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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NOCHE VISTA, LLC,
a Washington limited liability company,

Appellant,

v.

BANDERA AT BEAR MOUNTAIN RANCH
HOMEOWNERS ASSOCIATION, a Washington
Nonprofit Corporation,

Respondent.

REPLY BRIEF OF APPELLANT
NOCHE VISTA, LLC

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A. INTRODUCTION

Every word must be given effect when construing covenants. Respondent Bandera at Bear Mountain Ranch Homeowners' Association ("HOA") ignores this basic interpretive rule, arguing that the word "annexation" in the CC&Rs is just "one word" and can be disregarded. But annexation has a common-sense meaning that cannot be ignored: it means to add territory.

The HOA's failure to give effect to the word annexation becomes especially glaring when it is read in the context of the CC&Rs' other provisions, as it must be. The HOA's selective interpretation renders meaningless and nonsensical the CC&Rs' careful delineation of Phase III as separate from Phases I and II. Even though Phase I was situated similarly to Phase II—they both were undeveloped and undivided—the CC&Rs required annexation only for Phase III. The CC&Rs' other annexation provisions, ¶¶ 10.1 and 10.2, help explain the significance of this differential treatment. ¶¶ 10.1 and 10.2 state that annexed property becomes part of "Bandera," indicating that before annexation the property is not yet within "Bandera" for purposes of the CC&Rs' application. In short, Noche Vista's interpretation of the CC&Rs is the *only* interpretation that gives effect to every word and makes sense of the CC&Rs as a whole.

The HOA's selective interpretation becomes even more obviously

flawed when, despite 48 pages of briefing, the HOA cannot explain where to find a legal description in the CC&Rs that supports the HOA's view of Phase III. Instead of pointing to where the CC&Rs *include* Phase III in the land subject to the CC&Rs, the HOA changes the subject and argues that the CC&Rs do not *exclude* Phase III. But the CC&Rs *do* exclude Phase III, as a result of the definition of "Landholding," the annexation provisions, and the legal description of the property subject to the CC&Rs.

The HOA's equitable defenses fail. Among other flaws in its invocation of laches and estoppel, the HOA produces nothing more than speculation that it has suffered any injury here.

The trial court should be reversed.

B. REPLY ON STATEMENT OF CASE

In the HOA's statement of the case, the HOA asserts that the CC&Rs "are consistent" with Bandera's plat and "contain the same legal description of the same 92.90 acres of real property described in the Plat that constitute Bandera, including the 31.76 acres of Bandera Phase III." Br. of Resp't at 10 (citing CP 24-31, 53-54). But the HOA omits two crucial details.

First, the CC&Rs do *not* incorporate the Plat or its legal description by reference. CP 19-57. One page of the Plat is merely attached as the last page after the signature block. CP 56-57. It is then barely mentioned in the CC&Rs. CP 19-57. The definition of "Landholdings" does reference the

Plat as showing the Landholdings subject to the CC&Rs. CP 31-32. But of course this definition of “Landholdings” explains that Phase III is *not* included unless it is annexed. CP 32.

Second, the CC&Rs’ legal description does not simply copy the Plat’s legal description. Rather, the CC&Rs group Bandera Phases I and II into one legal description that concludes, “EXCEPT Bandera Phase III.” CP 24-26. The CC&Rs then separately provide the legal description for Phase III. CP 27-31. *Nowhere* do the CC&Rs provide a legal description that includes Bandera Phase III, CP 19-57, although the HOA implies otherwise.

The HOA claims that ¶¶ 12.4 and 12.5 “state ... that the Covenants apply to the real property *commonly known as* Bandera at Bear Mountain Ranch.” Br. of Resp’t at 11 (emphasis added). But the words “commonly known as” are the HOA’s words, not the CC&Rs’. Instead, ¶¶ 12.4 and 12.5 refer to “Bandera” without defining “Bandera” in the specific setting of the CC&Rs. CP 53-54.

