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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

No. 43434-2-II

BY

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

GARY A. CROWELL AND SUSAN M. HYDE,  
HUSBAND AND WIFE; AND  
CONNIE MAUREEN CONNELLY, PERSONAL REPRESENTATIVE  
OF THE ESTATE OF WARD B. HUNT, DECEASED

Respondents,

and

BARRY REIMER AND KELLY REIMER,  
HUSBAND AND WIFE

Appellants,

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APPEALS FROM THE SUPERIOR COURT FOR PIERCE COUNTY  
STATE OF WASHINGTON  
THE HONORABLE STEPHANIE AREND

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BRIEF OF APPELLANTS

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## **I. INTRODUCTION**

The parties are owners of three parcels of real property that are the subject of a “Declaration of Protective Covenants, Conditions and Restrictions” recorded in 1998 (the 1998 Protective Covenants). The 1998 Protective Covenants are significantly directed to the protection of marine views from each of the three parcels in the small development.

Relying upon a provision of the 1998 Protective Covenants allowing a “majority” to amend the 1998 Protective Covenants, two of the three parcel owners (the waterfront property owners) “amended” the 1998 Protective Covenants over the objection of the Appellants (the upland land owners), by eliminating all of the provisions protective of the marine views and other amenities of the small development. They even eliminated the enforcement provisions.

The parties each moved for summary judgment: Appellants argue that the changes made wholly eliminate provision for the protection of views, fail to reconcile the provisions of the 1998 Protective Covenants (protecting views and other amenities into perpetuity on the one hand and on the other allowing 2 of 3 owners to “amend” the provisions), and are both unreasonable and inequitable.

The Trial Judge ruled against the Appellants' motion to reinstate the 1998 Protective Covenants and to enforce them as to a view blocking tree, dismissing Appellants' first two causes of action and upheld the Amended Covenants as modified by a majority of the property owners (2 of 3). In doing so the Trial Court erred.

## **II. ASSIGNMENT OF ERROR**

The Trial Judge erred by dismissing Appellants' first two causes of action (that the Amended Covenants be declared invalid and the 1998 Protective Covenants be reinstated; and that the view protections of the 1998 Protective Covenants be enforced).

## **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

Should the 1998 Protective Covenants be reinstated and enforced and the Amended and Restated Covenants declared invalid because the removal of the protective provisions of the 1998 Protective Covenants destroys (eliminates) the amenity protections fundamental to the general scheme or plan of the development, and is therefore unreasonable and inequitable; fails to reconcile the language of the 1998 Protective Covenants (view protection v. right to amend) and ignores the expectation of the Appellants that view protections should protect their property value and their enjoyment of the marine views in "perpetuity"?

#### **IV. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT**

Appellants complain that the Respondents inappropriately (unreasonable and inequitably) amended the protective provisions of protective covenants relied upon by the Appellants right out of existence. This case turns on whether, under Washington law, the total elimination of the protective covenants that safeguard the amenities of the subject property is such a departure from the general scheme of the development as to be unreasonable and therefore unsupportable.

Plaintiffs/Appellants own the upland parcel and the Defendants/Respondents own the two waterfront parcels over and across which Appellants (for the time being) enjoy the marine views of Hales Pass and Wollochet Bay. Respondent Connie Maureen Connelly is the daughter and personal representative of the original declarant of the 1998 Protective Covenants, Ward A. Hunt, deceased (CP 1-33, Exhibit II).

The original declarants imposed Protective Covenants, Conditions, and Restrictions on the three parcels of land now owned by the parties herein. "1998 Protective Covenants" (CP 1-33, Exhibit II). These original protective provisions, sometimes referred to herein as the "1998 Protective Covenants" were intended to enhance the desirability of the three parcel development, especially the upland parcel eventually purchased by

Appellants. The protective provisions **eliminated** by Respondents' amendment include **all of the provisions for view protection** set forth in paragraph 4 of the 1998 Protective Covenants" (CP 1-33, Exhibit II); including language generally prohibiting

“...construction of **any kind or nature**, or landscaping of **any kind or nature** which would **in any way obstruct the view** of an adjoining lot subject to these protective covenants, conditions and restrictions.” (Emphasis added)

Additionally, section 4 of the 1998 Protective Covenants (CP 1-33, Exhibit II), eliminated by the Respondents' amendment, was designed and intended to limit improvement of the three parcels to one single family residence per lot, but permitting the construction of one 'accessory dwelling, provided, however that the location of any such 'accessory dwelling' be subject to the **unanimous approval of all lot owners**. Also allowed are 'out buildings' so long as they conform to the 1998 Protective Covenants regarding placement so as not to diminish views. All such provisions for protection of views, the whole section regarding view protection, were eliminated by Respondents' amendments.

Section 4 of the 1998 Protective Covenants (CP 1-33, Exhibit II), entitled "Construction", eliminated by the Respondents, provides:

4. Construction.

(a) With the Exception of Presently Existing Structures and Landscaping, there shall be no construction of any kind or nature,

or landscaping of any kind or nature which would in any way obstruct the view of an adjoining lot subject to these protective covenants, conditions and restrictions. Fences shall be no higher than six (6) feet. No structure, fence, or landscaping of any kind or nature shall be constructed nearer to the shoreline than existing landscaping and structures.

