

NO. 41062-1-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

NORM & JANET BRUNS,

Appellants,

vs.

THE WILLIAM M. AND WILHELMA COFER LIVING TRUST,

Respondent.

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STATE OF WASHINGTON
BY _____
DEPT. OF JUSTICE

REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS

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INTRODUCTION

Mr. and Mrs. Bruns are the appellants and cross respondents under RAP 10.1(f). This brief begins with their response to the cross appeal. That is followed by reply arguments in support of their own appeal. The brief concludes with a response to Mr. and Mrs. Cofer's request for this Court to award fees and costs under RAP 18.1. This brief has the same appendices as the opening brief: the subdivision plat map (Ex 1), the protective covenants (Ex 2), the trial court's Findings of Fact and Conclusions of Law (CP 201), and the Judgment (CP 218). As in the opening brief, dual citations (Ex or CP and App) are used for these documents.

In their cross appeal, Mr. and Mrs. Cofer assign error to seven findings of fact and seven conclusions of law. Brief of Respondent at pp. 6-8. The assignments of error are grouped into 3 issues. Brief of Respondent at p. 8. First, Mr. and Mrs. Cofer contend that an "accessory dwelling unit" under the city's 1995 zoning code is not a "dwelling" for purposes of the one-dwelling and minimum size limitations in the 1979 Bainbridge Landing Protective Covenants. This strained interpretation of the covenants was rejected on three occasions by two different judges of the Kitsap County Superior Court. A dwelling is a dwelling, and one means one. Second, Mr. and Mrs. Cofer challenge adverse factual

findings concerning some of the many affirmative defenses they asserted at trial. All of the challenged findings are amply supported by substantial evidence. Third, Mr. and Mrs. Cofer claim that the trial judge abused her discretion in rejecting their request for sanctions against Mr. and Mrs. Bruns. The trial court decision on this issue is fully explained and eminently reasonable.

The appeal by Mr. and Mrs. Bruns raises four issues. First, they appeal the trial judge's inconsistent interpretations of covenants 1 and 3, depending on whether or not Mr. and Mrs. Cofer connect their garage to their house. Mr. and Mrs. Cofer do not dispute that the trial court ruled in contradictory ways, but they claim this issue was not raised at trial. Their claim cannot be reconciled with the reality that the trial court ruled on the issue. This Court should reverse the trial court's decision in the scenario where Mr. and Mrs. Cofer connect their garage to their house. Second, Mr. and Mrs. Bruns appeal the adequacy of the injunction terms that were ordered by the trial court. Third, Mr. and Mrs. Bruns appeal the trial court's denial of damages. Fourth, Mr. and Mrs. Bruns appeal the trial court's denial of sanctions.

Mr. and Mrs. Cofer ask this Court to award them attorney fees and costs under RAP 18.1. This one-sentence request is unsupported and

unsupportable. The Supreme Court has made it clear that such a request will not be considered.

The brief submitted on behalf of Mr. and Mrs. Cofer takes great liberties with the rules and the record. This occurs in both the Counterstatement of the Case and in the Argument. The record is misused in at least four ways. First, some assertions of fact are made without any citation to the record. In at least one instance Mr. and Mrs. Cofer openly assert post-trial developments that obviously cannot be in the record. Brief of Respondent at pp. 14-15. No effort is made to comply with RAP 9.11 regarding additional evidence on review. The Court should either disregard this assertion or give Mr. and Mrs. Bruns the opportunity to explain more pertinent post-trial developments at the house next door. Second, some supposedly factual statements are not supported by the record citation. Third, other record citations are contradicted by competing evidence that is not cited or otherwise acknowledged. Finally, some citations to the record are both incomplete, and hence misleading, and also relate to issues that Mr. and Mrs. Cofer lost and have not appealed. For example, they continue to re-play their story about Mr. Cofer telling Mrs. Bruns about the apartment on multiple occasions during constructions. Brief of Respondent at p. 11. That story was rejected by

the trial court, and that portion of the decision was not appealed. It is time to let go of that story.

RESPONSE TO CROSS APPEAL

1. The trial court properly decided that an “accessory dwelling unit” is a “dwelling.”

The first issue raised by Mr. and Mrs. Cofer in their cross appeal asks, “Is an ADU part of, not separate from, a single family dwelling?” Brief of Respondent at p. 8. In other words, they ask this Court to hold that an “accessory dwelling unit” is not a “dwelling.” Their argument on this issue appears at pages 35 through 41 of their brief.

The pertinent provisions of the Bainbridge Landing Protective Covenants are as follows:

1. No lot shall be used except for residential purposes. No building shall be erected or permitted on any lot other than one detached single family dwelling and private garage for not more than three cars.
3. No dwelling shall be constructed with a ground floor area of the main structure, exclusive of one-story open porches and garages of less than 1000 square feet.
7. No structure of a temporary character, trailer, basement, tent, shack, garage, barn or other outbuilding, shall be used on any lot at any time as a residence, either temporarily or permanently.

CP 202-3 (App C); Ex 2 (App B). The trial court concluded as a matter of law that Mr. and Mrs. Cofer’s garage apartment, or “accessory dwelling unit,” violated these three provisions. CP 208-9 (App C).

While Mr. and Mrs. Cofer assigned error to each of the three conclusions of law, their argument is limited to the meaning of “dwelling” in paragraphs 1 and 3 of the covenants. Brief of Respondent at p. 35. In essence, the Cofers ask this Court to hold that an “accessory dwelling unit” is not a “dwelling.” Their argument is based on the contentions that (a) the city’s current zoning code – enacted long after adoption of the 1979 covenants – contains definitions which support Mr. and Mrs. Cofers’ position; (b) the testimony of the covenant drafters, the Tawreseys, is to the effect that they intended to incorporate the 1979 zoning code; and (c) in any case, Mr. and Mrs. Cofers’ construction of the covenants is required by case law compelling a narrow reading of the covenants such that any residential use is acceptable so long as there is at least one building on the subject property in which one or more families live. This position is at odds with longstanding Washington law and with the literal language of the covenants, as to which the record at trial changed nothing. It is also at odds with common sense.

The legal context in which Washington courts view restrictive covenants is important. Contrary to the contention of Mr. and Mrs. Cofer, that context supports the summary judgment granted below. The seminal decision in this area is the Washington Supreme Court case of *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997). In that case, the Supreme

Court rejected and discarded all of the rigid maxims regarding the free use of land on which Mr. and Mrs. Cofer rely. Instead, *Riss* held that restrictive covenants are to be construed by giving effect to their purpose and to protect the homeowners' collective interests, and required that the community interest prevail. Because the Supreme Court's discussion touches on (and rejects) virtually all of Mr. and Mrs. Cofer's arguments, we include the following case discussion.

First, the court noted that, even before the *Riss* decision, other Washington decisions "had begun to question whether the rules of strict construction should be applied where the meaning of a subdivision's protective covenants are at issue and the dispute is [as here] between the homeowners." *Id.* at 621 – 22. Thus, quoting from an earlier Court of Appeals decision, the *Riss* court noted:

Construction against the grantor who presumably prepared [a] deed is quite a different matter from construction of covenants intended to restrict and protect all the lots of a plat and future owners who buy and build in reliance thereon.

....

The premise that protective covenants restrict the alienation of land and, therefore, should be strictly construed may not be correct. "Subdivision covenants tend to enhance, not inhibit, the efficient use of land. . . . In the subdivision context, the premise [that covenants prevent land from moving to its most efficient use] generally is not valid."

..... The Court of Appeals has similarly observed:

While restrictive covenants were once disfavored by the courts, upholding the common law right of free use of privately owned land, modern courts have recognized the necessity of enforcing such restrictions to protect the public and private property owners from the increased pressures of urbanization.

Riss, 131 Wn.2d at 622 (emphasis and ellipses in original; internal citations omitted), quoting from *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993), and *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 179, 810 P.2d 27, *rev. den.* 117 Wn.2d 1013 (1991).

Second, the *Riss* court noted that the use of restrictive covenants had become a nationwide tool for maintaining the character of the neighborhoods in which people live. The court stated:

For example, since 1958 the Kentucky courts have regarded restrictive covenants “more as a protection to the property owner and the public rather than as a restriction on the use of property” and decline to apply “the old-time doctrine of strict construction[.]” *Highbaugh Enters Inc. v. Deatrick & James Constr. Co.*, 554 S.W. 2d 878, 879 (Ky. Ct. App. 1977 (citing *Brandon v. Price*, 314 S.W.2d 521 (Ky. 1958)). Twenty years ago New Hampshire noted that “[t]he former prejudice against restrictive covenants which led courts to strictly construe them is yielding to a gradual recognition that they are valuable land use planning devices.” *Joslin v. Pine River Dev. Corp.*, 116 N.H. 814, 367 A.2d 599, 601 (1976) (citing 7 G. THOMPSON, REAL PROPERTY § 3158 (J. Grimes ed. Supp. 1976)). The court observed that “private land use restrictions ‘have been particularly important in the twentieth century when the value of property often depends in large measure upon

maintaining the character of the neighborhood in which it is situated.” *Joslin*, 367 A.2d at 601 (quoting *Traficante v Pope*, 115 N.H. 356, 341 A.2d 782, 784 (1975)). The court rejected the principle that restrictive covenants are to be strictly construed in favor of the free use of land.

Riss, 131 Wn.2d at 622 – 23. The *Riss* court agreed with these principles, stating that:

[I]n Washington the intent or purpose of the covenants, rather than the free use of land, is the paramount consideration in construing restrictive covenants.

Id. at 623 (also noting that “both this court and the Court of Appeals have refused to apply principles of strict construction so as to defeat the plain and obvious meaning of restrictive covenants”).

Third, the *Riss* court then concluded that, rather than artificially limiting their application, restrictive covenants should instead be construed so as to protect the collective interests of the community of homeowners, and not let one rogue resident destroy what the covenants were designed to protect. The court stated:

The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court’s goal is to ascertain and give effect to those purposes intended by the covenants. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances. *Mountain Park Homeowners Assn Inc. [v. Tydings]*, 125

Wash.2d [337 (1994),] at 344; *Burton [v. Douglas County]*, 65 Wash.2d [619 (1965),] at 622. The court will place “special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.” *Lakes at Mercer Island Homeowners Assoc.*, 61 Wash. App. at 181.

Id. at 623 – 24. See also *Ross v. Bennett*, 148 Wn. App. 40, 50, 203 P.3d 383 (2008), *rev. den.* 166 Wn.2d 1012 (2009) (“But, in conflicts between homeowners as to the interpretation of restrictive covenants, courts should place special emphasis on arriving at an interpretation that protects the homeowners’ collective interest.”).

The gist of Mr. and Mrs. Cofers’ argument is that, so long as they have built a single family residence on their lot, and so long as it and any remaining units on the property are used only as residences, they have complied with the pertinent provisions of the protective covenants. Even a cursory reading of the protective covenants, however, demonstrates that any such contention is absurd.

First, the language of paragraph 1 of the protective covenants makes clear that mere residential use is not the only requirement. As noted in the Brunses’ Partial Summary Judgment Motion, Paragraph 1 of the Protective Covenants reads as follows:

No lot shall be used except for residential purposes. No building shall be erected or permitted on any lot other than one detached single family dwelling and private garage for not more than three cars.

Ex. 2 (App B) ¶ 1. This provision plainly requires more than mere residential use. Indeed, to so read it would render the entire second sentence of the provision surplusage, a proposition which is contrary to well accepted principles of construction. *Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 541 – 42, 94 P.3d 358 (2004).

Second, the Cofers' construction is at odds with the literal language of Paragraph 1 of the Protective Covenants. For one thing, the language is quite clear in limiting the number of residential units to "one single family dwelling" only. By its terms, the language does not permit multiple dwellings. For another, it draws a distinction between the "one single family dwelling" and the "garage." If they were considered all the same, the drafters of the Covenants would not have needed such separate language, and the fact that they included it makes clear that the distinction has meaning and must be enforced.

