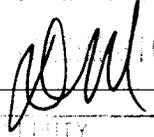


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NO. 37512-5-II

STATE OF WASHINGTON

BY:  CLERK

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WOLLOCHET HARBOR CLUB,
A non-profit corporation,

Appellant,

v.

DOREEN KNAPP, a single person; ANTONE MOSICH and BETTY

Respondents.

Brief of Certain Respondents

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I. INTRODUCTION

Appellant Wollochet Harbor Club (WHC) sued defendants, who are all lot owners in the “Second Addition,” to attempt to invalidate changes to restrictive covenants which had been made by Second Addition lot owners. The lot owners defended, and asserted that the Second Addition lot owners had exclusive power to amend or extinguish their covenants. Defendants also asserted a counterclaim that the WHC’s expenditure of assessments on the suit was *ultra vires*, because the WHC’s failed to obtain a vote of two thirds of its members to allow it to do so. Defendants moved for summary judgment dismissing the plaintiff’s suit for lack of standing. Plaintiff filed a cross motion for summary judgment on the merits of its claim that the amendments to the covenant were invalid. The trial court deferred ruling on plaintiff’s cross motion while it considered the defendant’s motion to dismiss. The trial court eventually ruled that the plaintiff lacked standing, and dismissed its claim.

The trial court then ruled that Article (q) of the plaintiff’s Articles of Incorporation did not permit spending assessments on litigation of this nature without a vote of 2/3 of the members of WHC. The court held that there was an issue of fact, however, as to whether the members of WHC had impliedly consented to that use of the assessments. After a trial on that issue, the trial court held the expenditures were *ultra vires*, and

entered findings, conclusions and a judgment in favor of the defendants requiring repayment of the money improperly expended.

The appellant now seeks review of the two rulings: first that WHC lacked standing as a matter of law, and second, that Article (q) precluded use of assessments for this litigation, absent a vote of 2/3s of the members.

II. COUNTERSTATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

- A. Did the trial court properly determine whether the Appellant had standing to bring suit before hearing its cross motion for summary judgment on the merits? (Assignment of Error #1)
- B. Were the Second Addition Covenants lawfully amended by the Second Addition Lot Owners pursuant to the express right of revocation set forth in the Second Addition Covenants? (Assignment of error #2)
- C. Is there a common plan among the four separate additions, where the Second Addition lot owners are given the exclusive power to amend and enforce Second Addition covenants, the covenants for the four different developments have different terms, and the Second Addition covenants make no reference to any other developments? (Assignments of error #1 & 2)
- D. Does Appellant corporation, which was not even formed until 4 years after the Second Addition was platted and its covenants were recorded, have the legal right to enforce the Second Addition Covenants or to participate in the process for revocation or amendment of the Second Addition Covenants? (Assignment of Error #2)
- E. Can the Articles of Incorporation and Bylaws of the plaintiff, which was created long after the Second Addition was created and its covenants were recorded, usurp powers specifically and exclusively reserved to the lot owners in the Second Addition? (Assignment of Error #2)

- F. Does the general grant to corporations of the power to sue under RCW 24.03.035 create rights not otherwise granted to the corporation and reserved to others? (Assignment of Error #2)
- G. Must the members of the corporation vote to authorize the commencement and funding of litigation against its own members, when the litigation is unrelated to roads, water and sewer, where the Articles of Incorporation require a two thirds vote to spend assessments on any corporate purposes other than for roads, water and sewer? (Assignment of Error #3)

III. COUNTERSTATEMENT OF THE CASE

The trial court properly ruled that the WHC lacked standing to object to the actions of the Second Addition owners in amending the Second addition covenants. The trial court also properly found, on summary judgment, that Article (q) required the WHC to secure a vote of two thirds of its members approving expenditure of assessments on this litigation. In order to understand the lack of standing, a history of the four separate developments, and of the WHC, is necessary.

A. The history of the Wollochet Yacht Harbor subdivisions: Four Different Plats created over 13 years, owned by different people, each with its own distinct and different Set of Covenants.

1. Wollochet Yacht Harbor: 1951.

The plat for Wollochet Yacht Harbor (WYH) was recorded on April 11, 1951, by the owners of the property, DeWitt Rowland, Anne Rowland, Radnor Pratsch and Martin Stockwell. CP 386-88. WYH consists of 11 lots of residential real property in Pierce County, one of

which was reserved as a common use beach area for the upland lots. CP 386. The Covenants for this first development expressly grant the power to change and enforce the covenants to those who own lots in that subdivision. CP 387-88 ¶1&2. The covenants further provide for a self contained community with its own architectural control committee (*Id. at* ¶17) elected by the lot owners within the development, a mutual beach area for the upland lots controlled by those lot owners (*Id. at* ¶21), specific rules regarding private wells (*Id. at* ¶26) and septic tanks (*Id. at* ¶15) and a view covenant for specific lots within the development. *Id. at* ¶22.

Noticeably absent from the Covenants in this 1951 development is any reference to the Appellant corporation, not then in existence, or to any other plat or anticipated development. In spite of Appellant's assertion to the contrary, neither the Plat nor the covenants make reference to this development as the "First" addition. There is no evidence in the record that at the time the WYH was platted Mr. and Mrs. Rowland owned any other property contiguous to this plat, whether separately or jointly with others.

2. Wollochet Yacht Harbor, Second Addition: 1953

A year and a half after the WYH was platted, Mr. and Mrs. Rowland, acting alone, platted a new development, called Wollochet Yacht Harbor, Second Addition, on June 5, 1953. CP 390-91. It is unknown

when the Rowlands acquired the property for the second addition. The Second Addition, containing 15 lots, is adjacent to and north of the WYH subdivision. CP 1218-23.

Mr. and Mrs. Rowland granted the power to amend the Second Addition covenants exclusively to the owners of lots within this new subdivision. The covenant (at issue in this case), uses the same language that was used in the WYH covenants and states:

(1) These covenants are to run with the land and shall be binding on all parties hereto and all persons claiming under them until January 1, 1972, at which time said covenants shall be automatically extended for successive periods of 10 years unless by vote of a majority *of the then owners of the lots* it is agreed to change said covenants in whole or in part.

CP 391. The power to enforce the covenants was similarly granted and reserved exclusively to those who owned lots within this new plat. The express grant is identical to that used in the WYH covenants and states:

(2) If the parties hereto, or any of them or their heirs or assigns shall violate or attempt to violate any of the covenants herein it shall be lawful *for any other person or persons owning any real property included in this agreement* to prosecute any proceedings at law or equity against the person or persons violating or attempting to violate any such covenant . . .

CP 391. The Second Addition did not share a common area mutual use beach area with the original WYH, but a new mutual use area (lot 10) was created just for the owners of lots in the Second Addition. *Id.* at ¶25. It

also had its own separate architectural control committee, composed exclusively of members owning lots in the Second Addition, to approve buildings in the new plat. *Id.* ¶17. Other than ¶s 1 & 2, the provisions of the covenants for the 2 subdivisions are not identical. CP 386-91.

Six months after the Second Addition was platted, Mr. and Mrs. Rowland amended the Second Addition Covenants to substitute three new paragraphs in place of three that they deleted. CP 392-93. They did *not* change paragraph (1), which granted the power to change the covenants, or paragraph (2), which granted the power to enforce them exclusively to the owners of lots in the Second Addition. The amendments, six months after the Second Addition was platted, made *no* reference to any corporation to be formed in the future.