(b) There shall be permitted construction of one single family residence per lot, and the construction of one "accessory dwelling" shall be permitted, provided, however that the location of said "accessory dwelling" shall be subject to the unanimous approval of all lot owners. Said "accessory dwellings", excluding garages, porches, and eaves shall have a living area of not more than one thousand (1,000) square feet, and no multi-level construction shall be permitted. Provided, however that a daylight basement home with one story above ground level is permitted. Provided further, however that two-story homes may be permitted on parcel C or for accessory dwelling units, provided they do not obstruct the views enjoyed by parcels A, B, or C. Nothing contained herein shall prohibit the construction of "out buildings" provided, however, that said "out buildings" must conform to these Protective Covenants, conditions and restrictions, and they must meet all Pierce County building code requirements.

(c) Any dwelling or structure erected or placed on any lot shall be completed as to external appearance including finish painting, within six (6) months from the date framing commences. Landscaping shall be completed within six (6) months from the date said dwelling is completed.

(d) No fence, wall, or hedge shall be erected or placed on any lot without the unanimous approval of all lot owners.

(e) No building shall be located on any lot nearer to the lot lines than required by the codes and ordinances governed by Pierce County.

By their terms, the 1998 Protective Covenants (CP 1-33, Exhibit II)

“...are for the purpose of enhancing and protecting the value, desirability and attractiveness...” of the subject property, to inure to the benefit of each owner thereof and to impose on each lot a servitude in favor of each other lot.”

With the stroke of a pen the Respondents have completely changed the plan for the property from a development protective of its amenities to one with no protection of amenities and particularly no protection for the view that enticed the purchase of the upland parcel by the Appellants from the declarant of the 1998 Protective Covenants, and encouraged them to build their home there.

That is, the Appellants, in reliance upon the protective provisions of the 1998 Protective Covenants, purchased the upland parcel from Ward A. Hunt and Rose Ann Hunt, the original declarants of the 1998 Protective Covenants; and built their home to take advantage of the marine views to the north over the waterfront parcels now owned by Respondents.

However, on January 6, 2012, the Respondents, owners of the waterfront parcels, a “majority” of the (3) lot owners subject to the 1998 Protective Covenants, amended (eliminated) the view and other protective provisions upon which the Appellants had relied. The elimination of the view protection provisions that help support the economic value of Plaintiffs’ property and protect the amenity of the marine views to the north over and across the Respondents’ lands is huge. The Amended

Covenants (CP 1-33, Exhibit III) do not regulate the height and placement of structures and landscaping that could affect the views from Appellants' upland parcel. Rather than enhancing and protecting the value, desirability and attractiveness of the subject property (the stated purpose of the 1998 Protective Covenants), the Amended Covenants (CP 1-33, Exhibit III) eliminate the protections of amenities and leave the Plaintiffs' property wholly at the whim and mercy of the Respondents and their successors re the placement of view-blocking landscaping and buildings. This is not an incremental change to permitted use of the parties' lands.

The purging of the view and other protective provisions from the 1998 Protective Covenants (CP 1-33, Exhibit II) changes (eliminates) the ability of Appellants to protect the amenities they had a right to believe were assured when they purchased from the declarant. The Amended Covenants (CP 1-33, Exhibit III) depart dramatically from the original 1998 Protective Covenants (CP 1-33, Exhibit II) in other ways as well: Restrictions on the conduct of businesses or commercial use of the property has been eliminated, as have provisions limiting and controlling pets (sections 6 and 7). Also eliminated are provisions pertaining to the maintenance of structures and landscaping (section 8); regulation of garbage and trash and noxious activity (sections 9 and 10). The stated right of an affected parcel owner to enforce the protections of the

Covenants and be awarded attorney fees is eliminated (section 12). To say that the original scheme or plan of the three parcel development is destroyed by the Respondents' amendments is an understatement.

## V. ARGUMENT

**Amended covenants and restrictions will not be upheld if they are unreasonable, are done in bad faith, or destroy or depart from the original plan of the development.** Washington's Appellate Courts have several times assessed the appropriateness of amended covenants over the challenge of a minority of affected property owners and have devised an analysis to help decide the equitable issues presented when protective covenants are amended pursuant to a provision that permits their amendment by less than all of the affected property owners, and the Washington case law is supportive of the Appellants' position in the instant case. See *Lakemoor Community Club, Inc., v. Swanson*, 24 Wn. App. 10, 15; 600 P.2d 1022 (Div. II, 1979) wherein the Court declined to uphold action taken under a right-to-amend clause that it deemed to be unreasonable and taken in bad faith. The *Lakemoor* Court recognized that the privilege to amend protective covenants "...must be interpreted in such a manner as to give meaning to all of the applicable restrictions and covenants" citing *Flamingo Ranch Estates, Inc. v. Sunshine Ranches*

*Homeowners, Inc.*, 303 So.2d 665, 666 (Fla. App. 1974), for the following:

In a sense, there is an inherent inconsistency between an elaborate set of restrictive covenants designed to provide for a general scheme or plan of development (generally considered to be for the benefit of the respective grantees), and a clause therein whereby the grantor reserves to itself the power at any time in its sole discretion to change or even arbitrarily abandon any such general scheme or plan of development (a power which is solely for the benefit of the grantor). **When such occurs, as it has in this case, rules of construction require that clauses which are apparently inconsistent with or repugnant to each other be given such an interpretation and construction as will reconcile them, if possible.** (Emphasis added)

In the instant case, this can be done by reading into the reservation clause a requirement of reasonableness, . . . We hold, therefore, that the clause in the Declaration of Restrictions, which reserves to the owner “the right to alter, amend, repeal or modify these restrictions at any time in its sole discretion” **is a valid clause so long as it is exercised in a reasonable manner as not to destroy the general scheme or plan of development.** (Emphasis added.)

