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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 RESPONDENT
BANDERA AT BEAR MOUNTAIN RANCH
HOMEOWNERS ASSOCIATION**

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A. INTRODUCTION

The question before this Court is whether the Covenants forming the residential subdivision Bandera at Bear Mountain Ranch (“Bandera”) apply to Appellant Noche Vista LLC’s real property that the Covenants define as “Bandera Phase III”.

Despite wanting the Covenants’ benefits – use of Bandera’s common areas, utility easements, and road system -- Noche Vista claims the Covenants’ development restrictions and assessment obligations do not burden its property. In other words, while Noche Vista wants its property to enjoy the Covenants’ benefits, it seeks a declaratory judgment excusing Noche Vista and its property from the Covenants’ obligations.

Noche Vista seeks a declaratory judgment despite nowhere in the Bandera Covenants, the seven amendments thereto, or Bandera’s Plat, did the Covenants’ Declarant, Scofield Construction, or its successor declarants, state the Covenants excluded Bandera Phase III, which Bandera’s Plat identifies and refers to as “Tract 10 of the Bandera Subdivision”. To the contrary, Scofield Construction unambiguously provided the Covenants applied to Tract 10, but exempt itself, its successor declarants, and any future owner of Bandera Phase III from paying

assessments until Tract 10 is subdivided into one-acre lots that the Covenants define as a “Landholding”.

The Covenants’ unambiguous and dispositive provisions applying the Covenants to Bandera Phase III are its introductory paragraph, its definitions of Bandera Phase I and II, Bandera Phase III, and Common Use Areas, and paragraphs 12.4 and 12.5. CP 024-031, 053-054. These provisions state the Covenants apply to all persons owning any real property in Bandera, which includes Bandera Phases I, II, III, and Bandera’s Common Use Areas. Id. The Covenants read:

THIS DECLARATION is made ... by ... SCOFIELD CORPORATION, LLC, ... as the owner and developer of certain real property situated in Chelan County, Washington, commonly known as Bandera at Bear Mountain Ranch, which property is more specifically described herein.

12.4 Binding. 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 other Governing Documents or 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 all such provisions will run with

the land and be **binding upon all persons who hereafter become the owner of an interest in Bandera.**

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

CP 053-054 (emphasis added).

The trial court agreed the Covenants applied to and are enforceable against Bandera Phase III. It found the Covenants' above-cited provisions dispositive, despite Noche Vista's best efforts to wriggle free.

CP 661-663. In Chelan County Superior Court's Memorandum Opinion, Judge Lesley A. Allan wrote:

[T]he essential issue presented ... is whether the property described as tract 10 or phase III ("phase 3") is subject to the "Declaration of Covenants, Conditions, and 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 answer the question yes ... [Noche Vista's argument] misses the mark ... [The Covenants] described the property encompassed by the CCRs, which included phase 3 ... 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.

CP 661-662.

On appeal, Noche Vista renews its efforts to wriggle free. It again argues that one word, “annexation”, in the last sentence of the Covenants’ definition of “Landholding”, must mean Scofield Construction intended the Covenants exclude Bandera Phase III, unless Scofield Construction, or its successor declarants, later annexed Tract 10 of the Bandera Subdivision into Bandera.

As Judge Allan stated, Noche Vista’s argument misses the mark. CP 662. To reach its conclusion, Noche Vista forces and strains an unreasonable interpretation of the remaining language Scofield Construction wrote on the 39 pages of Covenants, including the language in the Covenants’ definition of “Landholding”. This definition does not state Bandera Phase III is excluded from Bandera. CP 031-032. When interpreted in the context of the full text of the Covenants, it means that Scofield Construction, or its successor declarants, could later subdivide Bandera Phase III into one-third acre lots, with each lot then becoming a “Landholding”. CP 019-057. Upon becoming a “Landholding”, the Covenants state that each owner of each lot in Tract 10 becomes an “Owner” and owes “Assessments”, along with each owner of a

“Landholding” in Bandera Phase I and Bandera Phase II. Prior to Bandera Phase III’s subdivision into lots, no “Assessments” are owed. CP 031-032, 047-048.

When one interprets the language on all 39 pages of the Bandera Covenants consistent with Washington rules of covenant interpretation, including the law’s focus on protecting residential subdivision homeowners, the flaw with Noche Vista’s argument becomes even more apparent. Washington law requires courts interpret the full text of covenants to determine declarant intent, and directs courts place special emphasis on the law’s paramount purpose of protecting homeowners through interpreting covenants to protect the subdivision’s common residential plan. Saunders v. Meyers, 175 Wn. App. 427, 438–39, 306 P.3d 978, 984 (2013) (citations omitted).

When interpreted in their entirety and with the law’s special emphasis on the Covenants’ paramount purpose in mind, the Covenants’ definition of “Landholding” does exclude Bandera Phase III from the Covenants’ application. As indicated above, “Landholding” identifies when an “Owner” becomes obligated to pay “Assessments”. These definitions read:

1.2 “**Assessments**” means all amounts chargeable under the Governing Documents against an Owner or Landholding

1.15 “**Landholding**” means 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. “Landholding” is not intended to include any lot or tract which is solely Common Use Area. The number of Landholdings may be increased through annexation of Bandera Phase III.

1.17 “**Owner**” means one or more persons or entities who are ... the record owner of fee simple title to a Landholding, including Declarant ...

CP 024, 031-032.

Through the Covenants’ structure for the payment of “Assessments” only by the “Owner” of a “Landholding”, the Covenants allowed Scofield Construction, its successor declarants, or other future owners of unsubdivided tracts in Bandera to avoid paying assessments until they subdivided their tracts into 1/3 acre lots for sale. CP 031-032, 047-048. This allowed Scofield Construction, without paying assessments, to phase development of the three tracts that form Bandera (Bandera Phases I, II, and III) into lots. Id.

