

No.42687-1-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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DAVE'S VIEW, LLC, et al

Appellant,

v.

ANDY & SUE WHITWORTH, et al,

Respondents

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APPEAL FROM SUPERIOR COURT OF COWLITZ COUNTY

HONORABLE JAMES WARME, JUDGE

COWLITZ COUNTY CAUSE NO. 08-2-01650-2

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BRIEF OF THE APPELLANT

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**TABLE OF CONTENTS**

I. ASSIGNMENTS OF ERROR.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

III. STATEMENT OF THE CASE.....1

IV. ARGUMENT.....13

V. CONCLUSION.....56

**TABLE OF AUTHORITIES**

**TABLE OF CASES**

Ackerman v. Sudden Valley Community Ass'n.,  
89 Wash.App.156, 944 P.2d 315 (1997) ..... 33, 34, 35

Hollis v. Garwall, Inc. 137, Wn.2d 683, 974 P.2d 836  
(1999).....19, 20

Jones v. Berg, 105 Wash. 69, 177 P. 712 (1919)..... 20

Lakeview Blvd. Condo. Ass'n. v. Apartment Sales Corp.,  
102 Wn. App. 599, 9 P.3d 879 (2000) ..... 19

Shafer v. Board of Trustees of Sandy Hook Yacht Club  
Estates, 76 Wn.App. 267, 883 P.2d 1387 (1994) ..... 28, 29, 30

Shorewood West Condo Assoc. v. Sadri, 140 Wash.2d 47,  
992 P.2d 1008 (2000) ..... 31, 32

**TABLE OF STATUTES**

RCW 24.03..... 4, 26

RCW 58.17..... 21

RCW 64.34.....	16
RCW 64.38.....	2, 3, 18, 36, 38, 39, 47
RCW 64.38.020.....	15, 16, 17, 36, 45
RCW 64.38.025.....	4, 26
RCW 64.38.035.....	11

## **I. ASSIGNMENTS OF ERROR**

- A. ASSIGNMENT OF ERROR NO. 1: Trial court erred in entering Findings of Fact 3, 4, 5, 6, 7, 8, 22 & 31.<sup>1</sup>
- B. ASSIGNMENT OF ERROR NO. 2: Trial court terminated the Development “Control” Period without legal authority.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:**

- A. Did the trial court arbitrarily end the Development “Control” Period?
- B. Did the trial court deprive the Developer to exercise the powers of the Association and the Board during the Development “Control” Period?

## **III. STATEMENT OF THE CASE**

### **A. STATEMENT OF FACTS**

On August 22, 2002, Chad Wilson, his wife Michelle and his mother Lynda Wilson received preliminary approval to develop a large-lot rural subdivision known as Dave’s View at Martin’s Bluff in Cowlitz County (“Dave’s View” and/or “Development”) (Ex. 102 & 103). The 460 acre parcel sat on an ascending hilltop known as Martin’s Bluff. (Ex. 104).

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<sup>1</sup> Findings of Fact and Conclusions of Law set forth in Appendix A.

The Development was constructed by Dave's View LLC (the construction company owned by the Wilsons)<sup>2</sup>. The Development received preliminary plat approval for 118 lots<sup>3</sup>. (Ex. 102).

Creation of lots within the Development presented unique challenges due to the steep elevations of the hill and the need to use gravity based systems for water lines, storm water retention and wetland areas<sup>4</sup>. Construction of the lots proceeded in phases to better utilize the capacity of existing, offsite infrastructure and to determine what upgrades would be needed to serve ongoing development<sup>5</sup>.

Wilson sold the lots at the bottom of the hill first to fund the cost of the infrastructure and the excavation of more challenging lots at the top of the hill<sup>6</sup>. Wilson discounted the price of the lots sold during the first phase of construction because they were buying into a development not yet completed. A majority of Wilson's \$5,000,000 investment in the land

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<sup>2</sup> Chad & Michelle Wilson and Lynda Wilson were members of Dave's View LLC.

<sup>3</sup> Surveyor Charles Whitten testified at trial about receiving approval from Cowlitz County for large-lot rural subdivision. (See Whitten Testimony pg. 6:5-8:24, 30:4-33:4).

<sup>4</sup> Wilson has responsibility and liability for ongoing permits for geotech, storm water retention and wetlands with Federal, State and County authorities. (Whitten Testimony 24:18-27:15, 38:1-40:23).

<sup>5</sup> As part of the Development, Wilson was required to include 2 separate points of access into Dave's View for emergency vehicle and traffic circulation. However, since the time of trial, Respondents have discussed closing off access to lots in the higher elevation to minimize cars driving through Phase 1. Such an action would violate the terms of site plan approval. (Whitten Testimony 8:25-16:6).

purchase, permitting and construction of infrastructure happened years before the first lot even sold in 2004. (Ex. 121, Downing Testimony 14:20-19:19).

As a condition of Cowlitz County's plat approval for Dave's View, Wilson was required to record a declaration of covenants, conditions and restrictions and form a homeowner association. (Ex. 102, p 5; 105D). The Development was going to be served by private road systems, integrated storm water retention ponds, easements for shared driveways and building setbacks for the storm water drainage system and it would need to be self-sustaining without County funds for maintenance and repair<sup>7</sup>. (Ex. 102). One of the primary purposes of the Association and the Declaration was to create a legally binding responsibility among the lot owners to pay for and manage this private infrastructure system. (Ex. 102, p 5). The Declaration also created architectural design standards for each lot within Dave's View to be implemented through an architectural review committee managed by Wilson.<sup>8</sup>

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<sup>6</sup> The lots were constructed in numerical sequence with the lower numbered lots at the bottom of the hill in an ascending numerical order as they were developed up the hill to Martin's Bluff. (Ex. 104).

<sup>7</sup>(Whitten Testimony 16:21-17:21).

<sup>8</sup> The trial court ruled that Wilson would continue to make all decisions related to architectural design for each lot. However, there have been ongoing violations of the design covenants by Whitworth since before the trial which have never been remedied.

On April, 20, 2004, Dave's View LLC recorded the Declaration of Covenants, Conditions and Restrictions for Dave's View at Martin's Bluff against all 118 lots and common area for the entire Development<sup>9</sup>. (Ex. 105). Each of the Respondent lot owners purchased their lot after the Declaration had been recorded for Dave's View and in the first phase of construction<sup>10</sup>.

In order for Wilson to maintain the common plan or theme of development within Dave's View, Wilson needed to retain decision making power within the Association and the Board to ensure the assessments were properly allocated for common area maintenance, enforce the restrictive covenants and architectural design criteria for each lot. (Ex. 105, p 3, 4, 10). It is customary for Developers to retain this broad spectrum of power during the development period to maintain the integrity in the development while lots are being marketed, constructed and sold. (Downing Testimony 43:20-45:5, Hintz Testimony 109:5-109:24).

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<sup>9</sup> The Declaration has been amended by the Amendment to Declaration recorded October 7, 2004 as Auditor File No. 3238049 (Ex. 105A); Amendment to Declaration & Amendment (Ex. 105B); and Amendment to Architectural Review Guidelines recorded January 3, 2006 as Auditor File No. 3283826. (Ex. 105C)

<sup>10</sup> Appendix B establishes the date each lot was purchased by Respondents.

In 2005, Wilson sent out the first assessment for homeowner association dues for common area expenses to the lot owners who were part of the Development at the time<sup>11</sup>. The assessments were tied directly to the budgeted and published costs of operating the Association and maintaining the common area. (Ex. 111A, 111B, 112A-F, Downing Testimony 46:14). Wilson held annual meetings for lot owners within Dave's View. However, the meetings were informative only and no votes were taken on the budget or board positions<sup>12</sup>.

In 2005, Wilson hired Karl Hintz as an independent contractor to do property management work for the Association. Hintz performed bookkeeping, budgetary, covenant enforcement and some design and landscaping review of the homes being constructed. (Hintz Testimony 101:14-103:19). Hintz also performed similar tasks for Dave's View LLC (Wilson's development company). Up to 2008, Hintz was paid exclusively by Dave's View LLC. (Hintz Testimony 103:19-106:11). In 2009, Wilson phased out Hintz' work for the Association and hired a

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<sup>11</sup> In 2005, the regular assessment was \$150 per lot and the special assessment was \$150 (total \$300 per year). (Ex. 114A). In 2006, the assessment was \$300 for regular assessment and \$150 for special assessment Exh 114D. In 2007, the assessment was \$300; in 2008, the assessment was \$846.94; in 2009 the assessment was \$939.60, and in 2010, the assessment was \$600 per year. (Ex. 116).

<sup>12</sup> Whitworth testified at trial that no annual meetings were held as required under RCW 64.38.035. Wilson submitted all of the annual meeting minutes into evidence at trial. (Ex. 107-107E)

professional management company in an attempt to create a more arms-length relationship with Whitworth.<sup>13</sup>

From 2005 to 2007, dozens of homes were under construction and each of the lot owners worked with Wilson to gain approval for architectural and landscaping aspects of the individual homes. The design criteria contained in the Declaration was specific and required quality construction materials. (Ex. 105C, Downing Testimony 8:11-13:12, 84:4-84:16). Wilson wanted to create a uniform, but natural, plan and theme of development for Dave's View. (Ex. 104, pg. 10; 105C, pg. 34). The lot owners were required to use high grade exterior materials such as rock and brick, the exterior colors were to be muted and neutral, and the landscaping designs were to include rock and water features. (Ex. 105C).

The elevation of the Development allowed anyone driving through Dave's View to have a 180 degree view of each lot, including the exterior of the structure and landscaping in the front and back yards. (Ex. 105B, pg. 8). Wilson's attempts to enforce the strict architectural theme within the Development created debate and animosity with lot owners within the first phase. (Ex. 123 pg. 11-35; Ex. 124 pg. 1, 3-25, 31-32; Ex. 125 pg. 3-6;

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<sup>13</sup> RPM Management Co. charged the Association \$4,200.00 per year to perform services that the Association had never paid Hintz to do. (Exh.

Ex. 126 pg. 4-14; Ex. 126C, 126D, 126E; Ex. 127 pg, 1, 13-19; Ex. 128 pg. 3-11; Ex. 129 pg. 10-12).

During the time period that Respondents were building on their lots, Wilson was put in the position of supervising much of the construction which occurred on individual lots because the lot owners had not yet moved into the Development. The volume of contractors in and out of the Development created excessive road debris and damage to the private roads which increased the cost of maintaining the common area. Expenses like street sweeping and road maintenance increased significantly during this time (Ex. 112 A-F, Hintz Testimony 101:4-101:11).

In 2009, a series of disputes arose between Wilson and the lot owners who had purchased during the first phase of construction about architectural design, individual lot maintenance, common area expenses and management of the Association. (Ex. 114 A-T). These 17 lot owners stopped paying their annual assessments for common area expenses and stopped complying with many of the restrictive covenants and design criteria contained in the Declaration. (Ex. 116, 117, 118, 118A).

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112E).

When the 17 lot owners failed to pay the assessments, it caused a shortfall in the budget. Wilson subsidized part of the shortfall for several years, but much of the burden fell on the lot owners who were not parties to the lawsuit who paid more and suffered the effects of diminishing services<sup>14</sup>. Wilson recorded liens for past due assessments against the lot owners who stopped paying assessments<sup>15</sup>.(Ex. 118, 118A). And, Wilson recorded liens against a few of the same lot owners for covenant violations relating to design standards and lot maintenance issues.(Ex. 124, pg. 28, Ex. 128, pg. 8-10).

In 2009, these same unhappy 17 lot owners filed the lawsuit alleging that Wilson was mismanaging the Association funds and requested that any decision making power of Wilson in the Association or

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<sup>14</sup> Respondents failed to name essential parties Plaintiffs have asked this Court for relief affecting Lots 3, 4, 6, 12, 13, 14, 18, 19, 21, 26, 27, 28 29, 31, 33 34, & 35 in Phase I. Plaintiffs have asked this Court to require the owners of these lots to join and contribute monies to an additional HOA in Dave's View. The Court does not have personal jurisdiction over these lot owners or the real property owned by them because they have not been named as parties to this action and the relief requested by plaintiffs affects the property rights of these lot owners.

<sup>15</sup>Wilson's counter-claims in the lawsuit were never ruled on by the trial court, Appendix C.

on the Board be terminated<sup>16</sup>. (CP 1). During the 3 years of litigation, Whitworth's position expanded and they argued to the trial court, that the 17 lots owners be allowed to "succeed from the union" and form a completely new and separate homeowner association<sup>17</sup>. (CP 87, Hintz 115:10-121:1, 129:5-135:4). However, Wilson never intended for Dave's View to have more than one homeowner association. There is nothing contained in the Declaration that allows more than one homeowner association nor any method to divide the common area into phases for allocation of maintenance and expenses. (Ex. 104, pg. 10).

However, the trial court attempted to re-write the Declaration and recreated the entire theme of the Development in a way that was never anticipated by Wilson. The trial court created more than one homeowner association, divided up the financial responsibilities associated with the common area among different lots within the Development and made the ruling apply to lot owners never named in the lawsuit or afforded the

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<sup>16</sup> At the time the lawsuit was filed, Wilson had only platted 63 out of 118 lots in the 1<sup>st</sup> and 2<sup>nd</sup> phases of construction.