Later in its statement of the case, the HOA confuses the relationship between Bandera and Bear Mountain Ranch (“BMR”), calling BMR an “adjacent development.” Br. of Resp’t at 13. As the CC&Rs’ definitions make clear, however, Bandera Phases I and II, as well as Phase III, are

within BMR.¹ The CC&Rs’ definitional section gives the legal definition for BMR, which includes, “All of Section 18, Township 27 North, Rane 22, East, W.M.” CP 30. Then, the CC&Rs’ definitional section describes Bandera Phases I and II as a “parcel of land” within that same land area. CP 24. Because the legal definition for BMR encompasses the legal descriptions for Bandera Phases I and II as well as Phase III, those areas are inescapably part of BMR. The CC&Rs reinforce this conclusion when they incorporate by reference the Chelan County’s conditional zoning change for “Bear Mountain Ranch Resort.” CP 31, 56.²

Bandera Phase I and II’s inclusion in BMR matters because the CC&Rs waived each Owner’s right to “protest or object to future development in Bear Mountain Ranch,” which included Phase III. CP 192. In the CC&Rs, each Owner also “acknowledge[d] and agree[d] that areas of Bear Mountain Ranch will continue to be developed for residential use, for higher density occupation or for any other purpose permitted by law.”

¹ BMR is a 1500 acre Planned Development District approved by Chelan County in August 2000. It has its own set of development regulations. The 92.90 acre area known as Bandera at Bear Mountain Ranch was platted in January 2006 and is a part of BMR. Bandera is subject to BMR’s development regulations, notwithstanding the Bandera CC&Rs’ site-specific regulations.

² Bandera grantor Jerry Scofield’s development company marketed “Bandera” as an area within BMR. The Enduring Quality of Rustic Elegance, Bear Mountain Ranch, <http://www.bearmt.com/real-estate-homesites.html> (last accessed Nov. 13, 2019).

Id. As the HOA admits, the term “Owner” referred to the owners of “Landholdings,” which meant the individual lots platted for Phases I and II.

The HOA mentions the title insurer’s title report, CP 18-19, as Noche Vista’s brief does. The title report and title insurance exclusions for the CC&Rs and amendments may show that Noche Vista knew about those instruments. Legally, however, the title report and exclusions serve only an insurance purpose: “exclusionary clauses merely represent aspects of the property that the insurance company will not cover if it issues a title insurance policy.” *Barstad v. Stewart Title Guar. Co., Inc.*, 145 Wn.2d 528, 540, 39 P.3d 984 (2002). Those insurance documents do not establish “known encumbrances or defects of title.” *Id.* Thus, Noche Vista’s dealings with the title insurer, while interesting, are not material for the Court’s analysis.

A glaring omission in the HOA’s factual discussion is that Scofield’s “vision” for Bandera was uneconomic. Scofield’s company defaulted, leading it to grant a deed in lieu of foreclosure to North Cascades National Bank. CP 115-17. Even today, only a handful of Landholdings in Phases I and II have been developed; most are still dirt lots. CP 374. Remarkably, Scofield proposed a Lake Chelan development that failed, and remains a failure, despite the strong market for properties in that area. The HOA points to *nothing* in the record suggesting that the CC&Rs have done

anything other than destroy the value of the land subject to those restrictions.

At the same time that the HOA neglects critical details, it admits or does not dispute key facts about annexation. For example, the HOA admits that the page of the Plat attached to the end of the CC&Rs shows Bandera Phase I divided into “Landholdings.” Br. of Resp’t at 11. As the HOA further admits, that page of the Plat does not show either Bandera Phase II or Phase III as “subdivided into Landholdings.” *Id.* (citing CP 10, 17-57). And yet, as the HOA cannot dispute, the CC&Rs expressly provide an “annexation” procedure *only* for Phase III, not Phase II. CP 32, 51.

As the HOA also admits, Phase II was later subdivided into “Landholdings.” Br. of Resp’t at 11 (An amendment to Chelan County Plat No. P-2004-005 was recorded in July 2007.) But the HOA does not cite anything in the record showing that Phase II went through an “annexation” process to create these new Landholdings. In fact, the HOA admits that “there is no record” of any such annexation. Br. of Resp’t at 13. Thus, the record demonstrates that annexation was not necessary for Phase II, but the CC&Rs provided for annexation for Phase III.

C. ARGUMENT IN REPLY

- (1) The HOA Fails to Show that the CC&Rs Apply to the Noche Vista Property (Phase III)

Despite the HOA's slanting of the record, the text of the CC&Rs must prevail: Phase III may have been part of Scofield's vision for what Bandera could become, but the operative text of the CC&Rs separated Phase III from the rest of Bandera. And as the HOA admits, Phase III has never been annexed.