Third, the Cofers' arguments ignore the other highly pertinent provision of the Protective Covenants, namely, Paragraph 7. That provision reads as follows:

No structure of a temporary character, trailer, basement, tent, shack, garage, barn or other outbuilding, shall be used on any lot at any time as a residence, either temporarily or permanently.

Ex. 2 (App B) ¶ 7. The Cofers' use of the upper portion of their garage as a rental unit clearly and literally violated this provision.

Fourth, the Cofers' proffered constructions of the Protective Covenants make no sense and lead to conclusions that are absurd. In particular, if the Cofers are correct that "one" does not mean what it says in Paragraph 1, and that "garage" should essentially be read out of Paragraph 7, then why stop at merely one additional rental unit? Why not three or four? Or a dozen, thin and undetached from each other? While present zoning may not permit this, what of the future, when variances or zoning changes might? Homeowners adopt protective covenants like the one at issue here to protect against just such possibilities (see *Riss, supra*). Yet, the Cofers' construction clearly offers no protection against an unlimited number of residential units. Just as clearly, this is at odds with the overall intent of the covenant to preserve the original "single family dwelling" character of the neighborhood. It is well established that courts should avoid such absurd constructions. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 122, 118 P.3d 322 (2005). This alone requires rejection of the Cofers' arguments.

Against all this, the Cofers argue that their conduct can be insulated from liability because the City of Bainbridge Island adopted zoning ordinances which, in the Cofers' view, would allow them to do

what they did. They also inferentially rely on the approval of the Architectural Control Committee. On both counts, the Cofers are wrong.

The Cofers' first error has to do with the testimony of the signatories to the Covenants, Mr. and Mrs. Tawresey. According to the Cofers, one or the other of the Tawreseys testified that "[t]he Covenants were drafted to incorporate the City of Bainbridge Island building code requirements. RP 434 (3-170-10). There was no effort to vary from or alter what the zoning code provided. RP 434 (3-17-10). No definitions of terms were put in the covenants because the city already had a zoning code with definitions for the terms used in the covenants. RP 470 (3-17-10)." From this, the Cofers leap to the conclusion that reference to the definitions of the current city codes justifies what the Cofers did. This reasoning is flawed on any number of levels.

First, the only "evidence" that the Cofers offer is the testimony of the Tawreseys about the city codes as of 1979, when the covenants went into effect. That those codes were different than those currently in place is undisputed. As Exhibit 53 shows, the revision date for the code on which the Cofers rely is 1995, some 16 years after the date of the covenants. A city employee confirmed that at trial. RP 293 – 95 (3-16-2010). Absent some link between the exact text of the 1979 codes and the

current ones, therefore, any testimony about the relationship between the Covenants and the current codes is therefore simply beside the point.

Second, on this subject, the testimony of the Tawreseys is in any case remarkably unhelpful. According to the undisputed testimony of Mr. Tawresey, for example, he put the Covenants into place because he believed the City zoning required covenants to be in place. (RP 433) He also testified that “the zoning for the land when we went in was single-family residence. And so that was basically a repeat of the zoning requirement.” (RP 434). What the local definition (if any) was of a “single family dwelling” of course no one knows because the Cofers never offered any evidence of it. What we do know, however, from Mr. Tawresey’s own testimony, is that the subject of ADUs didn’t come up until years later, that at the time of the Covenants’ creation Mr. Tawresey didn’t even know what they were, and that he isn’t sure anyone at the time did. (RP 434). This, of course, is the antithesis of saying that the codes permitted ADUs or anything like them. How could they when, from the point of view of the codes, ADUs didn’t even exist?

Third, what the Cofers are really trying to do is to use the Tawresey testimony to support an “intent of the drafters” argument about the meaning and application of the terms used in the Covenants. Washington law is clear that the construction of the language of a

restrictive covenant is a matter of law for the court. *Parry v. Hewitt*, 68 Wn. App. 664, 668, 847 P.2d 483 (1992) (citing *Krein v. Smith*, 60 Wn. App. 809, 811, *rev. den.* 117 Wn.2d 1002 (1991)). In particular, in construing the meaning of a covenant, a court may not admit:

- 1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term;
- 2) evidence that would show an intention independent of the instrument; or
- 3) evidence that would vary, contradict or modify the written word.

Ross, 148 Wn. App. at 46. This rule applies equally to testimony of the "original contracting parties" as well as other witnesses. *Id.*

At bottom, what the Cofers are really arguing is that compliance with current municipal building codes insulate them from having to account for their willful violation of the Covenants. This is wrong as a factual matter and a matter of law.

First, there is no evidence that the restrictions in the Covenants were to be viewed as a moving target, their terms changing with every City modification of its codes. This would amount to a wholesale delegation of the Covenants to the City, essentially gutting their protective character. This, of course, would be at odds with the very nature and purpose of protective covenants and so, were such a wholesale delegation intended, one would expect to see something quite clear and specific about it contemporaneous with the Covenants' creation. Yet, there is nothing,

either in the Covenants themselves or in any of the Tawresy's testimony, that even remotely supports this view.

Second, the City itself did not intend to have any changes to its codes modify the obligations set forth in these Covenants or any others. Indeed, the very code on which Mr. and Mrs. Cofer rely is very clear that:

The provisions of this title shall not abrogate easements, covenants, or other restrictions of record imposed on properties in the city.

Ex. 52 at p. 3 (Municipal Code § 18.03.020). This said that the language and provisions of any then existing protective covenants – including those here at issue – remained in force and were not to be taken as affected at all by the 1995 codes on which the Cofers now rely.

Third, the very statement of the proposition – that all of the parties with interests in the Covenants ceded their terms to the City – invites its repudiation as nonsensical and absurd, virtually as a matter of law. As noted in *Riss, supra*, the whole point of restrictive covenants is to give private citizens the ability to protect their neighborhoods against change in ways that governmental regulations might not. Indeed, it has been held that, even when a statute bars cities and towns from zoning against certain uses, a restrictive covenant prohibiting such uses will prevail. *Peckham v. Milroy*, 104 Wn. App. 887, 893 – 94, 17 P.3d 1256 (2001). The rationale

for deferring to such private agreement is obvious and has been specifically articulated by The Supreme Court as follows:

The objective of a PUD [planned unit development, with a restrictive covenant requiring that certain property remain undeveloped as open space,] include a more efficient and desirable use of open land, and flexibility and variety in the physical development pattern, in order to provide a more desirable living environment than would be possible through a strict application of zoning ordinance requirements. . . . The ability of homeowners in a PUD to enforce restrictive covenants against original and subsequent property owners helps ensure that the community will be able to maintain its planned character and provide the lifestyle sought by its residents in making their homes there. . . .

City of Olympia v. Palzer, 107 Wn.2d 225, 230 – 31, 728 P.2d 135 (1986)

(emphasis added; internal citations omitted). This rationale is directly applicable here and bars any resort to zoning compliance as a vehicle for avoiding the dictates of the Protective Covenants.

2. This Court, like the trial court, should reject the affirmative defenses that Mr. and Mrs. Cofer have chosen to appeal.

The second issue in Mr. and Mrs. Cofer’s cross appeal asks, “Should Covenant violations by the Brunses and other neighbors, and contradictory positions by the Brunses regarding applicability and enforcement of the Covenants, bar injunctive relief?” Brief of Respondent at p. 8. In other words, they ask this Court to hold that they can have their apartment, despite covenants that ban it, because of conduct by Mr. and

Mrs. Bruns or other lot owners. This issue is argued at pages 41 through 47 of their brief.

The argument begins with the bare assertion that Mr. and Mrs. Cofer have equitable defenses. Brief of Respondent at p. 41. That is followed, not by a description of their defenses, but by a nearly two-page recitation of abstract legal principles drawn from other cases. Brief of Respondent at pp. 41-2. The grounds for Mr. and Mrs. Cofer's appeal -- the defenses that override the covenants and allow an apartment -- are then unveiled:

1. Mr. and Mrs. Bruns have a green metal roof.
2. Mr. and Mrs. Bruns have an outbuilding in their backyard and an arbor in their side yard.
3. Two homes were painted and one received a new roof without Architectural Control Committee approval.
4. One house in the neighborhood is pink.
5. One neighbor parked his horse trailer alongside his garage.
6. One neighbor had chickens.
7. Mr. Bruns told another neighbor that he could have an ADU.

Brief of Respondent at pp. 43-5. Some of these "defenses" are obviously nonsensical, and none hold up under closer scrutiny.

A perfect example is the assertion that Mr. Bruns told another neighbor he could have an ADU. The trial court rejected this assertion in

Finding of Fact 18. CP 206 (App C). Mr. and Mrs. Cofer acknowledge in their assignments of error that the trial court rejected the factual foundation for this defense. Brief of Respondent at p. 6.¹ One would think that there must be some powerful reason to assign error to this finding.

The neighbor in question is Mr. Barbo, who testified on the second day of trial, but debunking this argument starts with the cross examination of Mr. Bruns on the first day of trial:

[Mr. Wildsmith:] Do you recall Mr. Barbo expressing to you that he was considering a mother-in-law quarters or an ADU at his property?

[Mr. Bruns:] Bob did not say that.

[Mr. Wildsmith:] Did you tell Mr. Barbo that it wouldn't be a problem from your perspective if he had an ADU or mother-in-law quarters built at his property?

[Mr. Bruns:] No, absolutely I did not say that to Bob Barbo.

RP 162-63 (3-15-2010). What do Mr. and Mrs. Cofer say about this very substantial evidence in support of Finding of Fact 18? They say nothing. They ignore this testimony when citing to the record in support of their contrary assertion. Brief of Respondent at pp. 44-5. They cite exclusively to Mr. Barbo's testimony on the following day, but even then they have to

¹ Mr. and Mrs. Cofer erroneously claim that the applicable standard of review is abuse of discretion. Brief of Respondent at pp. 2-3. As demonstrated below, the correct standard is whether the trial court's finding is supported by substantial evidence.

grossly distort his testimony in order to make it fit their story. Despite obvious efforts to lead Mr. Barbo into supporting the defense strategy, he had the good sense to tell the truth:

[Mr. Wildsmith:] And after you expressed to Mr. Bruns your own thoughts and desires with respect to an ADU at your property, what was his reaction?

[Mr. Barbo:] His reaction was something to the effect that that wasn't -- that he wouldn't have a problem with me building. And I pointed to the -- we have in our lot, there's some empty space up near the cul-de-sac entrance. And I said for -- you know, it would be great to have a garage with a room over it, or that kind of arrangement, that we in buying our house, we saw the potential for that. And that's when he expressed that that -- the type of structure -- something to the effect that that's -- that type of structure isn't the problem, that wouldn't be an issue for us to do something like that, and have somebody -- our intention was to have guests and family members stay in that, as like a spare bedroom type of arrangement. And that didn't seem to be a problem to Norm.

[Mr. Wildsmith:] Did Mr. Bruns express to you why it was that it wouldn't be a problem for you to have an ADU versus why the Cofers shouldn't have an ADU?

[Mr. Barbo:] I don't recall exactly what his response was to that. The sense that I got was that it was -- that they were renting, that it had a full kitchen and that it was a separate residence on their property. The thing I was talking about building wasn't intended for renting out or that sort of thing. It was a spare room over the garage. My intention was to have like a shop, extra space for woodworking and then have a room above it. That distinction seemed not to be a problem to Norm.

RP 346-7 (3-16-2010) (emphasis added). So this “equitable defense” comes down to Mr. Bruns telling Mr. Barbo that his thought, his daydream, about someday adding a bedroom to his house would not be objectionable. The testimony of neither witness supports the fantastical

argument made by Mr. and Mrs. Cofer. Even if one could discern some inconsistency in the testimony, it is a factual matter for which there is substantial evidence to support the trial court's finding. The longstanding rule of this state is that factual findings supported by substantial evidence will not be overturned on appeal. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

The "pink house defense" is centered on Mr. Barbo, too. Mr. and Mrs. Cofer base this defense on the fact that one house in the neighborhood is painted a pinkish color and, in Mr. Barbo's view, "it really stands out." Brief of Respondent at p. 43. Mr. and Mrs. Cofer fail to disclose that Mr. Barbo does not object to the color. RP 351 (3-16-2010). Nor do they disclose that Mr. Bruns had no problem with the color and actually likes it. RP 161 (3-15-2010). Mr. and Mrs. Cofer also fail to cite the testimony of a member of the Architectural Control Committee who would only say that, if the Committee had been consulted, "[m]aybe we would have asked them to tone it down a bit." RP 469 (3-17-2010). Only Mr. Cofer testified that the color violated the covenants (RP 370 (3-16-2010)), but he has an obvious motivation to find violations wherever he can in his effort to salvage the apartment.