Extrinsic evidence supports this interpretation. According to Christoffer J. Snapp, he and his father-in-law, Jerry Scofield, had Scofield

Construction develop Bandera with the intent that Bandera Phases I, II, III, and its Common Use Areas formed the Bandera Subdivision, but that persons owning the three tracts forming Bandera did not owe "Assessments" until they subdivided their tracts for resale to an "Owner" of a "Landholding". According to Mr. Snapp:

It was Jerry Scofield and Scofield Corporation's intent that the Covenants include the Phase III Property ... Mr. Scofield and Scofield Construction's plan was to apply to Chelan County to plat the [Bandera] Development into individual lots for sale at three different times, or in three phases. The intent was not to annex the Phase II Property or the Phase III Property into the Development later. The intent was to include the real property constituting these phases with the recording of the Covenants and the Plat, along with the Phase I Property. The concept of phasing related only to the later division or platting of these three phases into individual lots for sale ... And, upon the creating of the plats establishing the individual lots, the owners of these individual lots, or "Landholding" as defined in the Covenants, would then be obligated to pay assessments, per Article 7 of the Covenants.

CP 302-303.

Having lost at summary judgment, and after Chelan County Superior Court entered a fee and costs judgment against it, Noche Vista filed a Motion for Reconsideration, with which it sought to offer the declaration testimony of Robert Yount and Keith Tower. The trial court rightfully disregarded Mr. Yount's and Mr. Tower's testimony. Under

Washington's rules for covenant interpretation, Mr. Yount's and Mr. Tower's testimony is not admissible, relevant extrinsic evidence of Scofield Construction's intent.

First, the Covenants unambiguously apply to Tract 10 of the Bandera Subdivisions, requiring no review of extrinsic evidence. Wilkinson v. Chiwawa Communities Ass'n, 180 Wn.2d 241, 250–51, 327 P.3d 614, 619 (2014).

And second, unlike the testimony of Mr. Snapp of Scofield Construction, the testimony of Mr. Yount and Mr. Tower does not help one understand what Scofield Construction wrote on the Covenants. Rather, Noche Vista offers this testimony to speculate about what Scofield Construction could have written. Courts are not to consider extrinsic evidence that would vary, contradict, or modify the written word or show an intent independent of the covenants. Id.

In sum, Chelan County Superior Court correctly granted the Bandera at Bear Mountain Ranch Homeowners Association's Motion for Summary Judgment, denied Noche Vista's Reconsideration Motions, and disregarded Noche Vista's new evidence offered on reconsideration, ruling the Bandera Covenants unambiguously apply to Noche Vista's Tract 10 of

the Bandera Subdivision. It also correctly awarded the Association legal fees and costs pursuant to RCW 4.84.330 and the Covenants' Attorneys' Fees Clause, finding the Association had successfully enforce the Covenants against Noche Vista's best efforts to wriggle free.

However, even if this Court were to find the Covenants ambiguous on their application to Bandera Phase III (which they are not), the extrinsic evidence confirms the Association's interpretation. And, as explained below, the Covenants' Seventh Amendment and/or the Doctrines of Estoppel and Laches each provide an independent bases on which this Court could affirm the trial court.

The Association respectfully requests this Court affirm the trial court and award it fees and costs on appeal, pursuant to RAP 18.1.

B. ASSIGNMENTS OF ERROR

Whether the trial court properly granted summary judgment in favor of the Association and properly awarded the Association attorneys' fees and costs.

C. STATEMENT OF THE CASE

Jerry Scofield owned Scofield Construction LLC and its successor declarant entities until his death in 2014. CP 005, 299.

Christoffer Snapp was Jerry Scofield's son-in-law and worked with Mr. Scofield and Scofield Construction and its successor declarants on the development of Bandera, including the creation of Bandera's Covenants, the amendments thereto, and Bandera's Plat. CP 298-299.

In 2006, Scofield Construction created the residential development Bandera at Bear Mountain Ranch, and recorded with the Chelan County Auditor's Office the Covenants and the Plat of Bandera at Bear Mountain Ranch P 2004-005. CP 005.

Bandera's Plat shows habitat areas, roads, and utility easements benefiting all real property in Bandera, and legally describes 92.90 acres of real property that Scofield Construction made part of the residential subdivision Bandera, which real property included 31.76 acres that the Plat identifies as Tract 10 of Bandera Subdivision, otherwise known as Bandera Phase III. CP 004, 110-117.

Bandera's Covenants are consistent with Bandera's Plat. They likewise identify habitat areas, roads, and utility easements benefiting all of Bandera, and contain the same legal description of the same 92.90 acres of real property described in the Plat that constitute Bandera, including the 31.76 acres of Bandera Phase III. CP 024-031, 053-054.

Attached and incorporated in the Covenants is one page of the Plat, which page shows Tract 8 of the Bandera Subdivision, also known as Bandera Phase I, subdivided into 44 Landholdings. CP 057. The Plat also shows only Bandera Phase I subdivided into "Landholdings". Both the Covenants and the Plat do not show Tracts 9 and 10, otherwise known as Bandera Phase II or Bandera Phase III, subdivided into Landholdings. CP 010-017, 057.

As for the Covenants' application to Bandera's 92.90 acres, paragraphs 12.4 and 12.5 and the Covenants opening paragraph (each quoted above) state (i) that the Covenants apply to the real property commonly known as Bandera at Bear Mountain Ranch, (ii) that the Covenants set forth a general scheme for Bandera's residential development, and (iii) that each person accepting a deed for any real property forming Bandera takes subject to and is bound by the Covenants and their general scheme for Bandera. CP 024-031, 053-054.

Paragraph 1.15 of the Covenants provides that the tracts forming Bandera can be subdivided into residential lots, each approximately 1/3 acre in size, and each called a "Landholding". Covenants' paragraph 1.17 refers to the person owning a "Landholding" as an "Owner", and states this

may include the Covenants' "Declarant" identified in paragraph 1.9 of the Covenants as Scofield Construction or its successors. The Covenants then state that Bandera Phase III, then owned by Scofield Construction, has not yet been subdivided into lots or Landholdings, but it could be so subdivided. CP 031-032. When subdivided, the Covenants' state that the "Owner" of a "Landholding" then owes "Assessments", but no "Assessments" are due until an "Owner" owns a "Landholding". CP 031-032. The Covenants' provisions for when assessments are due read as follows:

7.1 Covenant to Pay Assessment. By acquisition of an ownership interest in a Landholding, the Owner of the Landholding covenants and agrees on behalf of the Owner and its heirs, successors, and assigns to pay Management dues and all other Assessments and charges which may be established or collected as provided in this Declaration and the Governing Documents.

