

FILED  
COURT OF APPEALS  
DIVISION II

No. 43434-2-II

2012 SEP 26 PM 4: 27

STATE OF WASHINGTON

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

IN THE COURT OF APPEALS  
FOR 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.

---

**BRIEF OF RESPONDENTS**

---

Michael W. Johns  
WSBA No. 22054  
Attorneys for Respondents

ROBERTS JOHNS & HEMPHILL, PLLC  
7525 Pioneer Way, Suite 202  
Gig Harbor, Washington 98335  
Telephone No. (253) 858-8606  
Facsimile No. (253) 858-8646

**TABLE OF CONTENTS**

I. STATEMENT OF THE CASE ..... 1

II. ARGUMENT ..... 4

    A. Standard of Review..... 4

    B. The Amended CC&Rs Are Valid ..... 5

        1. The CC&Rs Specifically Provide For  
           Amendment By Majority Vote ..... 5

        2. There Is No Requirement That  
           Amendments to CC&Rs That Do Not  
           Create Additional Restrictions Be  
           “Consistent” With Any Plan of  
           Development ..... 9

        3. The Cases Cited By Plaintiffs  
           Regarding Enforcement of CC&Rs  
           Have No Relevance To This Case ..... 15

        4. Even If There Was A Requirement That  
           Amendments To CC&Rs That Do Not  
           Create Additional Restrictions Be  
           “Consistent” With A Plan of Development,  
           The Plaintiffs Have Failed To Establish  
           That The Amended CC&Rs Conflict With  
           The Plan Of Development ..... 17

    C. Request For Attorney’s Fees and Costs ..... 21

III. CONCLUSION..... 22

## TABLE OF AUTHORITIES

### **CASES**

<i>Amant v. Pacific Power &amp; Light Co.</i> , 10 Wn.App. 785, 520 P.2d 481 (1974) .....	4
<i>Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.</i> , 115 Wn.2d 506, 516, 799 P.2d 250 (1990).....	5
<i>Ball v. Stokely Foods</i> , 37 Wash.2d 79, 83, 221 P.2d 832 (1950) .....	7
<i>Failor's Pharmacy v. DSHS</i> , 125 Wn.2d 488, 493, 886 P.2d 147 (1994).....	4
<i>Graves v. P.J. Taggares Co.</i> , 94 Wn.2d 298, 616 P.2d 1223 (1980).....	4,5
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 695, 974 P.2d 836 (1999).....	9
<i>Hearst Commc'ns, Inc. v. Seattle Times</i> , 154 Wash.2d 493, 504, 115 P.3d 262 (2005) .....	7
<i>Heath v. Uruga</i> , 106 Wn.App. 506, 24 P.3d 413 (2001) .....	16
<i>In re Marriage of Rideout</i> , 150 Wash.2d 337, 77 P.3d 1174 (2003).....	5
<i>In re Marriage of Schweitzer</i> , 132 Wn.2d 318, 326-327, 937 P.2d 1062 (1997).....	8
<i>Lakemoor Community Club, Inc. v. Swanson</i> , 24 Wn. App. 10, 600 P.2d 1022 (1979) .....	13,14,15
<i>Leland v. Frogge</i> , 71 Wn.2d 197, 427 P.2d 724 (1976).....	5

<i>Mayberry v. City of Seattle</i> , 53 Wn.2d 716, 336 P.2d 878 (1959).....	4
<i>Mayer v. Pierce County Medical Bureau, Inc.</i> , 80 Wn.App. 416, 423, 909 P.2d 1323 (1995) .....	7
<i>Meresse vs. Stelma</i> , 100 Wn.App. 857, 999 P.2d 1267 (2000) .....	9,10,11,12,13,15
<i>Schaefer vs. Trustees of Sandy Hook Yacht Club Estates</i> , 76 Wn.App. 267, 883 P.2d 1387 (1994) .....	9,10,12,13,15
<i>Tradewell Stores v. Fidelity Cas. Co. of New York</i> , 67 Wn.2d 919, 410 P.2d 782 (1966).....	4
<i>Truck Ins. Exch. v. VanPort Homes, Inc.</i> , 147 Wash.2d 751, 766, 58 P.3d 276 (2002) .....	5
<i>Universal/Land Const. Co. v. City of Spokane</i> , 49 Wn.App. 634, 637, 745 P.2d 53 (1987) .....	8
<i>Wagner v. Wagner</i> , 95 Wash.2d 94, 101, 621 P.2d 1279 (1980).....	7
<i>White v. Wilhelm</i> , 34 Wn.App. 763, 771, 665 P.2d 407 (1983) .....	7
<i>Wimberly v. Caravello</i> , 136 Wn.App. 327, 336, 149 P.3d 402 (2006) .....	6,16
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 225, 770 P.2d 182 (1989).....	5

