

59211-4

59211-4

81873-8

Appellate Case No. 59211-4

COURT OF APPEALS,
DIVISION I OF THE STATE OF WASHINGTON

SANDRA LAKE,

Appellant

v.

WOODCREEK HOMEOWNERS ASSOCIATION,
a Washington homeowners association;
and GLEN R. CLAUSING, a single man,

Respondent.

APPELLANT'S REVISED OPENING BRIEF

Marianne K. Jones, WSBA #21034
Mona K. McPhee, WSBA #30305
JONES LAW GROUP, P.L.L.C.
11819 NE 34th Street
Bellevue, WA 98005
(425) 576-8899
Co-counsel for Appellant

Christopher Brain, WSBA #5054
TOUSLEY BRAIN STEPHENS
1700 7th Ave, Ste 2200
Seattle, WA 98101-4416
(206) 682-5600
Co-counsel for Appellant

2007 APR 13 PM 3:14

FILED
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

TABLE OF CONTENTS

	Page
I. Assignments of Error/Issues Pertaining to Assignments of Error	1
A. Assignments of Error	1
B. Issues Pertaining to Assignments of Error	1
II. Statement of the Case	4
A. Statement of Facts	4
B. Statement of Procedure	7
III. Summary of Argument	12
IV. Argument	11
A. Standards of Review	14
B. The board's approval and Mr. Clausing's construction of a bonus room were unlawful and prohibited because statutory law and the Woodcreek declaration do not authorize the board's approval.	14
i. The addition of Mr. Clausing's Bonus Room violated state law and the Woodcreek Declaration by creating new common area and increasing the common expenses and obligations of all Woodcreek homeowners without the required unanimous consent of all homeowners.	16
ii. The Woodcreek Declaration <u>only</u> authorizes the addition of a Bonus Room by a "purchaser" and Mr. Clausing is not a "purchaser" under the Declaration.	27

iii.	The Board and Mr. Clausing acted outside the authority of the Woodcreek Declaration by converting common area to limited common area for Mr. Clausing's exclusive use.	30
C.	The restrictions of the Woodcreek declaration are on title and run with the land, and cannot be changed without unanimous approval of the homeowners.	34
D.	The trial court abused its discretion by permitting Woodcreek to dramatically amend its answer while cross motions for summary judgment were pending.	39
i.	Ms. Lake should have been afforded the opportunity to conduct discovery prior to summary judgment when Woodcreek changed its position on liability.	39
ii.	Woodcreek should not have been permitted to retract admissions made in its original Answer.	41
iii.	Ms. Lake was prejudiced by Woodcreek's amendment of its Answer.	42
E.	The trial court erred when it ordered an award of attorney fees and costs to Defendant Glen Clausing against Plaintiff Sandra Lake.	46
F.	Ms. Lake requests an award of attorney fees and costs on appeal.	48
V.	Conclusion	48
VI.	Appendices	

TABLE OF AUTHORITIES

		Page
<i>Statutes</i>	RCW 64.32 <i>et seq</i>	12
	RCW 64.32.010(1)	18
	RCW 64.32.080	21, 22, 23, 24
	RCW 64.34.360(3)	21
	RCW 64.34.455	46, 47, 48
	RCW 65.08.070	37
<i>Court Rules</i>	CR 11	41
	CR 15(a)	42
	CR 56(f)	40, 41
<i>Case Law</i>	<i>Bogomolov v. Lake Villas Condominium Association</i> , 131 Wn.App. 353, 127 P.3d 762 (2006)	20, 32, 33, 48
	<i>Caruso v. Local 690, Int'l Bhd. of Teamsters</i> , 100 Wn.2d 343, 670 P.2d 240 (1983)	14, 42
	<i>City of Olympia v. Palzer</i> , 107 Wn.2d 225, 728 P.2d 135 (1986)	36
	<i>Chimney Hill Owners' Ass'n v. Antignani</i> , 136 Vt. 446, 392 A.2d 423 (1978)	36

<i>Del Guzzi Construction Co. v. Global Northwest</i> , 105 Wn.2d 878, 719 P.2d 120 (1986)	24, 41
<i>Dickson v. Kates</i> , 132 Wn.App. 724, 133 P.3d 498 (2006)	37
<i>Eagle Point Condominium Owners Association v. Coy</i> , 102 Wn.App. 697, 9 P.3d 898 (2000)	14, 46, 47
<i>Eaton v. General Compressed Air & Vacuum Machinery Co.</i> , 62 Wn. 373, 113 P. 1091 (1911)	45
<i>Frankland v. Lake Oswego</i> , 267 Or. 452, 417 P.2d 1042 (1973)	36
<i>Fry v. O'Leary</i> , 141, Wash. 465, 252 P. 111 (1927)	31
<i>Green v. Normandy Park</i> , 2007 Wn.App. LEXIS 171 (Wash. Ct. App. Feb 5, 2007)	35, 36
<i>Hearst Commc'ns, Inc. v. Seattle Times</i> , 154 Wn.2d 493, 115 P.3d 262 (2005)	28
<i>Hollis v. Garwall</i> , 137 Wn.2d 683, 974 P.2d 836 (1999)	28
<i>Keller v. Sixty-01 Associates of Apartment Owners</i> , 127 Wn.App. 614, 112 P.3d 544 (2005)	14, 20, 21, 22
<i>Lakes at Mercer Island Homeowners Ass'n v. Witrak</i> , 61 Wn.App. 177, 810 P.2d 27 (1991)	37
<i>Lutz v. Longview</i> , 83 Wn.2d 566, 520 P.2d 1374 (1974)	36

<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	47
<i>McDonald v. State Farm</i> , 119 Wn.2d 724, 837 P.2d 1000 (1992)	14
<i>Ridgway v. City of Osceola</i> , 139 Iowa 590, 111 N.W. 974 (1908)	31
<i>Riss v. Angel</i> , 131 Wn.2d 612, 934 P.2d 669 (1997)	36, 37
<i>United States v. Causby</i> , 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206, 1946 U.S. LEXIS 3008	31
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316 (1999)	42
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982)	14

Other Authority

6 P. Rohan, <i>Home Owner Associations and Planned Unit Developments</i> § 8.01 (1986)	36
Restatement (3 rd) of Property, <i>Servitudes</i> , § 1.5, comment a (2000)	37
Restatement (3 rd) of Property, <i>Servitudes</i> , § 4.1 (2000)	37
Restatement (3 rd) of Property: <i>Servitudes</i> , § 5.1 (2000)	37

I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignments Of Error

1. The trial court erred when it granted Defendants Glen Clausing and Woodcreek Homeowners Association summary judgment and dismissed Plaintiff Sandra Lake's claims.

2. The trial court erred when it permitted Defendant Woodcreek Homeowners Association to amend its Answer, which Plaintiff Sandra Lake relied on for her motion for summary judgment, one week before holding a joint hearing on Ms. Lake's, Mr. Clausing's, and Woodcreek Homeowners Association's motions for summary judgment.

3. The trial court erred when it ordered an award of attorney fees and costs to Defendant Glen Clausing against Plaintiff Sandra Lake.

B. Issues Pertaining To Assignments Of Error

1. Whether the board's approval and Mr. Clausing's construction of a bonus room were unlawful and prohibited because statutory law and the Woodcreek declaration do not authorize the board's approval. (Assignment of Error No. 1) The standard of review for this issue is de novo.

(a) Whether the addition of Mr. Clausing's Bonus Room violated state law and the Woodcreek Declaration by

creating new common area and increasing the common expenses and obligations of all Woodcreek homeowners without the required unanimous consent of all homeowners. (Assignment of Error No. 1) The standard of review for this issue is de novo.

(b) Whether the Woodcreek Declaration only authorizes the addition of a Bonus Room by a “purchaser” and Mr. Clausing is prohibited from adding a bonus room because he is not a “purchaser” under the Declaration. (Assignment of Error No. 1) The standard of review for this issue is de novo.

(c) Whether the Board and Mr. Clausing acted outside the authority of the Woodcreek Declaration by converting common area to limited common area for Mr. Clausing’s exclusive use. (Assignment of Error No. 1) The standard of review for this issue is de novo.

2. Whether the restrictions of the Woodcreek declaration are on title and run with the land, and cannot be changed without unanimous approval of the homeowners. (Assignment of Error No. 1) The standard of review for this issue is de novo.

3. Whether the trial court abused its discretion by permitting Woodcreek to dramatically amend its answer while cross motions for

summary judgment were pending. (Assignment of Error No. 2) The standard of review for this issue is abuse of discretion.

(a) Whether Ms. Lake should have been afforded the opportunity to conduct discovery prior to summary judgment when Woodcreek changed its position on liability. (Assignment of Error No. 2) The standard of review for this issue is abuse of discretion.

(b) Whether Woodcreek should not have been permitted to retract admissions made in its original Answer. (Assignment of Error No. 2) The standard of review for this issue is abuse of discretion.

