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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 315827-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JAMES WALTZ and MARILYN MILLER,

Appellants,

v.

TANAGER ESTATES HOMEOWNER'S ASSOCIATION, *et al.*

Respondents.

On Appeal from Spokane County Superior Court
Cause No. 11-2-02155-1

Judge Linda G. Tompkins

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is a action in which homeowners in a planned unit development are seeking equitable relief in the form of a declaratory judgment to revise and further build onto an addition to their house according to plans that were never approved by the homeowners association.

Appellant, Jim Waltz caused this controversy by attempting to construct an enormous addition to his house in the Development without the written approval of the Association, which he knew from prior experience was required. To find an acceptable resolution, the volunteer members of the Architectural Committee and the Board spent considerable time and effort and arrived at a compromise that was agreed upon by the Board and Mr. Waltz. Instead of abiding by the agreement and accepting the addition that he built, Mr. Waltz has continued to display the attitude and approach which created this problem by unfairly disparaging the good faith efforts of the members of the Board and the committee, even suing the individual Board members.

Following a four day bench trial on the merits, the Hon. Linda G. Tompkins correctly concluded that the Board acted within its legal authority when it approved the plans submitted by Mr. Waltz, which were subsequently

signed off on by him, and which were followed by Mr. Waltz when he built his addition. Judge Tompkins correctly entered judgment in favor of the homeowners association and the individual Board members, dismissing the Complaint.

II. STATEMENT OF THE CASE

Appellants James Waltz and Marilyn Miller ("the Waltzes") do not specifically assign error to any of the trial court's Findings of Fact ("FOF").

In 1995, Tananger Estates ("Development") was established as a residential planned unit development and the Tananger Estates Homeowners Association ("Association") was established as a nonprofit corporation to act as the management body for the Development. FOF 3&4, Exs. P-1 & P-2. There are approximately 60 houses in the development. Ex. D-54, RP 588.

The relevant portions of the Association's documents and their significance are set forth in the FOF 11-17 as follows:

“As a corporation, the Association is governed by the Articles of Incorporation and the Bylaws of the Association. (Exhibit P-01 and P-03).”
FOF 11.

“The Association and all lot owners in the Development are subject to the Declaration of Covenants, Conditions and Restrictions (the

“CC&R’s”). (Exhibit P-02).” FOF 12.

“The Association’s Articles of Incorporation provide that the Association shall be managed by a Board of Directors and the Association shall have the authority “to enforce all of the restrictions, covenants, and conditions, exercise all of the powers and privileges and to perform all of the duties and obligations of the Association” as set forth in the CC&R’s. (Ex. P-1, Articles of Incorporation, Article IV (a), Article VII.)” FOF 13. Directors are required to be homeowners in the Association and their terms are for a period of two years. Directors and committee members are not paid for their services. Ex. P-3, Article VII, RP 540, 541.

“The CC&R’s provide that the Board is the governing body of the Association and the primary function of the Association is the enforcement of restrictions set forth in the CC&R’s. (Ex. P-2, Articles 1.4, 3.1, 3.8).” FOF 14.

“The Association’s Bylaws provide that the Board of Directors has “powers necessary and proper for the governance and operation of the Association” (Ex. P-3, Bylaws, Article X (10, 11) and is to [p]erform any and all duties necessary to comply with the provisions and requirements of the CC&R’s, the Articles of Incorporation and Bylaws. (Ex. P-3, Bylaws, Article

X, Directors Duties (3)).” FOF 15.

“Under the Bylaws, actions of the Board of Directors are subject to certain requirements and procedures, including but not limited to:

- a. Section IV states in part, “All meetings of the Board will be open for observation by all owners of record and authorized agents. The Board shall keep minutes of all actions taken by the Board, which shall be available to all owners.” (Exhibit P-03)
- b. Section VI states in part, “The Directors shall have the right to take any action in the absence of a meeting which they could take at a meeting by obtaining the written approval of two thirds (2/3) of the Directors.” (Exhibit P-03)
- c. Section VII states in part, “No officer will act for the Association or any individual member except as is provided for in applicable state law, Covenants or Bylaws.” (Exhibit P-03)
- d. Section VIII states in part, “In the event of death, resignation or removal of a Board member, his successor shall be selected by the remaining Members of the Board and shall serve until

the next annual meeting.” (Exhibit P-03)

e. Section X states in part, “The Board of Directors duties are to:

1. Cause to be kept a complete record of all its acts and corporate affairs and to present a statement thereof to the Members at the annual meeting of the Members;”

(Exhibit P-03)

f. Section XVII states in part, “The Board of Directors shall

appoint an Architectural committee of no less than three (3) and no more than nine (9) Members. There will always be an

odd number of positions. This committee shall perform the function(s) as described in Article Nine (9) of the Articles of

Incorporation for the Tanager Estates Homeowner’s Association.” (Exhibit P-03).” FOF 16.

“Under the CC&R’s, actions of the Association and lot owners are subject to certain requirements and procedures.

a. Article 9.1 states:

9.1 Approval of Plans by Architectural Committee. No building, fence, wall or other structure shall be commenced, erected or maintained upon the Project, nor shall, any exterior addition to or change or alteration

therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to quality of workmanship and materials, and harmony of external design and location in relation to the surrounding structures and topography by an architectural committee composed of three (3) (sic) or more representatives appointed by the Board of Directors of the Association. In the event said committee fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it or if no suit to enjoin the erection of such structures has been commenced prior to the completion thereof, approval will not be required and this article will be deemed to have been fully complied with.

b. Article 9.2 states:

9.2 Specification of Reasons of Disapproval.

The Architectural Committee shall have the right to disapprove any plans and specifications submitted hereunder because of any of the following:

9.2.1 The failure of such plans or specifications to comply with any of the Tanager Estates restrictions;

9.2.2 Failure to include information in such plans and specifications as may have been reasonably requested;

9.2.3 Objection to the exterior design,

appearance or materials of any proposed structure;

9.2.4 Incompatibility of any proposed structure or use with existing structures or uses upon other Lots in the vicinity.

9.2.5 Objection to the location of any proposed structure upon any Lot or with reference to other Lots in the vicinity.

9.2.6 Objection to the grading plan for any Lot;

9.2.7 Objection to the color scheme, finish, proportions, style of architecture, height, bulk or appropriateness of any proposed structure;

9.2.8 Objection to parking areas proposed for any building on the grounds of (a) incompatibility to proposed uses and structures on such Lots of (b) the insufficiency of the size of parking areas in relation to the proposed use of the Lot; or

9.2.9 Any other matter which, in the judgment of the Architectural Committee would render the proposed structure, structures or uses inharmonious with the general plan of improvement of Tanager Estates or with structures or uses located upon other lots in the vicinity.

