANITA CARBAUGH, a single person;  
and VERNON SCOTT and LISA SCOTT, husband and wife,

Defendants/Respondents.

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DEAN DENNIS and KATHY DENNIS, husband and wife; DAN  
WOLFROM, as Personal Representative of the Estate of Essey Wolfrom;  
TIM POTTER and JORJA POTTER, husband and wife; and STEVE  
KELLER and DEANNA KELLER, husband and wife,

Defendants/Third-Party Plaintiffs/Respondents,

v.

LISA SCOTT and VERNON SCOTT, husband and wife; GRANT  
WILLIAMS and ADELE WILLIAMS, husband and wife; DAN  
LOHOSKY, SR., and MICHELLE LOHOSKY, husband and wife;  
WILLIAM SHAFFER and JUNE SHAFFER, husband and wife; KEVIN  
JACOBSON, a single man; JAMES HANSEN and ANITA HANSEN,

ORIGINAL

husband and wife; BETTY GOSSAR, a single woman; and HERMAN  
KOSIR and DOROTHY KOSIR, husband and wife,

Third-Party Defendants/Appellants.

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

Despite the tone of Certain Defendants' opposition brief, the parties largely agree on the relevant facts. The meaning of these facts under Washington law presents this Court with the question of how Washington public policy, which favors the collective interests of homeowners in an association, should be interpreted and applied. A split of authority exists among the states that have faced this issue. Some interpret covenants strictly, in favor of individual property rights. Some, like Washington, have rejected that strict interpretation in favor of furthering homeowners' collective rights.

However, before facing the issue of public policy, the court must determine the issue of standing. The authorities cited by Certain Defendants in their opposition brief actually support Wollochet Harbor Club's ("WHC") position that it has standing.

As to the dispute over the WHC's articles of incorporation ("Articles"), courts interpret Articles as they would any other contract: with the primary goal of interpreting intent of the contracting parties, here WHC's incorporators. Effect must also be given to each provision of the Articles so that none become meaningless or ineffective. The language of the Articles demonstrates that the incorporators intended to protect the views of Wollochet Bay and to permit the Board to assess individual owners for enforcement of that view protection.

Finally, consideration of attorneys' fees and costs should be remanded to the Superior Court for determination. Because the issue to be determined here relates to standing, the attorneys' fee provision in the governing documents is inapplicable until the parties' rights vis-à-vis the governing documents is determined.

## II. THE WHC BOARD HAS STANDING

### A. Preliminary Fact Determinations May Be Made Before Addressing Standing

"To have standing, a party must be in a law's zone of interest and must suffer some harm." *Lane v. City of Seattle*, 164 Wn.2d 875, 885, 194 P.3d 977 (2008) (cited with approval by Certain Defendants). As the *Lane* decision demonstrates, factual issues may need to be determined before standing is addressed. In *Lane*, before addressing standing, the Court made factual findings related to whether the provision of fire hydrants was a governmental or proprietary function (its was governmental) and whether a fee imposed by the City of Seattle was a fee or a tax. To reach the latter decision, the Court applied a three-factor test, concluding that under this *factual* test, Seattle had imposed a tax. *Id.* at 882-83. Only after these factual findings were made did the court address standing.

Here, the existence of a general scheme or plan for the entire subdivision ("Scheme") impacts whether standing to assert a legal interest in enforcing WHC's governing documents exists. If WHC has a Scheme (and it does), then the Board has standing to enforce and protect it – and

must enforce and protect it under its governing documents. Following *Lane*'s example, this preliminary fact determination must be made before reaching the issue of whether the Board has standing.

**B. Under *Lane*, Standing Does Not Depend on "Legal Interests"**

Further, *Lane* establishes that to have standing, WHC must be within the "zone of interest" and "suffer some harm." *Id.* at 885. The U.S. Supreme Court has defined "zone of interest" as including "'aesthetic, conservational, and recreational' as well as economic values." *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 154, 90 S. Ct. 827, 830, 25 L.Ed.2d 184 (1970).

