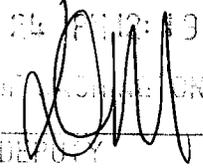


COURT OF APPEALS  
DIVISION II

FILED 04/11/12 10:10  
STATE OF WASHINGTON  
BY   
DEPUTY

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.

---

**APPELLANTS' AMENDED OPENING  
BRIEF**

---

David Lieberworth, WSBA #9329  
GARVEY SCHUBERT BARER  
Attorneys for Appellant  
Eighteenth Floor  
1191 Second Avenue  
Seattle, Washington 98101-2939  
(206) 464-3939

## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
ISSUES AND ASSIGNMENTS OF ERROR .....	2
Assignments of Error .....	2
Error 1: Conclusion of Law 18 (App C, p. 11) .....	2
Error 2: Conclusion of Law 19 (App C, p. 11) .....	2
Error 3: Conclusion of Law 20 (App C, p. 11) .....	2
Error 4: Conclusion of Law 21 (App C, p. 12) .....	2
Error 5: Corresponding Provisions of Judgment .....	3
Error 6: Failed to Adopt Additional Injunction Terms .....	3
Error 7: Conclusion of Law 27 (App C, p. 12) .....	3
Error 8: Corresponding Provisions of Judgment .....	3
Error 9: Conclusion of Law 22 (App C, p. 12) .....	3
Error 10: Conclusion of Law 23 (App C, p. 12) .....	3
Error 11: Conclusion of Law 24 (App C, p. 12) .....	3
Error 12: Finding of Fact 23 (App C, p. 7) .....	3
Error 13: Conclusion of Law 25 (App C, p. 12) .....	4
Error 14: Conclusion of Law 26 (App C, p. 12) .....	4
Error 15: Finding of Fact 21 (App C, p. 7) .....	4
Issues Pertaining To Assignments Of Error .....	4
Issue 1: Do the protective covenants allow Mr. and Mrs. Cofer to have an apartment by connecting their garage to their house? .....	4
Issue 2: Do the terms of the trial court's injunction otherwise fail to provide adequate protection for Mr. and Mrs. Bruns? .....	4
Issue 3: Did the trial court properly deny the monetary damages requested by Mr. and Mrs. Bruns? .....	4
Issue 4: Did the trial court properly deny the sanctions requested by Mr. and Mrs. Bruns? .....	4
STATEMENT OF THE CASE .....	5
ARGUMENT .....	16

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
1. The Protective Covenants Do Not Allow Mr. and Mrs. Cofer To Have An Apartment By Connecting Their Garage To The Main House.....	16
2. The Terms Of The Trial Court’s Injunction Do Not Adequately Protect Mr. and Mrs. Bruns From Future Violations Of The Protective Covenants .....	22
3. The Trial Court Improperly Denied The Monetary Damages Requested By Mr. and Mrs. Bruns.....	25
4. The Trial Court Improperly Denied The Sanctions Requested By Mr. and Mrs. Bruns.....	32
CONCLUSION.....	34
APPENDIX.....	36

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page</b>
<i>Backlund v. University of Washington</i> , 137 Wn.2d 651 at n. 1, 975 P.2d 950 (1999).....	27
<i>Bauman v. Turpen</i> , 139 Wn. App. 78, 160 P.3d 1050 (2007) .....	24
<i>Bloome v. Haverly</i> , 154 Wn. App. 129, 225 P.3d 330 (2010) .....	18
<i>Eagle Point Condominium Owners Ass'n v. Coy</i> , 102 Wn. App. 697, 9 P.3d 898 (2000), .....	33
<i>Federal Signal Corp. v. Safety Factors, Inc.</i> , 125 Wn.2d 413, 866 P.2d 172 (1994).....	27
<i>In re Rogers</i> , 117 Wn. App. 270, 71 P.3d 220 (2003).....	33
<i>Krein v. Smith</i> , 60 Wn.App. 809, 811, <i>rev. den.</i> , 117 Wn.2d 1002 (1991).....	18
<i>Kucera v. Dep't of Transp.</i> , 140 Wn.2d 200, 995 P.2d 63 (2000) .....	22
<i>Lake Limerick County Club v. Hunt Mfg. Homes, Inc.</i> , 120 Wn. App. 246, 84 P.3d 295 (2004).....	30
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998) .....	33
<i>Mason v. Mortgage America, Inc.</i> , 114 Wn.2d 842 (1990).....	27
<i>Mountain Park Homeowners Ass'n, Inc. v. Tydings</i> , 125 Wn.2d 337, 883 P.2d 1383 (1994).....	18
<i>Parry v. Hewitt</i> , 68 Wn.App. 664 (1992) .....	18
<i>Sales v. Weyerhaeuser Co.</i> 163 Wn.2d 14, 177 P.3d 1122 (2008).....	23
<i>State v. Superior Court for King County</i> , 95 Wash. 258, 163 P. 765 (1917).....	32

<i>T.S. v. Boy Scouts of America</i> , 157 Wn.2d 416, 138 P.3d 1053 (2006)....	34
<i>Washington State Physicians Ins. Exchange &amp; Ass'n v. Fisons Corp.</i> 122 Wn.2d 299 (1993).....	28
<i>Wimberly v. Caravello</i> , 136 Wn. App. 327, 149 P.3d 402 (2006).....	24
<i>Young v. Young</i> , 164 Wn.2d 477, 191 P.3d 1258 (2008).....	30
<b>Statutes</b>	
RCW 4.84.185 .....	32
<b>Rules</b>	
CR 52 .....	27
CR 11 .....	32
Local Rule 16(c) .....	13

## INTRODUCTION

This case involves enforcement of protective covenants in a residential subdivision. Appended to this brief are 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).<sup>1</sup>

The defendants, Mr. and Mrs. Cofer, built a house for themselves plus an apartment in the second story of their detached garage. The trial court ruled that the apartment violated the covenants because: (a) it exceeded the limit of one dwelling per lot, (b) it failed the minimum dwelling size of 1,000 square feet and (c) it violated the ban on using an outbuilding as a residence. The applicable provisions of the covenants are found in paragraphs 1, 3 and 7. The trial court also ruled that these violations were not excused by compliance with the city's zoning code or the architectural review provisions of the protective covenants.

The trial court granted injunctive relief to the plaintiffs, Mr. and Mrs. Bruns, but only for so long as the garage remains detached from the house. In other words, the trial court allowed Mr. and Mrs. Cofer to have the apartment by connecting the garage to the house. Consistent with this misinterpretation of the covenants and the

---

<sup>1</sup> These four documents are cited with dual references to the record and also the appendix to this brief. For example, the subdivision plat map is cited: Ex 1 (App A).

defendants' stated intent to connect the buildings, the trial court required only minimal physical changes to the apartment space. Mr. and Mrs. Bruns appeal from the limitations on their injunctive relief. They also appeal the trial court's denial of damages and sanctions.

## **ISSUES AND ASSIGNMENTS OF ERROR**

### **Assignments of Error**

Error 1: Conclusion of Law 18 (App C, p. 11). The trial court erred by (a) concluding that Mr. and Mrs. Cofer had remedied any violations of the protective covenants prior to trial and (b) giving them the option to eliminate injunctive relief by connecting their garage to their house.

Error 2: Conclusion of Law 19 (App C, p. 11). The trial court erred in concluding that (a) the steps taken by Mr. and Mrs. Cofer prior to trial are sufficient to remedy their violations of the covenants and (b) they should be prohibited from reversing those steps only so long as their garage remains separate from their house.

Error 3: Conclusion of Law 20 (App C, p. 11). The trial court erred in concluding that by connecting the garage to the house Mr. and Mrs. Cofer would resolve any concerns about the apartment being a separate dwelling, or "ADU."

Error 4: Conclusion of Law 21 (App C, p. 12). The trial court erred in concluding that Mr. and Mrs. Cofer would be in compliance

with the protective covenants by electing either of the court's two alternative courses of action.

