

**FILED**

SEP 30 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 289117

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

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ROSS WILKINSON and CINDY WILKINSON; MONTE KARNES and  
KIMBERLEY KARNES; DAVID BETHEL and JEANIE BETHEL;  
DARRELL MCLEAN; JIM PAULUS and KATHY PAULUS, JUSTIN  
HARGIS and TABATHA HARGIS; JOE HARGIS and LINDA  
HARGIS; DANIEL MACINDOE and ISIDRA MACINDOE; and  
DAVID SPICER and MARTHA SPICER,  
*Appellants*

v.

CHIWAWA COMMUNITIES ASSOCIATION, a Washington Non-  
Profit Corporation,  
*Respondent*

---

BRIEF OF RESPONDENT

---

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## **I. INTRODUCTION**

A small group of owners (Wilkinson, et. al) (“Appellants”) would like to operate a disruptive commercial nightly/weekend rental business in a residential and recreational community. Appellants would like to use the Internet to advertise their lodging to the general public in manner similar to hotels and motels. This type of activity was never allowed under any version of the Protective Covenants of Chiwawa River Pines.

Additionally, in 2008, the community debated and voted whether Appellants should be granted an exception for commercial use, and the overwhelming answer was no. Respondent Chiwawa Communities Association, the homeowner’s association (“Association”), therefore counterclaimed and sought and obtained a declaratory judgment and an injunction.

In the context of this brief, the term “short-term rentals” is equivalent to rentals for a period of one month or less unless otherwise specified.

## **II. RESPONSE TO ASSIGNMENT OF ERROR**

### *A. Response to Assignment of Error.*

The trial court properly granted summary judgment in favor of Chiwawa Communities Association (“Association”) in part. Appellants

presented no evidence in response to the Association's summary judgment motion to dispute the fact that, under versions of the Protective Covenants prior to 2008, the Board took enforcement actions against short-term rentals for a period of less than one month. Appellants presented no evidence to dispute the fact that the majority of owners voted not to allow short-term rentals as an exception to commercial use when the Protective Covenants were amended in 2008.

*B. Counter-statement of Issues Pertaining to Assignments of Error.*

1. Whether the trial court's examination of the 1988 and 1991 Amended Protective Covenants fell within the scope of the cross-motions for summary judgment.
2. Whether the 2008 Amendment to the Protective Covenants is severable and enforceable in part.
3. Whether the general scheme of the development supports an amendment restricting rentals for a duration of less than 30 days.
4. Whether the format of the trial court's ruling affects Appellants' appeal.

### III. STATEMENT OF THE CASE

#### A. *Statement of Facts.*

##### 1. *Chiwawa River Pines.*

Chiwawa River Pines is a beautiful planned community consisting of 367 lots located in Chelan County, Washington (“Chiwawa”). The community is located in an area zoned as Rural Waterfront and is subject to protective covenants. It includes a mixture of permanent residents and vacation owners.

Chiwawa River Pines is as an attractive and desirable community because of several unique factors: access to Forest Service and Bureau of Land Management (BLM) land, availability of county roads for snowmobiling, and the protection of the regulations of a planned development. CP 624 (Declaration of David Johnston, ¶ 3), CP 618 (Declaration of Joyce Pfluger, ¶ 3). Many other developments in the area do not have covenants or have weak covenants. The Protective Covenants were a factor in the decision of many who decided to purchase homes in Chiwawa River Pines. *See* CP 623-29 (Declaration of David Johnston).

Chiwawa River Pines comprises six sections. The developer, Pope & Talbot Development, Inc., started building in 1963 and continued building the community in phases with protective covenants recorded against all sections. CP 572 (*See* Declaration of Joanne Stanford, ¶ 5-7).

In 1988, the majority of the owners, 160 owners out of 240 owners, approved to consolidate the protective covenants for all sections, which was recorded on July 11, 1988, under Chelan County Auditor's File No. 8807110010 ("1988 Protective Covenants"). CP 269-70, 284-87. The 1988 Protective Covenants restrict land use to single-family residential use and prohibits nuisance, offensive use, and industrial and commercial use. CP 284-87 (Declaration of Gloria Fisk, Exhibit C: 1988 Protective Covenants). The 1988 Protective Covenants also expressly reserve the power of the majority of the property owners to adopt new restrictions. CP 287 (Declaration of Gloria Fisk, Exhibit C: 1988 Protective Covenants). The relevant portions read as follows:

2. Membership in Chiwawa Communities Association, Inc. Every conveyance of property in the plats shall be subject to the provisions of the Articles of Incorporation and the By-Laws of the Chiwawa Communities Association, Inc.

....

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

....

5. Nuisances or 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

....

10. Terms of Covenants. These covenants shall run with the land and shall be binding until 1998 (ten years), at which time said covenants shall be automatically extended for successive years periods of ten 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 284-87 (Declaration of Gloria Fisk, Exhibit C: 1988 Protective Covenants).

The Protective Covenants dated September 28, 1991, eliminating guest cottages were approved by the majority of the owners and recorded on December 24, 1992, under Recording No. 9212240036 (the “1991 Amended Protective Covenants”). CP 270 (Declaration of Gloria Fisk, ¶ 6). There were no substantive changes to the 1991 Protective Covenants that are relevant to the issues in the current litigation.

The 1988 and 1991 Amended Protective Covenants also include a severability clause:

8. Severability. The provisions hereof are severable, and the invalidation of any part or parts hereof shall not thereby disqualify or invalidate the other provisions hereof which shall remain in full force and effect in accordance with their terms.

CP 286 (Declaration of Gloria Fisk, Exhibit C: 1988 Protective Covenants, Section 8); CP 521 (Plaintiffs Cross-Motion for Summary Judgment and Response to Defendant’s Motion for Summary Judgment, Exhibit 9: 1991 Protective Covenants, Section 8).

