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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.

BRIEF OF APPELLANT
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A. INTRODUCTION

This case involves the interpretation of certain restrictive covenants. A real-estate developer in the Lake Chelan area, after tightly restricting individual lot buyers while maintaining flexibility for himself over the rest of his development, went bust. The developer conceived of a small neighborhood to be called “Bandera” as part of his larger resort development, Bear Mountain Ranch (“BMR”), overlooking the lake. He decided to build Bandera in phases, as reflected in a declaration of covenants, conditions, and restrictions (“CC&Rs”). The first two of three phases, Bandera Phases I and II, were expressly included in the legal description for the CC&Rs, but Phase III was not. The CC&Rs provided an option for future “annexation” of Phase III, and the CC&Rs prohibited the owners of lots in Phases I and II from objecting to future growth.

After starting construction on Phases I and II in accordance with the CC&Rs, the developer could not pay his bank loan, and he failed to deliver the resort amenities that his company had marketed. His company granted a deed in lieu of foreclosure to his bank for Phase III. At the time, Phase III had not been subdivided into lots or developed. No amendment to the CC&Rs had been recorded purporting to attempt the “annexation” of Phase III. After conveying “all of its right, title, and interest in” Phase III to his bank, however, the developer’s company recorded a document purporting

to amend the CC&Rs with detailed prescriptions for building design and construction. The bank sold Phase III to Noche Vista, LLC (“Noche Vista”). Noche Vista and the Bandera homeowners’ association (“HOA”) now disagree about whether Phase III is subject to the CC&Rs and its amendments. Restrictive covenants for residential communities must be interpreted according to their plain meaning, and all their terms given effect. Specific provisions take precedence over generalities. Only by ignoring the CC&Rs’ specific provisions can the CC&Rs be interpreted as restricting Phase III without its formal “annexation.” Unless annexed, Phase III remains part of Bandera only in terms of geography and as a potential concept for the future, not in terms of the CC&Rs.

The trial court erred in ruling on summary judgment that the CC&Rs applied to Phase III. That court also erred in awarding the HOA its attorney fees for this dispute, even though the language of the CC&Rs’ fee provision did not apply to this controversy and the HOA did not “substantially prevail” where Noche Vista prevailed on a significant issue below.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its November 15, 2018 order on summary judgment.

2. The trial court erred in entering its March 13, 2019 order

denying Noche Vista's motion for reconsideration.

3. The trial court erred in entering conclusion of law number 1 (3/13/19 findings/conclusions).

4. The trial court erred in entering conclusion of law number 2 (3/13/19 findings/conclusions).

5. The trial court erred in entering its March 13, 2019 judgment.

6. The trial court erred in entering conclusion of law number 1 (4/19/19 findings/conclusions).

7. The trial court erred in entering conclusion of law number 2 (4/19/19 findings/conclusions).

8. The trial court erred in entering its Second Judgment on April 19, 2019.

9. The trial court erred in entering its April 25, 2019 order denying reconsideration on fees.

(2) Issues Pertaining to Assignments of Error

1. Do a residential community's CC&Rs apply to undivided property that is not included in the CC&Rs' legal description and that is envisioned as the subject of future potential "annexation"? (Assignment of Error Nos. 1-9)

2. Did the trial court err in refusing to consider the declarations submitted on reconsideration regarding the grantor's intent in keeping Phase III separate from Phases I and II and developing Phase III differently? (Assignment of Error No. 2)

3. Was the HOA entitled to attorney fees? (Assignment of Error Nos. 3-9)

C. STATEMENT OF THE CASE

(1) Factual History

Bear Mountain Ranch. BMR, a 1,500-acre mixed-use residential and recreational district overlooking Lake Chelan, was the dream of real-estate developer Jerry Scofield. CP 004-05, 123. According to BMR's development company, Scofield's "intention was to go slowly, accumulating parcel after parcel of land and then packaging the home sites."¹ BMR includes a golf course, which opened in 2005, fruit tree orchards, and residential neighborhoods.²

Bandera's Three Phases. Scofield planned a neighborhood in BMR to be called Bandera, although his bank lender took over before he got very far. He conceived of developing Bandera in three phases, with the first two phases dedicated to development of single-family houses. CP 153, 165, 171-78, 189. Scofield explored other options for the third phase. In that effort, he hired a landscape architect who had worked with Scofield on BMR since 1980. CP 703-04. At Scofield's request, this landscape architect

¹ The History, Bear Mountain Ranch, <http://www.bearmt.com/ranch-history.html> (last accessed Aug. 1, 2019).

² Highest Desert Golf at Its Finest, Live a Life of Relaxed Luxury, Bear Mountain Ranch, <http://www.bearmt.com/real-estate.html> (last accessed Aug. 1, 2019).

worked with Scofield's architect to create a layout for developing the third phase as multifamily condominium buildings that could accommodate overnight rentals. CP 705, 707. In late 2005, Scofield also hired his long-time septic designer to evaluate whether the third phase's soils could accommodate septic systems to serve condominium buildings to be offered for overnight rentals. CP 708-10. His septic designer provided plans for septic systems that could serve up to 194 bedrooms. CP 710, 723.

By 2006, when Scofield's development company recorded the CC&Rs for the tracts of land he named "Bandera at Bear Mountain Ranch," CP 004-05, 123, 166, 171, 178, 203, Scofield had not resolved a plan for the third phase. Keeping his options open was Scofield's style as a developer. CP 704. Scofield adopted a step-by-step approach that retained control for himself over each phase of the development. This approach was reflected in the Bandera CC&Rs' legal descriptions of the property, in the CC&Rs' definitions of the terms "Owner," "Landholding," and "Plat," in the CC&Rs' procedures for annexation and amendment, and in the restrictions on the ability of an Owner to object to development outside the first two phases of Bandera, including multifamily developments. CP 166, 171-79, 197-98. This approach was reflected also in the recorded plat for Bandera. CP 146-54.

CC&Rs' Legal Descriptions. The CC&Rs' cover page listed a

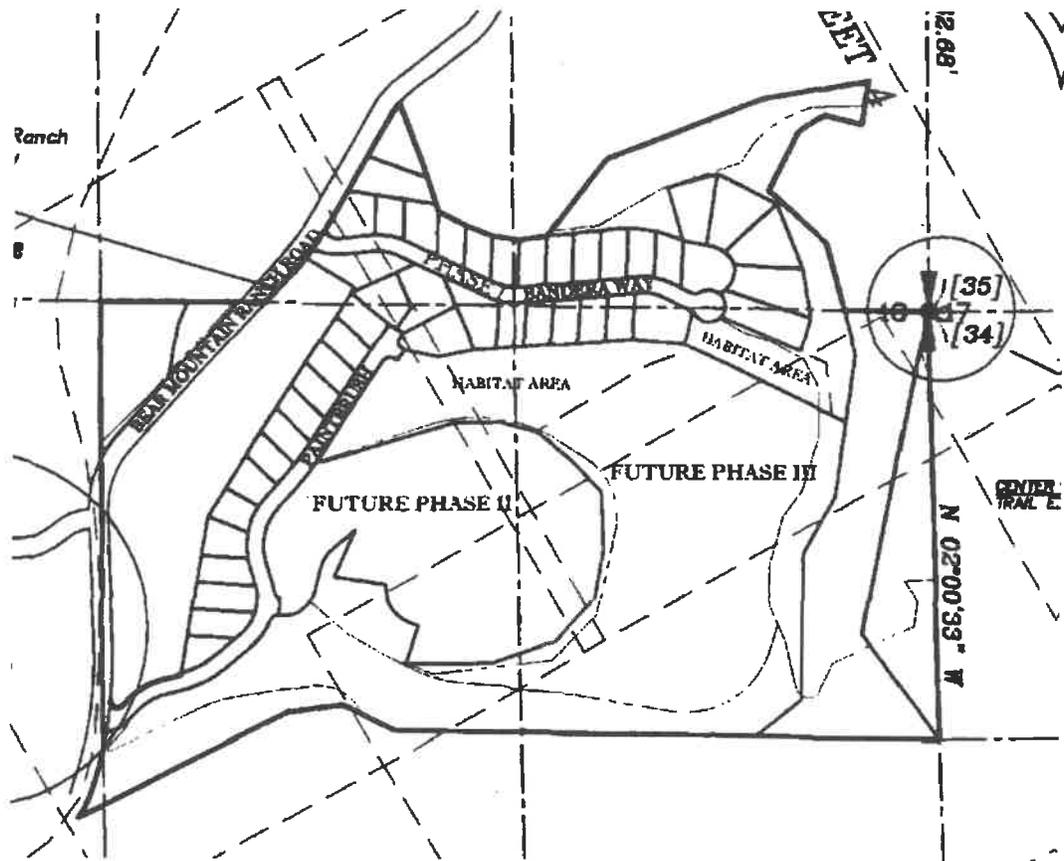
“Legal Description” for the land in Bandera, but the CC&Rs called this description “abbreviated” and directed the reader to “[a]dditional legal on pages 1, 2 and 3.” CP 166. This “Legal Description” did not reference pages 4, 5, 6, 7, and 8 of the CC&Rs. *Id.* In pages 1, 2, and 3, the CC&Rs set out the detailed legal description for “Bandera Phases I and II.” CP 171-73. This detailed legal description included an express exception: “EXCEPT Bandera Phase III.” CP 173. In this way, the “Bandera Phase III” tract of land was expressly carved out of the detailed legal description that was incorporated into the general “Legal Description” on the CC&Rs’ cover page. In pages 4, 5, and 6, the CC&Rs separately provided a detailed legal description for “Bandera Phase III.” CP 174-76. Then, in pages 6, 7, and 8, the CC&Rs provided a detailed legal description for the broader “Bear Mountain Ranch” community. CP 176-78. Scofield wanted to treat Phase III separately from Phases I and II.

CC&Rs’ Definitions. Under the CC&Rs, every “Owner” who “purchas[ed] a lot within Bandera” pledged to “commit to the vision of the Declarant and to abide by the intent and purposes of this declaration.” CP 171. The term Owner was defined as “one or more persons or entities who are, alone or collectively, the record owner of fee simple title to a Landholding.” CP 179. The term Landholding was defined as “one of the individual numbered lots, each approximately one-third acre in size,

designated by Declarant to be a Landholding in Bandera as shown on the Plat.” CP 178-79. The term Plat, in turn, was defined as “Chelan County Plat No. P-2004-005.” CP 179. Strung together, these definitions of Owner, Landholding, and Plat bound the fee simple titleholders of the individual numbered lots identified on Bandera’s recorded plat.

Bandera Plat. This plat, as originally recorded by Scofield, encompassed several tracts of land totaling 92.90 acres of real property, CP 146-54 approximately six percent of the overall BMR development. The plat identified “PHASE I” as a swath of land subdivided into at least 46 individual lots, each with their own identifying number. CP 147-49. The plat also identified a “FUTURE PHASE II” and a “FUTURE PHASE III.” CP 123, 147-50. Phase II corresponded with Tract 9, which bordered one of the roads. CP 148, 150. Phase III corresponded with Tract 10, a 31.76-acre area. CP 123, 149-50. Phase III was separated from the nearest road by Phase I lots and by designated habitat areas. CP 149-50. The plat did not subdivide Phase II or Phase III into individual lots. CP 146-54.³

³ The record does not include the supplemental subdivision plat for Phase II that was later recorded on July 30, 2007 for plat 2004-005, showing showed 27 individual numbered lots in Phase II. Chelan County Auditor’s Office AFN No. 2261941. The parties agree that Phase III has never been subdivided into individual lots.