In any case where the Architectural Committee shall disapprove any plans and specifications submitted hereunder, or shall approve the same only as modified or upon specified conditions, such

disapproval or qualified approval shall be accompanied by a statement of the grounds upon which such action was based. In any such case, the Architectural Committee shall, if requested, make reasonable efforts to assist and advise the applicant in order that an acceptable proposal can be prepared and submitted for approval.

c. Article 9.3 states:

9.3 Unapproved Construction; Remedies. If any structure shall be altered, erected, placed or maintained upon any Lot, or any new use commenced on any Lot, otherwise than in accordance with the plans and specifications approved by the Architectural committee pursuant to the provisions of the Article 9, such alteration, erections, maintenance or use shall be deemed to have been undertaken in violation of this Article 9 and without the approval required herein, and upon written notice from the Architectural Committee, any such structure so altered, erected, placed or maintained upon any Lot in violation hereof shall be removed, or altered and any such use shall be terminated so as to extinguish such violation. If fifteen (15) days after the notice of such a violation the Owner of the Lot upon which such violation exists shall not have taken reasonable steps toward the removal or termination of the same, the Association shall have the right, through its agents and employees, to enter upon such Lot and to take such steps as may be necessary to extinguish such violation and the cost thereof shall be a binding, personal obligation of such Owner as well as a lien (enforceable in the same manner as a mortgage) upon the Lot in question. The lien provided in this Section 9.3 shall not be valid as against a bona fide purchaser (or bona fide mortgagee) of the Lot in question unless a suit to enforce said lien shall have been filed in a court of record in Spokane County prior to the recordation

among the land records of Spokane County of the deed (or mortgage) conveying the Lot in question to such purchaser (or subjecting the same to such mortgage).

d. Article 10.1 states:

10.1 Enforcement. The Association, or an Owner, shall have the right to enforce by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration, against any person or persons violating or attempting to violate any covenant, either to restrain violation or to recover damages. Failure by the Association or by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter. (Ex. P-2, CC&R's)." FOF17.

In early 2007, the Waltzes purchased a residence within the Development. FOF 2. Prior to doing so, they understood their residence was in the Association and they contacted the Association president, Kirk Firestone, to inquire about building a shop and an addition to the garage. Mr. Firestone told them that the Development had CC&R's covering requests for changes to the property. FOF 18.

Shortly after moving into their residence in early 2007, Mr. Waltz started to build a storage shed without the written approval of the Association. Mr. Waltz was then contacted by Gary Wilson, chair of the

Architectural Committee, who provided him with a copy of the CC&Rs and told him he needed to submit a written plan for approval by the Association. FOF 19.

Mr. Waltz then submitted written plans in June 2007 to build a shed, shop and single car addition to his existing one-story garage. FOF 20, Exs. P-6, P-23 and P-24. The plan for the third car garage addition depicted a one level garage with a "hip roof" lower than the roof on the existing garage. FOF 20, Ex.P-6, P.4. These written requests were approved in writing by the Architectural Committee on June 26, 2007. Exs. P-6, P-23 & P-24. The existing garage prior to the addition is further depicted in the photograph at Ex D-83.

“The shed and shop were built in the fenced backyard, out of the sight of other homeowners in the Development. The Waltzes addition to the garage was the first garage modification in the Development. It is in the front of the house and it is highly visible.” FOF 21.

“In May or June 2008, the Waltzes decided to modify the previously approved plan for the new garage addition, to include a second-story above the third car addition for a “bonus room,” and to change the roofline. Prior to initiating construction, the Waltzes did not submit any modified plans. . . .”

FOF 23.

“On June 9, 2008 the Waltzes obtained a permit from Spokane County for the garage addition. The permit does not address the same issues as the CC&R's. Further, the CC&R'S Article 8.1 states:

8.1 Tanager Estates Governmental Regulation: Standards Control. Restrictions shall not be taken as permitting any action or thing prohibited by the applicable zoning laws, or the laws, rules or regulations of any governmental authority, or by specific restrictions imposed by any deed or lease. In the event of any conflict, the most restrictive provision of such laws, rules, regulations, deeds, leases or Tanager Estates restrictions shall be taken to govern and control.” FOF 24.

Mr. Waltz began construction of the garage addition in June 2008. By July 1, 2008, members of the Architectural Committee became aware that the garage actually being built by Mr. Waltz was substantially different from what had been approved in June 2007. A comparison of the pre-construction photo (Ex. D-55) the approved plan (Ex. P-6, P-4) and the construction photographs (Ex. D-58, P 4-9) demonstrate the substantial difference which was the concern of the Architectural Committee. (RP 380-381, 592) FOF 25 & 26.

“ . . . On July 1, 2008, Gary Wilson stopped by the Waltz residence and dropped off a copy of the 2007 approved garage plan. On the copy of the

2007 plan, Mr. Wilson wrote:

over single story County guideline's is 10' from property line
current structure is not approved by the TEHA Arch
Committee.

Please call Gary Wilson... “ FOF 26.