(a) The HOA's Interpretation Does Not Give Meaning to the CC&Rs' Annexation Procedure for Phase III

The HOA incorrectly argues that the CC&Rs' inclusion of the word "annexation" in the definition of a Landholding is meaningless. Br. of Resp't at 4, 27. The definition of Landholdings provides that "[t]he number of Landholdings may be increased through annexation of Bandera Phase III." CP 32.³ The HOA dismisses "annexation" as just "one word." Br. of Resp't at 4. But any construction of the CC&Rs that treats "annexation" as surplusage must be disfavored. "When interpreting a document, the preferred interpretation gives meaning to all provisions and does not render some superfluous or meaningless." *Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 131 Wn. App. 353, 361, 127 P.3d 762 (2006).

Despite the presumption that the word "annexation" has operative

³ The fact that this paragraph employs the term "may" in connection with annexation is itself consequential. In contrast to the term "shall" which is presumptively mandatory or imperative, *Erection Co. v. Dep't of Labors & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993), "may" means that there is discretion as to whether to actually undertake the action. In other words, the owner of Phase III retained discretion to not make Phase III subject to the CC&Rs.

effect, the HOA still argues that “the Covenants do not state that Bandera Phase III is excluded from Bandera and its Covenants, unless later annexed.” Br. of Resp’t at 27 (citing CP 19-57). By implication, however, the CC&Rs *do* state exactly that. That is the only reasonable meaning of “annexation.” As pointed out in Noche Vista’s opening brief, “annexation” is an undefined term, and so dictionary definitions are an interpretive aide. Br. of Appellant at 25-26 (citing *Kitsap Cty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 586–87, 964 P.2d 1173 (1998)). These dictionary definitions indicate that, as common sense suggests, “annexation” refers to the addition of a part that was not previously included. *Merriam Webster’s Collegiate Dictionary* 50 (11th ed. 2014); *Black’s Law Dictionary* 112 (11th ed. 2019). But the HOA really says nothing about that plain meaning of the word. Rather, the HOA’s interpretation of “annexation,” a term that has a very common meaning requiring the *addition of territory*, is simply absurd, disregarding its commonly accepted meaning. Br. of Resp’t at 4.

The CC&Rs’ surrounding provisions reinforce Phase III’s “apartness.” A declaration of restrictive covenants must be construed as a whole. *Wilkinson v. Chiwawa Communities Ass’n*, 180 Wn.2d 241, 250, 327 P.3d 614, 619 (2014). Critically, the CC&Rs treated Phase II and Phase III very differently, even though they were similarly situated: both were not yet divided into Landholdings at the time the CC&Rs were first recorded, as

the HOA admits. The CC&Rs required “annexation” only for Phase III, not Phase II. CP 178-79. Thus, the CC&Rs assumed Phase II could be converted into Landholdings simply by recording an amended plat. By contrast, the CC&Rs required a formal “annexation” for Phase III. *Id.* Thus, the CC&Rs gave a strong indication that Phase II was already part of the “Bandera” subject to the CC&Rs, but Phase III was not. Although Noche Vista’s opening brief explained the CC&Rs’ differentiation between Phase II and Phase III, the HOA offered no explanation for why the CC&Rs required “annexation” for one tract of land but not another, even though they were both undivided and indicated on the plat.

The annexation procedure in ¶¶ 10.1 and 10.2 further demonstrates that Phase III was excluded. For property to be “annexed,” ¶¶ 10.1 and 10.2 required the recording of a declaration describing the real property to be annexed. CP 51. Importantly, ¶ 10.2 explained that, after annexation, “[t]he annexed property will be part of Bandera.” CP 51. In other words, before annexation, such property was *not* part of “Bandera” within the meaning of the CC&Rs. That is the only reasonable interpretation that gives effect to the CC&Rs’ annexation provisions. Read in conjunction with the definition of Landholdings, ¶¶ 10.1 and 10.2 reinforce the interpretation that the CC&Rs excluded Phase III.

The HOA argues that these provisions mean that annexation is

merely a process for establishing when individual parcels become subject to assessments. Br. of Resp't at 5. But the word "annexation" would be a supremely odd word choice for defining when property becomes subject to assessments. The HOA's proposed interpretation also fails to explain why Phase II did not have to be annexed to be made into Landholdings subject to assessments, but Phase III did. The HOA's selective interpretation fails.