CP 147. To this day, Phase III remains undivided into individual numbered lots constituting "Landholdings." CP 007, 124. A GIS map shows that Phase III is bordered by the mostly undeveloped lots in Phases I and II, rough habitat areas, and golf fairways:



CP 349, 374.

Annexation Procedure for Adding Property and Increasing “Landholdings.” The CC&Rs provided a method for increasing the number of Landholdings (again, defined as “the individual numbered lots ... shown on the Plat,” CP 178-79) and thus the potential number of Owners in the development. The CC&Rs provided, “The number of Landholdings *may* be increased through annexation of Bandera Phase III.” CP 179 (emphasis added).

The CC&Rs specified the procedure for annexation in Article 10:

10.1 Annexation Approval. During the Development Period additional real property may become annexed to and become subject to this Declaration by the recording of a

supplemental (or amended) declaration executed by, or on its face approved by, the Declarant.

10.2 Effect of Annexation. The recording of a supplemental declaration with the Chelan County Auditor will effectuate the annexation of the described real property. The annexed property will be subject to this Declaration and the other Governing Documents. The annexed property will be part of Bandera. The supplemental declaration should incorporate by reference all of the covenants, conditions, restrictions, easements and other provisions of this Declaration, and may contain such complimentary additions or modifications of the covenants, conditions and restrictions in this Declaration as may be reasonably necessary to reflect the different character, if any, of the annexed property as are not inconsistent with the plan of this Declaration.

CP 198. In these provisions, the Declarant obtained the exclusive and unilateral authority to annex property to the tracts of land subject to the CC&Rs, for the entire Development Period. The CC&Rs defined Declarant to be Scofield's development company. CP 178. The CC&Rs defined the Development Period to end 35 years after the CC&Rs were recorded or the Declarant sent written notice to Management, whichever came earlier. CP 178.

Developer Control and Flexibility. Besides this exclusive control over annexation, the CC&Rs granted Scofield additional authority and flexibility to shape the future of Bandera and BMR. The CC&Rs gave Scofield the general discretion to unilaterally amend the provisions of the CC&Rs during the Development Period. CP 197-98. As the Declarant in

the CC&Rs, Scofield's development company was also the Management. CP 178. The CC&Rs exempted Scofield from the pre-construction review process that restricted every Owner. CP 179-81. Although the CC&Rs allowed the annexation of Phase III to create more Landholdings subject to the CC&Rs, the CC&Rs did not require the Declarant or Management to ever annex Phase III into CC&Rs. CP 166-205. Phase III could then be developed freely, subject to the land-use regulations that apply to BMR, such as its mitigation agreement with the County, the zoning code, and the conditions of the County's plat approvals. CP 178.

Meanwhile, the CC&Rs restricted every Owner in their use and development of their Landholdings, with restrictive covenants regarding architecture, building setbacks, house size, and the like. CP 179-85. One of the covenants generally restricted "all Landholdings" to "single family residential use." CP 189.

While restricting the Landholdings in Bandera, the CC&Rs bound each Owner in Bandera to a vision of the broader BMR development as an evolving, growing community, with each Owner waiving the right to "protest or object to future development in Bear Mountain Ranch":

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. Owner agrees not to protest or object to any future development of Bear Mountain Ranch.

This agreement by Owner is made in consideration of Owner's acquisition of property within Bear Mountain Ranch.

CP 192. The CC&Rs also warned each Owner that views could become obstructed:

Property owners cannot expect views, which exist at the time of purchase, to remain unchanged over time. Property may eventually be improved upon and landscaping, both on residential lots and Common Use Areas will mature. ... Each Owner in acquiring a Landholding acknowledges that the growth of vegetation and construction of Improvements on Bandera may impair or obstruct views that the Owner may have previously enjoyed. ... Each Owner acknowledges that any rights acquired in a Landholding do not include the preservation of any view.

CP 190.

The CC&Rs also set out provisions regarding their binding effect and general scheme in sections 12.4 and 12.5. CP 200-01.

First Six Amendments to the CC&Rs. Since the CC&Rs were recorded, Scofield amended the CC&Rs six times through 2009. CP 207-67. These amendments did not change the definitions of Owner, Landholdings, or Plat, nor did they change the procedures for annexation and amendment. CP 207-67. These amendments did not change the waiver of every Owner to object to future development of BMR. *Id.* Although these amendments each referenced Phase III, they did not change the CC&Rs'

legal description on its cover page or on pages 1 through 8 of the CC&Rs. CP 207-67.

Scofield's Bank Took Over. Scofield's dream did not prove economically feasible. Scofield's development company had marketed BMR as a thriving resort community with amenities including a beach club, hiking trails, a swimming pool, and a fitness center.⁴ But the development company snuck a provision in the first amendment to the Bandera CC&Rs stating that "[t]hese facilities are proposed and Declarant is not under any obligation to provide or complete them." CP 208. These amenities were never completed,⁵ and the Bandera project went belly up.

Scofield's development company had a loan from North Cascades National Bank ("Bank"). CP 376. In early 2012, Scofield's company granted a deed in lieu of foreclosure to the Bank. CP 007, 115-17, 124, 377. In the deed, Scofield's company granted to the Bank "all of its right, title, and interest in" the property known as Bandera Phase III. CP 115-16. The property had also become known independently as "Noche Vista." CP 381-83, 419.

⁴ *Experience a Sense of Discovery*, Bear Mountain Ranch, <http://www.bearmt.com/ranch-features.html> (last accessed Aug. 1, 2019).

⁵ These amenities are still described only as "planned" on the website for the BMR developer. *Id.*

New Ownership. In early 2013, the Bank entered a purchase and sale agreement with “John Dwyer and or assigns.” CP 395. The title company’s preliminary commitment for title insurance listed the CC&Rs and their first six amendments, but not the seventh amendment, as an exception to title. CP 352, 367. Dwyer formed Noche Vista, LLC, which then was granted the Phase III/Noche Vista property from the Bank by special warranty deed on April 11, 2013. CP 377, 385-87. Dwyer’s attorney emailed the title company to request that the CC&Rs and amendments be removed from the title report for Phase III. CP 363. The title company declined to do so. CP 364.

Dwyer and his attorney approached the Bank about removing Scofield from the CC&Rs as Management and Declarant for the CC&Rs. CP 377. Before closing, the Bank’s representative emailed an update to Dwyer, reporting that the HOA’s attorney had suggested an amendment to the CC&Rs that “replaces articles 2 and 3 in their entirety.” CP 416. Dwyer replied to the Bank’s representative, “it does appear we’re on the right track with adding Phase III back to Addendum 7.” CP 416. Dwyer also wrote, “I do want to be a good neighbor and fully intend to adhere to the CC&Rs.” CP 415. A few days later, the HOA’s attorney emailed a draft of the seventh amendment to Dwyer’s attorney. CP 419-22. As the HOA attorney’s wrote, “Scofield’s desire to retain the Bandera vision/characteristics has resulted

in extraordinarily detailed design guidelines.” CP 419. CP 425-26. Among these were 70 new pages of design guidelines that regulated every last architectural detail down to the houses’ railings and chimney shrouds. CP 461-520. The draft seventh amendment also provided for a homeowners’ association to replace Scofield’s companies as Management. CP 432-35. Dwyer’s attorney emailed that Dwyer “would like to proceed with closing on Friday.” CP 425. The day after the Bank granted the special warranty deed for Phase III to Noche Vista, the seventh amendment was recorded. CP 430. Scofield, on behalf of his development companies, was the only signatory. *Id.*

Later, Noche Vista suggested to the HOA that it would like to see amendments to the CC&Rs to loosen development restrictions. CP 328. Noche Vista also held a pre-application meeting with the County’s Department of Public Works about a plan to subdivide the Phase III property into 34 individual lots. CP 361-62. On behalf of Noche Vista, Dwyer met with the HOA several times, but many of the HOA members wanted to maintain the CC&Rs’ restrictions. CP 328-29. The HOA never signed off any changes to the CC&Rs. *Id.*

Hard feelings have since emerged about Noche Vista’s road access to Phase III on HOA roads. CP 331-32. The HOA admits that Noche Vista is not liable for HOA assessments because Noche Vista is not an Owner of

any Landholding—a prerequisite under the CC&Rs for liability for assessments. CP 330. The HOA claims that it has spent \$62,000 in 2015 and 2018 on “road work” and additional costs for snow removal.⁶ CP 331-32. But the HOA does not dispute that Phase III remains undivided and unoccupied, with no construction performed on that property. *See* CP 330-32.

(2) Procedural History

When the HOA insisted that the restrictions in the CC&Rs applied to Phase III without annexation of Phase III, Noche Vista brought this action against the HOA in the Chelan County Superior Court, requesting a declaratory judgment that Phase III is not subject to the CC&Rs. CP 001-121. The HOA answered and counterclaimed for a declaratory judgment that the CC&Rs apply to Phase III. CP122-28.

The parties filed cross-motions for summary judgment. CP 131-36, 273-95, 522-64, 595-640, 651-60. The trial court, the Honorable Lesley A. Allan, issued a letter ruling in favor of the HOA. CP 693-95; Appendix. This memorandum decision concluded that Phase III was subject to the CC&Rs and the first six amendments. *Id.* The court also concluded that

⁶ The HOA brings forward no evidence about how much its roads have been burdened by Noche Vista merely having road access to its undeveloped land. *See* CP 330-32, 369.

Scofield lacked the authority to bind Phase III to the seventh amendment, given his prior conveyance of all his title and interest in Phase III to the Bank. CP 694. But the court determined that “there are disputed facts with regard to the effect of the seventh amendment.” *Id.* The trial court’s subsequent order, which incorporated the letter ruling, formally denied Noche Vista’s motion and dismissed its declaratory-judgment action with prejudice. CP 691-92. The order granted the HOA’s motion and provided that the HOA’s “Counterclaims against Noche Vista shall proceed to trial or other disposition, including the Association’s petition, if any, for an award of legal fees and costs against Noche Vista.” *Id.*

Noche Vista filed a motion for reconsideration accompanied by two new witness declarations. CP 696-724, 756-61. The HOA opposed the motion. CP 725-51. The trial court denied reconsideration, stating it “elected not to consider” the new declarations. CP 842-44. The order denying reconsideration included findings supporting an immediate appeal under CR 54(b). CP 843-44.

The trial court awarded attorney fees to the HOA and entered judgment. CP 842-55. Noche Vista timely filed a notice of appeal. CP 856-77. Noche Vista then filed a motion for reconsideration of the award of attorney fees. CP 878-83. The trial court denied reconsideration, CP 922-

23, granted the HOA's motion for an award of additional attorney fees, CP 890-907, 913-18, and entered a second judgment, CP 919-21.

Noche Vista filed an amended notice of appeal. CP 924-30.

D. SUMMARY OF ARGUMENT

The question is not whether Phase III was part of BMR and subject to the land-use regulations that apply to BMR. Everyone agrees it was. The question is not whether Phase III was a geographic portion of the Bandera neighborhood. Everyone agrees it was. The question is not whether the CC&Rs here apply to the portions of BMR beyond Bandera. Everyone agrees they do not. The question is whether the CC&Rs which unambiguously apply to the tracts of land known as Bandera Phases I and II also apply to Phase III. The answer is no.

