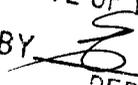


FILED
COURT OF APPEALS
DIVISION II
2012 NOV -6 PM 1:34
STATE OF WASHINGTON
BY 
DEPUTY

42687-1-II

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

DAVE'S VIEW, LLC, et al.,

Appellants,

v.

ANDY and SUE WHITWORTH, et al.,

Respondents.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....2

A. Factual Background.....2

B. Procedural Background.....5

III. ARGUMENT.....9

A. Standard of Review.....9

B. The Trial Court Was Correct in Ruling as a Matter of Law that the Development Control Period for Phase 1 Terminated on January 31, 2006.....10

1. The trial court only determined the end of the development period for phase 114

2. Developer’s argument that as long as Phases 3, 4 and 5 remain unsold, it may control the Homeowners’ Association for Phase 1 is wholly inconsistent with the language of the Declaration.....15

3. The trial court did not prohibit completion of the development using a common theme.....17

C. Findings of Fact Nos. 4, 6, 7, 22 and 31 Were Supported by Substantial Evidence and Should be Upheld by This Court.....20

1. Finding No. 4: The developer reserved the right to add property to the Association but had not done so.....20

2.	Finding No. 6: The HOA exists to collect assessments and maintain the common areas of the Property which currently encompasses the common areas of Phase 1 as delineated on the Plat of Phase 1.....	22
3.	Finding No. 7: The Association owes a duty to the Developer and Lot Owners to maintain the common areas	24
4.	Finding No. 22: There can be no recordings against Lot Owner titles without proper rules for enforcement and appeal.....	25
5.	Finding No. 31: Neither the Declarations nor the law gave authority to record Notices of past due assessments which were treated like liens against real property.....	29
	D. This Court Should Award Attorneys' Fees To Respondents.....	31
IV.	CONCLUSION.....	31

TABLE OF AUTHORITIES

CASES

<i>Ackerman v. Sudden Valley Community Assoc</i> , 89 Wn. App. 156, 944 P.2d 315 (1997).....	14
<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 344, 103 P.3d 773 (2004).....	19
<i>Hollis v. Garwall</i> , 137 Wn.2d 683, 696, 974 P.2d 836 (1999).....	11, 16
<i>Landmark Dev., Inc. v. City of Roy</i> , 138 Wn.2d 561, 980 P.2d 1234 (1999).....	10
<i>Mayer v. Pierce County Med. Bureau, Inc.</i> , 80 Wn. App. 416, 420-21, 909 P.2d 1323 (1995).....	16
<i>McKee v. AT & T Corp.</i> , 164 Wn.2d 372, 396, 191 P.3d 845 (2008).....	18
<i>Michak v. Transnation Title Ins. Co.</i> , 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003).....	9, 16
<i>Nelson v. McGoldrick</i> , 127 Wn.2d 124, 131, 896 P.2d 1258 (1995).....	18
<i>Queen City Sav. & Loan Ass'n v. Mannhalt</i> , 111 Wn.2d 503, 513, 760 P.2d 350 (1988).....	16
<i>Riss v. Angel</i> , 131 Wn.2d 612, 621, 934 P.2d 669 (1977).....	11-12, 16
<i>Schroeder v. Fageol Motors, Inc.</i> , 86 Wn.2d 256, 260, 544 P.2d 20 (1975).....	18
<i>Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates</i> , 76 Wn. App. 267, 883 P.2d 1387 (1994),.....	14
<i>Sheikh v. Choe</i> , 156 Wn.2d 441, 447, 128 P.3d 574 (2006).....	9

<i>Shorewood West Condo. Assoc v. Sadri</i> , 140 Wn.2d 47, 992 P.2d 1008 (2000).....	14
<i>Torgerson v. One Lincoln Tower, LLC</i> , 166 Wn.2d 510, 518, 210 P.3d 318 (2009).....	18
<i>Viking Properties, Inc. v. Holm</i> , 155 Wn.2d 112, 20, 118 P.3d 322 (2005).....	16
<i>Wimberly v. Caravello</i> , 136 Wn. App. 327, 336, 149 P.3d 402 (2006).....	16
<i>Zuver v. Airtouch Communications, Inc.</i> , 153 Wn.2d 293, 304-05,103 P.3d 753 (2004).....	18

STATUTES

RCW 64.38, <i>et seq.</i>	16, 19, 30
RCW 64.38.020.....	25
RCW 64.38.020(2)	19, 22, 24
RCW 64.38.020(11).....	25, 26
RCW 64.38.025.....	17
RCW 64.38.025(2).....	19
RCW 64.38.035(1).....	6
RCW 64.38.045(2).....	6
RCW 64.38.050.....	31

RULES

RAP 9.1.....	9
RAP 10.3(g).....	9

RAP 18.1.....31

I. STATEMENT OF THE ISSUES¹

A. Whether on summary judgment the trial court properly ruled:

a. that the development Period for Dave's View at Martin's Bluff Phase 1 ended 24 months from the date the Plat for Phase 1 was recorded or upon the sale of 33 of the 35 lots in Phase 1 (Finding of Fact No. 3);

b. that the Declaration did not provide for an extension of the Development Period for Phase 1 (Finding of Fact No. 5)

c. that January 31, 2006 was the date that development control for the Dave's View at Martin's Bluff homeowner association terminated and control of the Association shifted to the Phase 1 lot owners as of that date (Finding of Fact No. 8)?