“On July 2, 2008, Gary Wilson contacted Spokane County and was advised that the Waltzes' proposed construction complied with Spokane County setback requirements. Gary Wilson spoke with Mr. Waltz on July 2, 2008 and told Mr. Waltz that he needed to submit revised plans to the Association. Gary Wilson told Mr. Waltz that he thought the County's approval would override the CCR's. This statement was a mistake, as article 8.1 of the CCR's provides to the contrary. . . .” FOF 27.

This mistake and confusion was promptly corrected, and Mr. Waltz understood that he was required to submit new written plans. RP 382. The first plans were given to Gary Wilson on July 6, 2008 and submitted to the Architectural Committee on July 11, 2008. Exs. P-9, P-8, RP 341,342. The project was denied by a 6 to 1 vote of the Architectural Committee on July 15, 2008. FOF 32, Ex. 10, RP 383. The denial provided specific citations to the CCR's and the reasons for the denial and stated "possible remedies,"

which included "reducing the height to a bonus type structure above the garage" or "use previously approved plan design to complete the project." FOF 32.

Mr. Waltz submitted his second written proposal on July 17, 2008, which included measurements stating that the height of the second story of the garage addition would be 24'6", which was 6 inches higher than what he represented to be the height of the house. Written votes were taken and the project was denied on July 20, 2008 by a 4 to 1 vote, again with written citations to the CC&R'S, again stating possible remedies which included, "reducing the wall height for the structure above the garage " or "use previously approved plan designed to complete project." FOF 33, Ex P-11.

The written votes of Architectural Committee members demonstrate their efforts to work with Mr. Waltz. Marie Firestone's written vote of July 18, 2008 was to deny the project, but she made the specific recommendation to allow a "bonus room instead of a full second-story." Ex. P-11, p.4. Marcia Ethridge's denial vote on July 18, 2008 again cited the specific provisions of the CC&R's and gave her rationale for her vote. Her attached email of July 18, 2008 states:

... It was a good discussion last night and sounds like there

was a good discussion at the meeting last week. I hope we can help the homeowners to a quick solution....
Ex. P-11, p. 6&7.

Attached to the vote of Mr. Murray on July 18, 2008 is a lengthy written discussion of Mr. Murray's opinions and significantly, a discussion of the considerable time he spent investigating nearby developments with "comparative covenants." Mr. Murray also provided his suggestions:

Option A. Construct the 3rd garage according to the approved plan.

Option B. Modify the unapproved construction of the existing structure to a story and half living space over the 2 car garage and the 3rd garage addition roof lines/heights remain the same as in the initial approved plan. (Note: After touring the structure with the committee, there appears to be access out of the bedroom. If after lowering to a story and half access is in question, the ceiling can be fully vaulted, or construct a modified ceiling fault using scissor trusses, and/or adjust the story and half height enough to clear the door access.)

Ex. P-11, P3.

These written statements of Mr. Murray contradict the claim of Mr. Waltz that the Committee was not trying to work with him to find a solution which would allow sufficient access from the bedroom to the second story over the 2 car garage.

The events that occurred from July 20, 2008 through July 31, 2008, also contradict the claim that Marie Firestone and Marcia Ethridge, and other members of the Committee, were not using good faith efforts to find a resolution. The documents demonstrate that during that time there were numerous plans submitted which created significant confusion, and also demonstrate the concern of Committee members remained that the height of the proposed addition was higher than the existing house. FOF 34.

On July 21, 2008, Gary Wilson sent an email to the Architectural Committee which attached the potential plans. Mr. Wilson's email states, "Currently a 7 foot wall on top of the floor structure was proposed. I have included 3 other options to potentially consider. I spoke to Jim and Marilyn last night and we spoke about potentially having them drop the sidewalls down . . . these are merely options that may be a compromise for all of us." Marcia Ethridge's response to Gary Wilson, states, "If the walls are brought down, wouldn't it bring the trusses down and the peak not to be as tall on the addition? One of the main issues is the height." Ex. P-32.

"On either July 24 or July 26, 2008, Mr. Wilson delivered to Mr. Waltz the Committee's project denial notice for the July 17 proposal. In response, Gary Wilson prepared a few options for plans and Jim Waltz

identified his preferred plan by circling the plan with a pen. (Exhibit P-20)
This plan again listed the height of the garage at 24'6", which is in excess of
the 24' house measurement previously given by Mr. Waltz." FOF 35.

"On July 28, 2008, Gary Wilson forwarded to the Architectural
Committee an email with a plan indicating a height on the addition of 24 ft.
(Ex. P-12)." FOF 36.

"On July 29, 2008, Gary Wilson forwarded to the Committee, a
"revised submittal with corrected measurements," which was signed by Mr.
Waltz and in his handwriting, had a measurement for the existing house of
25' and a measurement for the addition, which is difficult to read. Marie
Wilson testified that she read that notation to be 25'7". (Ex. P-13) Later in
the day on July 29, 2008, Gary Wilson forwarded another email to the
Committee with an additional schematic for the trusses and different
measurements. (Ex. P-40)." FOF 37.

"All of this information and confusion led to the extended email by
Architectural Committee Member Marcia Ethridge to the Architectural
Committee on July 30, 2008 at 9:04 p.m., reiterating ongoing concerns to the
Committee, but with a desire to find a workable solution:

Although the height of the addition at 24'6" is only 6 inches

taller than the existing roofline, and is within the County's definition of second story height (25 feet), it is an overwhelming structure. . . .

Gary stated at the beginning of the meeting the "height" was never the issue, that it was bulkiness and not harmonious. I went back and looked at all of the emails in the last month, and found that height was listed as a concern in every one. It is not just the height of the walls at issue here, but bulk was directly related to the height at the peak being too tall to be proportionate. Yet, if the homeowner reduces the height of the walls, he increases the height of the trusses to be the same, if not higher at the peak than before.

If the homeowner had met his responsibility and submitted an appropriate detailed plan and received approval "before" starting a project as required by the Covenants - we wouldn't be here. However, in the extreme, the Association has a right to go in and tear down an unapproved structure and bill the cost to the homeowner. We're not doing that. We're trying to help them find a solution. . . .

