

FILED

AUG 30 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 289117

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROSS WILKINSON, et, ux, et al., Appellants

vs.

CHIWAWA COMMUNITIES ASSOCIATION, Respondents

BRIEF OF APPELLANTS

Dennis Jordan
Dennis Jordan & Associates,
Inc., P.S.
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CR 7(b)(1)

Abbreviations

CP Clerk’s Papers

CPE Cattle Point Estates

I. ASSIGNMENT OF ERROR.

1. This case concerns the validity and enforcement of a “2008 Amendment” to the Protective Covenants of Chiwawa River Pines which prohibited residential rentals of less than six months. (CP 43-85) The trial court did hold that restriction as written to be invalid. (CP 858 (lines 18-20); CP 859 (lines 9-24)).¹ However, it then proceeded to enter an order modifying the restriction to only prohibit residential rentals of less than one month. (CP 858-859) It is the trial court’s “re-writing” of the 2008 Amendment that the Appellants assign error to.

2. The Appellants also assign error to the trial court’s inclusion of what purport to be Findings of Fact and/or Conclusions/Rulings as part of its Order on Summary Judgment. (CP 852-863): CP 855 (lines 5-25); CP 856 (lines 1-24); CP 857 (lines 1-25); and CP 858 (lines 1-13). Specifically, and not in limitation of the above general assignment of error, the Appellants assign error to the inclusion of the following “rulings”:

2. . . . Based on past Board enforcement actions against nightly rentals and the language of the Protective Covenants, the

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The Appellants do not believe that the Respondent will be appealing that portion of the trial court’s Order. In other words, the Appellants believe that the respondent, on reflection, agrees that a six month restriction is unreasonable.

developer intended to prohibit short-term rentals for a duration of less than one month. (CP 858)

3. Rentals for a duration of less than one month violate the single-family residential use restriction and prohibition against commercial use, nuisance, and offensive use in the 1998 and 1991 Amended Protective Covenants. (CP 858)

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether or not the trial court had the authority to re-write the 2008 Amendment to prohibit residential rentals of less than one month after declaring the Amendment to be invalid based upon its prohibition of rentals of less than six months.

2. Whether or not a general plan of development that allows residential rentals can be modified to prohibit homeowners from renting their homes for a term of less than six months.

3. Whether or not the trial court exceeded the scope of its authority in its entry of an Order on Summary Judgment by including any Findings, Conclusions/Rulings in its Order much less the specific ones challenged herein.

III. STATEMENT OF THE CASE

Each of the named Appellants is the owner of at least one improved residential vacation home lot located within one of the six phases of the Plat of Chiwawa River Pines, Chelan County. (CP 443-444 and Exhibits referred

to; CP 552) As property owners, each is a member of the Respondent Chiwawa Communities Association, Inc. (CP 446) Each wish to rent or wish to preserve their right to rent their vacation properties to third parties contrary to the terms and conditions of a September 29, 2008 Amendment to the Association's Protective Covenants which prohibits short term rentals of less than six months.² (CP 43-85) Through the underlying cause of action, the Appellants challenged the validity of that Amendment as it affected their properties. (CP 43-85) On summary judgment, the trial court determined the Amendment to be invalid for rentals of less than six months. (CP 852-863) However, instead of leaving it at that, the trial court re-wrote the 2008 Amendment to only prohibit rentals of less than one month. (CP 858 and CP 859)

Chiwawa River Pines is located within 20 miles of Leavenworth and near Lake Wenatchee. It is within a major recreational/tourist area as that area is described by the Leavenworth Chamber of Commerce website at www.leavenworth.org. (CP 527-551) Therefore, the subject real properties are uniquely suited for short term residential rental use.

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In fact, the Appellants all rent (or wish to preserve their right to rent) their properties for short term stays of less than one month – often for weekend or week long stays.

The original developer of the six phases was Pope & Talbot. As each phase was developed, Pope & Talbot recorded a set of separate Protective Restrictions and Covenants (hereinafter the “Pope & Talbot Covenants”). (CP 444-445 and related Exhibits at CP 498-516) Except as otherwise discussed herein, each set of the Pope & Talbot Covenants for phases 2 through 6 were exactly alike in all aspects material to this litigation.