(c) Whether Ms. Lake was prejudiced by Woodcreek's amendment of its Answer. (Assignment of Error No. 2) The standard of review for this issue is abuse of discretion.

4. Whether the trial court erred when it ordered an award of attorney fees and costs to Defendant Glen Clausing against Plaintiff Sandra Lake. (Assignment of Error No. 3) The standard of review for this issue is abuse of discretion.

II. STATEMENT OF THE CASE

A. Statement Of Facts

Appellant Sandra Lake owns a condominium and lives at the Woodcreek townhouse condominiums in Bellevue, Washington. (CP 76.) Her two-story end unit had territorial views and natural light. (CP 843; *see also* CP 838, 844, 845.) She previously owned and lived in another unit within the Woodcreek condominiums, and she purchased her current unit in 1996 to take advantage of the light and views. (*See* CP 430-34, 826, 844, 845.) These amenities are important to her lifestyle and her work as an artist. (*See* CP 840, 843-44, 845.)

In July 2004, Respondent Glen Clausing, an attorney who lives in a one-story unit in a neighboring condominium building across a pathway from Ms. Lake's unit, began construction of a second story addition that blocked Ms. Lake's light and view. (*See* CP 77-78, 839, 840, 843-44, 845.) Instead of a view, she now looks out on a two-story uninterrupted wall that significantly reduces the light entering her home. (CP 838, 839, 840.) Mr. Clausing built this second story after the Board of Directors of Respondent Woodcreek Homeowners Association peremptorily reviewed his request to build without any investigation, inquiry, or notice to Ms.

Lake of its intent to consider Mr. Clausing's request.¹ (CP 6, 26.) The second story addition is referred to as a "bonus room". (See CP 386.)

Between 1972 and 1976 the Woodcreek condominiums were built over three phases. (CP 205-09, 279-80, 344, 386.) The development consists of 33 buildings with varying styles of units in each building, four units in most buildings, and a total of 150 units. (See CP 277, 342, 385.) Both single story and two story units exist in the same buildings. (CP 277, 385.) A recreation facility with a swimming pool, clubhouse, and tennis courts is available for all units to enjoy. (See CP 281, 387.) All unit owners are members of the Woodcreek Homeowners Association with voting powers and common expense obligations. (CP 283, 387-88.)

Woodcreek Homeowners Associates, the original owners of the property, recorded the original Declaration for the Woodcreek condominiums in 1972. (CP 218-88.) Subsequent amendments to the Declaration were recorded in 1973, 1974, and 1976 at the completion of each of three phases of the development, (CP 273-362, 341-64, 383-93),

¹ Mr. Clausing submitted his request for approval of construction of a bonus room to the Board on May 19, 2004 and the Board considered and approved the request the next day. (CP 5, 6, 26, 27.)

with a further amendment recorded in 1977, (CP 395-96).² The Woodcreek Declaration governs the homeowners' rights and responsibilities as required by the Horizontal Regimes Property Act, RCW 64.32 et seq.

Both Ms. Lake and Mr. Clausing have lived in Woodcreek for almost 20 years. (CP 76, 428-36.) Mr. Clausing has represented the Board and Homeowners Association since 1992. (CP 552-60.) On May 19, 2004, Mr. Clausing submitted a request for approval from the Board to add a "Bonus Room" to his unit. (*See* CP 5, 6, 15, 16, 26, 27, 54.) The Board considered and approved Mr. Clausing's request at a regular meeting on May 20, 2004 **the day after** Mr. Clausing submitted the request. (*See id.*) No reasonable notice to the membership or Ms. Lake of the Clausing request or the Board's consideration was given. (*See* CP 7, 17.) On July 10, 2004, Ms. Lake received notice of the Board's approval of Mr. Clausing's Bonus Room and the pending construction. (CP 77.) Construction began within the next day or so. (CP 77; *see also* CP 835.) Ms. Lake immediately attempted to contact the President of the Board and she voiced her objections to two other Board members. Her objections

² Additional amendments revising portions of the Declaration were recorded in 1987 and 1992. The content of those amendments is not relevant; they are provided in the clerk's papers at 398-405.

were to Mr. Clausing's right to construct the Bonus Room and to the disturbances and noise caused by the construction. (CP 77; *see also* CP 836.) She also contacted the Association manager, Bob Coffey, about her objections. (CP 836.)

Ms. Lake attended the next Board meeting on July 15, 2004 and raised her objections to the Board's actions. Notice of Ms. Lake's objections was given to Mr. Clausing who was present at that Board meeting. (CP 77, 58-60, 837.) The Board responded that their decision was justified and proper. (CP 77; *see also* CP 63, 837, 843.)

Mr. Clausing's Bonus Room was completed in the Fall of 2004. (CP 125; *see also* CP 6, 27.) The addition added approximately 458 square feet to his unit. (*See* CP 78, 438.) The Bonus Room created a solid wall from the ground to the second floor roof in place of Ms. Lake's former territorial views of a mountain, tree tops, and sky from her family room, office, front door, and hall window, and blocked much of the natural light Ms. Lake enjoyed. (CP 838, 839, 840, 843-44, 845.)

B. Statement Of Procedure

Ms. Lake filed this action against Woodcreek and Mr. Clausing on December 5, 2005. (CP 1-10.) Woodcreek filed its Answer to Complaint and Crossclaim against Mr. Clausing on or about May 5, 2006. (CP 13-

23.) At that time Woodcreek was represented by Kris J. Sundberg. (CP 11-12.) In its Answer, Woodcreek admitted many material facts and actions supporting Ms. Lake's claim of liability and motion for summary judgment, including:

- Action other than mere Board approval was necessary and should have been taken but for defendant's reliance upon the actions and advice of its attorney, Mr. Clausing, (CP 7-9, 18-19);
- On May 19, 2004, Mr. Clausing made a request in writing to the Woodcreek Homeowners Association to add a bonus room to this unit, (CP 5, 15);
- In his written request, Mr. Clausing specifically stated that his proposed bonus room would have no impact on his adjacent neighbors. He also stated: "The bonus room will not impact any views presently enjoyed by adjoining units and those in close proximity . . . The views from the windows in the unit in the next building to the north (unit 108) are not across the location of the proposed bonus room", (CP 5, 16);
- No independent investigation was conducted prior to approval of Mr. Clausing's application. Rather, defendant Woodcreek relied upon its attorney, Mr. Clausing, to protect its interests and to make sure that all proper considerations were given and procedures followed, (id.);
- The bonus room was approved by the Board on May 20, 2004, (CP 6, 16);
- Homeowner dues for common area maintenance were adjusted without unanimous consent of the owners, (CP 6, 17).

In addition, Woodcreek did not assert any affirmative defenses to Ms. Lake's claims, but did include a Crossclaim against Mr. Clausing asserting (i) a conflict of interest, (ii) misrepresentation or inadequate

representation by Mr. Clausing to the Board as to the true nature of his request, (iii) that his request was not consistent with Woodcreek's governing documents nor consistent with governing law, (iv) that Mr. Clausing should have advised Woodcreek to seek independent counsel because he represented the Board and Woodcreek, (v) that Mr. Clausing violated his duty to Woodcreek by placing his own personal interest above those of the Association, and (vi) that "by constructing the Bonus Room and converting common area of the condominium into private space for his exclusive personal use, Mr. Clausing wrongfully partitioned the common areas of the condominium and/or ejected his fellow owners, as tenants in common, from the common areas." (CP 13-23.) Woodcreek sought the remedy of removal of the Bonus Room, restoration of common areas, and indemnification for any liability awarded against Woodcreek in favor of Ms. Lake. (Id.) Shortly after filing Woodcreek's Answer on May 24, 2006, Mr. Sundberg filed a notice of withdrawal from representation of Woodcreek. Marion Morgenstern substituted as counsel for Woodcreek on approximately June 22, 2006.³ (CP 32-33.)

³ Mr. Sundberg and Ms. Morgenstern signed the notice of withdrawal and substitution on the same day Woodcreek filed its Answer, May 24, 2006. (CP 32-33.)

On June 15, 2006, Mr. Clausing filed his Answer and Affirmative Defenses to Ms. Lake's Complaint, and asserted a Counterclaim against Ms. Lake and a Cross Complaint against Woodcreek. (CP 24-31.) Woodcreek answered Mr. Clausing's Cross Complaint on June 26, 2006, with a general denial and asserted the affirmative defenses that Mr. Clausing failed to state a claim, Mr. Clausing did not reasonably rely on Woodcreek's approval of his Bonus Room, and that Mr. Clausing failed to mitigate damages. (CP 38-39.) Ms. Lake generally denied Mr. Clausing's Counterclaim in her Reply filed on June 22, 2006. (CP 34-37.)

On June 29, 2006, the parties conferred and submitted a Confirmation of Joinder representing to the court that all necessary parties had been joined, and all claims and defenses had been raised. (CP 43-45.)

