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Nos. 358259 and 360121

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

Edward Coyne et al, Respondents,

v.

Grigg Family LLC and City of West Richland, Appellants

BRIEF OF RESPONDENTS

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A. COUNTERSTATEMENT OF ASSIGNMENT OF ERROR

Counter-Issues Pertaining to Assignments of Error

1. Was it error for the trial court to consider the “surrounding circumstances” where Appellants made no specific evidentiary objection to evidence of the same and where Appellants asked the trial court to consider prior language of the covenants, later deleted by amendment of the covenants?

2. Where covenants provided that lots 1-29 in a plat were “known” and “described as residential lots” was there any genuine issue of material fact as to whether placement of a hardware and household goods store by the Grigg Family LLC would violate said covenants

B. RESPONDENTS' STATEMENT OF THE CASE

The Plaintiffs (Respondents on appeal) are all owners of homes along Austin Drive in the City of West Richland, County of Benton, State of Washington. The subdivision is known as “Canal Heights” and is comprised of 30 lots. CP 7-9.

A document recorded in 1948, entitled “Protective Covenants,” as amended provides that “all lots in said plat, except Lot 30, shall be known and be described as residential lots.” CP 63.

Defendant Grigg Family LLC (hereinafter "Grigg") (Appellant on appeal) is the owner of Lots 1 and 29 in Canal Heights. Defendant Grigg Family LLC purchased Lots 1 and 29 with the intention of placing a new hardware and household goods store on their property. CP 31-32, CP 132.

Defendant City of West Richland (hereinafter "City") (Appellant) is the owner of Lot 28. CP 32.

The lots in question were historically zoned as low density residential. CP 54.

On July 16th, 2013, the Defendant City of West Richland enacted an ordinance rezoning Lots 1, 28 and 29 from low density residential to Commercial-General. This included a change to the Comprehensive Plan for the City of West Richland. The rezone and change to the Comprehensive Plan, for Lots 1 and 29 was at the behest of the Grigg Family LLC. CP 10.

The Plaintiffs did not acquiesce in the zoning changes and certain of the Plaintiffs, Edward Coyne and those who are members of the West Richland Citizens for Smart Growth, challenged the changes in separate actions in Superior Court and the Court of Appeals, which were unsuccessful, as to the right of the City to re-zone. CP 54.

The Plaintiffs have consistently used their property to comply with the designation of their lots as “residential” as described by the “Protective Covenants.” CP 54-55.

The Plaintiffs believed that Defendants, based on their actions intended to carry out non-residential, commercial activity, which would violate the right of the Plaintiffs to have all owners of Lots 1 through 29 in Canal Heights limit activities on their property to those of a “residential” nature, which would not include “Commercial” uses. CP 55.

The Plaintiffs brought a suit for declaratory relief in the Superior Court of Benton County. CP 7-11.

The plans provided by the Grigg Family LLC indicate that the route of the existing street would be changed to reflect the fact that the existing street would instead be an entry into the store parking lot. CP 38, 41. The planned building is shown at CP 40. There are 15 parking stalls along the front of the store alone. CP 40. It appears that the store would be on Lot 1 and Lot 29 would be for additional parking. CP 41.

Plaintiff Dan Richey stated in his declaration in support of summary judgment that he and his wife owned two lots in Canal

Height subject to the covenants and they had owned another of the lots earlier. He was not aware of any other commercial use of the lots subject to the covenants, other than the planned use by the Grigg Family LLC of Lots 1 and 29. The Richeys had owned the lots they now own since 2004, and owned the other lot from 1987 to 2004. CP 54-55.

Richey was a member of an organization, West Richland Citizens for Smart Growth, that had always opposed commercial use of the property in question. CP 55.

C. ARGUMENT

Summary of Argument

The restrictive covenants at issue provide that lots 1-29 are “known” and “described as residential lots.” A lot with a Grigg’s hardware and household goods store located upon it is not a “residential lot.” For 70 years there has only been residential use of the lots. The trial court’s ruling granting summary judgment to the Respondents should be affirmed.

1. The trial court did not err in considering the “surrounding circumstances” in interpreting the protective covenants.

If the trial court should not have considered the “surrounding circumstances” then any error is harmless, as the plain language of the covenants still says the lots are “residential lots” and a lot with a Grigg’s hardware store on it is not a residential lot. Ignoring the surrounding circumstances does not help the Grigg Family LLC.