See also *Johnson v. Three Bays Properties, # 2, Inc.*, 159 So.2d 924, 4 A.L.R.3d 565 (Fla.App.1964); . . . .*Fairfax Community Ass'n v. Boughton*, 70 Ohio L.Abs. 178, 127 N.E.2d 641 (Franklin County C. P. 1955).”

A protective covenant turned over is a restrictive covenant. The ability to amend is not dependent upon whether the amending majority is trying to impose or remove restrictive covenants; it is dependent upon whether their right to amend “. . .is exercised in a reasonable manner as not to destroy the general scheme or plan of development”. *Lakemoor, supra.*

*Johnson v Three Bays Properties, #2, Inc., supra* at pages 925-6 (cited above in support of the *Lakemoor* decision by the Court of Appeals) recognizes that words allowing change (such as the right to “amend” as in the instant case) are neutral unless otherwise qualified:

This court is in full accord with the circuit judge's opinion that words and phrases used in contracts should be given the ordinary and commonly understood and accepted meaning.

The word modify is commonly understood to mean alteration or change. Thus alteration or change is not restrictive, it may be characterized, in a quantitative sense, as either an increase or decrease. As applied to the present situation, appellee would be entitled to adopt covenants that were either more or less restricted, and we affirm the lower court's ruling in this regard. (Citations omitted)

The argument that *only* the imposition of more restrictive conditions is subject to reversal upon Court review is not supported by the cited case law.

Further, the elimination of view protections by two of the three affected property owners appears to have been done in bad faith. The Respondents gain economic advantage at Appellants' expense if they appropriate the ability to develop their property without regard for Appellants' marine or other views. This has detrimental economic and other disadvantages for the Appellants that they could not have planned for when they were convinced to buy their protected parcel. The Trial Court decision has legitimized the Respondents' wholesale elimination of

the view and other protective covenants by failing to declare the Amended Covenants invalid and declining to reinstate and enforce the 1998 Protective Covenants and should be reversed. Because the facts are undisputed and the only issues are questions of law, the standard of review is *de novo*. *Department of Labor & Indus. v. Fankhauser*, 121 Wash.2d 304, 308, 849 P.2d 1209 (1993).

The 1998 Protective Covenants (CP 1-33, Exhibit II) describe (at page 4) the purpose and extent of the covenants and their intended protection of views and other amenities, recited above. The language is not ambiguous: It is clear that the 1998 Protective Covenants (CP 1-33, Exhibit II) are intended to permanently assure the “...enhancing and protecting [of] the value, desirability and attractiveness of said real property..” including the Appellants’ real property. The word “perpetual” used by the declarant is not ambiguous, it means everlasting, continuous, without end, permanent.”

Because the Respondents’ amendments eliminate the view protection provisions of the 1998 Protective Covenants (CP 1-33, Exhibit II) they are certainly unfair to the Appellants; and are unreasonable because completely at odds with the general plan of the development which provided for the permanent protection of views. The changes that two of three property owners would impose on the minority are not reasonable, particularly in the context of the 1998 Protective Covenants (CP 1-33,

Exhibit II) which by their terms were to provide for the protection of the value, desirability, and attractiveness of the subject parcels. The Defendants' amendments remove the view protection provisions of the 1998 Protective Covenants (CP 1-33, Exhibit II) thereby diminishing the value of the Appellants' property by stripping away the protection of the amenities of the 1998 Protective Covenants (CP 1-33, Exhibit II) and exposing the essential quality of the development, protection of its views, to loss: from multistory buildings, view obstructing landscaping and the placement of accessory and outbuildings in the Appellants' view corridors.

The Washington rule re the appropriateness of amendments of protective covenants or restrictions affecting real property by less than all of the affected property owners is addressed in *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wash. App. 267, 273-74, 883 P.2d 1387 (Div 1, 1994), wherein the Court stated:

We agree ... 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 the development.** (Emphasis added)

In the *Shafer* case, the issue was the validity of restrictions against junk cars being stored outdoors (regulation of which was clearly consistent with the general plan of development in that case) while the instant case is

concerned with unreasonable amendments that wholly eliminate restrictions on activity that threaten views and are thus inconsistent with the general plan of the development in this case.

Another helpful decision is found in this Court's *Meresse v. Stelma*, 100 Wn. App. 857, 865-866, 999 P.2d 1267 (Div. 2, 2000) where this Court *overturned* an amendment of CC&Rs by a majority of the homeowners **as not being reasonable or consistent with the overall plan of the development**, saying:

**In assessing what constitutes “a reasonable manner consistent with the general plan of the development,” we look to the language of the covenants, their apparent import, and the surrounding facts.** In [*Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wash. App. 267, 273-74, 883 P.2d 1387 (1994)], the existing covenants were extended to a restriction of a similar nature—restriction on storage of unused automobiles. 76 Wash.App. at 271, 883 P.2d 1387. Such a restriction is similar to the restrictive covenants in place for the Constant Oak Subdivision, particularly those relating to the overall harmonious appearance of the subdivision—dwelling size and tree-cutting.