**COURT RULES**

RAP 18.1 .....	21
----------------	----

## I. STATEMENT OF THE CASE

The Appellants Barry and Kelly Reimer (collectively referred to hereafter as the "Plaintiffs", as they were designated in pleadings before the Trial Court) and the Respondents Gary A. Crowell, Susan M. Hyde and Connie Maureen Connelly (collectively referred to hereafter as the "Defendants") are the owners of three neighboring parcels of property located on Fox Island. (CP 51) The Defendants' two parcels are located adjacent to the water, while the Plaintiffs' property is located upslope and is not adjacent to the water. (CP 51)

In April, 1998 all three parcels were owned by Ward and Rose Ann Hunt. The Hunts on April 8, 1998 recorded a Declaration of Protective Covenants, Conditions and Restrictions (the "CC&Rs") that covered all three of the parcels. (CP 51) The CC&Rs included provisions governing the use and maintenance of a road easement benefitting all three lots, placing restrictions on the construction of dwellings and accessory units on each of the parcels, governing landscaping, requiring underground utilities, prohibiting commercial use of the parcels and restricting the number and types of pets that could be kept on the parcels. The CC&Rs also provided that after the Hunts sold any of the parcels, the CC&Rs could be amended by an affirmative vote of a majority of the parcel owners. (CP 51, 64)

After recording the CC&Rs, the Hunts sold two of the

parcels, one to the Plaintiffs and one to defendant Gary Crowell and his then wife Rebecca Crowell (Rebecca Crowell is now deceased and Mr. Crowell is now married to Respondent Susan Hyde) (CP 51). The Hunts retained one of the waterfront parcels as their residence up until the time of their deaths. The Hunt parcel is currently owned by the Estate of Ward B. Hunt and managed by the Hunts' daughter, Respondent Connie Connelly, who is the personal representative of that estate. (CP 51)

In the fall of 2011 the Defendants engaged in discussions regarding the CC&Rs. They concluded that the CC&Rs needed to be amended. They were concerned that the provisions governing the road easement were overly cumbersome and outdated, including for example provisions governing a concrete ramp that were no longer applicable. (CP 52)

The Defendants further believed that the restrictions governing construction, landscaping and a number of other issues were too restricting, were in some instances ambiguous, and were of questionable value to the parcels as a whole. They also believed that existing state and local regulations would adequately protect the parties' interest with respect to issues such as use of the property and nuisances, and that deleting unnecessary provisions from the CC&Rs would remove needless encumbrances on the parties' titles and allow the parties to all enjoy greater use of their properties and ultimately make it easier for each of the parties to

sell their respective parcels in the future. (CP 52)

The Defendants therefore prepared a set of proposed amended CC&Rs and sent them to the Plaintiffs for their review and consideration. (CP 52-53) The proposed amended CC&Rs contained no provisions restricting construction or landscaping, and revised those provisions governing the road easement. (CP 68-77) The Plaintiffs objected to the proposed amendments in their entirety and did not provide any suggested revisions. (CP 53)

After considering the Plaintiffs' objections the Defendants made a number of revisions to the proposed amended CC&Rs that included adding back into the CC&Rs a section containing restrictions on construction and landscaping. The Plaintiffs again rejected the proposed revisions wholesale without providing any suggested revisions with which they would be willing to agree. (CP 53)

Because it was clear that no unanimous agreement was possible, the Defendants - constituting a majority of the parcel owners - on January 6, 2012 recorded the latest version of the amended CC&Rs (the "Amended CC&Rs"). (CP 53, 78-88) The Plaintiffs' lawsuit followed.