Although the HOA still sees a toehold for its argument in ¶¶ 12.4 and 12.5, those paragraphs must be read in conjunction with the annexation provisions. Those paragraphs do not offer any specific definition of "Bandera" or any indication of how to determine what property is in or out of "Bandera" within the meaning of the CC&Rs. Thus, a reader must refer to the CC&Rs' other, more specific provisions for guidance. *See, e.g., Adler v. Fred Lind Manor*, 153 Wn.2d 331, 355-56, 103 P.3d 773 (2004) ("It is a well-known principle of contract interpretation that 'specific terms and exact terms are given greater weight than general language.'" (quoting 2 *Restatement (Second) of Contracts* § 203(c) (1981))). ¶¶ 10.1 and 10.2 are more specific, indicating that some property is not part of the "Bandera" subject to the CC&Rs but may become so through annexation. CP 51. In turn, the CC&Rs' definition of Landholdings expresses that only Phase III must be annexed, not Phase II. CP 31-32. Read with ¶¶ 10.1 and 10.2, this definition means that Phase III is not yet part of "Bandera" for purposes of

the CC&Rs' application, but Phase II is. While ¶¶ 12.4 and 12.5 speak about the binding effect of the CC&Rs, other specific terms establish the meaning of "Bandera" for the purposes of the CC&Rs' application.

Surrounding events confirm Noche Vista's interpretation and undercut the HOA's. Under Washington's context rule for construing contracts and covenants, contextual evidence of the parties' objective intent may be considered to determine the meaning of the words in the instrument. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999). This context rule permits a court to "consider the circumstances leading to execution of the agreement." *Berg v. Hudesman*, 115 Wn.2d 657, 666, 801 P.2d 222 (1990). Here, before Scofield recorded the CC&Rs, Scofield was not settled on a development plan for Phase III and was open to options that would make Phase III different from Phases I and II. CP 703-05, 708-10. Consistent with Scofield's apparent interest in flexibility, the CC&Rs' wording and structure allowed Scofield to lock in a plan for Phases I and II while keeping his options open for Phase III.

Scofield's subsequent conduct is also relevant. *See, e.g., Berg*, 115 Wn.2d at 668. After recording the CC&Rs, Scofield divided Phase II into Landholdings by a recorded amendment to Chelan County Plat No. P-2004-005. But Phase II was not formally annexed, as the HOA admits. Br. of Resp't at 11, 13. Scofield's development company then marketed parcels in

Phases I and II with separate lot numbering from Phase III.⁴ Scofield also renamed Phase III “Noche Vista” and presented a preliminary plat for “Noche Vista,” which was approved by the Chelan County Hearing Examiner.⁵ Thus, he objectively showed an intent consistent with Noche Vista’s interpretation of the CC&Rs, allowing Phase III to be subject to the CC&Rs, but only upon the optional annexation of that territory.

In sum, the HOA’s selective focus on ¶¶ 12.4 and 12.5 reads the Landholding definition and ¶¶ 10.1 and 10.2 out of the CC&Rs. Noche Vista’s interpretation is the only one that gives effect to the CC&Rs’ Landholding definition and its annexation provisions.

(b) RCW 65.04.045 Further Confirms that the Legal Description Excluded Phase III

The HOA argues “that the Covenants do not state that Bandera Phase III is excluded from Bandera and its Covenants, unless later annexed.” Br. of Resp’t at 27. The HOA is incorrect

A statute required the CC&Rs to include “[a]n abbreviated legal description of the property,” which had to be on “the first page of the

⁴ The Enduring Quality of Rustic Elegance, Bear Mountain Ranch, <http://www.bearmt.com/real-estate-homesites.html> (click on “Site Plan”) (last accessed Oct. 23, 2019).

⁵ *In re Plat No. P 2004-005 & Planned Dev. No. PD 2004-004*, Chelan County Hearing Examiner (2005). The Bank’s marketing description for the listing in 2012 confirmed this history of Scofield refashioning Phase III as “Noche Vista.” https://www.realtor.com/realestateandhomes-detail/Bandera-at-Bear-Mountain-Rnch_Chelan_WA_98816_M26678-38483 (last accessed Nov. 13, 2019).

instrument.” RCW 65.04.045(1), (1)(f). This “abbreviated legal description” had to include the “lot, block, plat, or section, township, range, and quarter/quarter section, and reference to the document page number where the full legal description is included.” RCW 65.04.045(1)(f).