B. Whether the trial court's Findings of Fact Nos. 4, 6, 7, 22 and 31 were supported by substantial evidence during the trial?

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¹ Findings of Fact Nos. 3, 5 and 8 were dispositive rulings made pretrial under the court's December 27, 2010 Order/Declaratory Judgment of Plaintiffs' Motion for Partial Summary Judgment.

II. STATEMENT OF THE CASE

A. Factual Background

Petitioner is Dave's View, LLC, developer of the Dave's View at Martin's Bluff community ("Developer"). Respondents include a group of homeowners ("Homeowners") who purchased lots within Phase 1 of the community located in Kalama, Washington. Developer created a Washington non-profit corporation on December 12, 2003 under the name of "Dave's View at Martin's Bluff" as the homeowners' association for Phase 1 of the development ("Association"). CP 421.

The original Declaration of Covenants, Conditions & Restrictions ("CC&Rs") for Phase 1 of Dave's View at Martin's Bluff ("Declaration") was recorded on April 20, 2004. CP 446. Section 26 of the original Declaration provided that a homeowners association would be formed, "organized in a democratic manner," and become effective upon 24 months from recordation of the development plat or after Developer had sold all but two lots, whichever was later. *Id.* This period is referred to herein as the "Development Control Period." CP 454.

All but two lots in Phase 1 were sold as of January 31, 2006, yet it is undisputed that Developer did not turn over control to the homeowners at that time. CP 404, 413.

Section 3 of the original Declaration required approval of the majority of Lot Owners, or 80% of Owners' written consent, to amend the Declaration, while reserving to Developer 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." CP 449.

Section 25 of the original Declaration gave to the Association (not the Developer) the right to assess and collect funds for common area maintenance. CP 453.

Since its creation in 2003 through the trial court's summary judgment ruling in the underlying lawsuit, despite sales of all but one lot in Phase 1, the Board of Directors of the Association consisted solely of Developer's principals and insiders – Chad Wilson, his wife and mother. CP 85, 418. In other words, Developer never turned over control of the Association to the homeowners until the trial court forced him to do so pursuant to the summary judgment order entered at the end of 2010. CP 366.

During this never-ending "Development Control Period," Developer attempted to make numerous unilateral and substantial changes to the Declaration without notice to, or a vote of, the actual homeowners. First, on October 7, 2004, Developer unilaterally recorded an "Amended & Restated Declaration," which purportedly changed the architectural and

building requirements for 15 of the 35 lots in Phase 1.² Developer recorded the Amended and Restated Declaration without notice to the 20 lot owners who had bought in Phase 1 at that time.³

Second, on January 3, 2006, Developer recorded a separate Declaration to govern Phase 2 of the development called the "Declaration of Covenants, Conditions and Restrictions for Dave's View at Martin's Bluff / Phase-2".⁴ This Declaration attempted to serve a multiplicity of purposes for Phase 2, including: creation of a separate Architectural Control Committee; withdrawal and exemption of two of the Developers' personally owned and developed lots from Association governance and assessment; creation of different membership and voting rights; creation of separate rules; creation of separate design guidelines; and imposition of separate assessments from Phase 1. *Id.*

This Phase 2 Declaration did not amend the Phase 1 Declaration, nor was the property in Phase 2 added to the definition of "Property" as stated in the original Declaration or Plat. CP 480-529. Finally, on February 27, 2009, Developer recorded a document that purported to

² The putative amended Declaration modified §5(d) relating to the front elevation of the exterior siding required; §5(e) to reflect that 5 of the 35 lots were required to build three car garages; §8 modified the dwelling size, square footage requirements. CP 468.

³ CP 402-406: Affidavit of Andy Whitworth.

⁴ CP 480-529: Declaration of Covenants, Conditions & Restrictions for Phase 2, Auditor's File No. 3283826.

replace both the Phase 1 and the Phase 2 Declarations by adding a Phase 3 to the community.⁵ This Declaration purported to replace the original Declaration, modified the Declaration for Phase 2, increased the assessments on the sold lots, including all 35 lots in Phase 1, for all common area costs and maintenance for subsequent phases, allowed Developer to use assessments and dues collected for purposes other than common area maintenance, exempted “all real property” owned by Developer from assessments, including those lots which it had improved by common area accessibility, drainage and roadways, including Developer’s homes. CP 529-541. Essentially, Developer burdened the homeowners with the developmental costs of the improvements and maintenance for the unsold lots.

B. Procedural Background

The underlying superior court action involved over three years of protracted and contentious litigation and motions practice, culminating in a seven-day bench trial in June 2011 with subsequent supplemental proceedings continuing to the present day. The pertinent procedural history is as follows:

On August 19, 2008, 17 lot owners from Dave’s View at Martin’s Bluff Phase 1 filed a complaint against Dave’s View LLC, Dave’s View Homeowner Association, Chad Wilson and his mother, Lynda Wilson, individually. CP 1-54. Homeowners alleged that Developer had violated

⁵ CP 530-541: Amended Declaration of Covenants, Auditor’s File No. 3387490.