It was, however, proper to consider the “surrounding circumstances” even though the case could have been decided without doing so. Taken to its logical extreme, without “surrounding circumstances,” then the drawn plans for the Grigg’s store should not have been considered, to have a general idea of the size of the store planned, nor would the Court have known of the planned reroute Austin Drive around Lots 1 and 29 to essentially combine the two lots and to have Austin Drive border two sides of an existing lot instead of just go in front of it. CP 40-41.

Under the view of the Grigg Family LLC, the Court would have only the language of the covenants and the phrase “hardware store” before it. And no idea as to the actual uses of Lots 1 through 29 since 1949. If a covenant said “no horses” and someone put a horse on

the property, then perhaps the factual pattern would be simple enough to not need to consider any surrounding facts. But these covenants were enacted in 1949 and evidence of how the properties have actually been used since the covenants came into existence, the residential zoning that reflected the property use, CP 54, and what a modern day “hardware store” is like certainly would aid anyone in interpreting the covenants if there is any doubt. 64 years passed since enactment of the covenants and the first known commercial use being approved by the City in 2013.

“[S]urrounding circumstances are to be taken into consideration when the meaning is doubtful.” *Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965).

Was the meaning doubtful? Not necessarily. Since 1949, no one else has built a large business on the properties. At least in recent times, the zoning was low density residential. CP 54. The Grigg Family LLC and City of Richland at least at some point had actual knowledge of the protective covenants and apparently believed they allowed the hardware store. The Plaintiffs believe they do not. Someone had doubts about what was allowed or not.

Whether the language is “doubtful” goes hand in hand with the discussion of how each relevant term should be interpreted. And those are discussed, below, in addressing whether the Court’s interpretation was erroneous or not. If anything was “doubtful” it may have been what constitutes “trade” and what would be “noxious or offensive” trade. Up to some degree, some type of trade is allowed. It is the Grigg Family LLC who must push the envelope on that, or explain how a “hardware store” could have been realistically intended on a “residential” lot. The trial court judge discussed an issue raised by Grigg as to whether their proposed store was “trade” as contemplated by the covenants. RP 38-40, cited by Grigg in their brief, p. 9.

The other area of “doubt” could arise from the description of the lots as “residential” but without further description of what use is “residential” or not. It is the Grigg Family LLC who contends that being “known” and “described as residential” has nothing to do with permissible uses of said lots and that “residential” includes building a large-scale hardware store, so it is Grigg Family LLC who effectively contends the term is not clear. They critically cite the hearing transcript for the judge’s comment on the very issue raised by themselves. RP 39, cited by Grigg in their brief, p. 10.

It is the Grigg Family LLC how raised a doubt, not the Plaintiffs, so Grigg Family LLC should not be heard to complain. Grigg did not raise a specific evidentiary objection to consideration of “surrounding circumstances” in either its memorandum in support of its own motion for summary judgment, CP 20-20, or in its memorandum opposing Plaintiffs’ motion. CP 127-136. Although Grigg argued that the language of the covenants was plain, they also cited the same case law cited in their brief as to consideration of the surrounding circumstances when the meaning is doubtful. CP 23, 128. But they did not clearly argue that the surrounding circumstances should not be considered, instead focusing on that on appeal to claim for the first time it would be error to even considered.

In their motion for summary judgment, the Grigg Family LLC did not merely cite the most recent version of the protective covenants. Instead they cited an original version to argue an intent in making the amendment to allow commercial buildings. CP 23-24. The Grigg Family LLC then argued that the removal of certain language via the amendment “evidenced” the intent of the present covenant language. CP 25.

The Grigg Family LLC could have introduced only the amended covenants into the record, instead they chose to inject the original version and thereby offered “surrounding circumstances” of intent.

The Appellants also introduced, as part of their own motion for summary judgment, evidence of the current use of Lot 28 by the City, including a community garden for which users must pay a \$10 fee. Appellants argued this was evidence of what kind of “trade” was permitted. And may have hinted that Plaintiffs acquiesced in uses that were not strictly “residential.” Again, Appellants introduced extrinsic evidence on the question of what uses were permitted, instead of relying on language contained in the four corners of the document.

The Grigg Family LLC invited error or waived any objection to extrinsic evidence by offering the same in support of their own motion.

Courts often characterize the issue as one of waiver, stating “that any objection to the explanatory or contradictory evidence is waived because the evidence was 'invited, ' or because the objecting party was the first to 'inject the issue' into the trial.” 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 103.15, at 80-81 (5th ed. 2007).