A conceptual vision and binding CC&Rs are not the same thing. Phase III might have been part of the original developer's conceptual vision for what Bandera could become as part of BMR. But as the grantor of the binding CC&Rs, the developer never took steps to formally annex Phase III into the part of Bandera subject to the CC&Rs. If the developer had thought that Phase III *was* subject to the binding power of the CC&Rs, there would have been no reason for him to use the word "annexation" when referring to Phase III. There would have been no reason to provide a detailed procedure for the "annexation" of property. Words in legal instruments are

intended to have meaning, not to be surplusage. If the developer intended for Phase III be subject to the CC&Rs from the outset, there would have been no reason for him to provide separate legal descriptions for Phases I and II and Phase III. But provide separate legal descriptions he did; the CC&Rs incorporated only the legal description for Phases I and II into the legal description for the land subject to the CC&Rs. CP 166, 171-73. These specific provisions control over any of the generalities that might be found elsewhere in the CC&Rs. None of the amendments to the CC&Rs changed the critical definitions—the legal definitions of the CC&Rs’ land area, Phases I and II, and Phase III, or the definitions of the terms Owner and Landholding—or the procedure for annexation. The seventh amendment was not even valid.

There is no mystery why Phase III was mentioned in the CC&Rs; the purpose was not to subject Phase III to the CC&Rs from their inception. Rather, by creating a placeholder for Phase III to potentially become part of the community with an annexation process, the CC&Rs created a pre-existing framework that would apply to Phase III without the need for further negotiations. And by simultaneously mentioning Phase III and waiving Owners’ right to object to development in BMR, the CC&Rs put the buyers of lots in Phases I and II on notice that Phase III might join the rest of the neighborhood in being subject to the CC&Rs, but it also might

instead be a part of the growing BMR community beyond Phases I and II. The CC&Rs' scheme for Phase III thus kept the developer's options open and established reasonable expectations for buyers in Phases I and II to have about Phase III's future.

The correct interpretation of the CC&Rs should have been apparent on summary judgment, but it became even more evident when Noche Vista submitted new witness declarations on reconsideration. The trial court abused its discretion in refusing to consider those declarations.

The trial court erred in awarding attorney fees to the HOA, because the contractual attorney fee provision in CC&Rs covenants did not apply to this type of dispute. This case was not an effort "to enforce any covenant," CP 202, but to determine the threshold question of whether the CC&Rs apply to Phase III in the first instance.

E. ARGUMENT⁷

(1) Principles for Covenant Interpretation

Washington courts apply contract interpretation principles when

⁷ Summary judgment is a drastic remedy "appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Kittitas County v. Allphin*, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018); CR 56(c). It is appropriate only where a trial would be "useless." *Wheeler v. Ronald Sewer Dist.*, 58 Wn.2d 444, 446, 364 P.2d 30 (1961). The HOA bore the burden of establishing its right to judgment as a matter of law. In addressing whether a genuine issue of material fact is present, a court must construe the facts, and reasonable inferences from the facts in a light most favorable to Noche Vista as the non-moving party. This Court reviews decisions on summary judgment *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

interpreting CC&Rs. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). The “primary objective ... is determining the drafter’s intent.” *Id.* at 250. The language of the covenants must be given “its ordinary and common use” and must not be construed “in such a way so as to defeat its plain and obvious meaning.” *Id.* (quotations omitted). The instrument as a whole is examined in determining the meaning of a covenant’s language. *Id.* “The lack of an express term with the inclusion of other similar terms is evidence of the drafter’s intent.” *Id.* at 251.

The use of extrinsic evidence is limited when interpreting covenants. Washington courts “follow the objective manifestation theory of contracts.” *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Washington courts thus “determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *Id.* Under this doctrine, extrinsic evidence may not be used when interpreting a covenant 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,” to “vary, contradict or modify the written word,” or to “add to the language of the covenant.” *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 697, 974 P.2d 836 (1999). Extrinsic evidence may be used only “to determine the meaning of

the specific words and terms used in the covenants.” *Bauman v. Turpen*, 139 Wn. App. 78, 88-89, 160 P.3d 1050 (2007).

The HOA argued below that the CC&Rs should be construed “in favor of the Association and against Noche Vista,” simply because “the Covenants concern a residential subdivision.” CP 605, 633. Under this rule of construing the CC&Rs against the owner of Phase III, the HOA argued the CC&Rs applied to Phase III. *Id.* But no Washington court has ever held that a planned development’s CC&Rs must be construed in favor of a declarant/grantor or the homeowners’ association but against an individual property owner. The HOA is incorrect.

Washington courts have adopted a neutral rule of interpretation of CC&Rs based on the intent of the grantor. The historical rule in Washington was “that restrictive covenants, being in derogation of the common law right to use land for all lawful purposes, will not be extended to any use not clearly expressed, and doubts must be resolved in favor of the free use of land.” *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). Washington courts deemed this a “rule of strict construction against the drafter” of the covenants. *Id.* In *Riss* and since then, courts have repeatedly rejected the rule of strict construction in disputes between homeowners. *See, e.g., Riss*, 131 Wn.2d at 623 (“[W]here construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but

rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable.”).

Here, however, the dispute is *not* between homeowners who are unquestionably subject to the CC&Rs. Instead, this dispute centers on the threshold question of whether property is subject to restrictive covenants in the first instance. In this setting, the rule of strict construction must apply in the event of any ambiguity. *Cf. Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009) (holding that statutory liens that are “in derogation of common law” must be “strictly construed to determine whether a lien attached” as a threshold matter and thereafter may be construed according to the interpretive rule set out by statute); *Guillen v. Pearson*, 195 Wn. App. 464, 475, 381 P.3d 149 (2016), *review denied*, 187 Wn.2d 1005 (2017) (“But the strict construction rule applies only if a statute is ambiguous.”). Thus, if the CC&Rs’ applicability to Phase III is not “clearly expressed,” then the CC&Rs must not be “extended” to Phase III. *Riss*, 131 Wn.2d at 621. If there are any “doubts,” those doubts “must be resolved in favor of the free use of land.” *Id.*

The interpretation of covenants governing private properties under a community association is a *question of law*. *Wilkinson*, 180 Wn.2d at 249 (citing *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402

(2006)). “While interpretation of the covenant is a question of law, the drafter’s intent is a question of fact.” *Ross v. Bennett*, 148 Wn. App. 40, 49, 203 P.3d 383 (2008), *review denied*, 166 Wn.2d 1012 (2009) (citing *Wimberly*, 136 Wn. App. at 336). “But where reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.” *Id.* at 49-50 (citing *Owen v. Burlington N. and Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005)).

(2) The CC&Rs Did Not Apply to Bandera Phase III

The trial court failed to credit the express language in the CC&Rs requiring Phase III’s *annexation* before it was subject to those CC&Rs. While Phase III was noted on the Bandera plat and included within Scofield’s overall conception of what the Bandera neighborhood in BMR could become, the necessary annexation or amendments never occurred to bring Phase III within the binding provisions of the CC&Rs. This conclusion is made clear by the plain terms of the CC&Rs, when those terms are read as a whole and in a manner that gives effect to each word without rendering any provision superfluous. The clearest indicators in the CC&Rs of the grantor’s intent on this matter are twofold: first, the provisions regarding annexation; and second, the legal description for the land subject to the binding provisions of the CC&Rs. More support can be found in other provisions and the surrounding circumstances.

The word “annex” appears in the CC&Rs’ definition of the critical term Landholding and in a procedure for adding properties to the CC&Rs. The CC&Rs defined Landholding as “one of the individual numbered lots, each approximately one-third acre in size, designated by Declarant to be a Landholding in Bandera as shown on the Plat.” CP 178-79. The CC&Rs tied the term Landholding to the term Owner. The CC&Rs defined the term Owner as “one or more persons or entities who are, alone or collectively, the record owner of fee simple title to a *Landholding*.” CP 179 (emphasis added). The CC&Rs provided that every Owner was pledged to “abide by the intent and purposes of this declaration.” CP 171. With these interlocking definitions of Owner and Landholding, the CC&Rs bound only the individual numbered lots identified on the recorded plat. But the recorded plat did not include individual numbered lots for Phase III, showing the intent to not yet establish Landholdings in Phase III that were subject to the CC&Rs. This point was made explicit in the last sentence of the definition of Landholding, where the word “annex” appeared: “The number of Landholdings may be increased through annexation of Bandera Phase III.” CP 179.

A formal procedure for the “annexation” of property was established in the CC&Rs. Article 10 provided for “additional real property” to “become annexed to and become subject to this Declaration,” if the

“Declarant” recorded “a supplemental (or amended) declaration” with the County Auditor’s Office. CP 198. When a contract does not define terms, courts “turn to the dictionary to determine the plain, ordinary, and popular meanings of the terms.” *Kitsap Cty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 586–87, 964 P.2d 1173 (1998). The dictionary definitions of “annex” and “annexation” include “to add to something earlier, larger, or more important,” *Merriam Webster’s Collegiate Dictionary* 50 (11th ed. 2014); “to obtain or take for oneself,” *id.*; “[t]he act of attaching,” *Black’s Law Dictionary* 112 (11th ed. 2019); and “[a] formal act by which a country, state, or municipality incorporates land within its dominion,” *id.* Under the words’ plain meaning, then, the CC&Rs provided that some property was not subject to the CC&Rs and could be added or incorporated under their authority only through the formal procedure delineated in Article 10.

The use of the word “annex” in the definition of Landholding and in Article 10 cannot be treated as accidental or an incidental inconvenience to be ignored: “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, 766 (2006). By referencing the annexation procedure as a condition to Phase III containing any Landholdings, the CC&Rs showed the plain intent to leave Phase III out of

the CC&Rs unless the situation might become right for Phase III to be added and the Declarant (Scofield) recorded the proper documentation. The trial court read “annexation” out of the CC&Rs.

The HOA has proposed a reading of these provisions that attempts to limit the significance of “annexation.” According to the HOA, the term Landholding merely defines who can become a member of the HOA. CP 605-06. If that were true, however, the CC&Rs would not have used the word “annexation” for Phase III. The HOA’s interpretation “renders a provision ineffective.” *Snohomish Cty. Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850, 856 (2012) (citing *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980)). If the definition of Landholding assumed that Phase III was already subject to the authority of the CC&Rs, as the HOA contends, the CC&Rs would have used a different word, such as “division,” instead of “annexation.” The definition of Landholding would have read, “The number of Landholdings may be increased through the division of Bandera Phase III into individual numbered lots.” CP 179. But that is not what the CC&Rs said. Word choice matters.

The CC&Rs’ choice of the word “annexation” for Phase III grows even more significant when contrasted with the CC&Rs’ treatment of Phase II. Neither Phase II nor Phase III were divided into individual numbered lots

on the original plat. CP 146-54. Yet the CC&Rs used the term “annexation” only for Phase III. CP 178-79. So, rather than assume that Phase III was subject to their authority, the CC&Rs assumed that Phase II was and could be divided simply by altering the plat. By contrast, the CC&Rs required a formal “annexation” for Phase III. *Id.* Thus, upon the plat’s recording, Phase III did not include any Landholdings making it subject to the CC&Rs. This type of scheme—a phased, flexible development plan with a corresponding “annexation” procedure in the CC&Rs—was not unique to BMR. *See, e.g., Avolio v. Cedars Golf, LLC*, 196 Wn. App. 1063, 2016 WL 6708089 at *1 (2016), *review denied*, 187 Wn.2d 1026 (2017).