The *Lane* test differs significantly from that described by Certain Defendants, who argue that WHC has no legal interest in enforcing WHC's Scheme. Indeed, the U.S. Supreme Court has refused to adopt the "legal interest" test to determine standing. *See id.*, 397 U.S. at 153, 90 S. Ct. at 830 (rejecting argument that standing does not exist "unless the right invaded is a legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers privilege," and holding that such a "legal interest" test goes to the merits of a case – not the issue of standing). The rejection of "legal interests" as a test for standing comports with what WHC has been arguing all along – that a determination of the legal interests defined under its governing documents does not affect WHC's standing to bring this

action. In fact, the Board brought this action *to determine* those legal interests. *See* CP 10-11 (seeking declaratory relief regarding existence of Scheme and Board's power to enforce).

**C. WHC Has Both Personal and Representational Standing**

Under Washington law, standing may be personal or representational. *See Vovos v. Grant*, 87 Wn.2d 697, 700, 555 P.2d 1343 (1976) (holding that the Spokane Public Defender had representational standing to bring suit challenging court rule based on its duty to represent juveniles) citing with approval *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 275 A.2d 433 (N.J. 1971) (holding that tenant association had standing to represent members in litigation with landlords); *see also City of Seattle v. State*, 103 Wn.2d 663, 669, 694 P.2d 641 (1985) (“[A] party may have standing in either a personal or a representative capacity.”). Representational standing relates to the duties imposed on the entity seeking to represent its members. *See Vovos*, 87 Wn.2d at 701.

1. WHC Has Personal Standing

WHC falls within the “zone of interest” outlined by its governing documents, which require it to enforce and protect the Scheme of the entire subdivision. Moreover, WHC has suffered “injury in fact” in that the unreasonable elimination of certain restrictions in the Second Addition, particularly those related to view, density and building height, impairs WHC's ability to govern. *See* CP 1-12 (Complaint).

## 2. WHC Has Representational Standing

WHC also has representational standing to litigate on behalf of the entire subdivision. WHC represents more than just an assessment base to its members – it represents the governing body of the four additions that comprise the subdivision and is responsible for policing and governing matters delegated to it through its Articles and By Laws.

Similarly, in *Crescent Park, supra*, a tenant association brought mismanagement charges against its landlords. Resolution of the claims affected each member equally. *Crescent Park*, 275 A.2d at 434 & 437-38. The New Jersey Supreme Court recognized that “[n]o one before us questions the tenants’ stake and adverseness and admittedly there would have been no attack on standing if individual tenants had joined in the complaint.” *Id.* at 438. Likewise, Certain Defendants agree that standing would exist if members of the Second Addition joined in the complaint. *See* CP 41 (“The two owners who reside in the Second Addition are the proper parties.”). That being so, “it is difficult to conceive of any policy consideration or consideration of justice which would fairly preclude the Association from maintaining, on behalf of its member tenants, the present proceeding.” *Crescent Park*, 275 A.2d at 439.

Like the tenants’ association, WHC seeks to protect the rights of all of its members against those who seek to diminish those rights: “[T]he adverseness and private interest are present in at least as abundant measure

and the public interest also is served by an expeditious determination of the merits of the charges...” *Id.* at 438. Only when representational interests are solely monetary, is standing denied. *See Grant Co. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 804, 83 P.3d 419 (2004) (holding that diminution in a tax base is not an appropriate interest on which to base standing if it is the entity’s *only* interest in pursuing the litigation). WHC litigates not to protect its assessment base. Indeed, Certain Defendants agree that they owe dues to WHC for certain services. Rather, WHC seeks to protect its Scheme, which includes preservation of views, limits density, and imposes architectural restrictions.

**D. *Timberlane* is Distinguishable**

Unlike here, in *Timberlane* the association failed to provide the appellate court with the language in its declaration authorizing its actions. *Timberlane Homeowners Ass’n, Inc. v. Brame*, 79 Wn. App. 303, 307n.1, 901 P.2d 1074 (1995). Moreover, RCW 64.38.020(4) did not yet exist. This statute provides that, unless otherwise provided for in association’s governing documents, it may “[i]nstitute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more owners on matters affecting the homeowners’ association, but not on behalf of owners involved in disputes that are not the responsibility of the association.” RCW 64.38.020 did not become effective until July 23,

1995, less than two months before *Timberlane* issued. The court did not have the option of deciding whether standing existed under this statute.

