



**TABLE OF CONTENTS**

INTRODUCTION..... 1

RESTATEMENT OF THE ISSUES ..... 2

STATEMENT OF THE CASE..... 3

A. The ACC, covenants, and Submittal Procedure. .... 3

B. Holcomb lived in Taree before purchasing the subject property, and was Taree’s Vice President in 2006. .... 6

C. April – early May 2006: Holcomb left preliminary drawings on Moser’s doorstep after which the ACC told her it needed final plans..... 6

D. May 2006: Holcomb listed lot 18 for sale..... 8

E. May 10: The ACC sent Holcomb a letter, explaining that the ACC could not approve her request to construct until she submitted final permit plans. .... 9

F. May 11: Three of five ACC members met Holcomb and her architect to discuss Holcomb’s plans – all deny giving approval..... 9

G. May 12: Brachvogel sent the ACC a letter purporting to confirm approval..... 12

H. May 24: Moser called Brachvogel to discuss inaccuracies in the preliminary plans..... 12

I. June 7: Holcomb submitted her final plans to the County, but not to the ACC..... 13

J. June 15: The ACC informed Holcomb that it was still waiting for final plans so that it could vote on approval..... 13

K. June 28: Holcomb sent the ACC a letter insisting that it had already approved her plans – she did not address the request for final plans or attach a copy of the final plans she sent to the County..... 14

L. July 8: The County issued Holcomb’s permit..... 14

M.	July 12: the ACC again notified Holcomb that it was still waiting for final plans.....	14
N.	August 6: Holcomb asked the president of Taree Community Association to intervene and threatened suit if he did not. ....	15
O.	December 6: Six weeks after Holcomb filed suit, the ACC approved Holcomb's project.....	16
P.	The trial court found that the ACC approved Holcomb's plans, but that she just chose not to pursue building. ....	18
	ARGUMENT.....	19
A.	Standards of Review. ....	19
B.	The trial court plainly ruled that Holcomb chose not to pursue building, so could not establish causation. ....	20
C.	Substantial evidence supports the trial court's finding that Holcomb chose not to pursue building. ....	21
D.	This Court does not review credibility determinations, so should not review the trial court's decision that Holcomb chose not to pursue building. ....	23
E.	Holcomb's actions are also akin to a failure to mitigate. (BA 38-44).....	24
F.	The trial court properly denied Holcomb's motion for reconsideration.....	27
G.	Taree's corporate form shields Moser from individual liability.....	29
H.	In the alternative, if this Court is persuaded by Holcomb's arguments, then it should remand with instructions to decide whether (1) the ACC Submittal Procedure requiring final plans is enforceable; (2) the ACC could approve Holcomb's plans without taking a vote at an ACC meeting; and (3) the ACC acted reasonably and in good faith. ....	32
	CONCLUSION .....	37

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Cmty. Ass'n for Restoration of the Env't v. Dep't of Ecology,</i> ___ Wn. App. ___, ___ P.3d ___ (2009).....	24
<i>Cobb v. Snohomish County,</i> 86 Wn. App. 223, 935 P.2d 1384 (1997), <i>rev. denied</i> , 134 Wn.2d 1003 (1998) .....	24, 25
<i>Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.,</i> 85 Wn. App. 695, 934 P.2d 715 (1997), <i>aff'd in part</i> <i>and rev'd in part</i> , 135 Wn.2d 894 (1998).....	29, 31
<i>Grayson v. Nordic Constr. Co.,</i> 92 Wn.2d 548, 599 P.2d 1271 (1979).....	29, 30
<i>Johnson v. Harrigan-Peach Land Dev. Co.,</i> 79 Wn.2d 745, 489 P.2d 923 (1971).....	30
<i>Korst v. McMahon,</i> 136 Wn. App. 202, 148 P.3d 1081 (2006).....	19, 20, 21
<i>McCallum v. Allstate Prop. &amp; Cas. Ins. Co.,</i> 149 Wn. App. 412, 204 P.3d 944 (2009).....	27
<i>Meisel v. M&amp;N Modern Hydraulic Press Co.,</i> 97 Wn.2d 403, 411, 645 P.2d 689 (1982) .....	29
<i>Riss v. Angel,</i> 131 Wn.2d 612, 934 P.2d 669 (1997).....	30, 31, 36
<b>STATUTES</b>	
RCW 24.03.127.....	31

**OTHER AUTHORITIES**

RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 6.8  
ENFORCEMENT POWERS (2000) ..... 34

## **INTRODUCTION**

Gloria Holcomb could have obtained ACC approval in June 2006, by simply giving the ACC her final permit plans. Yet Holcomb insists that building would have defied the ACC. That is not what the trial court ruled, nor is it accurate.

The trial court found that Holcomb had ACC approval on June 12 2006, but chose not to build, so the ACC's post-June 12 requests for final plans did not damage Holcomb. There is ample evidence to support those findings, including that Holcomb was always equivocal about her intent to build, listed her lot for sale in May 2006, and could have easily and readily obtained ACC approval in June if she had been serious about building. The ease in which Holcomb could have obtained ACC approval also undermines her claim that she would have had to defy the ACC to build. This Court should affirm.

If this Court disagrees, then it must remand for fact-finding on the following: whether the ACC (1) could require final documents; (2) could approve Holcomb's plans without a vote; and (3) acted reasonably and in good faith. These questions must be answered before any court could determine the ACC's liability.

## **RESTATEMENT OF THE ISSUES**

1. Is there substantial evidence to support the trial court's findings that Holcomb simply chose not to pursue building, where she was equivocal about her intent to build from the beginning, listed her lot for sale, and easily could have obtained ACC approval if she had been serious about building?

2. Should this Court decline to address Holcomb's argument that she would have built but for the ACC's actions, where the trial court disbelieved Holcomb and this Court does not review credibility determinations?

3. Did Holcomb fail to mitigate her damages, where she easily could have given the ACC her final plans by June 7 at the latest, but refused to do so?

4. Did the trial court properly deny Holcomb's motion for reconsideration, where none of Holcomb's grounds addressed the trial court's findings that Holcomb simply chose not to pursue building, such that the ACC's post-June 12 actions did not cause her damages, if any?

5. Does Taree's corporate form shield Moser from individual liability?

6. Alternatively, if this Court reverses, should it remand to the trial court to decide (a) whether the ACC Submittal Procedure is enforceable; (b) the ACC could have approved Holcomb's request to construct without a vote; and (c) the ACC acted reasonably and in good faith, where the trial court cannot decide the ACC's liability without addressing these issues?