Mr. and Mrs. Cofer never explain to this Court just how the pink house defense operates to give them an apartment. The premise seems to

be that the owner's decision to repaint his house a pinkish color should have been approved in advance by the Architectural Control Committee. There are several problems with this premise. First, it is unclear whether repainting a house requires the Committee's approval. Ex. 2 at ¶ 2 (App B). Second, if no approval is sought and no one objects prior to completion of the work, the covenants provide that no approval is required and the Architectural Control Committee process will be deemed to have been fully complied with. Ex. 2 at ¶ 16 (App B). In other words, the covenants quite reasonably contemplate that the time for Mr. Cofer to object to the pink house was at the time it was being painted and not at the time of trial over his apartment. Finally, the covenants contain a severability clause that says invalidation of one covenant (for example, chronic failure to follow the Architectural Control Committee process in paragraph 2) would have no bearing on the effectiveness of the other covenants (such as paragraphs 1, 3 and 7 in this case). Ex. 2 at ¶ 19 (App B). The Supreme Court enforced a nearly identical severability clause in *Mountain Park Homeowners Association, Inc. v. Tydings*, 125 Wn.2d 337, 883 P.2d 1383 (1994).

Mr. and Mrs. Bruns brought a motion in limine to exclude evidence about alleged violations of unrelated covenants. CP 574. Mr.

and Mrs. Cofer successfully resisted that motion on a promise they did not

keep:

THE COURT: . . . Regarding the Mountain Park case, I've given a considerable amount of attention to this case and have determined that the plaintiff's argument is to effectively preclude testimony concerning violations of other covenants not specific to 1, 3 and 7.

The defendant's intention is to produce evidence concerning violation or abandonment of a variety if not all of the covenants within the development. I believe that the plaintiff's reading of Mountain Park is too narrowly construed. . . .

In this instance I believe it is a different theory that's being sought. It's not just, from the defendant's perspective, not just a violation of 1, 3 and 7, but basically the defense is that all of the covenants have effectively been abandoned. That is a different situation than the Mountain Park situation. If the defense is proceeding with a theory that all the covenants have been abandoned, then I believe that testimony regarding covenants not related to 1, 3 and 7 is a proper area of inquiry.

RP 80-1 (3-15-2010) (emphasis added). Mr. and Mrs. Cofer utterly failed to deliver on this promise, and now before this Court they are rearguing the defense of total abandonment with even fewer so-called violations than they mustered at trial.

The rest of the supposed violations still alive on appeal fare no better than the pink house defense. The green roof on the Bruns house is analyzed the same as the pink house, except that Mr. and Mrs. Bruns dutifully followed the Architectural Control Committee process. RP 169-73 (3-15-2010). The other house that was both repainted and re-roofed

(Mr. Barbo's) is analyzed the same as the pink house with the exception that Mr. Cofer is not complaining about the color. RP 349-50 (3-16-2010).

This brings us to the horse trailer and the empty chicken coop. First and foremost, horse trailers and chicken coops have nothing to do with the apartment. They are irrelevant under the severability clause. Second, neither the trailer nor the chicken coop represents a violation of any covenant. Mr. and Mrs. Cofer would have this Court believe that "neighbors keep chickens on their lot." Brief of Respondent at p. 44. In fact, Mr. Cofer made it clear to the trial court that the chickens are gone and only the empty coop remains. RP 371-72 (3-16-2010). For all we know of record, the next door neighbor came over and asked that the chickens go – exactly as good neighbors should do. In just the same way, if Mr. Cofer has a concern about the empty chicken coop under some unspecified covenant, he should go talk to that neighbor. He should not be allowed to leverage his own inaction into an opportunity to have an apartment.

Turning to the horse trailer, the covenants' only mention of trailers appears in paragraph 3 and 7, but the latter is clearly limited to trailers used as a residence and the former pretty clearly means the same. Certainly that was the understanding of Mr. Burke, the owner of the horse

trailer. RP 321-22 (RP 3-16-2010). Lest there be any doubt, Mr. Burke made it clear that no one is living in the horse trailer. RP 332 (3-16-2010). He also reported that no neighbor had told him it was a violation of the covenants. RP 322 (3-16-2010). He talked to his next door neighbor, Jerry, to confirm that he had no objection to the horse trailer. RP 322 (3-16-2010). Mr. Bruns testified that he couldn't even see the horse trailer until it was raised as an issue by Mr. and Mrs. Cofer shortly before trial. RP 158 (3-15-2010). Finally, the trial court's ruling was simply that the horse trailer and chicken coop were minor violations, at most, and did not support the defense that the covenants had been abandoned in total. CP 205 (App C) ¶ 11. This Court should not overrule that eminently correct decision.

Finally, we come to the outbuilding and arbor at the home of Mr. and Mrs. Bruns. These are said to violate paragraphs 1 and 2 of the covenants. Brief of Respondent at p. 43. Contrary to the claim of Mr. and Mrs. Cofer, paragraph 2 (the Architectural Control Committee process) was followed as to the outbuilding. RP 166-67 (3-15-2010). This clear testimony by Mr. Bruns is ignored by Mr. and Mrs. Cofer in their brief. Instead, for their unqualified assertion that Mr. and Mrs. Bruns did not ask for Architectural Control Committee approval they rely on Mrs. Tawresey's testimony that she did not remember. Brief of Respondent at

p. 43, citing RP 469 (3-17-2010). As to the arbor, the record is silent as to whether paragraph 2 of the covenants applies or was followed. RP 167 (3-15-2010).

Paragraph 1 of the covenants is inapplicable to outbuildings. Outbuildings are clearly contemplated as part of a single family dwelling. Ex. 2 (App B) ¶ 7. Finally, the Cofers bought into the neighborhood years after the outbuilding was constructed. If they didn't like it, or thought it violated the covenants, they should have said so then. Instead, they testified that they believed the covenants were in full force and effect at that time. RP 193-96 (3-16-2010). They decided to care about the outbuilding only after losing their first summary judgment motion in 2007. Mr. Cofer admitted to Mr. Bruns that he was complaining about the outbuilding to "strike back" and he wanted it torn down. RP 137 (3-15-2010). Mr. Cofer had ample opportunity during the trial to deny his retaliatory intent, but he did not do so.

3. The trial judge did not abuse her discretion in denying Mr. and Mrs. Cofer's request for sanctions against Mr. and Mrs. Bruns.

The third and final issue raised by Mr. and Mrs. Cofer in their cross appeal asks, "Should the Cofers be awarded their attorney fees and costs incurred in defending this action?" Resp. Opening Br. at p. 8.

Despite this extremely broad characterization of the sanctions claim, it is actually limited to a very narrow event in the case. Mr. and Mrs. Cofer's argument on this issue appears at pages 47 through 49 of their brief.

The trial judge rejected the claim in clearly articulated and eminently reasonable terms at Finding of Fact 9 and Conclusion of Law 16. CP 204, 210 (App C). Mr. and Mrs. Cofer failed to assign error to either Finding of Fact 9 or Conclusion of Law 16. Brief of Respondent at pp. 6-8. Nevertheless, they continue to argue the claim. Brief of Respondent at pp. 47-9. They acknowledge that the standard of review in such matters is whether the trial judge abused her discretion. Brief of Respondent at pp. 2-3. Yet they make no argument whatsoever to demonstrate how the trial judge abused her discretion; they simply assert that the trial court erred. Brief of Respondent at p. 48.

For nearly four years Mr. and Mrs. Cofer have doggedly pursued this ill advised claim against Mr. and Mrs. Bruns. The initial glimmer appeared in connection with their first failed effort to win this case on summary judgment. CP 448. Next they formalized their position as a counterclaim under CR 11 and RCW 4.84.185. CP 16. Their trial brief kept the claim alive. CP 799. Their closing argument at trial – ignoring the evidence actually adduced at trial – continued the claim in unaltered form. RP 580-81 (3-18-2010). Not only had the trial testimony precluded

the claim as a factual matter, but closing argument on behalf of Mr. and Mrs. Bruns had also demonstrated that the claim failed to comply with the applicable legal requirements. RP 552-54 (3-18-2010).

Mr. and Mrs. Cofer describe a somewhat appealing story in support of their claim. Brief of Respondent at pp. 47-9. The problem with their story is that it is just that – a story, a fabrication. Their story starts with the assertion that Mr. and Mrs. Bruns in their amended complaint asked for the garage and apartment to be torn down. Brief of Respondent at p. 47. The record citation (CP 9-10) in no way supports this assertion. While tear down would have been a legitimate request, as demonstrated by *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006), Mr. and Mrs. Bruns did not ask for that remedy.

It is true that the complaint was amended to allege that Mr. and Mrs. Cofer had not followed directions from the Architectural Control Committee to obtain its approval of their final selection of roofing materials and exterior paint colors. The sanctions claim is based on the assertion that Mr. and Mrs. Bruns amended their complaint “before knowing one way or another what the facts were.” Brief of Respondent at p. 47. The contention is that “no good faith argument could be made to support such a claim” and that the allegation was advanced without reasonable cause. Brief of Respondent at p. 47. The only citation to the

record is to testimony from Mrs. Bruns that does not address the allegation in the amended complaint at all. Brief of Respondent at p. 48. Mr. and Mrs. Cofer ignore the only relevant testimony in which Mr. Bruns described their investigation before the complaint was amended:

[Mr. Lieberworth:] If we look at this letter in the second paragraph there's a reference that says, "The only final condition is that you need to submit your choice of roofing material, (color and type), and your exterior paint color to us for approval prior to applying it." And I'll stop quoting there. Do you see that?

[Mr. Bruns:] Yes.

[Mr. Lieberworth:] Did you develop any information as to whether -- from the Tawerseys, as to whether or not such a submittal had occurred?

[Mr. Bruns:] Yes. What we were told is that no follow-up submittal on roofing material and exterior paint colors had ever been made by the Cofers.

[Mr. Lieberworth:] Okay. And as a result of that, was there an amendment to the claims?

[Mr. Bruns:] Yes. Our complaint was amended shortly thereafter to address that issue.

RP 122 (3-15-2010). At the time of trial Mrs. Tawresey, the Architectural Control Committee in question, was still unsure whether the follow up submission was ever made. RP 466-67 (3-17-2010). The trial court found that Mr. and Mrs. Bruns acted appropriately both in making the allegation and in withdrawing the allegation. Mr. and Mrs. Cofer offer no explanation of how the trial judge's denial of their sanctions claim could

be construed as an abuse of discretion. Their cross appeal on this issue should be rejected.

REPLY ARGUMENTS IN SUPPORT OF APPEAL

1. The protective covenants do not allow Mr. and Mrs. Cofer to have an apartment by connecting their garage to the main house.

The first issue in the appeal by Mr. and Mrs. Bruns asks whether Mr. and Mrs. Cofer can have an apartment again by connecting their garage to the main house. Appellant's Opening Brief at pp. 4, 16-22. Mr. and Mrs. Bruns put this issue first for a reason -- it threatens to destroy the essential characteristic of their neighborhood.

Bainbridge Landing is a neighborhood of 12 families who made a mutual commitment to keep it that way unless and until they – as a group - -decide otherwise by agreed upon procedures. This essential characteristic of the neighborhood will be destroyed if the trial court's misinterpretation of the covenants is affirmed. All of the individual homeowners, just like Mr. and Mrs. Cofer, will be free to have a small second dwelling. This would double the density of the neighborhood and otherwise change it forever. Mr. and Mrs. Bruns have the great misfortune of living next door to the first and only neighbor to advance such a scheme, but this case is not limited to these two parties. This Court's decision will directly affect all 12 families in Bainbridge Landing, and inevitably the Court's decision

will be read and applied to other neighborhoods with this common form of protective covenant or a desire to have this form of protection.