### III. WASHINGTON FAVORS THE COLLECTIVE INTERESTS OF HOMEOWNERS WHEN INTERPRETING COVENANTS

In *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997),

Washington's Supreme Court rejected a rule strictly interpreting real covenants so as to favor of the free use of land and adopted a liberal rule placing "special emphasis on arriving at an interpretation that protects the homeowners' collective interests." *Id.* at 623. A majority of the cases cited by Certain Defendants do not adopt this rule.<sup>1</sup> Three of these cases were decided decades ago before homeowner associations existed.<sup>2</sup> And two of the more recent cases do not involve homeowner associations.<sup>3</sup>

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<sup>1</sup> *King v. Ebrems*, 804 N.E.2d 821, 826 (Ind. Ct. App. 2004) (quoting *Grandview Lot Owners Ass'n Inc. v. Harmon*, 754 N.E.2d 554, 557 (Ind. Ct. App. 2001)) ("Restrictive covenants are generally disfavored in the law and will be strictly construed by the courts, which resolve all doubts in favor of the free use of property and against restrictions."); *Craven County v. First-Citizen Bank & Trust Co.*, 75 S.E.2d 620, 629 (N.C. 1953) ("[W]e adhere to the rule that these restrictive servitudes being in derogation of the free and unfettered use of land, the covenants imposing them are to be strictly construed in favor of the unrestricted use of property."); *Edwards v. Surratt*, 90 S.E.2d 906, 909 (S.C. 1956) ("[R]estrictive covenants are to be construed most strictly ... all doubts being resolved in favor of a free use of property and against restrictions."); *Reid v. Standard Oil Co. of Kentucky*, 130 S.E.2d 777, 780 (Ga. Ct. App. 1963) ("As a general rule, the owner of land in fee has the right to use the property for any lawful purpose, and any claims that there are restrictions upon such use must be clearly established. Limitations or restrictions by implication are not favored, and must be strictly construed.").

<sup>2</sup> See *Craven County*, *supra*, (1953); *Edwards*, *supra*, (1956); *Reid*, *supra*, (1963).

<sup>3</sup> *Maciewicz v. Metzger*, 750 N.E.2d 812 (Ind. Ct. App. 2001) (regarding dispute between individual homeowner, developer and governmental agencies over easement rights to access series of lakes); *Rooney v. Peoples Bank of Arapahoe County*, 513 P.2d 1077 (Colo. App. 1973) (regarding dispute between homeowner in one subdivision and a bank

**A. *Save Sea Lawn Acres Is Distinguishable***

Certain Defendants rely heavily on *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wn. App. 411, 1660 P.3d 770 (2007). This case is distinguishable from WHC's by the simple fact in *Save Sea Lawn*, the two additions vying for control did not have a master homeowner's association governing them both. Hence, the statement by the court that "[t]he deeds issued to the initial purchasers of Plat 2 did not contain any reference to the Plat 1 covenants" stands in stark contrast to the fact that purchasers of property in WHC are put on notice not only of the Protective Restrictions of their addition, but also receive notice of the Articles and By Laws of WHC and the Protective Restrictions *of all other additions*. As Certain Defendants point out, WHC's By Laws incorporate by reference the Protective Restrictions of all four additions "for the purpose of clarifying the rights and obligations of the corporation and its members." *See* Response at 10; CP 132.

As a result of this language, when Certain Defendants purchased their homes, each received notice that WHC was composed of four additions, that both the second and third additions had a view covenants and that a master homeowner's association, WHC, oversaw covenant

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land owner in a different subdivision over enforcement of deed restriction prohibiting bank from building a commercial building on its lot).

enforcement activities.<sup>4</sup> See CP 91-100 (Articles); CP 102-119 (By Laws). Certain Defendants do not discuss WHC's Articles, By Laws or governance structure; how they distinguish this case from *Save Sea Lawn*; or how they impact their position no Scheme exists.

**B. Cases Relied on by *Save Sea Lawn Acres* Do Not Promote Washington Public Policy in Favor of Homeowner Associations**

*Save Sea Lawn Acres* and the cases on which it relies is difficult to reconcile with Washington public policy favoring the collective interests of homeowner associations over individual property rights. *Riss*, 131 Wn.2d at 623. Since 1997, Washington courts have generally adhered to this public policy and interpreted covenants for the benefit of the association as a whole – not individual property owners.<sup>5</sup> *Save Sea Lawn Acres* may be reconciled with *Riss* by recognizing that a master homeowners' association governing the two subdivisions did not exist – unlike here. Most of the cases cited in *Save Sea Lawn Acres* also did not involve a master homeowner's association governing separate, but united,

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<sup>4</sup> Indeed, Certain Defendants' assertions notwithstanding, WHC has never taken the position it has the ability to impose or change covenants. Rather, WHC's position has consistently been that if the Second Addition insists on changing or modifying its protective restrictions, it must do so in a reasonable manner so as not to unreasonably and negatively impact the Scheme of the entire subdivision.