But *Shafer* does not address changes in restrictive covenants that differ in nature from those already in existence. We adopt the pertinent rationale of the Nebraska Supreme Court in *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W. 2d 610, 617 (1994):

**“The law will not subject a minority of landowners to unlimited and unexpected restriction on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants.** Accord *Lakeland Property Owners Ass'n v. Larson*, 121 Ill. App. 3d 805, 459 N.E. 2d 1164 (Ill. App. 2 Dist. 1984)

(holding that a deed's provision, permitting "change[s]. . . in whole or in part" to restrictive covenants upon majority vote, "clearly directs itself to *changes of existing covenants, not the adding of new covenants which have no relation to existing ones*"

(Emphasis added).

The foregoing assessment of the *limitation* of the power of a majority to amend protective covenants is essential to examination of the issue presented by the parties' on this appeal and should focus the Court's review of this appeal. Bringing an "equitable point of view" to the matters presented by this appeal, this Court should consider anew:

What is the nature of the general plan of the development as provided in the 1998 protective Covenants? What is the language of the covenants as originally promulgated, and its apparent import?

What were/are the surrounding facts"? How do the Amended Covenants (CP 1-33, Exhibit III) change and diminish the protections of the 1998 Protective Covenants (CP 1-33, Exhibit II)?

Are the changes reasonable, in view of the general plan for the development? That is, are the Amended Covenants (CP 1-33, Exhibit III) consistent with the general plan of the development?

It should be noted that but for the view protection covenants of the 1998 Protective Covenants (CP 1-33, Exhibit II) the condition (and the desirability) of the development would be vastly different from the "view point" of the upland landowner. Section 4 of the 1998 Protective Covenants (CP 1-33, Exhibit II) is directed most significantly to the

protection of views over the Respondents'/Defendants' waterfront parcels, providing in pertinent part:

4. (a) Regarding structures and landscaping in existence [in April, 1998] the 1998 Protective Covenants (CP 1-33, Exhibit II) state that

**“...there shall be no construction of any kind or nature, or landscaping of any kind or nature which would in any way obstruct the view of an adjoining lot subject to these protective covenants, conditions and restrictions”.**  
(Emphasis added)

This most important part of the restrictions against blockage of views in the 1998 Protective Covenants (CP 1-33, Exhibit II) is directed to the protection and maintenance of the vista, matters of aesthetic importance. The 1998 Protective Covenants (CP 1-33, Exhibit II) use *mandatory* terms to describe the aesthetic protections set forth; twice *requiring unanimity* of the owners of the subject properties to accommodate the placement of a structure or landscaping. The greater part of the 1998 Protective Covenants (CP 1-33, Exhibit II) is devoted to preservation or enhancement of the views and other aesthetics of the development.

Faced with clear language describing absolute and effective aesthetic protections, the owners of the waterfront parcels, including the daughter and personal representative of one of the Declarants of the 1998 Protective Covenants (CP 1-33, Exhibit II), have selfishly concluded that if the building and landscaping and other aesthetic protections of the 1998

Protective Covenants (CP 1-33, Exhibit II) were eliminated, it would be financially beneficial (to the Defendants) and their waterfront lots, as they could then place and erect structures and landscaping without having to be concerned with the effect on the views from Appellants' upland lot. Respondents, apparently believing they could increase the development potential and hence the market value of their waterfront lots, all to the detriment of the Appellants' upland property's value and quality, amended and restated the 1998 Protective Covenants (CP 1-33, Exhibit II) over the objection of Appellants, eliminating the view and other protections the Appellants counted on and unreasonably turned the scheme of the original development on its head.

The Defendants' amendments **eliminate** the limitations against construction or landscaping "of any kind which would in any way obstruct the view" from a parcel, including Appellants' upland lot. This basic protection, counted upon at purchase and since, *is gone* if the Amended Covenants are allowed to stand. The Amended Covenants are not concerned with view protection. Multi-story homes and accessory dwellings may be placed between Appellants and their view pursuant to Respondents' amendments. If the Respondent's amendments are allowed to stand, buildings or landscaping arising in Plaintiffs' narrow view corridors will effectively obstruct Appellants' marine views north over

Defendants' waterfront lots. Because the limited view corridors available to Appellants' home are easily obstructed with multistory buildings, landscaping and accessory structures, the inability to protect their view is wholly inconsistent with the original plan of the development. What was prohibited or required the agreement of all of the parcel owners is now an unfettered free for all. What the "majority" did in the instant case was remove the view protections Appellants relied upon, leaving them without recourse if a structure or landscaping on the waterfront lots was placed so that it obstructed the Appellants' views over the Respondents' parcels.

The elimination of view protection provisions is not consistent with "enhancing and protecting the value, desirability and attractiveness" of the real property as provided by the general plan of development set forth in the original 1998 Protective Covenants! The elimination of the aesthetic protections of the original covenants will not stand up against the foregoing application of Washington law.