The trial judge rejected Mr. and Mrs. Cofer's scheme as their property existed at the time of trial, but she also allowed Mr. and Mrs. Cofer to proceed with their scheme by the simple expedient of connecting their garage to their main house. The trial court decision allows them to resume operation of a rental apartment; it allows them to provide an apartment to a caretaker as payment in kind; and it allows them to provide a free apartment to their adult son or anyone else. In any of these scenarios – scenarios advanced at trial by Mr. and Mrs. Cofer themselves – there will be a second, under sized dwelling on Lot 10. The covenants governing this neighborhood clearly prohibit this. The trial judge agreed, but only for so long as the garage remains separate from the house. She inexplicably allowed Mr. and Mrs. Cofer to have an apartment again by connecting the two buildings.

Mr. and Mrs. Bruns had good reason to expect Mr. and Mrs. Cofer to deny that the trial judge ruled in this inconsistent fashion. Appellants' Opening Brief at 21-2. Mr. and Mrs. Cofer did not do so. Instead, they appear to agree that the trial judge allowed them to have an apartment by connecting their garage to the main house. Respondents Brief at pp. 15-18.

What do Mr. and Mrs. Cofer contend in response to this issue?

Their response is quite unexpected: “There has never been an ‘apartment’ at the Cofers’ property.” Brief of Respondent at p. 15. We understand this to mean that the trial was about an “accessory dwelling unit,” not an “apartment.” But Mr. Cofer’s own testimony shows this argument to be untenable. When called as a witness in the plaintiffs’ case in chief, Mr. Cofer was still insisting on the now abandoned story that he told Mrs. Bruns all about the “apartment” on multiple occasions during construction:

[Mr. Lieberworth:] Was there any discussion in this visit you're talking about now of the ADU?

[Mr. Cofer:] Yes. That would have been what we're doing with the whole property. Every time. That's what she came over for is to find out what we were doing. That's what we told her, what was going on.

[Mr. Lieberworth:] You're testifying here under oath that on each of the instances she came over so far, you mentioned the ADU?

[Mr. Cofer:] I don't know if I said ADU. But certainly what was going on. That there would be an apartment up there, and the living space above the garage, and three bedrooms, and an office. I would have told her all of that. And I would have said where we were. I would have told her on the December thing that everything was just soaking wet, everything was so saturated that I didn't think it was ever going to dry out.

[Mr. Lieberworth:] And you're confident that you told her those things about the apartment, as you put it?

[Mr. Cofer:] Yes.

RP 225-26 (3-16-2010) (emphasis added). The present claim that Mr. and Mrs. Cofer have never had an “apartment” should be rejected as nothing more than artless sophistry. Everyone, including the Cofers themselves, think of the disputed space as an apartment. They should not be heard to say otherwise.

The Bainbridge Landing Protective Covenants, paragraphs 1 and 3, limit each lot to one dwelling not less than 1,000 square feet in size. These provisions of the covenants prohibit the rental apartment which existed when this case was filed, and which still existed right up to the eve of trial, but the covenants prohibit more. They also prohibit an apartment that is provided in exchange for services (the caretaker scenario) and they prohibit an apartment that is given away for free (the adult son scenario). It is not enough to prohibit an “accessory dwelling unit.” Any form of small, second dwelling is prohibited. That prohibition must be clear both to the Cofers and future owners or occupants of Lot 10. The trial court lost sight of this and ruled that with the connection of the two buildings Lot 10 – and all the other lots in the neighborhood – can have any form of apartment, even a rental apartment. Mr. and Mrs. Cofer, in their response, do not deny that this is the trial court’s ruling. That is in their economic self-interest, of course, but it leaves them needing some other response to the first issue raised by Mr. and Mrs. Bruns. That response – that an

“apartment” was not the issue at trial – is eliminated by Mr. Cofer’s own testimony that he built an “apartment.”

2. The terms of the trial court’s injunction does not adequately protect Mr. and Mrs. Bruns from future violations of the Protective Covenants.

The second issue in the appeal by Mr. and Mrs. Bruns asks whether the trial court’s injunction is inadequate beyond its limited duration. Appellant’s Opening Brief at pp. 22-5. Mr. and Mrs. Cofer address the terms of the injunction in response to both the first and second issues raised by the appeal. Brief of Respondent at pp. 17-26. The starting point in analyzing the injunction aspects of this case is the trial judge finding that Mr. and Mrs. Bruns satisfied all of the requirements for injunctive relief. Appellant’s Opening Brief at pp. 18-19. Mr. and Mrs. Cofer did not appeal from this aspect of the trial court’s decision. Instead, they argue that the appropriateness of an injunction in the connection scenario was speculative under the “there’s never been an apartment” theory (Brief of Respondent at pp. 17-18) or the alternative theory that the trial court had essentially unfettered discretion to order the elimination, or “satisfaction,” of the injunction if Mr. and Mrs. Cofer connect their garage to their house (Brief of Respondent at pp. 19-26. While acknowledging the appropriateness of the injunction in the “no connection” scenario, they never otherwise explain the trial court’s inconsistent treatment of the

“connection” scenario. As demonstrated by Mr. and Mrs. Bruns in their opening brief, this inconsistency is best explained by the trial court’s mistaken interpretation of the covenants in the “connection” scenario. If one believes that an apartment is still prohibited if the connection is made, it follows logically that Mr. and Mrs Bruns are equally entitled to the protection of injunction in that scenario. The Court should also note that Mr. and Mrs. Cofer’s brief does not address the need to extend the existing injunction to require real elimination of the kitchen, removal of the separate entrance that the Cofers themselves planned to eliminate, and clarification of what it means to comply with the covenants in the future (no second dwelling). Appellant’s Opening Brief at pp. 23-25.

3. The trial court improperly denied the monetary damages requested by Mr. and Mrs. Bruns.

The third issue in the appeal by Mr. and Mrs. Bruns asks whether the trial court improperly denied their request for monetary damages. Appellant’s Opening Brief at pp. 25-32. Mr. and Mrs. Cofer address damages at pages 26 through 32 of their brief.

For the most part, Mr. and Mrs. Cofer do not really address the damages argument by Mr. and Mrs. Bruns. In particular, they do not address the fact that the trial judge had to be reminded of the contract theory for damages and resorted to an on-the-fly statement that the

requirements were not met (without saying what the requirements are or why they were not met). Appellants' Opening Brief at pp. 26-27. Her treatment of the unjust enrichment theory was the same. The one innovation in Mr. and Mrs. Cofer's brief is the affirmative defense of failure to mitigate damages. Brief of Respondent at p. 28. This defense was never raised previously, and generally affirmative defenses are waived unless raised at the trial court level. *Bernsen v. Big Bend Electric Cooperative, Inc.*, 68 Wn. App. 427, 433-4, 842 P.2d 1047 (1993). The argument is also completely unsupported by authority or facts in Mr. and Mrs. Cofer's brief. An argument with no authority must be rejected. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992). The Court should also take note of the fact that the burden of proving a failure to mitigate damages falls on Mr. and Mrs. Cofer. *See, e.g., Bullard v. Bailey*, 91 Wn. App. 750, 759, 959 P.2d 1122 (1998) ("As the wrongdoer, it is Bailey's burden to prove Bullard failed to mitigate.")

Mr. and Mrs. Cofer also renew the argument made at trial about electing between monetary damages and injunctive relief. Brief of Respondent at pp. 30-32. They also acknowledge that this argument was rejected by the trial court. Brief of Respondent at p. 32. Mr. and Mrs. Cofer have not assigned error to this ruling and, therefore, the argument should be rejected.

4. The trial court improperly denied the sanctions requested by Mr. and Mrs. Bruns.

The fourth issue in the appeal by Mr. and Mrs. Bruns asks whether the trial court improperly denied their request for sanctions. Appellant's Opening Brief at pp. 32-4. Mr. and Mrs. Cofer address sanctions at pages 32 through 35 of their brief.

Mr. and Mrs. Cofer cite one case for the proposition that, while a trial court must explain an award of sanctions, it need not explain a denial of sanctions. Brief of Respondent at pp. 33-34. The case cited by Mr. and Mrs. Cofer, *North Coast Electric Co. v. Selig*, 136 Wn. App. 636, 151 P.3d 211 (2007), does not stand for this proposition. In fact, *North Coast* gives detailed reasons for the relatively small portion of the attorney fee request that was denied. *Cf. Eller v. East Sprague Motors*, 159 Wn. App. 180, 244 P.3d 447 (2010), (reversing and remanding trial court's decision not to award sanctions.)

RESPONSE TO SANCTIONS REQUEST UNDER RAP 18.1

Counsel for Mr. and Mrs. Cofer concludes his brief as follows: "The Cofers request that this Court award them their attorney fees and costs incurred in this appeal." Brief of Respondent at p. 49. This request is made in blatant disregard of the ground rules laid down by the Supreme Court:

Wilson includes a request for attorney fees and costs in the last line of the conclusion of its Supplemental Brief, but does not include a separate section in its brief devoted to the fees issue as required by RAP 18.1(b). This requirement is mandatory. . . . The rule requires more than a bald request for attorney fees on appeal. . . . Argument and citation to authority are required under the rule to advise us of the appropriate grounds for an award of attorney fees as costs. . . . As Wilson fails to fulfill these requirements, attorney fees on appeal are denied.

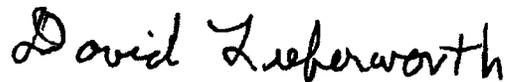
Wilson Court Limited Partnership v. Tony Maroni's, Inc., 134 Wash.2d 692, 710 n. 4, 952 P.2d 590 (1998) (citations omitted). For exactly the same reasons, the request on behalf of Mr. and Mrs. Cofer should be denied. Nor should they be allowed to resuscitate this claim in their reply brief. To allow that would be to deny Mr. and Mrs. Bruns their right to respond.

CONCLUSION

All four issues raised by Mr. and Mrs. Cofer in their cross appeal should be rejected. The appeal by Mr. and Mrs. Bruns should be granted in full, as summarized in the conclusion of their opening brief.

Respectfully submitted, this 19th day of April, 2011.

GARVEY SCHUBERT BARER



David Lieberworth, WSBA #9239
Attorneys for Appellants
Norm and Janet Bruns

APPENDICES

Subdivision Plat Map.....	Appendix A
Protective Covenants	Appendix B
Findings of Fact and Conclusions of Law	Appendix C
Judgment.....	Appendix D

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on April 19, 2011 I caused a copy of **REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS** to be served by Legal Messenger on the person listed below:

Quentin Wildsmith
Lasher Holzapfel Sperry & Ebberson PLLC
601 Union St Ste 2600
Seattle, WA 98101-4000

Dated this 19th day of April, 2011 at Seattle, Washington.