RCW 64.38.035(1) and (2), RCW 64.38.045(2), and that Developer had improperly assessed homeowner association dues against them. *Id.*

On September 29, 2008, Developer filed an answer and counterclaims and alleged that Homeowners had failed to pay homeowner association assessments and violated restrictive covenants and architectural/design covenants in the Declaration. CP 55-63.

On September 29, 2010, Homeowners filed a motion for partial summary judgment. CP 356-361, 386-401, 402-406, 407-411, 412-541 and 546-548. The trial court granted the motion and ruled:

1. The Declaration recorded under Cowlitz County Auditor's File No. 3221251 is the controlling instrument for Phase One of Dave's View at Martin's Bluff which runs with the land and cannot be unilaterally amended or restated by the Declarant. (Fn. 1, 2);
2. All subsequent amended or restated Declarations purporting to attach to, modify or alter the controlling instrument, i.e., Amended and Restated Declarations recorded under Auditor's File Nos. 3238049 (10/07/04), 3283826 (01/03/06), and 3387490 (02/27/09), records of Cowlitz County, are unenforceable and inapplicable as against Lots 1-35 of Phase One of Dave's View at Martin's Bluff. (Fn. 3);
3. The Development Period cannot be undefined in perpetuity. (Fn. 3);
4. Developer had no authority to pass costs related to other phases of development or unsold lots on to the Lot Owners of Phase One. (Fn. 4);
5. Each lot in Phase One must be assessed for those maintenance and repair costs which are incurred by Phase One only by the following formula: The total amount of

maintenance and repair costs for Phase 1 common area multiplied by a fraction in which the numerator is 1 and the denominator is 35. (Fn. 4);

6. Road maintenance and/or Drainage maintenance and/or repair expenses which are inseparable from other subsequent Phases must be assessed to Phase One by the following formula: The total amount of the costs multiplied by a fraction in which the numerator is 1 and the denominator is 118. (Fn. 4);

7. In accordance with the specific provisions of the controlling instrument at §26, the Development Period for Phase One concluded 24 months from recordation of the Plat or when the Developer had sold all but 2 Lots therein [January 31, 2006]. (Decl. of Chad Wilson at p.2, lines 9-10). The owners of Phase One have the right to form a Home Owners Association.

CP 362-366.

In summary, the trial court ruled that the Declaration amendments recorded by Developer were not binding on Phase 1 because the clause purporting to reserve a right to modify the Declaration during its perpetual Development Control Period or “waive nonconformity therewith” was illusory. CP 365. Therefore, Developer’s subsequent amendments and restatements were unenforceable and inapplicable to Phase 1. *Id.* However, the court did not invalidate the effect of the amended Declarations as to Phases 2 and 3.

Developer filed a Motion for Reconsideration of the trial court’s ruling that the amendments to the Declaration recorded by Developer were void and ordering the two-tiered assessment system to be applied to the Dave’s View community. CP 579-594. The motion was denied.

Developer then filed a Motion for Discretionary Review with this Court, which also was denied. CP 599-617.

On June 6, 2011, the parties commenced a seven-day bench trial before the Honorable James Warne. Following trial, on August 30, 2011, the court entered its 10-page Findings of Fact, Conclusions of Law and Order Pursuant to CR 54(b), along with appendices. CP 367-376. On September 29, 2011, Developer filed its Notice of Appeal.

In the Assignments of Error contained in its opening brief, Developer states the trial court erred in entering eight separate Findings of Fact. In the second and final Assignment of Error, Developer states the trial court terminated the “Development Control Period” of the Association without legal authority. That ruling, however, was also made during summary judgment, well prior to trial. In both the Notice of Appeal and Opening Brief, Developer failed to identify the court’s summary judgment order or refer to any rulings made therein.

Several of the Findings of Fact claimed as erroneously entered by the trial court, and the court’s ruling regarding the Development Control Period, were previously decided on summary judgment. Thus, Assignment of Error No. 2 and purported Findings of Fact Nos. 3, 5 and 8 should be carved out of review as part of the trial, and instead, reviewed *de novo* based upon the record before the court at the summary judgment

hearing. Findings of Fact Nos. 4, 6, 7, 22 and 31 may be reviewed based on evidence admitted at trial.⁶

III. ARGUMENT⁷

A. **Standard of Review.**

The appropriate standard of review for an order granting or denying summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). “A motion for summary judgment is properly granted where ‘there is no genuine issue as to any material fact and. . . the moving party is entitled to a judgment as a matter of law.’” *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794–95, 64 P.3d 22 (2003) (quoting CR 56(c)). Consequently, this Court should review the trial court’s summary judgment rulings, that is, determination of January 31, 2006 as the date that development control for the Dave’s View at Martin’s

⁶ In its opening brief, Developer cites to certain exhibits that are not part of the official appellate record as they were not admitted at trial. Consequently, Homeowners move to strike Exhibits 105, 105A, 105B, 112 E-F, 114 A-G & 114 I-S of Appellant’s Opening Brief because Developer failed to comply with RAP 9.11.

⁷ Though Appellant identified eight specific Findings of Fact and the trial court’s ruling on the Development Control Period as Assignments of Error, the opening brief included a myriad of factual findings and legal conclusions that are tantamount to appealing the entire trial court’s rulings. Instead of attempting to segregate the appropriate legal argument from non-appealable verities under RAP 10.3(g), in this brief, Respondents respond only to argument relating to the specific Assignments of Error identified by Appellant.