<sup>5</sup> See, e.g., *Green v. Normandy Park*, 137 Wn. App. 665, 687, 151 P.3d 1038 (2007) (quoting the *Riss* rule); *Wimberly v. Caravello*, 136 Wn. App. 327, 337, 140 P.3d 403 (construing covenants in favor of preserving neighborhood character); *Dickson v. Kates*, 132 Wn. App. 724, 735 n.16, 133 P.3d 498 (2006) (noting trend towards enforcing equitable restrictions or covenants not on title, but with notice, where common scheme or plan exists "usually in a subdivision.").

subdivisions. See *Rooney v. Peoples Bank of Arapahoe County*, 513 P.2d 1077 (Colo. App. 1973); *Loving v. Clem*, 30 S.W.2d 590 (Tex. Ct. App. 1930); *Russell Realty Co. v. Hall*, 233 S.W. 996 (Tex. Ct. App. 1921).<sup>6</sup>

However, the inclusion of *Reid v. Standard Oil Co., of Kentucky*, 130 S.E.2d 777 (Ga. Ct. App. 1963) and *Scoville v. Springpark Homeowner's Ass'n*, 784 S.W.2d 498 (Tex. Ct. App. 1990) are perplexing. *Reid* may be reconciled with *Riss* as it did not involve a master association. However, *Reid*, provides that "the owner of land in fee has the right to use the property for any lawful purpose, ... Limitations or restrictions by implication are not favored, and must be strictly construed." 130 S.E.2d at 780. *Riss* explicitly rejects this position. 131 Wn.2d at 623.

In *Scoville*, a master association did exist. But, the court declined to read the master declaration in harmony with a separate document of use restrictions applicable to the division that sought to "secede." 784 S.W.2d at 502-05. In contrast Washington courts harmonize correlating documents. *Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 276, 883 P.2d 1387 (1994); *Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 576, 295 P.2d 714 (1956).

Further, unlike the court in *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 150 P.3d 1163 (2007), the *Scoville* court did not

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<sup>6</sup> *Russell* left open the possibility that restrictions on property could be implied if a Scheme were proven to exist. In *Russell*, however, the court found the evidence "so frail, vague and indefinite that we would not be willing to permit a judgment based upon it to stand." 233 S.W. at 999-1000.

address the fact that the master association provided services to each of its divisions, including the one that seceded. For example, the master association assessed for funds to maintain “parks, playgrounds, open spaces and other amenities.” *Scoville* 784 S.W.2d at 500. The court permitted the dissenting division to secede without ever addressing the effect of mandatory assessments on association membership. *Cf. Ebel*, 136 Wn. App. at 793-94; *Kaanapali Hillside Homeowner’s Ass’n v. Doran*, 145 P.3d 899 (Haw. Ct. App. 2006) (“Inherent in [the homeowner association’s] right of management is the right to maintain. Maintenance costs money. Those who are entitled to enjoy the easements are the ones who must pay the costs of maintenance.”).

The dissent in *Scoville* more clearly represents Washington’s public policy. In his dissent, Justice Ovard criticized the majority for isolating the document containing the seceding division’s use restrictions from the master declaration governing all divisions. He argued that “[s]everal instruments pertaining to the same purpose, whether executed contemporaneously or at different times, are read together as one agreement.” 784 S.W.2d at 506. Recognizing that the governing documents of a subdivision may be developed over time, not necessarily contemporaneously, and reading the master declaration together with all other pertinent documents, Justice Ovard concluded that the developer intended that membership in the master association was mandatory as was

the payment of assessments. *Id.* at 506-07. The majority's result, he argued, was "contrary to the overall strategy for development." *Id.* at 509.

Additionally, he added, the right to amend "implies only those changes contemplating a correction, improvement or reformation of the agreement, rather than a complete destruction of it." *Id.* In other words, the power to amend must be wielded reasonably. This analysis, rather than one favoring individual rights over that of the collective, applies here.