Error 5: The trial court erred in those provisions of the Judgment (App D) that correspond to Conclusions of Law 18 through 21 (App C, pp. 11-12).

Error 6: The trial court erred in failing to adopt additional injunction terms that are necessary to prevent Mr. and Mrs. Cofer from having a second dwelling.

Error 7: Conclusion of Law 27 (App C, p. 12). The trial court erred in providing an ambiguous statement that the Judgment would be no bar to future claims or defenses "not specifically raised herein."

Error 8: The trial court erred in those provisions of the Judgment (App D) that correspond to Conclusion of Law 27 (App C, p. 12).

Error 9: Conclusion of Law 22 (App C, p. 12). The trial court erred in rejecting the unjust enrichment claim of Mr. and Mrs. Bruns.

Error 10: Conclusion of Law 23 (App C, p. 12). The trial court erred in rejecting the breach of contract claim of Mr. and Mrs. Bruns.

Error 11: Conclusion of Law 24 (App C, p. 12). The trial court erred in rejecting the breach of contract claim of Mr. and Mrs. Bruns.

Error 12: Finding of Fact 23 (App C, p. 7). The trial court erred in concluding that Mr. and Mrs. Bruns did not establish any monetary damage from the injury described in Finding of Fact 23.

Error 13: Conclusion of Law 25 (App C, p. 12). The trial court erred in rejecting the sanctions requested by Mr. and Mrs. Bruns.

Error 14: Conclusion of Law 26 (App C, p. 12). The trial court erred in rejecting the sanctions requested by Mr. and Mrs. Bruns.

Error 15: Finding of Fact 21 (App C, p. 7). The trial court erred in finding that Mr. and Mrs. Cofer have an agreement to pay legal fees without addressing the undisputed evidence that Mr. and Mrs. Cofer's lawyer is their son-in-law, they have paid him and his firm no legal fees at all in this case, their supposed fee agreement is not contingent on the outcome, and they likewise paid him no fees at all for a prior lawsuit against their former neighbor in Poulsbo.

#### **Issues Pertaining to Assignments of Error**

Issue 1. Do the protective covenants allow Mr. and Mrs. Cofer to have an apartment by connecting their garage to their house? (Errors 1 through 5.)

Issue 2. Do the terms of the trial court's injunction otherwise fail to provide adequate protection for Mr. and Mrs. Bruns? (Errors 1, 2, and 4 through 8.)

Issue 3. Did the trial court properly deny the monetary damages requested by Mr. and Mrs. Bruns? (Errors 9 through 12.)

Issue 4. Did the trial court properly deny the sanctions requested by Mr. and Mrs. Bruns? (Errors 13 through 15.)

## STATEMENT OF THE CASE

The parties are next door neighbors in a residential subdivision named Bainbridge Landing. RP 102 (3-15-2010).<sup>2</sup> Bainbridge Landing is a 12-lot subdivision that was platted in 1979. Ex 1 (App A). The developers, John and Alice Tawresey, imposed protective covenants on the subdivision at the time of its creation. Ex 2 (App B) pp. 3-4. The covenants run with the land and are binding on the lot owners for an initial period of 30 years with successive 10-year extensions thereafter. Ex 2 (App B) ¶ 17. The 10-year extensions are automatic unless a majority of the owners agree to change the covenants in whole or in part. Ex 2 (App B) ¶ 17.

The protective covenants create an Architectural Control Committee to review proposed construction. Ex 2 (App B) ¶ 2. The Committee is composed of Mr. and Mrs. Tawresey. Ex 2 (App B) ¶ 15. The covenants specify that the Committee's decision on whether or not to approve proposed construction must be based on four considerations: (1) the quality of the architectural design, (2) harmony of materials with existing structures and/or surroundings, (3) conformity with lot topography, and (4) removal of existing trees and vegetation. Ex 2 (App B) ¶ 2.

---

<sup>2</sup> Several proceedings in this case were transcribed for the appellate record. Because the multiple transcripts are not numbered sequentially, the form of citation used in this brief will end with a parenthetical reference to the date of the proceeding.

Upon submission of plans and specifications to the Architectural Control Committee, it has 30 days in which to review and respond to the plans. Ex 2 (App B) ¶ 16. If the Committee fails to respond in writing within that time, approval is not required and the related covenants are deemed to be fully complied with. Ex 2 (App B) ¶ 16. Similarly, if no suit to enjoin construction has been commenced before the completion of construction, approval is not required and the related covenants are deemed to be fully complied with. Ex 2 (App B) ¶ 16.

Mr. and Mrs. Cofer moved to Bainbridge Landing in March 2003 when they purchased an existing home on Lot 11. RP 189-90 (3-16-10); Ex 8. They were aware of the protective covenants at that time, and they believed them to be in effect. RP 193-96 (3-16-2010). In December 2003 they purchased vacant Lot 10 next door to Mr. and Mrs. Bruns. RP 190 (3-16-10); Ex 9. Mr. and Mrs. Cofer believed the covenants to remain in effect at that time. RP 193-96 (3-16-2010).

Mr. and Mrs. Cofer's plan for Lot 10 was to build a house for themselves plus an apartment that would qualify as an "accessory dwelling unit," or ADU in the second story of a detached garage. Ex 15. The ADU provisions of the Bainbridge Island zoning code were adopted in 1995. Ex 53; RP 293-94 (3-16-2010). An ADU can be attached to or detached from the main dwelling. Ex 53 at P. 1; RP 293 (3-16-2010). The zoning code establishes a maximum size of

800 square feet for an ADU. Ex 53 at P. 1. There are both permitted and unpermitted ADUs on Bainbridge Island. RP 293 (3-16-2010). For example, shortly before trial in this case, the city had just decommissioned another ADU in a code enforcement action. RP 302-03 (3-16-2010).

The only ADU in Bainbridge Landing is the one constructed by Mr. and Mrs. Cofer. RP 309 (3-16-2010). The Bainbridge Landing protective covenants limit each lot to “one detached single family dwelling and private garage for not more than three cars.” Ex 2 (App B) ¶ 1. ). When considering the meaning of the one dwelling limitation relative to their planned ADU, Mr. and Mrs. Cofer did not raise the subject any of the professionals assisting in the building of the ADU (RP 199-203 (3-16-2010)); they did not confer with Mr. and Mrs. Bruns or any other neighbor (RP 203 (3-16-2010)); and did they not consult with their lawyer, Mr. Wildsmith, who is their son-in-law. (RP 203-02 (3-16-2010)); RP 229 (3-16-11).

Instead, Mr. Cofer reviewed the city’s zoning code in its entirety for assistance in understanding the scope of paragraph 1 of the protective covenants. RP 478 (3-17-2010). He acknowledged that the zoning code is inapplicable to the Bainbridge Landing covenants because the code, itself, says it “shall not abrogate easements, covenants, or other restrictions of record imposed on properties in the city.” RP 478 (3-17-2010). His wife agreed that the city has nothing to do with protective covenants. RP 244 (3-16-

2010). Mr. and Mrs. Cofer raised the subject of the Bainbridge Landing protective covenants during the process of getting their building permit, but they were told by the city staff that the city has nothing to do with protective covenants. RP 245-46 (3-16-2010). Mr. and Mrs. Cofer raised the subject with city staff a second time, during this lawsuit, and the city again said it neither enforces nor abrogates private covenants. RP 308-09 (3-16-2010).

On July 19, 2005, the City of Bainbridge Island issued a building permit to Mr. and Mrs. Cofer. Ex 11. On July 30, 2005, Mr. and Mrs. Cofer notified the other residents of Bainbridge Landing that construction would begin soon on Lot 10. Ex 33. RP 477 (3-17-2010). The notification did not mention the ADU. Ex 33; RP 477 (3-17-2010)

Mr. and Mrs. Cofer applied for a second address for the ADU on May 2, 2006. Ex 12; RP 196-97 (3-16-2010). Mr. and Mrs. Cofer sold their first home in Bainbridge Landing, the existing home on Lot 11, on May 26, 2010. Ex 10. They moved from the neighborhood at that point, and did not return until they moved into their new house on Lot 10. RP 108 (3-15-2010).