State v. Scantling, 31940-7-III (unpublished opinion 7/7/15)

A party may “by introducing evidence similar to that already objected to, waive his objection.” *Sevener v. Northwest Tractor & Equipment Corp.*, 41 Wn.2d 1, 15, 247 P.2d 237 (1952).

Assuming that Grigg even preserved what is really an evidentiary issue, an error in admitting evidence that does not prejudice the defendant is not grounds for reversal. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). The improper admission of evidence constitutes harmless error if the evidence is minor in comparison to the overall, overwhelming evidence as a whole. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Any error in considering the surrounding circumstances was harmless error, since the plain language alone would support the Superior Court’s decision, because all of the lots involved are described as “residential” and have no other description.

Other cases interpreting restrictive covenants consider the “surrounding circumstances”.

Grigg has relied upon *Burton v. Douglas County*, 65 Wn.2d 619, 399 P.2d 68 (1965). In that case, the Court found the word “business” as used in the phrase “business trade” in the covenants in that case, to be “one of ambiguous and uncertain meaning. 14 Am.Jur. § 218,

p. 623.” 65 Wn.2d at 622. The *Burton* Court’s analysis clearly considers the “surrounding circumstances.”

If the term “business” is ambiguous, then the term “trade” as used in this case could also be ambiguous. Therefore there was no error in the trial court in this case considering the surrounding circumstances.

Wilkinson v. Chiwawa Communities Ass’n, 180 Wn.2d 241, 327 P.3d 614 (2014), primarily involved the interpretation of the term in covenants prohibiting “commercial” use. Yet clearly the Court considered surrounding circumstances in holding that short-term vacation rentals were not commercial use, e.g.: “Chiwawa residents have rented their homes to unrelated persons on a short-term, for-profit basis for decades without controversy.” 180 Wn.2d at 247.

Extrinsic evidence is ... used to illuminate what was written, not what was intended to be written.” *Hollis, [v. Garwall, Inc.]* 137 Wn.2d [683, 974 P.2d 836 (1999)] at 697. We, however, do not consider extrinsic “ [e]vidence that would vary, contradictor modify the written word” or “show an intention independent of the instrument.” *Id.* at 695.

The trial court did not improperly consider extrinsic evidence. It was proper in interpreting the covenants in light of Grigg’s argument that “trade” on “residential” lots included a large

hardware and household goods store. And in light of Grigg's argument that the pre-amendment language should be considered.

2. The trial court did not extend by implication the protective covenants so did not err

a. **"Residential" is not a restriction that was "extended"**

Grigg points out that while the covenants say that the lots will be "residential" lots they do not specify that they can only be *used* for residential purposes. Being "known" and "described as residential" is meaningless, according to Grigg. The drafters had nothing better to do than to come up with meaningless terms. Or, in amending the part 1 of the covenants, they intentionally removed certain language, while accidentally leaving in the description of the lots as "residential" under Grigg's view.

Grigg then takes the oral statement by the Superior Court judge acknowledging that to be the equivalent of extending it by implication to forbid uses not listed as forbidden. Grigg's claims the judge "acknowledged that the restrictive covenants do not specifically restrict use of the Canal Heights lots to *only* residential uses --" Grigg Brief, p. 10.

But that is not what the quoted language from the judge actually said. The judge merely acknowledged that the language in the covenants “doesn’t talk about it has to be used for that.” RP 39. That is different than saying they do not specifically restrict use to residential use, or what the overall intent is. What, according to Grigg, is the purpose of including the term “residential” if it has no meaning? The judge merely referred to what language was in, nor not in, the covenants, and did not agree the plain language did not restrict commercial use. It was one part of her analysis.

If anything, the judge was merely discussing Grigg’s claim that the lack of a list of what is excluded controlled the case.

A door marked “employees” would not mean the door is to be used only for employees, according to Grigg’s reasoning, it is also for any other purpose not expressly forbidden. That does not make sense. A plaque in a garden indicating a bush was a “rose bush” would also need to say it was not a daffodil nor was it a tulip, under Grigg’s reasoning. A can labeled as “tomato soup” could very well contain chicken soup as well or even instead of tomato soup altogether as the label could be completely meaningless, under Grigg’s absurd and childish reasoning.