**C. The Right to Change Must be Wielded Reasonably and Does Not Include the Right to Vacate the Protective Restrictions**

The Second Addition's protective restrictions provide only that homeowners in that division have the right to "change said covenants in whole or in part." CP 391. They do not have the right to "vacate," "eliminate," or "destroy" the Protective Restrictions – another fact which distinguishes this matter from that in *Scoville* where the homeowners were granted the right to "vacate" their covenants. *Scoville*, 784 S.E.2d at 503.

Several courts have been asked to determine whether the ability to "change" a covenant, incorporates the right to impose new or different covenants or eliminate them altogether. Most hold "no"; new and different covenants or the elimination of covenants altogether are not part of the right to "change." The increasing trend is to limit the exercise of "absolute" rights by imposing a reasonableness standard on the decision making process. The Alabama Supreme Court discussed this "more

enlightened and realistic perspective” in *Wright v. Cypress Shores Dev. Co., Inc.*, 413 So.2d 1115, 1121 (Ala. 1982).

In *Wright*, the developer/grantor reserved to itself the right to revoke the covenants it placed on its development. The Alabama Supreme Court rejected the argument that such reservation created an absolute right in the developer to destroy the Scheme of the subdivision at a later date if so desired. The court recognized that homeowners rely on the existence of a Scheme as an inducement to buy, and such reliance becomes part of the consideration for purchasing. *Id.* at 1122. The court found that when the burdens placed on the land operate to enhance the value of the property, changes to covenants, whether expressly reserved or not, must be done reasonably so as not to destroy the Scheme already in place. *Id.*

Quoting from 7 Thompson, Real Property, Section 3171 at 188, the court found that “there is an inherent inconsistency between an elaborate set of restrictive covenants designed to provide for a general scheme or plan of development” and the power “at any time” and in one’s “sole discretion to change or even arbitrarily abandon any such general scheme or plan of development.” *Id.* at 1123. When one seeks to exercise this right, as has happened here, “rules of construction require that clauses which are apparently inconsistent with or repugnant to each other be given such an interpretation and construction as will reconcile them, if possible.” *Id.* The Alabama Supreme Court reconciled this inconsistency by

imposing a rule of reasonableness in the exercise of these rights.<sup>7</sup> *Id.*; see also *Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc.*, 3030 So.2d 665, 666 (Fla. Dist. Ct. App. 1974) (imposing a rule of reasonableness on the unilateral right to amend covenants).

**D. The Developer Had Authority to Incorporate WHC and Bind the Second Addition**

Certain Defendants spend a large portion of their brief arguing that the developer of WHC did not have any authority *over fifty years ago* to impose the non-profit corporation it formed to govern the community onto the Second Addition. The language of the Standard Supplemental Agreement (“Supplement”) should answer this claim.<sup>8</sup> Paragraph 8 of the

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<sup>7</sup> *Accord Ebel v. Fairwood Park II Homeowners’ Ass’n*, 136 Wn. App. 787, 792-93, 50 P.3d 1163 (2007) (“In order for an amendment to be valid it must be adopted according to the procedures set up in the covenants and it must be consistent with the general plan of development.”); *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 273-74, 883 P.2d 1387 (1994) (“[A]n express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions respecting the use of privately-owned property is valid, provided that such power is exercised in a reasonable manner consistent with the general plan of development.”); *Meresse v. Stelma*, 100 Wn. App. 857, 999 P.2d 1267 (2000) (rejecting association’s decision to redirect a road in the subdivision despite ability of majority to change covenants “in full or in part” as redirection constituted new burden, not a change to existing burdens); *Montoya v. Barreras*, 473 P.2d 363 (N.M. 1970) (rejecting attempt by subdivision to eliminate covenants on one lots within the subdivision despite ability of majority to change covenants in whole or in part); *Boyles v. Hausmann*, 517 N.W.2d 610, 617 (Neb. 1994)(rejecting the association’s creation of a set back on a piece of land in the subdivision where one had not before existed because it created a “new and different” covenant, and was not a change to existing covenants)

<sup>8</sup> In the trial court, Certain Defendants relied on the Supplement to argue that no one in the Second Addition had notice that the non-profit corporation contemplated by the developer would include view enforcement. CP 36. They now abandon that position to argue that no one other than Carl Peterson signed the Supplement. However, the Supplement required all Second Addition owners to sign *or else forfeit their rights to*

Supplement requires all lot owners to “join with other lot owners in the organization of the non-profit corporation referred to herein.” CP 165. By participating in the organization of the corporation, lot owners in the 1950’s would have full knowledge of the view protections and enforcement provisions and would have agreed to their inclusion in the Articles and By Laws of WHC.