Bluff homeowner association terminated, as well as purported Findings Nos. 3, 5 and 8, under a *de novo* standard of review.

The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. First, this Court must determine if the trial court's findings of fact were supported by substantial evidence in the record and, if so, decide whether those findings of fact support the trial court's conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 980 P.2d 1234 (1999). Here, as evidenced below, there was substantial evidence admitted at trial to support the trial court's Findings of Fact Nos. 4, 6, 7, 22 and 31.

B. The Trial Court Was Correct in Ruling as a Matter of Law that the Development Control Period for Phase 1 Terminated on January 31, 2006.

The trial court specifically held that the Declaration was a contract and committed no error in interpreting it as such. It does not appear that Developer challenges this ruling. At issue is the language defining what has been referred to as the "Development Control Period" and how it related to Developer's reservation of rights to modify the Declaration for Phase 1 within the 24-month period.

Section 26 of the Declaration defining the "Development Control Period" provides, in relevant part:

26. 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. . . .

CP 445, § 26.

Section 3 of the Declaration provides for the amendment of the Declaration and states, in pertinent part:

3. Duration. . . . This Declaration may be amended by vote of a majority of the then Owners of the Lots of Dave's View at Martin's Bluff Phase 1, in whole or in part, if the change or modification is supported in writing by the vote of 80% of the Designated Owners; then and in that event, a modification may be made at any time by filing a suitable written instrument for public record, signed by 80% or more of the Designated Owners. 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.

Id. at § 3.

Developer asserted that the last two lots referred to in Section 26 were the last two lots of *any phase* added to the project and thus, the "Development Control Period" could potentially never end as long as Developer never completes all the phases planned. *See* CP 365, 454 § 26. In other words, Developer argued it could retain control until it voluntarily decided that its "investment is protected." The trial court properly disagreed. *See* CP 365.

On partial summary judgment, Homeowners argued that the covenants of the original Declaration should be interpreted in the same manner as a contract. CP 386-401. Accord *Hollis v. Garwall*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999); *Riss v. Angel*, 131 Wn.2d 612, 621, 934

P.2d 669 (1977). Using contract interpretation principles, the definition of the Development Control Period should be interpreted as ending when all but the *last two lots of Phase 1* were sold. *See* CP 454 § 26. This is because: (1) the original Declaration consistently used the term “Lots” to refer to the lots in Phase 1 (*see* CP 447, ¶ (k)); (2) interpreting the last two lots to mean the last two lots in Phase 1 was consistent with the remainder of the language in the original declaration (*see* CP 406, 445 Recitals A and C, 447 ¶ (o), 448 §§ 2 and 3); and (3) Developer never properly “added” property to the development in a way that would require the court to interpret lots to include subsequent phases.

The Declaration specifically defined “Lots” to be a lot in Phase 1:

The word “Lot” or “Lots” refers to 35 individual tracts of real property comprising Phase 1 of Dave’s View at Martin’s Bluff (along with additional lots which *may be added* to the Property by Declarant) as divided by deed from the Declarant...” [“Definitions” at page 3, CP 447 ¶ (k).]

Importantly, no lots were ever “added” to the Property. Instead, as separate phases were built, separate Declarations were filed for those lots and phases. *See* CP 478.

The trial court properly ruled that the Declaration should be interpreted to be consistent with the use of language in the remainder of the Declaration. The Declaration states unequivocally that:

- The Property encumbered includes 35 lots located in Phase 1 (CP 445, Recitals A);
- The words “Lot” or “Lots” are defined throughout the

document as the 35 Lots of Phase 1 (CP 447 ¶ (k));

- The Declaration corresponds directly to the duly recorded Plat, which Plat consisted of only Phase 1 (CP 406, 445 Recital A, and at 447 ¶ (o)); and

- The Declaration's duration clause [§ 3] specifically refers to Phase 1 only. *Id.*

Developer unsuccessfully argues that the "last two lots" must refer to the last two lots in any phase. However, when read strictly, the original Declaration provides that additional lots "which *may* be added to the Property." CP 447 (emphasis added). Thus, Developer reserved the right to add Phases to the development, yet he failed to do so.

Instead of amending the Phase I Declaration by adding additional lots or phases to the document and Plat, Developer filed a separate Declaration expressly governing Phase 2 (Entitled "Declaration of Dave's View at Martin's Bluff/Phase 2"). CP 478. The new Declaration did not change the definition of "Property" to include lots in Phase 1. "The Property" section as defined in the original Declaration remain unchanged: "... 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 Volume 13 Page 192 Fee#3221250." CP 445, Recitals at A. Thus, the trial court reasonably interpreted the term "last two lots" to mean the last two lots in Phase 1 and properly terminated the Development Control Period for Phase 1 based on that interpretation. This Court should reach the same conclusion and uphold the trial court's ruling

that the Development Control Period for Phase 1 terminated on January 31, 2006.

1. The Trial Court Only Determined the End of the Development Period for Phase 1.

In its summary judgment ruling, the trial court did not end the Development Control Period for all phases, but rather, held that under Section 26 of the original Declaration, the Development Control Period for Phase 1 ended when the Developer had sold all but two lots in Phase 1: January 31, 2006. CP 362-366. The trial court did not rule on the end the Development Control Period for any phase of the development which remained undeveloped. The trial court determined that the Development Control Period concluded for Phase 1 in accordance with the provisions of the Declaration.