## *2. Board Action Against Short-Term Rentals.*

It is undisputed that the Board took action against short-term rentals in the past. In 1987, the Board was notified that an owner, Larry Thormable, intended to rent his cabin on a day-to-day basis. CP 271 (Declaration of Gloria Fisk, ¶ 4). In a letter dated July 6, 1987, the Board advised Mr. Thormable that daily rentals would violate the land-use and nuisance and offensive-use provisions of the Protective Covenants. CP 305 (Declaration of Gloria Fisk, Exhibit F). Mr. Thormable responded in a letter dated July 18, 1987, that he had no intention of renting his cabin on a daily basis. CP 307 (Declaration of Gloria Fisk, Exhibit G).

In 1991, Gloria Fisk, then President of the Board of Trustees, asked an owner, Renate Brahm, to remove her driveway sign advertising lodging because no businesses were allowed in the community, pursuant to the Protective Covenants. CP 271 (Declaration of Gloria Fisk, ¶ 10). The Minutes of Special Meeting of the Board of Trustees of Chiwawa Communities Association dated December 8, 1991 memorialize the fact that Ms. Fisk informed the Board that Renate Brahm was advertising lodging via a driveway sign \ and that she would advise Ms. Braham that lodging is not allowed in the community. CP 309-10 (Declaration of Gloria Fisk, Exhibit H).

Chiwawa is a very large community, with 367 lots. CP 133 (Declaration of Mike Stanford, ¶ 14). Although Appellants operated nightly/weekend rentals, this does not mean this use was allowed under the Protective Covenants. Prior to the 2008 Amendment, an increasing number of properties in Chiwawa River Pines were being used for nightly/weekend rentals, as a business and for commercial use. The rentals were being advertised on the Internet and through professional rental property agencies. It was undisputed that Appellants (with the exception of Appellants Monte and Kimberly Karnes who would like to operate short-term rentals in the future) advertised their short-term rentals in a manner similar to motels and hotels, with rates per night. CP 172 - 73, 181-227 (Declaration of Joanne Stanford). The websites allowed customers to view photos of the lodging and a calendar of available dates. The websites also accepted payments via credit card, indicated the fees are subject to a 10% lodging tax, displayed check-in and check-out times, charged professional cleaning fees, and allowed multiple guests. *Id.*

### 3. *Operation of Short-Term Rentals.*

Many of the advertisements for the short-term rentals focused on the number of people that can sleep on the property, regardless of the number of actual bedrooms. Appellants Hargises and McLean advertised their properties as accommodating up to 10 people per property. For

example, “Relax Lodge” owned by Appellant Darrel McLean indicates the lodge can accommodate 10 adults. CP 198-204 (Declaration of Joanne Stanford, Exhibit D). Appellants Justin and Tabitha Hargis and Joe and Linda Hargis advertised their two properties jointly. Each house was listed as accommodating 2-10 people and each property has an 8-person hot-tub. CP 209-23 (Declaration of Joanne Stanford, Exhibit F).

Based on the Appellants’ discovery responses, it is undisputed the Appellants have generated the following income from the operation of short-term rentals.

<b><u>Plaintiff</u></b>	<b><u>Property Address</u></b>	<b><u>2007 Income</u></b>	<b><u>2008 Income</u></b>
Wilkinson	2413 Salal Drive	\$12,000 <sup>1</sup>	N/A
Karnes	2691 Kinnickinick Drive; 2620 Wenatchee Pines	Not used as short-term rental	Not used as short-term rental
Bethel	2309 Pine Tree	See figures for 2008	\$21,875 (Estimated) <sup>2</sup>

<sup>1</sup> CP 699 (Amended Declaration of Yen Lam with Plaintiff’s Discovery Responses, pg. 12)

<sup>2</sup> CP 716 (Amended Declaration of Yen Lam with Plaintiff’s Discovery Responses, pg. 29.) Plaintiffs Bethel failed to comply with the Court’s Order compelling a list of income (estimated) generated by each property requested in Defendant’s Interrogatory No. 3. Estimates were calculated by the Association by using information provided in Plaintiff Bethels Response to Interrogatory No. 3 as follows:

The phrase “times” is considered one night (although “times” may actually include more nights):

**2209 Pine Tree Road**  
125 times x \$125 = \$15,625

**2422 Salal Drive**  
35 times x \$175 = \$6,125

Bethel	2209 Pine Tree	See figures for 2008	\$15,625 (Estimated)
Bethel	2422 Salal	See figures for 2008	\$6,125 (Estimated)
Bethel	2648 Sumac Lane	See figures for 2008	\$2,175 (Estimated)
McLean	2657 Alder Lane	\$4,452 <sup>3</sup>	\$11,464 <sup>4</sup>
Paulus	2468 Salal	\$9,055 <sup>5</sup>	\$19,803 <sup>6</sup>
Justin and Tabitha Hargis	2477 Salal	\$16,019 <sup>7</sup>	\$28,208 <sup>8</sup>

The operation of the short-term rentals by Appellants is not incidental use. Additionally, some rentals are operated under a business entity or license. The rate at which the Appellants' properties are rented on a short-term basis is described as follows:

**2309 Pine Tree Road**

125 nights x \$175 = \$21,875

**2686 Sumac Lane**

(45 times since 2006; 15 times per year (2006 – 2008))

15 x \$145 = \$2,175

The four properties total \$45,800 annually. This is an approximation and may be lower than the real income generated since Respondent used the lower number of nights and prices in the range provided by Appellants Bethel.

<sup>3</sup> CP 743 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 56; Actual income unknown as an unknown commission is given to property manager)

<sup>4</sup> CP 744 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 57; Actual income unknown as an unknown commission is given to property manager)

<sup>5</sup> CP 753 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 66).

<sup>6</sup> CP 754 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 67).