<sup>17</sup> On June 6, 2011, Appellate objected under CR 12(b)(7) to Respondents request for the trial court to require Lots 3, 4, 6, 12, 13, 14, 18, 19, 21, 26, 27, 28 29, 31, 33 34, & 35 of the 1<sup>st</sup> phase of construction to contribute monies to a 2<sup>nd</sup> (and additional) HOA in Dave's View. The trial court never had personal jurisdiction over these lot owners or the real property owned by them because they were never named as parties to the action and the trial court dismissed Dave's View Homeowner Association from the lawsuit when it entered judgment. (CP 190).

opportunity of due process. Since the time of trial, no one within the Development is sure who is responsible for maintaining what portions of the common area, how the assessments should be calculated or collected with more than one homeowner association in existence and whether those lots not included in the lawsuit are legally bound by the trial court decision.

## **B. PROCEDURAL HISTORY**

On August 19, 2008, 17 lot owners (collectively “Whitworth”) from Dave’s View Homeowner Association filed a complaint against Dave’s View LLC, Dave’s View Homeowner Association, Chad & Michelle Wilson and Lynda Wilson individually as defendants (collectively “Wilson”).(CP 1).Whitworth alleged that Wilson had violated RCW 64.38.035(1)&(2), 64.38.045(2) and that Wilson had improperly assessed homeowner association dues.

On September 29, 2008, Wilson filed an answer and counter-claims and alleged that Whitworth had failed to pay homeowner association assessments and violated restrictive covenants and architectural/design covenants in the Declaration.

On June 17, 2009, the trial court granted Wilson's motion for injunctive relief requiring Whitworth to pay all past due assessments up through 2009 for Dave's View into the Court Registry. On November 23, 2009, the sum of \$4,280 was released to Wilson.

On May 18, 2010, one lot owner Hulse (Respondent) filed a motion requesting that the trial court remove the liens for past due assessments and landscape violations against Hulse's lot so that he could close a pending escrow. The court ordered Hulse to deposit the disputed sum and reserved on ruling on the validity of the liens until trial. (There were subsequent hearings on the liens which existed on this lot in January 2011. The court continued to reserve on its ruling until trial.)

On September 29, 2010, Whitworth filed for partial summary judgment. On December 27, 2010, the trial court entered an order ruling: (1) the original Declaration was the controlling document between Whitworth and Wilson which runs with the land and it cannot be unilaterally amended by Wilson; (2) all amendments to the original Declaration were unenforceable as to the lots in Phase 1; (3) Wilson's reservation of rights which allowed him to amend made the Declaration illusory because Wilson's performance was optional or discretionary;(4) Wilson could not pass on costs related to other phases of the development

or unsold lots to Phase 1;(5) the lots in Phase 1 are responsible for 1/35<sup>th</sup> of assessments for repair and maintenance costs incurred by Phase 1 only; (6) the lots in Phase 1 are responsible for 1/118<sup>th</sup> of assessments for road & drainage maintenance and repair expenses which are inseparable from other phases; and (7) the lots in Phase 1 have the right to form a homeowner's association.

On January 6, 2011, Wilson filed a motion for reconsideration with the trial court challenging the court's ruling that all of the amendments to the Declaration recorded by Wilson were void and ordering the two-tiered assessment system to be applied in Dave's View. The trial court denied Wilson's motion for reconsideration.

On January 25, 2011, Wilson filed a Motion for Discretionary Review with Division II asking for review of the trial court's order on summary judgment. Division II denied Wilson's request for Discretionary Review.

On June 6, 2011 a 7 day bench trial bench trial commenced before the Honorable James Warne.

On June 17, 2011, the trial court entered judgment for Whitworth and awarded \$190,000 which was entirely for attorney fees and costs.<sup>18</sup>

The trial court bifurcated the issue of further damages after Wilson turned over all homeowner association documents to Whitworth for a full accounting.

On October 11, 2011, the trial court ruled on Whitworth's claims for further damages based on the accounting of the homeowner association documents and the court entered an additional judgment in the sum of \$58,220.00.

#### **IV . ARGUMENT**

##### **A. THE TRIAL COURT ARBITRARILY ENDED THE DEVELOPMENT "CONTROL" PERIOD**

The trial court's ruling created two primary issues to be resolved by this Court: (1) whether the trial court erred when it ruled that the development "control" period ended on January 31, 2006 for Dave's View, and (2) whether the trial court erred by allowing 17 lot owners to

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<sup>18</sup> The trial court also removed Dave's View Homeowner Association as a defendant at the time judgment was entered. Wilson submits this creates even more of a problem with

create a new (second) homeowner association within Dave's View and divided the Development into sections, assigning responsibility for the common area costs to lots by dividing the Development into sections.

The governing documents did not provide for either of these things, thus the Declaration fails to provide guidance as to how to implement the trial court's ruling. The trial court made this ruling in June 2011, applying the rules retroactively which meant that all the Developer's actions for the previous 4½ years were being tried in retrospect under these newly imposed rules. On January 31, 2006, less than 30 out of the approved 118 lots had been sold by the Developer.

The termination of the development period (January 31, 2006) imposed by the trial court conflicts with the rights reserved by the Developer in the governing documents to retain control over the Association and Board until all but the last 2 lots were sold in the entire development. The trial court's ruling directly conflicts with RCW 64.38.020.

No statute exists in the State of Washington which imposes a deadline on a developer in a residential subdivision (homeowner

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the court having jurisdiction over any lot within the subdivision other than the 17

association) to turnover control of the homeowner association or board of directors to the lot owners. There is no common law in the State of Washington which addresses this issue. RCW 64.38.020 outlines some powers of the association, but contains a caveat which allows the declaration to trump the statute. The association's powers can be as broad as the governing documents provide<sup>19</sup>.

In stark contrast, the condominium association statute in RCW 64.34, et seq. imposes many more controls over developers, including the requirement for the developer to turnover control of the association to the condo owners within two years after the sale of the last unit (at the latest)<sup>20</sup>. The statutes evidence that the Washington legislature meant to separate how courts treat condominium associations versus (single family development) homeowner associations.

Further proof that no deadline exists for developer turnover in single family developments is the fact that Washington has recently put together legislation to impose a developer turnover period. The proposed

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lot owners who filed the lawsuit as plaintiffs.

<sup>19</sup> Other jurisdictions have dealt with the issue of a turnover period for homeowner associations, included as Ex. 3 to Declaration of Cassie N. Crawford during the proceedings for plaintiffs' summary judgment. (CP 110).

<sup>20</sup> RCW 64.34.308(4)

change in the law would phase out developer control in a homeowner association and gradually include new board members after the developer had sold a certain percentage of the lots<sup>21</sup>. However, this legislation is still pending and was not in effect when Dave's View was created in 2004 and is not in effect now.

Since there is no statutory deadline for a developer to turnover control in single family subdivisions, the Court must look at the declaration and other governing documents as provided in RCW 64.38.020 to determine what type of rights Wilson retained within the Association and the Development. The governing documents for Dave's View are the Plat, the Declaration & amendments, the Bylaws, the Articles of Incorporation and any rules & regulations promulgated by the Board.(Ex. 105, 105A-C, 105D).

The Declaration for Dave's View was recorded against 118 lots in 2004 before any lot was sold by Wilson. The Declaration reserved the right for Wilson to retain control of Dave's View Homeowner Association and the Board until all but 2 lots were sold in Phase 1, 2, 3, 4 or 5.(Ex. 105, 105 Sec 1(j),Sec 3, Sec 26.) That period of time was defined as the

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<sup>21</sup> ESB 5377 (Appendix D )

“Development Period” in the Declaration (Ex 105 Sec 1(j)). The Declaration also reserved the right for Wilson to amend the Declaration during the Development Period.(Ex. 105, Rec A, Sec 1(f), Sec 3, Sec 27(i)).

The trial court’s arbitrary termination of the Development Period (January 1, 2006) robbed Wilson of the ability to finish building out the Development free of interference from the lot owners and the deprived him of the ability to maintain the common areas and lot maintenance inside the Development to the high standards necessary to market and sell the remaining lots.(Downing Testimony 10:22-11:4, 14:20-15:11, 30:17-32:11). To make matters worse, the trial court ruled in June 2011 that the Development Period had already ended on January 31, 2006 so that all of the Developer’s actions for the last 4½ years (retroactively) had been a violation of the Declaration.

The majority of Wilson’s \$5,000,000 investment occurred with the land purchase, permitting fees and all of the professionals and materials needed to create the infrastructure.(Ex. 121). Wilson’s only opportunity to recoup that investment is by finishing the build out and selling the lots. (Downing Testimony 14:20-19:14). The trial court essentially reformatted

the business plan for the entire Development and rewrote the Declaration. The trial court created an arbitrary formula for assessments of common area costs, voided every amendment created by Wilson after the Declaration was recorded, rolled back the increase in the assessments to the time the Development was created (in 2004), and allowed 17 out of the existing 66 lot owners to break away and create a new and separate homeowner association.

None of these things were contemplated by the Declaration, the other governing documents or RCW 64.38 et seq. Instead, the trial court essentially rewrote the governing documents as it deemed to be equitable<sup>22</sup>. That flies in the face of contract law and the creation of covenants that “run with the land”. Now, the Development has no one in charge, has less than 50% of the money it needs to meet its budget and there has been no property management or maintenance of the common area since before the trial in 2010.

The Governing Documents contain no turnover requirement.<sup>23</sup> Given that no turnover requirement exists in any of the governing documents, the HOA statute requires application of running covenants and

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<sup>22</sup>Appendix E.

the subdivision statute to this case.

A covenant is an agreement or promise of two or more parties that something is done, will be done, or will not be done. In modern usage, the term covenant generally describes promises relating to real property that are created in conveyances or other instruments. There are essentially two kinds of covenants that run with the land, real covenants and equitable covenants. Hollis v. Garwall, Inc. 137, Wn.2d 683, 974 P.2d 836 (1999).

Where enforceability of a covenant is based, in part, on actual or constructive notice of a restriction, rather than on an incorporation of the restriction in a deed, the covenant is generally considered an equitable restriction.

A real covenant must meet five elements: (1) the covenant must be enforceable as a contract between the original parties; (2) the covenant must touch and concern estates in land with which the burdens and benefits run; (3) the covenanting parties must have intended to bind their successors in interest; (4) there must be vertical privity of estate; and (5) there must be horizontal privity of estate. To run in equity, an equitable restriction requires all of the above elements except horizontal privity of

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estate. Instead, the successor of the covenantor must have actual or constructive notice of the equitable restriction. Lakeview Blvd. Condo.Ass'n. v. Apartment Sales Corp., 102 Wn. App. 599, 9 P.3d 879 (2000).

The notice requirement is met by charging the successor with constructive notice through the operation of the recording acts. If the equitable servitude was contained in a duly recorded instrument in the chain of title of the covenantor's successor, there can be no question of notice. Jones v. Berg, 105 Wash. 69, 177 P.712 (1919).

If interpretation of the restrictive covenant is required, the court can apply the Berg "context rule". However extrinsic evidence is relevant in interpretation and discerning intent where more than one meaning can be given to the word. Hollis, supra at 695.

The subdivision statute allows for the creation of additional lots and creates a Plat. The Plat takes existing lots and creates different sizes and shapes. During the platting process, the Plat must meet existing governing standards for engineering, geotech, stormwater and environmental before any lot can be divided and resold by the property owner to a buyer.

RCW 58.17 provides:

“(1) Subdivision" is the division or redivision of land into five or more lots, tracts, parcels, sites or divisions for the purpose of sale, lease, or transfer of ownership, except as provided in subsection (6) of this section.

“(2) ‘Plat’ is a map or representation of a subdivision, showing thereon the division of a tract or parcel of land into lots, blocks, streets and alleys or other divisions and dedications.”

On August 22, 2002, Cowlitz County issued the conditions for approval of the Plat for the 118 lot subdivision known as Dave’s View at Martin’s Bluff.(Ex. 102). On April 4, 2004, the initial plat of Dave’s View and the Declaration were both recorded. Construction phasing (i.e. Phase 1, 2, 3...) was approved by Cowlitz County and the first 35 lots of 118 proposed lots was constructed. (Ex. 105). The face of the Plat refers to the Declaration. The Declaration refers to the Plat. The Plat contains a survey and the declaration also contains a reservation that allowed Wilson to add property to the Plat. The “Plat”, as defined by Cowlitz County, identifies both a mapped portion of the existing development as well as the entire proposed Development. (Ex. 104). A perimeter survey of the entire development was submitted for preliminary approval and a phasing survey is added to the “development” as phases are added to the “the property” (as defined in Ex. 105).

The build out of the lots was accomplished by phased-construction. Lots were created as the supporting infrastructure was put in (roads, sewer, storm water and power). (Ex. 102). Lots at the bottom of the hill were developed first and ascended toward the top of the bluff as the infrastructure was completed. The subdivision is subject to permitting restrictions for the stormwater detention, wetlands and the private road system. (Ex. 103). These permits are in the name of Chad Wilson and Dave's View LLC. Wilson is the responsible party to the governing authorities for any non-compliance of these systems. (Ex. 103).