The legal description for the bound properties only confirms the significance of the provisions regarding annexation. According to the CC&Rs, the legal description for the land bound by the CC&Rs was set forth “on pages 1, 2 and 3.” CP 166. In those pages, the CC&Rs described “Bandera Phases I and II,” with an express exception for Bandera Phase III: “EXCEPT Bandera Phase III.” CP 171-73. The CC&Rs separately described the “Bandera Phase III” tract of land on pages 4, 5, and 6, CP 174-76, as well as the whole “Bear Mountain Ranch” property, of which Bandera was a part, on pages 6, 7, and 8, CP 176-78. Read together, these provisions of the CC&Rs show that Phases I and II were subject to the binding provisions of the CC&Rs, and Phase III was not. This conclusion

does not change from the mere fact that the CC&Rs provided a legal description for Phase III. The CC&Rs included a legal description for BMR too, but no one believes that the CC&Rs thusly applied to the entire BMR community. The legal definition of Phase III was included only in the definitional section for the CC&Rs' defined words. Unlike the legal definition for Bandera Phases I and II, that legal definition for Phase III was not incorporated into any operative provision of the CC&Rs. If the HOA were correct that the definition of Phase III was actually meant to subject Phase III to the CC&Rs, then the CC&Rs would have pointlessly provided the express exclusion of Phase III from Phases I and II and the subsequent definition of Phase III. If Phase III were intended to be included from the inception, there would have been no need for those separate definitions.

Sections 12.4 and 12.5 of the CC&Rs do not trump the operation of the term Landholding or the tailored uses of the word "annex." In section 12.4, the CC&Rs further detailed the binding effect of the CC&Rs in section 12.4:

Each provision contained in this Declaration is deemed incorporated in each deed or other instrument by which any right, title or interest in Bandera is granted, devised or conveyed, whether or not set forth or referred to in such deed or other instrument. By acceptance of a deed, instrument or acquiring any ownership interest in any of the property subject to this Declaration, each person and their heirs, personal representatives, successors, transferees and assigns bind themselves and their heirs, personal

representatives, successors, transferees and assigns to all of the provisions now or hereafter imposed by this Declaration or the other Governing Documents and any amendments thereto. Declarant, for itself, its successors and assigns hereby declares that all of Bandera must be held, used and occupied subject to the conditions, covenants and restrictions of this Declaration and the other Governing Documents, and that all such provisions will run with the land and be binding upon all persons who hereafter become the owner of any interest in Bandera.

CP 200-01. This language is repetitive, general, and boilerplate. Without more specificity, it cannot and does not override the *specific* provisions set out in the legal description, the definition of Landholding, and the CC&Rs' procedure for annexation. *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 Contractors* § 203(c) (1981)); *Diamond B Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966, 970 (2003) ("Where the contract provides a general and a specific term, the specific controls over the general."). To give effect to those specific provisions while harmonizing with the general provisions set out in section 12.4, a proper interpretation of the CC&Rs is that Phase III was in the geography of Bandera and in the conception for what the neighborhood could become in the future, but for purposes of the CC&Rs today Phase III has not yet been annexed into the

“Bandera” that is subject to the CC&Rs. Any other interpretation would fail to give effect to the CC&Rs’ specific provisions regarding the status of Phase III. *See, e.g., Diamond B Constructors*, 117 Wn. App. at 165 (“We must construe a contract to give meaning to every term.”).

The general and boilerplate language of section 12.4 aside, the correct interpretation of section 12.4 finds support in the very next section of the CC&Rs, section 12.5:

General Scheme. Each Owner and person acquiring any interest in real property subject to this Declaration agrees that this Declaration and the other Governing Documents set forth a general scheme for the improvement, development, operation, management (including enforcement and dispute resolution) of the real property covered hereby, and further agrees that all of the Governing Documents run with the land and be binding on all subsequent and future owners, grantees, assignees and transferees.

CP 201. Here the CC&Rs again confirm that the touchstones of the CC&Rs’ binding effect are the definition of Owner and the related definition of Landholding. By using the phrase “person acquiring any interest in real property subject to this Declaration,” section 12.5 ensures that the CC&Rs apply to anyone who leases a Landholding or acquires some other interest in a Landholding.

The HOA argued below that if Phase III is not subject to the CC&Rs, then the owners of Phase III or newly subdivided lots in Phase III would

never have to pay for road maintenance, unlike the HOA's members. CP 281, 291-92, 301, 330-32, 606-07. That is not correct. Even though it is true that Phase III owners would not pay for maintenance through assessments, it is not true that they would forever get a free ride. The parties could negotiate a road maintenance agreement or, failing an amicable resolution, the HOA could bring a suit in equity. As this Court has held, trial courts have the power in equity to require users of a private road to share in maintenance costs. *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn. App. 702, 714-15, 721, 308 P.3d 644 (2013). The HOA cited no legal authority holding that property may become bound to the entire scheme of a set of CC&Rs based solely on the property owners' use of a road. So the annexation of Phase III was not accomplished merely through Noche Vista's limited use of roads to access its vacant property.

Nor was the annexation of Phase III accomplished by the amendments recorded by Scofield. The first amendment purported to amend only the definitional section (adding a definition for the term "Clubs"), paragraph 3.10 (regarding the authorized contractor for construction), and paragraph 7.2 (regarding limits on the use of "Assessments"). CP 207-08. The second amendment purported to amend only paragraph 3.10 again (regarding the authorized contractor). CP 217-18. The third amendment purported to amend only paragraph 3.6 (regarding "Commencement of

Construction”), and it limited its effect “only to lots within Bandera Phase II.” CP 228-29. The fourth amendment purported to amend only paragraph 4.6 (regulating the use of flag poles and the display of flags). CP 238-39. The fifth amendment purported to amend only paragraph 4.24 (restricting “further subdivision of a Landholding”). CP 249. The sixth amendment purported to amend only paragraph 3.6 (regarding “Commencement of Construction”), and it limited its effect “only to lots within Bandera Phase I.” CP 259.

Although these first six amendments all included Phase III with their “Legal Description,” they also included the legal description for “Bear Mountain Ranch.” CP 207, 211-14, 217, 221-24, 227-28, 232-35, 238-39, 242-45, 248-49, 252-55, 258-59, 263-66. If the mere mention of Phase III in the amendments’ legal description brought Phase III under the entirety of the CC&Rs, then logically BMR as a whole would have been, too, because the amendments included the legal description of BMR as well. That absurd result shows that the amendments’ legal description was not intended to change the scope of the property subject to the CC&Rs in the first instance. *See Wilkinson*, 180 Wn.2d at 225 (“We reject forced or strained interpretations of covenant language if they lead to absurd results.”). If any of the amendments had intended to “annex” Phase III, presumably they would have used the words “annex” or “annexation.” But those words

appear nowhere in the amendments. *See* CP 207-66. The HOA attempts to glean meaning from the amendments that simply is not there.

Each amendment's structure confirms the intent to not amend the CC&Rs' legal description (which referred only to pages 1, 2, and 3 of the CC&Rs) or the term Landholding. Each amendment was structured identically. After the background sections, each amendment set out an "Agreement" section with the operative language providing the actual amendments. These "Agreement" sections all omitted any mention of Landholdings and the legal description provided in the CC&Rs. CP 207-08, 217-18, 228-29, 239, 249, 258-59. Each amendment concluded by stating, "Except as otherwise amended herein, the parties hereby ratify the terms and conditions of the Declaration." CP 208, 218, 229, 239, 249, 260. Thus, the amendments were expressly intended to create only the amendments that were specifically mentioned in the "Agreement" sections, not to imply any amendments or annexation of land. After these amendments, the CC&Rs' original legal description and definition of Landholding remained unchanged.

The seventh amendment has a different history, but it too did not annex Phase III. Scofield signed the seventh amendment on behalf of his development companies as "Grantor." CP 441. The seventh amendment stated that it "modifies the Declaration only to the extent specified herein,

and only as to that property described on the attached Exhibit ‘A,’” which included Bandera Phases I and II and Phase III. CP 431, 443. The seventh amendment altered the CC&Rs’ definitions section, established a homeowners’ association, altered the design and construction restrictions, provided for assessments, and altered the procedure for amending the CC&Rs. CP 431-41. But like the first six amendments, this seventh amendment did not purport to amend the legal description in the CC&Rs themselves or the definition of Landholding. CP 430-41. The words “annex” and “annexation” appeared nowhere in the document. *See id.* Like the CC&Rs themselves, then, the actual binding effect of the seventh amendment remained conditioned on Phase III being formally annexed—a condition that has not been met to this day.

In any event, Scofield lacked the authority to bind Phase III to the seventh amendment, as the trial court ruled. Scofield’s company granted to the Bank “all of its right, title, and interest in” the property known as Bandera Phase III. CP 115, 116. Under Washington property law, any property rights not expressly excluded are included in the conveyance. *Knutson v. Reichel*, 10 Wn. App. 293, 295, 518 P.2d 233 (1973), *review denied*, 83 Wn.2d 1009 (1974). So Scofield conveyed any right he once had to annex Phase III or record an amendment applicable to it. Signed and

recorded long after Scofield defaulted on his loan and granted a deed in lieu of foreclosure, the seventh amendment was not valid for Phase III.

Even if the seventh amendment were construed to mean that Phase III had implicitly been annexed (it was not), the amendment would be invalid under *Wilkinson*. Without unanimous consent or express authorization in the CC&Rs for new restrictions to be added by majority vote, Washington law prohibits amendments to CC&Rs adding “new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants.” *Wilkinson*, 180 Wn.2d at 256. Here, the only signatory was Scofield, who no longer held any property interest in Bandera. The record does not disclose that all the Owners in Phases I and II or Noche Vista approved the seventh amendment as it was presented by Scofield. *See* CP 1-930. Plus, the CC&Rs authorized the Declarant to “amend any provision of this Declaration,” but not to create new restrictive covenants. CP 051. Under the rule of *Wilkinson*, then, the seventh amendment had to be consistent with the general plan of development and relate to existing covenants. But the amendment went far beyond the existing covenants, wiping out all the construction and design guidelines in the CC&Rs. *Compare* CP 034-38, *with* CP 435-38. The seventh amendment added 70 pages of new, highly specific design guidelines that had never been incorporated into the CC&Rs. CP 450-520.

As the HOA attorney's emailed at the time, "*Scofield's* desire to retain the Bandera vision/characteristics has resulted in extraordinarily detailed design guidelines." CP 419, 425-26 (emphasis added). But Scofield had lost the authority to impose his vision. The seventh amendment was invalid.

Noche Vista's interpretation of the CC&Rs and their amendments gives effect to those instruments' provisions and does not render superfluous their references to Phase III. By mentioning Phase III, those instruments accomplished two tasks.

First, they served as a placeholder. By contemplating that Phase III could be annexed in the future, they simplified the annexation process. The terms of the CC&Rs were established and did not need to be negotiated. All that had to be done was to formally annex Phase III if the circumstances were ever right.

Second, the CC&Rs and their amendments laid out a concept for what Bandera could become. These instruments thus served as notice to the Owners of Landholdings (the lots in Phases I and II) that they could reasonably expect the number of Owners and Landholdings in the neighborhood might increase. Rather than binding Phase III to the CC&Rs, the inclusion of Phase III in the conceptual vision of Bandera set the reasonable expectations of Bandera Phase I and II property owners: Bandera, like BMR as a whole, was likely to grow, and owners did not have

an entrenched right to object to future change and growth. Without establishing those reasonable expectations, Scofield may have encountered a legal challenge if he had moved forward with amending the CC&Rs to annex Phase III. *See, e.g., Meresse v. Stelma*, 100 Wn. App. 857, 866, 999 P.2d 1267 (2000) (striking down an amendment to CC&Rs that changed the location of a road because it was “unexpected”).