The Defendants filed a motion for summary judgment seeking dismissal of the Plaintiffs' claims challenging the Amended CC&Rs. (CP 39-49) The Plaintiffs filed a cross motion seeking a determination that the Amended CC&Rs were invalid. (CP 89-126)

The Trial Court granted the Defendants' motion, denied the Plaintiffs' motion and dismissed the Plaintiffs' challenge to the Amended CC&Rs. (CP 167-169)

## II. ARGUMENT

### A. Standard of Review.

When reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the Trial Court. Failor's Pharmacy v. DSHS, 125 Wn.2d 488, 493, 886 P.2d 147 (1994). The primary purpose of a summary judgment rule is to secure a just, speedy and inexpensive determination of every action by avoiding unnecessary trial. Mayberry v. City of Seattle, 53 Wn.2d 716, 336 P.2d 878 (1959).

Thus, where there is no genuine issue of material fact, granting summary judgment is proper. Tradewell Stores v. Fidelity Cas. Co. of New York, 67 Wn.2d 919, 410 P.2d 782 (1966). A material fact is one upon which the outcome of the litigation depends. Amant v. Pacific Power & Light Co., 10 Wn.App. 785, 520 P.2d 481 (1974). Once the moving party has met its burden of offering evidence showing that it is entitled to a judgment as a matter of law, the burden shifts to the non-moving party to set forth facts showing that there is a genuine issue for trial. Graves v. P.J.

Taggares Co., 94 Wn.2d 298, 616 P.2d 1223 (1980). A party may not rest upon pleadings or assertions, but must present evidence of fact on which that party relies. Leland v. Frogge, 71 Wn.2d 197, 427 P.2d 724 (1976).

If a Plaintiffs' response "fails to make a showing sufficient to establish the existence of an element essential to his case," then Defendants' motion for summary judgment should be granted. Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). When plaintiff fails to establish the existence of an essential element of its case, then there is no genuine issue as to any material fact and summary judgment is appropriate. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

The Court of Appeals may affirm the Trial Court's judgment "on any grounds established by the pleadings and supported by the record." Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wash.2d 751, 766, 58 P.3d 276 (2002); In re Marriage of Rideout, 150 Wash.2d 337, 77 P.3d 1174 (2003).

B. The Amended CC&Rs Are Valid.

1. The CC&Rs Specifically Provide For Amendment By Majority Vote.

The Plaintiffs vociferously assert before this Court, as they

did before the Trial Court, that they justifiably relied upon the language contained in the CC&Rs to permanently preserve absolutely unobstructed views for the benefit of their parcel. While making this assertion, however, the Plaintiffs provide absolutely no explanation as to how such reliance could be justified given the express terms set forth in Paragraph 11 of the CC&Rs, which specifically provided that “[t]his declaration can be amended at any time by the declarants prior to the sale of any lot by the declarants. Thereafter, this declaration can be amended by affirmative majority vote of the lot owners.”

Paragraph 11 placed no limitation as to which, or how many, of the provisions of the CC&Rs could be amended. Instead, any and all of the CC&Rs could be amended by majority vote. Anyone reading and relying upon the CC&Rs would have to take into account the fact that any or all of the individual provisions contained in the CC&Rs could be amended by the owners of two of the three parcels subject to the CC&Rs.

Basic rules of contract interpretation apply to the court's review of restrictive covenants. Wimberly v. Caravello, 136 Wn.App. 327, 336, 149 P.3d 402 (2006). Under such rules, reviewing courts must generally give words in a covenant their

ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. Hearst Commc'ns, Inc. v. Seattle Times, 154 Wash.2d 493, 504, 115 P.3d 262 (2005).

“An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.” Wagner v. Wagner, 95 Wash.2d 94, 101, 621 P.2d 1279 (1980); “[E]very word and phrase must be presumed to have been employed with a purpose and must be given a meaning and effect whenever reasonably possible.” Ball v. Stokely Foods, 37 Wash.2d 79, 83, 221 P.2d 832 (1950); “[C]ourts favor the interpretation of a writing which gives effect to all of its provisions over an interpretation which renders some of the language meaningless or ineffective.” Mayer v. Pierce County Medical Bureau, Inc., 80 Wn.App. 416, 423, 909 P.2d 1323 (1995).