On September 13, 2006, in reliance on the parties' representation that all of the necessary claims and defenses had been raised, and on Woodcreek's admissions, Ms. Lake filed a motion for summary judgment on the issue of liability set for hearing on October 11, 2006. (CP 46-75.)

On September 19, 2006, Marion Morgenstern filed a notice of intent to withdraw as counsel for Woodcreek. (CP 79-80.) Her withdrawal became effective on September 29, 2006. (Id.) Scott M. Barbara substituted as counsel. (CP 86-87.)

Mr. Clausing moved to continue the summary judgment hearing and to consolidate his cross-motion for summary judgment to be heard at the same time as Ms. Lake's motion. (CP 820-21.) The trial court granted Mr. Clausing's motion and continued the hearing to November 22, 2006. (Id.)

On October 5, 2006, Mr. Clausing filed a combined response to Ms. Lake's motion for summary judgment and his own Cross-Motion for summary judgment dismissal of Ms. Lake's claims and Woodcreek's cross claims. (CP 101-123.) Despite its admissions, Woodcreek joined in Mr. Clausing's cross-motion for summary judgment against Ms. Lake.⁴ (CP 664-65.)

On November 1, 2006, after Ms. Lake and Mr. Clausing had both filed their summary judgment motions, and Woodcreek had joined in Mr. Clausing's motion,⁵ Woodcreek moved to amend its Answer to Ms. Lake's Complaint. (CP 617-637.) Woodcreek's proposed amendment retracted admissions, changed factual allegations in its counter-claim, changed the relief sought, and added six affirmative defenses not initially pled against Ms. Lake. (Id.; *see also* CP 13-23.) Ms. Lake objected to

⁴ Woodcreek filed a joinder with Mr. Clausing's cross-motion for summary judgment against Ms. Lake on October 25, 2006 and filed the same document again on November 8, 2006. (CP 664.)

Woodcreek's proposed amendment on the grounds that she would suffer extreme prejudice from Woodcreek's retraction of admissions and change of position at a time that summary judgment motions on liability were pending. (CP 638-650.)

On November 16, 2006, one week before the scheduled hearing on summary judgment, the trial court granted Woodcreek's motion to amend its Answer. (CP 720-722.) Woodcreek filed its Amended Answer on or about November 20, 2006. (CP 807-819.)

The hearing on Mr. Clausing's and Woodcreek's cross-motions for summary judgment took place on November 22, 2006. (CP 777-781.) The court granted Mr. Clausing's motion for summary judgment dismissal of Ms. Lake's claims, and Woodcreek's oral motion for voluntarily nonsuit of its claims against Mr. Clausing following the court's ruling on Mr. Clausing's motion. (CP 777-781.)

III. SUMMARY OF ARGUMENT

The Woodcreek condominium Declaration and the Horizontal Property Regimes Act, RCW 64.32 et seq., govern the rights and obligations of homeowners at Woodcreek. The approval by the Woodcreek Board of Directors and the construction of a "Bonus Room"

⁵ See footnote 4.

added to Mr. Clausing's unit were acts outside the authority granted by statute and the Woodcreek Declaration and harmed Ms. Lake's rights. Authority for approval and construction of a Bonus Room does not exist in this case because (i) the addition of the Bonus Room created new common area and reserved common area for Mr. Clausing's exclusive use thereby changing the undivided percentage interest each homeowner has in the property without following the procedure mandated by statute and the Declaration; (ii) Mr. Clausing is not a "purchaser" under the Declaration who is permitted to add a Bonus Room; and (iii) the addition of the Bonus Room unlawfully changed title to property. As a result, the trial court erred in granting summary judgment to Woodcreek Homeowners Association and Mr. Clausing and dismissing Ms. Lake's claims. Furthermore, Ms. Lake was prejudiced when the trial court permitted Woodcreek Homeowners Association to amend its Answer, withdraw admissions, and change its position on liability one week before the summary judgment hearing. Ms. Lake also challenges the trial court's award of attorney fees and costs to Mr. Clausing; and she requests attorney fees and costs on appeal.

IV. ARGUMENT

A. Standards Of Review

Review of summary judgment is de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate “where the pleadings, depositions, affidavits and admissions on file show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.” *Keller v. Sixty-01 Associates of Apartment Owners*, 127 Wn. App. 614, 622, 112 P.3d 544 (2005) (internal quotation marks and citation omitted). The facts and all reasonable inferences are viewed in a light most favorable to the non-moving party, here the Appellant. *Id.*

A trial court’s order permitting amendment of a pleading is reviewed for manifest abuse of discretion or a failure to exercise discretion. *McDonald v. State Farm*, 119 Wn.2d 724, 737, 837 P.2d 1000 (1992); *see also Del Guzzi Construction Co. v. Global Northwest*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986), *quoting Caruso v. Local 690, Int’l Bhd. of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983).

When an award of attorney fees is challenged the reviewing court must examine whether the trial court abused its discretion. *Eagle Point*

Condominium Owners Association v. Coy, 102 Wn. App. 697, 715, 9 P.3d 898 (2000).

The Board's Approval And Mr. Clausing's Construction Of A Bonus Room Were Unlawful And Prohibited Because Statutory Law And The Woodcreek Declaration Do Not Authorize The Board's Approval.

The trial court erred in granting Mr. Clausing's and Woodcreek Homeowners Association's ("Woodcreek") summary judgment motions because the Woodcreek Declaration does not provide the Board of Directors for Woodcreek ("Board") with authority to approve the addition of a Bonus Room because (i) Mr. Clausing's Bonus Room created new common area placing additional common maintenance and repair obligations on all unit owners thereby necessarily changing the undivided percentage interest each owner has in the common areas which may only be done by unanimous consent of all the homeowners, (ii) a Bonus Room may not be added by anyone other than a "purchaser" at the time of construction of the condominiums, and (iii) Mr. Clausing's Bonus Room converted a portion of the common area into exclusive, interior apartment use.

- i. **The addition of Mr. Clausing's Bonus Room violated state law and the Woodcreek Declaration by creating new common area and increasing the common expenses and obligations of all Woodcreek homeowners without the required unanimous consent of all homeowners.**

The Clausing Bonus Room addition created both new common area for the benefit and burden of the condominium owners by adding new structural elements and converted common area into limited common area by enclosing the air space above the garage and reserving it for Mr. Clausing's exclusive use. The construction was approved by the Board. State law and the Woodcreek Declaration governing common area and expenses at Woodcreek prohibit Mr. Clausing's addition and the Board's approval without unanimous approval of all unit owners. The trial court therefore erred in granting Mr. Clausing's and Woodcreek's motion for summary judgment dismissing Sandra Lake's claim.

Common area is defined at Section 5 of the 1973 amendment of the Woodcreek Declaration, in part, as

... those areas ... as defined by the Act (RCW, Chapter 64.32) and all areas not expressly described as part of the individual residence apartments or as limited common areas ... and include, but are not limited to the following: ... B. The roofs, walls, foundations, studding, joists, beams, supports, main walls (excluding only non-bearing interim partitions of apartments, if any), pipes, conduits and wire wherever they may be located whether in partitions or otherwise, and all other structural parts of the buildings to the interior surfaces of the apartments' perimeter walls, floors, ceilings, windows and doors; that is to the boundaries as defined in the Act, in RCW 64.32.010(1).

(CP 282-83.) The Declaration distinguishes “common area” from “limited common area” and specifically states in Section 7(B) of the 1973 amendment that “the foundations, columns, girders, beams, supports, walls and roofs shall be considered common areas for the purpose of repair or replacement.” (CP 284 (excluding these items from the definition of “limited common area”).) Accordingly, by definition the entire exterior, structure, wall, siding, and roof of Mr. Clausing’s Bonus Room constitute newly created common area that, pursuant to Sections 13 (E) and (F) and 15 of the 1973 amended Declaration, the entire association is required and obligated to maintain, and, pursuant to Sections 6 and 15 of the 1973 amended Declaration, each member is assessed a common area maintenance fee therefor. (CP 283, 290-91, 294.)

Section 13(E) and (F) of the 1973 amended Declaration states,

The Board for the benefit of the condominium and the owners shall enforce the provisions of this Declaration and of the By-Laws and shall acquire and shall pay out of the common expense fund hereinafter provided for, all goods and services requisite for the proper functioning of the condominium ... E. Painting, maintenance, repair and all landscaping and gardening work for the common area ... F. Any other materials, supplies, labor, services, maintenance, repairs, structural alterations ... which the Board is required to secure by law or which in its opinion shall be necessary or proper for the operation of the common area ...

(CP 290-91.)

Section 6 of the 1973 amended Declaration states, in part,

Each such owner shall pay in addition to all assessments and other charges as herein provided, such dues and assessments as shall be from time to time fixed by the said Woodcreek Apartment Owners Association.