<sup>7</sup> CP 764 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 77)

<b><u>Plaintiff</u></b>	<b><u>Property Address</u></b>	<b><u>Average Number of Rentals</u></b>	<b><u>Business License?</u></b>
Wilkinson	2413 Salal Drive	30 nights per year <sup>9</sup>	No
Karnes	2691 Kinnickinick Drive; 2620 Wenatchee Pines	Not used as short-term rental but would like to operate short-term rental in the future	N/A
Bethel	2309 Pine Tree	125-150 nights per year <sup>10</sup>	Comfy Cabins, LLC <sup>11</sup>
Bethel	2209 Pine Tree	125 times per year <sup>12</sup>	Comfy Cabins, LLC
Bethel	2422 Salal	35 times per year <sup>13</sup>	Comfy Cabins, LLC
Bethel	2648 Sumac Lane	45 times from July 2006 to present <sup>14</sup>	Comfy Cabins, LLC
McLean	2657 Alder Lane	46 nights per year <sup>15</sup>	Leavenworth Cozy Cabins, LLC <sup>16</sup>
Paulus	2468 Salal	49 times since Dec. 2007 <sup>17</sup>	See previous
Justin and	2477 Salal	96 nights a year	The Great Escape,

<sup>8</sup> CP 765 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 78)

<sup>9</sup> Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 6

<sup>10</sup> CP 716 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 29)

<sup>11</sup> CP 717 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 30)

<sup>12</sup> CP 716 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 29)

<sup>13</sup> CP 716 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 29)

<sup>14</sup> CP 716 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 29)

<sup>15</sup> CP 727 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 40)

<sup>16</sup> CP 735 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 48)

<sup>17</sup> CP 746 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 59)

Tabitha Hargis		(approx. 8 nights per month) <sup>18</sup>	LLC <sup>19</sup>
Joel and Linda Hargis	2525 Kinnikinnick	96 nights a year (approx. 8 nights per month) <sup>20</sup>	Fish Lake Cabins Kinnikinnick, LLC <sup>21</sup>
MacIndoe	2618 Larch	65 nights per year <sup>22</sup>	No
Spicer	2511 Kinnikinnick	15-20 times a year <sup>23</sup>	No

#### 4. *The Vote.*

The Board asked the owners if they wanted to approve of exceptions to commercial use, including short-term rentals. Although different owners had different opinions and perceptions about the impact of the increase in nightly/weekend rentals in the community, it is undisputed the issue was debated in the community. Many owners, including Appellants, circulated letters in support of their position to the community. CP 132 (Declaration of Mike Stanford, ¶ 10).

A special meeting was called to coincide with the semi-annual meeting on September 27, 2008. CP 133 (Declaration of Mike Stanford,

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<sup>18</sup> CP 760 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 73)

<sup>19</sup> CP 770 Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 83

<sup>20</sup> CP 772 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 85)

<sup>21</sup> CP 784 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 97)

<sup>22</sup> CP 786 (Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 99)

¶ 12). The owners were asked to vote whether to allow each of the following as an exception to industrial or commercial use: 1) low-impact, service-oriented businesses; 2) long-term rentals (duration longer than six-months); 3) and short-term rental (duration shorter than six-months). See CP 146-56 (Declaration of Mike Stanford, Exhibit C: Special Meeting Notice and Ballot).

The Protective Covenants incorporate the By-Laws. CP 284 (Declaration of Gloria Fisk: Exhibit C: 1988 Protective Covenants, Section 2). Exhibit E, By-laws, Article I. Section 3). There are 367 lots in Chiwawa River Pines, CP 133 (Declaration of Mike Stanford, ¶ 14); however, each owner, has one vote, regardless of the number of lots owned. CP 205 (Declaration of Gloria Fisk: Exhibit E, By-laws, Article I. Section 3). Members can vote in person or may vote by proxy. CP 207 (Declaration of Gloria Fisk: Exhibit E, By-laws, Article II. Section 5). At the time of the vote there were 301 owners. CP 133 (Declaration of Mike Stanford, ¶ 15). Therefore, 152 votes in favor of the proposal were needed in order to approve the proposal. *Id.*

Two hundred and forty one (241) owners out of 301 cast their vote. CP 133 (Declaration of Mike Stanford, ¶ 16). The results are summarized below.

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<sup>23</sup> Amended Declaration of Yen Lam with Plaintiff's Discovery Responses, pg. 112

<b>Proposal</b>	<b>Total Yes</b>	<b>Total No</b>
Allow long-term, low-impact service-oriented businesses?	226	15
Allow long-term residential rentals for a period of more than six (6) consecutive months?	183	51
Allow short-term rentals for a period of less than six (6) consecutive months?	78	160

CP 133-34 (Declaration of Mike Stanford, ¶ 16).

The owners voted, overwhelmingly, not to permit short-term rentals for a period of less than six-months. One hundred sixty owners voted no. Even if all of the remaining sixty owners that did not participate had voted in favor of the short-term rentals, there would only be 138 owners in favor of allowing short-term rentals, which is not a majority. Clearly, the community does not want the operation of short-term rentals in their community.

The Association gave the Appellants an extremely long period of time to voluntarily come into compliance with the Protective Covenants. The short-term rental issue has been debated in the community since 2007. The vote to decide whether short-term rentals would be allowed as an exception to commercial use was held on September 27, 2008. The original date for compliance was set for January 1, 2009. CP 134 (Declaration of Mike Stanford, ¶ 19). Short-term rental owners,

including Appellant Jeanie Bethel, requested an extension due to economic conditions, which was granted. CP 134 (Declaration of Mike Stanford, ¶ 20). The date for compliance was extended to July 1, 2009. Appellants filed suit in August 2009.

*B. Statement of Procedure.*

Appellants initiated the current suit for declaratory judgment, seeking to declare the 2008 Amendment to the Protective Covenants (“2008 Amendment”) invalid. The Association counterclaimed for declaratory *and* injunctive relief.