In compliance with this statutory obligation, Scofield’s CC&Rs included a first page with the following legal description: “Ptn. S ½ NE ¼ & SE ¼, Sec. 18, T. 27 N., R. 22 E.W.M., Chelan County, Washington.” CP 19. Perhaps if this shorthand legal description were the only sentence in the abbreviated legal description, the HOA’s argument might have some merit. But the abbreviated legal description included a second sentence with the statutorily mandated “reference to the document page number where the full legal description is included.” RCW 65.04.045(1)(f). It provided, “[a]dditional legal on pages 1, 2, and 3.” *Id.* And on these pages 1, 2, and 3, the CC&Rs give the detailed legal description for “Bandera Phases I and II.” CP 24-26. On the very bottom of page 3, the legal description states, “EXCEPT Bandera Phase III.” CP 236. Then on pages 4, 5, and 6, which were not included in the first page’s reference to the full legal description, the CC&Rs give the legal description for “Bandera Phase III.” CP 27-29.

The HOA attempts to wriggle free from RCW 65.04.045 and the CC&Rs’ legal descriptions by arguing that they were meaningless. To be sure, as the HOA points out, the information on the first page is used by the

county auditor to generate the general index provided in RCW 65.04.050. But the statute uses the word “shall.” RCW 65.04.045(1). While the legislative purpose might have been to improve the efficiency of auditors’ offices by standardizing recorded instruments, the statutory mandate to individual grantors cannot be ignored. When Scofield was directed to indicate where the “full legal description is included,” RCW 65.04.045(1)(f), he referenced only the legal description for Bandera Phases I and II, not Phase III. The HOA does not argue that Scofield committed a mistake that should be reformed. Scofield’s compliance with the statute is a strong indicator of his objective intent, and the statute itself clarifies where to find the operative legal description in the CC&Rs.

The statute’s companion, RCW 65.04.047, further demonstrates the error in the HOA’s analysis. Under RCW 65.04.047(1), those who present an instrument for recording that “does not contain the information required by RCW 65.04.045(1) ... shall prepare a cover sheet that contains the required information.” Unlike in RCW 65.04.045, however, RCW 65.04.047(1) expressly disclaims the cover sheet as having any legal effect: “the names and legal description in the instrument itself will determine the legal chain of title.” No such caveat appears in RCW 65.04.045. By implication, where an instrument contains a first page that complies with RCW 65.04.045, as the CC&Rs do here, CP 19, the instrument’s first page

does have operative legal effect.

Regardless of the statute, however, when the CC&Rs are read as a whole, the first page cannot be construed as a meaningless recording block. It is the *only* place in the CC&Rs that provides the legal description. Indeed, the HOA nowhere points in its brief to any other place in the CC&Rs that provides the legal description. The HOA argues that ¶¶ 12.4 and 12.5 “unambiguously incorporate Bandera Phase III into Bandera, and subject to its Covenants.” Br. of Resp’t at 27. But those provisions do not set out the legal description or otherwise define what the CC&Rs mean when they reference “Bandera.” CP 200-01. Certainly the HOA is not arguing that the CC&Rs did not need to contain a legal description of the property subject to the CC&Rs. Because if they did not, the CC&Rs would be unenforceable as real covenants under the statute of frauds. *See, e.g., Dickson v. Kates*, 132 Wn. App. 724, 734, 133 P.3d 498 (2006).⁶

⁶ The HOA argues that this Court may not consider the CC&Rs’ legal description on appeal. Br. of Resp’t at 27. But the CC&Rs’ legal description is not a new issue, because the central issue in this case has always been whether the text of the CC&Rs binds Phase III. CP 524. But even if the CC&Rs’ legal description were a new issue, this Court should still consider it. A reviewing court may “consider newly articulated theories for the first time on appeal” if they are “arguably related to issues raised in the trial court.” *Wilcox v. Basehore*, 189 Wn. App. 63, 90, 356 P.3d 736 (2015), *aff’d*, 187 Wn.2d 772, 389 P.3d 531 (2017) (citation omitted). In *Wilcox*, for example, the appellant argued that the borrowed servant doctrine did not apply in that case in light of the contract’s language. On review, the appellant cited additional contract language in support of his argument. This Court considered the appellant’s new theory because it was “closely related” to his other arguments. *Id.* This Court should follow suit here: at the very least, the additional language in the CC&Rs’ legal descriptions is arguably related to the argument that the CC&Rs do not apply in light of the annexation provision for Phase III.