In late June 2006 Mrs. Bruns noticed two mail boxes with two addresses in front of Mr. and Mrs. Cofer's new house. RP 107 (3-15-2010); Ex 3. Mr. and Mrs. Cofer were no longer living in the neighborhood at that point, so it was not a simple matter to ask them for an explanation. RP 108 (3-15-2010). On July 1, 2006, during a

Saturday evening social engagement with former neighbors, Mr. and Mrs. Bruns were told that Mr. and Mrs. Cofer had built an apartment for their son. RP 109 (3-15-2010). On the following Monday morning, Mrs. Bruns went to city hall and reviewed the Lot 10 construction file. RP 109-11 (3-15-2010). City staff explained the ADU. RP 111 (3-15-2010). Mrs. Bruns called Mrs. Tawresey to ask if Mr. and Mrs. Cofer had submitted their construction plans to the Architectural Control Committee. RP 261 (3-16-2010). Mrs. Tawresey said that no plans had been submitted. RP 261 (3-16-2010).

Mr. Cofer was on the construction site on July 5, 2006, and Mrs. Bruns approached him to discuss three things: (a) the ADU, (b) whether the construction plans had been submitted to the Architectural Control Committee, and (c) when Mr. and Mrs. Cofer expected to move into their new house. RP 262-63 (3-16-2010). Mr. Cofer informed Mrs. Bruns that (a) the second story of the garage was a city-approved rental apartment with its own address, (b) the construction plans had been submitted to the Architectural Control Committee and (c) he expected to move into his new house in a couple of weeks. RP 262 (3-16-2010). Mr. Cofer asked, "We're not violating any covenants, are we?" RP 263 (3-16-2010). Mrs. Bruns nodded affirmatively. RP 263 (3-16-2010).

Mrs. Bruns spoke to Mrs. Tawresey a second time to let her know that Mr. Cofer said he had submitted construction plans to the Architectural Control Committee. RP 264 (3-16-2010). Mrs.

Tawresey checked her records and found an unsigned letter to Mr. and Mrs. Cofer. RP 264 (3-16-2010). She mailed a copy to Mr. and Mrs. Bruns. RP 265 (3-16-2010); Ex 4. The letter conveyed approval of the construction plans with the caveat that Mr. and Mrs. Cofer were required to make a follow up submission after they had made their final choices on roofing materials and exterior colors. Ex 4. Mrs. Tawresey informed Mr. and Mrs. Bruns that Mr. and Mrs. Cofer had not made the follow up submission to the Architectural Control Committee. RP 151 (3-15-2010).

This case was commenced on July 7, 2006, with service of the summons and complaint on Mr. and Mrs. Cofer. CP 284. A letter from the plaintiffs' lawyer was delivered to Mr. and Mrs. Cofer along with the summons and complaint. RP 147 (3-15-2010). Mr. Wildsmith appeared for Mr. and Mrs. Cofer. CP 288.

The parties engaged in settlement discussions through their lawyers. RP 117-18 (3-15-2010). Mr. and Mrs. Cofer offered not to rent the apartment while they owned the property. RP 117-18 (3-15-2010). This was small comfort, as Mr. Cofer had recently said they do not live anywhere very long. RP 263 (3-16-2010). The settlement discussions were unsuccessful because Mr. and Mrs. Cofer would not agree to make that a permanent commitment that runs with the land. RP 117-18 (3-15-2010). Mr. and Mrs. Bruns filed their complaint on July 18, 2006. CP 5. After Mrs. Tawresey told Mrs. Bruns that Mr. and Mrs. Cofer had not made a follow up submission on roofing

materials and exterior colors (RP 150-51 (3-15-2010)), the complaint was amended on July 21, 2006, to add an allegation that Mr. and Mrs. Cofer's roofing materials and exterior colors had not been approved by the Architectural Control Committee. CP 9. The chief concern underlying the amendment to the complaint was a desire to avoid the argument that Mr. and Mrs. Bruns waived requirements under the protective covenants. RP 150-54 (3-15-2010). On July 26, 2006, Mr. and Mrs. Cofer received their certificate of occupancy from the city. RP 215-16 (3-16-10); Ex 17.

Mr. and Mrs. Cofer left for Arizona in early 2007 and did not return until May 2007. RP 133-34 (3-15-2010). Mr. and Mrs. Bruns were planning to attempt to resume settlement discussions when Mr. and Mrs. Cofer returned from Arizona. RP 133-34 (3-15-2010). Instead, on May 25, 2007, while Mr. and Mrs. Cofer were still in Arizona they filed a motion for summary judgment. CP 295.

Mr. and Mrs. Bruns decided to oppose the motion. RP 133-34 (3-15-2010); CP 366. Mr. and Mrs. Bruns also dropped their claim regarding the roofing materials and exterior colors. CP 368 at n. 4. Judge Hartman heard oral arguments on June 22, 2007, and denied the motion in its entirety. CP 479. The order also formally dismissed the claim regarding roofing materials and exterior colors. CP 480 ¶2. Mr. and Mrs. Cofer then filed their answer on June 26, 2007, denying all claims against them, alleging affirmative defenses and asserting counterclaims. CP 12. The affirmative defenses and counterclaims

asked the court to find that the protective covenants are not in effect. CP 13, 17. The counterclaims included a request for sanctions for the dismissed claim regarding roofing materials and exterior colors and a request for equitable and/or injunctive relief against Mr. and Mrs. Bruns for an outbuilding in their back yard that allegedly violates paragraph 1 of the covenants. CP 16-17. Mr. and Mrs. Bruns filed their answer and defenses to the counterclaims on July 20, 2007. CP 19.

On July 30, 2007, Mr. and Mrs. Bruns sent a letter to Mr. and Mrs. Cofer for the purpose of trying to revive settlement discussions. RP 134-35 (3-15-2010). The letter was received by Mr. and Mrs. Cofer on August 1, 2010. RP 135-36 (3-15-2010). That evening Mr. Bruns spoke to Mr. and Mrs. Cofer regarding the dispute over the apartment. RP 135-38 (3-15-2010). Among other things, Mr. Cofer said "We're going to rent that apartment until a judge tells us we can't." RP 138 (3-15-2010). He also said he was retaliating against Mr. and Mrs. Bruns by seeking to have their outbuilding demolished as a violation of the protective covenants. RP 137 (3-15-2010).

The first tenant left in November 2007. RP 217 (3-16-2010). Mr. and Mrs. Cofer leased the apartment to a second tenant from July 1, 2008 to January 24, 2010. RP 217 (3-16-2010). Both leases provided rent of \$750 per month. Ex 18; Ex 19.

Mr. and Mrs. Bruns served written discovery requests on Mr. and Mrs. Cofer on September 25, 2007. CP 657. The depositions of

Mr. and Mrs. Cofer were taken in January 2008. RP 139 (3-15-2010).

Mr. and Mrs. Bruns were not deposed. RP 139 (3-15-2010).

In February 2009 the 30-year anniversary of the Bainbridge Landing protective covenants passed without any vote to amend them. RP 140 (3-15-2010). On March 2, 2009, at the request of Mr. and Mrs. Bruns, the superior court established a trial date of March 1, 2010, and assigned the case to Judge Mills. CP 498. The pretrial order also established a deadline to join parties, a deadline to complete discovery, a deadline for hearing dispositive motions, and a mandatory settlement date pursuant to Local Rule 16(c). CP 498.