On August 7, 1956, more than three years after the Second Addition was platted, Mr. and Mrs. Rowland and Mr. and Mrs. Peterson, two of the Respondents herein, signed a contract. CP 155. The contract was titled “Standard Supplemental Agreement, Wollochet Yacht Harbor Second Addition, **with Reference to Mutual Use Area, Water System and Roads**”. CP 157. In spite of the Appellants assertion to the contrary, (See Brief pg 34) there is no evidence that all of the lot owners in the Second Addition signed this agreement. The evidence reveals only that the Petersons did. CP 155. In fact, there is no evidence that this document

existed at any time prior to August 7, 1956. The Appellant asserts, with no basis, that because Peterson and Rowland signed the agreement, *all* of the Second Addition homeowners agreed to become members of a non-profit corporation “to govern WHC once incorporated”. (Appellant’s Brief at pg. 34) However, the standard supplemental agreement makes no reference to the corporation “governing” anything or anyone or to enforcing restrictive covenants. CP 157-68.

The Standard Supplemental agreement is relevant for one reason only: it describes that three years *after* the developers platted the Second Addition, they decided to create a corporation, the *sole* purpose of which (at least in so far as the Second Addition owner who signed it was concerned) was to handle power, garbage, road, water, sewer/septic issues and the maintenance of a mutual use beach area on Lot 10. CP 157-68. Of particular note is the title of the agreement itself which restricts its application to the “**Mutual Use Area, Water System and Roads**”. CP157 Noticeably absent from the Standard Supplemental Agreement is any reference to the corporation being formed to enforce covenants or to protect views. In fact, the specific powers *to change* and *to enforce* the Covenants and Restrictions for the Second Addition, in whole or in part, continued to be reserved solely to those who owned lots in the Second Addition. CP391.

The Standard Supplemental Agreement did not mention, refer to or change either of those grants of power.

Appellant argues that a reference in the Standard Supplemental Agreement to the restrictive covenants somehow grants the corporation power with respect to changing or enforcing them. (See Appellant's Brief pg 9) The language is, however, conditional, and there is no evidence in the record that the contingency was satisfied. The language referring to covenants, by the express terms of the document, only becomes applicable if the to-be-formed corporation contracts with the Rowlands to be subject to them and a majority of the lot owners also vote to approve. CP 161-62. There is no evidence that there was any such contract or majority vote. Thus, there is no evidence that the contingency ever occurred.

Even if the language quoted on pg. 9 of Appellant's brief was not conditional, at most it would make the corporation "subject to" the covenants. Its language does not address the power of Second Addition owners to change or enforce the Covenants. That power was expressly reserved exclusively to the lot owners three years earlier, in June of 1953.

3. Wollochet Yacht Harbor, Third Addition: April 1957.

Three years after the Second Addition was platted and over five years after Wollochet Yacht Harbor was platted, Mr. and Mrs. Rowland recorded the plat for Wollochet Yacht Harbor, Third Addition. CP 395.

Although the covenants recorded against the Third Addition properties contain some language similar to the covenants recorded for the Second Addition, other language is remarkably different. Using exactly the same language as they had in the original WYH development and for the Second Addition, the Rowlands granted the exclusive rights *to change* the covenants, in whole or in part, to the lot owners within the Third Addition. CP 396 ¶1. The power *to enforce* the covenants was again expressly granted to the lot owners in ¶2 but significant language was added elsewhere in the Covenants. CP 396. In ¶26, regarding view, the following language, not found anywhere in the covenants for the Second Addition (or any other Addition), was added: It reads:

...In addition to the rights of the owners and purchasers of lots of this addition, to protect the view from their respective lots and/or houses by any lawful means, the non-profit corporation herein referred to shall provide additional means of enforcing their provisions by corporate action and by providing penalties for violations or by assessing any lot owner, who, after notice, shall neglect or fail to remove the offending tree, obstruction or structure.

Thus, over five years after they began developing property in the area, Mr. and Mrs. Rowland, for the very first time, granted the authority to enforce a view covenant contained in the *Third* Addition to a corporation that was specifically referenced therein and *was to be formed in the future*. CP 396.

4. The WHC: created 4 years after the 2nd Addition was platted.

The WHC was not incorporated until 1957, six years after the original WYH plat was recorded, four years after the Second Addition was recorded and 8 months after the Third Addition was recorded. CP 92. The WHC is a homeowner's association composed of all of the lot owners in the Second, Third and Fourth Additions and of only four lots in the original WYH. CP 1218-23. Its Articles of Incorporation and Bylaws were adopted years after the Second Addition covenants were recorded. CP 92. Although the Bylaws make reference to covenants and restrictions against the four plats they do so only "for the purpose of clarifying the rights and obligations of the corporation and its members". CP 132 Neither document references a power to extinguish, amend or change covenants.

5. Wollochet Yacht Harbor, Fourth Addition: 1964

Thirteen years after the original WYH was platted, the Wollochet Yacht Harbor, Fourth Addition was platted. CP 400-01. Appellants incorrectly state that the Rowlands owned the property that became the Fourth Addition. The Rowlands, however, were only part owners together with Neil and Dorothea Robertson, and Robert and Celelia Hardwick. CP 401. There are only 16 protective covenants and restrictions recorded against this Addition (as compared with the 28 for the Second and Third

Additions) and they are different from those recorded in the original, Second or Third Additions. There is no view covenant at all. CP 402-03. The Fourth Addition covenants do, however, contain identical language to that used in all of the other developments that grants the owners of the lots within each addition the exclusive power “*to change* said covenants in whole or in part”. CP 402, ¶(1). This grant was made even though the corporation was in existence.

B. The 2006 Amendments were properly made by the 2nd Addition.

The “Second Addition” is composed of 15 lots and was platted on June 23, 1953. CP 389-90. The developer imposed restrictive covenants on all of the lots. CP 389. The covenants were to remain in effect until January 1, 1972 after which time they would automatically be renewed unless the majority of the owners **in the Second Addition** voted to extinguish them. *Id.* A majority of the lot owners in the Second Addition had the exclusive power to change the covenants in whole or in part. *Id.*

In October of 2006, a majority of the owners of lots in the Second Addition sent ballots to all of lot owners in the Second Addition proposing several amendments to the Covenants. CP 183, 190-99. All of the owners received a ballot and 12 of the 15 voted. CP 184. Only those proposed amendments which were approved by a majority of the owners of lots in

the Second addition were recorded. CP 184. The actual amendments to the Covenants were recorded with the Pierce County Auditor. CP 61-64.

C. The WHC fails to obtain the required vote of its members before spending assessments to sue Second Addition lot owners to challenge their Amendments.

The Wollochet Harbor Club (WHC) is a non profit homeowners' association. CP 92. It was not in existence when the Second Addition was platted in 1953. CP 92. Its members are composed of owners of lots in four different subdivisions platted by different developers between 1951 and 1964, with each development having separate and distinct restrictive covenants. CP 1218-23. The WHC collects assessments from all of its members. CP 1218-23.

The WHC Articles of Incorporation contain a provision regarding the power of the corporation to assess its members and the limitations thereon. CP 97, Art. (q). Article (q) is the only article that addresses WHC's power to assess its members. *Id.* Article (q) provides that although the corporation might assess its members for any of 17 express corporate purposes enumerated in the articles, "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 assessment.*" *Id.*

Without obtaining a vote of its members, the Board of the WHC used assessments collected from all of the members to commence and finance this lawsuit against all of the owners in the Second Addition, to challenge their amendment of the Second Addition covenants. CP184-85.¹ Owners in the Second Addition who were sued and who had approved the amendments to their own covenants answered and defended, claiming that the corporation lacked standing to sue and that it acted *ultra vires* when it used assessments to finance this litigation without a vote. CP 13-28

D. Prior Amendments of the Second Addition Covenants.

The Second Addition Covenants have been amended several times. The first amendment was by Mr. and Mrs. Rowland, themselves in September of 1953. CP 392-93. The Appellant quotes language from that amendment, (*See Appellant Brief pg.8*) which references “land westerly of this Addition”, however, that language was specifically deleted from the covenants over 17 years ago and has never been reinserted. CP 146-51.

In 1991 a majority of the lot owners in the Second Addition amended their covenants and deleted paragraph 26, regarding views, in its entirety. CP 146.² In 2001, a majority of the lot owners of the Second

¹ Most of the Board members own lots with views but not in the Second Addition. CP 1218-20.