(CP 283.)

And, Section 15 of the 1973 amended Declaration states,

All apartment owners are obligated to pay monthly assessments imposed by the Association of Apartment Owners to meet all common expenses of the property

(CP 294.)

The interior or exclusive area of an apartment is also distinct from common area. “The boundaries of an apartment located in a building are the interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof, and the apartment includes both the portions of the building so described and the air space so encompassed.” RCW 64.32.010(1); *see* Appendix 3. The boundaries of individual apartments are likewise defined by the 1976 amended Declaration in Section 4, as, “the interior surfaces of the perimeter walls [sic] floors, ceilings, windows and doors thereof.” (CP 385-86.) Each unit is also particularly described by height elevation and square footage in the recorded Woodcreek Declaration. (CP 279, 301-18, 343, 347-59, 386.) All of the area outside an individual apartment is either common area or limited common area. (CP 282-83.)

By definition, Mr. Clausing's Bonus Room created new common area including new and additional exterior walls, joists, beams, supports, pipes, conduits, and roof. (*See generally* CP 159-60, 438.) Prior to construction, these new structural common area items did not exist. There is no provision in the Declaration granting authority to the Board to authorize the creation of new common area. (*See generally* CP 218-66, 273-326, 341-64, 383-93.)

Common area is distinguished from limited common area and individual apartment units for the purpose of allocating the assessment for common expenses in accordance with Section 15 of the 1973 amended Declaration (quoted above) and Article IV, Section 2 of the Bylaws. Article IV, Section 2 of the Bylaws reads,

Approval of the budget shall constitute *assessment of that amount against each apartment unit, proportionate to the percentage of undivided interest set forth in the Declaration*, as then amended. Each month of the year covered by the annual budget, each unit owner shall pay as his respective monthly assessment for the common expenses one-twelfth his proportionate share of the common expenses for such year as shown by the annual budget; such proportionate share for each unit owner shall be established by a reasonable formula to allocate a portion of such expense to each unit owner....

(CP 413 (emphasis added).)

Section 5 of the 1976 amended Declaration explains the basis for each unit's undivided percentage interest. It states,

Attached hereto ... is a listing of the undivided percentage interest of each residence apartment unit by phase within the 150 apartment unit development together with a statement of each unit's value ... *The values placed upon the residence apartment units* and the values placed on each phase by the original Declaration and this Certificate of Amendment thereto have not been altered in any respect and *are made solely for the purpose of determining each apartment owner's undivided percentage interest in said condominium development* and said value shall not be construed to be a limitation or restriction on the sales price.

(CP 386-87 (emphasis added).)

In this case, the addition of a Bonus Room created new common area and necessarily changed the obligation to maintain common areas, which results in a change in the value and percentage of undivided interest in the common area of each and every condominium unit owner. *See Bogomolov v. Lake Villas Condominium Association*, 131 Wn. App. 353, 355-57, 127 P.3d 762 (2006); *Keller v. Sixty-01 Associates of Apartment Owners*, 127 Wn. App. 614, 623-24, 112 P.3d 544 (2005). Because Sections 6 and 15 of the 1973 amended Declaration and Article IV, Section 2 of the Bylaws impose assessments on unit owners for maintenance and repair of common area and those assessments are based on each owner's undivided percentage interest, the addition of common area that must be maintained through assessments necessarily changes each owner's undivided percentage interest.

The court in *Keller* stated explicitly that common area and common expenses are **necessarily linked** to the undivided percentage interest each owner has in the property for condominiums governed by RCW 64.32.080 of the Horizontal Property Regimes Act (“HPRA”). *Keller*, 127 Wn. App. at 623-24. RCW 64.32.080 continues to govern a condominium when a Declaration has not been amended to supplant that governing statute with RCW 62.34.060(3). *Id.* There is no evidence in the record that Woodcreek ever amended its Declaration to adopt the provisions of RCW 62.34.360(3).⁶ The relevant provisions of HPRA, the Woodcreek Declaration and the Bylaws that link common expenses and the percentage of undivided interest continue to govern, and specifically state that a unanimous vote of all owners is required to change a percentage of ownership for payment of common area expenses.

⁶ The court in *Keller* examined whether an amendment to the Declaration approved by less than 100 percent of the homeowners to adopt RCW 64.34.360(3), effectively decoupling the link between common expenses and the percentage of undivided interest, satisfied the requirements of the Horizontal Property Regimes Act (HPRA) and the Declaration. The court concluded that an amendment to the Declaration was required to adopt RCW 64.34.360(3) and, in the case before it, the approval of the amendment was effective. *Keller*, 127 Wn. App. 614; *see also* Appendix 3 for text of RCW 64.34.360(3).

RCW 64.32.080 states, “[T]he common expenses [of the property] shall be charged to, the apartment owners according to the percentage of undivided interest in the common areas and facilities.” As stated by the *Keller* court, under RCW 64.32.080 “the percentage of undivided interest and common expenses [are] linked – one [can] not be changed without the other being changed as well.” *Keller*, 127 Wn. App. at 623.

Compliance with RCW 64.32.080 may be set out in the governing documents of a condominium through requirements that monthly assessments for common expenses be assessed in proportion to the homeowner’s percentage of common interest in the common areas. *See id.* The Woodcreek Declaration and Bylaws lay out these requirements primarily in Sections 13 (E) and (F) and 15 of the 1973 amended Declaration and in Article IV, Section 2 of the Bylaws (all quoted above). (CP 290-91, 294, 413; *see also* CP 283 (Section 6 of the 1973 amended Declaration) (providing that each owner is a member of the Woodcreek Apartment Owners Association and is required to pay all assessments), 386-87 (Section 5 of the 1976 amended Declaration).)

The building of a Bonus Room created new common area and new common expenses. The increase in common expenses necessarily obligates Mr. Clausing to pay a higher percentage of the common area

expenses which, because the total of all ownership interests must equal 100%, has a corresponding decrease on the percentage of undivided interest each other homeowner has in the property, including Ms. Lake's interest.

Furthermore, the Board has acknowledged the creation of additional common area and the burden imposed for additional maintenance. However, instead of following the Declaration mandate that percentage interests be changed to allocate the additional burden, the Board unilaterally decided to simply charge a surcharge to Mr. Clausing for his Bonus Room. As explained above, RCW 64.32.080 and the relevant provisions of the Woodcreek Declaration and Bylaws require that monthly assessments against owners be directly linked to the percentage of undivided interest. As of September 1, 2004, the Board increased Mr. Clausing's monthly assessment **as a direct result of the addition of his Bonus Room.** (CP 194; *see also* CP 157.) His dues were raised to be in accord with the amount assessed against other J-style units with bonus rooms. (CP 194.)

Therefore, the Board has acknowledged that construction of additional common area for the exclusive use of one owner necessarily obligates that owner (here, Mr. Clausing) to pay a higher percentage of the

common area expenses. However, the Board is not authorized to informally raise Mr. Clausing's share of such expenses. In fact, by failing to formally change Mr. Clausing's, and all owners', undivided percentage interest, the raise in the amount assessed to Mr. Clausing is not of record to the public, including potential new owners. This failure circumvents the purpose of recording a Declaration, which is to give notice to the public of the value and burdens of property.

The obligation to pay common area expenses is directly tied to the undivided percentage of ownership by the Declaration, Section 15 of the 1973 amendment, Bylaws, Article IV, Section 2, and by statute, RCW 64.32.080. If Mr. Clausing's percentage obligation for payment changes, the automatic effect is a change of percentage interest for all other owners. Therefore, the percentage of undivided interest must be formally changed, but to do so requires a unanimous vote of all owners. (*See* CP 298.)

There is no authority in the Woodcreek Declaration for the Board alone to informally increase the burden of common expenses by approving the creation of common area or change the percentage of undivided interest the owners have in the property. (*See* CP 218-66, 273-326, 341-64, 383-93.) The **only** procedure that could permit the creation of new common area, and therefore new common expenses, or change the

percentage of undivided interest is set forth in paragraph 19 of the 1973 amendment to the Declaration. Paragraph 19 provides the procedures for amending the Declaration and states:

19. AMENDMENT TO DECLARATION: This Declaration may be amended consistent with the laws of 1963, Chapter 156 (RCW 64.32) upon securing the written consent of sixty (60) percent of the apartment owners; provided, however, that *any amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require unanimous written consent of all apartment owners except as provided in paragraph 6 above.*⁷

The amendment shall be reduced to writing and shall contain the certificate of the Directors that the requisite number of apartment owners have consented thereto as set forth above, and shall be acknowledged by the Directors. Such an amendment shall become effective upon the recording of such Certificate of Amendment with the Auditor of King County, Washington.”

(CP 298 (emphasis added).) This procedure was not followed.

Accordingly, the Board was not authorized to approve the construction of additional common area assigned to the exclusive use of one owner without a unanimous vote of all owners approving the reallocation of relative common area undivided ownership.