Sharon Damon

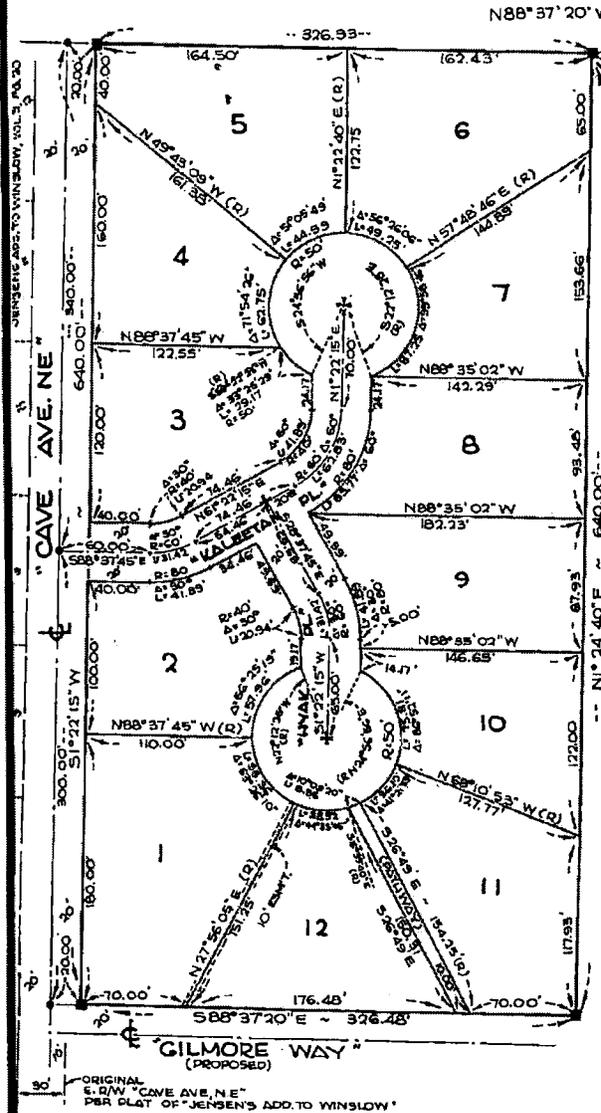
APPENDIX A

A 799540112

BAINBRIDGE LANDING

A PORTION OF NE 1/4, SW 1/4
SECTION 26, T. 25 N., R. 2 E., W. M.
CITY OF WINSLOW, KITSAP CO., WASHINGTON
APRIL 4, 1979

ROATS ENGINEERING
P.O. 1280



(E-W of SEC. 26)
T.P.O.B. 324.00

CENTER SECTION 26
NE WING POINT WAY
ONE WAY
E-LEONCLIFF AVENUE N.E.

LEGEND:
ALL LOT COR'S ARE 34" I.P. 2"x3" LOT STAKE
● CONC. MON IN CASE BY CITY OF WINSLOW
+ CONC. MON IN CASE BY THIS PLAT
■ IRON PIPE MON SET IN CONC.

DESCRIPTION
THIS PLAT OF "BAINBRIDGE LANDING" COMPRISES THAT PORTION OF THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 26, TOWNSHIP 25 NORTH, RANGE 2 EAST, W.M., KITSAP COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:
BEGINNING AT THE CENTER SECTION OF SAID SECTION 26; THENCE ALONG THE EAST-WEST CENTERLINE OF SAID SECTION 26, NORTH 88° 37' 20" WEST 324.00 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING NORTH 88° 37' 20" WEST 336.93 FEET TO THE EAST RIGHT-OF-WAY OF "CAVE STREET N.E.", AS DELINEATED BY THE PLAT OF "JENSEN'S ADDITION TO WINSLOW", AS RECORDED IN VOLUME 3 OF PLATS, PAGE 20, RECORDS OF KITSAP COUNTY; THENCE ALONG SAID EAST RIGHT-OF-WAY, SOUTH 1° 22' 15" WEST 446.00 FEET; THENCE LEAVING SAID EAST RIGHT-OF-WAY, SOUTH 88° 37' 20" EAST 306.68 FEET; THENCE NORTH 1° 24' 10" EAST 640.00 FEET TO THE TRUE POINT OF BEGINNING.
EXCEPT THE WEST 10 FEET FOR SAID "CAVE AVENUE N.E.", SITUATE IN KITSAP COUNTY, WASHINGTON.

SURVEYOR'S CERTIFICATION
I, GEORGE ROATS, REGISTERED AS A LAND SURVEYOR BY THE STATE OF WASHINGTON, CERTIFY THAT THIS PLAT IS BASED ON AN ACTUAL SURVEY OF THE LAND DESCRIBED HEREIN, AND CONDUCTED BY ME OR UNDER MY SUPERVISION, FROM JULY 7, 1977 THRU APRIL 1979; THAT THE DISTANCES, COURSES AND ANGLES ARE SHOWN THEREON CORRECTLY; AND THAT MONUMENTS OTHER THAN THOSE MONUMENTS APPROVED FOR SETTING AT A LATER DATE, HAVE BEEN SET AND LOT CORNERS STAKED ON THE GROUND AS DEPICTED ON THIS PLAT.

George Roats
GEORGE ROATS, CIVIL ENGINEER AND LAND SURVEYOR
REGISTER NUMBER 4809



PROTECTIVE COVENANTS
1. THE PROTECTIVE COVENANTS ARE RECORDED UNDER AUDITOR'S FILE NUMBER 7902010134, RECORDS OF KITSAP COUNTY, WASHINGTON.

7 1985-10-12

BAINBRIDGE LANDING

A PORTION OF NE 1/4, SW 1/4,
SECTION 26, T.25 N., R.2E., W.M.
CITY OF WINSLOW, KITSAP CO., WASHINGTON
APRIL 4, 1979

ROATS ENGINEERING
FOULSBRO

DEDICATION

"I, DON ALL MEN BY THESE PRESENTS THAT DOROTHY CAVE MYSTROM, A MARRIED WOMAN; HELEN M. DEDOCK, A SINGLE WOMAN; DAVID C. PETERSON AND SUSAN L. PETERSON, HUSBAND AND WIFE; JOHN G. TAMRESEY AND ALICE B. TAMRESEY, HUSBAND AND WIFE; SEAFIRST MORTGAGE CORPORATION DO HEREBY DECLARE THIS PLAT AND DEDICATED TO THE USE OF THE PUBLIC FOREVER ALL STREETS, AVENUES, PLACES AND UTILITY EASEMENTS OF WHATEVER PUBLIC PROPERTY THERE IS SHOWN ON THIS PLAT AND THE USE THEREOF FOR ANY AND ALL PUBLIC PURPOSES NOT INCONSISTENT WITH THE USE THEREOF FOR PUBLIC HIGHWAY PURPOSES. ALSO, THE RIGHT TO MAKE ALL NECESSARY SLOPES FOR CUTS AND FILLS UPON LOTS, BLOCKS, TRACTS, ETC. SHOWN ON THIS PLAT IN THE REASONABLE ORIGINAL GRADINGS OF ALL STREETS, AVENUES, PLACES, ETC. SHOWN HEREON. ALSO, THE RIGHT TO DRAIN ALL STREETS OVER AND ACROSS ANY LOT OR LOTS WHERE WATER MIGHT TAKE A NATURAL COURSE AFTER THE STREET OR STREETS ARE ORIGINALLY GRADED. ALSO, ALL CLAIMS FOR DAMAGES AGAINST ANY GOVERNMENTAL AUTHORITY ARE WAIVED WHICH MAY BE OCCASIONED TO THE ADJACENT LAND BY THE ESTABLISHED CONSTRUCTION, DRAINAGE AND MAINTENANCE OF SAID STREETS.

IN WITNESS WHEREOF WE HAVE SET OUR HANDS AND SEALS THIS 4th DAY OF April, 1979 A.D.

Dorothy Cave Mystrom
DOROTHY CAVE MYSTROM, A MARRIED WOMAN
Helen M. Dedock
HELEN M. DEDOCK, A SINGLE WOMAN
David C. Peterson
DAVID C. PETERSON
John G. Tamresky
JOHN G. TAMRESEY
Susan L. Peterson, His Wife
SUSAN L. PETERSON, HIS WIFE
Alice B. Tamresky, His Wife
ALICE B. TAMRESEY, HIS WIFE
Seafirst Mortgage Corporation
SEAFIRST MORTGAGE CORPORATION

ACKNOWLEDGEMENTS

STATE OF WASHINGTON
COUNTY OF KITSAP SS:
THIS IS TO CERTIFY THAT ON THIS 4th DAY OF April, 1979 A.D., BEFORE ME, THE UNDERSIGNED A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, DULY COMMISSIONED AND SWORN PERSONALLY APPEARED DOROTHY CAVE MYSTROM, A MARRIED WOMAN, TO ME KNOWN TO BE THE PERSON WHO EXECUTED THE FOREGOING DEDICATION AND ACKNOWLEDGED TO ME THAT SHE SIGNED AND SEALED THE SAME AS HER FREE AND VOLUNTARY ACT AND DEED FOR THE USES AND PURPOSES THEREIN MENTIONED.

WITNESS MY HAND AND OFFICIAL SEAL THE DAY AND YEAR FIRST ABOVE WRITTEN.
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RESIDING AT Beaufort
Boysie A. Shingler

STATE OF WASHINGTON
COUNTY OF KITSAP SS:
THIS IS TO CERTIFY THAT ON THIS 4th DAY OF April, 1979 A.D., BEFORE ME, THE UNDERSIGNED A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, DULY COMMISSIONED AND SWORN PERSONALLY APPEARED HELEN M. DEDOCK, A SINGLE WOMAN, TO ME KNOWN TO BE THE PERSON WHO EXECUTED THE FOREGOING DEDICATION AND ACKNOWLEDGED TO ME THAT SHE SIGNED AND SEALED THE SAME AS HER FREE AND VOLUNTARY ACT AND DEED FOR THE USES AND PURPOSES THEREIN MENTIONED.

WITNESS MY HAND AND OFFICIAL SEAL THE DAY AND YEAR FIRST ABOVE WRITTEN.
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RESIDING AT Beaufort
Boysie A. Shingler

ACKNOWLEDGEMENTS

STATE OF WASHINGTON
COUNTY OF KITSAP SS:
THIS IS TO CERTIFY THAT ON THIS 4th DAY OF April, 1979 A.D., BEFORE ME, THE UNDERSIGNED A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON DULY COMMISSIONED AND SWORN PERSONALLY APPEARED DAVID C. PETERSON AND SUSAN L. PETERSON, HUSBAND AND WIFE, TO ME KNOWN TO BE THE PERSONS WHO EXECUTED THE FOREGOING DEDICATION AND ACKNOWLEDGED TO ME THAT THEY SIGNED AND SEALED THE SAME AS THEIR FREE AND VOLUNTARY ACT AND DEED FOR THE USES AND PURPOSES THEREIN MENTIONED.

WITNESS MY HAND AND OFFICIAL SEAL THE DAY AND YEAR FIRST ABOVE WRITTEN.
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RESIDING AT Beaufort
Boysie A. Shingler

STATE OF WASHINGTON
COUNTY OF KITSAP SS:
THIS IS TO CERTIFY THAT ON THIS 4th DAY OF April, 1979 A.D., BEFORE ME, THE UNDERSIGNED A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON DULY COMMISSIONED AND SWORN PERSONALLY APPEARED JOHN G. TAMRESEY AND ALICE B. TAMRESEY, HUSBAND AND WIFE, TO ME KNOWN TO BE THE PERSONS WHO EXECUTED THE FOREGOING DEDICATION AND ACKNOWLEDGED TO ME THAT THEY SIGNED AND SEALED THE SAME AS THEIR FREE AND VOLUNTARY ACT AND DEED FOR THE USES AND PURPOSES THEREIN MENTIONED.

WITNESS MY HAND AND OFFICIAL SEAL THE DAY AND YEAR FIRST ABOVE WRITTEN.
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RESIDING AT Beaufort
Boysie A. Shingler

STATE OF WASHINGTON
COUNTY OF KITSAP SS:
THIS IS TO CERTIFY THAT ON THIS 4th DAY OF April, 1979 A.D., BEFORE ME, THE UNDERSIGNED A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON DULY COMMISSIONED AND SWORN PERSONALLY APPEARED Robert W. Winberg and John F. Marley Att'Y in C. and A. Anghel Secretary OF SEAFIRST MORTGAGE CORPORATION, THE CORPORATION THAT EXECUTED THE FOREGOING DEDICATION AND ACKNOWLEDGED SAID DEDICATION TO BE THE FREE AND VOLUNTARY ACT AND DEED OF SAID CORPORATION FOR THE USES AND PURPOSES THEREIN MENTIONED, AND ON OATH STATED THAT THEY WERE AUTHORIZED TO EXECUTE SAID DEDICATION AND THAT SEAL TO THE SEAL OF SAID CORPORATION.