While courts can consider extrinsic evidence to determine the intent of the parties to a contract, such evidence cannot be used to contradict or modify unambiguous terms found in a written contract. In order to be ambiguous, a covenant must be uncertain or two or more reasonable and fair interpretations must be possible. White v. Wilhelm, 34 Wn.App. 763, 771, 665 P.2d 407 (1983). The

court, however, will not read ambiguity into a contract where it can be reasonably avoided by reading the contract as a whole. Universal/Land Const. Co. v. City of Spokane, 49 Wn.App. 634, 637, 745 P.2d 53 (1987). In In re Marriage of Schweitzer, 132 Wn.2d 318, 326-327, 937 P.2d 1062 (1997), the Washington Supreme Court stated that

In Berg v. Hudesman, 115 Wash. 2d 657, 667, 801 P.2d 222 (1990)., this court held extrinsic evidence is generally admissible to ascertain the intent of the parties to a contract. **However, we made it clear in Berg that this rule, known as the "context rule," authorizes the use of extrinsic evidence only to elucidate the meaning of the words of a contract, and "not for the purpose of showing intention independent of the instrument."** Berg, 115 Wash. 2d at 669 (quoting J.W. Seavey Hop Corp. v. Pollick, 20 Wash. 2d 337, 348-49, 147 P.2d 310 (1944)). **We emphasized, "it is the duty of the court to declare the meaning of what is written, and not what was intended to be written."** Berg, 115 Wash. 2d at 669 (quoting Pollick, 20 Wash. 2d at 348-49). **We accordingly held in Berg that parol evidence cannot be used to "add[] to, modify[], or contradict[] the terms of a written contract, in the absence of fraud, accident, or mistake."** Berg, 115 Wash. 2d at 669 (quoting Pollick, 20 Wash. 2d at 348-49); see also U.S. Life Credit Life Ins. Co. v. Williams, 129 Wash. 2d 565, 570, 919 P.2d 594 (1996) ("unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions'." (quoting Lynott v. National Union Fire Ins. Co., 123 Wash. 2d 678, 684, 871 P.2d 146 (1994)). **The Court of Appeals therefore correctly applied the Berg doctrine when it held extrinsic evidence of the parties' intent is generally not admissible to contradict the terms of a written agreement.**

(emphasis added).

In Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999), the Supreme Court further clarified the limitations of extrinsic evidence.

Under Berg and cases interpreting Berg, extrinsic evidence may be relevant in discerning that intent, where the evidence gives meaning to words used in the contract. Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wash. 2d 178, 189, 840 P.2d 851 (1992) (extrinsic evidence illuminates what was written, not what was intended to be written). **However, admissible extrinsic evidence does not include: Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; Evidence that would show an intention independent of the instrument; or Evidence that would vary, contradict or modify the written word.**

(emphasis added.)

Applying the case law set forth above to the present dispute, it is clear that the specific terms of the CC&Rs allow for amendment of the CC&Rs by a majority of the lot owners. The Plaintiffs' unilateral interpretation of the CC&Rs, which would entirely ignore and render ineffective the amendment procedures set forth in Paragraph 11 of the CC&Rs, cannot and does not in any way modify the crystal clear language of Paragraph 11.

2. There Is No Requirement That Amendments To CC&Rs That Do Not Create Additional Restrictions Be "Consistent" With Any Plan of Development.

The Plaintiffs cite Schaefer vs. Trustees of Sandy Hook Yacht Club Estates, 76 Wn.App. 267, 883 P.2d 1387 (1994) and Meresse vs. Stelma, 100 Wn.App. 857, 999 P.2d 1267 (2000) for

the proposition that while amendments to CC&RS may be made by less than 100% of the owners, such amendments must be made “in a reasonable manner consistent with the general plan of development.” However, neither case has any bearing on the present dispute.

In Schaefer the Court of Appeals held that less than 100% of owners cannot adopt new restrictions imposing a greater burden on the minority property owners than was originally contemplated:

We...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.

Schaefer, 76 Wn.App. 267, 273-74 (emphasis added).

Similarly, the court in Meresse stated in pertinent part as follows:

Although emphasizing different perspectives, both parties cite Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc., 76 Wash.App. 267, 273-74, 883 P.2d 1387 (1994), in which Division One held:

[A]n 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*.

We generally agree with Division One's statement of this rule of law, but add a caveat appropriate to the different facts before us.

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, 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 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. 857, 865-866 (italicized emphasis original, underlined emphasis added)

Both cases stand for the limited principle that less than 100% of owners cannot impose new, unexpected restrictions on a minority of other owners. The Courts in both cases quite rightly determined that just because a property owner has agreed to subject his or her property to a certain level of regulation in a set of CC&Rs, the owner should not be required over his or her objection to subject his or her property to additional restrictions unless such additional restrictions are reasonable and consistent with the original plan of development.