What are we voting on now? The last plan approval form that was sent out yesterday included Gary's rendering of a structure with Mr. Waltz's signature scribbled on it and height. And the only approval form stating "not from the homeowner" addition of third car garage bay with additional second floor space over entire attached garage. . . . What is different about this proposal since the last vote?

. . . This is precedent setting and will become the development standard. We have a responsibility to all homeowners in the development and ultimately all of the homeowners are legally liable. . . .

(Ex. D-68, P. 3-6)." FOF 38.

"Committee Member Marie Firestone sent an email to the

Architectural Committee on July 30, 2008 at 9:43 p.m. stating:

At this point I would request an AC meeting be scheduled. We have several issues to discuss. First and foremost is that we do not have a complete plan to review. We have what looks to be 3 plans. . . . Gary if you could request these items from the homeowner, we could then proceed with a meeting. I do not know what time frame the homeowner could provide this proper documentation, but I would be available Sunday or any evening next week.

(Ex. D-68, P. 2-3)." FOF 39.

These emails, as well as the testimony at trial from Marcia Ethridge, Marie Firestone and Bill Murray demonstrate that there were considerable good faith efforts on the part of the Architectural Committee who were working long and late hours, late in the evening, in the heart of the summer to find a resolution for the problem Waltz created by building before he had proper approval. RP 607, 616, 617, 630, 631. These good faith efforts were made even though Mr. Waltz was "belligerent" with Marcia Ethridge. (RP 597)

The emails are also consistent with the testimony of the Architectural Committee members and Mr. Waltz, that this garage addition was the first requested garage addition in the Development and that it is in the front of the house and is highly visible. FOF 21.

“Gary Wilson responded to the emails from Marcia Ethridge and Marie Firestone of July 30, 2008, by announcing that he intended to proceed with an email vote despite the confusion expressed over what was being voted upon and the specific requests for a meeting to clarify all this. He stated that any member could vote to deny the July 29, 2008 plan if they felt there was insufficient information. He also expressed his frustration that he was at his “personal tipping point with this project and my position as Chair.” (Ex. P-33; D-68, P.2).” FOF 40.

On July 31, 2008, Kirk Firestone, as President of the Board, had a discussion with Gary Wilson during which Mr. Wilson advised that he would be resigning from the Board and as Chair of the Architectural Committee. Consequently, Kirk Firestone sent Gary Wilson an email stating:

All current votes are null and void as the AC has not been provided a complete set of plans to evaluate. An AC member has requested a meeting. As you are not willing to schedule one, I will. You will not send out a denial or approval on this plan. I will be contacting the AC and Mr. Waltz.

FOF 41.

“Shortly thereafter, Mr. Wilson, by email to the Board and Architectural Committee, formally resigned as the Vice President of the Board and Architectural Chair. Ex. P-33; D-68, P. 1 He stated the project

would have been approved if the president had not deemed the votes “null and void.”” FOF 42.

“No written votes were ever submitted by the Architectural Committee, but Mr. Wilson maintained that there would have been five approving and three disapproving the July 29th plan before the “null and void” decision.” FOF 43. Mr. Wilson admitted though that if the votes had come in and had been consistent with prior votes, the vote would have been “four to four.” (RP 376-377).

“On July 31, 2008, Mr. Firestone met Mr. Waltz at the Waltz residence advising of the Wilson resignation and asking Mr. Waltz to submit a new plan with front, rear, and side views and measurements.” FOF 44.

“On August 1, 2008, Mr. Firestone asked William Murray to fill the position of Vice President in light of Mr. Wilson’s resignation. However, there was no meeting of the Board where a majority of the Board voted to select William Murray to fill the position.” FOF 45.

“Jim Waltz again submitted a plan to Kirk Firestone on August 2, 2008. (Ex. P-14) Despite knowing that the rejections of prior plan submissions and the recommendations expressed by the Committee were based upon the addition being higher than the house, these new plans showed

the height for the proposed addition at 25'3" and the height of the house at 24'7".” FOF 46.

“On Sunday evening, August 3, 2008, the Architectural Committee held a meeting. There were no minutes of the meeting and there was conflicting testimony about what actions, if any, the Committee took relative to the Waltz issue.” FOF 47.

“Some testimony was introduced that at the meeting of the Architectural Committee on August 3, 2008, members of the Board were also present and after the situation was reviewed, a determination was made by members of the Architectural Committee to turn the matter over to the Board. No action was apparently taken on the latest Waltz plan.” FOF 48.

Kirk Firestone then met again with Jim Waltz on the following day, August 4, 2008, and Mr. Waltz provided another set of plans, this time finally proposing to lower the height on the garage to 23'8", which was below the height of the house. FOF 49, 50. Knowing that Waltz and the Board were anxious to find a resolution of this matter, an “Executive Board emergency meeting” was scheduled by Kirk Firestone for the following day, August 5, 2008. At the meeting, all 5 Board members voted unanimously to approve the plan submitted by Mr. Waltz on August 4, 2008. FOF 51, Ex. 34, 35

“Mr. Waltz signed off on each page of the approved plan on August 11, 2008, and proceeded to build pursuant to those plans in August and September of 2008.” FOF 52.

Mr. Waltz now claims that he signed and built “under protest,” but nowhere in all the voluminous documentation submitted is there any written notation to that effect. Also, no one testified, other than Mr. Waltz, that Mr. Waltz made such a statement. FOF 53.

Mr. Waltz filed this lawsuit in May of 2011, almost three years after the plans were approved and the structure was built. FOF 54 The Complaint seeks a Declaratory Judgment that the Waltzes are entitled to construct the modification to the new addition that they desire and the costs for making those modifications. CP 1, 19.

III. LEGAL AUTHORITIES

A. Standard of Review.

Though the trier of fact is free to believe or disbelieve any evidence at trial, “[a]ppellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier of fact.” *Jensen v Lake Jane Estates*, 165 Wn. App. 100, 104-105, 267 P.3d 435 (2011)

The Waltzes did not assign error to the Findings of Fact of the Trial Court. Unchallenged findings are to be treated as verities on appeal, and

review is limited to determining whether the Findings support the Conclusions of Law. *Id. Jensen*, 165 Wn. App. at 110, 267 P.3d 435; RAP 10.3(g).