Each of the Respondents purchased their lot after the Declaration and Plat had been recorded on April 20, 2004<sup>24</sup>. Each of the Respondents' deeds contain the title exception for the Declaration on the face of the Deed. The Declaration contained the reservation of rights for Wilson to retain control of the Association and Board up to the time the last two lots were sold (in any phase of the construction). (Ex. 105 Sec 1(j), 3, Ex. 105D, Bylaws Sec 1.5, 3.2, 3.3, 3.4). Retaining control of the Association and the Board ensured that Wilson was involved in the day to day operations of Dave's View until all of the infrastructure and lots had been created and sold. The day to day operations of the Association meant that

Wilson maintained control of the expenses that occurred at Dave's View. (Downing Testimony 42:22-43:13).

The ability to enforce the restrictive covenants and architectural design criteria meant Wilson maintained control of the overall plan or theme of Dave's View. (Downing Testimony 84:9-84:22). The Declaration also contained the reservation of rights for Wilson to amend the Plat, the restrictive covenants and the architectural design criteria in the Declaration. (Ex. 105 Recital A, Sec 3, 27(i), 105B Art II, Sec 1, Art, XII, Sec 1,2, 105C, 105D Bylaws Sec 3.2, 3.4; Downing Testimony 36:24-37:19, 48:19-56:4, 63:14-63:16). Wilson anticipated that he might be required to make changes within the common area, changes to the design criteria to meet market demands and changes to the restrictive covenants if repetitive and unforeseen problems occurred. (Downing Testimony 33:22-35:5, 43:20-44:25).

Washington has very few *published* decisions on the scope of the developer's role in a subdivision. However, the Restatement Third,

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<sup>24</sup> Respondents' date of acquisition of their lot (Appendix B)

Property (Servitudes) has been cited over and over again in many jurisdictions struggling with this issue. (See Appendix F).

The common theme repeated in each of these Restatements: (1) every action of the developer being scrutinized must be viewed by looking at what the governing documents states (first) and then the statute (second) and then weighed against protecting the interests of the community as a whole. Each of these things must be used as a filter to look at the developer's actions if they are being challenged by the association.

The court will uphold the actions of the developer as being prudent and fair during the development period if the developer:

- (1) fairly appraises the community of its intentions to make the fiscal decisions for the association,
- (2) fairly appraises the community of its reservation to amend the governing documents,
- (3) enforces the restrictive covenants and design criteria uniformly

When looking at officers or directors (or developers) actions under RCW 64.38.025, courts apply the same standard of care as other

corporations in the State of Washington set forth in RCW 24.03<sup>25</sup>. The court applies the business judgment rule and does not look back retroactively to determine whether the conduct which is being questioned is fair now, rather was it fair at the time it was done. If the corporate officer or director has not put themselves in a more favorable position by competing with the needs of the community association, to the detriment of the community, then those actions will be upheld as lawful by the court.

Managing and maintaining the common property is the primary business of the association. The association must accomplish this task by collecting an adequate assessment to meet the expectations of the lot owners who purchase into the development. Proper management and maintenance is of great importance to the lot owners to protect their personal investment in the development. To protect the interests of current and prospective lot owners during the period when the developer has control of the common property, either directly or through control of the association, the developer has a duty to use reasonable care and prudence in managing and maintaining the common property. What is reasonable depends on the circumstances, including the financial resources available. Wilson had the experience and expertise to manage the common area for

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<sup>25</sup> Application of RCW 64.38.025 is also *subject to whatever is provided for in the*

the Association during the Development Period.

Wentworth offered no testimony or documentary evidence at trial that the costs charged to the lot owners for any labor or materials used in common area was excessive or unnecessary under the circumstances. The trial court excluded most of the common area assessments charged to the lot owners from 2006 to trial because Wilson did not obtain competitive bids from other contractors before Wilson performed maintenance work for the Development through his construction company.

Wilson did not get competitive bids because he was in the construction business and knew how much those type of services would cost the Association if a third party vendor was used. Wilson had reserved the right to make those type of decisions during the Development Period in the Declaration so that every dollar spent in the Development would not be the subject of debate. The trial court also excluded most of the common area assessments because Wilson had produced copies of the cancelled checks for those Association expenses instead of the actual invoices.<sup>26</sup> Neither of these reasons means that Wilson's actions on behalf

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*governing documents.*

<sup>26</sup> Refer to trial court ruling on 6/17/11 (CP 188). RCW 64.38.045(1) specifically states the association is responsible for keeping and turning over all records, including but not limited to, checks, bank records, and invoices, in whatever form they are kept.... At trial, Wilson provided all bank statements and cancelled checks from 2005 to 2009 (Ex.

of the Association and the Board were unreasonable or a breach of the duty of care and loyalty imposed on a corporate officer.

The trial court ruled that all amendments to the Declaration recorded after January 31, 2006 were invalid as to Whitworth. The Declaration was amended October 7, 2004 and January 3, 2006.<sup>27</sup> Within the amendments, Wilson retained the right to modify the property to be included in Dave's View, the restrictive covenants and architectural design criteria because he knew the Development would take years to complete and he needed the flexibility to make changes required by governing authorities as well as the economy.

In Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, 76 Wn.App. 267, 883 P.2d 1387 (1994) the Court clearly recognized the power of a developer/declarant to include a reservation of power in the original Declaration of CCRs by including the right to amend during the development period.

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108, 109, 110, 111, 111A, 111B & 112) and testified that the Association did not retain copies of invoices after they had been paid since the cancelled check was the best record of monies spent by the Association.

<sup>27</sup> Both of the amendments were recorded before the end of the Development Period January 31, 2006 imposed by the trial court; however, court ruled both amendments were invalid as to Whitworth.

In Shafer, supra, a group of lot owners challenged the non-profit HOA's right to adopt new restrictions in the nature of restrictive covenants without the agreement of all the lot owners that would be affected.

The Shafer Court stated: "We agree with these concessions and take the opportunity to hold that an express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions respecting the use of privately owned property is valid, provided that such power is exercised in a reasonable manner consistent with the general plan of development". (Supra at 274).

When applying the principle of general theme, courts look for a common grantor/developer who puts a large tract of land on the market broken down into individual lots, a substantial number of which are subject to uniform restrictions protecting the nature of the neighborhood. The reliance by lot purchasers upon sales representations by the developer that the subdivision will be uniform in character is helpful in showing that a common plan exists. The exhibition of a plat or map of the entire tract and the actual physical development of the subdivision in accordance with the restrictions are each factors lending weight to an argument that a "common plan" exists.

The Court stated: “the realtors expressly agreed to this reservation of power by virtue of having purchased property within the development subject to the restrictions contained within the plat dedication”. (Supra. at 275).

The Shafer case confirmed Washington’s softening view on the use of restrictive covenants, “Rather than being disfavored as restraints on alienation, modern courts see them as being positive vehicles for the property and ordered development of land.” Supra at 274

“There seems to be a growing tendency to construe ambiguous language more liberally in favor of restrictions of a rather broad scope, when such intent of the covenanting parties may be found from the surround circumstances.” (See STOEBUCK, 52 Wash. L. Rev. at 885-86, 904-05).

Courts need to apply the “context rule” in interpreting restrictive covenants to look for the declarant’s intent by viewing the contract as a whole and acknowledged that a contract “provision is not ambiguous simply because parties suggest opposing meanings”.(Shafer, supra at 275).

The Shafer Court states when examining subsequent covenants recorded to determine whether they run with the land, the court analysis must consider the articles of incorporation and bylaws to be “correlated

documents” to the deed; and must look at whether the amendments referred back to the plat dedication, articles, and bylaws as the source from which the corporation (HOA) derived its power to adopt covenant changes.

This “correlation” theory also applies to Dave’s View. On the Plat, the Declaration, Bylaws, Articles and rules & regulations, Wilson expressly reserved the right to control the homeowner association until all but the last 2 lots were sold.(Ex. 105D, Bylaws Sec 3.2 & 3.4). This reservation included, the right to amend any portion of the covenants in the original Declaration during the Development Period.(Ex. 105 Recital A, Sec 3, 27(i)). Wilson included this reservation because he anticipated adding more lots to the Development. Adding lots may trigger changes to roads and easements from permitting authorities.

New lots may necessitate changes to structure size and design criteria to meet changing economic needs and could increase assessments for common area costs. Wilson wanted to make sure that he could do this without wrangling over every change with lot owners promoting their own personal agendas. Wilson’s ability to control the Association and Board in the day to day decisions affecting common area expenses and covenant compliance was the only way to do this. Volunteer lot owners in

an association have neither the time or experience to respond to the complex issues presented everyday in a large scale subdivision. Wilson's vast experience and attention to detail made Dave's View unique and promised long term success. More importantly, these are the things that each lot owner invested in when they purchased property within Dave's View

Courts in Washington also repeatedly consider the "common plan or theme of development" when a provision is challenged in a recorded plat or covenant. At Dave's View, Wilson had a vision of a high-end rural subdivision where stone and other natural materials were used on the exterior of the homes and water features and rock formations incorporated into the landscaping. (Ex. 105, Sec 27(b)). This upscale but "natural" look was carried through to common area features like Wilson's use of the hundred-year old munitions building at the bottom of the development as an entry feature.

Wilson repeatedly stated in the Declaration, Bylaws, Articles and rules & regulations that it was his "intent" to act on behalf of the Association and the Board until all but two lots were sold.(Ex. 105D, Bylaws Sec 3.2 & 3.4). Wilson wanted to avoid any of the lot owners interfering with day to day decisions relating to cost and upkeep of the

common area, which in turn threatened to compromise the entire common plan or theme for the whole development. When the trial court ruled that the Development Period ended on January 31, 2006 and that all amendments adopted by the Developer after January 31, 2006 were invalid, the court effectively reformed the Declaration and devastated the future success of the Development.

Shorewood West Condo Assoc. v. Sadri, 140 Wash.2d 47, 992 P.2d 1008 (2000), also dealt with the issue of amending covenants. Although the case involved a condominium development with a different applicable statute, the reasoning behind the decision is consistent with how Washington views the developer's the right to amend covenants.

In Shorewood, the original declaration did not contain a rental restriction but the bylaws did contain a restriction. The Supreme Court stated that if a rental restriction would have been contained in the original declaration instead of the bylaws, an amendment could have been recorded to add that restriction even though it affected a significant property right.

The Shorewood Court looked at other state authority to arrive at its decision. The effect of amendments on owners who purchased before the amendment was uncharted territory in Washington. The Shorewood

Court made it very clear that the amendment would be upheld if the owner had prior notice of the right to amend from the recorded declaration before the property was purchased. The Shorewood Court like other jurisdictions based its reasoning on the “correlated document” theory. Under this theory, the declaration is controlling with the bylaws and articles following in pecking order and will be enforced if they comport with the declaration itself.

“[C]entral to the concept of condo ownership is the principle that each owner, in exchange for the benefits of the association with other owners, ‘must give up a certain degree of freedom of choice which he [she] might otherwise enjoy in separate, privately owned property’”. (*Shorewood*, 140 Wn.2d at53). That concept holds true with all homeowner associations in general, particularly one in a development such as Dave’s View where lot owners were buying in to the overall look of the Development. Homeowner associations are created under a recorded plat and accompanying declaration which sets forth the “rules” in which the owners buy into the development. Because the Declaration is part of the plat, all of the rules in the Declaration run with the land, and the Declaration must be read as a whole and in concert with the other governing documents for Dave’s View.

The trial court ruled that Wilson was responsible for paying a pro rata share of the common area expenses for lots that had not been developed or sold. The subdivision was approved for 118 lots. Currently, only 63 of the lots have been platted and approximately 25 are in the completion stage with homes built. The development permit for the remaining lots has expired and will never be developed unless Wilson goes through the entire site plan approval process again. Wilson reserved the right to exempt the lots which had not been both developed and sold from incurring assessments.(Ex. 105B, Art V, Sec 2). The trial court's ruling changed Wilson's rights under the Declaration for the fiscal operations for the entire Development by requiring Wilson to pay an assessment for lots which had not been sold.

Ackerman v. Sudden Valley Community Ass'n, 89 Wash.App.156, 944 P.2d 315 (1997) dealt with the issue of allowing a developer to charge different assessments for platted versus unplatted lots. The court found it to be equitable. The case is important because it makes it clear that equity and equality are not the same thing with respect to determining assessments within a partially completed development.

In Ackerman, supra the lot owners of a residential development

challenged the two-tiered assessment language that was contained in the articles (but not the declaration of CCRs). The Court looked at all of the governing documents (in correlation), including the articles and bylaws to ascertain the developer's original intent. The lot owners argued that all lots should be assessed equally, but the Court found that equality was not the sole or even a necessary cornerstone of equity under all circumstances. (Supra. at 164).

The Ackerman Court coined the phrase "equity is not equality" with respect to the allocation of assessments among lot owners within an association. Directly on point, Ackerman found that references in covenants to minimum monthly dues did not establish a rigid definition of equity which required equal assessments for all lots in perpetuity. Ackerman held that the discretion to set the annual assessments depended on circumstances then prevailing. When the declaration of CCRs stated that in clear and unambiguous terms, the court would give it its manifest meaning. Ackerman reasoned that assessments do indeed "run with the land" and are appurtenant to ownership and that the authority to assess members was inherently contained in the declaration of CCRs and binding upon any lot owner purchasing under that declaration.