(c) The HOA's Other Attempts to Wriggle Free from the Legal Description and Annexation Provision Fail

The HOA emphasizes the declaration testimony of Christoffer Snapp, who recalled conversations he had with Scofield. Br. of Resp't at 29, 32-33 (citing CP 302). But Washington's context rule does not permit "[e]vidence of a party's unilateral or subjective intent as to the meaning of a contract word or term." *Hollis*, 137 Wn.2d at 695. Thus, what Scofield may have said in private to Snapp is irrelevant. Moreover, our state's context rule disallows "[e]vidence that would vary, contradict, or modify the written word." *Id.* Snapp's testimony therefore does not permit a court to disregard the words in the CC&Rs' legal description and the annexation provisions. In any event, at best, Snapp's opinion was contravened by the evidence adduced by Noche Vista below, creating a question of fact as to Scofield's intent as the Declarant.

The HOA still misrelies on the Seventh Amendment. Br. of Resp't at 22, 33, 38. By its own terms, that amendment modified the CC&Rs "only to the extent specified herein." CP 431, 443. It did not amend the CC&Rs' legal description, the definition of Landholdings, or the annexation provisions. CP 430-41. Thus, Phase III still had to be formally annexed for the CC&Rs (and their amendments) to have operative legal effect.

The HOA contends that the self-interests of the Owners of Phase I

and II should be relevant. Br. of Resp't at 31-33. But the CC&Rs state that Scofield wanted interpretive consideration given to "Bandera *and* Bear Mountain Ranch," CP 053 (emphasis added), not just to the interests of the Owners of Landholdings. The CC&Rs buttressed this point by stripping Phase I and II Owners of the right to object to development in BMR, making clear that their self-interests were not above all. CP 192. Then time proved that the CC&Rs were *bad* for both Bandera and BMR, leading Scofield's development to go bust and most parcels in Phases I and II to remain undeveloped. CP 115-17, 374. Bandera Phases I and II are a tiny sliver of BMR, a master planned development. Noche Vista, like the owners of the rest of the properties in BMR, will be subject to Chelan County's zoning restrictions for BMR. CP 31. The HOA does not argue that its community is degraded by the rest of BMR developing in accordance with that master plan, and there is no reason why Phase III should be any different.

(2) The HOA's Equitable Defenses Are Meritless

The HOA argues that the equitable defenses of laches and estoppel bar Noche Vista's declaratory judgment action. Br. of Resp't at 41-44. The HOA is incorrect.

(a) Laches Does Not Apply Because Noche Vista, LLC Was Reasonable to Pursue Amicable Resolution and Because the HOA Was Not Prejudiced

Laches is an equitable defense. *Vance v. City of Seattle*, 18 Wn. App.

418, 425, 569 P.2d 1194 (1977). The elements of laches are “(1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay.” *Lopp v. Peninsula Sch. Dist. No. 401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978) (quotation omitted). The applicability of laches “depends upon the particular facts and circumstances of each case.” *Id.* (citation omitted).

Here, the HOA is incorrect that these elements weigh in favor of binding Noche Vista to the CC&Rs without reaching the merits. Any “damages” from Noche Vista’s road access is speculative, minimal, and remediable. All the roads in the HOA’s network serve Bandera Phases I and II. CP 57. Because the HOA would have maintained those roads anyway, the HOA cannot and does not show that it spent a single penny more than it would have otherwise, to address any Phase III road impact. *See* Br. of Resp’t at 43-44. The HOA’s road maintenance has been for its members’ benefit, not for the good of Noche Vista’s dirt lots.

Even if the HOA has unfairly shouldered any maintenance burden to date, that problem is easy to remedy. As Noche Vista pointed out in its opening brief, it can be required in equity to contribute to the maintenance of an easement over roads. *See, e.g., Buck Mountain Owner’s Ass’n v.*

Prestwich, 174 Wn. App. 702, 714-15, 721, 308 P.3d 644 (2013); *Welker v. Mount Dallas Ass'n*, 9 Wn. App. 2d 1054, 2019 WL 2913739 (2019). Indeed, Noche Vista is willing to participate in a reasonable and fair road maintenance agreement or seek court approval of an equitable arrangement.⁷ No one is looking for a free ride. It would be unprecedented to impose the CC&Rs on Noche Vista on a rationale of road maintenance.

The HOA also argues that it was prejudiced by Jerry Scofield's death. Br. of Resp't at 44. But he died only seven months after Noche Vista bought the property, as the HOA admits, and there is no evidence that Noche Vista knew or should have known about his coming death. *Id.* Even if Noche Vista were somehow responsible for the loss of his testimony, his unavailability is only minimally prejudicial, if at all. Extrinsic evidence may not be used to show "a party's unilateral or subjective intent as to the meaning of a contract word or term," to show "an intention independent of the instrument," or to "vary, contradict or modify the written word." *Hollis*, 137 Wn.2d 683 at 695, 697. Scofield's subjective intent was irrelevant. What mattered was his objective intent, as manifested in what he said and did, and several witnesses have been available to testify about those facts.