The Waltzes' request for a Declaratory Judgment is functionally similar to asking for injunctive relief. *Greenbank Beach & Boat Club, Inc. v Bunney*, 168 Wn. App. 517, 523, 280 P.3d 1133 (2012). In *Greenbank*, the Plaintiff's Homeowner's Association sued a homeowner for building a house that did not comply with the Association's height restriction. The Association's Complaint sought a Declaration that the house "should be modified to bring it into compliance with the height restriction." *Greenbank*, 168 Wn. App. at 523, 280 P.3d 1133. The Court held that the Plaintiff's request for a Declaratory Judgment has the same effect as an injunction. *Id.* Similarly here, the Waltzes' request for a Declaration that they are entitled to construct their proposed modification to the addition according to their revised plans, has the same effect as an injunction.

In *Lenhoff v Birch Bay Real Estate*, 22 Wn. App. 70, 74, 75, 587 P.2d 1087 (1978), the Court stated:

The granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised

according to the circumstances of the particular case. *Holmes Harbor Water Co. v Page*, 8 Wn. App. 600, 603, 508 P.2d 628 (1973). *State ex rel. Carroll v Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), teaches as follows:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interest of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way of the other.

Homeowners Associations with restricted covenants are becoming increasingly prevalent and the evolution of the law recognizes the benefit of allowing Homeowners Associations to enforce restrictive covenants for the collective benefits of the entire Association. This concept was summarized in *Jensen*, 165 Wn. App. at 106, 267 P.3d 435:

...

Washington courts have moved away from the position of strict construction historically adhered to when interpreting restrictive covenants. *Viking Props., Inc. v Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005). This is due in large part to a shift in perception regarding restrictive covenants. *See Viking Props.*, 155 Wn.2d at 120. Instead of viewing such covenants as restraints on the free use of land, Washington courts have acknowledged that restrictive covenants “ ‘tend to enhance, not inhibit, the efficient use of land.’ ” *Viking Props.*, 155 Wn.2d at 120 (quoting *Riss v Angel*, 131 Wn.2d 612, 622, 934 P.2d 669 (1997)). Similarly, covenants also tend to enhance the value of the land. *Green v Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn. App. 665, 683, 151 P.3d 1038 (2007), *review denied*, 163 Wn.2d 1003, 180 P.3d 783 (2008). Consequently, we strive to interpret restrictive covenants in such a way that protects the homeowners’ collective interests and gives effect to the purposes intended by the drafters of those covenants to further the creation and maintenance of the planned community. *Lakes at Mercer Island Homeowners Ass’n v Witrak*, 61 Wn. App. 177, 181, 810 P.2d 27 (1991).

B. The Waltzes do not assign error to Conclusion #1 that the Association, acting through the Board of Directors, had the responsibility and the authority under Article 9.3 of the CC&R’s to enforce the CC&R’s to protect the collective interests of the Development.

The Association’s CC&Rs affirm that the Board is “the governing body of the Association... the *primary function* of the Association shall be the *enforcement of the restrictions* set forth in the Declaration...[and] the *affairs* of the Association shall be *managed* by a Board of Directors” (Ex. P-2, Articles 1.4, 3.1, 3.8). Article 9.3 of the CC&Rs provides that upon a

violation:

[T]he Association shall have the right, through its agents and employees, to enter upon such Lot and to take such steps as may be necessary to extinguish such violation and the cost thereof shall be a binding personal obligation of such owner as well as a lien (enforceable in the same manner as a mortgage) upon the Lot in question.

(Ex. P-2, Article 9.3).

- C. **The Trial Court did not err in its Conclusion #2 that the Board of Directors of the Association acted within the authority granted to it by the Articles of Incorporation, CC&Rs, and Bylaws when it intervened and took over the approval process after a series of Waltz proposals continued to depict the new addition exceeding the height of the house.**

Mr. Waltz claims that the Association, acting through its Board of Directors, did not have the authority to oversee his building approval process or to impose upon and enforce building restrictions contained in the CC&Rs. (CP 17, 18).

The Association's Articles of Incorporation state, "[t]he affairs of this Association shall be managed by a Board of ...Directors ..." and goes on to clarify that, "the Association shall have the authority to ... enforce all of the restrictions, covenants, and conditions, exercise all of the powers and privileges and to perform all of the duties and obligations of the Association

as set forth in that certain Declaration of Covenants, Conditions and Restrictions ...” (Ex. P-1, Articles of Incorporation, Article IV (a), Article VII, (emphasis added)).

The Association’s CC&Rs affirm that the Board is “the governing body of the Association... the primary function of the Association shall be the enforcement of the restrictions set forth in the Declaration...[and] the affairs of the Association shall be managed by a Board of Directors” (Ex. P-2, Articles 1.4, 3.1, 3.8).

The Association’s Bylaws state that the Board of Directors shall have the power to, “[e]xercise all other powers that may be exercised in this state by the same type of corporation as the Association; and [e]xercise any other powers necessary and proper for the governance and operation of the Association.” (Ex. P-3, Bylaws, Article X (10, 11)). In addition, the Bylaws state that “the Board of Directors Duties are to ...[p]erform any and all duties necessary to comply with the provisions and requirements of the Declaration, the Articles of Incorporation and these Bylaws.” (Ex. P-3, Bylaws, Article X, Directors Duties (3)).

Thus, the Association’s governing documents grant the Board of Directors authority to (1) enforce all of the restrictions, including building

restrictions, in the CC&Rs, (2) to perform any and all duties necessary to comply with the provisions of the CC&Rs, (3) to exercise any powers necessary for governance of the Association, (4) to perform all the duties and obligations of the Association, and (5) to manage the affairs of the Association. Thus, the Board's intervention was a proper exercise of its authority to perform any and all duties necessary to comply with the CC&Rs.