In pertinent part, those Covenants stated as follows:

- A. That their purpose was to establish “a general plan for the development” of Chiwawa River Pines:

Know all men by these presents: That Pope & Talbot, Inc., a corporation which has heretofore platted Chiwawa River Pines No. [*here the appropriate phase number was inserted*], hereby certifies and declares that it is the owner in fee simple of the Plat of Chiwawa River Pines No. [*here the appropriate phase number was inserted*], and further does hereby certify and declare that **it has established and does hereby establish a general plan for the development, improvement, maintenance and protection of all the real properly included in Chiwawa River Pines No. [*here the appropriate phase number was inserted*]**, according to the Plat thereof recorded on Pages [*here the appropriate phase number was inserted*] of Plats, records of Chelan County, Washington, hereinafter called the “Plat,” and does hereby establish the Protective Restrictions and Covenants hereinafter set forth subject to which all tracts, parcels, lots, building sites, and areas in the Plat shall be held and sold. (Emphasis supplied.) (CP 498-516)

B. That all property within the Plat of Chiwawa River Pines as related to a specific phase would be purchased subject to those specific Covenants and that “all owners of land in the Plat (defined as a specific phase) would automatically become members of the Respondent Chiwawa Communities Association, Inc.³, and, in turn, would be subject to all the duties and obligations of membership under the Articles of Incorporation and the By-laws and any amendments thereof.”:

These Protective Restrictions and Covenants shall be binding upon all parties and all persons having a legal, equitable, possessory or other qualified interest in the real property included in the Plat.

* * * *

Every conveyance of property in the Plat shall be subject to the provisions of the Articles of Incorporation and the By-Laws of CHIWAWA COMMUNITIES ASSOCIATION, INC., a nonprofit corporation organized under the laws of the State of Washington for the purpose, among others, of owning, operating, and maintaining a community water system. Membership in CHIWAWA COMMUNITIES ASSOCIATION, INC., shall be inseparably appurtenant to ownership of land in the Plat. All owners of land in the Plat shall automatically become members of CHIWAWA

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This HOA was formed on December 16, 1963. (CP 516)

COMMUNITIES ASSOCIATION, INC., and subject to all the duties and obligations of membership under the Articles of Incorporation and the By-Laws and any amendments thereof. (CP 498-516)

- C. That “all lots were to be utilized solely for single family residential use “consistent with [a] permanent or recreational residence”:

Land Use:

Lots shall be utilized solely for **single family residential use** consisting of single residential dwelling and such outbuildings, (garage, no more than one guest cottage, patio structure) **as consistent with permanent or recreational residence**. . . .⁴
(Emphasis supplied.) (CP 498-516)

- D. That “nuisance” and “offensive” and commercial uses were prohibited:

Nuisances o[r] Offensive Use:

No nuisance or offensive use shall be conducted or suffered as to lots subject hereto, **nor shall any lot be utilized for industrial or commercial use** . . .⁴
(Emphasis supplied.) (CP 498-516)

- A. That each set of the Pope and Talbot Covenants ran for successive periods of 10 years but could be amended by a

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This provision is not found in the Pope and Talbot Covenants for phase 2. (CP 498-500)

majority vote at the end of each 10 year period:

Amendments:

These covenants shall run with the land and shall be binding until June 30, 19___, at such time said covenants shall be automatically extended for successive periods of ten (10) years, unless the majority of the then owners of lots within the Plat agree, by majority vote, to change these Protective Restrictions and Covenants in whole or in part. (CP 498-516)

The phase 2 Pope and Talbot Covenants also contained a provision allowing the posting of a “for sale or rent” sign as long as it was limited in size to less than six square feet. (CP 499)

On July 11, 1988, a document titled “Protective Covenants For All of Chiwawa River Pines Chelan County, Washington” was recorded by the Respondent Association under Chelan County Auditor’s File Number 8807110010.⁵ (CP 517-520) This document had the stated intent of consolidating all of the prior individual sets of the Pope and Talbot Covenants under one umbrella. (CP 517) The 1988 recording (hereinafter the “1988 Covenants”) contained the same Land Use, Nuisance and Amendment paragraphs as set forth in the Pope and Talbot Covenants for the individual