7.2 Purpose of Dues and Assessments. Dues and other Assessments will be used to promote the health, safety, and welfare of the Bandera community, for costs incurred by Management for the improvement and maintenance of Common Use Areas, ... for road maintenance ... and for any other matters reasonably determined by Management or Management.

7.9 Lien and Personal Obligation. Assessments and all other amounts payable by Owners are secured by a lien against the Landholding to which they relate in favor of Management ...

CP 048.

As required by the Covenants' definition of "Landholding" ("... lots designated by Declarant to be a Landholding in Bandera as shown on the Plat"), when one reviews Bandera's Plat, a "Landholding" is only one of the 44 lots identified on Bandera's Plat for Bandera Phase I. The Plat shows no Landholding in Bandera Phase II or III. CP 010-017. And, while there is no record that Scofield Corporation or its successor declarants later "annexed" Bandera Phase II into Bandera, there is no dispute that Scofield Corporation subdivided Bandera Phase II into Landholdings, with each "Owner" thereof having the right to enjoy Bandera's common areas, roads, and utility easements, but subject to the Covenants' development restrictions and assessment obligations. CP 003-008.

Unlike Bandera Phase I and Bandera Phase II, Bandera Phase III has not yet been subdivided into "Landholdings". CP 007.

In addition to the Bandera Phase I, II, and III tracts, paragraph 1.5 of the Covenants provides a legal description for Bear Mountain Ranch, Bandera's adjacent development. CP 029-030. At paragraph 5.7, the Covenants expressly exclude Bear Mountain Ranch from the application of the Covenants. This paragraph reads:

5.7 Future Development. 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 045.

The Covenants do not contain a similar exclusion and "Future Development" provision for Bandera Phase III. CP 019-057.

The Covenants further provide that Scofield Construction, or its successor declarants, retain declarant control over Bandera for 35 years or until the Declarant expressly provides written notice to the Association it has terminated declarant rights. During this period, the Covenants permit the Declarant to amend the Covenants, including to add to the real property that makes up Bandera. CP 031,050-051. The Covenants read as follows:

1.11 **"Development Period"** means that period of time beginning as of the date of this Declaration and ending on the earlier of (1) thirty-five (35) years from the date hereof, or (2) written notice from Declarant to the Management [the Association] by which Declarant elects to terminate the Development Period.

9.2 Amendments. Commencing on the date of recording of this Declaration and continuing until the end of

the Development Period, the Declarant has the absolute right and sole discretion to amend any provision of the Declaration, except as expressly limited herein, provided further that such amendment does not adversely affect marketability of title to any Landholding or impair the security of any Mortgage ... The correction of a technical drafting or typographical error, correction of an obvious omission, resolution of any conflict with applicable laws, clarification of an ambiguous statement or other similar amendment is presumed to be reasonable and to not impact marketability of title or to impair security of any Mortgage, and such amendment may be made by Declarant at any time ... Any document amending this Declaration will be duly executed by the Declarant, or the president and secretary of Management as appropriate.

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 amendment) declaration executed by, or on its face approved by, the Declarant.

CP 031, 050-051.

In September 2006, Bear Mountain Ranch Holdings, LLC, a successor-in-interest to Scofield Corporation owned by Jerry Scofield, adjusted the boundary lines between the tracts forming Bandera Phase II and Bandera Phase III. With this boundary adjustment, Bear Mountain Ranch identified both Bandera Phase II and Phase III as being part of the Bandera residential subdivision. It identified each by their legal description created by the Covenants' recorded Plat, which for Bandera Phase II is

“Tract 9, of Bandera Subdivision” and for Bandera Phase III is “Tract 10, of Bandera Subdivision”. CP 040, 322.

Following the recording of the Covenants and the Plat, Jerry Scofield changed the name of Scofield Construction to B.M.R. Construction and Development, LLC, and executed seven (7) amendments to the Covenants. Each of the Covenants’ seven amendments reference the Bandera Phase III as part of Bandera. CP 059-113, 301, 306-320, and 322-323.

In August 2009, Jerry Scofield for his entities Bear Mountain Ranch Holdings, LLC and B.M.R. Construction and Development, LLC, Scofield Construction’s successor declarants, exercised declarant control and amended the Covenants to change their application to one of the three tracts constituting Bandera. CP 105-113. While it amended the Covenants for Bandera Phase I, permitting construction of improvements on each Landholding in Bandera Phase I to commence more than two years after the Owner’s lot purchase, it did not do the same for Bandera Phase II or III. CP 105-113.

The Covenants’ seventh amendment (the “Seventh Amendment”) recorded April 12, 2013, and prior to Noche Vista taking title to Bandera

Phase III by deed recorded April 15, 2013 (a fact Noche Vista has wrong at page 15 of its briefing, but verifiable by a review of the land records for Chelan County), again states that Bandera Phase III is part of Bandera and subject to the Covenants, along with Bandera Phase I, Bandera Phase II, and Bandera's "Common Use Areas" defined in Covenants' paragraph 1.7 to include the "Road Easements" and the "Utility Easement". CP 306. It further provides that the Declarant will transfer control of Bandera to the Association. It reads:

2.1 Purpose. The Association shall be incorporated by the Declarant, or the Declarant's agent, for the purpose of managing the Common Use Areas located within Bandera Phases I, II, and III only, and common amenities such as common area landscaping, private road, curbs, entrance gates and other components shared by all Landholdings within Bandera Phases I, II and III, and enforcing the Declaration. The Association's management and enforcement authority shall be confined to Bandera Phases I, II and III.

CP 311-312.

Prior to the Seventh Amendment, the Association never received from Scofield Construction or its successor declarants written notice of termination of declarant rights per Covenants' paragraph 1.1. CP 329.

After the recording of the Seventh Amendment and on April 15, 2013, Noche Vista took title to Bandera Phase III by deed accepted title to

“TRACT 10, BANDERA AT BEAR MOUNTAIN RANCH ... SUBJECT TO easements, restrictions, rights, reservations and matters apparent or of record.” CP 377, 385-387.