**The interpretation of a real covenant is a question of law.** *Meresse v. Stelma*, 100 Wn.App. 857, 864, 999 P.2d 1267 (2000). A court's primary goal when interpreting a covenant is to determine the declarants' intent. *Metzner v. Wojdyla*, 125 Wn.2d 445, 450, 886 P.2d 154 (1994). The Court will, to find the Declarants' intent, examine the document containing the covenants in its entirety, giving language its ordinary and

common meaning. *Mountain Park Homeowner's Ass'n, Inc., v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994)

If the foregoing analysis is brought to the instant case it is readily apparent that the purpose and intent of the 1998 Protective Covenants (CP 1-33, Exhibit II) is directed at protection the views and other amenities of each of the (three) subject parcels. Note, for example, the Declarants' use of mandatory verbs (shall, e.g.) and the requirement for unanimity in placing structures that are conditionally allowed.

The Respondents argue that the elimination of protective covenants, even view covenants, is not such a departure from the original plan of the development, or such a travesty from an equitable point of view, that the decision of the Trial Court, upholding the elimination of view and other protective covenants based on the vote of a 2 out of 3 majority of subject property owners is unacceptable. Respondents' argument in this regard is clearly untenable, and fortunately for Appellants, Washington courts do consider protective restrictions and covenants important, and have been supportive in cases where the Court is asked to interpret and enforce protective covenants, including those intended to preserve views and the aesthetic attributes of affected real property. Washington courts recognize that the elimination of view protections is significant! The examples of judicial interpretation of real covenants set forth below are illustrative of

the equitable analysis made in interpreting and enforcing protective covenants in the context of the intent of the declarants.

Pierce County Superior Court Judge Thomas Felnagle and later the Court of Appeals Division II, upheld subdivision covenants designed to protect views of the Narrows, near Tacoma, Washington, in *Heath v. Uraga*, 106 Wn.App 506, 24 P.3d 413 (2001). Ignoring the entreaties of his neighbors that his planned home was contrary to view protection covenants, Dr. Uraga continued to construct his home until trial; at which point, in the face of Dr. Uraga's intransigence, his mostly completed home was ordered "torn down."

In *Wimberly v. Caravello*, 136 Wn.App. 327, 149 P.3d 402 (Div. 3 2006) the court determined that the complaining property owners' property rights had been detrimentally affected by a large structure being built as a "garage". The complaining property owners brought an action to enjoin construction of a three-story "garage" based on a restrictive (i.e. protective) covenant. The offending neighbor, armed with a favorable ruling from the homeowner's association board, refused to bring his construction into compliance with the covenants as interpreted by the complaining property owners; continued to build the offending structure, thereby abridging the enjoyment and use of the complaining property owners property and its dollar value, a property right conferred by the

protective covenants. To reach the conclusion that the structure complained of did offend the protective covenants, the court considered the purpose of the provisions at issue, and the intended meaning of the terms *garage*, *simple*, and *well-proportioned*. In concluding that the non-conforming “garage” was neither simple nor well proportioned, the trial court held, and the appellate court affirmed, that in the circumstances the structure would have to be brought into compliance with the protective covenants, one and one-half stories would be removed! As part of its rationale the Court of Appeals, Div. III, said:

Specifically, the court must decide what constitutes "reasonableness" in a covenant in the context of the overall purpose of the covenants and the surrounding facts. *Meresse v. Stelma*, 100 Wash.App. 857, 865, 999 P.2d 1267 (2000). Extrinsic evidence is admissible for this purpose. *Hollis*, 137 Wash.2d at 694-95, 974 P.2d 836.

The circumstances surrounding the drafting of these covenants was the creation of a new residential community overlooking Lake Roosevelt. The scenic location and views are an intrinsic part of the aesthetic and monetary value of the lots. We agree with the trial court that to interpret the garage covenant as permitting a multi-story, multi-purpose structure, considerably taller than the house, with a bathroom and two rooms (office and recreation room) exclusively for residential use--and with exterior carports--would defeat the drafters' manifest purpose. The interpretation adopted by the court is reasonable considering the covenants in context. This conclusion is based on the court's findings that were in turn based in part on the testimony of the original developers.”

Appellants believe that if the Appellate Court makes a similar analysis in the instant case, it will reverse the trial Court's dismissal of Appellants first two causes of action and will reinstate and enforce the original protective covenants. Appellants' argument in the instant case is based on facts very similar to those of *Wimberly v. Caravello, supra*. Appellants' argument is that the Respondents' Amended Covenants (CP 1-33, Exhibit III) are an unreasonable departure from the Declarants' development plan as expressed in the original CC&Rs, e.g. based on the protection of marine views, particularly those of the upland parcel over the two waterfront parcels. The elimination of all view and other protections from the original Covenants is done in bad faith by two of the three property owners at the very significant economic and aesthetic expense of the third.