On October 23, 2009, Mr. and Mrs. Bruns filed a motion for partial summary judgment. CP 24. The summary judgment hearing was continued to December 11, 2009, allowing Mr. and Mrs. Cofer to file a cross motion on the same issues. CP 518. Mr. and Mrs. Cofer filed their cross motion on November 13, 2009. CP 145. Judge Mills heard arguments on December 11, 2009, and granted the plaintiffs' motion in its entirety. RP 29-34 (12-11-2009). The summary judgment order provides as follows:

1. The garage ADU on the property of defendant The William M. And Wilhelma Cofer Living Trust (the "Cofers") violates Paragraph 1 of the Protective Covenants because it exceeds the limitation of one detached single family dwelling and private garage.
2. The Cofers' garage ADU violates Paragraph 7 of the Protective

Covenants because it utilizes a garage and/or other outbuilding as a residence.

3. The Cofers' garage ADU violates Paragraph 3 of the Protective Covenants by having a dwelling of less than 1,000 square feet.
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.
5. Submitting building plans to the ACC is not enough to avoid or alleviate the restrictions otherwise imposed by the Protective Covenants.

CP 193. Three months later, during closing arguments at trial, Mr. and Mrs. Cofer asked the trial judge to reverse her summary judgment decision. RP 613 (3-18-2010). She declined and, instead, incorporated her summary judgment rulings into her Findings of Fact and Conclusions of Law. CP 257-58, 261-62.

The pretrial order set a judicial settlement conference for January 25, 2010. CP 498. The settlement conference occurred, but was not successful. RP 12 (2-12-2010).

On February 22, 2010, Mr. and Mrs. Cofer disclosed to Mr. and Mrs. Bruns that they had plans to connect their garage to the main house. Ex 74. They had already provided those plans to the city and the Architectural Control Committee, both of whom gave their approval. Ex 50; Ex 51; Ex 74. Mr. Cofer's letter to the Architectural

Control Committee stated that he had always intended to follow the protective covenants. Ex 75. During trial Mr. and Mrs. Cofer continued to acknowledge that the covenants were in effect at that time. RP 481-82 (3-17-2010).

After the second summary judgment hearing and before trial, Mr. and Mrs. Cofer also terminated their tenant's lease, removed the second mailbox, removed the stove and refrigerator in the disputed space, and covered its 220 volt electrical outlet. (RP 213-14 (3-16-2010)).

At the request of Mr. and Mrs. Bruns, the trial judge held a pretrial conference on February 12, 2010. RP 1-37 (2-12-2010). She ordered Mr. and Mrs. Cofer to submit a written offer of proof as to each of their many non-party witnesses. RP 28-36 (2-12-2010). They did so. CP 548. Mr. and Mrs. Bruns made their written response to the offer of proof in the form of a motion in limine. RP 2-3 (3-8-2010); CP 574. The trial judge held a follow up hearing on March 8, 2010, to consider the issues regarding the non-party witnesses. RP 1-76 (3-8-2010). She ordered further briefing at that time. RP 71-72 (3-8-2010). Argument on the further briefing was held on the morning of the first day of trial. RP 78-84 (3-15-2010). The trial judge decided to reserve her decision on the proffered testimony until hearing it in context. RP 78 (3-15-2010).

A non-jury trial was conducted on March 15-18, 2010, on the remaining issues of remedy, affirmative defenses, counterclaims, and

sanctions. RP 77-628 (3-15-2010 to 3-18-2010). At the close of trial, Mr. and Mrs. Cofer asked the court to reverse the partial summary judgment order in favor of Mr. and Mrs. Bruns. RP 613 (3-18-2010). The trial judge announced her decision on April 5, 2010, and entered her Findings, Conclusions and Final Judgment on July 15, 2010. RP 1-19 (4-5-2010); CP 201; CP 218. Mr. and Mrs. Bruns appealed on August 10, 2010. CP 222. Mr. and Mrs. Cofer cross appealed on August 12, 2010. CP 246.

### ARGUMENT

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

Mr. and Mrs. Bruns were stunned to learn that both a house and an apartment were under construction next door. RP 112-13 (3-15-10). They felt the apartment was a clear violation of the protective covenants, and they were adamantly opposed to it. RP 113 (3-15-10). Mr. and Mrs. Cofer would not agree to remedy the problem in a permanent way. RP 117-18, 122-23 (3-15-10). They offered only to pass off this lawsuit to the next (and presumably unsuspecting) owner of their home. That was unacceptable to Mr. and Mrs. Bruns. This left Mr. and Mrs. Bruns facing three bad choices: (a) accept the apartment, (b) move from their longtime home (with or without telling their buyer about the known violation of the covenants), or (c) fight for their rights. RP 113-16 (3-15-10). The least bad choice was to fight for their rights. RP 113-16 (3-15-10).

On December 11, 2009, it appeared the fight was largely over when the trial judge ruled that the apartment violated three separate provisions of the protective covenants and was not saved by either the local zoning code or the architectural review provisions of the covenants. The fight continued, however, as Mr. and Mrs. Cofer insisted on pursuing their long list of fact-intensive affirmative defenses, counterclaims and sanctions. A few days before trial they also unveiled their longstanding backup plan to connect the garage to the house in hopes of improving their position at trial.

In fact, Mr. and Mrs. Cofer's last minute disclosure of their connection plan changed the outcome. If the trial court's decision is allowed to stand, it gives Mr. and Mrs. Cofer a way to regain the apartment. At most, however, the connection plan should resolve only the violation of paragraph 7 of the covenants (using an outbuilding as a residence).<sup>3</sup> Connecting the two buildings does nothing to resolve the violations under paragraphs 1 and 3 (one dwelling per lot and no dwelling under 1,000 square feet). Therefore, Mr. and Mrs. Bruns are entitled to a permanent injunction without regard to whether the garage is connected to the house on Lot 10. As described more fully below, the trial court denied them a permanent

---

<sup>3</sup> Mr. and Mrs. Bruns are not appealing the trial court's decision to allow evidence of the construction plan. Nor are they appealing the trial judge's decision that the connection plan would resolve the violation of paragraph 7 (using an outbuilding as a residence).

injunction because of an erroneous interpretation of the protective covenants.

Questions of law involving protective covenants are reviewed de novo on appeal. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). The interpretation of restrictive covenants is a legal question and, therefore, is subject to de novo review. The most recent case to so state is *Bloome v. Haverly*, 154 Wn. App. 129, 138, 225 P.3d 330, 334 (2010). *Accord Parry v. Hewitt*, 68 Wn.App. 664, 668 (1992) (citing *Krein v. Smith*, 60 Wn.App. 809, 811, *rev. den.*, 117 Wn.2d 1002 (1991)). Consistent with this principle, the trial court in this case decided the meaning of the covenants as a matter of law on summary judgment.

The trial judge left no doubt that Mr. and Mrs. Bruns satisfied all of the requirements for injunctive relief:

I am persuaded that given the violation of the Covenants 1, 3, and 7, an injunction must issue in this case. The plaintiffs have established that they have a clear legal or equitable right, that they have a well-grounded fear of immediate invasion of that right, and that the act complained of resulted in actual and substantial injury to the plaintiffs.

RP 10 (4-5-2010). The court's written findings are to the same effect. CP 207 (App C) ¶ 23. The Judgment provides that "an injunction is entered in this case that requires defendant to comply with the

Covenants for the Bainbridge Landing neighborhood.” CP 218 (App D). While this language is problematic -- it begs the question of what constitutes compliance with the protective covenants -- the limited duration of the injunction is an even greater problem.

The Judgment is based on the concept of “two alternative remedies to satisfy this injunction.” CP 219 (App D). The first alternative deals with the facts as they existed at the time of trial. After describing the steps taken by Mr. and Mrs. Cofer to decommission the apartment as an ADU under the local zoning code, the injunction provides only that they may not reverse those steps. Moreover, the prohibition on reversing those steps is limited: “[The] Court requires the continued absence of the electrical line, 220 volt line, stove and refrigerator **so long as the garage remains a separate unit.**” CP 219 (App D) (emphasis added). The clear implication of the emphasized language is that the injunction ceases to apply, or is “satisfied” as the trial judge put it, if the garage is connected to the house.