The trial court issued an oral ruling on January 6, 2010. The parties submitted additional memoranda after the ruling. The oral ruling was modified and a written decision was entered on January 21, 2010. The trial court ruled that 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. CP 858. The court also that the ruled the prohibition in the 2008 Amendment against rentals of a period of more than one month but less than six months is invalid and unenforceable. CP 858. The remaining provisions of the Amendment were upheld. As part of the Order on Summary Judgment, Appellants were also ordered to

immediately cease and desist from advertising (in print and on the Internet) and operating short-term rentals for less than one month. CP 859.

Appellants filed for a Motion for Reconsideration, which was denied on March 26, 2010. CP 927-928. An appeal was filed on April 1, 2010.

Appellants also posted a cash bond of \$1,720 in an attempt to stay enforcement of the Order. On April 19, 2010, the Honorable Jack Burchard, visiting judge, declared the bond void and reiterated that the Appellants shall immediately cease and desist all activity inconsistent with the Court's ruling. Not all Appellants complied with this second court order. The Association moved for contempt and on June 24, 2010, the Court found Appellants McLean, Wilkinson, Bethel, Justin and Tabitha Hargis, and Joe and Linda Hargis, in contempt of court.

#### IV. ARGUMENT

##### A. *Standard of Review.*

Summary judgment is proper if the pleadings and supporting declarations show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). In reviewing the trial court's grant of summary judgment in a declaratory judgment action, the reviewing court shall engage in the same inquiry as the trial court, which is de novo review. *See Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992). Facts and reasonable inferences are construed in the light most favorable to the non-moving party. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993).

##### B. *Request for Costs on Appeal.*

The Association requests an award of costs on appeal pursuant to Paragraph 7 of the Declaration and RAP 14.1. The Enforcement provision reads as follows:

7. Enforcement. In the event of violation of the terms hereof, any owner of any lot subject hereto, or the Chiwawa Communities Association, Inc., above provided for, may institute proceedings for abatement or injunction or for damages and reasonable costs of any such action in any court having jurisdiction of the property subject, however, to each owner and the Chiwawa Communities Association, Inc., being recognized to have a property interest in the matters herein provided for, and the matter provided for herein being recognized as specifically enforceable. . . .

CP 286 (Declaration of Gloria Fisk: Exhibit C: 1988 Protective Covenants).

*C. The Trial Court Did Not Exceed the Scope of the Parties' Cross-Motions for Summary Judgment.*

Appellants initiated the current suit for declaratory judgment, seeking to declare the 2008 Amendment to the Protective Covenants invalid. The Association counterclaimed for declaratory and injunctive relief, seeking to declaration of validity and injunction against short-term rentals. Neither party requested a remedy for damages. Both parties sought equitable remedies. The Association asked the trial court to use its broad equitable powers to resolve the entire case.

The Association is baffled by Appellants' insistence that the parties asked the trial court to resolve limited and specific questions and that the trial court improperly examined the 1988 and 1991 Amended Protective Covenants. The main issue in this lawsuit is whether or not Appellants can operate their nightly/weekend rentals and whether such rentals are considered a commercial use. The Association's Counterclaim

states: “The 1988 and 1992 Amendments<sup>24</sup> to the Protective Covenants restrict land use to single-family use and prohibit nuisance, offensive, and industrial and commercial use.” CP 88. The Association also asked for “any additional or further relief that the Court finds equitable, appropriate, or just.” CP 91.

Both parties asked for an interpretation of the previous versions of the Protective Covenants. In Appellants’ Cross-Motion for Summary Judgment, Appellants state:

[T]he issues before this trial court are as follows: First, whether the use of an owner’s cabin for short-term rentals is an approved residential/recreational use or a banned commercial use. If the latter, then judgment will likely be entered in favor of the Defendant. If the former, then the second question is whether a ban on short-term rentals, even if approved by a majority vote, can be enforced.

CP 458-59.

Appellants clearly acknowledged that if the court found that short-term rentals violated the prior versions of the Protective Covenants, then judgment would be entered in favor of the Association.

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<sup>24</sup> The Amendment was dated 1991 but recorded in 1992. The Counterclaim refers to the Amendment as the 1992 Amendment; however, the 1992 Amendment is interchangeable with the 1991 Amendment.

The Court issued an oral ruling prior to its written ruling. A trial court is at liberty to change its oral ruling at any time prior to the entry of a judgment. *Biehn v. Lyon*, 29 Wn.2d 750, 189 P.2d 482 (1948). After the oral ruling, the Court considered additional memoranda prepared by both parties. The Association was absolutely clear that it had moved for full and not partial summary judgment, requested declaratory judgment and permanent injunction, and did not want to re-litigate the issue of whether short-term rentals less than one month violate the Protective Covenants. CP 911, 917. The trial court's written ruling, entered weeks after its oral ruling, was comprehensive, well considered, and disposed of the entire case. The only reason Appellants insist on limited rulings to specific questions is to overcome the weaknesses in their legal arguments.

*D. The 1988 and 1991 Amended Protective Covenants Did Not Allow Rentals of Less Than One Month*

*1. Interpretation of Restrictive Covenants*

Members of a planned association, in exchange for the benefits of association with other owners, must give up a certain degree of freedom. The Washington Supreme Court has long recognized that the unrestricted and unfettered free use of land is not applicable in a planned association, and restrictive covenants should be interpreted so that they protect the

homeowners' collective interest. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 72 Wn. App. 139, 146, 864 P.2d 392 (1993).

The Washington Supreme Court explicitly set out this doctrine as follows:

The time has come to expressly acknowledge 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. The court's goal is to ascertain and give effect to those purposes intended by the covenants. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances. The court will place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests."