² The officers of the WHC, which by 1991 had been formed, acknowledged the amendment and recorded it on 4-1-1991. The amendment took place during
Continued on next page

Addition recorded a signed petition attempting to change their covenants by purportedly reinstating the “original covenants”³ as recorded by the Rowlands at the time of the platting. CP 148-51 Thus, the original covenant language from June of 1953 was “reinstated”.⁴ Consequently, since 1991, there has been no language in the Second Addition covenants that refers in any way to the “land westerly of this addition”.

E. Assertions by the Appellant not Supported in the Record.

The introduction is not “concise” as required by RAP 10.3(a)(3), is factually inaccurate and contains improper legal argument. Additionally, throughout its brief, Appellant makes allegations unsupported by any facts in the record. The entire second paragraph on page 12 has no citation to the record for these sweeping opinions. Appellant repeatedly alleges that the restrictions for the Second and Third Additions are “identical” (*Brief pg 10*) but they are not. The allegation that these four separate subdivisions have a “homogenous appearance” is completely unsupported.

litigation brought by lot owners in the third addition to attempt to enforce the view covenant in ¶26 of the Second Addition covenants against a lot owner in the second addition. CP 134-41. After the second addition lot owners voted to delete ¶26 in its entirety, the Court dismissed the litigation on a motion for summary judgment. CP 143-44. No appeal was taken or challenge made to the amendment.

³ The officers of the WHC again acknowledged and facilitated the recording of this amendment. CP 150.

⁴ There is a serious issue as to whether placing a new restriction on view following the complete elimination of any and all view protection was an enforceable “change” to the remaining covenants or whether such a new restriction, with respect to lot owners who purchased after 1991, like Respondents Dennis, was proper without unanimous consent.

(*Brief pg. 20*) On pages 21-22 of its brief the Appellant makes assertions about the substantive content of the amendments, alleging that they have “eliminated” certain provisions and citing to the ballots, not the actual amendments that were recorded. Not all of the proposed amendments on the ballot passed. Compare CP 61-64 to CP 190-99. Consequently, appellant’s assertions, that proposed Amendments 1 & 2 were adopted, is false. CP 61-64. Amendments to design and density do not leave the second addition without regulation.⁵ The main dispute here is the elimination of the view covenant contained in paragraph 26. CP 61

IV. ARGUMENT

A. Standard of Review.

1. Order Bifurcating Standing from the Merits

A motion to bifurcate is within the discretion of the trial court. *State v. Mills*, 154 Wn.2d 1, 12, 109 P.3d 415 (2005). The denial of a motion to bifurcate will not be disturbed absent a showing of abuse of the trial court's discretion. *Jensen v. Beard*, 40 Wash.App. 1, 20, 696 P.2d 612, 623 (Wash.App.,1985). An abuse of discretion exists when the trial court's exercise of its discretion is manifestly unreasonable or based upon

⁵ Regardless of the substance of the amendments to the covenants, the Second Addition property remains subject to Pierce County building and zoning regulations as well as state and county shoreline management development regulations.

untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

2. Orders Granting Summary Judgment

The standard of review of the trial court's order granting summary judgment is de novo. *Morton v. McFall*, 128 Wn. App. 245, 115 P.3d 1023 (2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A fact is "material" if it is one upon which the outcome of the litigation depends in whole or in part. *Greater Harbor 2000 v. Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

B. The Court properly determined whether the plaintiff had standing before the court heard the plaintiff's motion on the merits.

The defendants brought a motion for summary judgment to dismiss the case based on the plaintiff's lack of standing to challenge the amendment of covenants by a majority of the Second Addition lot owners. The plaintiff filed a cross motion for summary judgment on the merits, asking the court to find that the Amendments were invalid. The trial Court properly decided whether the plaintiff had standing, before it undertook to decide whether or not the amendments were valid.

The standing doctrine prohibits a litigant from raising another person's legal right. (See, generally, 1 Washington Practice §2.20 and Timberlane Homeowners' Association Inc. v. Brame, 79 Wn. App. 303, 307, 901 P.2d 1074 (1995). Standing is a threshold question, which must be decided before reaching the merits. Allan v. University of Washington, 140 Wn.2d 323, 947 P.2d 360 (2000). Standing is jurisdictional. Lane v. City of Seattle, 2008 WL 4594192 (2008).

The appellant incorrectly states that the court bifurcated "the issue of the existence of a general scheme and plan from the issue of standing." The court simply ruled on the standing issue, before it considered the plaintiff's claim that the amendments were invalid as having violated a common plan or scheme. Answering the jurisdictional question of standing before reaching the merits of the Appellant's case was reasonable and based upon tenable grounds. Without standing the Court had no jurisdiction to hear the merits of the plaintiff's case. The Court did not abuse its discretion to decide the issue of standing before considering the merits of the plaintiff's claim.

C. The WHC has no standing to challenge the vote of the majority of the owners of the Wollochet Yacht Harbor Second Addition to make changes to the Restrictive Covenants

1. The powers to amend and to enforce were granted exclusively to Second Addition lot owners in 1953, not a corporation.

“The interpretation of language contained in a restrictive covenant is a question of law” which may be resolved on summary judgment. *Meresse v. Stelma*, 100 Wn. App. 857, 864 (2000). The primary objective is to determine the intent of the parties to the agreement and, in determining intent, clear and unambiguous language will be given its manifest meaning. *Burton v. Douglas Cty.*, 65 Wn.2d 619, 621, 399 P.2d. 68 (1965). A provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. *Shafer v. The Board of Trustees of Sandy Hook yacht Club Estates, Inc.* 76 Wn. App. 267, 275, 883 P.2d 1387 (1994) However, a provision is not ambiguous simply because the parties suggest opposing meanings. *Id.*

Mr. and Mrs. Rowland granted the power to change and enforce the covenants in the Second Addition exclusively to those owning lots **in that plat** in 1953. CP 391 ¶s 1&2. The language they used was as follows:

- (1) These covenants are to run with the land . . . until January 1, 1972, at which time said covenants shall be automatically extended for successive periods of 10 years unless by vote of a majority **of the then owners of the lots** it is agreed **to change** said covenants in whole or in part.
- (2) If the parties hereto, or any of them or their heirs or assigns shall violate or attempt to violate any of the covenants herein it shall be lawful **for any other person or persons owning any real property included in this agreement** to prosecute any proceedings at law or equity

against the person or persons violating or attempting to violate any such covenant . . . [Emphasis added.]

The original WYH covenants contain exactly the same language to grant the power to change and to enforce them exclusively to the owners of the lots **in that plat** in 1951. CP 385-86. There is no reference in either set of covenants to the other addition.

When the Rowlands platted the Third Addition in 1956, they recorded covenants that once again granted the power to change the covenants exclusively to the third addition lot owners, but used unique new language in a view covenant to grant a non-profit corporation to be formed in the future a right to enforce that view covenant. The new language stated:

*...In addition to the rights of the owners and purchasers of lots of this addition, to protect the view from their respective lots and/or houses by any lawful means, **the non-profit corporation herein referred to shall provide additional means of enforcing their provisions** by corporate action and by providing penalties for violations or by assessing any lot owner, who, after notice, shall neglect or fail to remove the offending tree, obstruction or structure.*

CP 391. The absence of similar language in the Second Addition covenants, coupled with the limiting reference in the title of the “Standard Supplement Agreement” to “**Mutual Use Area, Water System and Roads**” (CP157) demonstrates that the corporation was originally intended to

manage the mutual use area, roads and water. Only for the Third Addition was a corporation to enforce view rights. The Rowlands contemplated forming a corporation when they platted the Second addition in 1953 (CP 388 ¶25) but, in spite of the fact that they specifically knew how to grant enforcement rights to such a corporation (as evidenced by the Third Addition language doing so) they did not reserve or grant any rights to a non-profit corporation to enforce any of the Second Addition view restrictions or covenants. Mr. Rowland was an attorney. CP 92. He could have incorporated the WHC before he began the first development. He could have reserved the power to extinguish or change the covenants to himself thereby allowing a transfer of that power to a corporation later. He could have formed one large development (if he owned all of the property at that time) with one set of covenants for all of the lots. He could have drafted the covenants to run with the land permanently and perpetually. *He did none of these.* Instead, he (together with other and different owners) created four distinct additions, each with their own different set of covenants, and incorporated a separate association whose primary purpose and whose only authority with respect to the Second Addition owners, who may have signed the Standard Supplemental Agreement, is to manage the roads, water, sewer and mutual use areas. By the time the non-profit corporation was created in 1957, the Rowlands had

no power to change the Second Addition covenants, and the Rowlands had given the power to enforce the covenants exclusively to a majority of owners of the lots in the Second Addition. The Rowlands had no authority to grant any such powers to the corporation when it was finally formed. The covenants are clear: the majority of the lot owners in the Second Addition have the right to vote to eliminate or change the covenants.