This is made explicit in the trial court’s description of the “second alternative remedy which would satisfy this injunction.” CP 219 (App D). This second branch of the Judgment provides that, if Mr. and Mrs. Cofer “connect the garage and the main house in accordance with their proposed plan, thus creating a single residence,” the connection would remedy the violations of the covenants and end the limited form of injunction ordered by the court. CP 219 (App D).

The trial judge's decision paves the way for Mr. and Mrs. Cofer to seek a Satisfaction of Judgment as soon as the connection is made, thus eliminating all vestiges of the injunctive relief for which Mr. and Mrs. Bruns have fought so hard. Mr. and Mrs. Cofer will be free to return the stove and refrigerator, restore the 220 volt electrical service, and re-apply to the City for a legal ADU. The local zoning code defines "'accessory dwelling unit' to mean separate living quarters contained **within or detached from** a single-family dwelling on a single lot." Ex 53 at p. 1 (emphasis added); RP 293 (3-16-2010). Alternatively, Mr. and Mrs. Cofer may choose to join the ranks of other illegal ADU operators on Bainbridge Island. RP 293 (3-16-2010). Or they may operate it as an apartment for friends, family, employees, business associates, and so on.

In any of these scenarios, the effect on Mr. and Mrs. Bruns is the same as the conditions that prevailed before December 11, 2009. The lot next to theirs will have two dwellings, one of which does not even meet the minimum size requirement under the protective covenants. This outcome cannot be reconciled with the trial judge's clear -- and correct -- summary judgment decision that the apartment violates three separate provisions of the protective covenants and is not saved by either compliance with the local zoning code or the architectural review provisions of the covenants. But without the intervention of this Court there can be two dwellings next door to Mr. and Mrs. Bruns, not just one as required by paragraph 1 of the

protective covenants, and one of the two dwellings will not satisfy the minimum size requirement of paragraph 3 of the covenants.

The effect is not limited to Mr. and Mrs. Bruns. The trial court's interpretation of the protective covenants will allow all of the Bainbridge Landing lot owners to add rental apartments to their homes. The density of this 12-lot subdivision of single family homes could be doubled, and one of the core purposes of the covenants destroyed.

We expect Mr. and Mrs. Cofer to contend that if they or anyone else ever puts an ADU on Lot 10, whether the buildings are connected or not, such action would violate Conclusion of Law 1 and the Judgment. There are several problems with this argument. As discussed above, that view of the trial court's decision cannot be reconciled with the clear implication of the final sentence of Conclusion of Law 19, the express language of Conclusions of Law 20 and 21, and the corresponding language of the Judgment. CP 211 - 12 (App C); CP 218 (App D).

Even if one assumes the trial judge intended to prohibit an apartment no matter what, it would only mean she committed other reversible errors. She would have either failed to decide the entire connection scenario (inexplicably stopping short of granting a permanent injunction) or she would have made an inexplicable distinction between the connection scenario (no injunction) and the no connection scenario (injunction).

Either way, if the buildings are connected and the apartment is restored, Mr. and Mrs. Bruns would be facing the same three bad choices they faced in July 2006. If they make the same choice and defend their rights, they will be forced to start a new lawsuit in which they will incur even more legal fees on an issue that could have been avoided if the trial court fully had decided the present case.

Mr. and Mrs. Bruns would also surely face the argument that a second lawsuit is barred by the present case. They would be forced to rely on the trial court's ambiguous "no bar" clause. CP 213 (App C); CP 220 (App D). It is easy to see why Mr. and Mrs. Cofer would argue for this outcome, but this court should not allow it. Any way you look at it, the trial court mishandled the connection scenario and must be reversed on that issue.

**2. The terms of the trial court's injunction do not adequately protect Mr. and Mrs. Bruns from future violations of the protective covenants.**

There are two problems with the injunctive relief granted by the trial judge. First, as discussed above, it applies only so long as the garage remains detached from the house. The trial court's decision in this regard is based on an erroneous interpretation of the covenants, an error of law. In general, a trial court's decision to grant an injunction and the terms contained in the injunction are reviewed for abuse of discretion. *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). However, a trial court decision based on an

erroneous view of the law necessarily constitutes an abuse of discretion. *Sales v. Weyerhaeuser Co.* 163 Wn.2d 14, 177 P.3d 1122 (2008).

Second, in the “no connection” scenario, the trial court ordered only the minimal changes necessary to satisfy the city that the disputed space is no longer a legal ADU. This limitation on the injunctive relief is at least somewhat consistent with the trial judge’s belief that the connection plan would resolve all three violations of the protective covenants. In that view it would be cost effective to let Mr. and Mrs. Cofer preserve as much as possible of their investment in the apartment. The limitation is not appropriate, however, in light of the continuing violations of paragraphs 1 and 3 of the covenants (one dwelling per lot and no dwelling under 1,000 square feet). If this Court agrees, the trial court should not simply carry over the extremely limited injunction terms to the “connection” scenario. To do so would be an abuse of discretion because those injunction terms are tainted by the trial court’s error of law regarding the meaning of the protective covenants.

Because paragraphs 1 and 3 of the covenants continue to bar the apartment, regardless of whether the garage is connected to the house, there is no reason to preserve the “two alternatives” structure of the Judgment. Instead, there should be a single permanent injunction. The terms of that injunction should also provide greater

protection to Mr. and Mrs. Bruns. Their concerns are focused on the separate entrance to the apartment and its kitchen area.

Mr. and Mrs. Cofer concede the obvious fact that the kitchen area still looks like a kitchen:

[Y]es, the kitchen looks like a kitchen because it was designed that way. . . . If the space is no longer a kitchen somebody who is going to use that space will probably re-design it so it doesn't look like a kitchen anymore.

RP 622 (3-18-2010). Mr. and Mrs. Cofer are essentially asking the court to spare them the cost of the re-design and let it fall on the next owner.

Mr. and Mrs. Bruns are not so sanguine regarding the next owner's inevitable decision to incur the cost of really eliminating the kitchen. It is quite possible a buyer will look at that space and conclude the very opposite – that it is almost a complete kitchen and with just a little additional investment can be an apartment. Mr. and Mrs. Cofer should be required to make the changes now. More specifically, Mr. and Mrs. Cofer should be required to remove the microwave oven, the kitchen sink, the garbage disposal, the dishwasher, the kitchen cabinets, and the 220 volt wiring in the walls. Mr. and Mrs. Cofer's desire to postpone or transfer the cost of these changes is irrelevant. A balancing of the equities in protective covenant cases is reserved for defendants who are "innocent," as the case law defines that term. *Bauman v. Turpen*, 139 Wn. App. 78, 160

P.3d 1050 (2007); *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006). Mr. and Mrs. Cofer are not innocent.

Mr. and Mrs. Bruns are also concerned about the separate entrance to the apartment. The trial judge's decision to ignore this concern is particularly difficult to understand. One might think her decision on the separate entrance is related to her belief that an apartment is permitted once the buildings are connected, but even Mr. and Mrs. Cofer agreed that the separate entrance to the apartment should be eliminated unless local ordinances require it for safety reasons. RP 215 (3-16-2010). The permanent injunction should so state.

Lastly, Mr. and Mrs. Bruns request clarification of one term in the existing injunction language. As explained briefly in the argument on Issue 1, it is unhelpful for the Judgment to provide that "an injunction is entered in this case that requires defendant to comply with the Covenants for the Bainbridge Landing neighborhood." CP 218 (App D). This language begs the question of what constitutes compliance with the protective covenants. Instead, Mr. and Mrs. Bruns request language saying that Mr. and Mrs. Cofer and their successors are permanently enjoined from having an accessory dwelling unit or any other form of second dwelling on Lot 10.