*Riss v. Angel*, 131 Wn.2d 612, 623-624, 934 P.2d 669 (1997) (*citing Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 139, 344, 883 P.2d 1383).

In construing a covenant, the Court's goal is to ascertain the drafter's intent. "[L]anguage is given its ordinary and common meaning." *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999). Where there is ambiguity as to the drafter's intent, it may be resolved by considering evidence of the surrounding circumstances. *Id.* Where reasonable minds could reach but one conclusion, questions of fact

may be determined as a matter of law. *Owen v. Burlington N. and Santa Fe R.R. Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005).

The Court can examine how the parties have acted in interpreting those ambiguous provisions. *See Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 22 (1990). There are several factual distinctions between the present case and *Ross v. Bennett*, the case most heavily relied upon by Appellants. *See Ross v. Bennett*, 148 Wn. App. 40, 203 P.3d 383 (2009), *review denied*, 166 Wn.2d 1012, 210 P.3d 1018 (2009). It is undisputed that the Board took enforcement actions against nightly rentals in the past. In addition, the covenants in *Ross* and in Chiwawa River Pines are different. Both covenants restrict use to single-family use; however, in Chiwawa, all versions of the Protective Covenants in Chiwawa River Pines restrict land use to single-family residential use **and** prohibit nuisance, offensive use, and industrial and commercial use. These restrictions show that the intent of the grantor was to create a peaceful residential community as evidenced by the plain language of the Protective Covenants. Although there is language indicating that a sign may advertise a property for rent, the short-term rentals, especially the commercial-like nature and current volume of short-term rentals, were never envisioned by the original drafters. The broad language of the Chiwawa Protective Covenants and the undisputed enforcement actions

indicate that short-term rentals for less than 30 days are not allowed, even under the 1998 and 1991 version of the Protective Covenants.

*E. The 2008 Amendment to the Protective Covenants is Enforceable in Part.*

The Association is not appealing the trial court's invalidation of the portion of the 2008 Amendment prohibiting rentals for more than one month, but less than six months. Appellants assert this lack of an appeal means that the Association agrees that a six month restriction is unreasonable. Appellants' Brief, pg. 1, footnote one. This is not the case.

The Association does not agree a six month restriction is unreasonable. Leasing regulations and restrictions are commonplace in planned communities, permissible even under Board rules and regulations. The 2008 Amendment never eliminated the entire right to rent. The Association, however, would like to at some point have the community begin to reconcile over this short-term rental issue. The practical considerations for keeping peace in a large community outweigh the gain from appealing the trial court's order.

The trial court's ruling preserves the restrictions that the Association desires, which is the prohibition against rentals for a duration of less than one month. Based on the severability clause and case law, the

Amendment may be invalidated in part (as discussed herein). The trial court's order addresses the community's main concern about nightly/weekend rentals, which were at the heart of the community debate and vote.

1. *Case Law Allows Partial Enforcement*

The case cited by Appellants, *Seattle Professional Engineering Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000), is not applicable to the present case. In *Seattle Professional Engineering Employees*, the employees sued Boeing regarding an employment agreement provision that required an uncompensated "pre-employment" orientation. The Court stated that mechanical divisibility is the rule rather than the exception and declined to apply the exception to the Boeing Contract. *Seattle Professional Engineering Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 833, 991 P.2d 1126, 1131 (2000). The Court declined the request for partial rescission because even if it struck the provision, it would still need to change the start date of employment in the contracts. *Id.*

An exception to mechanical divisibility, as acknowledged by the Court of Appeals (Division One), however, exists. The exception applies to non-competition clauses. *Seattle Professional Engineering Employees Ass'n v. Boeing Co.*, 92 Wn. App. 214, 221, 963 P.2d 204, 208 (1998),

*aff'd*, 139 Wn.2d 824, 991 P.2d 1126 (2000). These non-compete clauses are also referred to as “covenants not to compete”—in other words, ***restrictive covenants*** in employment contracts. See *Wood v. May*, 73 Wn.2d 307, 309, 438 P.2d 587 (1968).

The Courts use another test for non-competition clauses. The test is whether partial enforcement is possible without injury to the public and without injustice to the parties. *Wood v. May*, 73 Wn.2d 307, 438 P.2d 587 (1968). In *Wood*, the court upheld partial enforcement for an overly broad employee restrictive covenant. The covenant restricted the former employee from the practice of horseshoeing within a radius of 100 miles from the employer’s business and for a period of five years. *Id.* at 308.

The Court agreed with the views expressed by Professor Willison:

If a sharply defined line separated a restraint which is excessive territorially from such restraint as is permissible, there seems no reason why effect should not be given to a restrictive promise indivisible in terms, to the extent that it is lawful. If it be said that the attempt to impose an excessive restraint invalids the whole promise, a similar attempt should invalidate a whole contract, although the promises are in terms divisible. Questions involving legality of contracts should not depend on form. Public policy surely is not concerned to distinguish differences of wording in agreements of identical meaning.

*Id.* at 314 (*citing* 5 Williston, Contracts s 1660 (rev. ed. 1937)). The Court found it equitable to enforce the injunction to the extent necessary to

accomplish the basic purpose of the contract and set a new trial to determine a reasonable time and space restriction. *Id.* at 591-92.

Similarly, the “blue pencil test” is not applicable to the restrictive covenants for a planned community, such as Chiwawa River Pines. Liberal rules apply for partial enforcement of restrictive covenants. For example, racial restrictions in old covenants have been declared constitutionally invalid, yet they do not invalidate the entire restrictive covenant.