Indeed, the CC&Rs were elsewhere animated by this interest in setting reasonable expectations for the Owners of Phases I and II and in preventing them from obstructing the developer’s flexibility to change and grow the development. In the CC&Rs, 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. Every “Owner agrees not to protest or object to any future development of Bear Mountain Ranch.” *Id.* 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, the CC&Rs were designed to tightly restrict Phases I and II according to Scofield’s vision, but to otherwise maintain flexibility for him to develop Phase III and BMR as he chose. And, via the CC&Rs, Scofield was upfront with the Owners of Landholdings in Phases I and II about his plans: their neighborhood could grow with the annexation of Phase III, but Phase III

and BMR as a whole could also grow and change beyond the confines of Phases I and II.

Scofield's scheme for the seventh amendment only confirms that his original intent as grantor of the CC&Rs was to leave Phase III out of the CC&Rs. The seventh amendment was his last-gasp effort to make his dream a reality and his control permanent. He added 70 pages of specific guidelines for architecture and landscaping in *Bandera*, CP 450-520. But he had not incorporated those guidelines himself into the CC&Rs when he still owned the land. Evidently, he had not wanted to unduly restrict himself by formally incorporating such detailed design guidelines into the CC&Rs. Before losing ownership, the grantor of the CC&Rs had thus shown the intent to maintain flexibility for himself while restricting the Owners of the Landholdings in Phases I and II. Each provision of the CC&Rs fits within this whole.

When interpreting CC&Rs, “[c]ourts place special emphasis on arriving at an interpretation that protects the homeowners collective interests.” *Wilkinson*, 180 Wn.2d at 250. The interests of the property owners here is to limit the scope of the CC&Rs, not broaden them. The economic failure of the development is evident in both the Bank taking ownership over Phase III and in the lack of construction in Phases I and II, as shown on the HOA's own GIS map:



CP 349, 374. Most lots in Phases I and II remain vacant while development in the rest of the Lake Chelan area is booming. And since Scofield's project went bust, the restrictions in the CC&Rs have become tighter, not looser, because of Scofield's last gasp at control via the seventh amendment. Although enforcing restrictive covenants is generally thought to increase property values, *Wilkinson*, 180 Wn.2d at 250, the CC&Rs here have objectively destroyed the economic value of the properties in the geographic area of Bandera. The owner of Phase III has in interest in remaining free from the objections of Owners of Phases I and II, as set out in the CC&Rs.

(3) The Trial Court Should Have Considered the Declarations Submitted on Reconsideration

The trial court did not consider the two witness declarations submitted by Noche Vista with its motion for reconsideration. CP 696-724, 756-61, 842-44. "Generally, nothing in CR 59 prohibits the submission of

new or additional materials on reconsideration.” *Martini v. Post*, 178 Wn. App. 153, 161, 313 P.3d 473 (2013) (citing *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612 (1997)) (footnote omitted). One of the witnesses was Scofield’s longtime landscape architect, who discussed Scofield’s conceptualizations of Phase III leading up to his recording of the CC&Rs. CP 703-05. The other witness was Scofield’s longtime septic designer, who discussed his knowledge of the same topic. CP 708-10. These witnesses testified that Scofield had explored developing Phase III as a multifamily condominium community and was not wedded to developing that area in the same way as the rest of the geographic area of Bandera. CP 703-05, 708-10. The trial court erred in not considering this witness declaration testimony.

Even when evidence has been “stricken” or “redacted” as part of a trial court’s decision on a motion, the reviewing court must itself review that evidence to determine whether it should have been considered. As the Supreme Court has said when reviewing a summary-judgment motion, “An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted.” *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301, 305 (1998). The same principle must apply to reconsideration motions. Although the standard of review here is for an

abuse of discretion rather than de novo, the reviewing court has no way of determining whether the trial court's decision "is manifestly unreasonable or based on untenable grounds," *Martini*, 178 Wn. App. at 161, unless the reviewing court actually examines the evidence which the trial court chose to ignore.

A trial court abuses its discretion in denying reconsideration where the motion for reconsideration and new accompanying evidence demonstrates that the trial court's initial decision was incorrect. This principle follows from this Court's decision in *Martini*. There, the trial court granted summary judgment to the defendant on the plaintiff's negligence claim, concluding that the plaintiff had not produced sufficient evidence of proximate causation. *Martini*, 178 Wn. App. at 159. The plaintiff filed a motion for reconsideration and included additional evidence, including an additional witness's testimony. *Id.* This Court held that the trial court abused its discretion in denying reconsideration, because "the evidence creates a genuine issue of material fact." *Id.* at 164. When the reconsideration motion demonstrates that the original decision was wrong, this Court made clear that the trial court's denial of reconsideration will be "manifestly unreasonable." *Id.* at 166. While a trial court properly exercises its discretion when it refuses to consider a declaration that "does not create any issues of material fact" and is "only a repetition of already presented

information,” *Chen*, 86 Wn. App. at 192, there is no justification for disregarding new evidence that shows the prior decision was error.

Here, the trial court’s refusal to consider Noche Vista’s new evidence was an abuse of discretion. The new evidence was permissible, because “nothing in CR 59 prohibits the submission of new or additional materials on reconsideration.” *Chen*, 86 Wn. App. at 192. The HOA would not have been prejudiced by the trial court considering the evidence, because “[i]n the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration.” *Id.* And the new evidence further demonstrated the error of the trial court’s ruling on the applicability of the CC&Rs to Phase III. The witnesses’ testimony shed light on “the surrounding circumstances of the original parties to determine the meaning of specific words and terms used in the covenants.” *Hollis*, 137 Wn.2d at 696. By showing that Scofield was exploring a very different development scheme for Phase III leading up to his recording of the CC&Rs, the declarations further bolster the conclusion that the CC&Rs notified the Owners in Phases I and II that Phase III *might* join the rest of the neighborhood in being subject to the CC&Rs, but it also *might not*: the annexation process kept the developer’s options open while construction started on Phases I and II. The trial court erred.

(4) The HOA Was Not Entitled to Attorney Fees⁸

The trial court awarded the HOA its attorney fees in this dispute. CP 842-55, 890-907, 919-21. In doing so, it erred because the contractual attorney fee provision in the covenants did not apply to this type of dispute.

¶ 12.16 of the original CC&Rs provides as follows:

In the event any party employs legal counsel to enforce any covenant of this lease, [sic] or to pursue any other remedy on default as provided herein, or by law, the substantially prevailing party shall be entitled to recover all reasonable attorneys' fees, appraisal fees, title search fees, other necessary expert witness fees and all other costs and expenses not limited to court action. Such sum shall be included in any judgment or decree entered.

CP 202. The clear intent of this language is that it applies only in instances where the HOA is seeking to compel an Owner who has failed to comply with “any covenant” and is in “default” of the covenants to come into compliance.

The covenants govern only the design, construction, and maintenance of improvements an Owner makes to a Landholding. CP 179-96, 432-41, 450-520. The chief design, building, and maintenance covenants—all pertaining by their terms only to improvements planned for or made to Landholdings—are found in the prebuilding construction review

⁸ Whether a contract authorizes an award of fees is a question of law reviewed *de novo* by this Court. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009).

covenants in Article 2, the construction covenants in Article 3, and the general conditions and restrictions in Article 4. The covenants continue through Article 12 with administrative and miscellaneous covenants, similarly focusing on the defined terms Owner, Landholding, and Improvement.

In short, the individual covenants only apply to issues related to construction activities (improvements) which have either been proposed or which are being undertaken on a Landholding. No such issue was present here. In fact, Noche Vista is not, in fact, an Owner because the Phase III does not yet have any Landholdings. CP 288 (The HOA's summary-judgment motion stating that "the Noche Vista Property is not a 'Landholding' because it has not yet been platted into individual lots...."); CP 602 (The HOA stating below that "since Noche Vista had not yet platted the Phase III Property into individual lots, Noche Vista was not the 'Owner' [of] a 'Landholding,' per the Covenants.").

Rather, according to the HOA, whether Noche Vista's property is a Landholding has only to do with "whether Noche Vista must pay dues and assessments to the Association." CP 605-06. Prior to property becoming a Landholding, no covenant applies and there is nothing to enforce. It is only after property has been annexed so as to become a Landholding and only when the Owner of the Landholding engages in some activity which runs

afoul of a specific covenant that ¶ 12.16 authorizes enforcement action in order to bring the Owner, the Landholding, and the Improvements into compliance with the covenant with which the Owner is alleged to have violated. In fact, before a parcel of property within Bandera has been annexed into Landholdings, the HOA had no authority to even go on the property, let alone take any enforcement action. CP 040 (“Inspection”) (“Management [has] ... the right to enter upon and inspect any portion of a *Landholding and Improvements* thereon” (emphasis added)).

¶ 12.6 does not apply. Rather, the sole issue in this case is whether the covenants even apply to Phase III. Covenant compliance or default is simply not part of this case. Prior to Noche Vista’s Phase III property becoming a Landholding, no individual covenant applies and no enforcement action is authorized. A fee award was improper.

Even if the covenants’ fee provision applied here, the trial court erred in awarding fees to the HOA where the HOA was not the “substantially prevailing party” within the meaning of the fee provision. Where both parties succeed on major issues in a case, there is no prevailing *Am. Nursery Products, Inc., v. Indian Wells Orchards*, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990); *Rowe v. Floyd*, 29 Wn. App. 532, 629 P.2d 925 (1981); *Sardam v. Morford*, 51 Wn. App. 908, 911-12, 756 P.2d 174 (1988); *Mellon v. Regional Trustee Services Corp.*, 182 Wn. App. 476, 498-99, 334

P.3d 1120 (2014). *Both* the HOA and Noche Vista prevailed on key aspects of the case.

Moreover, if this Court reverses the trial court on interpreting the covenants, the HOA will not be a prevailing party at all, and the fee provision would not apply.

(5) Noche Vista Is Entitled to Its Fees at Trial and on Appeal

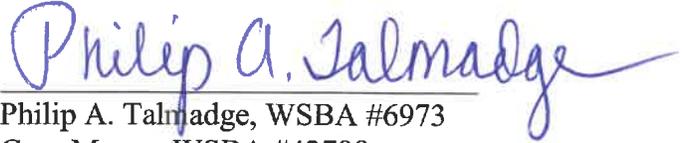
Without waiving its argument on the inapplicability of ¶ 12.16 to this controversy, should this Court reverse the trial court on its interpretation of the covenants as to Phase III, Noche Vista would be the prevailing party in the case, entitled to fees under ¶ 12.16 at trial and on appeal. Under such circumstances, Noche Vista is entitled to an award of its fees. RAP 18.1(a).

F. CONCLUSION

The trial court erred in ruling on summary judgment that Phase III was subject to the CC&Rs. This Court should reverse the trial court's summary judgment and judgments on fees. Costs on appeal, including reasonable attorney fees, should be awarded to Noche Vista.

DATED this 16th day of August, 2019.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Gary Manca, WSBA #42798

Talmadge/Fitzpatrick

2775 Harbor Avenue SW

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Seattle, WA 98126

(206) 574-6661

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PO Box 262

Wenatchee, WA 98807-0262

(509) 662-9602

Attorneys for Appellant

Noche Vista, LLC

APPENDIX

\$ FEE PAID
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Kim Morrison
Chelan County Clerk

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CHELAN COUNTY

**NOCHE VISTA, LLC, a Washington limited liability
company,**

Plaintiff,

v.

**BANDERA AT BEAR MOUNTAIN RANCH
HOMEOWNERS ASSOCIATION, a Washington
nonprofit corporation,**

Defendant.