The approved August 4, 2008 plan actually followed the Architectural Committee's July 15, 2008 and July 18, 2008, recommendations by lowering the height of the new structure to a total height of 23 feet 8 inches. (Ex. P-10, P-11), unchallenged Conclusion of Law #4.

The Washington Homeowners' Association Statute states "[u]nless otherwise provided in the governing documents, an association may...exercise any other powers necessary and proper for the governance and operation of the association." RCW 64.38.020 (14). Although the Association Bylaws and CC&Rs have provisions allowing the Board of Directors to appoint an Architectural Committee that is charged with enforcing Article 9 of the CC&Rs, there is no language or provision in the Association's governing documents that prohibit the Board of Directors from assuming the duties and

responsibilities of the Architectural Committee in order to ensure compliance with the CC&Rs. In fact, the Association's Bylaws require that at least two (2) of the Architectural Committee members also be members of the Board of Directors. (Ex. P-3, Bylaws, Art. XVII).

In addition, the Association's Bylaws refer to RCW 24.03.115. (Ex. P-3, Bylaws, Art. XVII). That statute provides:

The designation and appointment of any such committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any individual director of any responsibility imposed upon it or him or her by law.

RCW 24.03.115.

If a committee which is appointed by the Board of Directors fails to function in a manner consistent with its governing documents, the Board has the authority to ensure compliance with the governing documents. The Architectural Committee chair's and vice-chair's resignations, along with the confusion of other committee members, created a situation in which the Board intervened to perform its duty to ensure Waltz's proposed construction complied with the CC&Rs.

Mr. Waltz recognized the Board's authority to intervene when he submitted a new plan on August 4, 2008. On August 5, 2008, Mr. Firestone,

as president of the Board, called an emergency Board meeting under Art. V of the Bylaws. (Ex. P-3, Bylaws). During that August 5, 2008 meeting, the Board unanimously voted to approve Mr. Waltz's plan. FOF 51, (P-34, P-35) Mr. Waltz further recognized the Board's authority when he signed off on the approved plans on August 11, 2008 and built according to these plans.

D. The Trial Court did not err in its conclusion #3 that "Mr. Waltz's plans submitted to the Architectural Committee on July 29 and August 2, 2008 are not deemed approved under the Association's CC&R's. The Board validly assumed the approval process for Walt's project on August 3, 2008 and Mr. Waltz effectively withdrew his approval request regarding the July 29 and August 2, 2008 plan when he submitted a new and different plan to the Board of Directors on August 4, 2008, which was approved and signed off on by Mr. Waltz on August 11, 2008.

This conclusion is supported by the unchallenged Findings of Fact, particularly findings that 34, 38, 46, 49-52, and the unchallenged Conclusion #4, which states:

The approved August 4, 2008 plan followed the Architectural Committee's July 15, 2008 and July 18, 2008, recommendations by lowering the height of the new structure to a total height of 23'8".

E. The Trial Court did not err in conclusions #6 and #7 that Waltz's claim is barred by equitable estoppel.

Estoppel prevents a party from asserting a claim or right that contradicts what the party has said or done before. The elements of estoppel are: (1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such party resulting from allowing the first party to contradict or repudiate such admission, statement or act. *McDaniels v. Carlson*, 108 Wn. 2d 299, 308, 738 P.2d 254(1987).

In *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 150 P.3d 1163 (2007), homeowners sought a declaratory judgment that their homeowners' association was improperly formed and thus lacked the authority to enforce CC&Rs. The court held that the homeowners were estopped from challenging the association's authority because they had a three-to-four year period of participation in and acquiescence to the association's authority, including attending association meetings, paying dues, serving on the board and committees, and submitting requests for building approvals to the association. *Ebel*, 136 Wn. App. at 794, 150 P.3d 1163.

Conclusion #7 states: "clear, cogent and convincing evidence established that Waltz submitted his final building plan to the Board for approval on August 4, 2008. It was voted on and approved by the Board, and

Waltz then signed every page of the approved plans. Subsequently, he built the addition in accordance with those plans. Waltz acquiesced to the Board's authority to oversee the building approval process by submitting, signing off on, and building in accordance with the final approved plans." Conclusion #7 is supported by FOF 49 - 52.

Further, similar to the facts in *Ebel, Id.*, the Waltzes did not bring this lawsuit until "almost three years after the plans were approved and the structure was built." FOF 54.

F. The Trial Court did not err in Conclusion #5, that the Board Members did not breach their fiduciary duties and are not individually liable for the alleged damages.

The Waltzes do not assign error to the Court's Conclusion #1 that the Association, acting through the Board of Directors, had the responsibility and authority to enforce the CC&R's to protect the collective interests of the development. The central decision by the Board was to assume the approval process for the Waltzes' project and to approve Mr. Waltz's August 4, 2008 plan which he submitted. Error was not assigned to Conclusions #1 and #4, and for the reasons set forth above, Conclusions #2, 3, 6 & 7 were correctly decided by the Trial Court. Thus, since the Waltzes are not entitled to any judgment against the Association, an analysis of their claim for individual

Board member liability is not necessary.

However, even if the Waltzes would be entitled to judgment against the Association, the trial court did not err in concluding that the Board members did not breach their fiduciary duties. The Waltzes argue that the trial court imposed a lesser duty, relying on RCW 4.24.264 and RCW 24.06.035(2), when it determined that the Board members did not breach their fiduciary duties. (App. Brief p. 38). However, the trial court's Conclusion of Law # 5 is actually two-fold:

- 1) The Board members did not breach their fiduciary duty; and
- 2) The Board members are not individually liable for the alleged damages.