### **STATEMENT OF THE CASE**

#### **A. The ACC, covenants, and Submittal Procedure.**

Taree Community Association's protective covenants were recorded in 1969. Ex 9; RP 252. Taree Water System and Parks Maintenance Commission was incorporated as a non-profit in 1978, and became Taree Community Association in 1992. Ex 10; RP 250, 272. The Articles of Incorporation provide that each Taree lot owner is a member of the Taree Community Association. Ex 9 Art. IX; RP 205.

The covenants establish an architectural control committee (ACC) whose primary purpose is to ensure that Taree owners abide by the following covenants restricting building (Ex 1; RP 260):

4. No building shall be erected, placed or altered on any lot until construction plans and specifications and plan showing location of structure have been approved by the architectural control committee, as to quality of workmanship and materials, harmony of external design with existing

structures and as to location with respect to topography and finish grade elevation.

...

9. No building shall be erected on any lot with the foundation nearer than 25 (twenty-five) feet to any street right-of-way line or rear lot line nor nearer than 5 (five) feet to any interior or side lot line.

...

12. No dwelling or other structure will be built on any lot of this plat with the highest point more than 17 feet above the ground level at the base of said dwelling or structure . . .

Ex 1. With view lots like Holcomb's, the ACC is particularly concerned with the set-back requirement and height limit. RP 260.

Covenant 21 provides that the ACC must approve or disapprove any request to construct in writing. Ex 1 ¶ 21. If the ACC does not do so within 30 days, the request to construct is "deemed" to have satisfied the covenants, and the ACC waives the right to disapprove. *Id.*

Morris Moser, the current ACC chair, purchased a lot in Taree in 1985. Moser, who holds degrees in aeronautical and mechanical engineering and was a naval flight officer for five years, designed his residence with an architect's help. RP 254-55. Moser has lived in Taree since 1998, and joined the ACC in 1999. RP 255-56; CP 235. Moser began chairing the ACC in April 2001, a

volunteer position. *Id.* He has also served on the Taree Board of Directors since April 2006. *Id.*

In 2000-2001, the ACC adopted the following Submittal Procedure, which requires a lot owner to provide a copy of the “final drawings . . . submitted to Kitsap County Planning for the building permit” before the ACC can approve a project and before the 30-day clock (covenant 21) starts running:

1. Provide the ACC with a set of the final drawings including a detailed site plan identical to what was submitted to Kitsap County Planning for the building permit.

. . .

3. The 30 day ‘clock’ for the ACC to vote on your request does not start until after the ACC has received all the requested information. . . .

4. [After the ACC has] received all of the requested information, the ACC will meet, review the request, vote, and notify you by letter of the results.

Ex 12; RP 260, 324-25. The Submittal Procedure clarifies covenant four’s requirement that a lot owner submit “construction plans and specifications” for approval before building. Exs 1 ¶ 4, 12; RP 211.

Since adopting the Submittal Procedure, the ACC has considered four proposals for new construction, including Holcomb’s. RP 206. The height restriction was an issue with all

four. *Id.* All but Holcomb requested and were granted variances to the height restriction. RP 206-07. None of the other applicants failed to comply with the Submittal Procedure. RP 260.

**B. Holcomb lived in Taree before purchasing the subject property, and was Taree's Vice President in 2006.**

Holcomb bought the lot at issue ("lot 18") in 2003. RP 21. A John L. Scott real estate agent, Holcomb thought she "might" want to develop the property "someday." *Id.* At the time, Holcomb lived on lot 19 next door to lot 18, so was already a member of the Taree Community Association. RP 21, 205.

Holcomb was elected Taree's Vice President in April 2006, in the early stages of requesting consent to construct on lot 18. RP 78. Although she read the covenants, Holcomb states that she did not read the ACC Submittal Procedure.<sup>1</sup> RP 78-79.

**C. April – early May 2006: Holcomb left preliminary drawings on Moser's doorstep after which the ACC told her it needed final plans.**

On April 12, 2006, Holcomb left "preliminary sketch drawings" on Moser's doorstep, requesting consent to construct a

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<sup>1</sup> Holcomb argues in her statement of the Case that the ACC did not historically follow the Submittal Procedure. BA 14. Taree appropriately responds to this argument in its Argument § H.

residence on her lot 18.<sup>2</sup> Exs 18, 46; RP 264. Moser called an ACC meeting to review Holcomb's preliminary drawings the day after receiving them. Ex 46; RP 265-66. On April 18, Moser called Holcomb to discuss the setback and height limitations. Ex 46; RP 31-32, 267. Holcomb acknowledges that Moser told her that the ACC needed final plans. RP 33.

Architect Csilla Elliot (who worked with Holcomb's primary architect Peter Brachvogel) called the next day and agreed to put up 17 foot high "story-pole" at the "existing ground level at [the] back of [the] house," to establish the maximum allowable height. Ex 46; 129; 268. Holcomb also agreed to erect the story-pole at the back of her lot when talking to Moser after the annual meeting on April 20. Ex 46. When Moser and Holcomb spoke again over the phone on April 29, Holcomb indicated that she would not place the story-pole until after clearing the lot. Ex. 46.

Holcomb later told a neighbor that it would cost her \$1,000 to erect the story-pole, so on May 3 the ACC put up a story-pole and took photos documenting the height limit. Ex 46. The ACC

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<sup>2</sup> Although Holcomb testifies that she left the preliminary plans on Moser's doorstep on April 6 or 7, her envelope is dated April 12. *Compare* RP 30 with Ex 18.

subsequently asked Holcomb for a written request for a variance and final plans showing elevations. *Id.*

**D. May 2006: Holcomb listed lot 18 for sale.**

Holcomb listed lot 18 for sale in May 2006. RP 316. Although she denies having done so (RP 34), Paul Middlehoven, an ACC member, is certain that Holcomb listed lot 18 in May because he asked the John L. Scott realtor posting the sign to confirm that he had the correct lot, surprised that Holcomb was listing her lot when she had expressed her intent to build:

Q. . . . Do you recall seeing a sign for sale on that lot in May of 2006?

A. Yes, correct.

Q. No question in your mind?

A. No question in my mind, because I was in the front yard of my property when the person who was installing the lot, the for sale sign, the white post, with the John L. Scott, was ready to install. I stopped him . . . and asked him, are you on the right lot, because Ms. Holcomb is going to start building on this lot.

RP 316-17. The realtor checked his paperwork, confirming that he was on the right lot – Holcomb's lot 18. *Id.*

**E. May 10: The ACC sent Holcomb a letter, explaining that the ACC could not approve her request to construct until she submitted final permit plans.**

On May 10, the ACC sent Holcomb a letter noting that her preliminary drawings did not satisfy the set-back and height limits (covenants 9 and 12). Ex 2. The letter attached the Submittal Procedure, reminding Holcomb that the 30-day clock would not start running until Holcomb gave the ACC final plans:

[T]he 30 day ACC response will apply when the ACC receives your finalized home and site plan that are intended for presentation to the Kitsap County Planning for your building permit.