NO. 18-2-00108-5

**ORDER ON PARTIES' SUMMARY
JUDGMENT MOTIONS**

THESE MATTERS, having come on before the Court for hearing on the 28th day of August 2018, on Bandera at Bear Mountain Ranch Homeowners Association's Motion for Summary Judgment, and on Noche Vista LLC's Motion for Summary Judgment, and the Court having heard the oral argument of counsel, and further having reviewed the following documents:

- Noche Vista's Complaint;
- The Association's Answer, Affirmative Defenses, and Counterclaims;
- Noche Vista's Reply to Counterclaims;

Order on Parties' Summary
Judgment Motions - 1
082718(BAW1776080.DOCX;2/21369.055001/)

OGDEN MURPHY WALLACE, P.L.L.C.
1 Fifth St., Suite 200
Wenatchee, WA 98801
Tel: 509-662-1954/Fax: 509-663-1553

ORIGINAL

- 1 • The Association's Motion for Summary Judgment;
- 2 • The Association's Memorandum in Support of Summary Judgment Motion;
- 3 • The Declaration of Christoffer J. Snapp dated April 21, 2018;
- 4 • The Declaration of Steve Moore dated April 24, 2018;
- 5 • The Declaration of Jeff R. Davis dated May 31, 2018;
- 6 • The Declaration of Susan S. Bell dated June 4, 2018;
- 7 • Memorandum of Plaintiff Noche Vista, LLC in Opposition to Defendant's Motion
8 for Summary Judgment;
- 9 • The Declaration of Jim Blair dated July 26, 2018;
- 10 • The Association's Reply Memorandum in Support of Defendant's Summary
11 Judgment Motion;
- 12 • Plaintiff's Motion for Summary Judgment;
- 13 • Declaration of Robert G. Dodge dated June 7, 2018;
- 14 • Defendant's Memorandum in Opposition to Plaintiff's Summary Judgment
15 Motion;
- 16 • Reply Memorandum of Plaintiff Noche Vista, LLC in Support of Motion for
17 Summary Judgment; and
- 18 • Declaration of John Dwyer dated August 23, 2018.

19 And the Court having further reviewed the files and pleadings herein, and also having
20 written a Memorandum Decision regarding the disposition of each parties' Motion for Summary
21 Judgment, which Memorandum Decision is attached hereto and incorporated herein by
22 reference; NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

- 24 1. That the Association's Motion for Summary Judgment shall be and is hereby
25 granted. Noche Vista's declaratory judgment action is hereby dismissed with prejudice.
26

Superior Court of the State of Washington
For Chelan County

Lesley A. Allan, Judge
Department 1
Robert B. C. McSeveney, Judge
Department 2

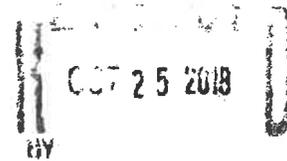


Kristin M. Ferrera, Judge
Department 3
Tracy S. Brandt
Court Commissioner

401 Washington Street
P.O. Box 880
Wenatchee, Washington 98807-0880
Phone: (509) 667-6210 Fax (509) 667-6588

October 24, 2018

Mr. Robert Dodge
Law Offices of Robert G. Dodge, PLLC
PO Box 262
Wenatchee, WA 98801



Mr. Brian Walker
Ogden Murhpy Wallace, PLLC
1 Fifth St., Suite 200
Wenatchee, WA 98801

Re: Noche Vista v Bandera
Chelan County Superior Court Cause No. 18-2-00108-5

Dear Mr. Dodge and Mr. Walker:

This case came before the court on August 28, 2018 on cross motions for summary judgment. Plaintiff Noche Vista, LLC appeared through John Dwyer and was represented by Robert Dodge. Defendant Bandera at Bear Mountain Ranch Homeowner's Association was represented by Brian Walker and Aaron Harris.¹ The court has considered all pleadings filed in connection with the motions, arguments of counsel and the file and records herein. This letter constitutes the court's memorandum decision.

The history and facts of the case have been set forth in great detail in the pleadings and will not be repeated herein. Simply put, the essential issue presented in the cross motions is whether the property described as tract 10 or phase III ("phase 3" herein) is subject to the "Declaration of Covenants, Conditions, Restrictions and Easements for Bandera at Bear Mountain Ranch" ("CCR's"). Despite plaintiff's best efforts to wriggle free of these legal restraints, the court answers this question yes. Therefore, plaintiff's motion for summary judgment is denied and defendant's motion for summary is granted.

¹ There may also have been lay representatives of defendant at the hearing, but the clerk's minutes do not reflect this, nor do the court's notes.

In the motions and responses, plaintiff relies on language in paragraph 10.1 which provides that additional property may be annexed into the development and thereby become subject to the CCR's. Plaintiff argues that phase 3 was never annexed; therefore, the title holder of the property never became an "Owner" under the CCR's and the property is not considered a "Landholding." This argument misses the mark.

The CCR's were created to promote a particular type of development at Bandera. The original CCR document described the property encompassed by the CCR's, which included phase 3. No party has argued that the legal description in paragraph 1.4 is anything other than a description of plaintiff's property. Paragraph 12.5, in turn, provides that any person who acquires any interest in any of the real property subject to the declaration agrees to the applicability and enforceability of the CCR's. *See also* paragraph 12.4.

There was no need for annexation of phase 3 because it was already part of Bandera and subject to the CCR's. The fact that the parcel had not yet been divided into lots only affects the requirement of contribution to the homeowners' association fees or dues.

The only debatable issue remaining in the case, from the court's perspective, is the effect on plaintiff of the seventh amendment to the CCR's. As argued by plaintiff, at the time Jerry Scofield executed the seventh amendment, he no longer held any legal interest in phase 3, having conveyed a deed in lieu of foreclosure to North Cascades National Bank on April 30, 2012. The court is persuaded that, legally, Mr. Scofield retained no interest – development or otherwise – in phase 3 as of that date. The cases cited by plaintiff support this conclusion. Further, it strains reason to suggest that a party could convey away all title to property and nevertheless argue that he still held the right to develop it absent a specific reservation of that right.

Interestingly, Mr. Dwyer (on behalf of plaintiff) apparently insisted on the execution of the seventh amendment before purchasing phase 3. In the course of those negotiations, he went so far as to indicate an intention to abide by the CCR's. Whether this was simply a clever ploy or a true expression of his intentions at the time is a question for another day. However, as discussed above, phase 3 is still subject to the original CCR's and the first six amendments, as those were also executed when Mr. Scofield could legally do so.

The court concludes that there are disputed facts with regard to the effect of the seventh amendment. It appears, at a minimum, that the amendment changed the entity with the ability to modify the CCR's in the future (from Mr. Scofield to members of defendant). In fact, this seemed to be the motivating issue for plaintiff's insistence on the seventh amendment. Whether plaintiff can claim some benefit from the amendment while disavowing its binding effect in other regards has not been addressed by the parties and will not be resolved in this decision.

Counsel should prepare and present an appropriate order. Thank you.

Sincerely,

A handwritten signature in black ink, consisting of several vertical strokes followed by a horizontal line that extends to the right.

Lesley A. Allan
Superior Court Judge

Cc: Court File

FILED
MAR 13 2019
Kim Morrison
Chelan County Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CHELAN COUNTY

NOCHE VISTA, LLC, a Washington limited liability company,

Plaintiff,

v.

BANDERA AT BEAR MOUNTAIN RANCH HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation,

Defendant.

NO. 18-2-00108-5

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

THIS MATTER came on regularly for hearing before the Court on January 18, 2019, on Plaintiff's Motion for Reconsideration of the Court's Order on Parties' Summary Judgment Motions entered November 15, 2018. Plaintiff Noche Vista, LLC, appeared by and through its attorney of record, the Law Offices of Robert G. Dodge, PLLC, and Defendant Bandera at Bear Mountain Ranch Homeowners Association, appeared by and through its attorneys of record, Ogden Murphy Wallace, P.L.L.C. The Court heard oral argument and reviewed the following additional pleadings filed by the parties: Plaintiff's Motion for Reconsideration, Defendant's

1 Memorandum in Opposition to Plaintiff's Motion for Reconsideration, and Plaintiff's Reply
2 Memorandum in Support of Motion for Reconsideration. The Court elected not to consider the
3 Declarations of Keith Tower and Robert Yount filed by Plaintiff in support of its Motion for
4 Reconsideration because the Plaintiff filed these Declarations after the Court had entered its
5 Order granting Defendant's Summary Judgment Motion. The Court being fully advised in the
6 premises finds that there is no basis to grant Plaintiff's Motion for Reconsideration.
7

8 Now, therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion
9 for Reconsideration is denied.
10

11 The Court previously directed entry of the Order on Parties' Summary Judgment
12 Motions as the Court's final judgment on the central, pivotal issue in this case whether the
13 Covenants encumber the Phase III property. In denying Plaintiff's Motion for Reconsideration,
14 the Court reaffirms that Order as its final judgment on that issue. The Court finds that the issue
15 of whether the Covenants encumber the Phase III property is at the very heart of this case; as
16 the Court observed during the January 18, 2019, hearing, that issue is "what drives this case."
17 The Court further finds that the unadjudicated claims which remain for determination by the
18 Court and the adjudicated claim regarding whether the Covenants encumber the Phase III
19 property are independent of one another such that an immediate appeal of the adjudicated
20 claim will not have any impact on further proceedings before the Court on the unadjudicated
21 claims. The Court further finds that the questions which would be reviewed on appeal of the
22 Order on Parties' Summary Judgment Motions are no longer before the trial court for
23 determination in the unadjudicated portion of the case and, further, that the need for review
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1 will not be mooted by future developments in the trial court. The Court further finds that an
2 immediate appeal will not delay the trial of the adjudicated matters and, further, that an
3 ~~immediate appeal will both simplify and facilitate the trial of the adjudicated matters.~~
4
5 Finally, the Court finds that considerations of judicial economy militate in favor of an immediate
6 appeal of said Order.

7 Accordingly, the Court finds and concludes that there is no just reason for delaying entry
8 of the Order on Parties' Summary Judgment Motions as a final judgment of the Court on the
9 issue whether the Covenants encumber the Phase III property.

10 DATED this 13th day of March, 2019.

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13 
HONORABLE LESLEY A. ALLAN

14 Presented by:

15 OGDEN MURPHY WALLACE, P.L.L.C.

16 By 
17 Aaron J. Harris, WSBA #36802
18 Brian A. Walker, WSBA #26586
Attorneys for Defendant

19
20 Copy Received; Approved as to Form;
Notice of Presentation Waived:

21 LAW OFFICES OF ROBERT DODGE, PLLC

22
23 By  03/11/19
24 Robert Dodge, WSBA #12313
25 Attorney for Plaintiff
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FILED 
MAR 13 2019
Kim Morrison
Chelan County Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CHELAN COUNTY

NOCHE VISTA, LLC, a Washington limited liability
company,

Plaintiff,

v.

BANDERA AT BEAR MOUNTAIN RANCH
HOMEOWNERS ASSOCIATION, a Washington
nonprofit corporation,

Defendant.