The court should not rewrite the unambiguous covenants. The Court in *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wash.App. 411, 166 P.3d 770 (2007), refused to allow extrinsic evidence to alter the plain meaning of a restrictive covenant nearly identical to the one at issue in this case. The covenant at issue specifically reserved both the power to amend the covenants and the power to enforce them to the “owners in said plat”. *Id. at 413*. The court refused to interpret the language of the covenant to grant an association of members of an adjoining plat the right to interfere with the amendment. The court stated:

SSLAA argues the rules governing the interpretation of restrictive covenants require the court to construe the intent of the drafting party, defining its terms by their meaning at the time the language was drafted...Under *Berg v. Hudesman* 115 Wash.2d 657, 667, 801 P.2d 222 (1990) and its progeny, “extrinsic evidence may be relevant in discerning that intent, where the evidence gives meaning to words used in the contract.” *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 695, 974 P.2d 836 (1999). While the *Berg* context rule has been extended to apply to the interpretation of restrictive covenants, it has not been extended to apply

where evidence would show an intention independent of an instrument. Because the evidence sought to be introduced here would modify the written instrument, *Berg* is not applicable....

In *Hollis*, the court held that the meaning of the words “plat” and “subdivision” were not ambiguous and refused to rewrite the plat covenants to change that meaning. *Hollis*, 137 Wash.2d at 697-99, 974 P.2d 836....Here, the separate filing of the plats is indicative of separate covenants. The owners in Plat 1 have the authority to enforce the restrictive covenant within their own plat, they do not have a clear legal or equitable right to enforce the restrictions contained in Plat 2.

While the owners of Plat 1 have benefited for over 50 years from the height restrictions contained in Plat 2, such benefit cannot be construed to give the owners the right to control the revoked restrictive covenant.

Id. at 418-419. (*Emphasis added*). Under the plain language of the Second Addition covenants, the power to amend the covenants was expressly and exclusively granted to the lot owners in that Addition.⁶ The WHC has no right to participate or challenge the actions of the Second Addition owners. Without such a legal right, it has no standing.

In *Timberlane Homeowners' Ass'n v. Brame*, 79 Wn. App. 303, 901 P.2d 1074 (1995) the Court refused to interpret or construe the

⁶ The WHC improperly relies upon a sales brochure prepared years after the WYH subdivisions were platted to argue that owners outside the Second Addition should be able to claim view rights over property in the Second Addition. (*See Brief pg. 20*) In *Sea Lawn*, *supra*, the Court held that a similar sales brochure was inadmissible even though it was prepared and used when the properties were originally marketed, because it would have modified the unambiguous language of the covenant reserving the right to revoke and enforce covenants to the owners “in said plat”. *Id.* at 418.

unambiguous language of a covenant in order to grant a homeowner's association standing to sue its members. According to the covenants, every homeowner had an easement of enjoyment in and to the common properties. *Id.* at 306. The Covenants specifically granted the Association the power to "maintain" the common areas that it owned. *Id.* at 308. The Association argued that the power to "maintain" the common areas included the power to enforce the members' easement rights to that common property. *Id.* The Court rejected the Association's argument, holding that the clear meaning of "maintain" referred to physical maintenance and did not create a right to enforce easement rights of the individual members. *Id.* Consequently, the Association had no standing to enforce easements rights granted to the members. Thus, the grant of authority as set forth in the Covenants is controlling on the question of standing. Without being granted the authority to extinguish or amend the covenants or to challenge the exercise of that grant, the Wollochet Harbor Club has no standing.

In spite of the unambiguous language of the Second Addition covenant which reserves the power *to change* and *to enforce* to the lot owners in the Second Addition, the WHC claims to have standing to "enforce" a common plan or scheme for the four separate subdivisions that it argues is destroyed by the adoption of the amendments to the Second

Addition covenants. An identical argument was rejected in the *Sea Lawn* case where the Court upheld summary judgment dismissing a similar attack on covenants.

2. As a matter of law, a common scheme or plan does not exist where the express rights to amend and enforce the covenants set forth in the Second Addition Covenants are limited to the Second Addition owners.

Sea Lawn, supra, is nearly identical to this case. Division I of the Court of Appeals held that where a subdivision is developed in sections and each section is platted and recorded at different times, restrictive covenants for each particular section apply only to the lots within that section and lot owners in neighboring sections cannot enforce the other subdivisions' covenants or participate in the process for amending or revoking them. *Save Sea Lawn Acres v. Mercer*, 140 Wn. App 411, 166 P.3d 770 (2007). Every argument being made by the Appellants in this case was rejected by the Court of Appeals Division I. In *Sea Lawn*, the Court examined two separately platted adjacent residential subdivisions. The subdivisions were platted within **16 days** of each other, by the same entity, and Plat 1's restrictive covenants were **identical** to Plat 2's. CP 412-14. The restrictive covenants for both plats contained language nearly identical to that used in the Wollochet Yacht Harbor Second Addition regarding the powers to change and enforce the covenants. The *Sea Lawn* covenants read as follows:

All of the foregoing conditions, limitations, restrictions and covenants shall be deemed covenants and restrictions running with the land and shall be binding . . . until January 1, 1956, at which time said covenants and restrictions shall be automatically extended for successive periods of 10 years each unless on or before said above mentioned date or any ten year extension, a written instrument shall be executed by the then record owners of a majority of the lots . . . terminating or otherwise changing or modifying said covenants or restrictions in whole or in part...

The owner of any lot in said plat shall have the right and power to enforce any and all of the conditions, limitations, restrictions and covenants contained herein...

Id. at 413-24. (Emphasis by the court). A majority of the owners in Plat 2 voted to revoke the restrictive covenants of their plat, which included a view protection covenant. *Id. at 414.* Lot owners in Plat 1 formed a non-profit corporation to contest the revocation of the restrictive covenants by the owners of Plat 2. *Id.* The association, just as the WHC does here, argued that the common plan doctrine prevented the Plat 2 homeowners from voting on the revocation of their covenants without the consent of the lot owners in Plat 1. Division I rejected the argument and ruled that the trial court had properly granted summary judgment dismissing the association's case.

The Court in *Sea Lawn* reviewed extensive authorities, and held, as a matter of law, that the development of subdivisions progressively over time in the manner described therein does not create a common plan or

scheme. The Court quoted *Reid v. Standard Oil Co.*, 107 Ga. App. 497,

130 S.E.2d 777 (1963) as follows:

...where the overall intent, as shown by plats, deed restrictions, and other like evidence, appears to be not to develop a subdivision as a single contemporaneous unit but to develop it progressively by sections, there is an explicit intent not to create a uniform system of reciprocal easements applicable to all sections but to develop a series of independent sections, each having its own restrictions benefiting only the lands in that section.