When accepting title, Noche Vista had actual knowledge the Covenants and each of its seven amendments were of record. In addition to the Covenants and its first six amendments being exceptions on Noche Vista’s preliminary title report, Noche Vista asked that the Seventh Amendment be recorded prior to it accepting title to Bandera Phase III. The Association’s attorney, Jennifer Sands, informed Noche Vista of the Seventh Amendment’s recording three (3) days prior to accepting title. CP 378, 427. The events leading to Noche Vista accepting title to Bandera Phase III after the recording of the Seventh Amendment are as follows:

Noche Vista acquired title to Tract 10 of Bandera Subdivision from North Cascades National Bank (“NCNB”). CP 115-117. NCNB owned Tract 10 from May 1, 2012 to April 15, 2013, having acquired title from Scofield Construction’s successor, Bear Mountain Ranch Holdings, LLC, in lieu of foreclosure. CP 377.

Bear Mountain Ranch Holdings’ deed in lieu of foreclosure did not state that NCNB also acquired its or B.M.R. Construction and Development,

LLC's declarant rights for the entire Bandera subdivision reserved in the Covenants. It only states Bear Mountain Ranch Holdings transfers to NCNB its rights, title, and interest in and to Bandera Phase III, together with easement rights for roads and utilities in Bandera. CP 115-117.

In January 2013, NCNB entered into a purchase and sale agreement with John Dwyer and/or his assigns [Noche Vista] for Tract 10 of Bandera Subdivision, with closing to occur no later than April 15, 2013. Per the purchase and sale agreement, John Dwyer or his assigns had the right to inspect, to review and approve a title report, and to investigate the Covenants' application to Bandera Phase III. CP 389-404.

Consistent with the purchase and sale agreement, NCNB provided John Dwyer with a title report prepared by North Meridian Title & Escrow. North Meridian's report showed the Covenants and its then existing six amendments as special exceptions to Tract 10's title. CP 353-360, 406-413.

After receipt of the North Meridian title report, John Dwyer personally, and through his attorney, Jeff Fehr, requested that the Covenants be amended a seventh time to remove Jerry Scofield's control

over the Bandera subdivision, including over Bandera Phase III. CP 415-426.

On March 28, 2013, Jeff Davis of NCNB advised John Dwyer, the principal of Noche Vista, he understood that “the Seventh Amendment replaces articles 2 and 3 [of the Covenants] in their entirety, so the issues of [Noche Vista’s] concern are eliminated”. CP 416.

In reply, Mr. Dwyer emailed Mr. Davis on March 28, 2013 that “... it does appear we are on the right track with adding Phase III back to Addendum 7. As you mentioned I do want to be a good neighbor and fully intend to adhere to the CC&Rs”. CP 415 (emphasis added).

Then, on April 3, 2013, attorney Fehr for John Dwyer advised the Association’s attorney, Jennifer Sands, that “I spoke with Jeff Davis at NCNB about our concerns regarding Articles 2 and 3 of the Bear Mountain CC&Rs, and Jeff indicated that you are working on a 7th Amendment to the CC&Rs, that should alleviate our concerns. The closing date of his purchase is April 15th, and my client is very anxious to review the proposed 7th Amendment prior to closing date to ensure that it eliminates Mr. Scofield’s control. Would it be possible to see a draft of the 7th Amendment when it’s ready?” CP 418.

On April 3, 2013, the Association's attorney, Ms. Sands, sent attorney Fehr via email a copy of the 7th Amendment, plus Design Guidelines, and advised that Scofield had agreed that the Seventh Amendment would apply to Bandera Phases, I, II, and III, but that "Mr. Scofield's desire to retain the Bandera vision/character has resulted in extraordinary detailed design guidelines." Mr. Fehr confirmed receipt of the Seventh Amendment and the Design Guidelines in an email to Ms. Sands sent April 4, 2013. CP 419-422.

As the April 15, 2013 closing date for NCNB's sale of Bandera Phase III to Noche Vista approached, and on April 9, 2013, attorney Fehr replied to an email from Ms. Sands advising Jerry Scofield has signed the Seventh Amendment. Referring to the Covenants' Seventh Amendment, attorney Fehr wrote, "My client [John Dwyer and Noche Vista] would like to proceed with closing on Friday. He would be satisfied with a signed copy of the agreement, plus confirmation that it has been submitted for recording ...". CP 425.

On April 12, 2013, Ms. Sands sent attorney Fehr a copy of the recorded Seventh Amendment. CP 352, 427-520.

The Seventh Amendment states that Bandera Phase III is part of the residential subdivision of Bandera, subject to Bandera's Covenants, and amends the Covenants' Sections 2 and 3 related to declarant control of Bandera. It also advises of the creation of the Association, the Association's covenant enforcement authority over Bandera, including over Bandera Phase III, and affirms that individual lots subdivided (or to be subdivided) in Bandera Phases I, II, and III could use Bandera's road system and other subdivision common areas. CP 301, 430-444.

With full knowledge of the April 12, 2013 recording of the Seventh Amendment and understanding it applied to all of Bandera, including Bandera Phase III, on April 15, 2013, Noche Vista took title to Tract 10 of Bandera subdivision "SUBJECT TO easements, restrictions, rights, reservations and matters apparent or of record." CP 385-387.

Prior to forming the Association and recording the Seventh Amendment, Bear Mountain Ranch Holdings, LLC and B.M.R. Construction and Development, LLC never advised their intent to terminate declarant control of Bandera. CP 329.

The Association is the governing body for Bandera's homeowners. It succeeds Bandera's Declarant and is charged to protect the

homeowner's interests in Bandera, including protecting Bandera's common, residential plan. CP 325, 328.

From April 2013 to 2016, Noche Vista expressed to the Association no issue with the Covenants encumbering its property, including no issue with the Covenants' Seventh Amendment. CP 328.

Since April 15, 2013, Noche Vista has used and enjoyed Bandera's roads, despite paying no assessments to the Association. CP 330.

Jerry Scofield died in January 2014. CP 298.

After Mr. Scofield died and in 2015, Noche Vista looked to subdivide Tract 10 of Bandera Subdivision into 34 individual lots, each a "Landholding" making Noche Vista an "Owner" required to pay "Assessments", per the Covenants. CP 361-362.