Regardless, the analysis set forth in *Ebel* applies here. The Court in *Ebel* faced a similar situation in which one group of homeowners sought to undo acts and decisions that had taken place years in the past. In *Ebel*, covenants were placed on the property in 1972. These covenants contemplated the creation of a homeowner’s association at some point in the future. *Ebel*, 136 Wn. App. at 789. In 1998, a homeowner’s association was finally formed. *Id.* at 790. In 2004 several homeowners filed suit challenging the authority of the homeowner’s association. The court found that even if the proper procedures had not been followed, the homeowners or their predecessors-in-interest had ratified the association:

It is undisputed that the Property Owners participated in the Association to varying degrees after it was created. All paid dues for over three years. Some served on the Board; others served on committees. Some submitted requests for property improvements to the Association for approval. All attended meetings in person

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*connect to the water system. See* CP 166 (¶11). Each of the Certain Defendants claim a right to water from WHC, leading to the logical conclusion that the Supplement had been signed by each lot owner in the Second Addition present in 1950.

or by proxy. The Property Owners clearly were aware of all the facts and accepted benefits from the Association. In these circumstances, they cannot now claim the Association lacks authority.

*Id.* at 793-94. The same holds true here.

DeWitt Rowland incorporated WHC in 1957 and it has operated as the master association for all four additions since that time. Certain Defendants challenge the authority of WHC to act in this capacity after over 50 years of operation and years of acquiescence on their part because they no longer like their responsibility to preserve views of Wollochet Bay. They seek to put their individual property interests over those of the community in derogation of Washington public policy and the deal they bought into when they purchased their property.

**IV. WHC'S INTERPRETATION OF ARTICLE (Q)  
GIVES EFFECT TO THE INTENT OF THE  
INCORPORATORS AND BEST FITS THE RULES  
OF CONSTRUCTION OF A CONTRACT**

Certain Defendants argue that under RCW 64.38.020, which governs homeowner's associations, Article (q), limits the powers of WHC to enforce view restrictions. Response at 42. The citation to RCW 64.38.020 does not assist the Court in construing Article (q). Rather the Court must analyze the intent of the incorporators, give effect to all the provisions of the Articles, and construe its general terms within the context of surrounding specific terms. As explained below, the

incorporators did not intend to limit WHC's power by requiring a two-thirds membership vote before enforcing or assessing for view protection.

**A. Effect Must Be Given To The Intent Of The Incorporators.**

WHC agrees, when construing a written contract the intent of the parties is paramount and controlling. *See Walden Inv. Group v. Pier 67, Inc.*, 29 Wn. App. 28, 30-31, 627 P.2d 129 (1981) ("The articles of incorporation represent a contract between the corporation and its shareholders."). As the Washington Supreme Court notes:

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

*Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973).

When a nonprofit corporation is formed for a specific purpose or purposes, the members of the corporation are "bound by provisions therein commensurate with promotion of the corporate objects." *Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 578, 295 P.2d 714 (1956). In *Rodruck*, members of an incorporated residential district challenged the corporation's right to levy assessments for road maintenance. The court found that the assessments must be paid. It read the articles of

incorporation, by laws and deed restrictions together, finding them to be “correlated” documents. *Id.* at 577. The court noted that the articles and bylaws enumerated corporate purposes and powers, including the maintenance and improvement of roads, which “constitute[d] a contract between [the nonprofit corporation] and its members.” *Id.* at 578.

As with *Rodruck*, the original WHC Articles and By Laws include directives to maintain the views of Wollochet Bay for the enjoyment of all residents, demonstrating the incorporators’ intent. *See* CP 95; RCW 24.03.025 (requiring that the articles of a corporation set forth the “purposes for which the corporation is organized.”). Article (j) articulates this intent, providing that WHC may enforce the restrictions in any of the additions by means set forth in the covenants, “or by such other and proper regulation as may be necessary to so enforce such covenants ... including any covenant or restriction respecting the maintenance of the view of Wollochet Bay from houses on any lots.” CP 95.

As is *Rodruck*, WHC’s Articles and By Laws are correlated documents and should be read together. 48 Wn.2d at 577. In addition to the Articles, the original By Laws include Article IV: “Protection of View For Back Lots.” This By Law sets forth a general directive to the Board to supervise the protection of views. *Id.* Article IV originally granted the Board independent authority to protect WHC’s views and the authority to assess WHC’s members for expenses incurred in doing so. CP 127.