In *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005), a developer sought to invalidate a restrictive covenant in its entirety because it contained an illegal racial restriction. The invalidation of the entire restrictive covenant would also allow the developer to develop its lot, since the covenant also had imposed a density limitation providing no more than one dwelling on each one-half acre. *Id.* at 324-25. The developer argued that if the racial restriction were excised, the covenant’s meaning would be radically distorted—rendering the covenant invalid in its entirety. *Id.* at 327. In *Viking*, the covenants did not contain a severability clause, but the Supreme Court explained that principles of strict construction do not apply, and it would use a construction that best guarded the homeowners’ collective interests. *Id.* at 328. The Court concluded that the trial court erred when it ruled that the unenforceable

racial restrictions could not be severed, explaining “[a]llowing private property owners to protect their rights by entering into restrictive covenants has long been favored in this state.” *Id.* at 328-29.

Washington courts have moved away from strict construction when interpreting restrictive covenants for planned communities.

Additionally, in the present case, there is a severability clause that allows the invalidation of part or parts of the covenants, without affecting the remainder. This severability clause is absolutely fatal to Appellants’ argument against partial enforcement. There is a contractual basis for the trial court’s ruling the 2008 Amendment is partially invalid.

2. *Even Under the Blue Pencil Test, the 2008 Amendment to the Protective Covenants is Partially Enforceable.*

Even if the Court applied the “blue pencil test,” the 2008 Amendment is not invalid in its entirety, and Appellants would still be prohibited from operating nightly rentals. Under the blue pencil test, the “offending portions of the covenant can be lined out and still leave the remainder grammatically meaningful and thus enforceable.” *Seattle Professional Engineering Employees Ass'n v. Boeing Co.*, 92 Wn. App. 214, 221, 963 P.2d 204, 208 (1998).

As illustrated below, the six month period may be excised from the 2008 Amendment, leaving a residential rental for “a month or more” as a permitted exception to commercial use.

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 businesses 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.~~

....

CP 168 (Declaration of Mike Stanford: Exhibit E: 2008 Amended Protective Covenants) (strikethrough added).

These line-outs do not rewrite the Protective Covenants—which is essentially a contract between homeowners. The intention of the community is clear. It is undisputed that the homeowners debated the nightly rental issue and that Appellants circulated materials in support of renting on a nightly basis to the community. CP 631 (Second Declaration of Mike Stanford, ¶ 4). If the majority of the community determined that rentals of a duration of six months or less are prohibited, then by inclusion, these voters clearly did not intend to allow rentals of one month or less. This intent should be honored. The case law and severability clause in the Protective Covenants allow for partial enforcement of the Protective Covenants.

*F. The 2008 Amendment to the Protective Covenants Does Not Violate the General Scheme of the Development.*

Appellants have no legitimate argument to challenge the trial court's partial enforcement of the 2008 Amendment. Appellant's next line of reasoning is that the 2008 Amendment is unenforceable because it violates the general scheme of the planned development and therefore needed a unanimous vote in order to pass.

As shown by past Board enforcement actions, the 1988 and 1991 Amended Protective Covenants do not allow the operation of nightly/weekend rentals. It also undisputed that the majority of the owners approved of the 2008 Amendment. The trial court's partial enforcement of the 2008 Amendment is consistent with the general plan of the development for Chiwawa River Pines. It is consistent with the residential use restriction and the prohibition against nuisance, offensive use, and industrial and commercial use.

This partial enforcement does not subject the minority to the unlimited and unexpected restrictions on their use of land. The 2008 Amendment does not unreasonably destroy the general plan of development because the law already distinguishes tenants from short-term lodgers. The mere fact that the community is located in a recreational area does not mean it is zoned for tourists. It should also be noted that the technology did not exist at the inception of Chiwawa River Pines to allow Appellants to advertise to a large number of the general public in a manner similar to hotels and motels, at a low-cost. Lastly, *Ross v. Bennett* is distinguishable and not applicable.

*1. The Law Already Recognizes a Distinction Between Lodgers and Tenants.*

Appellants point to the last sentence, regarding the display of signs for sale or rent, under Section 6 in the Protective Covenants, titled “Trash Disposal,” as giving them the unrestricted and unfettered right to operate rentals for any duration. Appellants believes there is no distinction between short-term and long-term rentals. The law, however, has long recognized distinctions between short-term rentals for a duration of less than one month and long-term rentals. These short-term occupants are not tenants.

Washington’s Residential Landlord-Tenant Act governs long-term rentals but not short-term lodgings. The Act exempts hotels, motels, and “transient” lodgings. RCW 59.18.040(3). Transient lodgers are not provided the protections under the Residential Landlord Tenant Act.

Transient lodging is lodging that has a duration of less than one month. The Department of Revenue, in explaining the taxation of persons operating establishments such as hotels, motels, and bed and breakfast facilities, provides the following definition of “transient”:

The term ‘transient’ as used in this section means any guest, resident, or other occupant to whom lodging and other services are furnished under a license to use real property for **less than one month**, or less than thirty

continuous days if the rental period does not begin on the first day of the month. . . .

WAC 458-20-166(2) (emphasis added).

Also, the Chelan County Code defines “lodging facilities” expansively, as follows:

[E]stablishments providing transient sleeping accommodations and may also provide additional services such as restaurants, meeting rooms and banquet rooms. Such uses may include, **but are not limited to**, hotels, motels and lodges greater than six rooms.

Chelan County Code § 14.98.020 (emphasis added).

According to the above definition, a lodging facility is not limited to hotels and motels.

Additionally, there is a difference in owner liability.

Lodgers/guests have fewer rights than tenants; however, owners owe lodgers/guests a higher standard of care than tenants. *See* William B. Stoebeck, *Washington Practice Series*, §6.3 (2009). An owner of the premises has a higher duty of care for a lodger’s or guest’s personal safety than a landlord has for a tenant’s safety. *See e.g. Curtis v. Lein*, 150 Wn. App. 96, 103-104, 206 P.3d 1264 (2009) (for tenants, owners must exercise reasonable care to discover dangerous conditions, but there is no liability for an undiscoverable latent defect).