The Superior Court did not, and did not need to, extend by implication the term “residential.” The plain and obvious reason the lots are called residential is because the intent of the parties to the covenants was that they were to be used for residential use. The term “residential” did not need to be followed by an exclusive list of what uses were forbidden. It did not require further elaboration on what was allowed, as long as the character of the use was “residential.” “The lack of an express term with the inclusion of other similar terms is evidence of the drafters' intent.” *Wilkinson v. Chiwawa*, 180 Wn.2d at 251, citing *Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965). While this principle may be cited more in connection with lists of what is prohibited, it applies as well to a list of what is allowed. Part 1 is a list of what is allowed in lots 1-29, “residential” use. By not listing retail businesses, it effectively prohibits that which is not listed. All lots except 30 are “residential.”

The fact is, “residential” is “residential” and everyone knows the basic meaning of the term. And they do not realistically then wonder if it means “commercial” too.

According to the *Merriam-Webster Dictionary*, “residential” means:

a : used as a residence or by residents, b : providing living accommodations for students a residential prep school

c: restricted to or occupied by residences a residential neighborhood

d : of or relating to residence or residences

e : provided to patients residing in a facility residential drug treatment;

also : being a facility providing such treatment a residential treatment center.

“Residential” is not a list of what is not allowed, it is a designation of what the lots are, and what is allowed, so analysis on the basis of “extension” of prohibited uses under (Parry) at that point does not fit.

b. Interpreting “trade” in light of the “residential” designation was not an extension of a restriction

The protective covenants do prohibit “noxious or offensive trade or activity ...” CP 36. Did the trial court extend by implication this restriction? No. The trial court considered the document as a whole. The lots are residential lots. The covenants say lots 1-29 are residential lots, they do not say that some are residential and some are for trade. Since only noxious or offensive trade is restricted, what does that leave? Trade that is consistent with the primary intent that

the lots are “residential.” The Superior Court judge recognized, as anyone who has lived in residential zoning would, that there is sometime activity in residential areas involving some “trade” such as hobby agriculture.

In interpreting what was meant by covenants that require lots to be residential, the Court interpreted the covenants as to whether a prohibition on noxious or offensive trade meant Grigg could build a hardware store. And found that it is not the type of “trade” allowed.

Grigg assumes it if it’s not “noxious or offensive” then it is allowable trade. But only by first conveniently ignoring that the lots are “residential.”

Thus the analysis by the Superior Court did not involve extending restrictions by implication. It involved finding the intent behind the fact that some “trade” is allowed by the covenants.

3. *Burton v. Douglas County* is distinguishable.

Grigg pins its hopes of wreaking ruin to Austin drive on *Burton v. Douglas County*, 65 Wn.2d 619, 399 P.2d 68 (1965). Grigg asserts the case is controlling because the Court in *Burton* held that building of a parking lot did not violate covenants that required any structure

to be a residence and which prohibited “noxious or offensive business trade” Grigg Brief, p. 12, *Burton*, 65 Wn.2d at 620.

Burton does not assist Grigg as there simply was no provision in the *Burton* covenants providing that the lots were “residential” lots. Burton did not involve covenants that said that all lots would be known as “residential.” It did say any *structures* would be only residences. Although any structures had to be single-family dwellings, the facts indicate there was already a golf course, clubhouse, caddy shack and paved parking lot in existence on the property when the covenants were enacted. 65 Wn. 2d at 619-20. Clearly there were uses allowed other than residential.

Within five years prior to the suit brought in *Burton*, an additional nine holes were added to the golf course. The plaintiff had purchased two lots next to existing blacktopped parking and built a residence. The country club then purchased five more lots, using two as tees and three that were across the street from the clubhouse had been used as unimproved parking for members for over 10 years. No one objected to these uses. 65 Wn.2d at 620-21.

When the country club sought to level and blacktop the three lots already being used as unimproved parking, Burton brought suit, contending it would violate the covenants. 65 Wn.2d at 621.

The trial court held that the improvement of the parking lot was a “business trade” in violation of the covenants. 65 Wn.2d at 621.

The appeal in *Burton* presented a single issue:

Was the restriction upon carrying on a “noxious or offensive or business trade” intended to proscribe the maintenance of a parking lot in conjunction with the operation of the golf club?

65 Wn.2d at 621.

Burton did *not* involve analysis of whether a parking lot could be put on a lot described as “residential” because no such language existed in *Burton*, as here. Finding the term “business” to be ambiguous, the Court found that the country club had an “essential character as a social organization.” Though it charged fees and even made a profit on some events, that did not change its status. It was not a business. 65 Wn.2d at 622. The parking facilities were reasonably necessary to operate the country club, which had always been an integral part of the property as a whole. The residential area

was a fine one due to its very location between the two “nines” of the golf course. 65 Wn.2d at 623-24.