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This document refers to recorded “Protective Covenants dated 23 April 1988” but no such Covenants have been located - at least of record.

phases and also included the “for sale or rent” sign restriction originally included in phase 2:

4. Land Use.

Lots shall be utilized solely for single family residential use consisting of single residential dwelling and such out-buildings (garage, no more than one guest cottage, patio structure), as consistent with permanent or recreational residence. (CP 518)

5. Nuisances of Offensive Use.

No nuisance or offensive use shall be conducted or suffered as to lots subject hereto, nor shall any lot be utilized for industrial or commercial use . . . nor shall there be kept animals or stock of any kind other than conventional, domestic pets with the exception of horses, etc., stabled on the lot for short-term recreational activities. (CP 518)

6. Trash Disposal.

. . . No sign of any kind shall be displayed to the public view on any lot, tract or subdivision thereof in the plat, except one sign of not more than 3 feet square giving the names of the occupants of the lot, tract, or approved subdivision thereof, **and one sign of not more than six square feet advertising the property for sale or rent.** (CP 519)

The 1988 Covenants were again amended on September 28, 1991 (CP 521-524) (This amendment was recorded in December, 1992 under Chelan County Auditor’s File Number 9212240036.) (CP 521-524) While paragraph 4 of the 1988 Covenants was altered to delete the words “no more than one guest cottage,” no other changes of any consequence were made.

On September 27, 2008, at a special meeting of the members of the Chiwawa Communities Association, a majority of these members approved amendments to Paragraphs 4 and 5 of the 1991 Covenants (hereinafter the "2008 Amendment). The 2008 Amendment prohibited short term rentals which were specifically defined as rentals of less than six months (CP 449-451; CP 525-526):

LAND USE. Paragraph 4, "Land Use," shall be amended in its entirety as follows:

Lots shall be utilized solely for single family residential use consisting of single residential dwelling and such out-buildings (garage, patio structure), as consistent with permanent or recreational residence. Lots shall not be utilized for industrial or commercial EXCEPT for the following:

- (1) **Long-term, low-impact service-oriented business:** Long-term, low-impact service-oriented business are defined as businesses operated by owners that reside on their properties on an ongoing basis, provide a direct benefit to the Association and its owners, and have a low impact on the community and its resources. Examples of long-term, low-impact, service-oriented businesses include the following: Trail grooming, backhoe operators, snow removal and accounting services. The Board of Trustees may approve long-term, low-impact, service-oriented businesses in addition to the examples given on a case by case basis. All long-term, low-impact, service-oriented businesses must comply with local zoning and permitting regulations and subject to the Protective Covenants and By-laws.
- (2) **Long-term residential rentals for a period of more than six (6) consecutive months:** All residential rentals for a period of six (6) consecutive months or more shall be

permitted, shall be in writing, subject to compliance with local zoning and permitting regulations, and subject to the Protective Covenants and By-laws.

All residential rentals for a period of less than six (6) consecutive months shall not be permitted.

* * * *

Paragraph 5 titled “Nuisances or Offensive Use” was also amended to read, in pertinent part, as follows:

No nuisance or offensive use shall be conducted or suffered as to lots subject hereto, nor shall any lot be utilized for industrial or commercial use (except as authorized under section 4, “Land Use”) (CP 449-450; CP 525-526)

Following the approval of the 2008 Amendment and its recording under Chelan County Auditor’s File Number 2291058, the Respondent Association sought to enforce it. (CP 86-92) Specifically citing to the 2008 Amendment in written demands, the Association directed the Appellants to stop using their residences for overnight rentals to third parties. (CP 881-882) In response, the Appellants filed and served a Complaint for Declaratory Judgment against the Association wherein they sought the following specific relief:

1. That the Court declare invalid and null and void the Protective Covenant recorded under Chelan County Auditor’s File Number 2291058 that prevents the Plaintiffs from renting their tracts for short term rental purposes. (CP 49)

Respondent’s Answer and Counterclaim sought the opposite relief:

1.2 Declaring valid and enforceable the amendment to the Protective covenants recorded on October 7, 2008 under Chelan County Auditor's File Number 2231058, which includes the restrictive covenant prohibiting residential rentals for a period of less than six months; (CP 91)

1.3 Permanently enjoining Plaintiffs from using their real properties as short-term rentals for a period of less than six consecutive months; (CP 91)