NO. 18-2-00108-5

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER GRANTING DEFENDANT'S
MOTION FOR AWARD OF ATTORNEYS'
FEES AND COSTS

THIS MATTER, having come before the Court for oral argument on January 18, 2019, on Defendant's Motion for Award of Attorneys' Fees and Costs, and Plaintiff Noche Vista, LLC, appearing by and through its attorney of record, the Law Offices of Robert G. Dodge, PLLC, and Defendant Bandera at Bear Mountain Ranch Homeowners Association, appearing by and through its attorneys of record, Ogden Murphy Wallace, PLLC, and the Court, having heard and received the evidence, heard argument, and being fully advised in the premises, finds that Defendant is the prevailing party, and entitled to an award of its reasonable attorneys' fees and costs. The Court hereby makes the following findings of fact and conclusions of law:

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I. FINDINGS OF FACT

1. Plaintiff, Noche Vista, LLC ("Noche Vista") filed this action on February 1, 2018, seeking a declaratory judgment that real estate located in Chelan County, Washington owned by Noche Vista (the "Property") was not subject to nor encumbered by the Declaration of Covenants, Conditions, Restrictions and Easements for Bandera at Bear Mountain Ranch recorded January 9, 2006, under Auditor's File No. 2218225, records of Chelan County, or six of the recorded seven amendments thereto. The Declaration of Covenants and its first six of the seven amendments are collectively referred to herein as the "Covenants."

2. ~~In its Complaint, Noche Vista did not plead the existence of the Seventh Amendment to the Covenants recorded April 12, 2013 under Auditor's File No. 2380369, records of Chelan County (the "Seventh Amendment"), or ask the Court to declare that the Seventh Amendment was invalid and not an encumbrance on the Property.~~

3. ~~Noche Vista sought an award of legal fees and costs per the terms of the Covenants.~~ The Covenants contain an attorneys' fees and costs provision that provides:

12.16 **Attorney Fees.** In the event any party employs legal counsel to enforce any covenant of this lease [sic], or to pursue any other remedy on default as provided herein, or by law, the substantially prevailing party shall be entitled to recover all reasonable attorneys' fees, appraisal fees, title search fees, other necessary expert witness fees and all other costs and expenses not limited to court action. Such sum shall be included in any judgment or decree entered.

4. Defendant, Bandera at Bear Mountain Ranch Homeowners Association (the "Association"), filed an Answer to Noche Vista's Complaint, and asserted a counterclaim for declaratory relief in its favor on March 15, 2018, alleging the Property was subject to the Covenants and the Seventh Amendment, and also claiming that even if the Covenants and the

1 Seventh Amendment were not legal covenants, the Covenants and the Seventh Amendment
2 were equitable servitudes that encumbered the Property and to which the Property was subject.
3 The Association also requested an award of legal fees and costs, per the terms of the Covenants.
4

5 5. After the commencement of this action, the parties engaged in discovery that
6 included written interrogatories, requests for production, requests for admission, and the
7 Association obtaining by subpoenas to multiple third parties documents that supported its
8 defense and equitable servitudes claim. The Association also employed an expert witness,
9 interviewed multiple fact witnesses, and obtained declaration testimony from its expert and fact
10 witnesses in support of its defense to Noche Vista's declaratory judgment action and in aid of
11 the Association's counterclaims. Noche Vista obtained an expert witness and secured declaration
12 testimony from its expert and its fact witnesses.
13

14 6. On June 7, 2018, each party filed competing motions for summary judgment. The
15 parties then each filed response and reply briefs, and the Court finds that the briefing was
16 extensive, but appropriate in light of the legal and factual issues raised, including the issue Noche
17 Vista raised and argued for the first time at summary judgment that the Seventh Amendment
18 was not valid and did not encumber the Property. Noche Vista did not plead the Seventh
19 Amendment issues it sought to argue at summary judgment in its Complaint and never sought to
20 amend its Complaint to assert these issues.
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23 7. On October 24, 2018, the Court issued a Memorandum Decision on the parties'
24 competing summary judgment motions. It ruled that the Property is subject to the Covenants
25 but did not rule on Noche Vista's argument that the Seventh Amendment is not valid or is not an
26

1 ~~encumbrance on the Property, either as a legal covenant or as an equitable servitude. The Court~~
2 ~~finds that Noche Vista's unpleaded argument concerning the Seventh Amendment was not before~~
3 ~~the Court, because it was not pled in Noche Vista's Complaint.~~

4
5 8. This Court entered a written order on the parties' summary judgment motions on
6 November 15, 2018 wherein the Court granted the Association's Summary Judgment Motion and
7 denied Noche Vista's Summary Judgment Motion, dismissing with prejudice Noche Vista's
8 declaratory judgment action and denying Noche Vista's request for legal fees and costs. Upon
9 the Court's Order, all claims of Noche Vista have been dismissed. ^{some of} The Association's counterclaims
10 remain.
11

12 9. The Association timely filed a motion for an award of attorneys' fees and costs
13 based upon the Covenants and RCW 4.84.330 on November 14, 2018.

14 10. Noche Vista filed a Motion for Reconsideration of the Court's Summary Judgment
15 Order on November 26, 2018.

16
17 11. The Association incurred additional fees in having to respond to Noche Vista's
18 Motion for Reconsideration and Noche Vista's objection to the Association's Motion for Award
19 of Attorneys' Fees and Costs. Counsel for the Association investigated the new evidence
20 submitted by Noche Vista to support its Motion for Reconsideration, namely the Declarations of
21 Keith Tower and Robert Yount and the materials provided under those declarations. It also
22 performed legal research regarding the arguments raised by Noche Vista and researched and
23 briefed its response to those arguments, including its objection to the newly submitted evidence.
24 The Association reviewed, evaluated, and responded to Noche Vista's memorandum in
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1 opposition to the Association's motion for attorneys' fees and costs. This entailed investigating,
2 researching, and responding to the legal arguments raised by Noche Vista regarding its objection
3 to the Association's application for an award of fees and costs.
4

5 12. At oral argument on the Association's Motion for Award of Attorneys' Fees and
6 Costs and Noche Vista's Motion for Reconsideration held on January 18, 2019, the Court denied
7 Noche Vista's motion and granted the Association's motion.

8 13. The Court finds that the Association and Noche Vista spent significant, but a
9 reasonable amount of time litigating this matter due to the complexities of the legal issues; i.e.
10 the drafting of the Covenants, the fact that the Covenants were recorded on January 9, 2006, and
11 the fact the Property had been conveyed ^{two}~~multiple~~ times since the Covenants' recording, with the
12 Declarant's principal, Jerry Scofield, deceased at the time this action commenced. There was
13 extensive but justified investigation, research, discovery, witness declarations, and briefing done
14 regarding the application of the Covenants to the Property, including each of the six initial
15 amendments thereto.
16
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18 14. As of December 12, 2018, the hourly rates and hours charged to the Association
19 by the law firm representing the Association are as follows:
20

<u>Name</u>	<u>2018 Rate</u>	<u>2018 Hours</u>	<u>2019 Rate</u>	<u>2019 Hours</u>
Brian A. Walker	\$325	142.10	\$350	6.50
Jennifer K. Sands	\$310	0.50	\$320	0.00
Aaron J. Harris	\$285	105.40	\$285	15.40
Paralegal	\$100	1.50	\$100	0.00

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MAR 13 2019
Kim Morrison
Chelan County Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CHELAN COUNTY

NOCHE VISTA, LLC, a Washington limited liability
company,

Plaintiff,

v.

BANDERA AT BEAR MOUNTAIN RANCH
HOMEOWNERS ASSOCIATION, a Washington
nonprofit corporation,

Defendant.

NO. 18-2-00108-5

JUDGMENT NO.

JUDGMENT

I. JUDGMENT SUMMARY

The following information is provided in compliance with RCW 4.64.030:

Judgment Creditor	Bandera at Bear Mountain Ranch Homeowners Association
Judgment Creditor's Attorneys	Aaron J. Harris and Brian Walker of Ogden Murphy Wallace, P.L.L.C.
Judgment Debtor	Noche Vista, LLC
Reasonable Attorneys' Fees	\$ 74,871.45
Costs	\$ 1,238.25
TOTAL JUDGMENT	\$ 76,109.70
Interest Rate After Judgment	12 percent (12%) per annum

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II. JUDGMENT

THIS MATTER, having come before the Court on Defendant's Motion for Award of Attorneys' Fees and Costs, and the Court having considered the evidence, and having made and entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Defendant's Motion for Award of Attorneys' Fees and Costs is hereby granted and an Order to that effect was entered.

2. Defendant is hereby awarded a money judgment against Plaintiff Noche Vista, LLC, a Washington limited liability company, in the principal amount of \$76,109.70 as of the date of this Judgment. The Judgment amount is calculated as follows: \$74,871.45 for reasonable attorneys' fees and \$1,238.25 for costs. Interest at the rate of 12% per annum shall accrue on the principal judgment amount of \$76,109.70 commencing on the date of this Judgment.

3. The Judgment amount may be increased by further entry of an Order or supplemental judgment of the Court for such additional costs and fees Defendant may in the future incur in collecting on the debt owed it by Plaintiff Noche Vista, LLC, and in enforcing the Judgment.

DONE IN OPEN COURT this 13th day of March, 2019.


HONORABLE LESLEY A. ALLAN

1 Presented by:

2 OGDEN MURPHY WALLACE, P.L.L.C.

3

4 By: *Aaron Harris*

Aaron J. Harris, WSBA #36802

5 Brian A. Walker, WSBA #26586

6 Attorneys for Defendant

7

8 Copy Received; Approved as to Form;

9 Notice of Presentation Waived:

10 LAW OFFICES OF ROBERT DODGE, PLLC

11

12 By: *Declined to sign*

Robert Dodge, WSBA #12313

13 Attorney for Plaintiff

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Sub No. 84

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Kim Morrison
Chelan County Clerk

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CHELAN COUNTY**

**NOCHE VISTA, LLC, a Washington limited liability
company,**

Plaintiff,

v.

**BANDERA AT BEAR MOUNTAIN RANCH
HOMEOWNERS ASSOCIATION, a Washington
nonprofit corporation,**

Defendant.

NO. 18-2-00108-5

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER GRANTING DEFENDANT'S
MOTION FOR ADDITIONAL FEES AWARD**

THIS MATTER, having come before the Court for oral argument on April 19, 2019, on Defendant's Motion for Additional Fees Award, and Plaintiff Noche Vista, LLC ("Noche Vista"), appearing by and through its attorney of record, the Law Offices of Robert G. Dodge, PLLC, and Defendant Bandera at Bear Mountain Ranch Homeowners Association (the "Association"), appearing by and through its attorneys of record, Ogden Murphy Wallace, P.L.L.C., and the Court, having heard and received the evidence, heard argument, and being fully advised in the premises, finds that Defendant's Motion should be granted. It is entitled to an award of additional

1 reasonable attorneys' fees incurred to respond to Plaintiff's Motion to Reconsider filed March 25,
2 2019. The Court hereby makes the following findings of fact and conclusions of law:

3
4 **I. FINDINGS OF FACT**

5 1. On February 1, 2018, Plaintiff, Noche Vista filed this action against the Association
6 seeking a declaratory judgment that Noche Vista's real estate located in Chelan County,
7 Washington (the "Property") was not subject to nor encumbered by the Declaration of
8 Covenants, Conditions, Restrictions and Easements for Bandera at Bear Mountain Ranch
9 recorded January 9, 2006, under Auditor's File No. 2218225, records of Chelan County, or six of
10 the recorded seven amendments thereto. The Declaration of Covenants and its first six of the
11 seven amendments are collectively referred to herein as the "Covenants."

13 2. On November 15, 2018, this Court entered an order dismissing Noche Vista
14 declaratory judgment action, as a matter of law.

16 3. On March 13, 2019, this Court awarded the Association legal fees and costs of
17 \$76,109.70, pursuant to the attorneys' fees provision set forth in the Covenants and RCW
18 4.84.330.

19 4. On March 25, 2019, Noche Vista filed a Motion for Reconsideration of this Court's
20 fees and costs award against it.