The Ackerman Court also pointed out that while governing documents of an association accommodate the concept of a multi-tiered dues structure, they did not attempt to anticipate specific implementation variables. Meaning, the issue of ongoing assessments is a moving target when a development has not been completely built out. In general, the more property is developed, the more the expenses increase, and as more lots are sold, the pro rata share decreases. This is a matter to be dealt with based on the intent expressed in the governing documents. And, the Ackerman Court correctly acknowledged that lot owners complaining about what should be included as an assessment is a matter of fact and should be determined by weighing testimony and documentary evidence. In the end, the Ackerman Court found that there was nothing in the governing documents of the HOA's that could conclude that the intent expressed in the covenants was to impose a rigid formula of *equal* assessments for all lots.

With Dave's View, the Declaration, Bylaws, Articles, and rules & regulations all consistently state that Wilson removed unplatted and unsold lots from assessments. (Ex. 105B, Art 1(H)). Wilson's rationale was that the unplatted lots placed no additional burden on common area

expenses being passed through to existing lot owners<sup>28</sup>. However, at the hearing for summary judgment, the trial court changed that. The court ruled that the lots constructed in the first phase were responsible for 1/35<sup>th</sup> of assessments for repair and maintenance costs incurred by Phase 1 only, and that the lots in Phase 1 were responsible for 1/118<sup>th</sup> of assessments for road and drainage maintenance and repair expenses which are inseparable from other phases. (CP 119). The trial court made no determination about the other lots built during the 2<sup>nd</sup> or 3<sup>rd</sup> phase of construction. Wilson offered testimony at trial through another developer in the community Diana Downing who corroborated Wilson's testimony about the types of costs typically incurred to maintain a large rural subdivision. (Downing Testimony 46:14- 46:18). This testimony was not rebutted by Whitworth in any way.

Another important thing about the Ackerman case is that the Court recognized that its ruling would "continue to have an effect on association business and on members' potential assessment obligations" and could affect the "clarity and finality to the interpretation of those documents". (Supra at 162). It is for that reason that Dave's View has so

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<sup>28</sup> Chad & Michelle Wilson and Lynda Wilson's lots were excluded from the subdivision plat and not included in the Declaration. (Ex. 105B, Art 1(F)).

adamantly argued for the trial court to follow out the consequences of its ruling at summary judgment and trial. The trial court openly suggested that if the assessment formula that it created did not work because the number of lots changed, the parties should come back to court. That is a completely impractical suggestion. The time and money that it requires to get a decision on whether an expense is tied to one portion of the common area versus another is not something that works for either party going forward.

**B. TRIAL COURT TOOK AWAY DEVELOPER'S ABILITY TO EXERCISE POWERS OF THE ASSOCIATION AND BOARD DURING THE DEVELOPMENT PERIOD**

The trial court's errors in the Findings of Fact & Conclusions of Law relate to two specific areas of Wilson's right to control the day to day operations of the Association and Board through the Development Period, namely: (1) the right to enforce regular and special assessments and fines for non-payment of common area expenses, and (2) the right to enforce restrictive covenants for maintenance and architectural design criteria on lot owners.

RCW 64.38 et seq. and the Governing Documents give the Board

the authority to create a budget, levy assessments (regular & special) and enforce non-payment of the assessments by suit or fine. A continuing lien for assessments was created against each lot when the Declaration was recorded and each lot owner took title to their lot.

The homeowner association statute RCW 64.38.020 titled "Association powers" clearly defers to the governing documents of the Association for all business decisions, including without limitation, financial matters, repairs and maintenance of the common area, day to day operations.<sup>29</sup>

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<sup>29</sup>Unless otherwise provided in the governing documents, an association may:

- "(1) Adopt and amend bylaws, rules, and regulations;
  
- (2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from owners;
  
- (3) Hire and discharge or contract with managing agents and other employees, agents, and independent contractors;
  
- (4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more owners on matters affecting the homeowners' association, but not on behalf of owners involved in disputes that are not the responsibility of the association;
  
- (5) Make contracts and incur liabilities;
  
- (6) Regulate the use, maintenance, repair, replacement, and modification of common areas;
  
- (7) Cause additional improvements to be made as a part of the common areas;

The portion of the relevant governing documents relating to the developer's authority to exercise control of the association and over the board is in Ex. 105.

Finding of Fact #6 and 7 conflict with the statutes and bylaws as

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(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property;

(9) Grant easements, leases, licenses, and concessions through or over the common areas and petition for or consent to the vacation of streets and alleys;

(10) Impose and collect any payments, fees, or charges for the use, rental, or operation of the common areas;

(11) Impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association;

(12) Exercise any other powers conferred by the bylaws;

(13) Exercise all other powers that may be exercised in this state by the same type of corporation as the association; and

(14) Exercise any other powers necessary and proper for the governance and operation of the association."

follows:

1. RCW 64.38(2)(10) which allows Wilson to adopt an annual budget for common area expenses and impose and collect assessments to meet the budget requirements. The trial court mistakenly tied certain common area expenses to certain phases (lots) within Dave's View. The entire common area and all related expenses belong to the Association which is comprised of all lots which have been sold by Wilson at the time of the assessment. The only reason that the lots were grouped together for construction in phases by Wilson was because the infrastructure was constructed incrementally in the Development. The common area adjacent to lots which were grouped together have no more and no less rights or financial responsibility to that adjacent common area.
2. Article 6.3(1) of the Bylaws which grants the Board authority: "To levy and collect assessments, annually, quarterly, monthly, or otherwise, to cover the cost of operating, repairing, improving, insuring and maintaining Association Property".
3. Article 6.3(2) of the Bylaws which grants the Board authority: "To

use and expand the assessments collected to maintain, improve, pay taxes, care for, replace and preserve Association Property".

4. Article 6.3(8) of the Bylaws which grants the Board authority: "To bring and defend actions by or against one or more existing or former members, directors, officers, or agents pertinent to the operation of the Association and to levy special assessments to pay the cost of such litigation." FINDING #6 & 7 conflicts with Article 10.1 of the Bylaws which states: "The Board of Directors shall have the power to adopt and amend budgets for revenue, expenditures, and reserves, and impose and collect assessments for common expenses from owners."

FINDING #22 & 31 conflicts with RCW 64.38(11) which allows Wilson to impose and collect charges for late payments and levy fines for unpaid assessments after notice to any lot owner under rules and regulations adopted by the Board. The trial court held that Wilson had no authority to impose fines and penalties for unpaid assessments by Whitworth.

FINDING # 22 & 31 conflicts with RCW 64.38(12)(13)(14) which gives Wilson broad powers to govern and enforce matters related to the

operation of the Association, including those powers contained in bylaws, corporate statutes and beyond. However, the trial court held that Wilson had no authority to record liens for unpaid assessments or maintenance violations which is specifically authorized under Section 28 of the Declaration and Article 6.3(1) & (7) and Article 10.1 of the Bylaws.

FINDING #22 & 31 conflicts with Section 28 of the Declaration: "Enforcement Provision. The bylaws of the Association shall provide for the enforcement of its assessments against the Lot subject thereto (including any Lots created by the subdivision of a Lot) in any manner provided by its bylaws, including the provision of a lien imposed upon a Lot to secure payment of a delinquent assessment with the lien to be enforced by the Association, or such other party as may be designated".

FINDING #22 & 31 conflicts with Section 40 of the Declaration: "Subordination of Assessment Liens. The liens for assessments provided in this Declaration shall be subordinate to the lien of any mortgage placed upon a Lot by mortgagee as a construction loan or purchase price security interest..."

FINDING #22 & 31 conflicts with Article 6.3(7) of the Bylaws which grants the Board authority: "To collect delinquent assessments by

suit or otherwise to abate nuisances, and to enjoin or seek damages from members for violations of the declarations or rules and regulations herein referred to or otherwise adopted by the Board..."

FINDING #22 & 31 conflicts with Article 6.4(7) of the Bylaws which reserves for the Association the authority to: "Create any necessary committees, enter into any contract on behalf of the Association and assess any necessary fines or lines against lots owners."

Section 25 of the Declaration required the lot owners to pay regular assessments of a minimum basic fee of \$150 per year.(Ex. 105, Sec 25, Ex. 105B, Art VI, Sec 4). Additionally, each lot could be assessed a portion of the balance of the total assessment (which may exceed \$150 per lot). Wilson included this provision in the Declaration so that the assessments could be increased over time as the actual expenses for the common area and Association increased. Wilson established and published an annual budget for common area expenses for Dave's View on the Dave's View property owner resource website. (Ex. 112, pg. 6.) Wilson created a dedicated resource website for the lot owners so that they had easy access to all governing documents, financial and budgetary information and announcements could be accessed by the lot owners

anytime. The budget was based on the actual assessments from the previous year with some cost of living increases and proportionately allocated from the number of lots which had been sold by Wilson at that time. (Ex.105B, Art VI, Sec 4). Whitworth was provided the financial statements each year which substantiated the costs included in the budget. (Ex. 112). Wilson invoiced the lot owners for the assessments. (Ex. 120). Whitworth failed to pay the assessments. (Ex. 116, 117). Whitworth refused to pay any increase in the assessment over \$150 per year.(Ex. 116, Ex. 117). Whitworth refused to pay for street sweeping, snow removal and weed/brush control in the common areas because the work was performed by Wilson. Whitworth refused to pay any expense related to Karl Hintz's work for the Association because Hintz also worked for another company owned by Wilson. Whitworth refused to pay for the repair and upgrade costs to the water feature at the entrance of the Development and claimed that it was a Developer expense. (Ex. 105, pg. 9). Whitworth refused to pay any of the litigation costs of this action related to the Association even though they were provided for in Section 25 of the Declaration (Ex. 105). Wilson delivered notice of default for unpaid assessments to Whitworth.(Ex. 118). Whitworth failed to cure their defaults. (Ex. 118). Wilson recorded Notice of Past Due Assessments

against the lots which had refused to pay their pro rata share of the common area and Association costs included in the Assessments. (Ex. 118).

Whitworth challenged the costs included in the Assessments for street sweeping, snow removal and weed/brush control in the common areas primarily because the work was performed by Wilson's company (Dave's View LLC) and alleged that the rates charged were not competitive. (Ex. 114K, 114L, 114O, 114P, 114Q, 114R, 114T, Downing Testimony 25:15-29:11). Wilson performed a lot of the necessary street sweeping and brush control within Dave's View because he owned an excavation business and had tractors and heavy equipment available on site. The extensive private road system and weed/brush control around the storm drains in the easements required commercial level equipment. Wilson did not charge any mobilization fee and a very competitive hourly rate for the labor performed by Dave's View LLC employees. (Downing Testimony 29:24-30;16, Hintz Testimony 110:1-113:10, 196:10-198:5). Wilson responded to Whitworth's challenges by producing all bank statements and cancelled checks which had been paid to Dave's View LLC as well as any other vendor or expense for the common area from 2005 through 2009 at trial.(Ex. 109, 111). Wilson also presented

testimony by himself and another developer in Cowlitz County (Diana Downing) about the customary costs which exist in a large rural subdivision still under construction with the type of amenities that Dave's View offered such as private roads and an entry water feature. (Downing Testimony 12:18-14:18, 18:8-19:4). Wilson and Downing also testified about the reasonableness of the charges that were paid to Wilson's excavation company and the costs that were saved by not hiring an outside excavator who would have charged to move the excavation equipment on site for mobilization to do the work.

Whitworth challenged fees paid to Karl Hintz<sup>30</sup>. Hintz performed management work for both Dave's View LLC and the Association. Hintz was the only employee of the Association and worked part-time. (Hintz Testimony 23:6-23:15). Wilson paid Hintz through Dave's View LLC to perform property management duties on behalf of the Association at Wilson's sole expense from 2006 until 2008. Hintz was paid \$3,500 by the Association in total to manage the Association from 2008 to 2009. The Wilsons were never paid any salary for the property management tasks or ARC plan review they performed over the years. Hintz managed the day-to-day operations of the Association such as banking,

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bookkeeping, collection of lot owner assessments, enforcing covenant violations for lot maintenance and design criteria. (Ex. 105B, Art XI, Sec 3, Hintz Testimony 124:5-129:2, 172:23-179:7). Hintz met with Wilson regularly to discuss architectural review and compliance issues as each of lot owners built their homes.(Hintz Testimony 37:20-39:9). After Hintz left in 2009, Wilson hired an outside property management firm who charged over \$4,200 per year to perform the same tasks as Hintz as performed. (Ex. 119)

Whitworth challenged the cost of repairs made by Wilson to the water feature at the entrance of the Development. (Ex. 114G).The water feature was installed in 2005 by Wilson and fed by a natural spring in an attempt to conserve water and keeping with the overall rural and natural theme of the Development. (Whitten Testimony 20:13-20:23). However, in the summer months, the spring did not produce enough consistent water to keep the pond full and the surrounding landscape hydrated. In July 2006, Wilson connected the landscaping irrigation system to the City of Kalama Water<sup>31</sup>.(Ex. 114F). The cost to hook up the water feature to the

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29 Surveyor Whitten testified that Wilson had done extensive excavating work moving rock from the existing quarries within Dave's View and putting in the private road system. Whitten 20/6 to 22/14

City water was \$6,700 and the Wilson's paid 50% and the Association was assessed 50% of that cost to the lot owners as a special assessment.(Downing Testimony 13:1- 14:17, 66:9-67:19). At the time of the assessment, Wilson owned just 1 lot in Phase 1 and less than 25% of the then-platted lots within the entire Development. Whitworth claimed that the water feature was defectively installed. However, it operated fine for 5 years with proper maintenance as is the case with all water features. Section 25 of the Declaration authorized special assessments for repairs to capital improvements - as well as common areas. The repair made to the water feature was outside of any builder warranty period, and Wilson reserved the right to assess repairs to capital improvements in the Declaration.<sup>32</sup> The trial court ruled that because the water feature was a capital improvement, any repair costs associated with the water feature were the sole responsibility of Wilson and could not be included as an Assessment to the lot owners even though the court ruled the Development Period had ended in January 2006, six month prior to when Wilson hooked up to the City water.