Before the trial court, Mr. Clausen claimed that his Bonus Room falls under the Section 12 of the 1973 amended Declaration section governing subdivision and combining of units. Section 12 states,

⁷ Paragraph 6 refers to membership in the association and transfer of ownership. (CP 283.)

... no subdivision or combination of any apartment unit or units or of the common area or facilities or limited common areas or facilities may be accomplished except by authorization by the affirmative vote of 51% of the voting power of the owners of the apartment units at a meeting called upon written notice which notice shall contain a general description of the proposed action and the time and place of the meeting....

(CP 289.) This section does not apply in this case because it neither authorizes the creation of new common area nor permissively allows the combination of any apartment unit with common area for the exclusive use of an owner. Such an interpretation completely contradicts Section 19 of the 1973 amended Declaration requiring unanimous written consent.

Likewise, both Mr. Clausing and the Board have attempted to treat the addition of a bonus room to a unit as the equivalent of a minor modification such as installation of a skylight or window planter box. Unlike a bonus room, these are not structural changes. A bonus room creates new common area that imposes new and additional common expenses on all unit owners. A minor modification, such as a skylight, does not create the same obligation. Section 17 of the 1973 amended Declaration states:

An apartment owner shall not make **structural modifications** or alterations **in** his apartment unit or installations located **therein** without previously notifying the Association of Apartment Owners in writing ... through the President of the Board....

(CP 296 (emphasis added).) The Declaration language that permits modifications to units limits modifications to those **in** or **within** the unit.

It does not permit modifications that create new common area.

- ii. **The Woodcreek Declaration only authorizes the addition of a Bonus Room by a “purchaser” and Mr. Clausing is not a “purchaser” under the Declaration.**

The Board also acted outside the authority granted by the Woodcreek Declaration when it approved the construction of Mr. Clausing’s Bonus Room because Mr. Clausing was not a “purchaser” at the time he made his request or built his Bonus Room. The Declaration makes it clear that the condominium units were built by a developer who offered to add a bonus room at the time of construction if the **purchaser** so chose. Section 4 of the 1976 amendment states,

In addition there is designed in the plans for Type L M [sic] units a room designated as the “bonus room”. At the option of the **purchaser** the floor plans for Types L and M Units will include an additional area to be situated directly above the car garage area which is incorporated within the basic structure of the apartment unit. The bonus room will consist of one of four alternate floor plans and will increase the square footage of said units by approximately 416 square feet.

(CP 386 (emphasis added).)⁸ The Declaration specifically states whether or not any particular unit has a bonus room. (*See e.g.* CP 395-96.) At the time Phase 3 of the development was handed over by the builder to the

association in 1977 (Mr. Clausing and Ms. Lake's units are part of Phase 3), Mr. Clausing's unit did not have a bonus room. (CP 375.) The language in the Declaration makes a critical distinction between "owner" and "purchaser" with respect to bonus rooms. Only "purchasers" are permitted to add a bonus room. Throughout the Declaration there are references to "owners" and their rights, interests, and obligations. (*See generally* CP 218-66, 273-326, 341-64, 383-93.) However, nowhere does the right to later add a bonus room inure to an "owner."

Pursuant to the unambiguous language of the Declaration, only a "purchaser" may elect to add a bonus room at the time of acquisition. (*See* CP 386.) Variance in the usage of these two terms is significant because condominium declarations are governed by the rules of contract interpretation, *see Hollis v. Garwall*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999), and each of the terms carries its own ordinary, usual, and popular meaning. *See Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005) (words in a declaration are given their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent).

⁸ J-style units, like Mr. Clausing's, fall within this language pursuant to the 1977 amended Declaration. (CP 395.)

The use of “purchaser” rather than “owner” means that permission to add the construction of a bonus room to a unit is limited to a “purchaser.” The “purchaser,” in the ordinary and usual use of the word in the context of the paragraph, is the party who is buying the unit and in the process of doing so elects to add the bonus room to the purchase prior to the transaction closing, the room being built, and the common area ownership interests vesting. Whereas the “owner” is the person who may have been a purchaser at one point, but who later owns the unit after the unit is built.

These interpretations of the terms “purchaser” and “owner” are further supported by the fact that a “purchaser” can negotiate for the bonus room with the developer/declarant, and is not constrained by the Declaration until the unit sale is closed when the values and undivided percentage interests are assigned to the unit. (*See* CP 223 (Section 4 of the 1972 original Declaration).) Once the transaction closes, the “purchaser” becomes an “owner” and is at all times subject to the terms of the Declaration.

At the time Mr. Clausing elected to add a bonus room, he was not a “purchaser.” Mr. Clausing purchased Unit 109 in September 1985 and the final relevant amendment to the Declaration was recorded in 1977. (CP

185, 428-29; 395-96.) Therefore, even when he did purchase Unit 109 he was not a “purchaser” under the Declaration. Even so, Mr. Clausing submitted his request to approve construction of a bonus room to the Board in May 2004. (CP 5, 6, 26, 27, 54.) By that time, Mr. Clausing had owned the unit for almost 19 years. Under either circumstance, Mr. Clausing cannot qualify as a “purchaser,” as defined by the Declaration. (CP 386.)

iii. The Board and Mr. Clausing acted outside the authority of the Woodcreek Declaration by converting common area to limited common area for Mr. Clausing’s exclusive use.

The air space where Mr. Clausing built his Bonus Room, above his garage, was common area before the Board permitted him to appropriate that space for his exclusive use. Section 5 of the 1973 amended Woodcreek Declaration defines everything and every space that is not limited common area or within the boundaries of the apartment as common area:

The common areas and facilities shall be ... all areas not expressly described as part of the individual apartments or as limited common areas or the property of the Association of Apartment Owners, and include, but are not limited to the following: ... E. All other parts of the property necessary or convenient to its existence, maintenance, safety and use not otherwise classified.

(CP 282-83.)

Courts have recognized the value of air and light involving the vacation of streets and alleys or portions thereof. In *Fry v. O'Leary*, 141 Wn. 465, 469, 252 P. 111 (1927), the court stated: "We think it is also clear, under the uniform weight of authority, that one who is an abutting property owner upon a street or alley, any portion or the whole of which is sought to be vacated, has the special right and a vested interest in the right to use the whole of the street for ingress and egress, light, view and air, and if any damages are suffered by such an owner, compensation is recoverable therefore. It follows, therefore, that if appellants' light, air, view or access is materially diminished, as alleged in the complaint, they are entitled to have the same passed upon by a jury regularly impaneled to determine the amount thereof." Citing *Ridgway v. City of Osceola*, 139 Iowa 590, 117 N.W. 974 (1908).

In *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), the United States supreme court said: "It is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining

land. The landowner owns at least as much of the space **above the ground** as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense -- by the erection of buildings and the like -- is not material.” (Emphasis added)

Just as Mr. Clausing’s former roof was common area maintained by the community so was the air space above his former roofline. As common area, the air space was the property of all unit owners including Ms. Lake as part of the community. In particular, Ms. Lake utilized that space by viewing the trees and mountains, which were unobstructed prior to Mr. Clausing’s construction of the bonus room. (CP 838, 839, 840, 843-44, 845.) Authorizing the conversion of that airspace to exclusive use by Mr. Clausing denies Ms. Lake use of the open common area that she had enjoyed for years.

By approving Mr. Clausing’s Bonus Room the Board effectively reserved exclusive rights in the common area over the garage to Mr. Clausing and permitted the creation of new limited common area. *See Bogomolov v. Lake Villas Condominium Association*, 131 Wn. App. 353, 370, 127 P.3d 762 (2006) (construction on common area that limits the use of common area and reserves exclusive rights to the common area to specific owners converts the common area to limited common area).

Section 9(E) of the 1973 amended Woodcreek Declaration states, “The limited common areas and facilities are for the sole and exclusive use of the residence apartments for which they are reserved.” (CP 287.) However, the Declaration does not authorize the creation of new limited common area or limited common area that is not within the more specific definition set out in the Declaration. (See CP 283-84, 287; see generally CP 273-326.) Limited common area, defined at Section 7 in the 1973 amended Declaration, includes only the patio and garden area for each unit, “original improvements on limited garden areas such as fences, gates and sidewalks of the patio areas and entrance areas”, the attic “space between the ceiling ... and the roof of the residence apartment”, crawl space under the unit, the entrance area, and the driveway parking area. (CP 283-284.) Reserving exclusive use in the new common area above his original roofline to Mr. Clausing changes the value of his unit and the percentages of undivided interest in the property for all units. See *Bogomolov*, 131 Wn. App. at 371. Again, a change in the value and percentage of undivided interest requires a unanimous amendment to the Declaration pursuant to Section 19 of the 1973 amended Declaration. (CP 298.) This step was not taken, common area in air space was converted, and Ms. Lake was harmed by this conversion.