Developer's reliance upon *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates*, 76 Wn. App. 267, 883 P.2d 1387 (1994), *Shorewood West Condo. Assoc v. Sadri*, 140 Wn.2d 47, 992 P.2d 1008 (2000), and *Ackerman v. Sudden Valley Community Assoc*, 89 Wn. App. 156, 944 P.2d 315 (1997), is unpersuasive as each of the foregoing cases is inapposite to the factual circumstances and legal issues on appeal here. The question to be answered relating to the "Development Control Period" is not whether a declarant of a homeowner association may retain the right

to add property to a community or alter its CC&Rs, but rather, the manner in which such changes are made. None of the cases relied upon by Developer stand for the proposition that following creation of a homeowner association and after homes or lots have been conveyed to owners, a declarant may unilaterally change or modify the CC&Rs, assessments or record amended Declarations without input or approval of a stated percentage of the association members, as was done in this case. RP: June 8, 2011, Vol. I at 3:9-12:24. Developer acted without authority, and such action in attempting to hold onto and control the Dave's View homeowners' association for Phase 1 indefinitely was properly voided by the trial court.

2. Developer's argument that as long as Phases 3, 4 and 5 remain unsold, it may control the Homeowners' Association for Phase 1 is wholly inconsistent with the language of the Declaration.

In the mind of Declarant Chad Wilson, the "Development Control Period" apparently survives in perpetuity as long as Developer owns two or more Lots in any of the phases of Dave's View. See § 1, "Definitions" of the CC&Rs.⁸ Allowing the Developer unilateral authority to modify the CC&Rs without any input from the other homeowners of the Dave's View community - in perpetuity - is onerous, unjust and contravenes the purpose

⁸ The "Development Period" is defined as "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." CP 448: Section 1(j) of the CC&Rs.

of establishing an association of homeowners, as required under § 26 of the CC&Rs and state law under RCW 64.38, *et seq.* The trial court committed no error in holding that the Development Control Period ended when the last two lots in Phase 1 remained to be sold.

Courts interpret covenants like contracts. *See Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999). Basic rules of contract interpretation apply when interpreting restrictive covenants. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). A court's primary objective in interpreting a restrictive covenant is ascertaining the intent of the original parties to the covenants. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005). In determining intent, the court gives language its ordinary and common meaning. *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). Courts resolve any doubts in favor of the free use of land. *Riss*, 131 Wn.2d at 621.

The general rule in Washington is where a contract is ambiguous and *parol evidence* is not available to resolve the ambiguity, the ambiguity is construed against the drafter of the contract. *Queen City Sav. & Loan Ass'n v. Mannhalt*, 111 Wn.2d 503, 513, 760 P.2d 350 (1988). "A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning." *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 420-21, 909 P.2d 1323 (1995). Here, because § 3 of the Declaration and Amended

Declaration is contradictory, unreasonable, inequitable and ambiguous, it should be construed against the Developer. Consequently, Developer did not have unilateral authority without input or approval from Association homeowners to amend the CC&Rs for Phase 1 and the trial court's summary judgment rulings should not be vacated by this Court.

3. The Trial Court Did Not Prohibit Completion of the Development Using a Common Theme.

The trial court did not deprive the Developer of any rights as to completing the overall development within the common theme he desires. The trial court made no ruling purporting to modify the architectural design or the general plan which the Developer authored for future phases. The trial court ruled that the "Development Control Period" under the CC&Rs for Phase 1 was procedurally and substantively unconscionable and this ruling should be upheld by this Court. Developer imagined that the "Development Control Period" would exist in perpetuity as long as the Developer owns two or more Lots in any of the phases of Dave's View. Allowing the Developer to unilateral amend the CC&Rs indefinitely, without any input from the other Lot Owners of the Dave's View community, would be onerous, unjust and contravenes the purpose of establishing an association of homeowners, as required under § 26 of the CC&Rs and state law under RCW 64.38.025.

Procedural unconscionability “relates to impropriety during the process of forming a contract” and refers to “blatant unfairness in the bargaining process and a lack of meaningful choice.” *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975); *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 518, 210 P.3d 318 (2009). “Whether an agreement is unconscionable is a question of law for the Courts.” *McKee v. AT & T Corp.*, 164 Wn.2d 372, 396, 191 P.3d 845 (2008).

Procedural unconscionability is determined “...in light of the totality of the circumstances, including (1) the manner in which the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms, and (3) whether the terms were ‘hidden in a maze of fine print.’” *Torgerson*, 166 Wn.2d at 518-19 (internal quotations and citations omitted). Courts do not apply the *Torgerson* factors “mechanically without regard to whether in truth a meaningful choice existed.” *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995). “[T]hat an agreement is an adhesion contract does not necessarily render it procedurally unconscionable,” but an adhesion contract is procedurally unconscionable where the party lacks “meaningful choice.” *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 304-05, 103 P.3d 753 (2004).