*Id.* (emphasis original).

Although Holcomb acknowledges reviewing the May 10 letter and Submittal Procedure, she states that she did not do so until June or early July, claiming the Moser told her to disregard it. RP 35. Moser denies having done so. RP 274.

**F. May 11: Three of five ACC members met Holcomb and her architect to discuss Holcomb's plans – all deny giving approval.**

Holcomb's architect Peter Brachvogel scheduled a time on May 11, 2006 to meet at lot 18 and discuss the 17 foot height limit. RP 37-38, 142-43. Before the meeting, Brachvogel prepared a revised set of plans reflecting changes to comply with the 25-foot

setback. RP 38, 140-41. Holcomb did not give the ACC the updated drawings before May 11. RP 38.

Brachvogel arrived late and began the conversation with “Which one of you is Moser?” RP 233-34. “It kind of went down hill from that point on.” *Id.* Moser found it difficult to work with Brachvogel. RP 234.

Moser and Middlehoven, the only ACC members present, assumed that Brachvogel was going to provide final plans. RP 275. Instead, Brachvogel provided “updated preliminary drawings.” *Id.*; Ex 20. In fact, Moser, Middelhoven, and Brachvogel “identified” the drawings as “preliminary drawings.” RP 276. Moser understood that Brachvogel would begin preparing the final plans after their May 11 discussion. RP 231.

Holcomb arrived about one-half-hour late, shortly after Brachvogel left. RP 39, 276. A third ACC member, Dennis Wodtke, also arrived late. RP 300-01. Moser told Holcomb that her new preliminary plans remedied the problem with the setback requirement. RP 277. He also re-raised a prior suggestion about rotating her foundation to better maximize her view. *Id.* Holcomb was “still considering it.” *Id.*

Holcomb claims that Moser, Middlehoven, and Wodtle “approved” her plans on May 11. BA 11-12. She argues that Moser and Middlehoven stated their approval to Brachvogel and repeated it to her and that Wodtle stated his approval to her. *Id.* She omits, however, that Moser, Middlehoven, and Wodtle all deny approving her plans and that the other two ACC members were not present on May 11.

There are five ACC members – Moser, Wodtle, Middlehoven, Dan Brinnel, and Doug Gordon. RP 279. Moser testified that neither he nor anyone else approved Holcomb’s plans on May 11. RP 276. Middlehoven added that he did not tell Brachvogel or Holcomb that the plans were approved as they were still incomplete. RP 315. Instead, either Middlehoven or Moser told Brachvogel that the ACC still needed the final plans that would be submitted to the County. *Id.* They told Holcomb that her plans “look[ed] okay,” but that they were still incomplete. *Id.* RP 315-16.

Wodtle had a doctor’s appointment that morning and joined the others after Brachvogel left. RP 301. He saw Holcomb’s car, but thinks she was off wandering around the lot. *Id.* He did not tell Holcomb her plans were approved – he does not even recall talking to her. *Id.*

**G. May 12: Brachvogel sent the ACC a letter purporting to confirm approval.**

On May 12, 2006, Brachvogel sent a letter to the “Taree Association,” attention Moser, stating Brachvogel’s “understanding that [Moser] representing the Architectural Control Committee (ACC)” approved the design on May 11. Ex 3. Brachvogel acknowledged, however, that the plans he gave the ACC were not final, stating “I am moving ahead with the completion of the Contract Documents in preparation for building permit submittal to Kitsap County.” *Id.*

Holcomb argues that Moser’s “personal notes confirm the ACC’s approval.” BA 11. Moser’s notes simply document Brachvogel’s statement in the May 12 letter that the ACC approved Holcomb’s drawings on May 11. Ex 46. Moser does not adopt Brachvogel’s statement. *Id.*

**H. May 24: Moser called Brachvogel to discuss inaccuracies in the preliminary plans.**

Moser called Brachvogel on May 24 to discuss inaccurate elevations in the May 11 drawings. RP 278. Brachvogel was “essentially unresponsive” and seemed uninterested. *Id.*

**I. June 7: Holcomb submitted her final plans to the County, but not to the ACC.**

Holcomb submitted her final plans to Kitsap County on June 7. RP 105, 161. She did not give the ACC a copy of the final plans she submitted to the County. RP 282.

**J. June 15: The ACC informed Holcomb that it was still waiting for final plans so that it could vote on approval.**

On June 15, 2006, Moser sent Holcomb a letter stating that the ACC was still waiting for final plans. Ex 4. The letter plainly states that the ACC would not approve the project without receiving and voting on final plans (*id.*):

As of this date the ACC has not received a set of the final drawings to review, discuss, and vote on for final approval as is required per the Taree ACC Submittal Procedure (see the attachment to the ACC letter dated May 10, 2006). Notwithstanding the letter from [Brachvogel] dated May 12, 2006 the ACC is required to follow the ACC Submittal Procedure before it can issue a letter of approval. In summary, the information provided thus far has been very useful and the ACC awaits the submittal of your final drawings.

Holcomb repeatedly states that the June 15 letter attempted to revoke or deny approval. BA 4, 13. She even puts “revoke” in quotation marks, incorrectly suggesting that the word appears in the letter. BA 4. The letter does not attempt to revoke approval, nor could it where none of the ACC members believed that they had given approval. Rather, the letter simply notifies Holcomb that

the ACC had not and would not vote on her request to construct until she gave the ACC final plans. Ex 4.

**K. June 28: Holcomb sent the ACC a letter insisting that it had already approved her plans – she did not address the request for final plans or attach a copy of the final plans she sent to the County.**

After receiving the ACC's June 15 letter, Holcomb could have easily given the ACC a copy of the same plans she filed with the County for permitting, just one week earlier. RP 105, 161. She did not. RP 282. Instead, she insisted that the ACC had already approved her plans. Ex 5. Holcomb told the ACC to stay off her property, threatened to sue, and stated that she would move forward with construction unless the ACC stated its intent to withdraw approval within seven days. *Id.*

**L. July 8: The County issued Holcomb's permit.**

The County issued Holcomb's permits on July 8 and she picked them up on July 11. RP 34. Holcomb still did not give the ACC her final plans. RP 282.