The Court also relied upon the following rule, stated in *Rooney v. Peoples Bank of Arapahoe County*, 32 Colo. App., 178, 513 P.2d 1077 (1973)

where multiple plats were created from a larger tract of land:

The five subdivisions were developed as separate and distinct units. A separate plat was filed for each subdivision. The tract was not developed as a single contemporaneous unit. In similar factual situations, courts of other jurisdictions have held that where the grantor's entire tract of land is developed in separate sections and not as a single unit, ***there is no general plan or scheme which would permit owners in all the subdivisions to enforce restrictive covenants against each other.***

Id. at 417. Other jurisdictions are in accord.⁷ The *Sea Lawn* court upheld

⁷ *King v. Ebrems*, 804 N.E.2d 821, 831 (Ind. App. 2004) (where lots from a tract are sold subject to covenants and a later platted property from same tract contains substantially similar covenants, court refused to allow unplatted individual lot owners to enforce covenants against platted property owners and rejected applicability of common plan doctrine); *Mackiewicz v. Metzger*, 750 N.E.2d 812, 820-1 (Ind. App. 2001) (affirming summary judgment and holding that where parcel of land is subdivided into a number of plats, the owner of land in one plat may not enforce its covenants against a property owner in an adjacent but separate plat); *Edwards v. Surratt*, 90 S.E.2d 906, 912, 228 S.C. 512 (1956) (where separate and distinct units or plats are established from a single large

Continued on next page

summary judgment dismissing the case holding that because the plats in Sea Lawn Acres were created and recorded at separate times with separate, though identical, sets of covenants, there was no common scheme as a matter of law. *Id. at 422*. The Court specifically rejected the Association's argument that because the two plats were recorded within days of each other they demonstrated a common scheme or plan. *Id. at 417*. The Court explained its reasoning as follows:

Like those in *Reid* and *Rooney*, the plats in Sea Lawn Acres were created and recorded at separate times. SSLAA [Save Sea Lawn Acres Ass'n.] argues that the fact that Plat 1 and Plat 2 were recorded within a month of each other demonstrates a common scheme or plan. **In fact, the opposite is true.** Plat 1 and Plat 2 had separate restrictive covenants. Each covenant reserved the right to enforcement and to revocation to only those lot owners who were *within that plat*. No deed to any lot in Plat 2 references the covenant in Plat 1 or vice versa. Both covenants identically recite that they may be terminated or revoked by a document "executed by the then record owners of a majority of the lots in said plat...." The limiting phrase "in said plat" is legally significant and results in the covenants

tract of land and restrictions are imposed that relate to the separate units, only the property owners in each unit have the right to enforce the restrictions *inter se*); *Kuchler v. Mark II Homeowners Ass'n, Inc.*, 412 N.E.2d 298, 300 (Ind. App. 1980) ("where the grantor's entire tract of land is developed in separate sections and not as a single unit, there is no general plan or scheme which would permit owners in all the subdivisions to enforce restrictive covenants against each other."); *Craven County v. First-Citizens Bank & Trust Co.*, 75 S.E.2d 620, 628-29, 237 N.C. 502 (1953) (where chain of title evidences intent to develop separate, distinct units within a larger area, "effect will be given to restrictive covenants only as they relate to each such separate unit."); *Russell Realty Co. v. Hall*, 233 S.W. 996, 999 (Tex. App. 1921) (purchasers' rights under restrictive covenants "are circumscribed and confined by the territorial limits of the plat with reference to which the purchasers bought, and purchasers cannot be granted relief [against] an adjoining section," even where adjoining section property owners are violating covenants that apply to their property).

being “applicable to and only to the numbered lots shown [on the respective plat].” *Reid*, 130 S.E.2d at 779.

Id. [Emphasis added] The Court also adopted the reasoning of *Loving v. Clem*, 30 S.W. 2d 590, (Tex. Civ. App. 1930) recognizing that where the developer restricts the grant of rights to those “in said plat” or similar language it “demonstrates an intent ‘that the common grantor created separate units and vested the owners of lots in each unit with power to amend the restrictive clauses without the aid or interference of owners of lots located in other units.’” *Id.* at 418 quoting *Loving*, *supra* at 592-93. In *Sea Lawn*, *Reid* and *Rooney*, all of the subdivisions were platted by one developer. *Sea Lawn*, *supra* at 412; *Reid*, *supra* at 498; *Rooney*, *supra* at 180. Each subdivision was platted separately at different times. *Sea Lawn* *supra* at 417. Each subdivision had its own covenants. *Id.* at 412; *Reid*, *supra* at 500; *Rooney*, *supra* at 180. Each of the sets of covenants reserved the power to amend, revoke and enforce them to lot owners within the addition governed by the covenants. *Id.* *Sea Lawn*; *Reid* and *Rooney* were all decided on summary judgment, with each court holding that the owners of neighboring plats had no legal right to contest, approve, enforce or otherwise interfere with the covenants in a separately platted subdivision. *Sea Lawn*, *supra* at 416-17.

In the case at bar, only the Second and Third Additions were owned exclusively by Mr. and Mrs. Rowland. The other subdivisions were owned by them in conjunction with other people. CP 386, 398. Consequently, unlike the plats in *Sea Lawn*, there was not one single developer for all of the plats. The four subdivisions were separately created over years, not days. CP 386, 390, 395, 398. Just like the covenants in *Sea Lawn*, the four WYH plats reserve the power to change or eliminate the covenants to those owning lots within each of the respective plats and no set of covenants, even those recorded after the WHC was incorporated in 1957, gave that power to the corporation. *Id.* The reasoning of *Sea Lawn* is even more compelling here and the same rule of law applies: as a matter of law, there is no common plan or scheme where the grantor develops the plats progressively and separately, records covenants for each plat and reserves the right to enforce, amend and revoke covenants to only those lot owners in that plat. *Id. at 419.* The lot owners in adjoining subdivisions have no right to enforce the other subdivision's covenants OR participate in the process for amending or revoking them. *Id. at 419-20*

A homeowner's association is in no better position to challenge than an association composed of the owners of an adjacent subdivision. In *Sea Lawn*, the Court relied upon *Scovill v. Springfield Homeowner's Ass'n*,

784 W.W.2d 498 (Tex. App. 1990). In *Scoville*, a homeowners association in one real estate subdivision brought suit to challenge the legal effect of the action taken by the majority of lot owners in a second subdivision, known as the “Second Addition,” to terminate the covenants binding their properties. *Id. at 498*. The homeowners association argued that the common plan doctrine prevented the Second Addition owners from voting on the revocation without the consent of the lot owner members of the homeowners association. The Court in *Sea Lawn* analogized its case to *Scoville* and adopted that court’s reasoning, at 140 Wn. App. 419-20:

Like SSLAA [Save Sea Lawn Acres Ass’n] the homeowner’s in the first subdivision argued that the common plan doctrine prevented the second addition homeowners from voting on the revocation without the consent of the lot owner members of the homeowners association. The *Scoville* court rejected this position holding that **the second addition lot owners could exercise their reserved right to revoke real property covenants even if doing so “is inconsistent with the general plan or scheme.”** *Scoville*, 784 S.W. 2d at 504. The covenants in *Scoville* are similar to the covenants here. Like the second addition subdivision owners in *Scoville*, the Plat 2 owners validly terminated the restrictions in accordance with the terms of the covenants.

It is clear that whether the suit to invalidate an amendment or revocation or to enforce a common scheme or plan is brought by the owners of an adjacent subdivision, by a non profit association formed to represent them or by a homeowner’s association, the result is the same: they have no

rights where the owners of a different addition validly terminate or amend the restrictions in accordance with the express grant of power in the covenants. If, under *Sea Lawn* and *Scoville*, they have no right to contest the complete elimination of the covenants, they clearly have no right to contest an amendment short of elimination. Without such rights, the corporation has no standing.