The rest of the HOA's arguments are based on pure speculation. Br.

⁷ Additionally, all properties within BMR, including Phase III, must comply with a BMR road maintenance agreement, in any event.

of Resp't at 43. The HOA does not carry its burden of proving laches. *See, e.g., Brust v. McDonald's Corp.*, 34 Wn. App. 199, 208-09, 660 P.2d 320 (1983) (holding that the party raising laches has "the burden of proof").

(b) Equitable Estoppel Does Not Apply Because Noche Vista Has Not Acted Inconsistently, the HOA Did Not Change Its Position, and No Injury Resulted

Estoppel is "not favored." *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986, 994 (1994). Its effects are severe, "precluding one party from offering an explanation or defense that he or she would otherwise be able to assert." *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993). Our Supreme Court has warned against cavalierly "enforcing such silence." *Id.* The elements of estoppel must be applied "strictly" to protect against estoppel's harsh effects from being applied unfairly. *Id.* (quoting *Stouffer-Bowman, Inc. v. Webber*, 18 Wn.2d 416, 428, 139 P.2d 717 (1943)). As a safeguard, Washington law imposes "the highest possible burden of persuasion" in civil law: "[t]he burden of 'clear, cogent, and convincing evidence.'" This burden must be met for each element. *Id.* Here, the HOA has that high burden, *Alaska Marine Trucking v. Carnation Co.*, 30 Wn. App. 144, 149, 633 P.2d 105, *review denied*, 96 Wn.2d 1020 (1981), *cert. denied*, 456 U.S. 964 (1982) (party raising estoppel has the burden), and it does not carry its burden on *any* of the three elements.

First, the HOA has not proven by clear, convincing, and cogent evidence that Noche Vista made “an admission, statement, or act inconsistent with the claim afterwards asserted.” *Liebergesell v. Evans*, 93 Wn.2d 881, 888, 613 P.2d 1170, 1175 (1980). The HOA’s argument does not identify specific prior statements, but it appears to have two in mind. Br. of Resp’t at 41. Noche Vista’s principal, John Dwyer, said by email to the Bank that “I do want to be a good neighbor and fully intend to adhere to the CC&Rs.” CP 415. Then, after the Bank forwarded the Seventh Amendment, Noche Vista’s attorney replied that Dwyer “would be satisfied with a signed copy of the agreement, plus confirmation that it has been submitted for recording.” CP 425.

But Dwyer never said that he believed Phase III was subject to the CC&Rs without annexation. Instead, his email was a statement about what he anticipated: as the new owner of Phase III, he would endeavor to live in harmony with the owners in Phase I and II and abide by the CC&Rs. CP 415. But just like Scofield before him, the CC&Rs’ annexation provision gave him the choice to remain separate if he decided not to opt in. He was not making an irrevocable promise. Noche Vista’s litigation position has been that Bandera Phase III could become subject to the CC&Rs’ operative provisions, but only if it is annexed. Dwyer never said differently before on Noche Vista’s behalf. CP 415, 419-22, 425.

Dwyer's statements about the Seventh Amendment were no different. As made plain in an email from his attorney, Dwyer's interest in the Seventh Amendment was to "eliminate[] Mr. Scofield's control." CP 418. Neither Dwyer nor his attorney ever said that Dwyer believed the Seventh Amendment would make Phase III subject to the CC&Rs without annexation.

Second, the HOA also has not shown by clear, cogent, and convincing evidence that it took "action ... on the faith of such admission, statement, or act," and that this reliance was "justified." *Liebergesell*, 93 Wn.2d at 888-89. Dwyer was communicating with the Bank, not the HOA. CP 415-27. Because Scofield had granted a deed in lieu of foreclosure, the Bank was controlling the show. CP 377. The HOA has presented no evidence that the Bank would have done anything differently had Dwyer been more explicit at the time that the CC&Rs' annexation provision was optional. To the contrary, as a Bank executive later explained, the Bank understood that Dwyer's goal in amending the CC&Rs was "to remove Mr. Scofield's management of Bandera as the developer." CP 377. The Bank executive did not say that the Bank would have sold the property to Dwyer only if Dwyer agreed that Phase III was subject to the CC&Rs' restrictions without annexation. Rather, the Bank executive explained that the Bank "did not object to changes to the Covenants agreeable to Noche Vista that

facilitated closing.” CP 378. Thus, the evidence suggests that the Bank simply wanted to sell and did not care about the CC&Rs. There is no evidence that the Bank sold the property to Dwyer only because Dwyer said Phase III was subject to the CC&Rs (which it was not).