**M. July 12: the ACC again notified Holcomb that it was still waiting for final plans.**

The ACC responded to Holcomb's June 28 letter within seven days (RP 282) and sent her a response letter on July 12 – the day after Holcomb obtained her permits. Ex 6. The ACC told

Holcomb that it was still waiting for her final plans “identical to what [Holcomb] submitted to Kitsap County,” explaining:

For obvious reasons, the ACC established this requirement as a matter of policy many years ago and it applies to all Taree lot owners. This is a requirement which you can easily and readily satisfy.

*Id.* Holcomb had her permits in hand, so could have “readily and easily satisf[ied]” the ACC’s request for final plans, but still did not send the ACC a copy. RP 282.

**N. August 6: Holcomb asked the president of Taree Community Association to intervene and threatened suit if he did not.**

Holcomb states that in early August she approached Taree Association President Dan Maloney before a board meeting with “approved plans in hand,” offering to pay another architect to review them to prove that she had already provided the ACC all necessary information. RP 53-54; BA 17. She claims that Maloney “rebuffed her,” stating the matter “was ‘in the hands of the lawyers.’” BA 17.

According to Maloney, Holcomb asked him to approve her plans and threatened suit if he did not. RP 252. She then resigned her vice presidency and left before the meeting started. *Id.*

Holcomb claims she had no choice but to sue. BA 17. But Holcomb did not ask Maloney to take her plans and give them to the ACC. As Taree’s Vice President (RP 78), Holcomb surely knew

that Moser, a member of the board of directors, would be at the board meeting, yet she did not wait to hand her plans to Moser. Holcomb again failed to give the ACC her final plans. RP 205-06.

Holcomb repeatedly argues that she could not build “in defiance of the ACC,” so tried to persuade the ACC to “re-approve” or “acknowledge its approval.” BA 15-16, 38-39. But she never gave the ACC what it asked for repeatedly – the final plans she submitted to the County on June 7.

**O. December 6: Six weeks after Holcomb filed suit, the ACC approved Holcomb’s project.**

Holcomb filed suit for declaratory relief and damages on October 27, 2006. CP 1; RP 54. On December 1, Moser, Wodtke, Maloney, and Taree’s attorney met with Holcomb and Brachvogel to “attempt to resolve the impasse regarding the receipt of final drawings.” RP 285. Despite Holcomb’s insistence that she was willing to hand over final plans in August, she continued to use the May 11 plans at this meeting, again failing to give the ACC a copy of her final plans. BA 17, RP 53, 285.

As if undisputed, Holcomb argues (in her facts) that the May 11 drawings are no different than the December 1 plans the ACC ultimately approved, and were “identical in all material respects” to

the plans she gave the County for permitting. BA 18. But Moser and Wodtke unequivocally opined that the December 1 plans and the permit plans are different than the May 11 drawings:

Comparing the May 11 drawings and December 1 plans:

- ◆ Brachvogel deleted the elevation numbers on the front and side elevation drawings. The ACC asked him to do so to ensure that final height of the structure was not misleading.
- ◆ Brachvogel wrote “rough grade equals preconstruction grade, top of concrete at southwest elevation matches rough framing.”
- ◆ The additional information allowed the ACC to determine the height of the structure, which the ACC could not do without that notation.
- ◆ This was the first time that the ACC was able to match the height of the natural grade behind the house with the level of the floor and ultimately the height of the peak of the roof.
- ◆ Holcomb even admits that the permit plans had “added in structural details.”

RP 95, 285-87, 290, 303-04.

Comparing the May 11 drawings and the permit plans:

- ◆ One difference is the average natural grade is filled in.
- ◆ The permit plans include four natural grade elevation benchmarks identified along the back of the structure.

RP 289-90.

Although Holcomb still did not give the ACC her final plans at the December 1 meeting, the December 1 plans finally gave the ACC enough information to make a decision. RP 290. The ACC voted to approve Holcomb’s plans on December 3, and gave her

written approval on December 6. RP 287-288, 304, 317-18; CP 80-81.

Moser and Wodtke agreed that the ACC very well could have approved Holcomb's plans in June or July if she had given the ACC her final plans. RP 290, 307.

**P. The trial court found that the ACC approved Holcomb's plans, but that she just chose not to pursue building.**

The trial court found that the ACC actually or tacitly approved Holcomb's project by June 12, 30 days after Brachvogel's May 12 letter purporting to confirm approval. The court did not, however, decide whether approval was actual or tacit, *i.e.*, based on the ACC's failure to grant or deny approval within 30 days of Brachvogel's May 12 letter:

[Holcomb's] plans were submitted and considered by the ACC, and either were agreed to by the ACC or there was no decision made in writing, within 30 days, which was required by the protective covenants of the Plat of Taree.

[Holcomb] had the approval of the ACC by June 12, 2006. CP 631, FF B-1<sup>3</sup> & B-2. The court found that once she had ACC approval, Holcomb simply chose not to build, such that the ACC did not cause her damages (CP 631, FF B-3 & B-4, CL 1):

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<sup>3</sup> The trial court broke its findings into sections "A" and "B." CP 630-31. The findings are attached.

[Holcomb] then chose not to pursue building the building, from this court's view.

There is nothing in the record that any action after June 12, 2006 was a legally cognizable cause of the building not proceeding.

...

There are no compensable damages based upon the ACC's actions in this matter.

## ARGUMENT

### A. Standards of Review.

This Court will affirm the trial court's findings if they are supported by substantial evidence – “evidence sufficient to persuade a rational fair-minded person the premise is true.” **Korst v. McMahon**, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). This is a “deferential standard,” and the Court “views all reasonable inferences from the evidence in the light most favorable to the prevailing party,” Taree. **Korst**, 136 Wn. App. at 206. If a finding is supported by substantial evidence, then this Court “will not substitute [its] judgment for that of the trial court, even though [it] might have resolved a factual dispute differently.” *Id.*

The Court next considers whether the findings of fact support the conclusions of law. 136 Wn. App. at 206. The Court reviews conclusions on law *de novo*. *Id.*

**B. The trial court plainly ruled that Holcomb chose not to pursue building, so could not establish causation.**

The trial court's findings are straightforward: (1) the ACC actually or tacitly approved Holcomb's plans; (2) Holcomb chose not to build despite ACC approval; and (3) nothing after June 12 2006 "was a legally cognizable cause of the building not proceeding." CP 630-31. In other words, the trial court found that the ACC's June 15 and July 12 letters requesting final documents – "action[s] after June 12" – did not prevent Holcomb from building. *Id.* Instead, she simply "chose not to pursue building." *Id.*

Holcomb incorrectly argues that the trial court's findings lead to the inescapable conclusion that she had to "defy" the ACC and build to establish legally cognizable damages:

- ◆ The "sense" of the court's findings is that "Ms. Holcomb's subsequent failure to proceed immediately with construction is the legal cause of any damages she suffered." BA 31.
- ◆ "There is no factual or legal basis to conclude that Ms. Holcomb had to defy (or even could defy) the ACC and begin construction shortly after June 12, 2006." BA 43.
- ◆ "There is no evidence that Ms. Holcomb could or should have defied the ACC and begun construction shortly after June 12, 2006 . . . ." BA 38.
- ◆ "[I]t was not incumbent upon Ms. Holcomb to take the risk of defying the ACC." BA 48.
- ◆ "The doctrine of avoidable consequences did not require Ms. Holcomb to defy the ACC." BA 24.