C. The Restrictions Of The Woodcreek Declaration Are On Title And Run With The Land, And Cannot Be Changed Without Unanimous Approval Of The Homeowners.

The Woodcreek Declaration is recorded and included on the title of each and every homeowner within the Woodcreek Homeowners Association by incorporating the Certificate of Amendment to the Woodcreek Declaration (also referred to in this brief, as appropriate, as, e.g. the 1973 amended Declaration or the 1976 amended Declaration) that incorporates each specific phase. (See CP 388-89, 429.) The relevant Certificate of Amendment for Mr. Clausing's unit is the 1976 amended Declaration incorporating Phase 3 of the development. In Mr. Clausing's deed conveying title the 1976 amended Declaration incorporates by reference the Survey Map and Plans that were filed under receiving no. 7683100585. (CP 429; *see also* CP 389; *see generally* CP 383-93.) In addition, Section 7 of the 1976 amended Declaration designates that:

[T]his Certificate of Amendment together with the Survey Maps and Plans referred to herein, ... state the covenants, conditions, and restrictions effecting a common plan for the condominium development mutually beneficial to all of the described apartments, and that the covenants, conditions and restrictions and plan as now existing or hereafter amended, are binding upon each such apartment as a parcel of realty, and upon its owners or possessors and their heirs ... without requirement of further specific interest or inclusion in deeds, contracts, or security instruments....

(CP 388.)

Mr. Clausing's unit 109 is a J-style unit. (CP 369, 375.) The Survey Map and Plans specifically delineate the square footage of the J-style units and the bonus rooms and include height restrictions. (See CP 369-70.) The Survey Map and Plans were later amended on or about November 7, 1977 under receiving number 7711080802. (CP 372-76.) That amendment lays out which of the apartments were assigned bonus rooms, including Ms. Lake's unit number 108; however, Mr. Clausing's unit, number 109, was not included in this designation. (CP 375.) On the contrary, the amendment states that Mr. Clausing's apartment was not applicable for a second floor and his ceiling peak was restricted to an elevation of 297.38 inches. (Id.) These restrictions, which are found in the Survey Maps and Plans, run with the land. (CP 388.)

The Woodcreek Declaration is similar to restrictive covenants on title. Restrictions, or covenants, are in place for the benefit of all who are restricted by them. *Green v. Normandy Park*, 2007 Wash. App. LEXIS 171 (Wash. Ct. App. Feb. 5, 2007). The Woodcreek Declaration restrictions on title should be enforced because restrictions, or covenants, tend to enhance the efficient use of land and its value. The value of maintaining the character of the neighborhood in which the burdened land is located is a value shared by the owners of the other properties burdened

by the same covenants. *Riss v. Angel*, 131 Wn.2d 612, 622-24, 934 P.2d 669 (1997); *see also Chimney Hill Owners' Ass'n v. Antignani*, 136 Vt. 446, 392 A.2d 423 (1978) (covenants are imposed as part of a common plan of development to benefit all of the grantees of the developer). The ability of homeowners in a development, like Woodcreek, to enforce covenants against original and subsequent property owners helps ensure that the community will be able to maintain its planned character and provide the lifestyle sought by its residents in making their homes there. *See generally* 6 P. Rohan, *Home Owner Associations and Planned Unit Developments* § 8.01 (1986). The objectives of a development, like Woodcreek, include a more efficient and desirable use of open land, and flexibility and variety in the physical development pattern, in order to provide a more desirable living environment than would be possible through a strict application of zoning ordinance requirements. *Lutz v. Longview*, 83 Wn.2d 566, 568, 520 P.2d 1374 (1974); *see also City of Olympia v. Palzer*, 107 Wn.2d 225, 728 P.2d 135 (1986); *Frankland v. Lake Oswego*, 267 Or. 452, 417 P.2d 1042 (1973).

Restrictive covenants are interpreted to give effect to the intention of the parties to an agreement incorporating covenants and to carry out the purpose for which the covenants are created. *Green*, 2007 Wash. App.

LEXIS 171 at 23, *citing Riss*, 131 Wn.2d at 621 and Restatement (3rd) of Property, *Servitudes*, § 4.1 (2000). The purpose of those establishing the covenants is the relevant intent. *Riss*, 131 Wn.2d at 621. Special emphasis must be placed “on arriving at an interpretation that protects the homeowners' collective interests.” *Riss*, 131 Wn.2d at 624, quoting *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 181, 810 P.2d 27 (1991).

Here, the Woodcreek Declaration states in the heading of section 7 of the 1976 amended Declaration that the covenants contained therein are intended to “run with the land.” (CP 388-89.) This means that the benefit or burden created in the land passes automatically to successors to the benefited or burdened estates. *See* Restatement (3rd) of Property: *Servitudes*, § 5.1 (2000); *see also* Restatement (3rd) of Property: *Servitudes*, § 1.5, comment a (2000). The Declaration also states exact height specifications and unit style. (CP 375-76.) These specifications run with the land and are restrictions on the Woodcreek property for the benefit and burden of all of the homeowners who live there. *See Dickson v. Kates*, 132 Wn. App. 724, 737, 133 P.3d 498 (2006) *citing* RCW 65.08.070; *see* Appendix 3 for text. The “covenants running with the land” contained within the Declaration are real covenants that Mr.

Clausing is bound by and Ms. Lake should be able to rely upon. The Declaration being recorded puts both Mr. Clausing and Ms. Lake on notice of the final construction of the units, whether it has a bonus room, the exact square footage of each unit, whether it has a second story, the exact ceiling height, and the ceiling peak. (CP 375-76.)

The description of Mr. Clausing's unit as a single story, with a 284.39 inch first floor ceiling height, with a ceiling peak of 297.38 inches, (CP 375), and 1922 square feet, (CP 376), is what is recorded on title. In fact, it is on every Woodcreek homeowner's title and it is binding upon each unit as a parcel of realty without regard to further specific inclusion in deeds. By allowing Mr. Clausing's Bonus Room to be constructed, which increased the unit ceiling height, the ceiling peak, the square footage and made the unit two stories, Mr. Clausing and the Board acted in direct contradiction with what the title report describes for each of the 150 Woodcreek units. To do so the title must be changed and the restrictions and covenants on title were not changed. Section 19 of the 1973 amended Declaration requires a unanimous consent of the homeowners to amend these designations. (CP 298.) The records show that the Board recognized a necessity to increase Mr. Clausing's percentage of undivided interest by increasing his dues. (CP 194; *see also* CP 157.) With no

official change to the title and with the Board only informally requiring an increase in his dues, Mr. Clausing is restricted by the title on the property from constructing a Bonus Room and Ms. Lake has the right on title to expect a Bonus Room will not be built. The title restrictions and rights of Ms. Lake and the other homeowners outweigh any informal action by the Board.

D. The Trial Court Abused Its Discretion By Permitting Woodcreek To Dramatically Amend Its Answer While Cross Motions For Summary Judgment Were Pending.

The trial court abused its discretion by permitting Woodcreek to amend its Answer while cross-motions for summary judgment were pending.

- i. Ms. Lake should have been afforded the opportunity to conduct discovery prior to summary judgment when Woodcreek changed its position on liability.**

Woodcreek filed its Answer on May 4, 2006. (CP 13-23.) After Ms. Lake filed her motion for summary judgment on the issue of liability on September 13, 2006, Woodcreek filed a motion to amend its Answer on November 1, 2006. (CP 617-637.) The trial court considered Woodcreek's motion to amend on November 16, 2006, prior to the hearing on cross motions for summary judgment scheduled for November 22, 2006. (CP 720-722; 777-781.) At the time Woodcreek filed its motion to

amend, the facts of the case had not changed, the law had not changed, the Woodcreek Declaration had not changed, and two attorneys representing Woodcreek had made representations to Ms. Lake's counsel that Woodcreek agreed with the primary underlying claim of liability made by Ms. Lake. Based upon all of these events and the timing of Woodcreek's reversal of position, Ms. Lake was prejudiced and the trial court abused its discretion.

CR 56(f) permits a court to refuse a motion for summary judgment or order a continuance to accommodate additional discovery when a party opposing the motion, for reasons stated, cannot "present by affidavit facts essential to justify his opposition...." It was not possible for Ms. Lake to fully respond to Woodcreek's argument in support of its motion to amend its Answer or to fully respond to Clausing's or Woodcreek's motions for summary judgment. In support of its motion to amend Woodcreek relied on a declaration from Larry Wilson claiming that first one attorney representing Woodcreek and then a second either failed to obtain Woodcreek's approval of the filed Answer or failed to amend the Answer upon Woodcreek's direction. (CP 618-619, 804-06.) Mr. Wilson's declaration contradicted representations made beginning in early April 2006 and continuing at least through August 2006 by Woodcreek's first

two attorneys to Ms. Lake's counsel and to the court through the Confirmation of Joinder. (CP 651-52; 43-45.)