WHC relies heavily on language inserted by the developer as an *amendment* to the Second Addition covenants in 1953, 6 months after the subdivision was originally platted, to argue that there was some intent by the developer to create a common scheme or plan with later developments done at different times, with different covenants, and in some cases different developers. (*See brief page 34*) The Appellant argues that the reference to land “lying westerly thereof” put the second addition owners on notice that their covenants were meant to benefit some land to the west.⁸ There are several reasons why, although such language once existed more than 17 years ago, it can no longer provide the basis for either a “common plan or scheme” or a right to amend or enforce one.

⁸ It is interesting to note that the majority of lots in the Third Addition are located to the **north** of the Second Addition. CP 1222. Most of the lots to the **west** of the second Addition are in the Fourth Addition, which has no view covenant. CP 1222 & 398. Thus, it is very unclear which property “to the west” was to be benefited. Identical language has been held by this court to be too indefinite to satisfy the requirements of the Statute of Frauds. *Dickson v. Kates*, 132 Wn. App, 724, 734, 133 P.3d 498 (2006).

First, the language is no longer part of the Second Addition covenants and has not been for over 17 years. It is undisputed that in 1991 a majority of the lot owners in the Second Addition, with the approval of the WHC officers, eliminated paragraph 26, the view covenant. CP 146. From April 1991 to September 2001 anyone buying a lot in the Second Addition had no view covenant restricting their property.⁹ Those who could have sought to challenge the actions of the Second Addition majority to extinguish or amend their own covenants based upon the existence of a common scheme or plan failed to do so in 1991, leaving the covenant of record for the past 17 years void of any reference to any land “lying westerly thereof”. Second, it is undisputed that a majority of the Second Addition owners amended their covenants again on September 28, 2001. They voted to “reinstate” the **original** paragraph 26 as it read in June of 1956 and added some new language.¹⁰ CP 149. Whether that new restriction is a valid “amendment” or whether it required the unanimous consent of all owners was an issue never reached by the trial court. Assuming, however, for purposes of argument that the 2001 vote of the majority was a valid “change” to the covenants, it did not reinstate the

⁹ Mr. and Mrs. Dennis, Respondents, purchased in May 1, 2001. CP 183

¹⁰ The majority attempted to reinstate the original ¶26 and also voted to add the following language “In addition, all homeowners shall keep and maintain the easements and grounds around their property”. CP 149.

1953 *amendment*, but merely reinstated the *original* language of the plat of Wollochet Yacht Harbor, Second Addition which makes no reference to any property to the west of the Second Addition but instead created a view covenant only for the lots in the Second Addition.¹¹ Thus, for the past 17 years, ¶26 of the Second Addition has contained no language referring to the “westerly lots”. Consequently, no one purchasing a lot in the Second Addition after 1991 had any notice whatsoever that the covenants were ever intended to benefit some property lying to the west.

Third, it is undisputed that the purchasers of lots within the Second Addition purchased those lots knowing that its covenants were limited and revocable. The recorded covenants contain no mention of a corporation that would have any rights to amend, revoke or enforce the covenants and restrictions for that Addition. By their terms, the Second Addition Covenants expressly state that they can be “changed in whole or in part” by a majority of the then lot owners in the Second Addition. All of the other additions contain identical language, so all purchasers in each of the respective subdivisions were on notice that their right to make changes to

¹¹ Since 2001, the language of ¶26 of the Second Addition reads as follows: (26) It is essential that the view from any lot *of this addition* be maintained and safeguarded so far as it is possible so to do without restricting the use of other lots as allowed by the provisions herein. Therefore no hedge - - - shall be permitted over 7 feet in height and no trees will be permitted of such height or character that they restrict the view of any part of Wollochet Bay from houses, built or to be built, on other lots *of this addition*. This provision shall be strictly enforced...” CP 391 (Emphasis added).

covenants was limited to changing or revoking only those covenants that applied to the Addition in which they purchased. In *Reid*, supra, one of the cases upon which the Court in *Sea Lawn* relied, the court stated that:

“[s]ince these plaintiffs were on notice under the terms of the deed that the restrictions applicable to them were enforceable only as to lots within their own section plat, they show no right which would allow them to interfere with the agreement between parties to a sale of land in another plat or section to change or nullify restrictions on such land between themselves.”

Reid, 130 S.E.2d at 782. It is not subject to reasonable dispute that four separate plats and their separate covenants were recorded prior to the development and sale of the lots comprising each subdivision. Thus, every current lot owner and their predecessors in interest were on notice of the provisions limiting the power to change the covenants at the time of purchase and conveyance.

3. The WHC, incorporated in 1957, cannot usurp powers through its “governing documents” that were granted exclusively to others in covenants recorded in 1953.

Appellant devotes 5 pages of its brief to arguing that the Articles of Incorporation and Bylaws of the WHC provide standing to challenge the amendment of the covenants in the Second Addition. They make reference to the “governing documents”. While the documents governing the corporation may indeed be the Articles of Incorporation and Bylaws, those documents do not govern the rights granted to property owners in

the Covenants recorded against their properties years before the WHC was created. Although the Appellant urges this court to ignore any distinction between the power to challenge amendments to covenants and the power to enforce them, they are two completely different powers. The first is the power to extinguish and change in whole or in part the recorded covenants. The second is the power to enforce violations of the covenants as they are written or changed over time. This distinction is of paramount importance because this lawsuit, brought by the WHC, is one to challenge the power to amend and to invalidate the amendments as recorded. It is NOT an action to enforce a covenant violation. Where the challenge is not against someone who has violated a covenant but rather is litigation initiated to invalidate the amendments made to covenants, it is not an enforcement action. *Meresse v. Stelma*, 100 Wn. App. 857,869, 999 P.2d 1267 (2000).

(a) The power to change in whole or in part. The first power, to extinguish or change, is specifically granted to the majority of the owners in the Second Addition. CP 391. There is no reference in any of the governing documents of the corporation to suggest that it has the power to extinguish or change the covenants. Nor would the incorporators of WHC have any authority to vest that power in WHC. In fact, the

covenants recorded *after* the incorporation of the Wollochet Harbor Club suggest just the opposite. CP 398-99.

When the Fourth Addition covenants were recorded in 1964, seven years **after** the WHC was incorporated, the developers continued to grant the power to extinguish or change the covenants or to amend them to the owners of that addition, not the WHC. CP 399. Thus, even when the developers were platting the Fourth Addition and the WHC was already in existence, they made a deliberate choice to continue to grant those powers to those who owned lots in the addition rather than to the WHC.

(b). The power to enforce. The Covenants for the Second Addition specifically grant the lot owners within the addition the power to enforce the covenants as against other owners in the Addition. CP 391. A corporation is mentioned to be formed to own and manage the mutual use area. CP 391 ¶ 25. The Standard Supplemental Agreement references a future corporation to handle utilities but does not refer to any power with respect to covenants. CP 157-68. Although the Articles of Incorporation for the WHC, filed on December 19, 1957, enumerate as one of its “purposes”, the enforcement of covenants and restrictions in any of the additions, the incorporators had no authority to make such a grant with respect to the original development or the Second Addition. By 1957 the only thing that the Rowlands had the power to grant to the WHC was

the power to enforce the *Third Addition* covenants that had been specifically reserved to the corporation in its Covenants. CP 396 ¶26. Those who purchased in the Third Addition would, by virtue of the recorded covenants, be placed on notice that a corporation to be formed would have such rights. The Second Addition, however, had no such notice and the rights expressly reserved to them could not be granted to the corporation by those who had already given them away.

Granting the power to enforce the Second Addition Covenants to its owners does not conflict with or render superfluous the language in the governing documents of the corporation which purport to grant enforcement power to the association. The covenants and the governing documents can be read together with both retaining their clear meaning. The association was granted the power to enforce the view covenant in the Third Addition. Consequently, the association has “enforcement” power; it is just limited to the view Covenant in the Third addition and the covenants in the Fourth Addition, which do not include view.

3. The Covenants filed in 1953 are not “correlating documents” with the Articles of Incorporation and Bylaws filed in 1957.