Grigg cannot successfully rely upon a case which holds the activity complained of was not a “business” in violation of a covenant prohibiting “business trade.” Grigg is a business, not a social organization, nor is what it intends to build an integral part of an existing facility within the Austin Drive development.

Interestingly, Grigg relies upon the covenants in this case prohibiting only “noxious or offensive trade” and thus their “trade” would be permitted if not “noxious or offensive.” In *Burton*, the phrase was “business trade.” If anything, this could indicate there is a distinction between the commonly understood meaning of “trade” versus “business” and allowing some “trade” does not contemplate a true “business.”

To the extent Grigg would rely on language from *Burton* about there being no express prohibition on non-residential uses, *Burton* did not involve covenants describing all lots as “residential” nor does this case involve obvious historical use of the properties for a use other than residential as in *Burton*. So there is no valid comparison.

It is submitted by Respondents that the description of the lots as “residential” is in fact a prohibition on non-residential use, or at a minimum on use that is not compatible with residential use, such as the hardware store planned by Grigg on a two-lot site, requiring re-routing of the Austin Drive.

4. The term “residential” should not be ignored in interpreting “trade.”

Grigg argues that the “only mandate” in the covenants is that the lots be “described” as “residential. Grigg Brief, p. 16. And that, according to the twisted reasoning of Grigg, does not restrict the use of the lots. Why would a term the drafters included in the covenants be rendered meaningless? It is absurd that a description would have absolutely no purpose. The mere fact it is not worded in terms of a “shall not” does not matter. To specify “residential” is to exclude that which is not residential.

That some “trade” is allowed does not detract from the overarching purpose of the covenants that the lots be “residential” in nature. “Trade” must be read in conjunction with “residential.” “We ... consider the instrument in its entirety.” *Wilkinson v. Chiwawa Communities Ass’n*, 180 Wn.2d 241, 250, 327 P.3d 614 (2014). The

interpretation by Grigg requires not considering the document in “its entirety” but instead, considering the “trade” provision in sheer isolation. This Court should not “wall off” the term “residential” from the term “trade” and instead make a common sense interpretation and hold that only that “trade” consistent with the “residential” character of the neighborhood be allowed.

“In determining the drafter's intent, we give covenant language ‘its ordinary and common use’ and will not construe a term in such a way ‘so as to defeat its plain and obvious meaning.’” *Wilkinson v. Chiwawa Communities Ass’n*, 180 Wn.2d at 250, quoting *Mains Farm*, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993); *Riss v. Angel*, 131 Wn.2d 612, 623, 934 P.2d 669 (1997).

Rather than place a thumb on the scales in favor of the free use of land, “[t]he court's goal is to ascertain and give effect to those purposes intended by the covenants.” *Riss*, 131 Wn.2d at 623. Courts “place ‘special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.” *Id.* at 623-24 (quoting *Lakes at Mercer Island Homeowners Ass’n v. Witrak*, 61 Wn.App. 177, 181, 810 P.2d 27 (1991)).

Wilkinson v. Chiwawa Communities Ass’n, 180 Wn.2d at 250.

This Court should reject the invitation of Grigg to cynically defeat the plain and obvious meaning of the Austin Drive covenants, which

is that the lots will be used for residential use. The Grigg hardware store has *nothing to do with residential use*.

Respondents do not have to show that the “trade” would be noxious or offensive or a nuisance to be prohibited. “Trade” that does not comply with the designation of the lots as “residential” is not allowed.

The “trade” planned by Grigg is not a “residential” use. It is not going to be carried on by residents. It is not going to directly benefit residents.

Evidence of what trade would be consistent with “residential” lots can be found in the zoning that governed the area before the City of West Richland re-zoned the three lots in question to “commercial” which also required amendment of the Comprehensive plan, so engrained was the residential nature of the land.

West Richland Municipal Code Chap. 17.24 governs “Low Density Residential” uses allowed, the zoning designation for all 29 lots until it was changed for the three lots in question. Those can include, assuming the covenants designation of “residential” is not more restrictive, include keeping of one large domestic animal other than swine, per half-acre, WRMC 17.24.030 K, as a primary use.

Secondary uses include hobby agriculture which can include signs for the sale of items grown on the land, up to six square feet, temporary stands to sell produce, and bed and breakfasts. WRMC 17.24.040 C., D. But the Grigg store was not allowed under Low Density Residential, or else the zoning change would not have been necessary. Thus, some “trade” going on does not destroy the residential character of a neighborhood. If the Griggs store was consistent with the existing residential use, including the type of trade associated with residential use, then the zoning would not have to have been changed to commercial.