Without informing the Association, Noche Vista also started looking to wriggle free from the Covenants. CP 328, 363.

Without informing the Association, Noche Vista asked that North Meridian Title & Escrow remove from Noche Vista's title report the Covenants and amendments thereto, including the Seventh Amendment that Noche Vista had asked the Association record prior to accepting title.

By email dated April 5, 2016, North Meridian Title & Escrow refused. CP 363, 364.

In 2016, and after it was unsuccessful with North Meridian Title & Escrow, Noche Vista first approached the Association about possible modifications to the Covenants. By this time, members of the Association had bought "Landholdings" in Bandera Phase I and II, had built on those "Landholdings" and paid "Assessments" consistent with the Covenants, expecting the Covenants covered all of Bandera, including Bandera Phase III, and relying on the Covenants' common residential development plan for Bandera. CP 328-329.

As stated above, Noche Vista has used Bandera's road system to access Bandera Phase III since acquiring title in April 2013. Without Noche Vista's right to use Bandera's roads, Noche Vista is without access to its land. CP 301, 330, 368-369.

Since accepting title to Bandera Phase III, Noche Vista has paid no costs related to the repair and upkeep of Bandera's road system, despite the fact the Association has paid approximately \$62,000.00 to improve Bandera's roads, plus the cost of annual snow removal. The Association did not assess Noche Vista for road system costs or snow removal, because

it understood that since Noche Vista had not yet subdivided Tract 10 into individual lots, Noche Vista was not the “Owner” of a “Landholding”, and the Covenants did not yet obligate Noche Vista to pay the Association “Assessments”. CP 331-332.

To justify its use of Bandera’s roads, Bandera previously admitted its Tract 10 is part of Bandera. Noche Vista stated that “the roads identified as part of the Bandera Development were identified and platted in order to serve and provide access to **all real property located within the Bandera Development, including the Noche Vista Property [Bandera’s Tract 10].**” CP 368 (emphasis added).

D. ARGUMENT

1. Covenants apply to Bandera Phase III

(a) Covenants are unambiguous

Noche Vista’s appeal fails to address the initial question Washington law requires when interpreting the Covenants - whether the Covenants unambiguously apply to Bandera Phase III.

If the Covenants unambiguously apply, Washington law requires that courts interpret the Covenants as written. Burton v. Douglas Cty., 65 Wn.2d 619, 621–22, 399 P.2d 68, 70 (1965); Wilkinson v. Chiwawa

Communities Ass'n, 180 Wn.2d at 249–50, 327 P.3d at 619. It is only if this Court were to find the Covenants ambiguous (which they are not) would Washington law direct this Court to consider extrinsic evidence to help interpret what Scofield Construction wrote in the Covenants, not what it could have written. Id.

Here, the Covenants, each amendment thereto, and the incorporated Plat, unambiguously include Bandera Phase III into the Bandera residential subdivision, allowing Bandera Phase III access to Bandera's roads, utility easements, and other common areas, but also subjecting Bandera Phase III to the Covenants' development restrictions and assessment obligations once subdivided into "Landholdings". The Covenants provide the legal descriptions for the 92.90 acres that make up Bandera, including the 31.76 acres that form Bandera Phase III. CP 019-027, 323. And, the Covenants' paragraphs 12.4 and 12.5 (quoted above) state the Covenants apply to all real property described therein commonly known as Bandera at Bear Mountain Ranch, regardless of whether that real property had been subdivided into residential lots or Landholdings. CP 053-054.

Fatal to Noche Vista's efforts to wriggle free is the undisputed fact that the Covenants do not state that Bandera Phase III is excluded from Bandera and its Covenants, unless later annexed. CP 019-057. To the contrary, paragraphs 12.4 and 12.5 of the Covenants unambiguously incorporate Bandera Phase III into Bandera, and subject to its Covenants. CP 053-054.

Desperate for any language to support its interpretation, Noche Vista argues for the first time on appeal that the abbreviated legal descriptions to pages in the Covenants on the Covenants' recording block creates an ambiguity as whether the Covenants apply to Tract 10. This Court should not consider this argument because Noche Vista did not raise it at the trial court. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. RAP 9.12. An argument that was neither pleaded nor argued to the superior court on summary judgment cannot be raised for the first time on appeal." Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008), review denied, 165 Wn.2d 1017, 199 P.3d 411 (2009).

However, if the Court did consider Noche Vista's recording block argument (which it should not), there is no dispute that Bandera Phase III's legal description is part of the abbreviated legal description included on the Covenants' recording block, with the tax parcel number for legal description also affixed to the recording block as the tax parcel number existed prior to Scofield Construction's platting Bandera into Tracts 8, 9, and 10. CP 019.

In any event, recording blocks are not part of the recorded document. They are required by RCW 65.04.045 for purposes of indexing the document with the applicable county land record, which land records in this case show Bandera Phase III is a part of Bandera. CP 352-356. RCW 65.04.050.

Because the Covenants are unambiguous and apply to Bandera Phase III, this Court should affirm the trial court's grant of summary judgment.

(b) Noche Vista unsuccessfully tries to wriggle free

Unable to directly address the language in paragraph 12.4 and paragraph 12.5 of the Covenants, Noche Vista strains to force an interpretation that addresses why Scofield Construction included Bandera

Phase III in the Covenants and in the Plat forming Bandera, other than its intent that the Covenants apply to Bandera Tract 10.

To try and wriggle free, but in direct conflict with the testimony of Christoffer J. Snapp of Scofield Construction that Scofield Construction intended the Covenants apply to Bander Phase III, Noche Vista speculates that Scofield Construction could have added Bandera Phase III as a “placeholder”, because it may have desired to avoid future disputes with an “Owner” who acquired a “Landholding” in Bandera Phase I or Phase II, if Scofield Construction later sought to add Bandera Phase III to Bandera, while at the same time develop Bandera Phase III inconsistent with the Covenants.

Noche Vista’s placeholder interpretation is strained and forced. It also ignores and/or makes superfluous the language stated in the whole text of the Covenants. In paragraphs 9.2 and 10.1 of the of the Covenants, Scofield Construction reserved declarant control over Bandera, including the right to add more property to Bandera or to modify development restrictions. CP 050-051. Since the Covenants already allowed the Declarant to add property to or modify development restrictions, Scofield

Construction had no need for Noche Vista's alleged "placeholder" for Bandera Phase III.