Respondent then filed a Motion for Summary Judgment. Under its Relief Requested section, it sought relief that mirrored its Counterclaim:

Defendant CHIWAWA COMMUNITIES ASSOCIATION request this Court enter an Order on Summary Judgment declaring that the 2008 amendment to the Chiwawa River Pines Protective Restrictions and Covenants is valid and enforceable against Plaintiffs. (CP 102)

Appellants' Cross Motion for Summary Judgment sought the exact opposite relief:

Plaintiffs request that this Court enter an Order on Summary judgment declaring that the 2008 AMENDMENT TO PROTECTIVE COVENANTS FOR ALL OF CHIWAWA RIVER PINES prohibiting short-term rentals of less than six consecutive months is invalid and unenforceable against the named Plaintiffs and their successors and assigns as owners of the tracts/lots described below. (CP 443)

The parties' Cross Motions for Summary Judgment were heard and, on January 21, 2010, the trial court entered the following ruling:

The 2008 amendment to the Protective Covenants is invalid and unenforceable for rentals of a period of more than one month.⁶

Therefore, as requested by the Appellants, the trial court found the 2008 Amendment to be invalid. However, the trial court then took the unprecedented step to re-write it in a manner that the Court felt made it enforceable – an action which the Appellants challenge.

Following a Motion for Reconsideration which was denied on March 26, 2010 (CP 872-882; CP 894-896), this Appeal was filed on April 1, 2010.

IV. ARGUMENT

1. The standard for review of an Order on Summary Judgment is a de novo review.

When reviewing a trial court's decision on a motion for judgment as a matter of law, the appellate court applies the same standard as the trial court and reviews the grant or denial of the motion de novo. *Davis v. Microsoft Corp.*, 149 Wash.2d 521, 531, 70 P.3d 126 (2003). “A motion for judgment as a matter of law must be granted ‘when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.’” *Id.* (quoting *Sing v. John L. Scott, Inc.*, 134 Wash.2d 24,

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CP 852-863.

29, 948 P.2d 816 (1997)). “Substantial evidence” is evidence that is sufficient “ ‘to persuade a fair-minded, rational person of the truth of a declared premise.’ ” *Davis*, 149 Wash.2d at 531, 70 P.3d 126 (quoting *Helman v. Sacred Heart Hosp.*, 62 Wash.2d 136, 147, 381 P.2d 605 (1963)).

2. The original Pope and Talbot Covenants established a “General Plan of Development” for all phases of Chiwawa River Pines that limited the use of lots to “single family residential use....as consistent with [a] permanent or recreational residence.”

The original recorded Pope & Talbot Covenants⁷ clearly and expressly “established “a general plan for the development, improvement, maintenance and protection of all real property” included within each of its phases.

The leading case covering the question of covenants relative to the restrictive use of the lots is *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 24 A. 388, 392, where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues, and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, . . . and it appears, by writings or by the circumstances, . . . that each purchaser is to be subject to and to have the benefit thereof; . . . one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase. (*Tindolph v. Schoenfeld Bros.*, 157 Wn. 605, 607-608, 289 P.530 (1930))

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CP 444-445 and related Exhibits at CP 498-516.

This general plan of development specifically limited the use of the lots within the development to “single family residential use as consistent with [a] permanent or recreational residence” with commercial uses being barred.⁸ That general plan of development as originally expressed continued unchanged into the 1988⁹ and 1991¹⁰ Covenants except that the 1988 and 1991 Covenants each expressly allowed signs advertising a cabin “for rent” as long as the sign was limited in size.¹¹

3. Under Washington law, the Respondent Association does not have the power to unreasonably alter an established general plan of development without the consent of each of its members.

On paper, the Respondent Association has always had the authority to amend the Covenants by majority vote.¹² However, that ability is subject to limits imposed by Washington law. Specifically, the Association “must exercise its power to adopt new restrictions respecting the use of privately

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CP 499, 503, 508, 511 and 514.

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CP 518.

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CP 522.

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CP 519 and 523.

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CP 500, 504, 508, 511, 514, 520 and 524.

owned land “in a reasonable manner [so] as not to destroy the general scheme or plan of development.” *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 273, 883 P.2d 1387 (1994), review denied, 127 Wn.2d 1003, 898 P.2d 308 (1995)(quoting *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)).