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<sup>31</sup>Hintz was paid by Dave's View LLC as a project manager during the Development Period from 2005 to 2009. Hintz was paid as an independent contractor through his company Fork in the Road Hintz 35/19 to 37/19.

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Whitworth claimed that Wilson had not complied with corporate formalities for the Association or the Board. Whitworth claimed that Wilson had not kept the Association financial records separate from Dave's View LLC. (Hintz Testimony 4:3- 4:8, 99:17-100:22). Whitworth claimed that the Board had not conducted annual meetings or ever allowed the lot owners to participate in putting together the yearly budget for the Association. (Hintz Testimony 29:8-31:2). Wilson presented every bank statement and cancelled check for the Association from 2005 to 2009, meeting minutes from every annual meeting for the Association from 2005 to 2009 along with each annual budget and breakdown of the yearly expenses which were permanently posted on the Dave's View website and mailed to each lot owner. Whitworth challenged the cost of any legal fees incurred by the Association to enforce covenants for lot maintenance, architectural design criteria or Wilson's defense of the Association in this lawsuit<sup>33</sup>. Whitworth named the Association as a defendant along with Dave's View LLC and Chad, Michelle and Lynda Wilson individually. Wilson was required to defend legal actions involving the Association under RCW 64.38 et seq., the Declaration.(Ex. 105, Sec 31, 105B, Art

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<sup>33</sup> The special assessment for attorneys fees came up as an issue in several different ways throughout the case. (Ex. 105, Sec 28, 31, 25, Ex. 105D, Art 6.3(1), Art 6, Sec 6.3(8), Ex. 114.

VII, Sec 1 & 2, Art XI, Sec 2 and the Bylaws, Ex. 105D, Art 6, Sec 6.3(4)). Wilson established a special assessment of \$20,000 to defend the Association in this lawsuit. (Ex. 112, pg. 7). Whitworth refused to pay any part of the special assessment - just as they had refused to pay any increase to the \$150 regular annual assessment. This unpaid assessment became a lien on Whitworth's property - as did the unpaid regular annual assessments. (Ex. 105B, Art VI, Sec 1). Two of the Respondent lot owners (Jeff/Amy Hulse and Harold/Jolene Haro) attempted to either refinance or sell their property after the lien had been placed against their lot.

Hulse and Haro challenged Wilson's right to impose liens for unpaid assessments and violations of the Declaration<sup>34</sup>. The trial court ruled that the recorded liens created a cloud on title, were not authorized under RCW 64.38 et seq., the Declaration or the Bylaws, and awarded damages to Hulse and Haro as part of the judgment. (CP 205). Section 25 of the Declaration and Article 6.3(1) & (7), and Article 10.1 allowed Wilson to impose a lien for unpaid assessments and fines against defaulting lot owners.(Ex. 105, Sec 25, 105B, Art VI, Sec 4). The lot

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<sup>34</sup>Hulse, Allington, Springer, Taylor had ongoing violations (property condition) which remained uncured at the time of trial. (Hintz Testimony 27:15-28:6, 170:7-172:15). All of the Respondents had failed to pay homeowner association assessments since 2008.

owners were given written demand, the right to cure and failed to do so. (Ex. 114D, 114M, 114Q, 118).

Section 25 of the Declaration imposes a continuing lien on each lot for ongoing assessments. (Ex. 105, Sec 25, 105B Art VI, Sec 4) The burden of the expenses for the common area falls on each lot owner who benefits from the common area amenities. Whitworth's failure to pay both their regular assessments and special assessments created more of a financial burden on the other lot owners and Wilson. It increased the amount the other lots owners and Developer would be required to pay to meet the annual budgetary demands. And, it created a shortfall so that there was insufficient money to keep the common area properly maintained and equal to the quality necessary to continue to successfully market and sell lots.(Downing Testimony 14:20-16:16, 46:14-46:18). That was exactly what Whitworth was counting on. Wilson's ability to finish the Development or sell any more lots has been completely impeded by Whitworth's actions. The annual budget had to operate on 50% of the revenues that it had previously operated on causing lack of maintenance to the entry water feature, private roads, brush/weed control and enforcement of the Declaration regarding maintenance violations and deviations from

the architectural design criteria. The Development currently looks terrible.

In its ruling, the trial court acknowledged that Wilson had subsidized the budget shortfall for several years and that the charges passed through by Wilson for road maintenance and other common area costs were probably reasonable, but held that the testimony of Chad Wilson, Karl Hintz and Diana Downing about the reasonableness of the costs (Court Ruling 6/17/11, Downing Testimony 25:15-30:16), and the cancelled checks presented at trial without receipts were insufficient because there were no invoices and that those costs were disallowed as costs in the Association budget.<sup>35</sup> There was no evidence to contrary entered by Whitworth at trial.

RCW 64.38(1) & (14) allows the Association to adopt rules and regulations related to the overall operation of the Association. Wilson instituted architectural design criteria for the exterior finishes to compliment the surrounding rural environment. Paint colors were neutral or muted, rock and stone type finishes were encouraged as an exterior finish on the structure rather than builder grade siding, landscaping with water features or other rock & stone formations were prevalent in Dave's

View and a uniform standard of excellence was required on any exterior portions of a lot that faced the private roads which were shared throughout the Development. (Ex. 105, Sec 27(a), 105C Sec 2.1(A)).

Sections 5 through 18 of the Declaration contain the detailed restrictive covenants relating to the exterior appearance of the lots and homes within the Development. Most of these restrictive covenants are identical to those that exist in other developments. The “rules” that are imposed on lot owners are only as good as the rules that are enforced timely and uniformly. Wilson’s counter-claims in the trial court action included many violations of the covenants by Whitworth.

After notice to the respective parties, any ongoing violation was subject to fines which had been imposed in the violation letters sent to the lot owners as well as the Dave’s View website. When the violations require legal action, legal fees and costs were incurred by the Association to enforce uniform standards. Violations of the restrictive covenants affected all lot owners within the Development. The violations and fines which necessitated legal action are set forth in Appendix C.

Section 27 of the Declaration contains all of the specific architectural design standards for all new construction and any additions

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built on the lots within Dave's View (Ex. 105, 105C).

The original design standards set forth in the Declaration applied to each of 17 Respondent lot owners. Respondents' lots were subject to the original standards as they were amended on October 7, 2004 and January 3, 2006 because they purchased their property after the amendment had been recorded.(Ex. 105). Any amendment to the design standards which existed at the time Whitworth's built any additions onto their lots would apply and should have been implemented by the lot owner.

The trial court never ruled on any of Wilson's counter-claims against Whitworth for violations of the restrictive covenants or design criteria. The trial court states that all of the violations had been resolved at the time and trial and were moot. (CP 205). This ignores two very important parts of Wilson's case. First, if the trial court would have ruled whether Whitworth had violated the restrictive covenants and design criteria, then Wilson would have been able to recoup the fines and legal fees paid by the Association at trial. Second, if the trial court would have ruled on those violations, then Wilson's affirmative defense of "dirty hands" would have prevented Whitworth from getting any monetary relief at trial for the financial burdens the non-paying Respondents created for the Association and other lot owners.

The trial court never ruled on any of the restrictive covenant or design criteria violations set forth in Appendix C. Many of these violations exist today and the fines and legal fees incurred by the Association as a result of the violations were never recouped by the Association because the trial court never ruled on them.

### **C. ATTORNEY FEES**

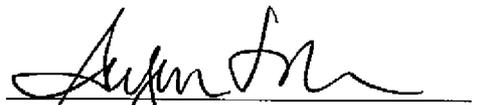
Pursuant to RAP 18.1(b) and Declaration Section 30, Wilson requests an award of fees for this time expended on this appeal.

### **V. CONCLUSION**

The trial court's ruling appeased a small group of renegade lot owners by creating a second homeowner association for Respondents which completely ignored the rights of the lot owners who were not named as parties to the lawsuit by Respondents and left Wilson unable to market the remainder lots because of the uncertainty as to who is in charge. This creates an untenable situation wherein everyone loses what they bargained for in buying into the Development. With two independent homeowner association which were never anticipated by the Declaration,

there is no guidance as to who bears responsibility for services and enforcement of the covenants and restrictions. This trial court ruled without legal authority (from the Declaration or homeowner statute RCW 64.38 et seq.) and left the parties in a chaotic situation which harms everyone in the Development. This court should reverse the trial court's ruling and remand the matter to the trial court to rule on Wilson's counter-claims.

Respectfully submitted this 18<sup>th</sup> day of July, 2012,

  
SUZAN C. CLARK, WSBA #17476  
Attorney for the Appellants

## APPENDIX "A"

FILED  
SUPERIOR COURT

2011 AUG 30 A 9:45

COWLITZ COUNTY  
BEVERLY R. LITTLE, CLERK

BY \_\_\_\_\_

**SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY**

ANDY & SUE WHITWORTH, Husband  
and Wife; DOUG & STACY YEAMAN,  
Husband and Wife; ROBERT & PHYLLIS  
NELSON, Husband and Wife; BRENT &  
CONNIE DAVIS, Husband and Wife;  
NICK & JOANN SPRINGER, Husband  
and Wife; KARL & MARSHA MICHELS,  
Husband and Wife; DOUG & YOLANDA  
RAUCH, Husband and Wife; HOWARD  
& STACEY ALLINGTON, Husband and  
Wife; MARVIN & HELEN TAYLOR,  
Husband and Wife; RANDY & JODI  
SPARKS, Husband and Wife; MORALL  
& WENDI OLSON, Husband and Wife;  
DAVE & CRISTA NEAL Husband and  
Wife; and FELIX & JOLENE HARO,  
Husband and Wife, JEFF & AMY HULSE,  
Husband and Wife, BRENDAN & ANGIE  
HEATH, Husband and Wife, GILBERT  
ORNELAS and CAROLEE ORNELAS,  
Husband and Wife, and CAROLEE  
ORNELAS as Trustee of the CINDY  
MORSE LIVING TRUST,

Plaintiffs,

v.

No. 08-2-01650-2

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER PURSUANT  
TO CR 54(b)**

1 DAVE'S VIEW, LLC, a Washington  
2 limited liability company; DAVE'S VIEW  
3 AT MARTIN'S BLUFF  
4 HOMEOWNERS' ASSOCIATION, a  
5 Washington non-profit corporation,  
6 LYNDA S. WILSON, an individual; and  
7 CHAD WILSON, a married man,

8 Defendants.

9 THIS MATTER was tried in a bifurcated bench trial before the above-entitled  
10 Court, the Hon. James E. Warne, on June 7, 8, 9, 16 & 17, 2011. The Plaintiffs were  
11 represented by Vincent L. Penta, P.S. of the Law Office of Vincent L. Penta, P.S. and  
12 Daniel E. Zimberoff, Esq. of the Barker Martin law firm. The Defendants were  
13 represented by Cassie N. Crawford, Esq. of Vancouver Land Law.

14 A. **Plaintiffs' Witnesses.** Testifying at trial were Andrew Whitworth, Stacey  
15 Allington, Jeff Hulse, Morall Olson, Jolene Haro, Bob Nelson, Karl Michels, Carolee  
16 Ornelas, Marv Taylor and Joann Springer, all of whom were Plaintiffs. Testifying on  
17 behalf of Plaintiffs were Carl McCrary, in his capacity as Director of the City of Kalama  
18 Department of Public Works, and Terry Woodruff, an expert, in his capacity as Assistant  
19 Manager and Chief Title Officer for Cowlitz Title Company.

20 B. **Defendants' Witnesses.** Testifying at trial were Chad Wilson, Defendant  
21 and Managing Member of Dave's View, LLC; Karl Hintz, a former employee of Dave's  
22 View, LLC; Paul King, formerly of King's Landscaping; Diana Downing, a home owner  
23 and real estate agent in Phase 1; Don Vossler, a lot owner in Phase 1 of Dave's View at  
24 Martin's Bluff; Chuck Whitten, retired, regarding his prior service as the engineer for  
25 Hagedorn Inc.; and Mike Wojtowicz, in his capacity as Director of the Cowlitz County  
Department of Building and Planning.

C. **Evidence Presented and Entered.** Voluminous evidence was presented

1 the witnesses, and having heard the arguments of Counsel and being otherwise fully  
2 advised,

3 **NOW, THEREFORE, THE COURT FINDS:**

4 **A. The Homeowners' Association.**

5 1) The Declaration of Covenants, Conditions and Restrictions was drafted by  
6 ~~Mr. Wilson.~~ *the defendants.*

7 2) The original and applicable Declaration (AFN 3221251) states that the  
8 subject Property is defined as Phase 1 according to the Plat filed and the recitals therein.