The Covenants' placeholder provision for Bear Mountain Ranch highlights Noche Vista's strained and forced interpretation. With paragraph 5.7 of the Covenants allowing possible "Future Development" of Bear Mountain Ranch inconsistent with the Covenants, Scofield Construction drafted its placeholder. It had the Covenants address possible future development inconsistent with Bandera's residential subdivision plan, and warned those buying a tract or a "Landholding" in Bandera of this possibility. While Scofield Corporation easily could have done so in its placeholder for Bear Mountain Ranch, Scofield Construction did not include a placeholder for Bandera Phase III. Instead, Scofield Construction limited its placeholder to Bear Mountain Ranch, writing:

5.7 Future Development. 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 045.

It is important to remember that Washington law prohibits Noche Vista from a forced and strained interpretation of the Covenants, and from offering an interpretation of words that the Covenants do not contain. Wilkinson v. Chiwawa Communities Ass'n, 180 Wn.2d at 249–51, 327 P.3d at 619. These rules of covenant interpretation prohibit Noche Vista's efforts on appeal to wriggle free. Noche Vista cannot speculate on Scofield Construction's intent, especially with the Covenants' unambiguous application to Bandera Phase III, and without extrinsic evidence to support its interpretation of what is written in the Covenants. Id.

As indicated above, this Court should only construe the extrinsic evidence of Scofield Construction's intent, if it finds the Covenants ambiguous on the issue of whether they apply to Bandera Phase III. Burton v. Douglas Cty., 65 Wn.2d 619, 399 P.2d 68 (1965). Although there is no need to review the extrinsic evidence due to the unambiguous language in paragraphs 12.4 and 12.5 cited above, the extrinsic evidence supports Bandera Phase III's inclusion into the Covenants and Bandera.

First, Scofield Construction included Bandera Phase III into the Covenants and Bandera's Plat. Had it desired that the Covenants exclude this property, Scofield Construction could have simply omitted the

reference to Bandera Phase III from the Covenants, the Plat, and from each of the Covenants' seven amendments. This is especially true because the Covenants' paragraph 10.1 gave Scofield Construction, and its successor declarants, the authority to add to Bandera any other real estate not set forth in the Covenants.

Second, despite including Bandera Phase III in the Covenants, Scofield Construction never stated in the Covenants, in the seven amendments thereto, or in Bandera's Plat, that Bandera Phase III was not subject to the Covenants and not part of Bandera. Rather, it included Bandera Phase III into each document, and provided for access and utility easements benefiting this property, along with the other tracts in the Bandera Subdivision.

Third, Christoffer J. Snapp, Jerry Scofield's son-in-law who assisted Scofield Construction with its development of Bandera, affirms that Mr. Scofield and Scofield Construction intended the Covenants apply to Bandera Phase III. Mr. Snapp testifies, "[i]t was Jerry Scofield and Scofield Corporation's intent that the Covenants include the Noche Vista Property [Bandera Phase III]. On many occasions, Mr. Scofield told me of his intent

that the Noche Vista Property was included in the Development [Bandera] and subject to the Covenants.” CP 302.

Fourth, the Seventh Amendment shows Scofield Construction’s intent, through its successors, Bear Mountain Ranch Holdings, LLC and B.M.R. Construction and Development, LLC, that the Covenants apply to Bandera Phase III. While still retaining declarant control and prior to Noche Vista accepting title to Tract 10, but with Noche Vista’s prior approval, these successor Declarants expressly reaffirmed the Covenants’ application to Bandera Phase III as they transferred control of Bandera to the Association and terminated declarant control.

Noche Vista also errs when it argues that the Covenants must be read strictly against the Association, or at least neutrally, and not in a manner to protect Bandera’s common residential development plan or scheme. Noche vista errs, because Washington law requires covenants be interpreted to find the drafter’s intent. Wilkinson, 180 Wn.2d at 250, 327 P.3d at 619. Here, Scofield Construction’s intent is clear. It directed at paragraph 12.1 of the Covenants that one read the Covenants liberally to protect Bandera’s common residential development plan. RCW 65.04.045. This provision reads:

12.1 Interpretation, Construction, and Enforcement. ... The provisions of the Declaration and the other Governing Documents must be liberally interpreted and construed to promote and effectuate the vision, intent and philosophy of the Declarant of the development, operation and maintenance of Bandera and Bear Mountain Ranch.

CP 053.

Washington law does not direct this Court to strictly construe the Covenants against the Association. While case law directs strict construction against a covenants' drafter, strict construction is not applicable when the dispute does not involve the covenants' drafter. Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 120 (2005). Here, there is no dispute that Scofield Construction drafted the Covenants and that Noche Vista's dispute is with the Homeowners' Association. CP 005.

As for Noche Vista's argument that the Washington State Supreme Court's ruling in Riss v. Angel requires this Court adopt a neutral construction of the Covenants, Noche Vista is again mistaken. Riss v. Angel's holds that courts are to construe covenants in favor of protecting Bandera's homeowners' expectations in the residential subdivisions' common plan or scheme. The Washington State Supreme Court explained that Washington law, like many other jurisdictions, no longer construes

covenants in favor of the free use of land, but favors protecting homeowners in residential subdivisions. It stated:

The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. **The court's goal is to ascertain and give effect to those purposes intended by the covenants. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances. (Citations omitted). The court will place special emphasis on arriving at an interpretation that protects the homeowners' collective interests.**

Riss v. Angel, 131 Wn.2d at 612, 623-624, 934 P.2d 669, 676 (1997) (emphasis added).

Noche Vista further errs when it claims that its dispute is not with homeowners and, therefore, the Supreme Court's holding in Riss v. Angel does not apply. The Bandera at Bear Mountain Ranch Homeowners Association is the representative body for Bandera's homeowners. RCW 64.38.020. It is charged with protecting Bandera's residential plan set forth in the Covenants and the amendments thereto. Id.; Riverview Cmty. Grp. v. Spencer & Livingston, 181 Wn.2d 888, 894, 337 P.3d 1076, 1079 (2014).