Further, “[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 v. Stelma*, 100 Wn. App. 857, 866, 999 P.2d 1267 (2000) (quoting and adopting the rule stated in *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610, 617 (1994)).

Therefore, while the Association has authority to amend the Protective Restrictions and Covenants, it may not thereby destroy the general plan of development, it must exercise its authority reasonably, and it may not subject the minority of Chiwawa River Pines to “unlimited and unexpected restrictions on the use of their land.” *Meresse*, 100 Wn. App. at 866, 999 P.2d 1267. Therefore, the Appellants argue that **if** the Pope and Talbot

Covenants and/or the 1988 and 1991 Covenants allowed rentals of less than six months in duration, the 2008 Amendment approved by a majority of the lot owners unreasonably destroys that established general plan; therefore, the 2008 Amendment is invalid and unenforceable – a conclusion that the trial court itself reached.¹³

4. Under the Pope and Talbot Covenants as well as the 1988 and 1991 Covenants, the general plan of development allowed residential rentals of less than six months.

First, under the original Pope and Talbot Covenants¹⁴ as well as the 1988¹⁵ and 1991¹⁶ Covenants, there was no express prohibition against renting properties for residential use for any term. In fact, the phase 2 Pope and Talbot Covenants¹⁷ and the 1988¹⁸ and the 1991¹⁹ Covenants all

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CP 858 and 859.

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CP 498-516.

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CP 517-519.

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CP 521-524.

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CP 499.

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CP 519.

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CP 523.

acknowledged the right to rent for any term by regulating the size of the “for rent” signs that could be displayed on any one lot.

Second, the Court in *Ross v. Bennett*, 148 Wash. App. 40 (2008/2009) review denied at 166 Wash 2nd 1012 (2009) has very recently made it clear that a prohibition of commercial uses within a development whose lots were limited to single family residential use does not work to prohibit short-term, vacation type residential rentals. In that case, the properties within the Cattle Point Estates (“CPE”) were subject to a CPE Covenant that limited the use of “all parcels. . . . to residence purposes only and only one single family residence may be erected on each such parcel.” (*Ross*, supra at 44.) However, in 2002, the Cattle Point Owners Association “issued a transient rentals policy stating that a lease/rental shall not be for a period of less than 30 days.” (*Ross*, supra at 44.) The defendant in that case used his property to generate income by renting to persons for less than 30 days. On a Motion for Summary Judgment, the trial court concluded that rentals for less than 30 days constituted a business use, not a residential use. After concluding that all business uses of property in CPE, including rentals of less than 30 days, were violations of the CPE Covenant, the trial court permanently enjoined the defendant from renting his property for periods of time of less than 30

days. The defendant appealed the summary judgment ruling. *Id.* at 45, 203 P.3d 383.

The Court of Appeals reversed the trial court's grant of summary judgment and remanded for entry of a judgment in favor of the defendant. First, the Court of Appeals rejected the Plaintiff's argument that "a vacation rental is a business use." *Id.* at 51, 203 P.3d 383.

[The Defendant] proposes a rental of the property that is identical to his own use of the property, as a residence, or the use made by a long-term tenant. The owner's receipt of rental income either from short or long-term rentals, in no way detracts or changes the residential characteristics of the use by the tenant. (*Id.* at 51, 203 P.3d 383.)

Next, the Court declined to make a distinction between long and short term rentals where the CPE Covenants themselves had not done so expressly:

We agree with [the Defendant] that the trial court erred in finding that short-term vacation rentals were prohibited by the CPE Covenant. On its face, the CPE Covenant does not prohibit the short-term rental of Bennett's house to a single family who resides in the home. The CPE Covenant merely restricts use of the property to residential purposes. Renting the [Defendants] home to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of the CPE Covenant. **The transitory or temporary nature of such use by vacation renters does not defeat the residential status.** (*Id.* at 51-52, 203 P.3d 383. (Emphasis supplied.))