22 5. The Association incurred additional fees responding to Noche Vista's
23 Reconsideration Motion and seeking an award of additional legal fees related thereto. The
24 Association review^{ed} Noche Vista's Motion, conduct legal research related thereto, draft this
25 Memorandum, draft the Note for Motion and the Motion for Additional Legal Fees Award, draft
26

1 the Declaration of Brian A. Walker filed therewith, prepare for and argue against Noche Vista's
2 Reconsideration Motion and for the Association's Motion, and draft the supplemental Findings
3 of Fact and Conclusions of Law and a Second Judgment.
4

5 6. The Court finds that the Association spent a reasonable amount of time litigating
6 Noche Vista's Reconsideration Motion and seeking an award of additional legal fees related
7 thereto, which required the Association to brief the law and facts related to the application of
8 the Covenants' attorneys' fees clause to Noche Vista's declaratory judgment action, the Lodestar
9 Method for calculating legal fees and costs, the Court's prior application of the Loadstar Method
10 to the Association's prior in defense of Noche Vista's claims, and the Association's entitlement to
11 an additional fees award under RCW 4.84.330 and the Covenants.
12

13 7. The hourly rates and hours the law firm representing the Association charged are
14 as follows: Brian A. Walker - \$350; Aaron J. Harris - \$285; and Paralegal - \$100.
15

16 8. The Association incurred \$5,326.50 in legal fees for 15.60 hours of time spent from
17 March 26, 2019 to April 19, 2019 responding to Noche Vista's Reconsideration Motion and
18 seeking an additional award of legal fees.
19

20 II. CONCLUSIONS OF LAW

21 1. The Association was the prevailing party and Noche Vista was not the prevailing
22 party under RCW 4.84.330 and the Covenants. The Covenants encumber and are enforceable
23 against the Property.
24
25
26

1 2. The Covenants and RCW 4.84.330 require this Court to award legal fees and costs
2 to the Association. The Court's only discretion is on the amount of the legal fees and costs to be
3 awarded, applying the lodestar calculation set forth in *Mahler v. Szucs*, 135 Wn.2d 398 (1998).
4

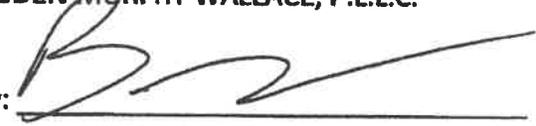
5 3. The lodestar calculation involves two primary steps. First, the Court is to
6 determine the reasonable hours and hourly rates under the circumstances of the case, and then
7 multiply the reasonable hourly rate by the number of hours reasonably expended. *Broyles v.*
8 *Thurston County*, 147 Wn. App. 409, 452 (2008). Second, the Court may adjust the fees award
9 upward or downward to reflect factors not already taken into consideration. *Id.*
10

11 4. To determine the legal fees award for the Association related to its responding to
12 Noche Vista's Reconsideration Motion and to its request for additional legal fees, the Court
13 reviewed the Association's invoices presented to the Court, determined that the hourly rates set
14 forth therein were reasonable in light of the subject matter at issue, and multiplied these
15 reasonable hourly rates charged by the reasonable number of hours the Court found the
16 Association's attorneys and paralegals spent working to respond to Noche Vista's Motion for
17 Reconsideration, and preparing the pleadings related to the Association's request for an
18 additional award of legal fees.
19

20 5. The Court finds that the hours the Association's attorneys and paralegals
21 dedicated to respond to Noche Vista's Motion for Reconsideration and to request additional legal
22 fees, 15.60 hours, were reasonable and necessary to the Association prevailing on Noche Vista's
23 Motion and being awarded additional fees.
24
25
26

1 Presented by:

2 OGDEN MURPHY WALLACE, P.L.L.C.

3
4 By: 

5 Aaron J. Harris, WSBA #36802
6 Brian A. Walker, WSBA #26586
7 Attorneys for Defendant

8 Copy Received; Approved as to Form;
9 Notice of Presentation Waived:

10 LAW OFFICES OF ROBERT DODGE, PLLC

11 By: _____

12 Robert Dodge, WSBA #12313
13 Attorney for Plaintiff

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Sub No. 85

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FILED

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Kim Morrison
Chelan County Clerk

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CHELAN COUNTY

NOCHE VISTA, LLC, a Washington limited liability
company,

Plaintiff,

v.

BANDERA AT BEAR MOUNTAIN RANCH
HOMEOWNERS ASSOCIATION, a Washington
nonprofit corporation,

Defendant.

NO. 18-2-00108-5

SECOND JUDGMENT

I. SECOND JUDGMENT SUMMARY

The following information is provided in compliance with RCW 4.64.030:

Judgment Creditor	Bandera at Bear Mountain Ranch Homeowners Association
Judgment Creditor's Attorneys	Aaron J. Harris and Brian Walker of Ogden Murphy Wallace, P.L.L.C.
Judgment Debtor	Noche Vista, LLC
Reasonable Attorneys' Fees	\$5,326.50
Costs	\$ 0.00
TOTAL JUDGMENT	\$5,326.50
Interest Rate After Judgment	12 percent (12%) per annum

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II. SECOND JUDGMENT

THIS MATTER, having come before the Court on Defendant's Motion for Additional Fees Award, and the Court having considered the evidence, and having made and entered its Findings of Fact and Conclusions of Law,

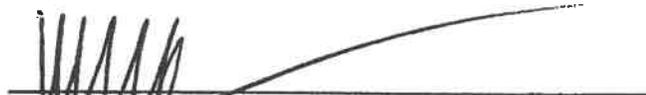
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Defendant's Motion for Additional Fees Award is hereby granted and an Order to that effect was entered.

2. Defendant is hereby awarded a second money judgment against Plaintiff Noche Vista, LLC, a Washington limited liability company, in the principal amount of \$5,326.50 as of the date of this Judgment. The Judgment amount is calculated as follows: \$5,326.50 for reasonable attorneys' fees and \$0.00 for costs. Interest at the rate of 12% per annum shall accrue on the principal judgment amount of \$5,326.50 commencing on the date of this Second Judgment.

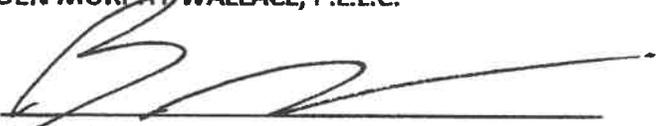
3. The Second Judgment amount may be increased by further entry of an Order or supplemental judgment of the Court for such additional costs and fees Defendant may in the future incur in collecting on the debt owed it by Plaintiff Noche Vista, LLC, and in enforcing the Second Judgment.

DONE IN OPEN COURT this 19th day of April, 2019.


HONORABLE LESLEY A. ALLAN

1 Presented by:

2 OGDEN MURPHY WALLACE, P.L.L.C.

3
4 By: 

5 Aaron J. Harris, WSBA #36802
6 Brian A. Walker, WSBA #26586
7 Attorneys for Defendant

8 Copy Received; Approved as to Form;
9 Notice of Presentation Waived:

10 LAW OFFICES OF ROBERT DODGE, PLLC

11
12 By: _____

13 Robert Dodge, WSBA #12313
14 Attorney for Plaintiff

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Sub No. 87

\$ FEE PAID
\$30

AM FILED
2 APR 25 2019
Kim Morrison
Chelan County Clerk

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

NOCHE VISTA, LLC, a Washington
limited liability company,

Plaintiff,

vs.

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

Defendant.

No. 18-2-00108-5

ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION
(FEE AWARD AND JUDGMENT)

17 THIS MATTER came on regularly for hearing on April 19, 2019, before The Honorable Lesley
18 A. Allan, Judge of the Chelan County Superior Court, on Plaintiff's Motion for Reconsideration of the
19 Court's Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion for Award of
20 Attorneys' Fees and Costs (Sub No. 64) and Judgment (Sub No. 65), both entered March 13, 2019. The
21 Court, having reviewed Plaintiff's opening and reply memoranda in support of its Motion for
22 Reconsideration (Sub Nos. 71 and 83, respectively) as well as Defendant's opposing memorandum (Sub
23 No. 78), having heard argument of counsel of record for the parties, Robert G. Dodge for the Plaintiff
24 and Brian A. Walker for the Defendant, having reviewed the records and pleadings on file herein, and
25 being otherwise fully advised in the premises, Now, Therefore,

28 ORDER DENYING MOTION
FOR RECONSIDERATION
(FEE AWARD & JUDGMENT) - 1

LAW OFFICES OF ROBERT G. DODGE, PLLC
124 N WENATCHEE AVE STE A
PO BOX 262
WENATCHEE WA 98807-0262
509/662-9602 FAX 509/662-9606

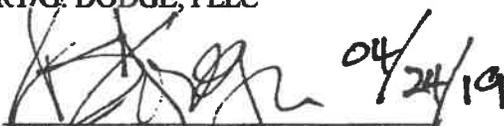
1 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for
2 Reconsideration is DENIED.

3 DATED this 25th day of April, 2019.

4 
5 Lesley A. Allan, Judge

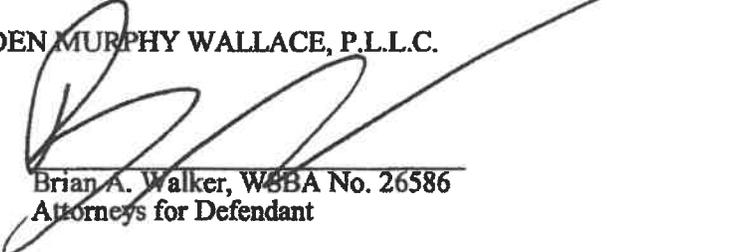
6 PRESENTED BY:

7 LAW OFFICES OF
8 ROBERT G. DODGE, PLLC

9  04/24/19
10 By: Robert G. Dodge, WSBA No. 12313
11 Attorneys for Plaintiff

12
13 APPROVED AS TO FORM,
14 NOTICE OF PRESENTATION WAIVED:

15 OGDEN MURPHY WALLACE, P.L.L.C.

16 
17 By: Brian A. Walker, WSBA No. 26586
18 Attorneys for Defendant

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28 ORDER DENYING MOTION
FOR RECONSIDERATION
(FEE AWARD & JUDGMENT) - 2

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DECLARATION OF SERVICE

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

Brian A. Walker, WSBA #26586
Aaron J. Harris, WSBA #36802
Ogden Murphy Wallace, P.L.L.C.
1 Fifth Street, Suite 200
Wenatchee, WA 98807-1606

Robert G. Dodge, WSBA #12313
Law Offices of Robert G. Dodge, PLLC
124 N. Wenatchee Avenue, Suite A
PO Box 262
Wenatchee, WA 98807-0262

Original electronically delivered by appellate portal to:
Court of Appeals, Division III
Clerk's Office

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: August 16, 2019, at Seattle, Washington.



Sarah Yelle, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

August 16, 2019 - 2:34 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36677-4
Appellate Court Case Title: Noche Vista, LLC v. Bandera at Bear Mountain Ranch Homeowners Assoc.
Superior Court Case Number: 18-2-00108-5

The following documents have been uploaded:

- 366774_Briefs_20190816143243D3985634_0952.pdf
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Briefs - Appellants
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A copy of the uploaded files will be sent to:

- aharris@omwlaw.com
- assistant@tal-fitzlaw.com
- bwalker@omwlaw.com
- gary@tal-fitzlaw.com
- matt@tal-fitzlaw.com
- rgd@robertdodgelaw.com

Comments:

Replaces previous Brief of Appellant Noche Vista, LLC (pages 9-12 were blank)

Sender Name: Sarah Yelle - Email: assistant@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

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