9 3) The Development Period ended twenty-four months from the date the Plat  
10 for Phase 1 was recorded or upon the sale of thirty-three of the thirty-five lots in Phase 1,

11 *which was 1/31/06.*  
12 4) The Developer reserved the right to add property to the Association but  
13 has not done so.

14 5) The Declaration does not provide for any extension of the Development  
15 Period for Phase 1.

16 6) The Homeowners' Association exists to collect assessments and maintain  
17 the common areas of the Property which currently encompasses the common areas of  
18 Phase 1 as delineated on the Plat, and any other property which is later added by the  
19 Developer.

20 7) The Association owes a duty to the Developer and Lot Owners to maintain  
21 the common areas, which common areas include all of the common areas delineated on  
22 the plat of Phase 1 and the main private road known as Dave's View Drive which is  
23 shared with Phases 2 and 3.

24 8) The Association should have been turned over to the Phase 1 lot owners as  
25 of January 31, 2006.

1 9) The Association is governed by RCW 64.38.

2 10) The Association has duties and responsibilities, all of which have to do  
3 with maintaining the common areas within the development.

4 11) The Association must carry out its duties in good faith.

5 12) The Association is obligated to keep financial and sufficient records to  
6 enable it to declare to each owner/member the true statement of its financial status.

7 13) All records, including, but not limited to bank records, checks and  
8 invoices, in whatever form they are, are the property of the Association and its Members.

9 14) Each Association manager has an obligation to turn over all the original  
10 books and records to the new Association immediately upon termination of the  
11 management relationship with the old Association.

12 B. Architectural Review Board. *14(a) The development of the entrance water  
feature was a capital expense  
of the developer.*

13 15) Each lot owner purchased with knowledge of the architectural design  
14 standards as set forth in the original Declaration and all material disputes related to such  
15 standards have been resolved by the Owners in agreement with the Developer, or  
16 otherwise, leaving no issues remaining for the trial Court to adjudicate.

17 16) There are no rules or design guidelines adopted other than those set forth  
18 in the original Declaration.

19 17) The Association cannot change the design standards, and the Developer  
20 cannot change the design standards after the sale of the lots.

21 18) The architectural rules are designed to protect the Developer's investment  
22 and the Homeowners' investments.

23 19) The enforcement of architectural rules is not a function of the Association.

24 20) The undeveloped lots remaining in Phase 1 are obligated to build in

1 accordance with the design standards and guidelines under which they purchased.

2 21) No rules were adopted regarding enforcement of the architectural rules or  
3 design guidelines.

4 22) There can be no recordings against Lot Owner titles without proper rules  
5 for enforcement and appeal.

6 **C. Association Records and Accounting.**

7 23) Defendants did not comply with RCW 64.38.

8 24) Wilson testified that he was the Association and that he, his mother and  
9 wife would make all the decisions and would give the lot owners such financial  
10 information as they saw fit, ~~and then decided that they did not need any information.~~

11 25) The Wilsons had the highest duties of loyalty to the Association as would  
12 the directors of any non-profit corporation.

13 26) Wilson, as and for himself and in his capacity as the Managing Member of  
14 the Dave's View, LLC, testified that he performed work for the Association in lieu of  
15 paying dues on his lots, and also that he paid himself for work done out of Association  
16 funds.

17 27) Defendant Wilson and Dave's View, LLC failed to account for any of the  
18 work he claimed to have done.

19 28) Defendants did not provide the full records to any lot owner upon request  
20 and did not provide the Plaintiffs nor the trial Court with the full records for the  
21 Association.

22 29) Defendants invaded Association funds to pay their own costs, specifically,  
23 but not limited to, the payment of three checks from Association funds to an employee of  
24 Dave's View LLC, the payment of capital expenses for the installation of a water meter.

1 and original landscaping at the front entrance of the Development, and paying Wilson  
2 and/or his companies for work that is <sup>undocumented</sup> unsubstantiated by the records provided.

3 30) Defendants failed to maintain a clear line between Association funds and  
4 their own funds.

5 31) ~~Defendants did not have~~ <sup>Neither the declarations nor the law gave</sup> authority to record Notices of past due  
6 assessments which were treated like liens against real property.

7 II

8 CONCLUSIONS OF LAW

9 Based upon the foregoing Findings of Fact, the Court hereby sets forth Its  
10 CONCLUSIONS OF LAW as follows:

11 1) The Defendants violated the Homeowners' Association Act (RCW 64.38)  
12 by failing to maintain sufficient records, failing to provide an account to each owner,  
13 failing to call annual meetings of the owners and by improperly imposing assessments  
14 upon lot owners.

15 2) The Defendants did not act in accordance with their fiduciary obligations  
16 as set forth in RCW 24.03 *et seq.* and RCW 64.38.025.

17 3) The Developer and/or any Manager of the Association shall call for the  
18 organizational meeting for the purpose of democratically electing the Board of Directors,  
19 and the Dave's View at Martin's Bluff Homeowners' Association shall bear the costs of  
20 serving the notices upon all the Phase 1 lot owners.

21 4) All financial records from the very first assessment to the present time  
22 shall be turned over to the new Association's democratically elected Board of Directors.

23 5) The Association shall, if desired, have an audit conducted of the records  
24 and this Court shall retain jurisdiction for the purpose of making the determination as to

1 the extent of any conversion of Association funds by the Defendants based upon such an  
2 audit.

3 6) The Association shall be responsible to maintain all the common areas of  
4 Phase 1, and in addition thereto, shall be responsible for forty percent (40%) of the  
5 maintenance and repair costs associated with the front entry of the development and the  
6 common road known as Dave's View Drive.

7 7) All assessments imposed by the Defendants after January 31, 2006 were  
8 improper and unenforceable.

9 8) The Notices of Past Due Assessments as recorded by the Defendants  
10 against the real property titles of the Plaintiffs are slanderous to the titles of the Plaintiffs  
11 ~~and Plaintiffs have been damaged thereby.~~

12 9) Plaintiffs Haro and Hulse shall be awarded their damages as a result of the  
13 offense to their respective titles.

### 14 III

### 15 ORDER

16 In consideration of the foregoing Findings of Fact and Conclusions of Law, the  
17 Court **ORDERS** the following relief to be granted to the Plaintiffs:

18 1) Judgment for the damages incurred by Defendants' slander of title against  
19 Plaintiffs HARO is hereby awarded in the sum of Nine Hundred Ninety Seven Dollars  
20 and Fifty Cents (\$997.50) with interest thereon at the statutory rate of twelve percent per  
21 annum (12%);

22 2) Judgment for the damages incurred by Defendants' slander of title against  
23 Plaintiffs HULSE is awarded, and it is hereby ordered that the Four Thousand Five  
24 Hundred Dollars (\$4,500.00) which had been improperly withheld from the sale proceeds

1 of Plaintiffs HULSE shall be released and judgment is awarded in the sum total of the  
2 interest thereon at the statutory rate of twelve percent per annum (12%) from the date the  
3 funds were withheld until the date they are released to Plaintiffs HULSE.

4 3) Defendants or their Property Manager shall call the organizational meeting  
5 of the Association at a reasonable time and place within 30 days of the entry of this Order  
6 in accordance with the foregoing Findings and Conclusions of Law.

7 4) Defendants and their agents shall turn over to the democratically elected  
8 Board of Directors of the new Association:

9 a) All records from the date of the first assessments;

10 b) All accounts held by the Association and in the name of the  
11 Association; and

12 c) All funds collected, by assessment or special assessment, or held  
13 by the Developer or Association in the trust accounts or other  
14 accounts of any title company or property management company,  
15 in excess of \$150 per lot for all Phase 1 lots from January 31, 2006  
16 to the present date.

17 5) The Court shall retain jurisdiction for the purpose of entering judgment  
18 against the Defendants for all invasions of Association funds, or funds which are  
19 determined to have been improperly taken or paid from the Association upon completion  
20 of an audit of the records for up to one year from the date of entry hereof.

21 6) Those certain Notices of Past Due Assessments which have operated to  
22 slander the title of the real properties of the Plaintiffs are hereby invalidated and a  
23 separate release shall be signed contemporaneously herewith to clear Plaintiffs' title of  
24 the encumbrance created thereby (AFN 3388973, 3388974) .

25 7) The Court reconsidered its Declaratory Judgment granted in this action on  
December 27, 2010, and affirms its decision therein as being a final judgment in this

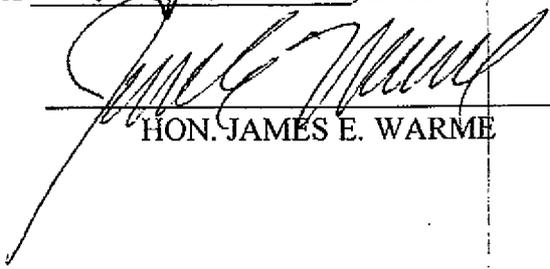
1 action, except for that portion which assigns the obligations for maintenance within the  
2 development that this Court has addressed with specificity herein at §2, ¶6 above.

3 8) That Defendants and/or their agent, RPM Services as Property Manager,  
4 shall tender all funds held for and on behalf of the Association, to the Clerk of the above-  
5 entitled Court no later than 30 days from the entry of this Order.

6 9) Plaintiffs, as the substantially prevailing party, are hereby awarded their  
7 Court costs and Attorneys' fees upon submission of an appropriate Cost Bill.

8 10) The Clerk of the above-entitled Court shall, upon entry of this Order, remit  
9 all funds deposited by Plaintiffs currently held in the Clerk's Registry in the amount of  
10 Four Thousand, Two Hundred Ninety-Eight Dollars and Five Cents (\$4,298.05) to the  
11 Law Office of Vincent L. Penta, P.S., In Trust, for and on behalf of Plaintiffs.

12 **SO ORDERED** this 30<sup>th</sup> day of August, 2011.

13  
14   
15 \_\_\_\_\_  
16 HON. JAMES E. WARNE

17 Presented by:

18 

19 \_\_\_\_\_  
20 VINCENT L. PENTA, P.S., WSBA 17827  
21 Of Attorneys for Plaintiffs

22  Approved as to form;

23 \_\_\_\_\_  
24 CASSIE N. CRAWFORD, WSBA \_\_\_\_\_  
25 Attorney for Defendants

APPENDIX "B"

LOT	NAME	ACQUISITION
15	Taylor, Marvin	11/4/04
30	Michels, Kari & Marsha	5/25/04
1	Haro, Jolene & Felix	7/7/04
9	Creekside Properties	7/6/04
11	Allington, Howard & Stacey	2/25/05
59	Olson, Randall & Kaye	1/25/06
8	Nelson, Robert & Phyllis	5/28/04
23	Springer, Nicholas & JoAnn	5/12/04
20	Sparks, Randy & Jodi	10/7/04
2	Yeaman, Douglas & Stacey	7/19/04
17	Ornelas, Gilbert &Carolee	11/24/04

## APPENDIX "C"

### ALLINGTON – Lot 11

Violation #1: Failure to pay *proportionate* annual assessments for 2008, 2009, 2010 & 2011 in the sum of \$1,200.00 plus 12% interest.

Violation #2: Failure to complete paved driveway 2/06, 6/07, 11/07, 3/08)

**“Section 6. Driveways. (a) All driveway approaches or areas of ingress and egress, during construction will be required to have a minimum of 20 feet of crushed rock where adjoining any existing asphalt road within Dave’s View. Within one (1) year of issuance of the certificate of occupancy, the Owner must install an asphalt or concrete driveway to the area of the dwelling on the Lot.”**

Violation #3: Failure to relocate rock wall built on storm water pond & provide erosion control plan 1/09

### HARO – Lot 1

Violation #1: Failure to pay *proportionate* annual assessments for 2008, 2009, 2010 & 2011 in the sum of \$1,200.00 plus 12% interest.

### HULSE – Lot 16

Violation #1: Failure to pay *proportionate* annual assessments for 2008, 2009, 2010 & 2011 in the sum of \$1,200.00 plus 12% interest.

Violation #2: Storing recreational vehicles (boat) on the east side of garage in view of the public right of way (11/07, 4/09).

**“Section 18. Nuisances and Maintenance... no on-street parking of any vehicle, boat, recreational vehicle... recreational vehicles, boats, and/or trailers shall be allowed to park on each lot, provided that they are screened from view of the common driveway and from view of right of ways and other lots within the property by fencing, landscaping or are garaged...”**

Violation #3: Landscaping violation, spoils piles – no erosion control (12/07, 1/11)  
ARC(p) **“Upon the receipt of approval from the ARC, the Owner shall, as soon as practicable, satisfy all conditions thereof, if any, and diligently proceed with the**

commencement and completion of all construction pursuant to the approved plans. The Owner shall satisfy all conditions and the construction, reconstruction, refinishing, alterations, or together work pursuant to the approved plans within one (1) year from the date of such approval..”

**MICHAELS – Lot 30**

*Violation #1:* Failure to pay *proportionate* annual assessments for 2008, 2009, 2010 & 2011 in the sum of \$1,200.00 plus 12% interest.

*Violation #2:* Failure to maintain landscaping (6/07)

“Section     Maintenance of Landscaping...Landscaping after installation will be maintained to provide a neat and attractive appearance, including the removal of dead bushes, trees, trash and debris. The Association will have the right to require any Owner to landscape and/or maintain landscaped areas, or to maintain natural areas in its natural state on any right of way between a Lot and a street that is immediately adjacent to such Lot...”