The Appellants advertise furnished lodgings on the Internet and provide cleaning services as part of their short-term rentals. These factors classify their occupants as lodgers/guests and not tenants. “[T]o provide residence to paying customers is not synonymous with a residential purpose.” *Hagemann v. Worth*, 56 Wn. App. 85, 91, 782 P.2d 1072 (1989) (emphasis added). Appellants’ use of their properties is not consistent with residential use.

Based on existing Washington law, no landlord/tenant relationship exists for owners that provide occupants lodging for less than 30 days. Therefore, Appellants are not “renting” their premises; they are granting lodgers a license to use their real properties for less than 30 days. *See e.g., Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 133, 875 P.2d 621, 628 (1994) (“The Restatement (Second) of Torts § 330 (1965) defines a licensee as ‘a person who is privileged to enter or remain on land only by virtue of the possessor's consent.’”).

## 2. *Recreational Use Does Not Encompass Nightly/Weekend Rentals.*

Although Leavenworth offers recreational activities for visitors, this does not mean that the entire city is zoned to accommodate tourists. As shown by the district use chart, there are numerous types of zoning allowed. CP 633-39 (Second Declaration of Mike Stanford, Exhibit A:

District Use Chart). In fact, there is a specific “Tourist Zone.” *See* Chelan County Code Chapter 11.46. Chiwawa River Pines is a planned community located in a zone identified as “Rural Waterfront,” which does not permit the operation of lodging facilities. CP 637 (Second Declaration of Mike Stanford, Exhibit A: District Use Chart). Additionally, covenants may be more restrictive than the zoning regulations.

Chiwawa River Pines has a mixture of permanent owners and vacation home owners. Many vacation home owners, however, purchased their properties to enjoy the recreational activities in the area, not to operate a short-term rental business. *See* CP 623-29 (Declaration of David Johnston), CP 811-17 (Declaration of Lloyd Brodniak), and CP 617-22 (Declaration of Joyce Pfluger). Many vacation home owners do not support the operation of short-term rentals in the community. *Id.* The phrase “consistent with . . . recreational residence” in the Protective Covenants modifies the term “single family residential use” and is not equivalent to short-term rental use.

3. *Appellants’ Use of Properties was not Envisioned by the Original Developers Because of Differences in Available Technology*

Appellants insist that the original Protective Covenants, created when the community was formed in the sixties, permitted Appellants’ operation of nightly/weekend vacation rentals. Appellants’ current use of

their properties, however, could not have been envisioned by the original developers because the technology that enables the Appellants to advertise and drive large volumes of people into Chiwawa River Pines did not exist at that point in time.

Chiwawa Communities Association, Inc., was formed on December 16, 1963. CP 170 (Declaration of Joanne Stanford ¶ 5). In the sixties and seventies, early research efforts involving the development of packet-switched networking solutions were underway at educational and research facilities. CP 650-669 (Second Declaration of Yen Lam in Support of Defendant's Motion for Summary Judgment, Exhibit A: History of the Internet, Wikipedia). At this point in time, use of the Internet was primarily limited to educational and research facilities. Standardized protocols for the Internet were not implemented until 1983. CP 656.

The development of the Internet browser was the key to introducing the Internet to the general public. A web browser is a software application for retrieving, presenting, and traversing information resources on the World Wide Web. CP 671 (Second Declaration of Yen Lam in Support of Defendant's Motion for Summary Judgment, Exhibit B: Web Browser, Wikipedia). The NCSA Mosaic web browser, the first graphical web browser, was introduced in 1993. *Id.* Netscape Navigator

followed in 1994 and Microsoft's Internet Explorer was developed in 1995. *Id.*

In the mid-nineties, Internet browsers were available, but the creation of web sites was limited to a small population with technical skill. As the number of websites grew, there was no easy way to find these websites until the emergence of search engines. Google was incorporated on September 4, 1998. CP 677 (Second Declaration of Yen Lam in Support of Defendant's Motion for Summary Judgment, Exhibit C: Corporate Information, Google website). Over the next few years, the Internet evolved from static pages viewed and generated by a few to an entire e-commerce industry easily viewed by millions.

It is undisputed fact that the Internet, in its current form as a global and searchable network, did not exist in the sixties. As previously discussed, Appellants' properties (with the exception of Monte and Kimberly Karnes) advertise their rentals in a manner similar to motels and hotels on the Internet. *See infra.*

The Internet has leveled the playing field for many, allowing individuals and small businesses to have an online presence equivalent to large companies. In the same manner, Appellants, before they were ordered to cease and desist their nightly/weekend rentals, had a presence on the Internet that was equivalent to a commercial hotel/motel/lodge at a

relatively inexpensive cost. There is no possible way that Appellants could have advertised or operated their short-term rentals or attracted the same number of customers in the sixties when Chiwawa River Pines was originally developed because the technology was simply not available at that time. Low-cost print advertising cannot reach the same number of the general public as low-cost Internet advertising can.

4. *Ross v. Bennett is Not Applicable*

Appellants also insist that the 2008 Amendment is not enforceable under *Ross v. Bennett*, which held the prohibition against commercial use in a restrictive covenant does not prohibit short-term, vacation rentals.

*Ross*, 148 Wn. App. at 51-52.

*Ross* is a Division One decision and it is important to understand the differences between the *Ross* Appellant and the present Appellants in reviewing the analysis of the *Ross* Court. In *Ross*, the short-term rental owner rented his property a total of four times for a total revenue of \$1,150 in a two-year period. *Id.* at 44. The Court of Appeals (Division One) ruled that the use of short-term rentals was identical to the owner's own use of the property, as a residence, or the use made by a long-term resident. *Id.* at 51.