Therefore, absent any express prohibition against rentals of less than six months being included as part of the general plan of Chiwawa's subdivision and, under the authority of the *Ross* case cited above, it is clear

that rentals of less than six months under the Pope & Talbot Covenants and the 1988 and 1991 Covenants constituted an allowed residential use, not a prohibited commercial use.²⁰

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This conclusion is true whether the covenants at issue are strictly interpreted or are interpreted in a manner that protects the collective interests of the homeowners:

More recently, however, we have indicated that “where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable.” *Riss*, 131 Wash.2d at 623, 934 P.2d 669. This is because “ [s]ubdivision 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.” *Id.* at 622, 934 P.2d 669 (emphasis omitted) (second alteration in original) (quoting *Mains Farm*, 121 Wash.2d at 816, 854 P.2d 1072).

As such, “[t]he court’s goal is to ascertain and give effect to those purposes intended by the covenants.” *Riss*, 131 Wash.2d at 623, 934 P.2d 669. In ascertaining this intent, we give a covenant’s language its ordinary and common use and will not read a covenant so as to defeat its plain and obvious meaning. *Mains Farm*, 121 Wash.2d at 815-16, 854 P.2d 1072. Moreover, “[t]he court will place ‘special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.’” *Riss*, 131 Wash.2d at 623-24, 934 P.2d 669 (quoting *Lakes at Mercer Island Homeowners Ass’n v. Witrak*, 61 Wash.App. 177, 181, 810 P.2d 27 (1991)). (Emphasis supplied.)

5. Having ruled that the 2008 Amendment was invalid, the trial court does not have the ability/power to re-write/revise/partially rescind its provisions in order to make it valid/enforceable.

The trial court correctly ruled that the 2008 Amendment was invalid to the extent that it prohibited residential rentals of less than six months. That is where the trial court should have ended its analysis. Instead, the trial court chose to re-write the Amendment to bar residential rentals of less than one month.²¹ Case law is clear that neither the trial court nor the Court of Appeals has the authority or power, **“under the guise of construing the contract, to disregard contract language or revise the contract.”**^{22 23}

In *Seattle Professional Engineering Employees Ass'n v. Boeing Co.* 92 Wash. App. 214, 220-221, 963 P.2d 204, 208 (Wash.App. Div. 1,1998), the trial court entered an Order on Summary Judgment in favor of Boeing in

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CP 858-859.

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Seattle Professional Engineering Employees Ass'n v. Boeing Co., 92 Wash.App. 214, 220-221, 963 P.2d 204, 208 (Wash.App. Div. 1,1998) citing *Rones v. Safeco Ins. Co. of Am.*, 119 Wash.2d 650, 654, 835 P.2d 1036 (1992); *Wagner v. Wagner*, 95 Wash.2d 94, 101, 621 P.2d 1279 (1980).

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In Washington, basic rules of contract interpretation apply to review of restrictive covenants. *Wimberly v. Caravello*, 136 Wash.App. 327, 336, 149 P.3d 402 (2006).

a Declaratory Judgment action. In that action, the parties sought a ruling on the meaning of a contract provision. The employees asked the trial court to take the same approach that a Washington court is authorized to take in construing the validity of a non-competition clause wherein the court, if it determines the clause to be invalid as written can, 'in the interests of justice,' re-write it:

It is well settled that a court of equity will use its power to enforce a restriction against a former employee's competition only to the extent that such restriction is reasonable and necessary to protect a legitimate business interest of the employer. *Racine v. Bender*, supra, *Schneller v. Hayes*, 176 Wash. 115, 28 P.2d 273 (1934). See also 6A Corbin, Contracts s 1394 (1962). But it does not follow that an entire contract must fail because of an unreasonable restriction as to time and area. One line of authority holds that unless the contract is divisible the court will not write a new contract and will refuse to grant any equitable relief against competition. See, e.g., *Wisconsin Ice & Coal Co. v. Lueth*, 213 Wis. 42, 250 N.W. 819 (1933); *Welcome Wagon, Inc. v. Morris*, 224 F.2d 693 (4th Cir.1955); Restatement, Contracts s 518 (1932). However, a substantial number of American courts in later cases have adopted a new and different rule that a contract in restraint of trade will be enforced to the extent it is reasonable and lawful. See, e.g., *John Roane, Inc. v. Tweed*, 33 Del.Ch. 4, 89 A.2d 548, 41 A.L.R.2d 1 (1952); *Redd Pest Control Co. v. Heatherly*, 248 Miss. 34, 157 So.2d 133 (1963); *Igoe v. Atlas Ready-Mix Inc.*, 134 N.W.2d 511 (N.D.1965).