The court's findings plainly contradict this argument. Holcomb chose not to build regardless of the ACC's actions, so it is irrelevant that building might have "defied" the ACC. CP 631, FF B-3.

Holcomb's argument is also fatally flawed in that Holcomb did not have to "defy" the ACC if she had chosen to build. Rather, she could have built with ACC approval by simply giving the ACC her final plans. *Infra*, Argument § C & E.

**C. Substantial evidence supports the trial court's finding that Holcomb chose not to pursue building.**

The question on review is whether, taking all reasonable inferences from the evidence in Taree's favor, there is evidence sufficient to convince a rational fair-minded person that Holcomb simply "chose not to pursue building." CP 631, FF B-3; *Korst*, 136 Wn. App. at 206. Holcomb does not address this question. Instead, her only challenge to the court's finding that she simply chose not to pursue building after she had ACC approval, is that she could not reasonably be expected to test the ACC's resolve. *Supra*, Argument § B. Holcomb misses the point.

The evidence that Holcomb decided to sell her empty lot is alone sufficient to support the trial court's finding on this issue. Middlehoven unequivocally testified that Holcomb listed lot 18 for

sale in May 2006, which is before the ACC allegedly “revoked” approval. RP 316-17. He is sure of the date because he found it odd that Holcomb was attempting to sell lot 18, after expressing her intent to build. *Id.* Although Holcomb denies listing lot 18 in May, the trial court can choose to believe Middlehoven.

In any event, Holcomb acknowledged that she listed lot 18 for sale in July 2006. RP 34. And she was equivocal about her intent to build in the first place – stating that she bought lot 18 thinking she “might” want to build “someday.” RP 21. This too supports the trial court’s finding that Holcomb just decided not to build. CP 631, FF B-3.

Holcomb’s argument that the ACC’s actions forced her to abandon her project is unpersuasive. BA 24, 31, 38, 43, 48. If Holcomb really wanted to build, she could have “easily and readily” obtained ACC approval by simply giving the ACC her final plans.

Ex 6. She had many opportunities to do so:

- ◆ On June 7, when she submitted final plans to the county;
- ◆ After receiving the ACC’s June 15 letter, asking for final plans;
- ◆ On June 28, when she responded to the ACC’s June 15 letter;
- ◆ On July 11, when she picked up her permits;

- ◆ After receiving the ACC's July 12 letter, again asking for final plans; or
- ◆ On August 6, when she went to the Taree board meeting with "approved plans in hand."

*Supra*, Statement of the Case. The ACC likely would have approved Holcomb's final plans had she submitted them in June or July. RP 307.

In short, there is adequate support for the trial court's finding that Holcomb just chose not to build, independent of any events after June 12. As such, the ACC did not cause Holcomb's alleged damages.

**D. This Court does not review credibility determinations, so should not review the trial court's decision that Holcomb chose not to pursue building.**

The trial court's finding that Holcomb elected not to pursue building is a credibility determination. CP 631, FF B-3. The basis of Holcomb's lawsuit is that she intended to build and that the ACC's actions caused delay, making it impossible for her to do so. BA 18-19. In finding that Holcomb simply decided not to build, the trial court plainly dis-believed Holcomb's claims that she would have built but for the ACC's actions. CP 631, FF B-3. The Court should not review this issue, since it will not review credibility

determinations. ***Cnty. Ass'n for Restoration of the Env't v. Dep't of Ecology***, \_\_\_ Wn. App. \_\_\_ ¶ 23, \_\_\_ P.3d \_\_\_ (2009).

**E. Holcomb's actions are also akin to a failure to mitigate. (BA 38-44).**

Holcomb does not address causation, even though that is clearly the basis of the trial court's decision. Instead, she couches her arguments in the mitigation of damages doctrine. BA 38-44. This argument incorrectly assumes that Holcomb would have pursued building but for the ACC's post-June 12 actions. *Supra*, Argument § C. The Court need not consider this argument.

In any event, Holcomb failed to mitigate her damages. Assuming that Holcomb wanted to build, it was unreasonable to refuse to give the ACC her final plans.

Under the doctrine of avoidable consequences, or mitigation of damages, a party may not recover damages she "could have avoided through reasonable efforts." ***Cobb v. Snohomish County***, 86 Wn. App. 223, 230, 935 P.2d 1384 (1997), *rev. denied*, 134 Wn.2d 1003 (1998). In other words, the doctrine requires the plaintiff to take reasonable steps to avoid damages. ***Cobb***, 86 Wn. App. at 233.

In **Cobb**, developer R/L Associates submitted a preliminary plat application to subdivide real property into eighteen lots, planning to build twelve new homes. 86 Wn. App. at 226. As a condition of plat approval, a Snohomish County ordinance required developers to contribute to improving roads impacted by their proposed projects, and Snohomish sought \$10,000 from R/L to build a left-turn lane near the proposed development. *Id.* at 228. R/L appealed Snohomish's decision to a hearing examiner, lost, and appealed to the superior court without paying the \$10,000 under protest. *Id.* at 233.

The trial court ruled that R/L failed to mitigate its damages by failing to pay the \$10,000 under protest so that it could obtain plat approval and move forward with its development. *Id.* The appellate court affirmed, holding that R/L (1) had the \$10,000; (2) stood to profit \$960,000; and (3) had previously paid exactions under protest. *Id.* at 234.

If Holcomb actually wanted to build, then the only reasonable course of action to mitigate her damages was to give the ACC final plans when she had them no later than June 7 or any time thereafter. Instead, Holcomb just kept insisting that the ACC had already approved her plans and that she did not have to provide

final plans. Ex 5; BA 13, 16-17, 38-39. The only thing standing between Holcomb and ACC approval was her stubborn refusal to give the ACC her final plans. *Supra*, Argument § C. If R/L had to pay \$10,000 to mitigate its damages, Holcomb certainly had to turn over her final plans to mitigate hers.