The second sentence of Conclusion #5 relates to the standard for imposing personal liability against corporate directors under RCW 4.24.264 and RCW 24.06.035(2), not for breach of fiduciary duty. Those statutes deal with a corporate director's personal or individual liability for actions or inactions within his or her official capacity as director. Neither statute mentions fiduciary duty. The Defendants' Closing Arguments illustrated the distinction stating: "There is more than one statute in Washington that provides *immunity* for Board members who are officers of a non-profit

corporation. . . .” (CP 774)(emphasis added) The Waltzes recognized the distinction in their Rebuttal Closing Argument by stating that the statutes were being used “to insulate Board members from the consequences of their misconduct on August 5, 2008. . . .” (CP 811)

The trial court in a bench trial is presumed to know the law. *Douglas NW., Inc. v. Bill O'Brien & Sons Const., Inc.*, 64 Wn. App. 661, 681, 828 P.2d 565 (1992). A director has a duty to perform his or her duties in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. RCW 24.03.127. The Waltzes set forth that standard in their Trial Memorandum (CP 90) and their Rebuttal Closing Argument. (CP 812) The defendants did not propose an alternative standard for breach of fiduciary duty. The trial court did not use a lesser standard than RCW 24.03.127 in determining that the board members did not breach their fiduciary duties.

Thus, in reaching its conclusion that the board members did not breach their fiduciary duties, the trial court implicitly found that the board members acted in good faith and as ordinarily prudent people in a like position would under similar circumstances. The trial court’s reference to RCW 4.24.264 and RCW 24.06.035(2) relates to a separate conclusion that the Board members are not individually liable for the alleged damages.

The Waltzes cite *Riss v. Angel*, 131 Wn. 2d 612, 934 P.2d 669 (1997) in support of their argument that individual directors who violate their duties are liable to homeowners for their unreasonable conduct. (App. Br. p. 40) Contrary to the Waltzes' argument, *Riss* did not impose personal liability against directors of a non-profit, incorporated homeowners association for mere unreasonable conduct. The plaintiffs in *Riss* sued all the homeowners individually. *Riss*, 131 Wn. 2d at 619, 934 P.2d 669. Unlike the Association here, the homeowners association in *Riss* was unincorporated. *Riss*, 131, Wn. 2d at 636, 934 P.2d 669 (emphasis added). On that basis, the *Riss* court found all members who denied the plaintiff's construction plans individually, jointly and severally liable. *Riss*, 131 Wn. 2d at 634-38, 934 P.2d 669. In situations involving corporations like the Association here, board members can only be individually liable if they commit or condone a wrongful act in the course of carrying out their duties and if a lack of good faith is shown. *Schwarzmann v. Ass'n of Apartment Owners of Bridgehaven*, 33 Wn. App. 397, 403, 655 P.2d 1177 (1982).

Here, the trial court properly concluded that the Board members did not breach their fiduciary duties. The trial court also properly concluded that the Board members were not individually, jointly and severally liable for the alleged damages.

CC&Rs requiring consent before construction will be upheld only if authority to consent is exercised reasonably and in good faith. *Riss*, 131 Wn.

2d at 624, 934 P.2d 669. A decision rejecting a proposed construction may be deemed unreasonable if it is made without a site visit or objective comparison with existing structures, if it is based on inaccurate representations of the structure made by decision makers, if the rejection imposes more burdensome requirements than those imposed by the CC&Rs, and if the rejection is only supported by conclusory statements that the proposed construction is not harmonious with the surrounding structures. *Riss*, at 131 Wn. 2d at 628-29, 934 P.2d 669.

The potential bias of a decision maker is not sufficient, standing alone, to render unreasonable the decision to approve or disapprove a proposed construction. *Green v Normandy Park*, 137 Wn. App. 665, 695-96, 151 P.3d 1038 (2007).

The denial of a proposed plan is reasonable if made after an objective investigation of the proposed structure, including a review of the proposed plans and a visit to the site. *Heath v. Uruga*, 106 Wn. App. 506, 517-18, 24 P.3d 413 (2001). In *Heath*, the court found that the denial of proposed construction plans was reasonable because, before making a decision, the defendant reviewed the proposed plans over several days; investigated the roof pitch, wall height, and foundation height; determined the height of the house from the top of the foundation to the top of the roof; and determined the extent of any view impairment. *Heath*, 106 Wn. App. at 518, 24 P.3d 413.

Here, the Waltzes argue that Board members acted unreasonably by denying their plans. However, the Board did not deny the Waltzes' plans. The unchallenged findings of fact indicate that it was the Architectural Committee that voted to disapprove the Waltzes' plans on July 15, 2008 and July 20, 2008. FOF 31-35. The Board actually approved the plans submitted to it by Mr. Waltz on August 4, 2008, and Mr. Waltz signed off on those plans. FOF 51-52.

In addition, the unchallenged findings of fact indicate that the denials were reasonable. The Architectural Committee investigated the proposed construction over several days, which included a site visit and a review of multiple sets of the proposed plans from the Waltzes. FOF 34. The Architectural Committee's denial notices contained specific references to the CC&Rs and even suggested possible remedies. FOF 32, 33. One member of the Architectural Committee, Mr. Murray, spent considerable time investigating and comparing other nearby developments with "comparative covenants" and provided detailed suggestions to the Waltzes. (Ex. P-11, P3)

Contrary to the Waltzes' argument, any statement that the Waltzes' proposed structure was unharmonious was not purely conclusory. The Architectural Committee made it clear that the proposed garage was unacceptable because its height exceeded the height of the Waltzes' house and that a garage with a height lower than the house would be approved. FOF 32-38, 46, 49-51. In fact, the plan that was ultimately approved by the

Board and signed off on by Mr. Waltz actually followed prior recommendations of the Architectural Committee to lower the height of the garage below the height of the house. Conclusion #4.

G. The Trial Court did not abuse its discretion when it declined to award costs, including attorney fees, to the Walzes.

Not only did the Waltzes not prevail, but the general rule, commonly referred to as the “American rule” is that each party will pay its own attorney fees and costs except when authorized by contract, statute, or a recognized ground in equity. *Cosmopolitan Eng’g Group v Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296, 149 P.3d 666 (2006).