WITNESS MY HAND AND OFFICIAL SEAL THE DAY AND YEAR FIRST ABOVE WRITTEN.
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RESIDING AT Beaufort
Chalene S. Shingler

72905110112

BAINBRIDGE LANDING

A PORTION OF NE 1/4, SW 1/4
SECTION 26, T. 25 N., R. 2 E., W. M.
CITY OF WINSLOW, KITSAP CO., WASHINGTON
APRIL 4, 1979

ROATS ENGINEERING
POULSBRO

APPROVALS

1. APPROVED BY ME THIS 7th DAY OF MAY 1979 A.D.

John M. Holman
CITY ENGINEER, WINSLOW



2. EXAMINED AND APPROVED BY THE CITY PLANNING AGENCY THIS 7th DAY OF MAY 1979 A.D.

James R. Banks
CHAIRMAN, CITY PLANNING AGENCY, WINSLOW

3. EXAMINED AND APPROVED BY THE CITY COUNCIL THIS 7 DAY OF MAY 1979 A.D.

David W. Harris
DEPUTY MAYOR, CITY OF WINSLOW

TREASURER'S CERTIFICATION

I HEREBY CERTIFY THAT ALL STATE AND COUNTY TAXES HERETOFORE LEVIED AGAINST THE PROPERTY DESCRIBED HEREIN, ACCORDING TO THE BOOKS AND RECORDS OF MY OFFICE, HAVE BEEN FULLY PAID AND DISCHARGED, INCLUDING 1979 TAXES.

Richard E. ...
TREASURER, KITSAP COUNTY

RECORDING CERTIFICATION

"FILED FOR RECORD AT THE REQUEST OF Township Investment
THIS 11th DAY OF May, 1979, AT 10 MINUTES PAST
11th A.M. OFFICE AND RECORDED IN VOLUME 22 OF PLATS,
PAGE 4, 5 & 6, RECORDS OF KITSAP COUNTY, WASHINGTON.

Shirley Hall
CLERK, KITSAP COUNTY

APPENDIX B

7902010134

6

136 Fernhill Ave. N.E.
Bainbridge Island, Ak. 98110

FILED FOR RECORD
REQ. OF *John S. Lawrence*

J.S. FLD -1 PH 2: 23

GENERAL OFFICE
KITSAP COUNTY REGISTER
DEPT. *el*

BAINBRIDGE LANDING
PROTECTIVE COVENANTS

1. No lot shall be used except for residential purposes. No building shall be erected or permitted on any lot other than one detached single family dwelling and private garage for not more than three cars.
2. No building shall be erected, placed or altered on any lot until the construction plans and specifications and a plan showing the location of the structure have been approved by the Architectural Control Committee. The committee, in making a decision, shall consider: (1) the quality of the architectural design; (2) harmony of materials with existing structures and/or surroundings; (3) conformity with lot topography; (4) removal of existing trees and vegetation.
3. No dwelling shall be constructed with a ground floor area of the main structure, exclusive of one-story open porches and garages of less than 1000 square feet. No prefabricated, modular or premanufactured homes shall be permitted on any lot. No trailers or mobile homes shall be permitted on any lot.
4. No building shall be located on any lot nearer to the front lot line, back line or side line than the minimum building setback lines shown on the recorded plat, or nearer than minimum building setback distances of the most recent City of Winslow zoning ordinance. In any event, front yards, rear yards, side yards facing streets shall not be less than 20 feet from any lot line or right-of-way. Side yards shall not be less than 1.5 feet in sum, with no side yard less than 5 feet.
5. Easements for drainage facilities are reserved over a 2 1/2 foot wide strip along each side or interior lot lines and over the rear five feet of each lot. Easements for installation and maintenance of other utilities are reserved as shown on the recorded plat or other recorded instrument of record. Within these easements no structure, planting or other material may be placed or permitted to remain which may damage or interfere with the installation and maintenance of utilities, or which may obstruct or retard the flow of water through drainage channels in the easements. The easement area of each lot and all improvements in it shall be maintained continuously by the owner of the lot, except for those improvements for which public utility or utility company is responsible.
6. No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood.
7. No structures of a temporary character, trailer, basement, tent, shack, garage, barn or other outbuilding, shall be used on any lot at any time as a residence, either temporarily or permanently.

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3. No sign of any kind shall be displayed to the public view on any lot except one professional sign of not more than one square foot, one sign of not more than five square feet advertising the property for sale or rent, or signs used by a builder to advertise the property during the construction and sale period.
9. No oil drilling, oil development operations, oil refining, quarry or mining operations of any kind shall be permitted on or in any lot. Nor shall oil wells, tanks, tunnels, mineral excavations or shafts be permitted upon or in any lot. No derrick or other structure designed for use in boring for oil or natural gas shall be erected, maintained or permitted upon any lot.
10. No animals, livestock or poultry of any kind shall be raised, bred or kept on any lot except that dogs, cats or other household pets may be kept provided that they are not kept, bred or maintained for any commercial purpose.
11. No lot shall be used or maintained as a dumping ground for rubbish. Trash, garbage or other waste shall not be kept except in sanitary containers. All incinerators or other equipment for storage or disposal of such materials shall be kept in a clean and sanitary condition. No automobiles may be parked in the open on any lot or driveway for a period longer than one month, except cars in road operating condition.
12. No individual water supply system shall be permitted on any lot unless such system is located, constructed and equipped in accordance with the requirements, standards and recommendations of applicable state or local public health authority. Approval of such system as installed shall be obtained from such authority.
13. No individual sewage disposal system shall be permitted on any lot unless such system is designed, located and constructed in accordance with the requirements, standards and recommendations of the Kitsap County Health Department. Approval of such system as installed shall be obtained from such authority.
14. No fence, wall, hedge or shrub planting which obstructs sight lines at elevations between 7 and 6 feet above the roadways shall be placed or permitted to remain on any corner lot within the rectangular area formed by the street property lines and a line connecting them at a point 25 feet from the intersection of the street lines, or in the case of a rounded property corner, from the intersection of the street property lines extended. The same sight line limitations shall apply on any lot within 10 feet from the intersection of a street property line with the edge of a driveway or alley. No trees shall be permitted to remain within such distances of such intersections unless the foliage line is maintained at sufficient height to prevent obstruction of such sight lines.
15. The Architectural Control Committee is composed of John Tawressey and Alice Tawressey, Winslow, Washington. Either member of the committee may designate a representative to act for it. In the event of death or resignation of any member of the committee, the remaining members shall have full authority to designate a successor. In the event of death or resignation of both members, property owners shall appoint a new committee. Neither of the members of the committee nor its designated representative shall be entitled to any compensation for services performed pursuant to this covenant.

16. The Architectural Control Committee's approval or disapproval as required in these covenants shall be in writing. In the event the committee or its designated representative fails to approve or disprove within 30 days after plans and specifications have been submitted to it, or in any event if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with.
17. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of 30 years from the date these covenants are recorded, after which time said covenants shall automatically be extended for successive periods of 10 years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part.
18. Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant either to restrain violations or to recover damages.
19. Invalidation of any one of these covenants by judgment or court order shall in no way affect any of the other provisions which shall remain in full force and effect.
20. No lot or portion of a lot in this plat shall be divided and sold or resold or ownership changed or transferred whereby the ownership of any portion of this plat shall be less than the area required for the use district in which located.

The undersigned, being the owners of the land described as:

That portion of the Northeast quarter of the Southwest quarter of Section 26, TWP 25 N, Range 2E W.M. Beginning at the Northeast corner of said Northeast quarter, Southwest quarter; thence along the East-West centerline of said Section 26, N $88^{\circ}37'20''$ W 324 feet to the True Point of Beginning; thence continuing N $88^{\circ}37'20''$ E 326.93 feet to the Easterly margin of Cave Avenue; thence along said Easterly margin S $1^{\circ}22'15''$ W 40.00 feet; thence leaving said Easterly margin S $49^{\circ}43'09''$ E 161.33 feet to a point on a curve the center of which bears S $49^{\circ}43'09''$ E 50 feet, an arc distance of 62.75 feet; thence leaving said curve N $88^{\circ}37'45''$ W 122.55 feet to a point on the Easterly margin of Cave Street; thence along said Easterly margin S $1^{\circ}22'15''$ W 260 feet; thence leaving said Easterly margin S $88^{\circ}37'45''$ E to a point on a curve the center of which bears S $88^{\circ}37'20''$ E 50 feet, an arc distance of 55.36 feet; thence leaving said curve, S $27^{\circ}56'05''$ E 151.25 feet; thence S $88^{\circ}37'20''$ E 256.43 feet; thence N $1^{\circ}24'40''$ E 640.00 feet to the True Point of Beginning.

Containing 4.05 acres.

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REEL 164FA 235

Do hereby impose these covenants upon all of the real property incorporated within the Bainbridge Landing plat.

John G. Tawresey
John G. Tawresey

Alice B. Tawresey
Alice B. Tawresey

STATE OF WASHINGTON)
) ss.
COUNTY OF KITSAP)

On this day personally appeared before me JOHN and ALICE TAWRESEY, to me known to be the individuals described in and who executed the foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed for the uses and purposes mentioned therein.

WITNESS my hand and official seal hereto affixed this 28th day of January, 1979.

Rayce G. Slingsby
Notary Public in and for the State of
Washington, residing at Bainbridge, WA



7902010134

REH164FR 236

APPENDIX C

FILED
KITSAP COUNTY CLERK
2010 JUL 15 PM 3:01
DAVID W. PETERSON

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KITSAP

NORM AND JANET BRUNS, Husband
and Wife,

Plaintiffs,

v.

THE WILLIAM M. AND WILHELMA
COFER LIVING TRUST,

Defendant.

NO. 06-2-01696-5

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FNFL

This matter came before the Court for trial without a jury on March 15 through March 18, 2010. The Court delivered its decision on April 5, 2010. The following constitute the Court's findings of fact and conclusions of law.

A. FINDINGS OF FACT

1. The plaintiffs are Norm and Janet Bruns (the "Brunses"), who reside at 362 Hyak Place in the City of Bainbridge Island, Washington. Their home is on Lot 9 of a development known as Bainbridge Landing, whose plat map is Exhibit 1 at trial.

2. The defendant is The William M. and Wilhelma Cofer Living Trust (the "Trust"), which owns property legally described as Lot 10, Bainbridge Landing, according to plat recorded

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-1

ORIGINAL

JUDGE LEILA MILLS
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

10/2/10

1 in volume 22 of plats, pages 4, 5 and 6, in Kitsap County, Washington, Tax Parcel No. 4098-
2 000-010-0003 (the "Property"). William M. Cofer and Wilhelma Cofer (the "Cofers") are the
3 trustees of the trust and control its conduct. The acts and omissions of the Cofers as described
4 herein constitute the acts and omissions of the Trust.
5

6 3. In 2005 and 2006, the Cofers constructed a house on the Property and also a
7 garage with a second floor that contained an "Accessory Dwelling Unit" (ADU) as then defined
8 by the Bainbridge Island Municipal Code. Among other things, the ADU contained cooking
9 facilities (including shelving and storage, a stove, a refrigerator and dishwasher), sanitation
10 facilities (including a sink, commode and tub/shower) and a living and sleeping area. The ADU
11 was also serviced by a 220 volt line and was issued a permit by the City of Bainbridge Island. It
12 had its own separate address and mailbox and could (and still can) be accessed by means of a
13 door separate from the main house on the Property. Hereinafter, these Findings and Conclusions
14 refer to the second floor of the garage and related appurtenances as the "Cofers' ADU."
15
16

17 4. The Bainbridge Landing development is subject to a set of restrictive covenants
18 running with the land entitled the "Bainbridge Landing Protective Covenants" (hereinafter
19 sometimes referred to as the "Covenants" or "Protective Covenants"), Exhibit 2 at trial. The
20 provisions of the Covenants pertinent here are as follows:
21
22

23 No lot shall be used except for residential purposes. No building
24 shall be erected or permitted on any lot other than one detached
25 single family dwelling and private garage for not more than three
26 cars.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-2

JUDGE LEILA MILLS
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

1 Protective Covenants, ¶ 1.

2 No structure of a temporary character, trailer, basement, tent,
3 shack, garage, barn or other outbuilding, shall be used on any lot at
4 any time as a residence, either temporarily or permanently.