Holcomb ironically argues that “[i]t was always within the power of the ACC to reaffirm its May 11 approval or to recognize that it had failed to act within the time required by the Taree Covenants. It was the ACC’s stubborn refusal to do so that led to the delay.” BA 41. So too could Holcomb at any time have realized that the ACC had not acted within 30 days, so could not deny her request. So too could Holcomb have given the ACC the same permit plans she gave the County on June 7. It was Holcomb’s stubbornness that caused the delay.

In short, if Holcomb had really wanted to build, then she could have quickly and easily obtained ACC approval in June 2006. She caused any delay damages by failing to mitigate.

**F. The trial court properly denied Holcomb's motion for reconsideration.**

Holcomb's motion for reconsideration repeated the same arguments she raised at trial. This Court should affirm on this point for the same reasons addressed above.

Holcomb moved for reconsideration or a new trial, based on (1) surprise; (2) insufficient evidence to support the trial court's decision; and (3) substantial injustice. BA 45. As part of this motion she offered a declaration from her lender, indicating that the bank would not close her construction loan while the dispute with the ACC was ongoing. BA 47; CP 650-52. This Court reviews the trial court's decision denying Holcomb's motion for reconsideration for an abuse of discretion. *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 419-20, 204 P.3d 944 (2009).

Holcomb argues that the trial court erroneously denied her motion for the following reasons:

- ◆ She complains that the trial court's decision was unfair "surprise," arguing that the trial court's decision is an "unsought amendment of the pleadings," where Taree argued that Holcomb failed to mitigate after December 2006, not after June 12, 2006. BA 46-47.
- ◆ She argues that substantial evidence did not support the trial court's decision, stating that she could not have proceeded with construction in June 2006. BA 48.

- ◆ She argues that substantial justice was not done, accusing the trial court of “ignore[ing] the undisputed facts.” BR 49.

These arguments are grounded on that same argument that Holcomb did not have to “defy” the ACC and begin construction in June 2006. BA 48.

Holcomb again mischaracterize the trial court’s ruling. The court did not rule that Holcomb failed to mitigate after June 2006, nor did it rule that Holcomb had to “defy” the ACC and build. *Supra*, Argument § B. Rather, the court simply ruled that Holcomb “chose not to pursue building.” CP 631, FF B-3. As discussed above, there is sufficient evidence to support that finding. *Supra*, Argument § C.

The court simply did not believe that Holcomb would have built but for the ACC’s actions. It considered her motion and her lender’s declaration, and was not persuaded otherwise. CP 653-54.

Contrary to Holcomb’s claims, the trial court did not “ignore” the ACC’s June 15 and July 12 letters requesting final documents. BA 49. Rather, the court found that nothing after June 12 caused Holcomb not to build other than her own decision not to pursue building. CP 631, FF B-3, B-4. If Holcomb had wanted to build,

she could have secured ACC approval and her construction loan by just giving the ACC her final plans.<sup>4</sup>

**G. Taree's corporate form shields Moser from individual liability.**

The Court should reach this issue only if it reverses the primary issue. Moser can be liable only if Taree is liable, where the parties agree that he always acted in his "official capacity" as the ACC chairman. BA 32. If the Court reaches this issue, then it should hold that Taree's corporate form shields Moser from personal liability, and instruct the trial court as such in the event of a remand.

This Court has long recognized that "the purpose of the corporate form is to limit shareholder liability." *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. 695, 707, 934 P.2d 715 (1997) (citing *Meisel v. M&N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 411, 645 P.2d 689 (1982)), *aff'd in part and rev'd in part*, 135 Wn.2d 894 (1998). A corporation is a "distinct" entity from its shareholders. *Grayson v. Nordic Constr. Co.*, 92

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<sup>4</sup> Holcomb also argues that ACC members testified "untruthfully" that the ACC consistently required final plans. BA 50. Final plans were not required in the examples Holcomb refers to. *Infra*, Argument § H. In any event, the "untruth[]" Holcomb alleges did not affect the outcome of the case, where the trial court did not decide whether final plans were required.

Wn.2d 548, 552, 599 P.2d 1271 (1979). If the corporate veil is intact, the corporate form shields an officer from personal liability unless he commits a tort. ***Johnson v. Harrigan-Peach Land Dev. Co.***, 79 Wn.2d 745, 752-53, 489 P.2d 923 (1971); see also ***Grayson***, 92 Wn.2d at 553-54 (CPA violation).

Moser cannot be personally liable where Holcomb has not attempted to pierce the corporate veil or accused Moser of a tort. ***Grayson***, 92 Wn.2d at 553-54. Taree is a non-profit corporation, and Holcomb agrees that Moser acted on the corporation's behalf at all times. RP 272; Ex 10; BA 32. Holcomb never argued corporate disregard, so Taree's corporate form shields Moser. ***Grayson***, 92 Wn.2d at 553-54. And Holcomb never accused Moser of a tort – her claims are for breach of the Taree covenants, which are treated like a contract. ***Riss v. Angel***, 131 Wn.2d 612, 621, 934 P.2d 669 (1997).

Holcomb's sole argument is that Moser is personally liable by analogy to ***Riss***, *supra*, which is easily distinguishable, where the homeowners association involved was unincorporated. BA 33; 131 Wn.2d at 636. Applying agency principles, the ***Riss*** Court held that only those homeowners' association members who participated in or ratified the act at issue could be jointly and

severally liable. *Id.* Holcomb argues that Moser is personally liable “[f]or the same reasons.” BA 33. But Holcomb fails to address the plain distinction between *Riss* and this case – that Taree’s homeowners’ association is incorporated. Analogizing this matter to *Riss* ignores the very purpose of incorporation – to shield individuals from liability. *Eagle Pac*, 85 Wn. App. at 707.

The business judgment rule may also shield Moser from personal liability, although further fact-finding is required on this point. The business judgment rule immunizes a director from personally liability if he acts in good faith and within the standard of ordinary care. *Riss*, 131 Wn.2d at 632-33. The business judgment rule is codified in RCW 24.03.127, Washington Non-Profit Corporation Act, Duties of a Director.

The trial court did not decide whether Moser (or the ACC) acted reasonably and in good faith, nor could it have meaningfully done so without deciding whether approval was actual or tacit. CP 630-31; BA 33. Holcomb argues that the trial court “implicitly found” that Moser acted unreasonably in “retracting the ACC’s May 11 approval.” BA 34. But this argument incorrectly assumes that the trial court found actual approval on May 11 – it did not. CP 630-31. If this Court holds that Moser might be subject to personal

liability, then it should remand with instructions to decide whether the business judgment rule immunizes Moser.