In the present case, the short-term rentals are not used in manner identical with the owner's own use of the property or the use by a long-

term tenant. Appellants' short-term rentals are rented more frequently, ranging from 15 to 65 to 125 times a year. *See infra* pg. 10-11. Additionally, Appellants' income from short-term rentals range from \$3,168 (actual income 30% higher due to commission paid to property manager) to \$33,481, to even higher. *See infra* pg. 9-10. The short-term rentals are being advertised on the Internet in a manner similar to motels and hotels and because of this advertising the community is experiencing increased traffic. The volume of short-term renters and their corresponding impact is not equivalent to the use of one family or a long-term tenant residing at the property.

Additionally, Division's One's reasoning that frequency of use does not change the nature of use is not consistent with Division Three's interpretation and analysis of residential use and the prohibition against commercial use in restrictive covenants. In *Ross*, the owner rented out his property infrequently, four times a year. *Ross*, 148 Wn. App. at 44. If we apply the *Ross* reasoning to its logical conclusion, a property rented out each and every single day would not change the single family use of the property. This is nonsensical. As the Supreme Court noted in *Main Farm Homeowners Association v. Worthington*, the operation of an adult family home violated the covenant restricting use to single family residential purposes because the single-family residential nature of use of the home is

destroyed by the elements of commercialism. *Main Farm Homeowners Association v. Worthington*, 121 Wn.2d 810, 821, 854 P.2d 1072 (1993).

Division Three of the Court of Appeals has held that catering to paying customers is not a residential use of property. In *Hagemann v. Wroth*, 56 Wn. App. 85, 91, 782 P.2d 1072 (1989), the declaration for the planned community stated that the plat was for “residential and recreational use,” and prohibited any “business, industry or commercial enterprise of any kind or nature . . . .” *Id.* at 86-87. Division Three enjoined the operation of an adult family home, holding that the “term business is the antonym of residential and to provide residence to paying customers is not synonymous with a residential purpose.” *Id.* at 91.

Although the issue was not raised by the parties in *Hagemann*, the Court in a footnote states: “[O]ne could argue a number of unrelated persons residing together does not constitute a ‘family’ for the purpose of the declaration restriction to ‘single-family residences.’” *Id.* at 92. A single family is traditionally viewed as a housekeeping unit. Black’s Law Dictionary defines a family as:

1. a group of persons connected by blood, by affinity, or by law, esp. within two or three generations. 2. A group consisting of parents and their children. 3. A group of persons who live together and have a shared commitment to a domestic relationship.”

Black’s Law Dictionary 273 (7th ed. 1999).

If “family” means all those who live under one roof, the word “family” would have no independent meaning. *See Matthews v. Penn-America Insurance Company*, 106 Wn. App. 745, 749, 25 P.3d 451 (2001).

Some of Appellants’ advertisements are designed to attract a large group of people looking for vacation lodging. These properties are advertised as accommodating 8-10 occupants. Clearly, the definition of “single family” does not extend to a group of friends renting a property for a night or weekend. As discussed previously, these transient occupants are paying customers with a license to use the property, not tenants under a lease.

Finally, unlike the situation in *Ross*, the short-term rental issue was debated and voted upon by the owners in Chiwawa River Pines, and the amendment is a reflection of the majority will.

*G. Trial Court Did Not Include Any Findings of Fact and Any Rulings are Superfluous and Do Not Need to be Stricken on Appeal*

The Court was not asked to make and, in fact, did not make any findings of fact.<sup>25</sup> The findings placed in the order are the undisputed

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<sup>25</sup> Defendant’s proposed order was mislabeled but clarified by counsel and corrected in the final order.

facts, which were specifically reviewed by Appellants' counsel during the hearing on presentation of the proposed orders held on January 21, 2010. Appellants' counsel agreed that numbers one through eight (page 4, line 5 through page 6, line 5) were the undisputed facts.

Even if present, findings of fact and conclusions of law do not prejudice the appealing party. *Washington Optometric Assoc. v. County of Pierce* states: “[F]indings of fact and conclusions of law are superfluous in . . . summary judgment . . . . Thus, failure to assign error to any of them has no effect on plaintiff’s [appellant’s] case.” *Washington Optometric Assoc. v. County of Pierce*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968). *See also Duckworth v. Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

The Court of Appeals reviews the trial court’s ruling de novo. The format of the summary judgment order does not, in any way, prejudice Appellants during their appeal. Appellants’ true purpose in challenging alleged findings of fact and conclusions of law is to find an alternative way to invalidate the 2008 Amendment and circumvent any analysis of the prior Protective Covenants.

## V. CONCLUSION

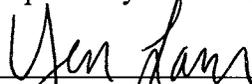
Three years ago, at the beginning of this debate, none of the owners could have predicted the extent of the anger and controversy that would eventually come to surround the nightly/weekend rental issue. This has been a wrenching experience for the community, the Board, and, even the Appellants themselves. The debate, however, was and remains a necessary one. The community was at a crossroads. This case is about the identity and soul of Chiwawa River Pines.

The crux of Appellants' argument is that frequency of rental use does not matter and the financial gain of a minority (above and beyond what they can make via allowable long-term rentals) trumps all. If one of the Appellants has four properties, one of which is rented 150 times a year, what is next for the community? The only logical answer is that there will be more and more short-term rental operations in Chiwawa River Pines. The community made a democratic decision—it decided to remain a place for families and not turn into a resort.

The decision of the trial court should be affirmed and costs awarded to the Association.

DATED this 29<sup>th</sup> day of September, 2010.

Respectfully submitted,



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Yen Lam, WSBA #32989

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**PROOF OF SERVICE**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

**Via Email and First Class U.S. Mail**

Dennis Jordan  
Dennis Jordan & Associates, Inc., P.S.  
4218 Rucker Ave.  
Everett WA 98203

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29<sup>th</sup> day of September, 2010, at Mountlake Terrace, WA.

  
\_\_\_\_\_  
Kate Matar