*Violation #3:* PAINTED FIRE HYDRANT BROWN – NUISANCE (violation of Section 5.2.1 Public Hydrants, Sub-section 5.2.1.1 “all barrels are to be chrome yellow except in cases where another color has already been adopted”.

**NELSON– Lot 8**

*Violation #1:* Failure to pay *proportionate* annual assessments for 2008, 2009, 2010 & 2011 in the sum of \$1,200.00 plus 12% interest.

*Violation #2:* Storing recreational vehicles (boat) on the east side of the residence in view of the public right of way (1/09, 4/09).

“Section 18. Nuisances and Maintenance... no on-street parking of any vehicle, boat, recreational vehicle... recreational vehicles, boats, and/or trailers shall be allowed to park on each lot, provided that they are screened from view of the common driveway and from view of right of ways and other lots within the property by fencing, landscaping or are garaged...”

*Violation #3:* Failure to submit plans for outbuilding to ARC for approval (6/09).

“(k) Submittal and Plan Review. Plans and specifications shall be submitted to the ARC... ARC shall conduct reviews of plans...”

**“The following shall be submitted to the ARC for final approval prior to any grading or construction:**

**“i. Site plan at the appropriate scale showing the location of the buildings...**

**“iii. Lot layout showing lot boundaries and dimensions on a scale standard in the industry...**

**“ix. Any accessory improvements (shops, outbuildings, RV storage, carports, etc.) contemplated on the lot must be shown on the plan submittal”**

**ORNELAS– Lot 5, 17,**

*Violation #1:* Failure to pay *proportionate* annual assessments for 2008, 2009, 2010 & 2011 in the sum of \$1,200.00 plus 12% interest.

*Violation #2:* Failure to maintain Lot #5 & #17 (Sect. 18)

**“Section Maintenance of Landscaping...Landscaping after installation will be maintained to provide a neat and attractive appearance, including the removal of dead bushes, trees, trash and debris. The Association will have the right to require any Owner to landscape and/or maintain landscaped areas, or to maintain natural areas in its natural state on any right of way between a Lot and a street that is immediately adjacent to such Lot...”**

**SPARKS – Lot 20**

*Violation #1:* Failure to pay *proportionate* annual assessment for 2008, 2009, 2010 & 2011 in the sum of \$1,200.00 plus 12% interest.

**SPRINGER – Lot 9 & 23**

*Violation #1:* Failure to pay *proportionate* annual assessment for 2008, 2009, 2010 & 2011 in the sum of \$1,200.00 plus 12% interest.

*Violation #2:* Reckless driving & damaging public right of ways by leaving tire tracks in cul de sac of Mt. Reign Rd. (4/07)

**“Section 18. Nuisances and Maintenance. No illegal, noxious or offensive activity shall be carried out upon any Lot, nor shall anything be done thereon which may be**

**or may become an annoyance or nuisance to the neighborhood or other Lots within the Property. No activity shall be conducted and no improvements constructed on any Lot which is or might be unsafe or hazardous to person or property.”**

*Violation #3:* Unauthorized excavation on Lot 9 destabilizing an environmentally sensitive area (storm water facility) (6/09). Cutting of utility cables & future service lines from right of ways (6/09).

**“(k) Submittal and Plan Review. Plans and specifications shall be submitted to the ARC... ARC shall conduct reviews of plans...”**

**“Clearing, grading or construction shall not commence until the ARC final plan approval and building permits are obtained.”**

*Violation #4:* Dumping of dog poop onto undeveloped property owned by defendant (9/09).

**Civil citation issued by Cowlitz County Sheriff to Springer.**

*Violation #5:* Placement of business/trade sign on property (6/10).

**“Section 10. Signs. No sign of any kind shall be erected, maintained or displayed to the public view of any Lot except for... advertising property for sale or rent... “**

### **TAYLOR – Lot 15**

*Violation #1:* Failure to pay *proportioante* annual assessment for 2008, 2009, 2010 & 2011 in the sum of \$1,200.00 plus 12% interest.

*Violation #2:* Advertising/Trade signage placed in front yard (2/08).

**“Section 10. Signs. No sign of any kind shall be erected, maintained or displayed to the public view of any Lot except for... advertising property for sale or rent... “**

*Violation #3:* RV parking (CCR 18)

**“Section 18. Nuisances and Maintenance... no on-street parking of any vehicle, boat, recreational vehicle... recreational vehicles, boats, and/or trailers shall be allowed to park on each lot, provided that they are screened from view of the common driveway and from view of right of ways and other lots within the property by fencing, landscaping or are garaged...”**

### **YEAMAN – Lot 2**

Violation #1: Failure to pay *proportionate* annual assessments for 2008, 2009, 2010 & 2011 in the sum of \$1,200.00 plus 12% interest.

Violation #2: Failure to submit plans and complete landscaping within one (1) year (10/05, 2/06).

**ARC(p) “Upon the receipt of approval from the ARC, the Owner shall, as soon as practicable, satisfy all conditions thereof, if any, and diligently proceed with the commencement and completion of all construction pursuant to the approved plans. The Owner shall satisfy all conditions and the construction, reconstruction, refinishing, alterations, or together work pursuant to the approved plans within one (1) year from the date of such approval...”**

Violation #3: Placing newspaper box in public right of way (6/09).

## **WHITWORTH**

Violation #1: Failure to pay *proportioante* annual assessments for 2008, 2009, 2010 & 2011 in the sum of \$1,200.00 plus 12% interest.

Violation #2: Failure to complete exterior aggregate/rock finish on dwelling unit from (10/04, 8/06, 4/07)

**Section 5(c) Each dwelling and/or accessory buildings shall be completed including the exterior (i.e. doors, windows, painting, etc. within one (1) year from the start of such construction including all landscaping”**

(Penalties of \$25.00 per day commencing 6/18/06 plus 12% interest)

Violation #3: Advertising/Trade signage (no trespassing) placed in back of property in 8/06.

**“Section 10. Signs. No sign of any kind shall be erected, maintained or displayed to the public view of any Lot except for... advertising property for sale or rent...”**

**APPENDIX "D"**

**ESB 5377**

---

ENGROSSED SENATE BILL 5377

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State of Washington

62nd Legislature

2011 Regular Session

By Senators Morton, Swecker, and Stevens

Read first time 01/21/11. Referred to Committee on Financial Institutions, Housing & Insurance.

1 AN ACT Relating to homeowners' associations; amending RCW 64.38.010  
2 and 64.38.025; adding new sections to chapter 64.38 RCW; and providing  
3 an effective date.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 64.38.010 and 1995 c 283 s 2 are each amended to read  
6 as follows:

7 ~~((For purposes of this chapter:))~~ The definitions in this section  
8 apply throughout this chapter unless the context clearly requires  
9 otherwise.

10 (1) "Homeowners' association" or "association" means a corporation,  
11 unincorporated association, or other legal entity, each member of which  
12 is an owner of residential real property located within the  
13 association's jurisdiction, as described in the governing documents,  
14 and by virtue of membership or ownership of property is obligated to  
15 pay real property taxes, insurance premiums, maintenance costs, or for  
16 improvement of real property other than that which is owned by the  
17 member. "Homeowners' association" does not mean an association created  
18 under chapter 64.32 or 64.34 RCW.

1 (2) "Governing documents" means the articles of incorporation,  
2 bylaws, plat, declaration of covenants, conditions, and restrictions,  
3 rules and regulations of the association, or other written instrument  
4 by which the association has the authority to exercise any of the  
5 powers provided for in this chapter or to manage, maintain, or  
6 otherwise affect the property under its jurisdiction.

7 (3) "Board of directors" or "board" means the body, regardless of  
8 name, with primary authority to manage the affairs of the association.

9 (4) "Common areas" means property owned, or otherwise maintained,  
10 repaired or administered by the association.

11 (5) "Common expense" means the costs incurred by the association to  
12 exercise any of the powers provided for in this chapter.

13 (6) "Residential real property" means any real property, the use of  
14 which is limited by law, covenant or otherwise to primarily residential  
15 or recreational purposes.

16 (7) (a) "Affiliate" means any person who controls, is controlled by,  
17 or is under common control with the developer.

18 (b) For the purposes of this subsection:

19 (i) A person "controls" another person if the person: (A) Is a  
20 general partner, officer, director, or employer of the developer; (B)  
21 directly or indirectly or acting in concert with one or more other  
22 persons, or through one or more subsidiaries, owns, controls, holds  
23 with power to vote, or holds proxies representing more than twenty  
24 percent of the voting interest in the developer; (C) controls in any  
25 manner the election of a majority of the directors of the developer; or  
26 (D) has contributed more than twenty percent of the capital of the  
27 developer.

28 (ii) A person "is controlled by" another person if the other  
29 person: (A) Is a general partner, officer, director, or employer of  
30 the person; (B) directly or indirectly or acting in concert with one or  
31 more other persons, or through one or more subsidiaries, owns,  
32 controls, holds with power to vote, or holds proxies representing more  
33 than twenty percent of the voting interest in the person; (C) controls  
34 in any manner the election of a majority of the directors of the  
35 person; or (D) has contributed more than twenty percent of the capital  
36 of the person.

37 (iii) Control does not exist if the powers described in this

1 subsection are held solely as security for an obligation and are not  
2 exercised.

3 (8) "Board of directors" means the body, regardless of name, with  
4 primary authority to manage the affairs of the association.

5 (9) "Developer" means: (a) Any person who reserves any developer  
6 control in the governing documents; or (b) any person who exercises  
7 developer control or to whom developer control is transferred.

8 (10) "Developer control" means the right of the developer or  
9 persons designated by the developer to appoint and remove officers and  
10 members of the board of directors, or to veto or approve a proposed  
11 action of the board or association.

12 (11) "Homeowner" means any person who is an owner of real property  
13 subject to the governing documents.

14 (12) "Person" means a natural person, corporation, partnership,  
15 limited partnership, trust, governmental subdivision or agency, or  
16 other legal entity.

17 (13) "Special developer rights" means rights reserved for the  
18 benefit of a developer to: (a) Complete improvements indicated on  
19 survey maps; (b) exercise any development right; (c) maintain sales  
20 offices, management offices, and signs advertising the development; (d)  
21 use easements through the common elements for the purpose of making  
22 improvements to the development; (e) make the development part of a  
23 larger development; or (f) appoint or remove any officer of the  
24 association or any master association or any member of the board of  
25 directors, or to veto or approve a proposed action of the board or  
26 association, during any period of developer control.

27 **Sec. 2.** RCW 64.38.025 and 1995 c 283 s 5 are each amended to read  
28 as follows:

29 (1) Except as provided in the association's governing documents or  
30 this chapter, the board of directors shall act in all instances on  
31 behalf of the association. In the performance of their duties, the  
32 officers and members of the board of directors shall exercise the  
33 degree of care and loyalty required of an officer or director of a  
34 corporation organized under chapter 24.03 RCW. An obligation of good  
35 faith is imposed in the performance and enforcement of all contracts  
36 and duties governed by this chapter and in all other transactions

1 involving developers, the board of directors, associations, and their  
2 members. For the purposes of this section, "good faith" means honesty  
3 in fact and the observation of reasonable standards of fair dealing.

4 (2) The board of directors shall not act on behalf of the  
5 association to amend the articles of incorporation, to take any action  
6 that requires the vote or approval of the owners, to terminate the  
7 association, to elect members of the board of directors, or to  
8 determine the qualifications, powers, and duties, or terms of office of  
9 members of the board of directors; but the board of directors may fill  
10 vacancies in its membership of the unexpired portion of any term.

11 (3) Within thirty days after adoption by the board of directors of  
12 any proposed regular or special budget of the association, the board  
13 shall set a date for a meeting of the owners to consider ratification  
14 of the budget not less than fourteen nor more than sixty days after  
15 mailing of the summary. Unless at that meeting the owners of a  
16 majority of the votes in the association are allocated or any larger  
17 percentage specified in the governing documents reject the budget, in  
18 person or by proxy, the budget is ratified, whether or not a quorum is  
19 present. In the event the proposed budget is rejected or the required  
20 notice is not given, the periodic budget last ratified by the owners  
21 shall be continued until such time as the owners ratify a subsequent  
22 budget proposed by the board of directors.

23 ~~(4) ((The owners by a majority vote of the voting power in the~~  
24 ~~association present, in person or by proxy, and entitled to vote at any~~  
25 ~~meeting of the owners at which a quorum is present, may remove any~~  
26 ~~member of the board of directors with or without cause.))~~ Any meeting  
27 by the board of directors must be held at a time and place that is  
28 convenient for the homeowners of the association. A convenient time is  
29 between five o'clock p.m. and nine o'clock p.m. on a weekday or between  
30 nine o'clock a.m. and five o'clock p.m. on a Saturday or Sunday. A  
31 convenient place means a location within twenty miles from any property  
32 subject to the governing documents.

33 (5)(a) Subject to subsection (7) of this section, the governing  
34 documents may provide for a period of developer control of the  
35 association, during which period a developer, or persons designated by  
36 the developer, may: (i) Appoint and remove the officers and members of  
37 the board of directors; or (ii) veto or approve a proposed action of  
38 the board or association. A developer has a fiduciary duty in

1 appointing and removing nonowner members of the board of directors. A  
2 developer is responsible for actions of nonowner members of the board  
3 of directors appointed by the developer under the doctrine of  
4 respondeat superior. A developer's failure to veto or approve proposed  
5 action in writing within thirty days after receipt of written notice of  
6 the proposed action shall be deemed approval by the developer board of  
7 directors.