**H. In the alternative, if this Court is persuaded by Holcomb's arguments, then it should remand with instructions to decide whether (1) the ACC Submittal Procedure requiring final plans is enforceable; (2) the ACC could approve Holcomb's plans without taking a vote at an ACC meeting; and (3) the ACC acted reasonably and in good faith.**

The trial court found that the ACC actually approved Holcomb's plans, "or" tacitly approved her plans by failing to respond within 30 days of Brachvogel's May 12 letter. CP 631, FF A-8, B-1 & 2. The findings offer no further insight into the trial court's decision on this point.

The trial court did not decide whether (1) the ACC had authority to require final plans before it would vote on approval and before the 30-day clock would start running; (2) the ACC could approve Holcomb's request to construct without voting at an ACC meeting; or (3) the ACC (and Moser) acted reasonably and in good faith. If the Court reverses, it should remand with instructions to resolve these issues.

The ACC Submittal Procedure requires a lot owner to give the ACC a copy of the "final drawings . . . submitted to Kitsap County Planning for the building permit," expanding covenant four's

requirement that a lot owner submit “construction plans and specifications” for approval before building. Ex 1 ¶ 4. Moser and his predecessor ACC chair Kellie Riley developed the ACC Submittal Procedure in 2000-2001 in response to problems with a prior owner’s request for consent to construct. Ex 12; RP 260, 324-25. The ACC adopted the Submittal Procedure, intending that a lot owner would submit final plans to the ACC the same day she submitted plans to the County for permitting. RP 211.

Once it has final permit plans, the ACC meets to vote on whether to approve or deny a request to construct. RP 290-91. The ACC has never approved building plans without a meeting and a vote. RP 291. As chair, Moser has never granted verbal approval. RP 262.

The trial court could not properly decide that the ACC actually or tacitly approved Holcomb’s request to construct without deciding whether the Submittal Procedure is enforceable. If the Procedure is enforceable, then there is not actual or tacit approval: (1) the ACC will not vote on approval without the final permit plans; and (2) the 30-day clock is not running until ACC has final permit plans. Ex 12.

The ACC has the authority to adopt the Submittal Procedure as it can “adopt reasonable rules and procedures” to assist in enforcing the covenants. RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 6.8 *Enforcement Powers* (2000). Holcomb suggests that the ACC exceeded its authority in adopting the Submittal Procedure, but mistakenly relies on RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 6.9, the purpose of which is to prevent implied “restrictions on the structures or landscaping” an individual lot owner may place on her lot. RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 6.9, *Design-Control Powers (comment (b))* (2000). The Submittal Procedure governs the requirements for requesting consent to construct under covenant four – it does not restrict the structures Holcomb can place on her lot.

Holcomb also argues that the ACC did not historically follow the Submittal Procedure. BA 14, 50. In one of the examples she cites, the ACC had not yet adopted the Submittal Procedure, and in the other two, the Submittal Procedure did not apply:

- ◆ Sliger: In 1993, 7-plus years before the ACC adopted the Submittal Procedure, Sliger submitted plans marked “not for building permit.” RP 217-18. The ACC indicated that the plans expressed the spirit and intent of the Taree covenants, but told Sliger they would have to seek a waiver. RP 217. The ACC ultimately approved Sliger’s plans. RP 218.

- ◆ Middelhoven: In 2003, the Middelhovens asked the ACC to review a proposed garage addition. RP 213. They did not submit final plans, but the ACC never had to address the issue because the Middelhoven's called Moser indicating that they were changing their plans. RP 214-15. Height was not an issue in any event. RP 261-62.
- ◆ Baker: In 2004, Baker sought a variance from the 25 foot setback to build an art studio or garden house. RP 215. Since the structure was less than 200 square feet, no permit was required, so the Submittal Procedure did not apply. RP 215-16.

The ACC never deviated from the Submittal Procedure where the height limit was implicated. RP 261.

The trial court also could not have properly found that the ACC actually approved Holcomb's plans without deciding whether the ACC must vote on requests to construct at an ACC meeting. The ACC must hold a meeting at which all members vote before approving (or denying) a request to construct. RP 291. Only Moser and Middlehoven allegedly approved Holcomb's plans to Brachovgel on May 11. *Supra*, Statement of the Case § E. Wodtke arrived after Brachovgel left and denied even speaking to Holcomb. *Id.* This site visit was not an ACC meeting and no vote occurred.

As such, the ACC could not have approved Holcomb's request to construct on May 11 (RP 291):

- Q. So on the May 11 site plan meeting . . . would you have been able to approve those plans at the site visit?

A. No.

Q. Why is that?

A. Well, there's several reasons. We would have to call a meeting. We would have to have all, [sic] members and they would have to review and vote. And it would be basically an entire meeting to do that.

Finally, in the unlikely event that the trial court were to decide that the Submittal Procedure is unenforceable and that the ACC can approve a request to construct without an ACC meeting and vote, the trial court could still find that the ACC acted reasonably and in good faith. An association is not liable just because it is mistaken – it is liable only if its acts unreasonably and without good faith when applying the covenants. *Riss*, 131 Wn.2d at 627-28. In *Riss*, the association was liable because it “arbitrarily rejected” the applicant’s building plans, where “two of the board members inaccurately represent[ed] the impact of the structure,” drawing objections from neighbors. *Id.* at 628-29.

Here, Moser and Wodtke unequivocally testified that they could not and did not approve Holcomb’s request to construct on May 11 because she had not provided final plans. *Supra*, Statement of the Case § E. The trial court did not address this issue (BA 36; CP 630-31) and could easily find that the ACC’s actions after May 11 were reasonable, based on its good faith belief

that the ACC did not approve Holcomb's request to construct and that the 30-day clock was not running because Holcomb had not provided final plans.

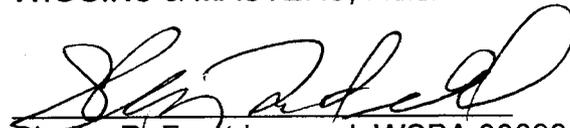
In sum, the trial court's failure to address the Submittal Procedure and ACC voting requirements undermines its findings that the ACC approved Holcomb's request to construct. And the trial court could not find the ACC liable without addressing whether there actions were reasonable and in good faith. If the Court reverses, then it should remand with instructions to address these issues.

### **CONCLUSION**

The trial court correctly found that Holcomb simply chose not to build, regardless of the ACC's actions. Holcomb fails to address that finding, instead claiming that she did not have to defy the ACC and build. But building did not have to entail defying the ACC. Rather, if Holcomb actually wanted to build, she could have done so any time, with ACC approval, if she just provided the ACC her final plans. This Court should affirm.

If the Court were to disagree with the trial court's reasoning, the Court should remand to the trial court to decide the issues left unresolved by the findings and conclusions.

WIGGINS & MASTERS, P.L.L.C.