Here, there is little doubt that Homeowners and the other Lot Owners at Dave's View had no meaningful choice in altering the terms of the CC&Rs when they purchased their lots. Also, the express language of the "Development Control Period" is hidden in a maze of print— 3 lines out of 16 pages that comprise the CC&Rs. Moreover, the Developer never highlighted the terms of the "Development Control Period" to the prospective purchasers or Lot Owners at Dave's View. CP 409: Michels Affidavit at ¶¶ 8 through 10. Lastly, the prospective purchasers and eventual Lot Owners did not have a reasonable opportunity to understand the meaning of the "Development Control Period" and its legal import to limit their rights and the rights of the other Association members. *Id.*

In addition to procedural unconscionability, the open-ended "Development Control Period" would be substantively unconscionable. Substantive unconscionability involves cases "where a clause or term in the contract is ... one-sided or overly harsh...." *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004). A plain reading of the term showing the Developer can retain certain developmental rights indefinitely is undoubtedly "one-sided and overly harsh."

Lastly, allowing the Developer unilateral authority to modify the CC&Rs beyond the time that the Association should be transitioned to the homeowners directly contravenes RCW 64.38.025(2). Under the statute,

“[t]he board of directors shall not act on behalf of the association . . . to take any action that requires the vote or approval of the owners. . . .” Even assuming *arguendo* that the Developer was a legitimate director, to unilaterally amend the CC&Rs would trump the Lot Owners’ right to approve and vote on any such alterations to the Declaration, as required by the statute.

Under state law and the doctrines of procedural and substantive unconscionability, and to support the legislature’s intent in ensuring homeowner associations are governed consistently under RCW 64.38, *et seq.*, this Court should affirm the trial court in holding that the “Development Control Period,” as stated in § 3 of the original Declaration, terminated on January 31, 2006.

C. Findings of Fact Nos. 4, 6, 7, 22 and 31 Were Supported by Substantial Evidence and Should be Upheld by This Court.

1. Finding No. 4: The Developer reserved the right to add property to the Association but had not done so.

There is substantial evidence in the trial record supporting the court’s finding that Developer reserved the right to add property to Phase 1 of the Association, but failed to do so. The most compelling evidence of this finding came from Developer himself. Chad Wilson testified at trial that he purposely only included the legal description for Phase 1 of the development in the Declaration for Phase 1. RP: June 16, 2011, Vol. I, p.

69:4-18. He also testified that his intent was to record a separate Declaration and impose separate guidelines against Phase 2 that would not affect Phase 1 owners because the style and quality of homes for Phase 2 was planned to be different—“a little nicer homes.” RP: June 16, 2011, Vol. I, pp. 83-88. Developer clearly testified that he recorded separate Declarations for Phase 1 and 2. RP: June 16, 2011, Vol. I, p. 74:15-22.

Witness Mike Wojtowicz, Director of Cowlitz County Building & Planning, also confirmed at trial that Phase 1 and 2 are separate plats and that Phase 2 was never legally annexed into Phase 1. RP: June 16, 2011, Vol. II, 117:11-18:24. Also, witness Diana Downing, the Developer’s real estate agent, testified that if Developer intended to develop Dave’s View at Martin’s Bluff as one consistent community, he should have referred to Phases 1 through 3 in the original Declaration, but he did not. RP: June 10, 2011, Vol. I, pp. 62:23-64:10.

Moreover, the putative amended Declarations recorded by Developer expressly referred and related to Phase 2 of the community. CP 480, 528-529. On their face, the documents were unrelated to Phase 1. Based on the documentary evidence and live testimony admitted at trial, there was overwhelming evidence that Developer failed to add property to Phase 1 of Dave’s View at Martin’s Bluff prior to the end of the

Development Period. Accordingly, this Court should uphold the trial court's Finding of Fact No. 4.

2. Finding No. 6: The HOA exists to collect assessments and maintain the common areas of the Property which currently encompasses the common areas of Phase 1 as delineated on the plat of Phase 1...

There is no dispute that "the Homeowners' Association exists to collect assessments and maintain the common areas of the Property. . . ." In fact, in its opening brief, Developer cites to statutory authority and provisions of the Association's governing documents supporting this precise fact. Instead, Developer claims the trial court "mistakenly tied certain common area expenses to certain phases (lots) within Dave's View." Appellant's Brief at p. 41. Developer claims Finding of Fact No. 6 "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.'" *Id.* at p. 42.

Once again, it is undisputed that the Dave's View board of directors had the power to adopt and amend budgets and impose and collect assessments for common expenses from owners, as allowed under Section 10.1 of the Bylaws and RCW 64.38.020(2). The trial court's Finding of Fact No. 6 does not violate this principle. The dispute appears

to be on the second clause of the Finding, that is, that the term “Property” refers to “Phase 1 as delineated on the Plat, and any other property which is later added by the Developer.” CP 406, 446. In essence, this argument is tied to Findings of Fact Nos. 4 and 7, which Developer claims is erroneous in segregating Phase 1 from the other phases contemplated and platted separately by Developer.

There is substantial evidence in the trial record that the “Property” at issue in the case was limited to Phase 1. The Declaration defined the “Plat” as “the recorded Plat of Phase 1 of Dave’s View at Martin’s Bluff recorded in Cowlitz County, Washington and any revisions thereto after the date hereof.” CP 406, 446. There was no evidence admitted at trial that Developer revised the Plat for Phase 1 to include any additional phases or property to Phase 1.