Through subsequent amendments to WHC's By Laws, WHC's members also intended that the protection of views remain a primary purpose of WHC. *See* CP 38; CP 121-32. These later amendments demonstrate that WHC's membership never abandoned the corporate purpose of protecting views of Wollochet Bay, but in fact strengthened WHC's commitment to the protect them. CP 117-19. The membership changed Article IV from a general, but mandatory, requirement that the Board to supervise the protection of views to a specific set of provisions that required the Board to refer covenant violations to legal counsel, including view restriction violations. CP 119.

Given the significant emphasis that WHC's incorporators and membership placed (and continues to place) on the protection of views, both through WHC's Articles and By Laws, WHC Board's complaint seeking to enforce the Scheme of WHC is appropriate and did not require a two-thirds membership vote. *See* RCW 24.03.035; *State v. Lally*, 59 Wn.2d 849, 855, 370 P.2d 971 (1962) (holding that a corporation has those powers reasonably necessary to carry out its purposes).

**B. Effect Must Be Given To All Provisions Of The Articles**

As Certain Defendants argue, an agreement, such as the Articles, must be interpreted in a way that gives effect to each provision. Response at 43. *McDonald. v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 734,

837 P.2d 1000 (1992) (citing RESTATEMENT (SECOND) OF CONTRACTS

§ 203(a) (1981)), which provides:

In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:

(a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect[.]

WHC's nine incorporators found the enforcement of view restrictions to be of such importance that they specifically included it as an "object and purpose" of WHC. *See* CP 95 (Article (j)). Under the Supplement, home owners in WHC were required to cooperate in creating WHC, and were on notice of the inclusion of this power in the Articles and By Laws. Under Certain Defendants' interpretation of Article (q) of WHC's Articles, Article (j) would be reduced merely to a suggestion because WHC would need to obtain a two-thirds membership vote before fulfilling its purpose to protect the views of Wollochet Bay.

**C. Rules of Contract Construction Support WHC's Interpretation of Article (q).**

Certain Defendants and WHC agree that the following rules of contract construction apply: (1) an interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective; and (2) to determine the

meaning of an undefined term used in a contract, one looks at the words and phrases surrounding the term for guidance.

Certain Defendants note that the word “purposes” appears in the section heading “Objects and Purposes” of the Articles. They argue that the word “purposes” in the heading and in Article (q) must have the same meaning. (Response at 47.) Certain Defendants, however, cite no case for the proposition that a general term is to be defined by its first use in the contract. The term “purpose”/“purposes” appears throughout the Articles and is used so generally that one cannot reasonably infer WHC’s incorporators intended to fix its meaning by its first appearance.

Instead, the applicable rule of construction states that a general term is to be defined *in the context in which it appears and by the specific words surrounding that general term. See Cockle v. Dep’t of Labor and Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). If the Court adopts Certain Defendants’ argument, then the first portion of Article (q) – a specific list of items for which assessments may be made – is rendered superfluous and meaningless. If the incorporators’ intended to address the procedure for assessments for all “purposes,” and not just capital costs, the incorporators could have easily eliminated this specific list and written Article (q)’s purpose as follows: “To assess the members of the corporation, provided that no member shall be assessed for items other than for the water system, roads and sewage (or septic tank effluent

system) unless two-thirds of the members of this corporation ... shall approve such assessments.” They did not. It makes sense that the incorporators intended Article (q) to specifically address assessments for capital costs<sup>9</sup> because of the potential size of such improvements.

**D. Certain Defendants Misconstrue WHC’s Position**

Certain Defendants argue that without Article (q)’s limitation on the power to assess, then WHC would have unlimited authority to assess members for any act WHC is authorized to perform – rendering Article (q) meaningless. Response at 45. Respondents, however, misconstrue WHC’s argument. WHC does not argue for, nor do the Articles allow for, unlimited authority of the Board.

First, Certain Defendants broadly misconstrue the authority granted to the Board by the Articles to borrow money, enter into contracts and otherwise obligate WHC. WHC’s contracting power is limited to those “objects and purposes” identified in the Articles. WHC does not have authority to enter into contracts unless it is for a purpose identified in the Articles. View protection is one of those purposes.