A handwritten signature in black ink, appearing to read "Shelby R. Frost Lemmel", written over a horizontal line.

Shelby R. Frost Lemmel, WSBA 33099  
241 Madison Avenue North  
Bainbridge Island, WA 98110  
(206) 780-5033

**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENTS** postage prepaid, via U.S. mail on the 20<sup>th</sup> day of May 2009, to the following counsel of record at the following addresses:

Counsel for Appellant

Alan Scott Middleton  
Davis Wright Tremaine, LLP  
1201 3<sup>rd</sup> Ave, Suite 2200  
Seattle, WA 98101-3045

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
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Shelby R. Frost Lemmel, WSBA 33099  
Attorney for Respondents

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DAVID W. PETERSON

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KITSAP**

GLORIA HOLCOMB, a single person, )  
)  
)  
Plaintiff, )  
)  
vs. )  
)  
TAREE COMMUNITY ASSOCIATION, a )  
Washington nonprofit corporation; and )  
MORRIS MOSER, Chairman of the )  
Association's Architectural Control )  
Committee, )  
)  
Defendants. )

No.: 06-2-02512-3

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This matter was tried to the Court, without a jury, from May 13, 2008 to May 14, 2008. The undersigned Judge presided at the trial. The claims presented for adjudication were as follows:

1. Breach of contract (grounded in covenants); and
2. Breach of covenant of good faith and fair dealings.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW-1-

**COPY**

WOLFE LAW OFFICES, PLLC  
216 Sixth Street  
Bremerton, WA 98337  
(360) 782-4200

1 Plaintiff Gloria Holcomb appeared personally at the trial and through her attorney  
2 of record, Alan Middleton. Defendants Taree Community Association and Morris Moser  
3 appeared personally at trial and through their attorney of record, Edward E. Wolfe.

4 Based on the evidence presented at trial, the Court makes the following Findings  
5 of Fact:

6 **I. FINDINGS OF FACT**

7 **A. Breach of Contract (Grounded in Covenants)**

- 8 1. Plaintiff owns an undeveloped lot in Kitsap County located at 24655 Taree  
9 Drive, in the Plat of Taree.
- 10 2. The property of the Plaintiff is subject to protective covenants, recorded for  
11 the Plat of Taree.
- 12 3. The protective covenants establish an Architectural Control Committee  
13 (“ACC”) and requires submission to and approval by the Architectural  
14 Control Committee of certain improvements, including the building of a  
15 house.
- 16 4. The Plaintiff retained an architect, Peter Brachvogel, who prepared  
17 construction plans for the Plaintiff and met with the Taree ACC on the  
18 Plaintiff’s property on May 11, 2006.
- 19 5. On May 12, 2006, Mr. Brachvogel sent a confirming letter to Defendants,  
20 indicating his belief and understanding that the ACC approved the design.
- 21 6. The next correspondence in this matter was a June 15, 2006 letter from the  
22 ACC to the Plaintiff.
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7. After the May 11, 2006 meeting, the Plaintiff proceeded to attempt to obtain a building permit from the county and secured one on July 10, 2006.

8. The Plaintiff's plans were submitted and considered by the ACC, and either were agreed to by the ACC or there was no decision made in writing, within 30 days, which was required by the protective covenants of the Plat of Taree.

**B. Breach of Covenant of Good Faith and Fair Dealings**

1. The Plaintiff's plans were submitted and considered by the ACC, and either were agreed to by the ACC or there was no decision made in writing, within 30 days, which was required by the protective covenants of the Plat of Taree.

2. The Plaintiff had the approval of the ACC by June 12, 2006.

3. The Plaintiff then chose not to pursue building the building, from this court's view.

4. There is nothing in the record that any action after June 12, 2006 was a legally cognizable cause of the building not proceeding.

Based on the above findings, the Court makes the following Conclusions of Law:

**II. CONCLUSIONS OF LAW**

1. There are no compensable damages based upon the ACC's actions in this matter.

2. Taree Community Association and Mr. Moser are not responsible for any of the damages argued by the Plaintiff.

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- 3. There is not a statutory basis for the recovery of attorney's fees by either side.
- 4. There is not an equitable basis to award attorney fees to either party in this matter.

Dated this 18 day of July, 2008.

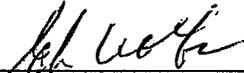
**LEONARD W. COSTELLO**

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Honorable Leonard W. Costello  
Kitsap County Superior Court

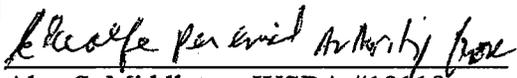
Presented by:

Wolfe Law Offices, PLLC

  
 \_\_\_\_\_  
 Edward E. Wolfe, WSBA #24952  
 Attorney for Defendants

Copy Received; Approved as to Form;  
Notice of Presentation Waived:

Davis Wright Tremaine, LLP

  
 \_\_\_\_\_  
 Alan S. Middleton, WSBA #18118  
 Attorney for Plaintiff



CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed or caused to be mailed a copy of the foregoing ERRATA, via U.S. mail, postage prepaid, on the 22 day of May, 2009 to the following counsel of record at the following addresses:

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Seattle, WA 98101-3045

  
Shelby R. Frost Lemmel, WSBA 33099  
Attorney for Respondents

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BY \_\_\_\_\_  
DATE \_\_\_\_\_  
COUNSEL FOR RESPONDENTS  
SHELBY R. FROST LEMMEL

residence on her lot 18.<sup>2</sup> Exs 18, 46; RP 264. Moser called an ACC meeting to review Holcomb's preliminary drawings the day after receiving them. Ex 46; RP 265-66. On April 18, Moser called Holcomb to discuss the setback and height limitations. Ex 46; RP 31-32, 267. Holcomb acknowledges that Moser told her that the ACC needed final plans. RP 33.

Architect Csilla Elliot (who worked with Holcomb's primary architect Peter Brachvogel) called the next day and agreed to put up 17 foot high "story-pole" at the "existing ground level at [the] back of [the] house," to establish the maximum allowable height. Ex 46; RP 129, 268. Holcomb also agreed to erect the story-pole at the back of her lot when talking to Moser after the annual meeting on April 20. Ex 46. When Moser and Holcomb spoke again over the phone on April 29, Holcomb indicated that she would not place the story-pole until after clearing the lot. Ex. 46.

Holcomb later told a neighbor that it would cost her \$1,000 to erect the story-pole, so on May 3 the ACC put up a story-pole and took photos documenting the height limit. Ex 46. The ACC

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<sup>2</sup> Although Holcomb testifies that she left the preliminary plans on Moser's doorstep on April 6 or 7, her envelope is dated April 12. *Compare* RP 30 with Ex 18.