The testimony highlighted in the previous section relating to Finding of Fact No. 4 applies here and similarly supports the trial court’s Finding of Fact No. 6. Because Developer recorded a “stand alone” Declaration and plat for Phase 1 of Dave’s View at Martin’s Bluff, and subsequently recorded documents did not legally “add to” Phase 1, this Court should uphold the trial court’s Finding of Fact that the Homeowners’ Association exists to collect assessments and maintain the common areas of the Property which currently encompasses the common

areas of Phase 1 as delineated on the Plat, and any other property which is later added by the Developer.

3. Finding No. 7: The Association owes a duty to the Developer and Lot Owners to maintain the common areas,

As with the preceding Finding, there is no dispute that “the Association owes a duty to the Developer and Lot Owners to maintain the common areas, . . .” Rather, Developer challenges the trial court’s Finding that the “common areas include all of the common areas delineated on the plat of Phase 1 and the main private road known as Dave’s View which is shared with Phases 2 and 3.” Once again, the dispute involves the trial court segregating Phase 1 common areas from subsequent phased common areas (except for maintenance costs associated with the private road that runs through each of the phases). As discussed in the two preceding sections involving Findings of Fact Nos. 4 and 6, there was substantial evidence admitted at trial supporting the trial court’s Findings that Phase 1 common areas are separate and distinct from the common areas of other phases of the development (with the exception of the private road known as Dave’s View Drive).⁹ Accordingly, this Court should uphold the trial court’s Finding of Fact No. 7.

⁹ There is no dispute that Phase 1 homeowners are responsible for paying pro rata maintenance costs for their share of costs to maintain the Dave’s View Drive.

4. Finding No. 22: There can be no recordings against Lot Owner titles without proper rules for enforcement and appeal.

Revised Code of Washington § 64.38.020 provides, in pertinent part:

Unless otherwise provided in the governing documents, an association may:

* * *

(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;

(Emphasis added). Thus, under the Washington Homeowners' Association Act, Chapter 64.38.020(11), a homeowner association such as Dave's View cannot levy fines unless there is notice and an opportunity to be heard in accordance with procedures provided in the Association's Bylaws or rules and regulations along with a previously established fine schedule.

The Dave's View at Martin's Bluff Declaration contains a section relating to Architectural Review Committee ("ARC") protocols, designed to ensure the overall planning philosophy of the community is carried out

as a common plan or theme. CP 454-455. The section contains clear guidelines for appeal of any ARC resident aggrieved by a decision of the ARC. CP 455.

Section 6.3 of the Bylaws of Dave's View at Martin's Bluff states:

. . . [T]he Board of Directors may exercise all such powers of the Association and do all such lawful acts and things as are not directed or required to be exercised or done by the members of the Association by statute or by the Articles of Incorporation or by these Bylaws, including, but not limited to, the following:

* * *

7. 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. Such rules and regulations, and amendments thereto, shall be binding upon the members *when the Board has approved them in writing and mailed a copy of such rules and regulations, and all amendments, to each member at the address of the member reflected in the records of the Association.*

CP 430-31 (emphasis added).

Evidence presented at trial demonstrated that in imposing assessments and fines against Mr. Whitworth and others for alleged ARC violations, Developer failed to follow RCW 64.38.020(11), as well as the rules he himself imposed and adopted in the Association's CC&Rs. For example, Mr. Whitworth received a notice that the front elevation of his house did not contain sufficient rock and brick, even though the house had

been completed for over a year and the original Declaration contained no language as to a brick or rock requirement. RP: June 7, 2011, Vol. I at pp. 29-30. In fact, the August 8, 2006 notice referenced a change in the CC&Rs that had not previously been provided to Mr. Whitworth or any other Phase 1 homeowner. RP: June 7, 2011, Vol. I at pp. 30-32; Plaintiff's Ex. 7

Shortly after receiving the notice, Mr. Whitworth met with Developer's representatives and as a result of the meeting, agreed to add additional brick and rock to his home at a cost of \$3,800. RP: June 7, 2011, Vol. I at pp. 38-39. Even after Mr. Whitworth added additional brick and rock to his home, Developer still recorded a lien against Whitworth's property, alleging "Grantor is in default, pursuant to Section 5(c) of the CC&Rs and the grantor failed to complete the exterior finish of the dwelling unit, so it is not in compliance with the CC&Rs." RP: June 7, 2011, Vol. I at pp. 39-41; Plaintiff's Ex. 9. Developer recorded a lien against Whitworth's property even though the homeowner was not in violation of Section 5(c) of the Declaration and was never delinquent with any past due assessments. *Id.*

At trial, Developer Chad Wilson testified that the governing documents he authored (both the Declaration and the Bylaws) clearly stated that the Declaration would control when presented with any conflict

with the other governing documents. RP: June 17, 2011, Vol. I at 135:21-137:15. He testified that there were closed meetings only and no appeal process because he hadn't been asked for one, that the Bylaws did not give him authority to assess the lot owners and that there were conflicts within the Bylaws that were to be controlled by the language of the Declaration. RP: June 17, 2011, Vol. I at 132:14-133:24. He testified that he charged assessments without regard to the language of the governing documents because he believed that the governing documents did not apply during the development period and that he was entitled to change them as he saw fit. RP: June 17, 2011, Vol. I at 133:25-134:18. All of this testimony contravenes the Washington Homeowners' Association Act and substantially supports the trial court's Finding of Fact No. 22.