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

The complaint in this case seeks both injunctive relief and monetary damages. CP 10. Mr. and Mrs. Bruns described their two grounds for damages – breach of contract and unjust enrichment – in their trial brief. CP 712-14. Mr. and Mrs. Cofer moved for a directed verdict at the close of the plaintiffs’ case. RP 279 (3-16-2010). The trial court ruled that Mr. and Mrs. Bruns had made out a prima facie case for damages. RP 286 (3-16-2010).

When the trial judge gave her oral decision, however, she ignored breach of contract and summarily dismissed unjust enrichment:

As to the claim by the Brunses that there should be monetary relief for the violations, this Court is not persuaded that there should be a payment from the defendants to the plaintiffs for what the plaintiffs determine and claim is an unjust enrichment. **I don’t believe that the plaintiffs have satisfied the requirements of a showing of unjust enrichment**, and it doesn’t appear to me that there should be effectively a reimbursement of any rental amounts or monetary benefit gained by the defendants. I don’t believe that it makes any sense for that money to be paid into the Brunses or paid to the Brunses as part of the relief in this case.

RP 12-13 (4-5-2010) (emphasis added). This situation was brought to the trial judge’s attention when the parties were next before her. RP 5 (4-23-2010). She chose to stand on her original treatment of unjust enrichment (“I don’t believe the plaintiffs have satisfied the

requirements”) and disposed of the breach of contract claim in the same summary fashion. RP 9-10 (4-23-2010). Her findings and conclusions do the same. CP 207 (App C) ¶ 23; CP 212 (App C) ¶¶ 22-24.

Findings of fact and conclusion of law were required because this case was tried without a jury. CR 52. While the appellate courts do not require any particular form, the findings and conclusions must be sufficient for the appellate court to understand what questions were decided by the trial court and in what manner they were decided.

*Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 422, 886 P.2d 172 (1994). *Cf. Backlund v. University of Washington*, 137 Wn.2d 651, 656 at n. 1, 975 P.2d 950 (1999) (trial court’s ill-advised refusal to comply with CR 52 not necessarily fatal if appellate court can discern what questions the trial court decided and the theory for the decision). The findings and conclusions in this case do not satisfy this standard because they lack any meaningful explanation of the facts and theory for the decision. CP 207 (App C) ¶ 23; CP 212 (App C) ¶¶ 22-24.

Two separate legal theories support an award of monetary damages. The first is breach of contract. Mr. and Mrs. Cofer deprived Mr. and Mrs. Bruns of the benefit of their bargain. *See Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 849 (1990) (“Contract damages are ordinarily based on the injured party’s expectation interest and are intended to give that party the benefit of the bargain

by awarding him or her a sum of money that will, to the extent possible, put the injured party in as good a position as that party would have been in had the contract been performed.”) (awarding damages for loss of enjoyment of mobile home when the wrong one was delivered). The rental income, which the Cofers clearly cannot keep, provides a measure of the associated damages.

There is no question that there was a breach of contract, as the trial judge said very plainly:

I mean, I have found that there's been a breach of the covenant. We can call it a breach of covenant and breach of contract under the covenant. I'm not sure if it makes a substantive difference, because it results in the same thing. There was a failure to follow the covenants.

RP 10 (4-23-2010). Moreover, the trial judge found that the breach resulted in harm:

The Brunses have established that . . . the act complained of resulted in actual and substantial injury to the plaintiffs. . . This violates the Brunses' property interest . . . .

CP 207 (App C) ¶ 23. Once the fact of harm is established, as it was here, monetary sums which provide a measurement of the harm with some reasonable certainty suffice to support a dollar award.

*Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*

122 Wn.2d 299, 331 (1993). Nevertheless, the trial judge

inexplicably refused any compensation for the harm admittedly suffered by Mr. and Mrs. Bruns.

As the trial judge found, the existence of an apartment next door “violates the Brunses’ property interest.” In other words, Mr. and Mrs. Cofer took their neighbors’ property. They took away the right of Mr. and Mrs. Bruns to enjoy a neighborhood with just one substantial sized dwelling per lot, a neighborhood with no apartments. CP 207 (App C) ¶23. What is the value of what Mr. and Mrs. Cofer took? Their own leases show the value. Both leases place a value of \$750 per month on the apartment. Ex 18; Ex 19.

Based on this value, Mr. and Mrs. Bruns seek monetary damages in the total amount of \$32,250. This amount is comprised of \$17,250 for the 23 months when the apartment was leased and \$15,000 for the 20 months when it was available for lease. That there were periods in which the unit sat vacant is irrelevant. The protective covenants bar the very existence of the unit, occupied or not. For the period of time the apartment existed, Mr. and Mrs. Bruns were deprived of their contractually assured benefits under the protective covenants. There are no disputed facts regarding the claim for damages, so Mr. and Mrs. Bruns ask this Court to grant their claim in the full amount requested at trial.<sup>4</sup>

---

<sup>4</sup> Mr. and Mrs. Cofer presented evidence of the operating expenses they incurred while the apartment was leased to their two tenants. They claimed, without substantiation, that their expenses were in the range of \$175 to \$250 per month. RP 423 (3-17-2010). Counsel for Mr. and Mrs. Cofer seemed to offer to use the figure

A second ground for awarding damages to Mr. and Mrs. Bruns is the doctrine of unjust enrichment. The elements of a claim for unjust enrichment are as follows:

Three elements must be established in order to sustain a claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and acceptance or retention by the defendant of the benefit under circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

*Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008)

(awarding value of benefit without deduction of costs incurred in creating it). The doctrine has been applied when a party fails to honor covenants running with the land and benefits from that breach. *Lake Limerick County Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 261-62, 84 P.3d 295 (2004) (failure to pay dues owed under covenant, both before and after purchase of burdened land by defendant).

Mr. and Mrs. Cofer took their neighbors' property interest and transformed it into cash. They knowingly enjoyed this income, and it is manifestly inequitable for them to keep it. They knew they were on

---

most favorable to Mr. and Mrs. Bruns, but he apparently got mixed up and used the expense figure least favorable to Mr. and Mrs. Bruns. RP 580 (3-18-2010). Had he followed through correctly on his stated intent of "being fair to the Bruns," the net value of the apartment (\$750 rent less \$175 expenses, or \$575 per month) times the number of months the apartment existed (23 occupied and 20 available, or a total of 43 months) would reduce the measure of damages to \$24,725.

thin ice as soon as Mr. and Mrs. Bruns asserted their rights under the protective covenant. They offered not to rent the apartment, if only Mr. and Mrs. Bruns would agree to postpone the fight until after Mr. and Mrs. Cofer had sold the problem to an unsuspecting buyer. While Mr. and Mrs. Bruns understandably rejected this offer, Mr. and Mrs. Cofer nevertheless elected not to rent the apartment for the first 11 months. Then, after Judge Hartman denied their first summary judgment motion, Mr. and Mrs. Cofer did a most remarkable thing – they proceeded to rent the apartment as if they had won or at least received some encouragement from Judge Hartman (which they most certainly did not). Rather than to step back and reassess their legal position, Mr. Cofer took the position that, “We’re going to rent that apartment until a judge tells us we can’t.” RP 138 (3-15-2010). He and his wife did just that.

What is equitable about Mr. and Mrs. Cofer keeping their ill-gotten gain under these circumstances? The trial judge did not address this or any of the other elements of unjust enrichment. Perhaps she thought it equitable because of her belief that Mr. and Mrs. Cofer were just a minor connection away from being back in the apartment business. Perhaps she viewed this lawsuit as turning on a technicality, the detached nature of the garage. There is no need for this Court to remand to find out what the trial judge was thinking then or would think now. This Court has all the information it needs in order to award Mr. and Mrs. Bruns their contract damages or, at a

minimum, to disgorge the unjust enrichment enjoyed by Mr. and Mrs. Cofer.

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

Mr. and Mrs. Bruns asked the trial court to impose sanctions against Mr. and Mrs. Cofer on three different grounds: CR 11, RCW 4.84.185 and the court's inherent power to control litigation. CP 721-27; RP 552-56 (3-18-2010). They did not do so lightly. Sanctions are an extraordinary measure, but the tool exists for good reason and on occasion must be used. Without the threat of sanctions, some litigants inevitably would abuse the process and, over time, the standard of practice would devolve to that level.