In the context of Washington law, the subject of interpreting and amending protective covenants is not a specious squabble: The 1998 Protective Covenants (CP 1-33, Exhibit II, at paragraph 4) are clearly intended to provide protection of views and other amenities; and hence the use, enjoyment, value, desirability and attractiveness of the subject properties, including especially the Appellants' upland parcel. The view and other protections of the 1998 Protective Covenants (CP 1-33, Exhibit II) are the most important part of the original protective covenants. The

ability of the Appellants to enforce them, eliminated by the Respondents' amendments, is a matter of substantial aesthetic and monetary value. By omitting the view and other protections of the 1998 Protective Covenants (CP 1-33, Exhibit II) from the Amended Covenants (CP 1-33, Exhibit III); the Defendants have sought to change unreasonably the general plan of the original development.

If the Amended Covenants (CP 1-33, Exhibit III) are allowed to stand, Appellants would have no basis to complain that Respondents' landscaping "obstructs" their view. See Appellants' second cause of action herein. (CP 1-33). If the Amended Covenants (CP 1-33, Exhibit III) are allowed to stand, and the 1998 Protective Covenants (CP 1-33, Exhibit II) are not reinstated, the Appellants can not assure that the marine views from Appellants' parcel over Defendants' water front parcels are preserved. Respondents' amendments, which remove all view protection provisions and leave the property subject to improvements and landscaping that can obstruct views from Appellants' upland parcel, are not appropriate, are unexpected, done in bad faith, and are not reasonable and should, per the Washington case law on the subject, be held for naught.

Respondents argue that the 1998 Protective Covenants included a clause that permitted their unqualified amendment by a majority of the affected property owners, i.e. by at least 2 of the 3. Thus, two of the property owners, at considerable expense to the third, voted the protective features of the 1998 Protective Covenants (CP 1-33, Exhibit II) right out of existence! **It is for this Court to reconcile the Appellants' argument for reinstatement of the 1998 Protective Covenants (CP 1-33, Exhibit II) with the Respondents' argument that they are expressly permitted the right to amend the provisions of the 1998 Protective Covenants (CP 1-33, Exhibit II).**

To reconcile the parties' positions in this regard, the Court should consider the guides to interpretation discussed in *Hollis v. Garwall*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999); *Ball v. Stokely Foods*, 37 Wn.2d 79, 83, 221, P.2d 832 (1950); and *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn.App. 416, 423, 909 P.2d 1323, (1995) **in the context of *Meresse v. Stelma*, 100 Wn.App. 857, 999 P.2d 1267 (2000), *Shafer v. Trustees of Sandy Hook Yacht Club Estates*, 76 Wn.App. 267, 883 P.2d 1387 (1994), and the other case law cited herein that measures the reasonableness of amendments to CC&Rs and their consistency with the general plan of development of the property at issue.**

*Hollis v. Garwall*, *supra* at 842-3 provides with regard to interpreting covenants:

A court must construe restrictive covenants by discerning the intent of the parties as evidenced by clear and unambiguous language in the document. The court must consider the document in its entirety. Only in the case of ambiguity will the court look beyond the document to ascertain intent from surrounding circumstances. (Citations omitted).

The language of the original protective covenants is clearly devoted to the protection of view and other amenities.

See also *Mains Farm Homeowners Ass'n*, 121 Wash.2d 810 at 815-16, 854 P.2d 1072 (1993)

“... equitable considerations must be kept in mind when turning to the standards of interpretation. First, “[i]n Washington, owners of land have an equitable right to enforce covenants by means of a general building scheme designed to make it more attractive for residential purposes, without showing substantial damage from the violation.” (Citations omitted.) *Hagemann v. Worth*, 56 Wash. App. 85, 88, 782 P.2d 1072 (1989).

Second, “[t]he primary objective in interpreting restrictive covenants [protective covenants are equally descriptive] is to determine the intent of the parties ...” (Footnote omitted.) *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wash. App. 177, 179, 810 P.2d 27, review denied, 117 Wash.2d 1013, 816 P.2d 1224 (1991). In determining intent, language in the covenant is to be given its “ordinary and common use”. *Krein v. Smith*, 60 Wash. App. 809, 811, 807 P.2d 906, review denied, 117 Wash.2d 1002, 815 P.2d 266 (1991).

In *Riss v. Angel*, 131 Wash.2d 612, 621, 622, 934 P.2d 669 (1997), our Supreme Court sought to interpret and enforce protective covenants as between contending property owners, as in the instant case, saying

The court's primary objective in interpreting restrictive covenants is to determine the intent of the parties. *Metzner v. Wojdyla*, 125 Wash.2d 445, 450, 886 P.2d 154 (1994); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wash.2d 810, 815, 854 P.2d 1072 (1993); *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wash.App. 177, 179, 810 P.2d 27, review denied, 117 Wash.2d 1013, 816 P.2d 1224 (1991). In determining intent, language is given its ordinary and common meaning. *Metzner*, 125 Wash.2d at 450, 886 P.2d 154; *Mains Farm*, 121 Wash.2d at 815, 854 P.2d 1072; *Krein v. Smith*, 60 Wash.App. 809, 811, 807 P.2d 906, review denied, 117 Wash.2d 1002, 815 P.2d 266 (1991). The document is construed in its entirety. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wash.2d 337, 344, 883 P.2d 1383 (1994); *Burton v. Douglas County*, 65 Wash.2d 619, 622, 399 P.2d 68 (1965). The relevant intent, or purposes, is that of those establishing the covenants. Robert G. Natelson, *Law of Property Owners Associations* § 2.5, at 61 (1989).