Notwithstanding substantial evidence in the trial record of Developer failing to follow the enforcement and appeal procedures prior to recording liens against lot owners, that is not the specific Finding of Fact entered by the trial court. Finding No. 22 does not state that Developer failed to follow the proper rules for enforcement and appeal; rather, simply that "[t]here can be no recordings against Lot Owner titles without proper rules for enforcement and appeal." Thus, there is no basis for challenging this Finding, as under state law and the express language of the Dave's View at Martin's Bluff Declaration, assessments for ARC or

other CC&R violations cannot be assessed without proper authority. Proper authority is obtained by adopting and following published CC&Rs and rules with an opportunity to be heard. Accordingly, this Court should uphold the trial court's Finding of Fact No. 22.

5. Finding No. 31: Neither the Declarations nor the law gave authority to record Notices of past due assessments which were treated like liens against real property.

The trial court entered Finding of Fact No. 31:

Neither the declarations nor the law gave authority to record Notices of past due assessments which were treated like liens against real property.

CP 373.

Homeowners do not dispute that when properly followed—which was not done by Developer in this case—the original Declaration for Phase 1 provided authority for the Association—not Developer—to record liens against real property based on past due assessments. Here, however, there was substantial evidence admitted at trial that Developer himself unilaterally assessed fines and increased annual assessments against Dave's View at Martin's Bluff homeowners in contravention of the Association's CC&Rs. RP: June 16, 2011, Vol. I at 77:6-80:16; 97:9-105:24; CP 409. There was further evidence that Developer himself recorded notices of past due assessments against Homeowners that acted

to cloud title. RP: June 8, 2011, Vol. I at 76:19-78:2, 80:11-84:14; June 17, 2011, Vol. I at 115:25-116:2; 118:1-120:4.

In its oral ruling, the trial court explained the fact that there was no authority on which the Developer could rely for his clouding of two of the Plaintiffs' titles to their properties. RP: June 27, 2011; Vol. I at 14: 16–25. Plaintiffs Jeff and Amy Hulse and Felix and Jolene Haro were both damaged by the Developer's recording of a Notice of Past Due Assessment, which the title company testified that it treated as a lien. *Id.* at 15:1-16:4; RP: June 8, 2011, Vol. I at 76:19-78:2, 80:11-84:14. The trial court ruled that neither the Homeowners' Association Act nor the Declaration for Dave's View at Martin's Bluff provided authority for recording those documents which created a slander on the title of Hulse and Haro. CP 374-75; RP: June 27, 2011, Vol. I at 14:16-16:4.

Also, Developer Chad Wilson testified at trial that the Bylaws at Section 6.4 dictated that the board could not take any action without a vote of the owners to assess fines or liens against lot owners, and that he disagreed with the language of his own Bylaws. RP: June 17, 2011, Vol. I at 132:14-133:24.

Developer lacked authority under RCW 64.38, *et seq.* and the Bylaws and Declaration of Dave's View at Martin's Bluff to record

notices of past due assessment and/or record liens against the lot owners.

Thus, this Court should uphold the trial court's Finding of Fact No. 31.

D. This Court Should Award Attorneys' Fees to Respondents.

Respondents respectfully request an award of reasonable attorneys' fees and expenses incurred during this appeal pursuant to RAP 18.1. Attorneys' fees and costs were awarded to Respondents in the underlying action by the trial court as allowed under RCW 64.38.050. CP 376; 380-82.

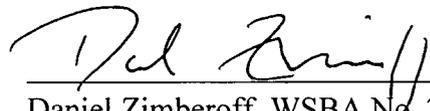
IV. CONCLUSION

This is a case where a developer staunchly refused to unleash his grip on a homeowner association, even when his conduct violated state law and the very governing documents he created. Based on the statutory and case authority and evidence submitted to the court for the summary judgment motion, this Court should affirm the trial court's granting of partial summary judgment ruling that the "Development Control Period" for Phase 1 of Dave's View at Martin's Bluff terminated on January 31, 2006 and that the Declaration does not provide for an extension of the Development Control Period for Phase 1 beyond that date. Additionally, there was substantial evidence admitted at trial supporting the trial court's Findings of Fact Nos. 3, 4, 5, 6, 7, 8, 22 and 31. Affirming the trial

court's rulings will allow fairness, balance and harmony to exist within the
Dave's View at Martin's Bluff community.

Respectfully submitted this 5th day of November, 2012.

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ANDY & SUE WHITWORTH,
et al,

Respondents,

v.

DAVE'S VIEW, LLC, *et al,*

Appellants.

No. 42687-1-II

CERTIFICATE OF
SERVICE BY MAIL

The undersigned hereby certifies that she served a true and correct copy of the RESPONDENTS' BRIEF in the above-entitled Cause:

by mailing a true and correct copy thereof in a sealed, first class, postage prepaid envelope addressed properly to the below-stated Attorneys and depositing the same in the U.S. Mail at Longview, Washington on the date set forth below:

Court of Appeals (*via email*)
coa2filings@courts.wa.gov

Suzan L. Clark, Esq. (*via email and first class*)
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Dated this 5th day of November, 2012.

/s/ Rachel L Paquette

RACHEL L. PAQUETTE

Legal Assistant to Vincent L. Penta, P.S.