Article 10.1 of the Association's CC&Rs states that the Association or an owner has the right to enforce the CC&Rs by any proceeding at law or in equity against any person violating them, either to restrain the violation or recover damages. (Ex. P-2). The CC&Rs do not contain a prevailing party attorney fee provision for such lawsuits, and neither do the Articles of Incorporation or Bylaws. (Exs. P-1, P-3).

In a factually similar case, *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 519, 280 P.3d 1133 (2012), a homeowners' association sued homeowners for building their home in violation of the association's height restriction. The homeowners built without the required approval from the association and in disregard of the association's warning

that it would sue them if they continued to build in violation of the height restriction. *Greenbank*, 168 Wn. App. at 521, 280 P.3d 1133. At trial, the association sought and was awarded attorney fees based on the equitable ground that the homeowners committed prelitigation misconduct, i.e., acted in bad faith by building in violation of the height restriction. *Greenbank*, 168 Wn. App. at 524, 280 P.3d 1133. The Court of Appeals reversed the trial court's award of attorney fees. *Id.* The court held that in order for prelitigation misconduct to be sanctionable by an order to pay the other party's attorney fees, there must be some disregard of judicial authority. *Greenbank*, 168 Wn. App. at 526, 280 P.3d 1133.

Similarly here, there is no prevailing party attorney fee provision and there has been no disregard of judicial authority by either party. Thus, the Trial Court's Conclusion #8, that neither Plaintiffs or Defendants are entitled to attorney fees is correct.

H. The Trial Court did not abuse its discretion in striking the Waltzes' Jury Demand.

The Complaint lists causes of action for declaratory relief and breach of fiduciary duty. CP 16 - 19. In addition, the Waltzes seek general and special damages, costs and attorney fees, and "other relief as the court deems just and equitable." CP 19. The damage claim was limited to \$16,215 for labor to modify the existing addition, plus materials of \$4,000. Ex. P-80, RP 148.

There is a right to a jury trial where the civil action is purely legal in nature. *Brown v Safeway Stores, Inc.*, 94 Wn. 2d 359, 365, 617 P.2d 704 (1980). Conversely, where the action is purely equitable in nature, there is no right to a trial by jury. *Id.* The overall nature of the action is determined by considering all the issues raised by all of the pleadings. *Id.* In cases involving both equitable and legal issues, the Court has wide discretion to allow a jury on some, none, or all issues presented. *Brown*, 94 Wn.2d at 367, 617 P.2d 704.

The distinction between legal and equitable claims is based on the nature of the action, not the form of the action. *Auburn Mech., Inc. v Lydig Const., Inc.*, 89 Wn. App. 893, 899, 951 P.2d 311 (1998). The Court must examine the pleadings on file at the time the Court rules on the motion to strike the jury demand, and it should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues. *Id.* More importantly, courts must examine the remedy sought. *Id.*

Even if the action is one for money damages, it may be primarily equitable in nature. *Allard v Pac. Nat. Bank*, 99 Wn.2d 394, 400, 663 P.2d 104 (1983). In determining whether a case is primarily equitable in nature or is an action at law, the Court should consider a variety of factors including, but not necessarily limited to, the following:

- (1) who seeks equitable relief;

- (2) is the person seeking the equitable relief also demanding trial of the issues to the jury;
- (3) are the main issues primarily legal or equitable in their nature;
- (4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury;
- (5) are the equitable and legal issues easily separable;
- (6) in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed;
- (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues.

Brown, 94 Wn.2d at 368, 617 P.2d 704 (citing *Scavenius v Manchester Port Dist.*, 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970)).

Coercive orders such as injunctions or decrees of specific performance are equitable remedies. *Auburn*, 89 Wn. App. at 902, 951 P.2d 311. Rescission is also an equitable remedy. *Id.* Here, the Waltzes are seeking equitable relief in the form of a declaratory judgment that they are entitled to construct their new addition according to the revised plans they submitted on July 29, 2008 and August 2, 2008.

Although the Complaint does not contain the word “injunction” or “enjoin”, the Waltzes’ request for a declaratory judgment is functionally similar to asking for injunctive relief. See *Greenbank Beach & Boat Club, Inc. v Bunney*, 168 Wn. App. 517, 523, 280 P.3d 1133 (2012).

Looking beyond the pleadings to ascertain the real relief requested, the Waltzes are seeking a judgment that adopts their interpretation of the CC&R’s and Bylaws, particularly that the Board does not have the authority to intervene in the architectural approval process and that the Architectural Committee’s failure to act on a construction plan deems it approved. The Waltzes are seeking an order of specific performance of the CC&R’s and Bylaws according to their interpretation. They are also seeking an injunction preventing the Board from intervening in the architectural approval process thereby rescinding the authority granted to the Board under the CC&R’s and Bylaws. Furthermore, the Waltzes seek rescission of the construction plan that they and the Board agreed to in August, 2008.

Although the Waltzes do seek monetary damages, the primary relief sought is equitable. A judgment for monetary damages in this case, by itself, will not permit the Waltzes to build their desired addition. The monetary damages of \$20,215 to reconstruct the garage are secondary to the declaratory judgment. In order to build the desired addition, the Waltzes must have a coercive order from this Court granting them the right to do so, which is an equitable remedy.

Thus, the Trial Court did not abuse its discretion in striking the Jury Demand.

IV. CONCLUSION

Based upon the foregoing, the Respondents submit that the Trial Court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 18 day of Nov, 2013.

MULLIN, CRONIN, CASEY & BLAIR, P.S.

A handwritten signature in black ink, appearing to read "Timothy P. Cronin", written over a horizontal line.

Timothy P. Cronin WSBA #08227

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of Nov, 2013, I caused to be served a true and correct copy of the foregoing **Brief of Respondents** by the method indicated below, and addressed to the following:

John Guin
Law Office of John H. Guin, PLLC
220 W. Main
Spokane, WA 99201

- PERSONAL SERVICE
- U.S. MAIL
- HAND DELIVERED
- OVERNIGHT MAIL
- TELECOPY (FAX)


Timothy P. Cronin