Historically, Washington courts have also held that restrictive covenants, being in derogation of the common law right to use land for all lawful purposes, will not be extended to any use not clearly expressed, and doubts must be resolved in favor of the free use of land. E.g., *Burton*, 65 Wash.2d at 622, 399 P.2d 68 (citing *Granger v. Boulls*, 21 Wash.2d 597, 152 P.2d 325, 155 A.L.R. 523 (1944)); *Bersos v. Cape George Colony Club*, 10 Wash.App. 969, 971, 521 P.2d 1217 (1974) (same); *Fairwood Greens Homeowners Ass'n, Inc. v. Young*, 26 Wash.App. 758, 761-62, 614 P.2d 219 (1980) (same). The Court of Appeals in this case applied the rule of strict construction against the drafter, reasoning that the homeowners are the drafters because they amended the covenants in 1990.

Washington courts have begun to question whether rules of strict construction should be applied where the meaning of a subdivision's [934 P.2d 676] protective covenants are at issue and the dispute is among homeowners.

Construction against the grantor who presumably prepared [a] deed is quite a different matter from construction of

covenants intended to restrict and protect all the lots of a plat and future owners who buy and build in reliance thereon.

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

In the instant case, the language in the original CC&Rs is quite clear, and its ordinary and common meaning can be readily understood. It is not ambiguous and the document does not require extrinsic evidence to understand what the drafter intended: the perpetual protection of views from each of the three parcels described in the document.

The 1998 Protective Covenants (CP 1-33, Exhibit II), the substantive elimination of which is at issue here, provide for extensive view protection: The locations of potentially obstructing structures were to be unanimously approved. There were to be no obstructions that diminish the view from any of the 3 lots, including Appellants' upland parcel; into perpetuity. How can that protective language be given effect in the same document that permits a majority (2 of 3 in this case) to amend the CC&Rs? The answer is provided in the following discussion.

Amendments to protective covenants, when allowed at all, must be reasonable and consistent with the general plan of the development. In assessing

what constitutes "a reasonable manner consistent with the general plan of the development," we look to the language of the covenants, their apparent import, and the surrounding facts. *Meresse v. Stelma*, 100 Wn. App. 857, 865, 999 P.2d 1267 (2000) (quoting *Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn.App. 267, 273-74, 883 P.2d 1387 (1994), review denied, 127 Wn.2d 1003 (1995)).

*Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267,273-74, 883 P.2d 1387 (1994), review denied, 127 Wn.2d 1003 (1995):

...if a valid agreement expressly reserves the power to less than 100 percent of affected property owners to adopt new restrictions respecting the use of privately-owned property within the development, such restrictions are enforceable against all property owners. This concession is appropriate in light of the overwhelming, albeit out-of-state, authority to this effect. See *Boyles v. Hausmann*, 246 Neb. 181,517 N.W. 2d 610 (1994); see also *Hanchett v. East Sunnyside Civic League*, 696 S.W. 2d 613 (Tex. App. 1985); cf. 5 Richard R. Powell et al., *Powell on Real Property* p 677 (1991); *Hening v. Maynard*, 227 Va. 113, 313 She'd 379 (1984). For its part, *Sandy Hook* concedes that it must exercise its power to adopt new restrictions respecting the use of privately owned land "in a reasonable manner [so] as not to destroy the general scheme or plan of development." *Lakemoor Comm'ty Club, Inc. v. Swanson*, 24 Wash. App. 10,15, 600 P.2d 1022, review denied, 93 Wash.2d 1001 (1979) (quoting *Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc.*, 303 So. 2d 665, 666 (Fla. Dist. Ct. App. 1974)).

And see, *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn.

App. 787, 150 P.3d 1163 (Wash.App. Div. 3 2007):

Amendments to covenants are permissible. *Meresse v. Stelma*, 100 Wash App 857 865 999 P.2d 1267 (2000); *Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc* ' 76 Wash.App. 267, 273, 883 P.2d 1387 (1994), *review denied*, 127 Wash.2d 1003 898 P.2d 308 (1995). In order for an amendment to be valid, it must be adopted according to the procedures set up in the covenants and it must be consistent with the general plan of the development. *Shafer*, 76 Wash. App. at 273-74, 883 P 2d 1387. But an amendment may not create a new covenant that has no relation to the existing covenants. *Meresse*, 100 Wash. App. at 866, 999 P.2d 1267.

And *Wimberly v. Caravello*, 136 Wn.App. 327,149 P.3d 402 (Wash.App.

Div. 3 2006):

In *Meresse*, the court determined that an amendment to a covenant was invalid because "[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants." *Meresse*, 100 Wn.App. at 866 (quoting *Boyles v. Hausmann*, 246 Neb. 181, 191, 517 N.W. 2d 610 (1994)).