Thus, if an owner buys property subject to CC&Rs regulating only the types of building materials that may be used for construction of homes, the owner might not have grounds to object to additional regulations being enacted regarding the colors of the building materials that may be used because the plan of development as set forth in the original CC&Rs clearly contemplated regulation of building materials. However, the same owner would most certainly have grounds to object if the majority sought to impose limits on the number or types of pets the owner might keep if the original CC&Rs had no restrictions whatsoever governing pets, as such regulation would be unexpected and in no way related to the plan of development providing only for governance of building materials.

The principle enunciated in Meresse and Shaefer, that a majority cannot impose new and unexpected restrictions on another owner's use of his or her own property just because that property is subject to CC&Rs, while important and entirely valid, has absolutely no bearing on the present dispute. The amended CC&Rs recorded January 6, 2012 included no new restrictions on the Plaintiffs' use of their property. Instead, the amended CC&Rs modify and reduce the restrictions placed on the individual parcels subject to the CC&Rs.

The plaintiffs have failed to cite any Washington authority for the proposition that a majority of owners cannot amend CC&Rs to reduce existing restrictions, or that such reduced restrictions would have to pass some judicial test of "consistency" with any sort of plan. Meresse and Shaefer certainly do not provide any support for the Plaintiff's proposition. Thus, for example, while Meresse and Shaefer may provide that a majority of owners in a subdivision with CC&Rs regulating only roofing materials cannot impose restrictions regarding pets on an unwilling minority, nothing in either case in any way suggests that the majority could not relax existing restrictions on roofing materials, or even to eliminate such restrictions entirely.

The Plaintiffs also cite to Lakemoor Community Club, Inc. v. Swanson, 24 Wn. App. 10, 600 P.2d 1022 (1979). But, as is true of the Meresse and Shaefer cases cited by the Plaintiffs, Lakemoor provides no support for their position. Indeed, the Court's decision in Lakemoor had nothing to do with amendments to CC&Rs, much less the power of a majority of homeowners to amend CC&RS.

Instead, the Court in Lakemoor was asked to review the actions of a developer retaining a unilateral right to grant exceptions to regulations contained in CC&Rs. The CC&Rs at issue in Lakemoor contemplated "an integral unit of residences surrounding Ken Lake without breaks in the alignments of the

residences and without through traffic streets insofar as is possible". *Id.* at 11. The CC&Rs thus prohibited the use of any lots for dedication as streets to areas outside of the development, but provided that the developer retained the right to grant exceptions to this prohibition at the developer's discretion. *Id.*

After the developer granted an exception to a contractor that intended to use 25-foot wide strips of two of its lots as an access route, the homeowner's association sued. The Trial Court granted a permanent injunction against the use of the lots as an access route, finding that the developer had promised potential purchasers that the development would be self contained with a closed road system and that the exception the developer had granted was out of character with and would defeat the purpose of the CC&Rs. *Id.* at 12-13.

The Court of Appeals affirmed the Trial Court's decision. In doing so it noted that there was "an inherent inconsistency between an elaborate set of restrictive covenants designed to provide for a general scheme or plan of development...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." *Id.* at 15. The Court stated that the apparent inconsistency could be resolved "by

reading into the reservation clause a requirement of reasonableness.” Id.

This principle set forth in Lakemoor restricting the right of a developer to unilaterally provide exceptions to regulations contained in CC&Rs, while just as important and valid as the principle enunciated in Meresse and Shaefer that a majority of owners cannot subject a minority of owners to new and unexpected restrictions on the use of their property, has the same bearing on the present dispute as do Meresse and Shaefer - none. Lakemoor would only be relevant if the “developer” here - the Hunts - had retained and exercised a right to grant exceptions to the CC&Rs. But the Hunts neither retained nor exercised any such right.

4. The Cases Cited By Plaintiffs Regarding Enforcement of CC&Rs Have No Relevance To This Case.

The issue in this case is whether a majority of owners may amend CC&Rs to reduce existing restrictions if the CC&Rs grants the power to amend to the majority. The Plaintiffs, however, apparently recognizing that Meresse, Shaefer and Lakemoor provide no support for their argument that any amendment reducing restrictions must be subject to a “reasonableness” test, go on to devote a significant portion of their Appellate Brief to addressing issues not relevant to this appeal.