In further effort to wriggle free of the Covenants, Noche Vista asserts the mistaken premise that the Covenants' defined term for "Landholding" trumps all other provisions of the Covenants. In so arguing, Noche Vista ignores Washington law that requires courts construe covenants in their entirety and to avoid forced or strained reading. Wilkinson v. Chiwawa Communities Ass'n, 180 Wn.2d at 255, 327 P2d at 619. Noche Vista's offered interpretation would leave paragraphs 12.4 and 12.5 of the Covenants superfluous and is not in harmony with the Covenants' assessment payment provisions in paragraphs 7.1, 7.2, and 7.9. On the other hand, the Association's interpretation is inclusive and in harmony with all other Covenants. Its interpretation gives effect to all provisions, and is consistent with the Covenants' provisions for "Owner" "Assessments" payment in paragraphs 7.1, 7.2, and 7.9.

And, the Covenants' definition of "Landholding" is not any more specific than their definitions of "Bandera Phase III", "Owner", or "Assessments", all of which are to be read as a whole, giving effect to each definition. Id. The Covenants do not state or otherwise suggest there is one defined term more important than any other defined term, as Noche Vista wrongly claims. According to Washington law, this requires the Court

read each defined term in the context of the whole Covenants, and to not favor one defined term over another, and to do so favoring the interpretation that protects Bandera's homeowners. Id.

The fact the Covenants and the Plat allowed Bandera Phase III use of Bandera's road system and utility easements also defeats Noche Vista's forced interpretation. Unless Bandera Phase III is included in Bandera and part of the Covenants, Noche Vista cannot use Bandera's roads or utility easements. While Noche Vista seeks the benefit of Bandera (road use and utility easements), its forced and strained interpretation of the Covenants would excuse Noche Vista from the Covenants' burdens (development restrictions and future assessment obligations). Noche Vista cannot have it both ways. This fact is apparent, when one studies Noche Vista's argument for its right to use Bandera's roads. In so arguing, Noche Vista had to admit Bandera Phase III is subject to the Covenants. It states: "the roads identified as part of the Bandera Development were identified and platted in order to serve and provide access **to all real property located within the Bandera Development, including the Noche Vista Property.**" CP 368 (emphasis added).

Based on the foregoing, this Court should affirm the trial court and rule the Covenants apply to Bandera Phase III, as a matter of law.

2. Other grounds for summary judgment

While the trial court never had to reach these issues, if it so desired, this Court could rule the Seventh Amendment binding on Noche Vista and its property. The Court could reach this result because (a) the declarant rights to all of Bandera did not transfer to North Cascades National Bank (“NCNB”) when NCNB took title to Bandera Phase III; or (b) Noche Vista is precluded by the Doctrines of Estoppel and Laches from disputing the validity of the Seventh Amendment and the Covenants.

(a) Continued declarant control

Contrary to Noche Vista’s claim, the law distinguishes title in a tract of real property located in a development from the development rights for that development. Development rights and title are divisible. They are not automatically tied together. One can sell a tract of property in a residential development and retain the right to develop the remainder of that development. W. Main Assocs. v. City of Bellevue, 106 Wn.2d 47, 50 (1986); R.D. Merrill Co. v. State, Pollution Control Hearings Bd., 137 Wn.2d 118, 124 (1999); Howard v. Murray, 184 So. 3d 1155, 1164–66 (Fla. Dist.

Ct. App. 2015) (“development rights do not pass automatically with the conveyance of the fee interest”); Keith v. Mountain Resorts Dev., L.L.C., 337 P.3d 213, 227 (Utah 2014) (“Land development rights, which are a conditional right granted and controlled by the county government, are not included as a matter of law in a deed’s general terms of conveyance giving a grantee the ‘rights and privileges belonging’ to a piece of real property.”).

While undisputed that Bear Mountain Ranch Holdings, LLC, a successor to Scofield Corporation, transferred title to Bandera Phase III to NCNB in lieu of foreclosure, there is no evidence suggesting it and B.M.R. Construction and Development, LLC also transferred to NCNB their development rights for the Bandera subdivision. CP 377. Rather, NCNB took title subject to the Covenants and the successor declarants’ development rights reserved therein until Bear Mountain Ranch Holdings and B.M.R. Construction and Development, LLC each transferred control of Bandera to the Association on April 13, 2013 in the Seventh Amendment. CP 381-383, 306-320.

The Covenants expressly state that the Declarant's development rights for all of Bandera only transfer upon the express assignment of those rights to a successor declarant. Paragraph 12. 13 of the Covenants read:

12.13 Declarant's Successor. For the purpose of this Declaration and the easements, dedications, rights, privileges and reservations set forth herein, a successor and assign of Declarant is deemed a successor Declarant and assign only to the extent specifically designated by Declarant and only with respect to the particular rights and interests specifically designated.

CP 055.

Scofield Construction and its successor declarants never terminated the Declarant's development rights to the Bandera Subdivision prior to the recording of the Seventh Amendment. The Association never received from Scofield Construction or its successor declarants written notice of development rights termination, as required by paragraph 1.11 of the Covenants. CP 329.

Because Bear Mountain Ranch Holdings, LLC and B.M.R. Construction and Development, LLC retained their declarant rights per the Covenants, their execution of the Seventh Amendment binds Noche Vista and its property.

(b) Estoppel and laches

Estoppel: There is no dispute that Noche Vista sought the recording of the Seventh Amendment, accepted title to Bandera Phase III on April 15, 2013 after knowing of the recording of the Seventh Amendment on April 12, 2013, stated its belief the Covenants and each amendment thereto applied to Bandera Phase III, and promised the Association Noche Vista would adhere to the Covenants. These undisputed facts satisfy the elements for estoppel: (1) an admission, statement, or act, inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party arising from permitting the first party to contradict or repudiate such admission, statement, or act. Concerned Land Owners of Union Hill v. King Cty., 64 Wn. App. 768, 777, 827 P.2d 1017, 1022 (1992).

Satisfying element 1, Noche Vista promised to adhere to the Covenants and its amendments before buying Bandera Phase III. It participated in, encouraged, and sought the recording of the Seventh Amendment, accepting the Amendment's terms before closing on its acquisition of Bandera Phase III.