**We conclude that all rental prohibitions in the 2008 Amendment are invalid. And we reverse the trial court's ruling rewriting the 2008 Amendment to prohibit rentals of less than one month.** This means that all rental prohibitions are stricken from the 2008 Amendment to section 4 and section 5 of the covenants. Given our decision, we also strike the remaining findings and rulings in the trial court's summary judgment order. A trial court's findings and conclusions-entered on summary judgment are superfluous. *Wash. Optometric Ass'n v. County of Pierce*, 73 Wn.2d 445,448, 438 P.2d 861 (1968). (Emphasis added)

Sometimes cited by our Washington Courts as support for their rulings are cases from other jurisdictions, such as. *Hanchett v. East Sunnyside Civic*

*League*, 696 S.W. 2d 613 (Tex. App. 1985), where the appropriateness of a majority changing of the covenants was discussed:

In order for a subsequent instrument to amend the original restrictive covenants governing a subdivision, three conditions must be met. First, the instrument creating the original restrictions must establish both the right to amend such restrictions and the method of amendment. *Couch v. Southern Methodist University*, 10 S.W. 2d 973, 974 (Tex. Comm'n App. 1928, judgment adopted); *Loving v. Clem*, 30 S.W. 2d 590 (Tex. Civ. App.-Dallas 1930). **Second, the right to amend such restrictions implies only those changes contemplating a correction, improvement, or reformation of the agreement rather than a complete destruction of it.** *Couch v. Southern Methodist University*, 10 S.W. 2d at 974. Third, the amendment to the restrictions may not be illegal or against public policy. *Harrison v. Air Park Estates Zoning Committee*, 533 S.W. 2d 108, 111 (Tex. Civ. App.-Dallas 1976, no writ). [Emphasis added]

For the majority (2 of 3 in the instant case!) to destroy the view protections of the original 1998 Protective Covenants (CP 1-33, Exhibit II) by writing them out of existence is a huge change and hardly consistent with the original plan or scheme of the development: The Respondents' amendments wholly destroy the effect of the protective provisions from paragraph 4.a. of the 1998 Protective Covenants (CP 1-33, Exhibit II) including the clearly-stated concept that:

“ . . . there shall be no construction of any kind or nature, or landscaping of any kind or nature which would in any way obstruct the view of an adjoining lot subject to these protective covenants, conditions and restrictions”.

The basic concept of view protection is eliminated by the amended CC&Rs as are the totality of the view protection provisions of the original 1998 Protective Covenants (CP 1-33, Exhibit II). Such a change, destruction of the view and other amenity protections of the original 1998 Protective Covenants (CP 1-33, Exhibit II), is not reasonable and is absolutely contrary to the general scheme or plan (for view protection) of the development. Accordingly the amended CC&Rs should be held for naught, the original CC&Rs should be reinstated in all respects, and the Defendants Crowell should be required to trim or remove their birch tree that exceeds the roof line of their home. Plaintiffs should be allowed attorney fees for enforcing the original CC&Rs as provided in the instrument (CP 1-33, Exhibit II).

### **IN CONCLUSION**

To provide relief to the Appellants in the instant case, including setting aside the Amended Covenants and enforcing the 1998 Protective Covenants, requires this Court, exercising its equitable powers, to reverse the Trial Court, and conclude that the amendment and revision of the 1998 Protective Covenants by the Respondents, wholly eliminating view and other protection, is unreasonable and inconsistent with the general plan of the development as expressed in the original 1998 Protective Covenants

(CP 1-33, Exhibit II). The Amended Covenants (CP 1-33, Exhibit III) should be declared invalid; and the 1998 Protective Covenants (CP 1-33, Exhibit II) should be reinstated and enforced to protect the views of the parties' parcels of property without lapse or exception. Respondents Crowell should be ordered to trim or remove the birch tree that extends beyond their roof line and obstructs the Appellants' view of Hales Pass and Cromwell. Respondents' summary judgment motions should be rejected; the Appellants' should be allowed their attorney fees and costs associated with enforcing the 1998 Protective Covenants (CP 1-33, Exhibit II, ¶12 pages 8 & 9), as provided in that instrument.

RESPECTFULLY SUBMITTED,

GORDON & ALVESTAD

By:   
DAVID D. GORDON, WSB #5159  
Attorney for Appellants

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

BARRY REIMER and KELLY REIMER,  
husband and wife,

Plaintiffs/Appellants,

vs.

GARY A. CROWELL and SUSAN M. HYDE,  
Husband and wife; and CONNIE MAUREEN  
CONNELLY, Personal Representative of the  
Estate of Ward B. Hunt, deceased

Defendants/Respondents.

Court of Appeals Cause No. 43434-2-II

Lower Court No. 12-2-05511-0

**CERTIFICATE OF SERVICE OF  
BRIEF OF APPELLANTS**

The undersigned hereby certifies under penalty of perjury of the laws of the State of Washington, that on the 6th day of September, 2012, I caused a true and correct copy of the Brief of Appellants to be delivered to the following counsel of record:

Michael W. Johns  
Roberts Johns & Hemphill, PLLC  
7525 Pioneer Way Ste 202  
Gig Harbor, WA 98335-1166

by the following method:

- Depositing same postage prepaid in the United States Mail  
 Via Facsimile  
 Hand delivery by ABC-Legal Messenger Service, Inc.  
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 Personally delivering copies to the person(s) identified above.

ORIGINAL

**CERTIFICATE OF SERVICE OF  
BRIEF OF APPELLANTS - 1**

GORDON & ALVESTAD  
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(253) 858-6100 Fax: (253) 858-9747

1 I hereby certify under penalty of perjury under the laws of the State of Washington  
2 that the foregoing is true and correct.

3 DATED at Gig Harbor, Washington, this 11th day of September, 2012.

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