The Plaintiffs thus cite to Heath v. Uraga, 106 Wn.App. 506, 24 P.3d 413 (2001) for the proposition that a Court can order a home built in contravention of the governing provisions contained in CC&Rs be torn down. While the result in Uraga is certainly noteworthy and of considerable interest to the legal community as evidence that Courts can and will punish parties that proceed to build homes in violation of clear provisions contained in CC&Rs, it simply has no relevance to the issue of whether CC&Rs can be amended.

Similarly, the Plaintiffs' citation to Wimberly v. Caravello, 136 Wn.App. 327, 149 P.3d 402 (2006) sheds no light on the issues involved in this appeal. Wimberly involved a dispute over construction of a garage and required the Court to interpret the meaning of existing standards for construction set forth in the governing CC&Rs. As was the case in Uraga, the Wimberly case ultimately found the garage that had been built to be in violation of the CC&Rs and ordered it to be removed. The Plaintiffs emphasize this fact by ending their sentence summarizing the decision with an exclamation mark (Plaintiff's Brief, page 20), but fail to explain what bearing this second example of the Court's power to order the removal of structures built in contravention of existing CC&Rs has

on the issue of whether CC&Rs can be amended by a majority of owners if the CC&Rs so provide.

The Defendants have never challenged the Courts' authority to enforce CC&Rs. The three pages of the Plaintiffs' brief spent on highlighting the Court's authority to do so is thus clearly nothing more than an attempt by the Plaintiffs to raise a straw issue regarding which they believe can score points while distracting the Court's attention from the real issue in this case, which is that the Defendants, constituting a majority of the owners of the parcels subject to the CC&Rs, had and properly exercised the power to amend the CC&Rs to reduce restrictions the majority had determined served no legitimate purpose.

4. Even If There Was A Requirement That Amendments To CC&Rs That Do Not Create Additional Restrictions Be "Consistent" With A Plan of Development, The Plaintiffs Have Failed To Establish That The Amended CC&Rs Conflict With The Plan Of Development.

The Plaintiffs have failed to provide any Washington authority supporting their assertion that amendments to CC&Rs that do not create additional restrictions are subject to a requirement that they be consistent with a plan of development. However, even assuming that the law did so provide, the Plaintiffs have failed to provide the Court with absolutely any example of

what would be acceptable amendments to the CC&Rs. Their failure to do so only serves to highlight that their position is really that absolutely no amendments could possibly be allowed over their objection. In other words the Plaintiffs want the Court to pretend, as they do, that they enjoy easements over the Defendants' property that cannot be amended absent their consent.

But the CC&Rs are not an easement for the sole benefit of the Plaintiffs. Instead, the CC&Rs specifically provide that the restrictions imposed on all of the properties subject to them can be modified at any time upon the vote of a majority of the owners of those properties. Clearly some amendments must therefore be possible, even in the absence of unanimity.

Yet the Plaintiffs not only fail to provide the Court with any example of what amendment could be possible, they failed to provide the Defendants with any proposed alternatives prior to the recording of the Amended CC&Rs. Though the Plaintiffs gratuitously accuse the Defendants of bad faith in their Appellate Brief (an all too common accusation leveled by parties with no legitimate legal arguments to make) it is undisputed that before proceeding with the amendments the Defendants sent two sets of proposed amended CC&Rs to the Plaintiffs for their review and

consideration. Unfortunately, the Plaintiffs rejected both proposed sets wholesale without providing any suggested language that they would accept.

The undisputed record thus establishes that the Defendants twice attempted to engage the Plaintiffs in discussion regarding the proposed amendments to the CC&Rs, but the Plaintiffs twice rebuffed their attempts. Rather than acknowledge that amendments could be made and provide suggested language they could live with, the Plaintiffs put their heads in the sand and took the position that no amendment whatsoever could be made without their approval, despite the specific language in Paragraph 11 of the CC&Rs to the contrary. If there was any bad faith in this case it was exhibited by the Plaintiffs, not the Defendants.

But the relevant issue in this case is not whether one side or the other acted in bad faith. Instead, assuming the Amended CC&Rs are subject to a "consistent with the plan of development" test, the issue would be whether the Plaintiffs have raised a question of material fact as to whether the Amended CC&Rs are inconsistent with a plan of development. Other than Mr. Reimer's testimony as to his unilateral interpretation of the CC&Rs, the Plaintiffs introduced no evidence of any "plan" the Hunts had for a development consisting of only three lots. Nor, other than Mr. Reimer's testimony as to how unacceptable any modification of the view enjoyed from the Reimer lot might be, did the Plaintiffs provide

any evidence that the amendments made by the Defendants are “inconsistent” with any plan the Hunts may have had.