Despite these contradictions, Ms. Lake was not permitted to conduct discovery to clarify the circumstances under which Woodcreek's original Answer was filed. Ms. Lake should have been afforded the opportunity to discover facts related to Woodcreek's amended claims, and the trial court abused its discretion by allowing Woodcreek to amend its Answer, without permitting Ms. Lake to conduct additional discovery, which resulted in an untimely and unfair amendment to the pleadings during the pendency of motions for summary judgment. CR 56(f); *see also Del Guzzi Construction Co. v. Global Northwest*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986) (a denial to amend pleadings was upheld where the trial court was protecting parties from untimely and unfair amendments).

ii. Woodcreek should not have been permitted to retract admissions made in its original Answer.

Woodcreek sought to retract its admissions on the basis that the original Answer was not verified. However, if a party's attorney signs a pleading, then verification not required. CR 11 states,

Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name.... [Certain petitions, not relevant here,]

shall be verified. **Other pleadings need not, but may be, verified or accompanied by affidavit.** The signature of a party or of an attorney constitutes a certificate by the party or attorney

(Emphasis added.) No evidence has been presented that Woodcreek's first attorney, Mr. Sundberg, was other than competent in the relevant area of law. Mr. Sundberg was competent to sign the Answer originally filed by Woodcreek and verification of the pleading by Woodcreek itself was not required. Furthermore, Woodcreek's second attorney, Marion Morgenstern, who also represented the homeowner's association in the *Bogomolov v. Lake Villas* case, did not move to amend the Answer either. By permitting Woodcreek to retract admissions made in its Answer, the trial court abused its discretion.

iii. Ms. Lake was prejudiced by Woodcreek's amendment of its Answer.

Civil Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." CR 15(a). However, leave should be denied where amendment would result in prejudice to the opposing party. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). "The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party." *Id.* citing *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 350, 670 P.2d 240 (1983). The trial court abused its discretion because Ms. Lake was prejudiced and justice was not

served by permitting Woodcreek to retract previous admissions, change its position entirely, change factual allegations, and include new affirmative defenses after all pleadings had been filed, a Confirmation of Joinder had been submitted, and cross motions for summary judgment had been filed.

Prior to Woodcreek's motion to amend its Answer this case had been litigated for seven month in reliance on Woodcreek's original Answer, on representations it made through its first two attorneys, and on Woodcreek's participation in filing the Confirmation of Joinder. (CP 651-52.) In early April 2006 Woodcreek's attorney admitted to Ms. Lake's counsel that the Board acted improperly and was required by law to take additional action prior to approving the construction of a Bonus Room in Mr. Clausing's unit. (CP 652.) Woodcreek reaffirmed its position and made specific admissions to the parties and to the court by filing its Answer on May 4, 2006 and by filing the Confirmation of Joinder, in cooperation with all parties, on June 29, 2006. (CP 13-23, 43-45.) Until Woodcreek joined in Clausing's Motion for Summary Judgment against Ms. Lake, Woodcreek gave no indication that its position was any other than that represented to Ms. Lake and the trial court through its statements, Answer, and participation in filing the Confirmation of Joinder. (CP 664-665.)

Ms. Lake was prejudiced by the filing of an Amended Answer because Woodcreek was permitted to change its position on liability and retract admissions. Below are two examples of retracted material admissions and changed allegations:

<u>Complaint Allegations</u>	<u>Original Answer & Counter-Claim</u>	<u>Amended Answer</u>
4.4 Defendants' approval of Defendant Clausing's request to add on a Bonus Room was unreasonable and arbitrary. (CP 7.)	27. Answering paragraph 4.4 of the Complaint, defendant Woodcreek admits that action other than mere Board approval was necessary and should have been taken but for defendant's reliance upon the actions and advice of its attorney, defendant Clausing. Save as admitted, defendant denies the remaining allegations. (CP 18.)	27. Paragraph 4.4 of the Complaint is denied. (CP 813.)
4.6 Pursuant to the Bylaws and Declaration, Defendant Woodcreek Homeowners' Association had an obligation to obtain the unanimous consent of all unit owners prior to approving Defendants Clausing's request to increase the size of his apartment unit and amend the Declaration to change the ownership interest in the common areas and facilities. (CP 7.)	29. Answering paragraph 4.6 of the Complaint, defendant Woodcreek admits that action other than mere Board approval was necessary and should have been taken but for defendant's reliance upon the actions and advice of its attorney, defendant Clausing. Save as admitted, defendant denies the remaining allegations. (CP 18.)	29. Paragraph 4.6 of the Complaint is denied. (CP 814.)

The Amended Answer of Woodcreek permitted by the trial court stands out from the usual situation when courts freely give leave to amend pleadings because it completely retracts previous admissions and changes the factual situation the parties had been dealing with prior to the filing of the Amended Answer. The trial court should have denied Woodcreek's motion to amend. *See Eaton v. General Compressed Air & Vacuum Machinery Co.*, 62 Wn. 373, 375, 113 P. 1091 (1911) (court did not abuse its discretion by denying a defendant's motion to amend its Answer and change admissions to a cause of action to general denials during trial). The practical reality is that preparing for new defenses and claims a few months before trial may result in additional discovery and legal strategizing, but it does not change the basis for the litigation that all parties have been relying upon. Woodcreek retracted admissions made six months prior to its request for amendment and changed its position on liability that it held for seven months only days prior to consideration of cross-motions for summary judgment. The facts that guided the course of this litigation were, for all intents and purposes, changed by Woodcreek's amendment. That fact alone should have been sufficient proof of a fact issue precluding summary judgment but the trial court both allowed the amendment and granted summary judgment. As a result, Ms. Lake

suffered prejudice and the trial court abused its discretion when it allowed the amendment.

E. **The Trial Court Abused Its Discretion In Awarding Attorney Fees And Costs To Mr. Clausing.**

The trial court abused its discretion when it ordered attorney fees in favor of Mr. Clausing against Ms. Lake. (CP 990-92.)

Based on the briefing submitted by the parties to the trial court, it appears that the trial court relied on RCW 64.34.455 of the Condominium Act to award attorney fees to Mr. Clausing. RCW 64.34.455 states, “The court, in an appropriate case, may award reasonable attorney fees to the prevailing party.” The court must consider the purpose of this statute in determining whether it applies. *See Eagle Point*, 102 Wn. App. at 712. The purpose of RCW 64.34.455 “is to punish frivolous litigation and to encourage meritorious litigation.” *Id.* at 713. RCW 64.34.455 also “reflects a legislative purpose to ensure adequate representation for aggrieved purchasers of condominiums, and to encourage private action to enforce the act’s guarantees.” *Id.* (citations omitted). Application of RCW 64.34.455 is only appropriate when its purposes will be achieved. This is not an appropriate case for an award of attorney’s fees to Mr. Clausing because Mr. Clausing is not the party seeking to enforce the

statutory guarantees afforded to condominium owners⁹ and there was no finding by the trial court that Ms. Lake's suit was frivolous. Therefore, there was no basis for the trial court to award fees under RCW 64.34.455.

Finally, the court's order does not state the basis for the award or the method used to calculate the award.¹⁰ (Id.) To withstand appeal, an attorney fee award must be accompanied by findings of fact and conclusions of law to establish a record adequate for review. *Eagle Point*, 102 Wn. App. at 715, citing *Mahler v. Szucs*, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998). The trial court's order granting attorney fees lacks any indication of the basis for the award (e.g. statute or equitable basis) and fails to state the basis of its calculation for awarding \$30,000 to Mr. Clausing. (CP 990-92.) Without this information the appellate court can not adequately review whether the court abused its discretion in granting the award and the amount of the award. *See Eagle Point*, 102 Wn.App. at 715. Therefore, the order awarding attorney fees should be remanded to the trial court.

⁹ As the plaintiff, Ms. Lake would be the party seeking enforcement.

¹⁰ The trial court reduced the award of attorney fees sought by Mr. Clausing from \$57,286.25 to \$30,000. (CP 863, 990-92.) Ms. Lake maintains that attorney fees should not have been awarded. However, if it is concluded that fees must be awarded, Ms. Lake agrees in principle with the court's reduction of the fees. However, Ms. Lake acknowledges that it is not clear how or why the trial court reduced the fees and this lack of clarity calls for a remand to the trial court for a statement of reasoning behind the calculation.

F. **Ms. Lake Requests An Award of Attorney Fees and Costs On Appeal.**

Pursuant to RCW 64.34.455, Ms. Lake requests the appellate court award attorney fees and costs for bringing this appeal. Ms. Lake brought a meritorious case and seeks to enforce the statutory guarantees afforded condominium owners.