We adopt the reasoning in the second line of cases. **The enforcement of such a contract does not depend upon mechanical divisibility, meaning that offending portions of the covenant can be lined out and still leave the remainder grammatically meaningful and thus enforceable. This is the so-called 'blue pencil test.' The better test is whether partial enforcement is possible without injury to the public and without injustice to the parties.** *Ceresia v. Mitchell*, 242

S.W.2d 359 (Ky.1951); *Fullerton Lumber Co. v. Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955); 17 C.J.S. Contracts s 289 p. 1224.²⁴

However, Division I of the Court of Appeals expressly held that it would not extend the ‘interests of justice test’ used in interpreting and enforcing noncompetition clauses beyond those specific cases:

The trial court correctly identified the problem with partial rescission in this case by noting that rescinding only the portions of the employment agreements concerning unpaid orientation would not by itself result in a separately enforceable contract. Once the erroneous provisions are stricken, the agreements still contain fixed starting dates for employment that do not encompass attendance at orientation. **As is the case with reformation, we are not at liberty, under the guise of construing the contract, to disregard contract language or revise the contract.** *Rones v. Safeco Ins. Co. of Am.*, 119 Wash.2d 650, 654, 835 P.2d 1036 (1992); *Wagner v. Wagner*, 95 Wash.2d 94, 101, 621 P.2d 1279 (1980).

The plaintiffs urge this court to adopt a broader interpretation of the court’s power to partially rescind a contract. **According to the plaintiffs, where partial enforcement would serve the ends of justice, the court should not be limited to rescinding a provision based on its mechanical divisibility.**^{FN3} *See Wood v. May*, 73 Wash.2d 307, 313, 438 P.2d 587 (1968). **However, mechanical divisibility remains the rule rather than an exception. Our courts have applied the more generous interests of justice test only to cases involving noncompetition clauses. See Wood**, 73 Wash.2d at 314, 438 P.2d 587. **We decline the invitation to extend this analysis to other aspects of employment contracts.**

FN3. Also known as the blue pencil test, mechanical divisibility requires that the remainder of the contract be both

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Wood v. May, 73 Wash.2d 307, 312-313, 438 P.2d 587, 590 - 591 (Wash. 1968) (Emphasis supplied.)

grammatically meaningful and enforceable once the offending portions are lined out. *Wood v. May*, 73 Wash.2d 307, 313, 438 P.2d 587 (1968).²⁵

When the employees took the issue up to the Supreme Court, the Supreme Court agreed with both the trial court and the Court of Appeals. Using nearly identical language as the Court of Appeals, the Supreme Court characterized the employees' argument for partial enforcement as "meritless":

The employees next argue the trial court should have partially rescinded that portion of the contract requiring attendance at mandatory pre-employment orientation sessions without pay. The employees contend this provision violates public policy because it is contrary to the WMWA. **A contract may be partially rescinded if the offending provisions can be "lined out," while leaving the remainder grammatically meaningful and enforceable.** *Wood v. May*, 73 Wash.2d 307, 313, 438 P.2d 587 (1968) (the so-called "blue pencil" test). **Contrary to the employees' assertions, this test remains the rule rather than the exception in Washington.** *Seattle Profl Eng'g Employees Ass'n*, 92 Wash.App. at 221, 963 P.2d 204. If we were to strike the provision at issue as the employees request, the contracts would still contain fixed starting dates for employment that excluded the mandatory pre-employment orientation sessions; we would still have to modify the contracts to alter the starting date of employment. **Again, we are "not at liberty, under the guise of construing the contract, to disregard contract language or revise the contract."** *Seattle Profl Eng'g Employees Ass'n*, 92 Wash.App. at 221, 963 P.2d 204 (citing *Rones v. Safeco Ins. Co. of Am.*, 119

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Seattle Professional Engineering Employees Ass'n v. Boeing Co., 92 Wash.App. 214, 220-221, 963 P.2d 204, 208 (Wash.App. Div. 1,1998) (Emphasis supplied.)