8 (b) Regardless of the period provided in the governing documents,  
9 a period of developer control terminates no later than the earlier of:  
10 (i) Sixty days after conveyance of seventy-five percent of the lots  
11 that may be created to owners other than the developer; or (ii) the  
12 date on which the developer records an amendment to the declaration  
13 pursuant to which the developer voluntarily surrenders the right to  
14 further appoint and remove officers and members of the board of  
15 directors. A developer may voluntarily surrender the right to appoint  
16 and remove officers and members of the board of directors before  
17 termination of that period in accordance with (b)(i) of this  
18 subsection, but in that event the developer may require, for the  
19 duration of the period of developer control, that specified actions of  
20 the association or board of directors, as described in a recorded  
21 instrument executed by the developer, be approved by the developer  
22 before they become effective.

23 (6) Not later than sixty days after conveyance of twenty-five  
24 percent of the lots that may be created to owners other than a  
25 developer, at least one member and not less than twenty-five percent of  
26 the members of the board of directors must be elected by owners other  
27 than the developer. Not later than sixty days after conveyance of  
28 fifty percent of the units that may be created to owners other than a  
29 developer, not less than thirty-three and one-third percent of the  
30 members of the board of directors must be elected by owners other than  
31 the developer.

32 (7) Within thirty days after the termination of any period of  
33 developer control, the owners must elect a board of directors of at  
34 least three members, at least a majority of whom must be owners. The  
35 number of directors need not exceed the number of lots subject to the  
36 governing documents. The board of directors must elect the officers.  
37 These members of the board of directors and officers take office upon  
38 election.

1       (8) Notwithstanding any provision of the governing documents to the  
2 contrary, the owners, by a two-thirds vote at any meeting of the owners  
3 at which a quorum is present, may remove any member of the board of  
4 directors with or without cause, other than a member appointed by the  
5 developer. The developer may not remove any member of the board of  
6 directors elected by the owners.

7       NEW SECTION. Sec. 3. A new section is added to chapter 64.38 RCW  
8 to read as follows:

9       Within sixty days after the termination of the period of developer  
10 control, or in the absence of a period of developer control, within  
11 sixty days after the first conveyance of a lot subject to the governing  
12 documents, the developer must deliver to the association all property  
13 of the owners and of the association held or controlled by the  
14 developer including, but not limited to:

15       (1) The original or a photocopy of all the governing documents;

16       (2) The minute books, including all minutes, and other books and  
17 records of the association;

18       (3) Resignations of officers and members of the board who are  
19 required to resign because the developer is required to relinquish  
20 control of the association;

21       (4) The financial records, including canceled checks, bank  
22 statements, and financial statements of the association, and source  
23 documents from the time of incorporation of the association through the  
24 date of transfer of control to the unit owners;

25       (5) Association funds or the control of the funds of the  
26 association;

27       (6) All tangible personal property of the association, represented  
28 by the developer to be the property of the association or ostensibly  
29 the property of the association, and an inventory of the property;

30       (7) Insurance policies or copies thereof for the association;

31       (8) Any other permits issued by governmental bodies applicable to  
32 the real estate subject to the governing documents in force or issued  
33 within one year before the date of transfer of control to the unit  
34 owners;

35       (9) All written warranties that are still in effect for the common  
36 elements, or any other areas or facilities which the association has  
37 the responsibility to maintain and repair, from the contractor,

1 subcontractors, suppliers, and manufacturers and all owners' manuals or  
2 instructions furnished to the developer with respect to installed  
3 equipment or building systems;

4 (10) A roster of owners and their addresses and telephone numbers,  
5 if known, as shown on the developer's records;

6 (11) Any leases of the common elements or areas and other leases to  
7 which the association is a party;

8 (12) Any employment contracts or service contracts in which the  
9 association is one of the contracting parties or service contracts in  
10 which the association or the owners have an obligation or a  
11 responsibility, directly or indirectly, to pay some or all of the fee  
12 or charge of the person performing the service; and

13 (13) All other contracts to which the association is a party.

14 NEW SECTION. **Sec. 4.** A new section is added to chapter 64.38 RCW  
15 to read as follows:

16 (1) No special developer right created or reserved under the  
17 governing documents may be transferred except by an instrument  
18 evidencing the transfer executed by the developer or the developer's  
19 successor. The name of the transferee must be recorded in every county  
20 in which any portion of the real property subject to the governing  
21 documents is located. Each owner must receive a copy of the recorded  
22 instrument, but the failure to furnish the copy does not invalidate the  
23 transfer.

24 (2)(a) Upon transfer of any special developer right, a transferor  
25 developer is not relieved of any obligation or liability arising before  
26 the transfer. Lack of privity does not deprive any unit owner of  
27 standing to maintain an action to enforce any obligation of the  
28 transferor.

29 (b) If a successor to any special developer right is an affiliate  
30 of a developer, the transferor is jointly and severally liable with the  
31 successor for any obligations or liabilities of the successor relating  
32 to the real property subject to the governing documents.

33 (3)(a) A successor to any special developer right who is an  
34 affiliate of a developer is subject to all obligations and liabilities  
35 imposed on the transferor by this chapter or by the governing  
36 documents.

1 (b) A successor to any special developer right who is not an  
2 affiliate of a developer is subject to all obligations and liabilities  
3 imposed by this chapter or the governing documents. The successor is  
4 not liable for any:

- 5 (i) Misrepresentations by any previous developer;  
6 (ii) Warranty obligations on improvements made by any previous  
7 developer;  
8 (iii) Breach of any fiduciary obligation by any previous developer  
9 or the developer's appointees to the board of directors; or  
10 (iv) Any liability or obligation imposed on the transferor as a  
11 result of the transferor's acts or omissions after the transfer.

12 NEW SECTION. **Sec. 5.** This act takes effect August 1, 2011.

--- END ---

## APPENDIX "E"

### NO TURNOVER REQUIREMENT IN DAVE'S VIEW GOVERNING DOCUMENTS (DECLARATION & BLYAWS)

FINDING #3, 5 & 8 conflict with Section 1(j) of the Declaration: "Development Period" means that the period of time that the Declarant holds title to at least two (2) lots in Phase 1, 2, 3, 4 or 5 for purposes of development, sale or resale." (Ex. 105).

FINDING #3, 5 & 8 conflict with Section 1.5 of the Bylaws: "Development Period" means that period of time that the Declarant holds title to at least two (2) Lots in Phase 1, 2, 3, 4 or 5 for purposes of development, sale or resale." (Ex.105D).

FINDING #3, 5 & 8 conflict with Section 3.2 of the Bylaws: "Declarant's Reservation of Authority During Development Period. Declarant hereby reserves for itself, its successor or assigns, during the development period, all of the rights, powers and function of the Association, its members or the Board itself, which shall be exercised and/or performed by the Declarant, including, but not limited to the adoption and/or amendment of architectural control standards and rules and regulations and the designation of the Architectural Review Committee." (Ex. 105D)

FINDING #3, 5 & 8 conflict with Section 3.3 of the Bylaws: "Development Period. The Dave's View development period shall mean twenty four (24) months from the date of recording the initial Declaration or until the date that all but two (2) of the proposed lots within the Dave's View plat (all phases) have been sold, whichever is later...."(Ex. 105D).

FINDING #3 & 5 conflict with Section 3 of the Declaration: "...Provided, further, that Declarant reserves the right to modify the Declaration, or waive nonconformity therewith, at any time during the Development Period for Dave's View at Martin's Bluff."(Ex. 105).

FINDING #3 & 8 conflict with Bylaws Article 6.14.3.1: "All meetings of the Board of Directors shall be closed for observation by all lot owners of record and their authorized agents during the development Period." (Ex. 105D).

FINDING #4 conflicts with Recital A of the CCRs : "Declarant is the owner in fee simple of certain real property situated in Cowlitz County, Washington, which comprises a subdivision known as Dave's View at Martin's Bluff, Phase 1, according to the duly recorded plat thereof recorded in Cowlitz County, Washington, described as Vol. 13, Pg. 192, Fee#3221250 (hereinafter referred to herein as the "Property" and/or "Dave's View at Martin's Bluff"). Phases 2, 3, 4 and/or 5 may be added to the Property by Declarant at some future date. In the event additional phases are added by Declarant, all phases shall hereinafter be collectively referred to as the "Property"." (Ex. 105).

FINDING #5 & 8 conflict with Bylaws Article 5.2.1: "Annual Meeting. The first meeting of the membership shall be held: within twenty-four (24) months after the date of recordation of the initial plat of Dave's View at Martin's Bluff, after Declarant has sold all but two (2) Lots or elects to terminate authority during the development period whichever is later..." (Ex. 105D).

FINDING #5 & 8 conflict with Bylaws Article 6.6.1: "The initial Board of Directors named in the Articles of Incorporation shall serve until the end of the development period as defined in the recorded covenants and restrictions for Dave's View". (Ex. 105D).

FINDING #5 & 8 conflict with Bylaws Article 6.6.2: "After the development period or upon election of termination of control by the Declarant, the initial annual meeting of the members shall be held." (Ex. 105D).

FINDING #8 conflicts with Section 26 of the Declaration: "Establishment of Association. In order to enforce the provisions of this Declaration, there shall be formed the Association which shall be organized in a democratic manner and become effective at a meeting of the Designated Owners of the Lots within twenty-four (24) months after the date of recordation of the plat of Dave's View at Martin's Bluff or after Declarant has sold all but two (2) Lots, whichever is later. The Declarant shall arrange for the calling of the first meeting of the Association. The Association shall elect such officers and establish such bylaws, rules and regulations for the operation of the Association and enforcement of this Declaration that are reasonably required." (Ex. 105).

## APPENDIX “F”

### **“§6.14 Duties of Directors and Officers of an Association**

“The directors and officers of an association have a duty to act in good faith, to act in compliance with the law and the governing documents, to deal fairly with the association and its members, and to use ordinary care and prudence in performing their functions.”

The standard of care of that of an ordinary reasonable director of a common-interest community. The primary functions of the association in a common-interest community are to protect property values and quality of life by managing the common property. The directors must act in good faith and deal fairly with the association members.

If a director’s actions cannot be justified by applying the business judgment rule based on the circumstances that existed at the time of action which causes damages to the other party, then personal liability may result for that director.

### **“§6.16 Representative Government**

“Except as otherwise provided by statute or the governing documents, an association in a common-interest community is governed by a board elected by its members. The board is entitled to exercise all powers of the community except those reserved to the members.”

### **“§6.17 Voting Rights**

“Except as otherwise provided by statute or the declaration, votes are allocated to members on the basis of the number of lots or units owned that are currently subject to an obligation to pay assessments or dues...”

### **“§6.18 Meetings and Elections**

“Except to the extent the association is properly controlled by the developer under Section 6.19, and subject to reasonable procedures set forth in the governing documents or adopted by the association, members of a common-interest community have the right to vote in elections for the board of directors and on other matters properly presented to the members, to attend and participate in meetings of the members, to attend and participate in meetings of the members, and to stand for election to the board of directors...”

### **“§ 6.19 Developer’s Duty to Create an Association and Turn Over Control**

“(1) The developer of a common-interest-community project has a duty to create an association to manage the common property and enforce the servitudes unless exempted by statute.

(2) After the time reasonably necessary to protect its interest in completing and marketing the project, the developer has a duty to transfer the common property to the association, or the members, and to turn over control of the association to the members other than the developer.

(3) After the developer has relinquished control of the association to the members, the association has the power to terminate without penalty:

(a) any contract...”

### **“§ 6.20 Developer’s Duties to the Community**

members,  
members:  
“Until the developer relinquishes control of the association to the  
the developer owes the following duties to the association and its

“(1) to use reasonable care and prudence in managing the maintaining the common property;

(2) to establish a sound fiscal basis for the association by imposing and collecting assessments and establishing reserves for the maintenance and replacement of common property;

(3) to disclose the amount by which the developer is providing or subsidizing the services that the association is or will be obligated to provide;

(4) to maintain records and to account for the financial affairs of the association from its inception;

(5) to comply with and enforce the terms of the governing documents, including design controls, land-use restrictions, and the payments of assessments;

(6) to disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining; and

(7) to disclose all material facts and circumstances affecting the financial condition of the association, including the interest of the developer and the developer’s affiliates in any contract, lease or other agreement entered into by the association.”

### **“§ 6.21 Developer’s Power to Waive Provisions of the Declarations**

“A developer may not exercise a power to amend or modify the declaration in a way that would materially change the character of the development or the burdens on the existing community members unless the

declaration fairly apprises purchasers that the power could be used for the kind of change proposed.”

THE AMERICAN LAW INSTITUTE, Restatement of the Law Third – Property (Servitudes) (1998)

# SUZAN L CLARK ATTORNEY AT LAW

**July 18, 2012 - 7:07 PM**

## Transmittal Letter

Document Uploaded: 426871-Appellants' Brief.pdf

Case Name: Dave's View LLC et al v. Andy & Sue Whiteworth et al

Court of Appeals Case Number: 42687-1

**Is this a Personal Restraint Petition?**  Yes  No

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- Brief: Appellants'
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
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