It goes without saying that an appellate court must show deference to a trial court's exercise of its discretion in the use of sanctions. While a trial court's decision on sanctions is reviewed only for an abuse of discretion, the exercise of discretion is reviewable. It is the longstanding policy of this state that the appellate courts can and will act when the discretionary power of a lower court has not been properly exercised. *State v. Superior Court for King County*, 95 Wash. 258, 163 P. 765 (1917).

Because abuse of discretion is the standard of review for a wide variety of trial court decisions, there are a great many appellate cases that articulate what constitutes an abuse of discretion. Several cases are most pertinent here where the problem is that the trial judge

gave no reasons for rejecting the sanctions claims of Mr. and Mrs. Bruns. A trial court's exercise of discretion must be based on articulable reasons:

[W]e will exercise our supervisory role to ensure that discretion is exercised on articulable grounds. We remand the fee award to the trial court for the entry of proper findings of fact and conclusions of law consistent with this opinion.

*Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). *Accord Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 9 P.3d 898 (2000) (appellate courts exercise a supervisory role to ensure that discretion is exercised on articulable grounds); *In re Rogers*, 117 Wn. App. 270, 71 P.3d 220 (2003) (judicial discretion requires tenable grounds or reasons).

In sharp contrast to the trial judge's unexplained rejection of the sanctions claims advanced by Mr. and Mrs. Bruns, she articulated clear reasons for rejecting the sanctions claims of Mr. and Mrs. Cofer. CP 210 (App C). One is left to guess at what reasons the court had for rejecting the sanctions requested by Mr. and Mrs. Bruns. Perhaps the trial court's reasons were related to her erroneous view of the covenants in the event that Mr. and Mrs. Cofer connect their garage to their house. If so, a trial court decision based on an erroneous view of the law necessarily constitutes an abuse of discretion. *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 177 P.3d 1122 (2008). A trial court's discretionary decision is untenable whether it applies the

wrong legal standard or rests on facts unsupported in the record. *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 138 P.3d 1053 (2006). Here we are unable to tell what facts or law the trial judge relied upon. Whatever her reasons may be, Mr. and Mrs. Bruns are entitled to have those reasons articulated. They are also entitled to reasoning that reflects a legally correct interpretation of the protective covenants.

In the course of reconsidering and articulating reasons for granting or denying sanctions, the trial judge should be required to address the cost advantage that has favored Mr. and Mrs. Cofer to date and may well explain some of their litigation tactics. The trial court erred in finding that Mr. and Mrs. Cofer have an agreement to pay legal fees.. CP 207 (App C), ¶ 21. Yet the undisputed evidence shows Mr. and Mrs. Cofer's lawyer is their son-in-law, they have paid him and his firm no legal fees at all in this case, their supposed fee agreement is not contingent on the outcome, and they likewise paid him no fees at all for a prior lawsuit he handled for them. RP 229-32 (3-16-2010). To the extent that the trial court's finding is intended to mean that the parties bore roughly equal litigation costs, such a finding is unsupported by substantial evidence in the record.

### **CONCLUSION**

Mr. and Mrs. Bruns ask this Court to reverse the trial court in four respects. First, they ask this Court to determine that Mr. and Mrs. Cofer and their successors should be permanently enjoined from

having an accessory dwelling unit or other form of second dwelling on Lot 10. This injunction should be entered without regard to whether the garage is connected to the house. Second, Mr. and Mrs. Bruns ask this Court to order injunction terms that better protect against future use of the disputed space as a dwelling. Third, they ask this Court to award damages in the amount of \$32,250. Fourth, Mr. and Mrs. Bruns ask this Court to reverse the trial court's decision on sanctions and remand for reconsideration based on articulable reasons that reflect this Court's disposition of the other three issues.

Respectfully submitted, this 23<sup>rd</sup> day of February, 2011.

GARVEY SCHUBERT BARER

By *Seth Bunt* #30379 for  
David Lieberworth, WSBA #9239  
Attorneys for Appellants  
Norm and Janet Bruns

**APPENDIX**

## APPENDIX A



# 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  
POULSBORO

## DEDICATION

"KNOW ALL MEN BY THESE PRESENTS THAT DOROTHY CAVE NYSTROM, A MARRIED WOMAN; HELEN N. DINDOCK, A SINGLE WOMAN; DAVID C. PETERSON AND SUSAN L. PETERSON, HUSBAND AND WIFE; JOHN G. TAMRESSET AND ALICE B. TAMRESSET, 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 THE 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 GRADING 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 4<sup>th</sup> DAY OF April, 19 79 A.D.

Dorothy Cave Nystrom  
DOROTHY CAVE NYSTROM, A MARRIED WOMAN

Helen N. Dindock  
HELEN N. DINDOCK, A SINGLE WOMAN

David C. Peterson  
DAVID C. PETERSON

Susan L. Peterson  
SUSAN L. PETERSON, HIS WIFE

John G. Tamresset  
JOHN G. TAMRESSET

Alice B. Tamresset  
ALICE B. TAMRESSET, HIS WIFE

Seafirst Mortgage Corporation  
SEAFIRST MORTGAGE CORPORATION

## ACKNOWLEDGEMENTS

STATE OF WASHINGTON  
COUNTY OF KITSAP SS:

THIS IS TO CERTIFY THAT ON THIS 4<sup>th</sup> DAY OF April, 19 79 A.D., BEFORE ME, THE UNDERSIGNED A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, DULY COMMISSIONED AND SWORN PERSONALLY APPEARED DOROTHY CAVE NYSTROM, 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 Bainbridge

STATE OF WASHINGTON  
COUNTY OF KITSAP SS:

THIS IS TO CERTIFY THAT ON THIS 4<sup>th</sup> DAY OF April, 19 79 A.D., BEFORE ME, THE UNDERSIGNED A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, DULY COMMISSIONED AND SWORN PERSONALLY APPEARED HELEN N. DINDOCK, 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 Bainbridge

## ACKNOWLEDGEMENTS

STATE OF WASHINGTON  
COUNTY OF KITSAP SS:

THIS IS TO CERTIFY THAT ON THIS 4<sup>th</sup> DAY OF April, 19 79 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 Bainbridge

STATE OF WASHINGTON  
COUNTY OF KITSAP SS:

THIS IS TO CERTIFY THAT ON THIS 4<sup>th</sup> DAY OF April, 19 79 A.D., BEFORE ME, THE UNDERSIGNED A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON DULY COMMISSIONED AND SWORN PERSONALLY APPEARED JOHN G. TAMRESSET AND ALICE B. TAMRESSET, 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 Bainbridge

STATE OF WASHINGTON  
COUNTY OF KITSAP SS:

THIS IS TO CERTIFY THAT ON THIS 4<sup>th</sup> DAY OF April, 19 79 A.D. BEFORE ME, THE UNDERSIGNED A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON DULY COMMISSIONED AND SWORN PERSONALLY APPEARED Robert J. Wikard AND John F. March Dist. Vice President and Asst. Regional 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 IS 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 Bainbridge

7995110112

# 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 7<sup>th</sup> DAY OF MAY 1979 A.D.

J. M. Holman  
CITY ENGINEER, WINSLOW



2. EXAMINED AND APPROVED BY THE CITY PLANNING AGENCY THIS 7<sup>th</sup> 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 HEREON, ACCORDING TO THE BOOKS AND RECORDS OF MY OFFICE, HAVE BEEN FULLY PAID AND DISCHARGED, INCLUDING 1979 TAXES.

David E. ...  
TREASURER, KITSAP COUNTY

### RECORDING CERTIFICATION

"FILED FOR RECORD AT THE REQUEST OF Town of Bainbridge  
THIS 11<sup>th</sup> DAY OF May, 1979, AT 10 MINUTES PAST  
11<sup>00</sup> A.M. O'CLOCK AND RECORDED IN VOLUME 52 OF PLATS,  
PAGES 546, RECORDS OF KITSAP COUNTY, WASHINGTON.