Wash.2d 650, 654, 835 P.2d 1036 (1992)). We find the employees' arguments based on mutual mistake or rescission *meritless*.²⁶

What this trial court has done with the 2008 Amendment is to re-write it because the offending portion can't simply be lined out. Such action is clearly contrary to established law and this Court should reverse the trial court by declaring the 2008 Amendment unenforceable as to rentals of less than six months.

6. The trial court also entered the following ruling:

“Rentals for a duration of less than one month violate the single-family residential use restriction and prohibition against commercial use, nuisance, and offensive use in the 1988 and 1991 Amended Protective covenants.”²⁷

In entering that ruling, the trial court improperly exceeded the scope of the parties' Motions for Summary Judgment.

Despite being outside of the scope of the pleadings (the Complaint, the Counterclaim and the Cross Motions for Summary Judgment) of both parties, the trial court also entered a ruling that “rentals for a duration of less than one month violate the single-family residential use restriction and the

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Seattle Professional Engineering Employees Ass'n v. Boeing Co. 139 Wash.2d 824, 833-834, 991 P.2d 1126, 1131 (Wash.,2000) (Emphasis supplied.)

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CP 858.

prohibition against commercial use, nuisance, and offensive use in the 1988 and 1991 Amended Protective Covenants.”²⁸

The purpose of a motion under the Civil Rules is to give the other party notice of the relief sought. CR 7(b)(1) requires that a motion “shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” (*Pamelin Industries, Inc. v. Sheen-U. S. A., Inc.*, 95 Wash.2d 398, 402, (1981).)

In this case, both the Complaint²⁹ and the Counterclaim³⁰ as well as the Cross Motions for Summary Judgment³¹ sought a single determination – a declaration of the validity or invalidity of the 2008 Amendment that prohibited residential rentals of less than six months. Therefore, that portion of the trial court’s ruling should be ordered stricken by the Court of Appeals.

7. Over the Appellants objections, the trial court improperly included Findings and Conclusions/Rulings as part of its Order on Summary Judgment which this Court should strike and/or not consider.

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CP 858.

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CP 49.

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CP 91.

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CP 102 and 443.

The rule of law is clear that it is “not proper” for the trial court to include Findings and Conclusions/Rulings as part of an Order on Summary Judgment:

We initially note that the trial court entered findings of fact and conclusions of law in the order granting partial summary judgment. However, findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court. *Chelan Cy. Deputy Sheriffs' Ass'n v. Chelan Cy.*, 109 Wash.2d 282, 294 n. 6, 745 P.2d 1 (1987).

Therefore, the Appellants seek an order from this Court striking the following Findings and Conclusions/Rulings from the trial court’s Order on Summary Judgment: (CP 852-863): CP 855 (lines 5-25); CP 856 (lines 1-24); CP 857 (lines 1-25); and CP 858 (lines 1-13).

V. CONCLUSION

The 2008 Amendment prohibiting residential rentals of less than six months is clearly contrary to the general plan of development of Chiwawa River Pines and, therefore, unenforceable against the Appellants. Just as clear is the fact that the trial court did not have the authority to re-write the 2008 Amendment to only prohibit rentals of less than one month. Even then, however, prohibiting rentals of less than one month is contrary to the holding of the *Ross* case and exceeds the scope of the relief requested in the parties’ pleadings as well as their Cross Motions for Summary Judgment. All in all,

the trial court's Order on Summary Judgment should be modified to reflect simply that the 2008 Amendment is invalid and unenforceable as to residential rentals of less than six months.

Respectfully submitted,

DENNIS JORDAN & ASSOCIATES,
INC., P.S.

By

A handwritten signature in black ink, appearing to be 'Dennis Jordan', written over a horizontal line.

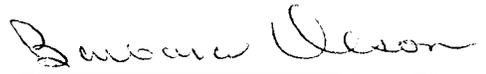
Dennis Jordan, WSBA # 4904
Attorney for the Appellants

DECLARATION OF MAILING

I declare under the penalty of perjury of the laws of the State of Washington that a copy of the foregoing Brief of Appellants was on this day deposited in the U. S. mail by declarant in a properly stamped and addressed envelope addressed to:

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Executed at Everett, Washington on this 27th day of August, 2010.



Barbara Olson