Second, WHC’s power to assess is addressed both in the Articles and the By Laws, which are correlated documents. The following By

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<sup>9</sup> Certain Defendants make much of the fact that WHC used the phrase “capital improvements” in its opening brief. Response at 46-47. They argue that Article (q) addresses not only improvements but also maintenance and operation. WHC does not, and did not, intend to exclude the maintenance and operation of capital structures by the use of the phrase “capital improvements.”

Laws address assessments: (1) Article II – Water System, Garbage Disposal, Fees and Dues; (2) Article III – Sewage Disposal System or Septic Tank Effluent System Fees and Charges; (3) Article IV – Protection of View for Back Lots; and (4) Article V – Private Roads, Drainage.

Read consistently with Article (q), the By Laws set forth a framework for the Board's authority to take action and a procedure for assessing members to fund those actions. Article IV of the By Laws provides express authority to the Board to assess for view protection. Read as a correlated document with the Articles, the By Laws support WHC's argument that Article (q) only addresses capital costs.

**E. The 1956 Supplement Does not Limit the Board's Authority to Assess for Non-Capital Costs.**

Certain Defendants argue that the 1956 Supplement demonstrates the incorporators intended to require a two-thirds membership vote for assessments other than those for water, roads and sewage. Response 45. CP 157-68. They claim that the Supplement notified WHC owners that a corporation would be formed to handle their roads, water and sewer. This argument is incorrect for two reasons.

First, the Supplement did not include "sewers" in its list of items that the future corporation would handle. CP 154-168; *see* CP 155 (the Supplement "contemplated the incorporation of a nonprofit corporation that would own and manage the water and the roads."). The fact that the future corporation, WHC, was created to handle sewers as well as water

and roads indicates that WHC's incorporators did not intend the list of responsibilities in the Supplement to be exclusive.

Second, the Supplement does not address procedures for assessing for the cost of building and maintaining water, roads or sewers. It is pure speculation to assume WHC's incorporators limited assessment power for all other "purposes" (by requiring a two-thirds vote) because the Supplement required that the corporation handle roads and water.

#### **V. ATTORNEYS' FEES AND COSTS**

WHC believes it is entitled to an award of attorneys' fees for pursuing this litigation should it prevail on its substantive claims, including its claim of standing. Assuming the issue of standing is resolved favorably to WHC, the issue of attorneys' fees on appeal should be deferred until after resolution of the factual issues in the trial court. Only then will the true prevailing party be ascertainable. *See Transpac Dev. Inc. v. Oh*, 132 Wn. App. 212, 220, 130 P.3d 892 (2006) (remanding to trial court for determination of prevailing party status).

#### **VI. CONCLUSION**

WHC has standing to bring this action in both its personal and representational capacity. It has a responsibility under its governing documents and to its residents to protect the community's Scheme. Certain Defendants are fifty years too late to challenge the powers that WHC has been exercising all this time. The cohesion of this community

depends on the ability of WHC to enforce the Scheme in place for the last 50 years when it is threatened by unreasonable and unexpected changes to the protective restrictions in one of its additions.

As to the interpretation of the Articles, Article (q) is limited by its language to assessments related to capital costs. The insertion of the phrase "other corporate purposes" was not intended to apply to non-capital expenses not specifically addressed in Article (q).

For these reasons and those stated in WHC's opening brief, WHC moves the Court to reverse the trial court's order dismissing WHC's complaint for lack of standing; reverse the trial court's order limiting WHC's assessment authority; dissolve the trial court's injunction prohibiting it from expending funds without a two-thirds membership vote; and remand this matter to the trial court to resolve the factual issues raised in WHC's complaint.

DATED this 12<sup>th</sup> day of February, 2009.

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**CERTIFICATE OF SERVICE**

I, Betty Lou Taylor, hereby certify that on the 12th day of February, 2009, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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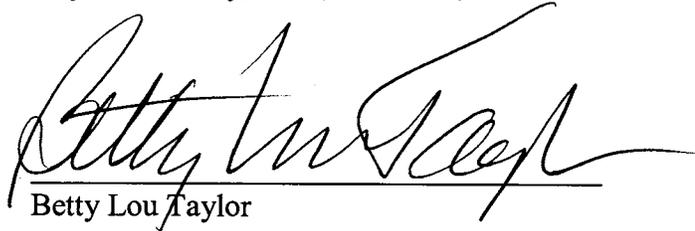
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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 12th day of February, 2009, at Seattle,  
Washington.

  
Betty Lou Taylor