As the Defendants pointed out in their Response to the Plaintiffs’ Motion for Summary Judgment, the photos submitted by the Plaintiffs did not support their position that the Amended CC&Rs are somehow inconsistent with the plan of development. Mr. Crowell demonstrated in his Response Declaration and the photos submitted with that declaration that the Plaintiffs misrepresented to the Court what views actually existed when the Plaintiffs purchased their property. (CP 146-158) More importantly, Mr. Crowell’s declaration and attached photos demonstrated that the potential impact on the Plaintiffs’ view as a result of the amendments to the CC&Rs is quite small.

It is significant that the Defendants submitted no reply testimony challenging Mr. Crowell’s assertion that removing the restriction on second stories to the homes on the Defendants’ properties could not block more than a tiny portion of the Plaintiffs’ view, and only up to an elevation far lower than that of many of the trees that were in place at the time the Plaintiffs purchased their property. Thus, even if the Trial Court could have considered whether the Amended CC&Rs were consistent with some original

plan of development, the Plaintiffs failed to provide the Court with any evidence that raised a genuine issue or material fact as to whether the modifications made in the Amended CC&Rs were somehow inconsistent with the plan of development governing the parties' properties.

While Mr. Reimer's testimony did establish that the Plaintiffs subjectively believe that even the most minor impairment of their existing view is unacceptable, and that as a result their use and enjoyment of their property will be dramatically impacted, the undisputed evidence was that the actual effect of the Amended CC&Rs on their views is objectively quite minor. The Plaintiffs thus failed to raise any genuine issue of material fact as to whether the Amended CC&Rs are inconsistent with a "plan of development", and the Trial Court correctly dismissed the Plaintiffs' claims challenging the validity of the Amended CC&Rs.

C. Request For Attorney's Fees And Costs.

Pursuant to RAP 18.1, the Defendants request that they be awarded their attorney's fees and costs incurred in this appeal. Paragraph 12 of the CC&Rs provides that the prevailing party in any legal action to enforce the CC&Rs is entitled to an award of their attorney's fees and costs. The Plaintiffs' claims to invalidate

the Amended CC&Rs and reinstate the original CC&Rs constitute legal action to enforce the CC&Rs. The Defendants as the prevailing party on those claims are therefore entitled to recover their reasonable attorney's fees and costs incurred in this appeal.

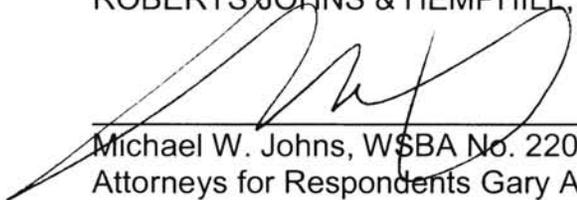
### III. CONCLUSION

For all of the reasons set forth above, this Court should therefore affirm the decision of the Trial Court.

Dated: September 25, 2012.

Respectfully submitted

ROBERTS JOHNS & HEMPHILL, PLLC



---

Michael W. Johns, WSBA No. 22054  
Attorneys for Respondents Gary A.  
Crowell, Susan M. Hyde and Connie  
Maureen Connelly

**CERTIFICATE OF SERVICE**

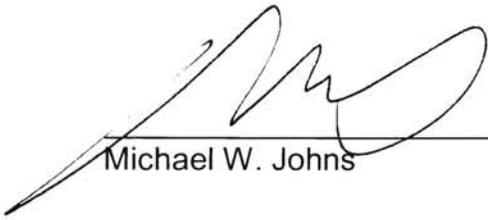
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served by STATE OF WASHINGTON DEPUTY foregoing BRIEF OF RESPONDENTS on the following individuals in the manner indicated:

David D. Gordon  
Gordon & Alvestad  
7525 Pioneer Way, Suite 101  
Gig Harbor, WA 98335

- ( ) Via U.S. Mail
- ( ) Via Facsimile
- ( ) Via Hand Delivery
- ( ) Via ECF
- (XX)** ABC Legal Services

SIGNED this 26<sup>th</sup> day of September, 2012 at Gig Harbor, Washington.

  
\_\_\_\_\_  
Michael W. Johns

FILED  
COURT OF APPEALS  
DIVISION II  
2012 SEP 26 PM 4: 27  
STATE OF WASHINGTON  
DEPUTY