5 Protective Covenants, ¶ 7.

6 No dwelling shall be constructed with a ground floor area of the
7 main structure, exclusive of one-story open porches and garages of
8 less than 1000 square feet.

9 Protective Covenants, ¶ 3.

10 5. The Protective Covenants also contained a provision requiring approval of certain
11 aspects of building plans by what it called an Architectural Control Committee ("ACC"). The
12 provision in question, Paragraph 2, reads as follows:

13 No building shall be erected, placed or altered on any lot until the
14 construction plans and specifications and a plan showing the
15 location of the structure have been approved by the Architectural
16 Control Committee ["ACC"]. The committee, in making a
17 decision, shall consider: (1) the quality of the architectural design;
18 (2) harmony of materials with existing structures and/or
19 surroundings; (3) conformity with lot topography; (4) removal of
20 existing trees and vegetation.

21 6. The Cofer's submitted building plans to the ACC which contained the ADU on
22 them prior to commencing construction and received approval of those plans. There is
23 correspondence also indicating that the ACC required further submittal of paint color and roofing
24 choices, to which the Cofer's responded.

25 7. The Brunses filed suit to enforce the Protective Covenants and for other relief on
26 July 6, 2006, and amended their complaint on July 21, 2006. The amended complaint included
demands for both injunctive and monetary relief. The Brunses also sought an award of sanctions
under RCW 4.84.185 (Washington's frivolous litigation statute), CR 11 and Washington
common law.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-3

JUDGE LEILA MILLS
Kitsap County Superior Court
614 Division Street, MS-24
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(360) 337-7140

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8. The Cofers answered and asserted affirmative defenses and counterclaims on June 25, 2007. The counterclaims asserted at trial were for tortious interference with a business expectancy with respect to renting the ADU, for violations of RCW 4.84.185 and CR 11 based on the Brunses' assertion of Covenant violations concerning the Cofers' paint color and roofing, and for violations of the Protective Covenants by the Brunses based on their construction of a sauna and hot tub outbuilding adjacent to their house and construction of a green metal roof on the Brunses' house. The affirmative defenses pursued at trial were for termination of the Covenants based on abandonment, frustration of their purpose, on changed neighborhood conditions and character, and on equitable defenses including relative hardship, acquiescence, laches, estoppel and unclean hands based on the theory that the Brunses had been on notice of the Cofers' construction of the ADU and failed to sue timely in response. At trial, the Cofers also asserted the invalidation of the Covenants based on superseding governmental action, and based on public policy considerations, in light of the passage of the Growth Management Act in the 1990s (the "GMA"). .

9. The Cofers moved for summary judgment on May 24, 2007. In that motion, they contended in part that the ACC had approved the Cofers' choices of paint colors and roofing. The Brunses were not aware of any approval of the Cofers' paint color and roofing choices until that motion. In response, the Brunses withdrew any allegations of claims based on those choices or on the absence of ACC approval of them. The balance of the Cofers' summary judgment motion was denied.

10. On December 11, 2009, this Court granted the Brunses a partial summary judgment that the Cofers' ADU was in violation of Paragraphs 1, 3 and 7 of the Protective Covenants. A copy of the Order granting that partial summary judgment is attached hereto as

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-4

JUDGE LEILA MILLS
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

1 Exhibit A.

2 11. The evidence shows anecdotal examples of what are argued to be violations of the
3 Protective Covenants in the Bainbridge Landing neighborhood ranging from paint color to
4 storage of a horse trailer to the creation of a sauna area without permission by the ACC.
5 However, these anecdotal alleged violations do not rise to the level of wholesale abandonment of
6 the Covenants. The Covenants are still very much a part of how the Bainbridge Landing
7 community exists, and Mr. Cofer in his own testimony acknowledged the existence and
8 desirability of the Protective Covenants.
9

10 12. The evidence shows that there have been huge increases in the population of the
11 City of Bainbridge Island since the creation of the Bainbridge Landing plat in February 1979 and
12 that, together with such population increase, there has come a significant increase in urbanization
13 of the area surrounding Bainbridge Landing itself. There are various service and retail industries
14 around the plat. However, albeit the surrounding area has changed, those changes have not
15 occurred to a great degree in the Bainbridge Landing plat itself. The plat remains a residential
16 area of single family dwellings to the greater degree, whereby the Covenants have been
17 followed. Any changed conditions in the areas surrounding the plat have not frustrated the
18 original purpose of the Protective Covenants; nor have they frustrated the Covenants' common
19 plan. The Covenants remain useful and in effect.
20

21 13. While the GMA may have encouraged ADUs, it also stated that the act would not
22 override private protective covenants.
23

24 14. The parties to this case have presented directly conflicting accounts of when the
25 Brunses learned of the ADU.

26 15. The Cofers have failed to show that the Brunses have failed to enforce a

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-5

JUDGE LEILA MILLS
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

1 restriction in the Protective Covenants against other violators and are now seeking to enforce a
2 similar violation against the Cofers.

3
4 16. The parties to this case have presented directly conflicting accounts of when the
5 Brunses discovered or learned of the ADU. The Court is not persuaded that there is sufficient
6 proof that the Brunses lacked reasonable promptness in bringing suit.

7
8 17. The testimony between Ms. Brunns and Mr. Cofer is directly contradictory as to
9 when Mr. Cofer first told Ms. Brunns that the space above the garage was intended as a living
10 space. He says that he let her know this immediately. Ms. Brunns flatly denies that such a
11 conversation existed and says that the first time she realized the intentions of her neighbors was
12 when she saw the extra mailbox in front of the Property.

13
14 18. Also, the Court does not find that the Cofers have proven that the Brunses
15 represented to the Cofers and other neighbors that there was no enforceable restriction as to the
16 ADU or that the Brunses did not intend to enforce the Protective Covenants.

17
18 19. The Brunses have a sauna/hot tub structure on their property and also have a
19 green metal roof. The Cofers assert that the structures and the roof were placed on the Brunses'
20 property without the ACC's approval. To the extent that the sauna/hot tub structure, the roof, or
21 their alleged placement on the Brunses' property without ACC approval are asserted to be
22 violations of the Protective Covenants, such violations would be minor and do not destroy the
23 overall scheme of the covenants. There is nothing in the record to suggest that these supposed
24 violations are anything but minor and certainly nothing to suggest that they have destroyed the
25 scheme of the Bainbridge Landing plat or development.

26
27 20. Given this Court's December 11, 2009 partial summary ruling, the Cofers could
28 not have had a valid and viable business expectancy that they could rent the ADU.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-6

JUDGE LEILA MILLS
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

1 21. The Cofers have an agreement to pay for legal fees with their counsel, and the
2 Brunses have incurred legal fees and expenses.

3 22. The Cofers rented the ADU to two different tenants. One covered the period
4 August 1 to November 30, 2007. The other covered the period July 1, 2008 to January 31, 2010.
5 The unoccupied period, from July 26, 2006 when the ADU and the house on the Property were
6 first certified for occupancy and February 28, 2010, totals approximately 24 months. The
7 monthly rental in for each lease was \$750. The total rent received by the Cofers was \$17,250.00,
8 from which the Cofers paid expenses relating to the rental including utilities, taxes and
9 insurance.
10

11 23. The Brunses have established that they have a clear legal or equitable right, that
12 they have a well-grounded fear of immediate invasion of that right, and that the act complained
13 of resulted in actual and substantial injury to the plaintiffs. The injury to the Brunses is that they
14 are effectively not living in a plat where they have an expectancy that they would be living in an
15 area of single-family homes which are allowed a single detached garage. Instead, through the
16 action of the Cofers, the Brunses have seen not only a single-family home on that lot but also a
17 garage together with a detached ADU. This violates the Brunses' property interest as they are
18 not able to benefit from the controlled and orderly nature of the covenants as they existed when
19 they purchased their property. The Brunses have not, however, established any monetary
20 damages from said injury.
21

22 24. Mr. Josh Maachen of the Building Department of the City of Bainbridge Island
23 testified that, by reference to the City's codes, an ADU is a self-contained residence when there
24 is a sleeping area, cooking facilities, and sanitation area together. According to Mr. Maachen, all
25 three elements are required.
26

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-7

JUDGE LEILA MILLS
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

1 25. After this Court entered its December 11, 2009 partial summary judgment Order,
2 the Cofers voluntarily took the following steps. First, they terminated the tenancy existing at the
3 ADU. Second, they removed the 220 electric service to the ADU and plastered over the ADU's
4 220 volt box. Third, they removed the stove and the refrigerator from the ADU's kitchen area.
5 Fourth, they called for a follow-up inspection by the City of Bainbridge Island and Kitsap
6 County Labor and Industries, which declared that the kitchen and cooking facilities had been
7 removed, and that the ADU had been decommissioned and as such no longer existed under the
8 City Code. Per the Bainbridge Island officials, the result was that the area above the garage was
9 now just "habitable space." (see Exhibit 49). Fifth, the Cofers removed the second mailbox on
10 the Property associated with the ADU.
11

12 26. The Cofers also hired an architect licensed in the State of Washington, and
13 commissioned the drawing of preliminary plans to connect their detached garage with the main
14 house on the Property via a mudroom. Those preliminary plans were submitted to the City of
15 Bainbridge Island planning department for review and were given approval as to zoning setback,
16 lot coverage and building height (see Exhibit 50). From this stage, the Cofers were invited by
17 the City to submit final plans for which review and permitting would take a matter of weeks.
18
19

20 **B. CONCLUSIONS OF LAW**
21

22 1. The Cofers' ADU on the Property violated Paragraph 1 of the Protective
23 Covenants because it exceeded the limitation of one detached single family dwelling and private
24 garage.

25 2. The Cofers' ADU violated Paragraph 7 of the Protective Covenants because it
26 utilized a garage and/or other outbuilding as a residence.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-8

JUDGE LEILA MILLS
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

1 3. The Cofers' ADU violated Paragraph 3 of the Protective Covenants by having a
2 dwelling of less than 1,000 square feet.

3
4 4. Compliance with the City of Bainbridge Island's zoning rules does not allow the
5 Cofers to avoid the limitations that the Protective Covenants otherwise impose.

6 5. Submitting building plans to the ACC is not enough to avoid or alleviate the
7 restrictions otherwise imposed by the Protective Covenants.

8 6. Abandonment of protective covenants or unenforceability by frustration of their
9 purpose requires a showing not only of prior violations of the covenants by other residents but
10 that they have been so abandoned that they are useless in every detail and it would be inequitable
11 to enforce them. That showing has not been made here and the defense of abandonment fails.

12 7. Any changed conditions in the areas surrounding the Bainbridge Landing plat
13 have not frustrated the original purpose of the Protective Covenants; nor have they frustrated the
14 Covenants' common plan. The Covenants remain useful and in effect. The defense of changed
15 neighborhood fails.

16
17 8. The GMA did not override the provisions of private protective covenants. The
18 GMA does not constitute governmental action that supersedes or in any way affects the validity
19 or enforceability of the Protective Covenants at issue in this case.

20 9. Neither the GMA nor any other statute, ordinance or regulation brought to the
21 Court's attention evidences a public policy such as to override the protective covenants. Public
22 policy does not in any way affect the validity or enforceability of the Protective Covenants at
23 issue in this case.

24
25 10. Public policy considerations are not a basis for discarding the Protective
26 Covenants. Because the GMA was not intended to override those individual mandates on any

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-9

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1 particular development, the public interest suffers no adverse impact from the existence of the
2 Protective Covenants.

3
4 11. The Cofers have failed to prove that the Brunses acquiesced to the violations of
5 the Protective Covenants by the Cofers. The defense of acquiescence fails.

6
7 12. Laches may be proved by showing that the plaintiff failed to bring suit against the
8 defendant with reasonable promptness. The Court is not persuaded that there is sufficient proof
9 that the Brunses lacked reasonable promptness in bringing suit. The defense of laches fails.

10
11 13. The Cofers have not proven that the Brunses are estopped from enforcing the
12 Protective Covenants. The defense of estoppel fails.