Appellant argues that all of the “governing documents” must be considered together to determine the grantor’s intent. The governing documents of the corporation formed in 1957 (Art. of Inc. and Bylaws),

[CP 92-100 & 121-32], however, are not the governing documents of the subdivision created in 1953. The governing document for that subdivision is the Plat which contains Restrictive Covenants for the Second Addition. CP 390-91.

Appellant argues that rules of contract construction apply and that “correlating documents” must be read in context. The problem is that the documents the Appellant suggests should be considered together, the Second Addition Covenant (created in 1953), the Standard Supplemental Agreement (dated 1956), and the Articles and Bylaws (filed in 1957), were not made contemporaneously or even remotely closely together.

The cases upon which the Appellant relies for the rules regarding “correlating documents” are cases where such documents are relevant because the development is platted *contemporaneously* with the incorporation of its homeowner’s association. In *Shafer v. Sandy Hook*, 76 Wn. App. 267, 883 P12d 1387 (1994), the court examined the meaning of a Restrictive Covenant contained on a dedicated plat that reserved power to a homeowner’s association and which specifically was made subject to its Articles of Incorporation. *Id. at 269*. In order to determine the developer’s intent, the court examined the Articles of Incorporation as a “correlating document” because “the Articles were expressly referenced in the reservation of power and were prepared *contemporaneously with the plat*

dedication". *Id. at 275*. Here, where there is a 3 year gap, the documents should not be considered correlating.

4. The authorities upon which the Appellant relies are inapposite.

None of the cases cited by the Appellant, *Meresse v. Stelma, supra*; *Ebel v. Fairwood Park*, 136 Wn. App. 787, 150 P.3d 1163 (2007), *Shafer v. Sandy Hook, supra*; or *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669, (1997) addressed the issue of whether a homeowner's association has standing to challenge amendments made by lot owners in one subdivision. In each case, those who challenged amendments to covenants were residents in the subdivision to which the covenants applied and direct beneficiaries of the grant of authority to amend them. Thus, in each of the cases affected minority owners brought suit, not neighbors in a separate subdivision or an association. In each of the cases, the property owners involved all owned property in the same subdivision or plat.¹² Only the *Sea Lawn* case, noticeably absent from Appellant's brief, deals directly with the issue and holds that an association of property owners in a distinct and separate subdivision has no legal right to participate in or interfere with the process of amending the covenants of an adjoining subdivision. *Id. at 418*.

¹² Appellant also relies upon *Green v. Normandy Park*, 137 Wn. App. 665, 151 P.3d 1038 (2007). In *Green* the HOA was specifically enforcing powers passed to it by the developer who had specifically reserved the enforcement authority to himself in the restrictive covenants. *Id. at 684*.

The Appellant relies upon two out of state cases, *Loch Haven Homeowners Ass'n*, 389 So.2d 697, (Fla. Dist. Ct. App. 1980) and *Graham v. Berrmunder*, 93 A.D. 2d 254, 462 N.Y.S. 2d 231 (N.Y. App. Div. 2d Dep't 1983) arguing that one factor alone, such as the reservation of the power to amend or the fact that all restrictions in one development are not identical, may not be determinative regarding an intent to create a common plan. (*See brief page 33*) These cases are of no precedential value and those rules of law were not adopted or referenced in the *Sea Lawn* decision. Even if such a rule was considered, in the case at bar the reservation of the power to amend the covenant is not the only factor that reveals that there is no common scheme.

Under the analysis in *Sea Lawn*, many factors are determinative of the lack of a common scheme or plan, all of which are present in this case. The Wollochet Yacht Harbor subdivisions were created progressively over time, each with their own set of distinctive covenants, consistently continuing to reserve the power to amend to those who reside within the specific subdivision. The covenants for the original WYH subdivision do not reference a corporation to be formed. The covenants for the Second Addition refer to a corporation to be formed to own and manage the roads and mutual use areas only. The standard supplemental agreement limits the corporation to be formed as created for the purpose of handling roads,

water, sewer and mutual use areas. The Third Addition covenants are the only ones which specifically reveal the grant of a power to a corporation to enforce the third addition view covenant. When the documents used by the developers to create the subdivisions are considered, it is clear that they created the corporation and, as an afterthought, granted it enforcement powers in the only subdivision where they had been specifically reserved: the Third Addition.

Appellant cites two cases in support of its claim that the corporation has standing to object to changes in one subdivision if they violate a common plan. The cases, *Johnson v. Mt. Baker*, 113 Wn. 458, 194 P. 536 (1920) and *Dickson v. Kate*, 132 Wn.App. 724, 133 P.3d 498 (2006), both considered the doctrine of equitable servitudes to imply a covenant in circumstances where no express covenants were recorded against the properties in question. In *Sea Lawn* the Court considered and rejected the reasoning of both of those decisions explaining that no equitable servitude can be *implied* where there are *express* and unambiguous covenants against the properties. *Id.* at 421-22. Here, as in *Sea Lawn*, the WHC seeks to imply a restrictive covenant contrary to the express ones already recorded against the properties.

5. The general grant to corporations of the power to sue does not create rights not otherwise granted to the corporation and reserved to others.

Appellant argues that both RCW 24.03.035 (governing non profit corporations) and RCW 64.38.020 (governing homeowners associations) somehow grant it standing to challenge the amendment to covenants. Both statutes grant a general power to sue. RCW 64.38.020 is the more specific statute because the WHC is a homeowner's association. It limits the power to sue, allowing the association to sue only "on matters affecting the HOA" and prohibiting lawsuits **"on behalf of owners involved in disputes that are not the responsibility of the association."** Here, where the power to extinguish, amend and enforce the covenants was expressly and exclusively granted to the Second Addition owners and there is no common plan as a matter of law, the statute prohibits the WHC from undertaking this litigation because it is not its responsibility to do so.

D. The WHC has no authority to commence and finance this litigation because it did not obtain the approval of 2/3 of its members.

RCW Ch. 64.38 specifically outlines the powers of a homeowners association. RCW 64.38.020, which contains a list of 14 powers, begins with the following caveat: **"Unless otherwise provided in the governing documents** an association may...." The governing documents of the WHC, specifically, its Articles of Incorporation, do provide "otherwise" and specifically confine the power of the Board of Trustees to assessing its members for only three limited things absent a vote of two-thirds of its

members. Section (q) of the Articles of Incorporation of the WHC provides as follows:

(q) To assess the members of this corporation for the maintenance and operation of the water system and development and improvement thereof necessary to provide water to all homes of members, and for the maintenance, repair and operation of the above referred to septic tank effluent system, in the manner and to the degree as shall be set forth in the by-laws, and to assess the members for improvements in the mutual use areas, and for other corporate purposes, **provided, however, 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 assessment.**

CP 97. Thus, under the Articles of Incorporation, the power to use assessments for litigation, a corporate purpose outside the enumerated powers, requires a vote of the members. No vote was taken to permit assessments to fund this litigation. CP 171, 175-76 & 184-85.

The Articles of Incorporation represent a contract between the corporation and its shareholders and should be interpreted in accordance with accepted rules of contract construction. *Walden Inv. Group v. Pier 67, Inc.*, 29 Wn. App. 28, 627 P.2d 129 (1981); *In re Olympic Nat'l Agencies, Inc.*, 74 Wn.2d 1, 442 P.2d 246 (1968). An agreement should be interpreted in a way that gives effect to each provision. *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 837 P.2d 1000 (1992), *citing*, *RESTATEMENT (SECOND) OF CONTRACTS §203(a) (1981)*.

In construing a written contract, the basic principles require that (1) the intent of the parties controls, (2) the court ascertains the intent from reading the contract as a whole, and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous. *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965). Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it. *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976).

Interpretation of an unambiguous contract is a question of law. *Absher Constr. Co. v. Kent School District No. 415*, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995). “If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.” *Voorde Poorte v. Evans*, 66 Wn. App. 358, 362, 832 P.2d 105 (1992). A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 275, 883 P.2d 1387 (1994), review denied, 127 Wn.2d 1003, 898 P.2d 308 (1995). A provision, however, is not ambiguous merely because the parties suggest opposing meanings. *Shafer*, 76 Wn. App. at 275, 883 P.2d 1387.