Even if the HOA somehow relied, the HOA has failed to show that its reliance was justified. The CC&Rs’ meaning was clear, as discussed above. From the face of the CC&Rs, the HOA could see that Phase III was excluded from the CC&Rs’ legal description. The HOA also could see that Phase III had to be annexed, whereas Phase II did not. As this Court has explained, “[r]eliance is justified only when the party claiming estoppel did not know the true facts and had no means to discover them.” *Marashi v. Lannen*, 55 Wn. App. 820, 825, 780 P.2d 1341 (1989) (citation omitted). Here, the HOA has always had ready access to the CC&Rs. Any reliance by the HOA was thus unjustified under the strict standard which the HOA must meet here.

Third, the HOA also has not shown by clear, cogent, and convincing evidence that it would suffer “an injury ... if the claimant is allowed to contradict or repudiate his earlier admission, statement, or act.” *Liebergessell*, 93 Wn.2d at 888-89. For the same reasons that the HOA cannot demonstrate the prejudice required to sustain its defense of laches, the HOA does not carry its heavy burden of establishing this final element

of estoppel.

On top of that, the HOA has never shown that it would be injured if the Phase III were not bound by the CC&Rs. To the extent that the HOA believes its members might lose their views or encounter more intense usage of the golf course and the rest of BMR, those objections have already been addressed by the CC&Rs' terms. They provided that every "Owner acknowledges and agrees that areas of Bear Mountain Ranch will continue to be developed for residential use, for higher density occupation or for any other purpose permitted by law." CP 192. The CC&Rs cautioned also that "[p]roperty owners cannot expect views, which exist at the time of purchase, to remain unchanged over time." CP 190. Thus, there were no *reasonable* expectations that would be unsettled here. In any event, the HOA has produced no evidence that the HOA would in some way be harmed if Phase III developed under different development and design restrictions than those provided in the CC&Rs. A cry of "neighborhood character" would be nothing more than speculation.

In short, the HOA's equitable defenses fail.

(3) The HOA Fails to Show that It Is Entitled to a Fee Award

Even if the HOA prevails on appeal, the HOA still will not be entitled to a fee award under the CC&Rs. The HOA asserts, without analysis, that ¶ 12.16 of the CC&Rs applies here because it hired an attorney

to enforce the CC&Rs. Br. of Resp't at 45-47. But this lawsuit was not an effort to "enforce any covenant" of the CC&Rs. CP 202.⁸ Here, however, the litigation centered on the threshold question of whether the CC&Rs applied *at all* to Phase III. The attorney fee provision did not apply to this dispute.

D. CONCLUSION

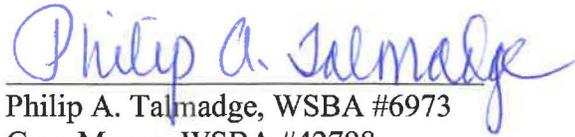
The CC&Rs make no sense if the annexation provisions and the legal descriptions are read as the HOA proposes. The HOA focuses on the word "Bandera" in ¶¶ 12.4 and 12.5, but it ignores the surrounding provisions of the CC&Rs that explain what property is in "Bandera" (Bandera Phases I and II) and what property must be annexed (Phase III). If the CC&Rs were read as the HOA proposes, the CC&Rs' annexation provisions and their purposeful separation of Phase III from Bandera Phases I and II would be read out of the CC&Rs.

The trial court should be reversed. If this Court holds the attorney fee provision applies to this dispute, the Court should grant fees to Noche Vista. Costs should be awarded to Noche Vista.

⁸ An example of such a suit might be the HOA bringing a suit against an HOA member to enforce compliance with the design-approval process.

DATED this 5th day of November, 2019.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Reply Brief of Appellant* in Court of Appeals, Division III Cause No. 36677-4-III to the following:

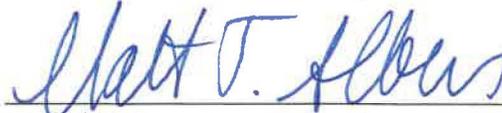
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 13, 2019, at Seattle, Washington.



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