13
14 14. While there may be circumstances in which one who violates protective
15 covenants cannot bring actions for violations against others, it is also the case that there is an
16 exception to any such rule for alleged violations that are minor and do not destroy the overall
17 scheme of the covenants. To the extent that the Brunses' sauna/hot tub structure, their use of a
18 green metal roof or the placement of either of them on the Brunses' property without ACC
19 approval are asserted to be violations of the Protective Covenants, that exception applies here.
20 The unclean hands defense fails.

21
22 15. Given this Court's December 11, 2009 partial summary judgment ruling, the
23 Cofers could not have had a valid and viable business expectancy that they could rent the ADU.
24 The Cofers have not proven and do not have a basis for any claim of tortious interference.

25
26 16. The Brunses' withdrawal of claims based on the Cofers' choice of paint color and
roofing cured any defect in their pleadings. The Cofers are not entitled to and do not have any
basis for any award under RCW 4.84.185 or CR 11.

17. The Cofers' violations of the Protective Covenants set forth above results in their

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-10

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1 having unclean hands. They are therefore barred from seeking any relief as to their allegations
2 that the Brunses' sauna/hot tub structures or green metal roof – or their alleged placement on the
3 Brunses' property without ACC approval – violate the Protective Covenants.
4

5 18. Based on the Court's prior December 11, 2009 Partial Summary Judgment Order
6 and the evidence provided at trial, an injunction is required in this case but the Court concludes
7 that the Cofers have already taken the steps necessary, prior to trial, to remedy any violations of
8 the covenants.¹ The injunction therefore will take the form of two alternative remedies from
9 which the Cofers must elect a chosen remedy. The Court is not requiring both courses of action,
10 nor is the Court requiring that the Cofers take any additional action.

11 19. The first remedy assumes that there is no structural connection between the
12 Cofers' garage and the main house on the Property. The cooking facilities have already been
13 removed by the Cofers as the 220 electrical line has been decommissioned and the stove and
14 refrigerator have been physically removed. This Court is satisfied that the area above the garage
15 is no longer a separate self-contained dwelling. The violation of the covenants has effectively
16 been removed. This Court is not requiring anything beyond what has already been done to bring
17 the Cofers into compliance with Covenant No. 7. Continued absence of the 220 volt line and
18 stove and refrigerator is required so long as the garage remains separate.
19

20 20. The second alternative remedy assumes that the Cofers elect to connect the garage
21 and the main house in accordance with their proposed plan. Provided that the connection
22 satisfies any governmental requirements including those of the City of Bainbridge Island and the
23 Architectural Control Committee requirements, this Court need not address the parameters or
24 design of the connection at this time. Such a connection of the garage to the main house would
25

26

¹ See Exhibit A: *Order Granting Plaintiff's Motion for Partial Summary Judgment, December 11, 2009.*

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-11

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1 resolve any concerns about the area above the garage being a separate dwelling, or "ADU."

2 21. With either election of their alternative remedies, the Cofers' property would be
3 in compliance with the covenants that have been challenged to the satisfaction of this Court.

4 22. The plaintiffs have not satisfied the requirements of a showing of unjust
5 enrichment, and that claim fails. The Brunses are not entitled to a monetary award based on
6 unjust enrichment measured by the rent of the ADU by two tenants. This Court is not persuaded
7 that there should be a payment from the defendants to the plaintiffs for what the plaintiffs
8 determine and claim is an unjust enrichment. There is no equitable basis for that rent money to
9 be paid to the Brunses as damages in this case.
10

11 23. The Brunses are not entitled to an award of breach of contract damages measured
12 by the rent of the ADU by two tenants. The Brunses failed to establish any monetary damages
13 that resulted from the breach of the covenants in this case, and that claim for damages fails.
14

15 24. The Brunses are not entitled to an award of damages with the rental rate as the
16 measure for the unoccupied months of the garage apartment under a breach of contract theory,
17 given that the unit was still a commissioned ADU. The Brunses failed to establish any monetary
18 damages that resulted from such claimed breaches of the covenants. This claim for damages
19 fails.

20 25. The Brunses are not entitled to an award of sanctions on any of their three
21 asserted grounds.

22 26. Each party has requested that the Court award attorney fees and court costs under
23 the Court's equitable powers. The Court finds no basis for an award of attorney fees to any party
24 in this case, and therefore each party will bear its own attorney fees and court costs.
25

26 27. Nothing in these Findings of Fact and Conclusions of Law shall be constructed by

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-12

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way of collateral estoppel, res judicata or otherwise, to bar the Brunses, the Cofers or respective successors in interest from raising future claims or defenses regarding the application of the covenants to any use of the disputed garage space not specifically raised herein.

DATED this 15 day of July, 2010.



A handwritten signature in black ink, appearing to read 'Leila Mills', is written over a horizontal line.

Judge Leila Mills

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-13

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Exhibit A

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RECEIVED AND FILED
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DAVID W. PETERSON
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

NORM and JANET BRUNS, husband and wife,

Plaintiffs,

THE WILLIAM M. AND WILHELMA COFER
LIVING TRUST,

Defendant.

NO. 06-2-01696-5

ORDER GRANTING PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT

THIS MATTER came before Court on Plaintiffs' Motion for Partial Summary Judgment ("the Brunses' Partial Summary Judgment Motion") and on Defendant's Cross Motion for Partial Summary Judgment ("the Cofers' Cross Motion for Partial Summary Judgment). The Court considered the following materials submitted to it by the parties in connection with both motions:

1. The Brunses' Partial Summary Judgment Motion;
2. The Declaration of Norm Bruns (and attached exhibits);
3. The Declaration of David Lieberworth (and attached exhibits, including previously filed declarations);
4. Defendant's Response to Plaintiff's Motion;
5. Plaintiffs' Reply Brief in Response to Defendant's Opposition;
6. Defendant's Cross Motion for Partial Summary Judgment;

ORDER GRANTING PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT - 1
SEA_DOCS:944378.1 (13157-00100)

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A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
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Seattle, Washington 98101-2939
(206) 464-3939

cel

- 1 7. Defendant's May 25, 2007 Motion for Summary Judgment;
- 2 8. Joint Declaration of William and Wilhelma Cofer;
- 3 9. Declaration of Quentin Wildsmith in Support of Defendant's Motion for
- 4 Summary Judgment;
- 5 10. Joint Declaration of John G. and Alice B. Tawressey;
- 6 11. Defendant's Reply in Support of its May 25, 2007 Summary Judgment Motion;
- 7 12. Supplemental Declaration of Alice Tawressey;
- 8 13. Supplemental Declaration of William Cofer
- 9 14. Plaintiffs' Response to Defendant's Cross Motion ;
- 10 15. Defendant's Reply Brief in Response to its Motion; and
- 11 16. The records and files herein.

12 Having been thus fully informed, and having heard the arguments of counsel, NOW,
 13 THEREFORE,

14 IT IS HEREBY ORDERED, and the Court finds, as follows:

- 15 *AK* 1. The garage ADU on the property of defendant ^{exceeds the limitation of} The William M. And Wilhelma ^{one} Cofer Living Trust (the "Cofers") violates Paragraph 1 of the Protective Covenants because it is ~~a second detached single family dwelling on their premises.~~ *And private garage*
- 16 *AK* 2. The Cofers' garage ADU violates Paragraph 7 of the Protective Covenants because it utilizes a garage ~~as a dwelling.~~
- 17 *AK* 3. The Cofers' garage ADU violates Paragraph 3 of the Protective Covenants by having a dwelling of less than 1,000 square feet. *for other outbuilding w/ residence*
- 18 4. Compliance with the City of Bainbridge Island's zoning rules does not allow the Cofers to avoid the limitations that the Protective Covenants otherwise impose.
- 19 *AK* 5. Submitting building plans to the ACC is not enough to ^{or alleviate} avoid the restrictions otherwise imposed by the Protective Covenants.
- 20 *AK* 6. *Based upon the foregoing,* The Brunses' Partial Summary Judgment Motion is therefore GRANTED.

ORDER GRANTING PLAINTIFFS' MOTION
 FOR PARTIAL SUMMARY JUDGMENT - 2
 SEA_DOCS:944378.1 (13157-00100)

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DATED this 11 day of December, 2009.



Judge Lena Mills

Presented by:

GARVEY SCHUBERT BARER

By 

David Lieberworth, WSBA #9329
Attorneys for Plaintiffs

Approved as to form:

LASHER HOLZAPFEL SPERRY & EBBERSON

By 

Quentin Wildsmith, WSBA #25644
Attorneys for Defendant

ORDER GRANTING PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT - 3
SBA_DOCS:944378.1 [13157-00100]

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APPENDIX D

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KITSAP

NORM AND JANET BRUNS, Husband
and Wife,

Plaintiffs,

v.

THE WILLIAM M. AND WILHELMA
COFER LIVING TRUST,

Defendant.

NO. 06-2-01696-5

JUDGMENT

CLERK'S ACTION REQUIRED

JD

This matter having come regularly before the Court for trial on March 15 through March 18, 2010, and the Court having heard the testimony and having examined the evidence submitted by the parties, being fully advised, having filed its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance with those findings and conclusions, the Court now enters the following JUDGMENT:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that an injunction is entered in this case that requires defendant to comply with the Covenants for the Bainbridge Landing

JUDGMENT-1

ORIGINAL

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10402

1 Neighborhood. There are two alternative remedies to satisfy this injunction. The defendant must
2 elect which remedy it chooses to implement. The Court does not require both courses of action.

3
4 The first remedy assumes that there is no structural connection between the defendant's
5 garage and the main house on the Property. The eating area at the Property has now been
6 effectively removed as the 220 electrical line has been decommissioned and the stove and
7 refrigerator have been physically removed. This Court is therefore satisfied that the area above
8 the garage is no longer a separate self-contained residence. The violation of the covenants has
9 effectively been removed. The Court does not require further action beyond what has already
10 been done under this remedy to bring the defendant into compliance with Covenant No. 7. Court
11 requires the continued absence of the electrical line, 220 volt line, stove and refrigerator so long
12 as the garage remains a separate unit.
13
14

15 The second alternative remedy which would satisfy this injunction assumes that the
16 defendant elects to connect the garage and the main house in accordance with their proposed
17 plan, thus creating a single residence. Provided the connection satisfies any governmental
18 requirements including those of the City of Bainbridge Island and the Architectural Control
19 Committee requirements, this Court need not address the parameters or design of the connection
20 at this time.
21
22

23 With either of these courses of action, the defendant would bring their property into
24 compliance with the Covenants that have been challenged to the satisfaction of this Court.
25
26

JUDGMENT-2

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Nothing in these Findings of Fact and Conclusions of Law shall be constructed by way of collateral estoppel, res judicata or otherwise, to bar the Brunses, the Cofers, or respective successors in interest from raising future claims or defenses regarding the application of the covenants to any use of the disputed garage space not specifically addressed herein.

DATED this 15 day of July, 2010.


Judge Leila Mills

JUDGMENT-3

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DECLARATION OF MAILING

I, MICHELLE DELLINO, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

On July 15, 2010, I caused a copy of: 1) Judgment, and 2) Findings of Fact and Conclusions of Law in the above entitled action in the manner noted on the following:

Quentin Wildsmith Lasher Holzapfel Sperry & Ebberson 2600 Two Union Square 601 Union Street Seattle, WA 98101-4000	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Fax: <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via E-mail
David Lieberworth Garvey Schubert Barer 1191 Second Avenue, 18 th Floor Seattle, WA 98101-2939	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Fax: <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via E-mail

DATED this 15th day of July 2010 at Port Orchard, Washington.


MICHELLE DELLINO

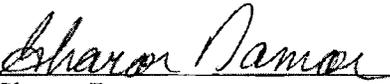
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STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on February 23, 2011, I caused a copy of **Appellants' Amended Opening Brief** to be served by US Mail on the person listed below:

Quentin Wildsmith
Lasher Holzapfel Sperry & Ebberson PLLC
601 Union St Ste 2600
Seattle, WA 98101-4000

Dated this 23rd day of February, 2011, at Seattle, Washington.


Sharon Damon