Shirley Hall  
CLERK, KITSAP COUNTY

## APPENDIX B

7902010134

6-

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

FILED FOR RECORD  
REQ. OF *John D. Lawrence*  
3:09 PM -1 PH 2-23

REGISTERED  
MITSUBISHI SECURITY ASSURANCE  
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 15 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.

7902010134

REC 164FB 233

8. 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° 37' 20" W 324 feet to the True Point of Beginning; thence continuing N 88° 37' 20" E 326.93 feet to the Easterly margin of Cave Avenue; thence along said Easterly margin S 1° 22' 15" W 40.00 feet; thence leaving said Easterly margin S 49° 43' 09" E 161.33 feet to a point on a curve the center of which bears S 49° 43' 09" E 50 feet, an arc distance of 62.75 feet; thence leaving said curve N 88° 37' 45" W 122.55 feet to a point on the Easterly margin of Cave Street; thence along said Easterly margin S 1° 22' 15" W 260 feet; thence leaving said Easterly margin S 88° 37' 45" E to a point on a curve the center of which bears S 88° 37' 20" E 50 feet, an arc distance of 55.36 feet, thence leaving said curve, S 27° 56' 05" E 151.25 feet; thence S 88° 37' 20" E 256.48 feet; thence N 1° 24' 40" E 640.00 feet to the True Point of Beginning.

Containing 4.05 acres.

7902010134

REEL 164FA 235



## APPENDIX C

FILED  
KITSAP COUNTY CLERK

2010 JUL 15 PM 3:01

DAVID W. PETERSON

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

*102 dr*

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 Cofers 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  
Port Orchard, WA 98366  
(360) 337-7140

1           8.     The Cofers answered and asserted affirmative defenses and counterclaims on June  
2 25, 2007.    The counterclaims asserted at trial were for tortious interference with a business  
3 expectancy with respect to renting the ADU, for violations of RCW 4.84.185 and CR 11 based  
4 on the Brunses' assertion of Covenant violations concerning the Cofers' paint color and roofing,  
5 and for violations of the Protective Covenants by the Brunses based on their construction of a  
6 sauna and hot tub outbuilding adjacent to their house and construction of a green metal roof on  
7 the Brunses' house.   The affirmative defenses pursued at trial were for termination of the  
8 Covenants based on abandonment, frustration of their purpose, on changed neighborhood  
9 conditions and character, and on equitable defenses including relative hardship, acquiescence,  
10 laches, estoppel and unclean hands based on the theory that the Brunses had been on notice of  
11 the Cofers' construction of the ADU and failed to sue timely in response.   At trial, the Cofers  
12 also asserted the invalidation of the Covenants based on superseding governmental action, and  
13 based on public policy considerations, in light of the passage of the Growth Management Act in  
14 the 1990s (the "GMA"). .

15  
16  
17           9.     The Cofers moved for summary judgment on May 24, 2007.   In that motion, they  
18 contended in part that the ACC had approved the Cofers' choices of paint colors and roofing.  
19 The Brunses were not aware of any approval of the Cofers' paint color and roofing choices until  
20 that motion.   In response, the Brunses withdrew any allegations of claims based on those choices  
21 or on the absence of ACC approval of them.   The balance of the Cofers' summary judgment  
22 motion was denied.

23  
24           10.    On December 11, 2009, this Court granted the Brunses a partial summary  
25 judgment that the Cofers' ADU was in violation of Paragraphs 1, 3 and 7 of the Protective  
26 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  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

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.

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

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

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

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

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

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

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW-9

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

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

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

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

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW-11

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

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

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

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

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

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

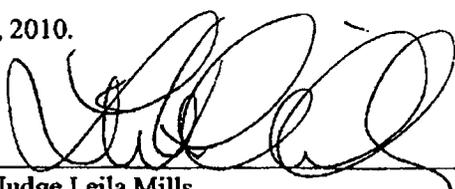
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW-12

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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.

  
\_\_\_\_\_  
Judge Leila Mills

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW-13

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

# Exhibit A

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

RECEIVED AND FILED  
IN OPEN COURT  
DEC 11 2009  
DAVID W. PETERSON  
KITSAP COUNTY CLERK

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)

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
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. Tawresey;
- 6 11. Defendant's Reply in Support of its May 25, 2007 Summary Judgment Motion;
- 7 12. Supplemental Declaration of Alice Tawresey;
- 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 *AS* 1. The garage ADU on the property of defendant The William M. And Wilhelma *exceeds the limitation of*  
 16 Cofer Living Trust (the "Cofers") violates Paragraph 1 of the Protective *one*  
 17 Covenants because it is ~~a second detached single family dwelling on their~~  
 18 *And private garage*
- 18 *AS* 2. The Cofers' garage ADU violates Paragraph 7 of the Protective Covenants  
 19 because it utilizes a garage as a dwelling.
- 19 3. The Cofers' garage ADU violates Paragraph 3 of the Protective Covenants by *For other outbuilding as a residence*  
 20 having a dwelling of less than 1,000 square feet.
- 21 4. Compliance with the City of Bainbridge Island's zoning rules does not allow the  
 22 Cofers to avoid the limitations that the Protective Covenants otherwise impose.
- 22 *or alleviate* 5. Submitting building plans to the ACC is not enough to avoid the restrictions  
 23 otherwise imposed by the Protective Covenants.
- 23 *Based upon the foregoing* 6. The Brunses' Partial Summary Judgment Motion is therefore GRANTED.
- 24 *AS*

25  
 26  
 ORDER GRANTING PLAINTIFFS' MOTION  
 FOR PARTIAL SUMMARY JUDGMENT - 2  
 SEA\_DOCS:94-078.1 (13157-00100)

GARVEY SCHUBERT BARER  
 A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
 eighteenth floor  
 1197 second avenue  
 seattle, washington 98101-2939  
 (206) 464-3939

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

DATED this 11 day of December, 2009.

  
Judge Lena Mills

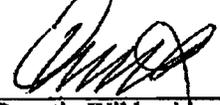
Presented by:

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

## APPENDIX D

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

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

104ds

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

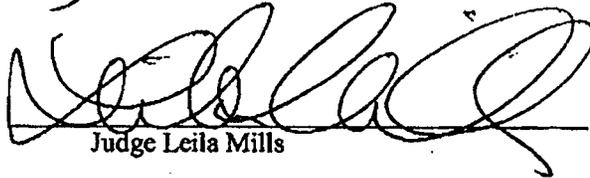
23 With either of these courses of action, the defendant would bring their property into  
24 compliance with the Covenants that have been challenged to the satisfaction of this Court.  
25  
26

JUDGMENT-2

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

1            Nothing in these Findings of Fact and Conclusions of Law shall be constructed by way of  
2 collateral estoppel, res judicata or otherwise, to bar the Brunses, the Cofers, or respective  
3 successors in interest from raising future claims or defenses regarding the application of the  
4 covenants to any use of the disputed garage space not specifically addressed herein.  
5

6            DATED this 15 day of July, 2010.  
7

8  
9  
10              
11            Judge Leila Mills

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
  
JUDGMENT-3

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**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:

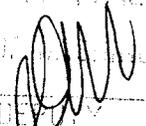
Quentin Wildsmith Lasher Holzapfel Sperry & Ebberson 2600 Two Union Square 601 Union Street Seattle, WA 98101-4000	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Fax: <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via E-mail
David Lieberworth Garvey Schubert Barer 1191 Second Avenue, 18 <sup>th</sup> 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 15<sup>th</sup> day of July 2010 at Port Orchard, Washington.

  
MICHELLE DELLINO

COURT OF APPEALS  
WASHINGTON

11 FEB 2011 PM 12:19

STATE OF WASHINGTON  
BY 

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