By comparison, the Supreme Court of Washington has held that “short-term rentals” did not violate covenants barring commercial use of the property or restricting lots to single-family residential use. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d at 245. Small-scale trade does not equal “commercial” use, as Defendant would have the Court believe. No one would seriously argue that the Grigg store is not “commercial” use. No one would argue that “short-term rentals” are not “trade” of some kind. So not all “trade” is the same type of use contemplated by Grigg.

Regardless, even ignoring the overall purpose of having *only* “residential” lots, the “trade” here is “offensive” as shown by the photographs of other Grigg’s stores. Large trucks making deliveries in a neighborhood, commercial size dumpsters, and that kind of traffic are offensive to those owning the other “residential” lots.

5. The type of structures allowed.

Despite claiming the trial court should not have considered the “surrounding circumstances,” Grigg’s offered the prior language of the covenants before they were amended as to evidence of the intent of the covenants.

Previously the covenants said the lots were “residential” lots and that construction was limited to a detached single-family home of no more than two stories and a two-car garage. CP 63.

The amended version left only the following language in part 1: “all lots in said plat, except Lot 30, shall be known and be described as residential lots.” *Id.*

Under Grigg’s reasoning, the zoning could be changed for all lots and hardware stores could be built on each and every lot and they would still be “known as and be described as residential lots.” That

does not make sense but would have to be true if their rationale is accepted.

It does not follow that the intent of the amendment was to allow unbridled commercial development, as then the designation of “residential lots” would also have been removed. The description as “residential lots” remained in place like the Rock of Gibraltar.

The amendment is consistent with the lots still being confined to residential use, but that homes did not have to be detached, single-family, no more than two stories and garages did not have to be limited to two cars. There is no evidence of any other change in intent.

Without citing any language from the covenants, Grigg maintains that the only restrictions on structures are on residential structures and therefore there is no restriction on commercial buildings. First this ignores the very first requirement, that the lots are “residential lots.” Part 2 of the covenants says residential structures must have a septic tank. According to Grigg, the lack of this requirement for any other structures means the drafters contemplated large retail hardware stores without any plumbing facilities for employees or customers, which is very unlikely. There is no inconsistency with

specifying the requirement for a “residential structure” because a residential lot can still have a garage, storage shed or other structures associated with a residence that would not need septic. The two years for completion of structures without specification as residential also is consistent with the lots being “residential” for the same reason.

Part 3 also imposes a minimum 600 square feet requirement only upon a “residential structure. But if anything, this would mean a building for “trade” could be less than 600 square feet, not on the scale of the store planned by Grigg. Limiting the requirement to residential structures again only recognizes that garages, sheds, etc. are part of residential life but do not need to have the same requirements as dwellings.

6. The trial court did not err in holding the City of West Richland violated the covenants.

To the extent the City of West Richland has effectively joined in the arguments made by Grigg, the briefing set forth above is hereby incorporated by reference as to the arguments made by the City of West Richland.

First the City of West Richland should be a party bound by the ruling against Grigg as building by Grigg would require the City to issue permits for the project to continue and the City of West Richland should not be permitted to do anything with Lot 28 that would aid Grigg in violating the covenants.

Further, the City of West Richland should still be held to a ruling that the covenants describing the lots as “residential” are valid and binding upon the City. And the city of West Richland could aid other owners in the future in trying to put retail stores on the lots.

And the ruling against use of Lot 28 as a park and community garden should be affirmed, as the use is not for a residence, and the City of West Richland could expand its use of the “park” beyond that which is compatible with a “residential Lot” such as installing ball fields, overhead lights, expanding parking, etc..

7. Attorney fees requests by Grigg and the City of West Richland should be denied.

Aside from the fact that neither Appellant should be granted any relief on the merits, neither Appellant has cited any underlying basis, aside from RAP 18.1 as to why they should be awarded fees even if they could somehow prevail.

D. CONCLUSION

There is no material issue of fact in that it is undisputed that lots 1-29 are “residential lots” as described by protective covenants. The Grigg’s store would not be a residential use. Actions by the City of West Richland in assisting Grigg to violate the covenants violate the covenants and the City’s use of Lot 28 for a park and community garden do not comply with the restriction of “residential” use of the lots.

The trial court’s order granting summary judgment to Respondents, and denying the same to the City of West Richland should be affirmed.

Respectfully submitted,

s/ William Edelblute Dated: 8/3/18

William Edelblute

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