Article (q) is the only article that addresses the power to assess. A vote is required to assess for “other corporate purposes” besides road, water and sewer. CP 97 This is consistent with the Standard Supplemental agreement where owners buying lots in the Second Addition were notified that such a corporation would be formed to handle their roads, water and sewer. CP 157-68. When the Rowlands finally incorporated the WHC and enumerated its “corporate purposes” they provided that to assess members for expenditures beyond those contemplated in the standard supplemental agreement, a supermajority vote would be required. CP 97.

WHC’s position has been that those provisions of the Articles of Incorporation that enumerate its objects and purposes (other than the section governing assessments) somehow imply a concurrent power to *assess* its members and/or spend *assessments* to finance the Board’s exercise of its other purposes. If that is true, the only paragraph of the Articles of Incorporation that is devoted to assessments would be superfluous. This is contrary to the rule for the construction of contracts that prevents courts from disregarding contract language the parties used and favors an interpretation of a contract which gives effect to all of its provisions over one which renders some of the language meaningless or ineffective. *Better Financial Solutions, Inc. v. Transtech Electric*, 112 Wn. App. 697, 51 P.3d 108 (2002). If the Board can assess members to

pay for anything that the Board of Trustees has power to do, the assessment language is meaningless. The Board may have the power to borrow money, enter into contracts and otherwise obligate the Association but when it decides to exercise those powers it has no power to assess its members for the costs associated with those actions unless it obtains a two-thirds vote of ALL of its members.

While the Board may have the power to sue its own members under sections (k) or (n), it clearly has no power to assess its members to finance the cost of the litigation without first obtaining a vote of two-thirds of them. Such a construction does not render the other enumerated “powers meaningless” as argued by WHC. Such a construction allows those sections relating to the purposes of the corporation to be meaningful while at the same time allowing the section dealing with assessments to enjoy its plain and clear meaning. The Board may have many different purposes and powers, but the purse strings are controlled by the members. Section (k), which grants the corporation the power to render services to its members, simply defines what costs can be considered as part of those services, such as depreciation, obsolescence and replacement costs. It does not grant the corporation the power to assess its members for those costs.

Appellant argues that section (q) is restricted to “capital improvements.” The plain language of section (q) states that it applies not

only to development and improvement (which would be capital) but also to maintenance and operation of the water, roads and sewer systems. Appellant, while correctly citing many rules of construction applies the rules improperly. In order to read the contract “in context” or apply the *ejusdem generis* rule, the entire document must be read in context noting, for example, where the word “purpose” is first mentioned within it.

The second Article is entitled “Objects and **Purposes**” and contains a list of 19 objects and purposes, enumerated from (a) to (s) for which the corporation was formed. CP 93-98 Three of those purposes are roads (*i*), water (*a*) & (*b*) and sewer (*c*). The “other corporate purposes” must, therefore, be the remaining purposes enumerated in the “Objects and Purposes” section of the document. Hiring an attorney to file a lawsuit against 15 of its 91 members to enforce a purported common plan or scheme is an “other” corporate purpose that required a vote, especially when the assessments spent totaled more than \$40,000.

The only way to read the limitation in (q) is to understand that the power of the Board to assess without a vote was limited to providing the three enumerated utility type services necessary for every lot owner: roads, water and sewer. Any other assessment requires membership approval.

Reading Article (q) to require a vote for expenditures other than road, water and sewer does not result in a blanket prohibition on all administrative expenses. Section (q) of the Articles of Incorporation authorizes the Board to assess members for operating expenses, such as computers, paper, stamps, envelopes, bookkeeping services, audits and attorneys fees, provided that such expenses are incurred to provide water, roads and sewer services to its members. Such costs are those normally incurred by any association to exist and provide services to and communicate with its members. Article (q) specifically allows the Board to spend assessments when it is using those funds for the maintenance and operation of the roads, water and septic effluent systems on behalf of its members. Expenses to provide these services are certainly not confined to the purchase of asphalt, pipes, and gravel or bulldozer services.

The WHC Board can pay for insurance, accountants and attorneys if their services are reasonably related to operate the association to provide the road, water and sewer services and any other services that have been approved by a vote of two thirds of the members. What the Board cannot do, however, is decide to assess its members or to spend monies already assessed for any *other corporate purpose*, including the commencement and financing of litigation to challenge the amendment of covenants by some of its members or to enforce a common plan or scheme. That type

of action is clearly an "other" corporate purpose for which a vote is required.

E. Respondents are entitled to attorneys' fees on appeal.

Article XVIII of the WHC Bylaws provides as follows:

...should the Board of Trustees retain legal counsel **for purposes of resolving any dispute with a property owner based on a decision or resolution of the Board of Trustees**, the prevailing party in that dispute (whether resolved through arbitration or by a court of law) **shall be entitled** to all costs incurred in such dispute resolution, including reasonable attorney's fee, and those incurred on appeal.

The phrase "shall be entitled" has been given mandatory meaning when used in attorney's fees clauses contained in contracts. *Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 654 P.2d 712 (1982). The Association filed this action and the appeal based upon a decision of its Board of Trustees to resolve a dispute with property owners. CP 1-12 ¶3.37 If the trial court's decision is upheld, the WHC's Bylaws mandate an award of attorneys' fees on appeal to the Respondent as the prevailing party.

V. CONCLUSION

The WHC has no standing to challenge the amendment of the Second Addition covenants by its members because the powers to amend and to enforce those covenants are unambiguously granted exclusively to the lot owners in the Second Addition. Further, it has no standing to

enforce a common plan or scheme because no common plan or scheme exists as a matter of law when subdivisions are separately platted, each with its own distinct set of covenants, by different owners over 13 years with each set of covenants granting the power to extinguish or change them, in whole or in part, to those who reside exclusively within each subdivision. Moreover, the Second Addition owners have the right to lawfully revoke or change their covenants even if doing so is inconsistent with a general plan or scheme. This Court should affirm the trial court's dismissal of WHC's complaint on summary judgment.

Article (q) of the WHC Articles of Incorporation requires that the Board obtain the approval of two thirds of its members before spending assessments on any corporate purpose other than those reasonably related to providing road, water and sewer services. The commencement and funding of litigation against its members to challenge the amendment of covenants required the approval of two thirds of its members. The Judgment finding that the Board's action in commencing and financing this litigation was ultra vires should be affirmed.

Dated December _____, 2008

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DIVISION II

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STATE OF WASHINGTON
BY _____
DEP. _____ *DM*

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

WOLLOCHET HARBOR CLUB, a
Washington non-profit corporation,

Plaintiff/Appellant,

v.

DOREEN KNAPP, a single person; et al.,

Defendants/Respondents,

v.

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

NO. 32517-5-II

CERTIFICATE OF SERVICE

DOROTHY KOSIR, husband and wife,

Third-Party Defendants,
Appellants.

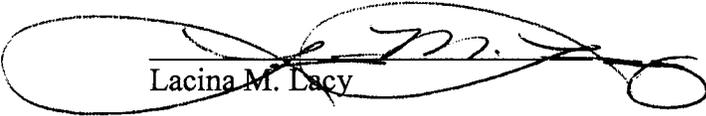
I, Lacina M. Lacy, under penalty of perjury under the laws of the State of Washington declare as follows:

I am an individual of at least 18 years of age, a resident of Pierce County, Washington, and not a party to this action. On June 12, 2009, I did cause to be served by electronic mail a true and correct copy of the Motion to Accept Corrections to Table of Authorities, the Declaration of Kathleen E. Pierce in Support of Motion to Accept Correction to Table of Authorities and Certificate of Service on:

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DATED this 12th day of June, 2009 at Tacoma, Washington


Lacina M. Lacy