As to element 2, the Association acted on Noche Vista's above statement or action. After the recording of the Seventh Amendment, the Association permitted Noche Vista to use Bandera's road system, cost free. CP 330-331.

Satisfying element 3, Noche Vista sued the Association to contradict or repudiate Noche Vista's prior statements, admissions, and action. If Noche Vista is permitted to do so, the Association will suffer injury. Had the Association known in 2013 that Noche Vista would later materially change its position on the Covenants' application in 2018, the Association could have had NCNB also sign the Seventh Amendment or taken other action to remove Noche Vista's argument that the Seventh Amendment and the Covenants are invalid. Or, the Association could have charged Noche Vista to use Bandera's road system or, if needed, it could have precluded Noche Vista's use.

More importantly, the Association's members acquired lots in Bandera and built homes on those lots believing Bandera Phase III is subject to the Covenants. If Noche Vista removes Bandera Phase III from Bandera and/or develops its land inconsistent with Bandera's Covenants,

Bandera's common development plan would be damaged, injuring the Association and its members. CP 325-326, 329-331.

Based on the foregoing, the Association respectfully requests this Court find estoppel applies to bar Noche Vista's declaratory judgment action, as a matter of law.

Laches: Laches also bars Noche Vista's declaratory judgment claim. It applies when there has been inexcusable delay in commencing an action that causes prejudice to the defendant. Clark Cty. Pub. Util. Dist. No. 1 v. Wilkinson, 139 Wn.2d 840, 848 (2000).

Here, Noche Vista delayed, without excuse, until February 1, 2018 to bring this declaratory judgment action, despite having acquired title to Bandera Phase III about five (5) years prior on April 15, 2013. CP 001-008, 377.

Noche Vista's delay has prejudiced the Association. Its delay allowed Noche Vista to use Bandera's road system for free since April 15, 2013. And, had the Association known of Noche Vista's position prior to 2018, it could have had NCNB also sign the Seventh Amendment to reaffirm the Covenants' application, take other steps to address Noche Vista's current arguments, or denied Noche Vista access to Bandera's road

system. Noche Vista's delay also prevents the Association from securing Jerry Scofield's testimony as to his intent that the Covenants apply, due to Mr. Scofield's passing on January 11, 2014.

The Association respectfully requests this Court rule that the Doctrine of Laches bars Noche Vista's declaratory judgment action, as a matter of law.

3. Trial court did not err when disregarding Declarations of Robert Yount and Keith Tower

This Court reviews the trial court's decision not to consider Noche Vista's declarations submitted with its reconsideration motions to see if the trial court's rulings were manifestly unreasonable or based on untenable grounds. Martini v. Post, 178 Wn. App. 153, 161, 313 P.3d 473, 478 (2013).

Chelan County Superior Court acted reasonably and on tenable grounds when it declined Noche Vista's offered declaration testimony from Robert Yount and Keith Tower. Mr. Yount and Mr. Tower offered facts immaterial to the question before the trial court and now on appeal – whether the Bandera Covenants apply to Bandera Phase III.

Mr. Yount merely testifies that Jerry Scofield liked to keep his development options open. CP 703-707. Mr. Tower testifies that in 2005,

and prior to Mr. Scofield recording the Covenants in 2006, he told Mr. Scofield that Bandera Phase III could accommodate a septic drain field for 194 bedrooms. Thereafter, Mr. Scofield recorded the Covenants. CP 708-724.

4. Association entitled to legal fees and costs

Pursuant to the Covenants, RCW 4.84.330, and RAP 18.1, the Association requests an award of attorneys' fees and costs against Noche Vista on appeal.

The Covenants allow for fees and costs when the Association enforces the Covenants. The Covenants' Attorney Fees Clause reads:

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.

RCW 4.84.330 reads, in relevant part:

In any action on a contract ... where such contract ... specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract ..., the prevailing party ... shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements ...

RAP 18.1 reads, in part, as follows:

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses ...

This is the section of the Association's opening brief requesting fees and expenses under RAP 18.1.

Washington law states that a court must award attorneys' fees to the prevailing party when required by a contract. Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 654 P.2d 712 (1982). This includes when the contract takes the form of covenants. Riss v. Angel, 131 Wn.2d at 633, 934 P.2d at 681. And, "[a] contractual provision for an award attorney fees at trial supports an award of attorney fees on appeal". Reeves v. McClain, 56 Wn. App. 301, 311, 783 P.2d 606, 611 (1989).

Because the Covenants apply to and are enforceable against Noche Vista and Bandera Phase III, so too is the Covenants' Attorneys' Fees Clause. It provides that a party is entitled to attorneys' fees when, the "party employs legal counsel to enforce any covenant ...". CP 055.

Here, the Association employed Ogden Murphy Wallace, P.L.L.C. to enforce the Covenants against Noche Vista's declaratory judgment action brought to try and wriggle free from the Covenants and the Association's right to enforce the same. CP 001-008.

If the Association prevails on appeal, it will have successfully enforced the Covenants against Noche Vista's continued efforts to wriggle free. Pursuant to RAP 18.1, this Court should award the Association its legal fees and costs on appeal.

5. Noche Vista not entitled to legal fees and costs

Washington law does not allow Noche Vista an award of legal fees and costs, unless Noche Vista first prevails on its declaratory judgment action. RCW 4.84.330. Noche Vista has not so prevailed and is not entitled to legal fees and costs on appeal. RAP 18.1.

E. CONCLUSION

The Association respectfully requests this Court affirm Chelan County Superior Court's Order granting the Association summary judgment and the trial court's award of legal fees and costs to the Association. It also respectfully requests that this Court award the Association fees and costs on appeal.

RESPECTFULLY SUBMITTED this 9th day of September, 2019.

Respectfully submitted,

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DECLARATION OF SERVICE

On the 9th day of September, 2019, I electronically served a true and accurate copy of the ***Brief of Respondent Bandera at Bear Mountain Ranch Homeowners Association*** in Court of Appeals, Division III, Cause No. 36677-4-III upon the following:

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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 that the foregoing is true and correct.

Dated September 9, 2019, a Wenatchee, Washington.



Aaron J. Harris

OGDEN MURPHY & WALLACE PLLC

September 09, 2019 - 3:09 PM

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