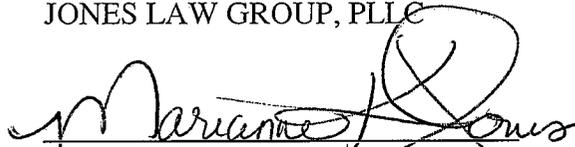
V. CONCLUSION

Mr. Clausing's Bonus Room was built unilaterally and without a unanimous vote to change the undivided percentage interest in the property that is required by the increase in the amount of common area that all of the homeowners, including Ms. Lake, are now responsible to paint, maintain, and replace. The Bonus Room was built in violation of the Woodcreek Declaration, which affords such option only to "purchasers". Construction of the Bonus Room converted common area air space previously enjoyed by Ms. Lake, which is a property right of hers and others in the community, into limited common area exclusively used by Mr. Clausing. The law does not allow such actions, and *Bogomolov v. Lake Villas* makes that clear. The Bonus Room was built in violation of the Declaration, which states the height of Mr. Clausing's roof, the type of unit without a bonus room, and the square footage of the unit, which is recorded on title and is part of Ms. Lake's title to her unit. The Board was

wrong in taking this action and the trial court erred in granting summary judgment and dismissing Ms. Lake's claims. Woodcreek initially admitted its action was wrongful. When Woodcreek's Answer was amended just prior to summary judgment it contained direct contradictions of previous admissions. Merely the subsequent denial of previously admitted facts proves that summary judgment was not proper. The summary judgment decision of the trial court must be reversed, the attorney's fees award vacated, and Ms. Lake should be granted her attorney's fees on appeal.

RESPECTFULLY RE-SUBMITTED this 12th day of April, 2007.

JONES LAW GROUP, PLLC

A handwritten signature in black ink, appearing to read "Marianne K. Jones", is written over a horizontal line.

MARIANNE K. JONES, WSBA #21034

MONA K. MCPHEE, WSBA #30305

and

TOUSLEY BRAIN STEPHENS PLLC

CHRISTOPHER BRAIN, WSBA #5054

Counsel for Appellant Sandra Lake

APPENDICES

1. *Chimney Hill Owners' Ass'n v. Antignani*, 136 Vt. 446, 392 A.2d 423 (1978)
2. *Frankland v. Lake Oswego*, 267 Or. 452, 417 P.2d 1042 (1973)
3. Text of RCW 64.32.010(1), RCW 62.34.060(3), RCW 65.08.070

Appendix 1

Service: **Get by LEXSEE®**
Citation: **136 Vt 446**

*136 Vt. 446, *; 392 A.2d 423, **;
1978 Vt. LEXIS 772, ****

Chimney Hill Owners' Association, Inc. v. Serafin R. Antignani and Gloria R. Antignani and
Chimney Hill Owners' Association, Inc. v. Eastern Woodworking Company and Chimney Hill
Owners' Association, Inc. v. Kenneth G. Keatinge and Margaret Keatinge

Nos. 264-77, 265-77, 268-77

Supreme Court of Vermont

136 Vt. 446; 392 A.2d 423; 1978 Vt. LEXIS 772

September 12, 1978, Opinion filed

PRIOR HISTORY: [*1]**

Actions for money due under covenant of lot owners to pay upkeep charge for common lands of development. District Court, Unit No. 6, Windham Circuit, *Carnahan*, Acting District Judge, presiding.

DISPOSITION: *Judgment for defendant Eastern Woodworking Company affirmed. Judgment reversed as to defendants Keatinge and Antignani, and cause remanded in each of these cases for computation of appropriate amount of assessment due and entry of judgment in favor of the plaintiff accordingly.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff homeowners' association brought an action to recover assessments allegedly due on lots owned by defendants, a company and two individuals, under a covenant to pay upkeep charge for common lands of development. The District Court, Unit No. 6, Windham Circuit (Vermont) entered judgment in favor of defendants and the association appealed.

OVERVIEW: The community was a recreational second home development in which defendants all held multiple lots. The development also had a large area that was "common land" and included a large clubhouse, swimming pools, tennis courts, and an underground private water system. The former corporate owner conveyed the development to the association. In the deed was a declaration of protective covenants which stated that an annual charge was assessed against each lot and paid to the grantor, its successors and assigns for the right to use the common lands, facilities, and services provided by the grantor, its successors, and assigns. The company owner's purchase agreement also stated that there would be one annual charge until one or more of the lots were improved. The court held that the deed expressly contemplated the possibility of a written release by separate agreement, and the purchase agreement did not contradict the deed. The company's defense based on the release was valid against the association. The court held however that the individual owners needed provide more substantial evidence to sustain a conclusion of waiver of the assessments on the association's behalf.

OUTCOME: The court affirmed the judgment in favor of the company, reversed the judgment as to the individuals, and remanded the cause for computation of appropriate amount of assessment due and entry of judgment in favor of the association.

CORE TERMS: covenant, common lands, deed, successors, common land, annual, assigns, sales agreement, common plan, grantor, common scheme, assignee, recreational, upkeep, right to collect, enforceable, singular, conveyed, binding, waived, notice, covenant to pay, strong evidence, unimproved, improved, assignor, grantee, negates, billed, touch

LexisNexis(R) Headnotes ♦ [Hide Headnotes](#)

[Contracts Law](#) > [Contract Conditions & Provisions](#) > [Waivers](#) > [General Overview](#) 

[Contracts Law](#) > [Types of Contracts](#) > [Covenants](#) 

HN1  A waiver is the intentional relinquishment or abandonment of a known right and may be evidenced by express words as well as by conduct. A waiver of a covenant may be made orally by the party for whose benefit it was inserted, even if the instrument containing the covenant requires a writing. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Contracts Law](#) > [Types of Contracts](#) > [Covenants](#) 

[Real Property Law](#) > [Restrictive Covenants](#) > [Covenants Running With Land](#) 

HN2  For a covenant to be enforceable as running with the land, four requirements must be met: a writing, intent, touch and concern, and notice. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

♦ [Hide Headnotes / Syllabus](#)

HEADNOTES: 1. Covenants--Common Lands or Places--Enforcement

Association of property owners in recreational second home development, which owned common land which owners of all lots were entitled to use, had ability to enforce the rights of its members in general in actions such as action for enforcement of covenant to pay assessments for upkeep of the common land, but existence of the rights depended on a common plan for the development of the area, and no common plan would be found where the association took the common land from corporation which had developed the area and sold the lots and the corporation had intended not to turn the land over to such an association, which suggested that intent of covenant to pay assessments, which corporation had also passed to the association, was to benefit the corporation, not the lot owners.

2. Covenants--Common Lands or Places--Enforcement

Where corporation which developed second home development deeded to property owners association the common land owned by the corporation, and assigned right to assessments against lot owners for upkeep of the common land, association could not enforce covenant by lot owners to pay the assessment, for there was no common plan for development where corporation had not intended to eventually turn the common land over to such an association, which suggested that intent of the covenant was to benefit the corporation, not the lot owners, and where purchase agreements contained provision that corporation and its successors could release payment of the assessment, which was strong evidence against a common plan.

3. Covenants--Common Lands or Places--Common Plan

The essence of a common plan in regard to restrictions and covenants among owners in a

building or recreational development is that the benefit and burden fall upon each lot in the development, and retention by the common grantor of a power to substantially alter the arrangement negates the reciprocity and mutuality necessary for a common plan to exist and is strong evidence against existence of an enforceable common plan.

4. Assignments--Obligor's Defenses

Assignee of right to collect payments due took the right subject to all defenses of obligor against assignor that were not acquired or set up in fraud of the rights of the assignee after notice was given of their existence.

5. Waiver--Generally

A waiver is the intentional relinquishment or abandonment of a known right and may be evidenced by express words as well as by conduct.

6. Covenants--Waiver

A waiver of a covenant may be made orally by the party for whose benefit it was inserted, even if the instrument containing the covenant requires a writing.

7. Covenants--Common Lands or Places--Upkeep Charges

Where assessment covenant of lot owners, for upkeep of common lands of second home recreational development, was for the benefit of corporation which built the development and owned the common lands and for the benefit of its successors, and corporation waived the assessment as to certain lots on a year by year basis, property owners association which took title to the common land and right to the assessments from corporation was entitled to enforce the assessments against the lots as to which there had been year by year waiver, as there had been no intentional permanent relinquishment by corporation of right to collect the assessment.

8. Covenants--Common Lands or Places--Upkeep Charges

Where agreement for sale of lots in recreational second home development contained covenant for annual charge per lot for upkeep of common lands and provided for right in grantor to terminate the charge on any lots, and the agreement for sale of eleven lots provided that only one annual charge would be made until one or more lots were improved, owner of the eleven lots was not liable for eleven charges to property owners association which took title to the common lands, and an assignment of right to the charges, from grantor.

9. Covenants--Release--Extinguishment

Where deed expressly contemplated possibility of written release from covenant by separate instrument, and sales agreement contained a release, it could not be successfully claimed that sales agreement was merged into the deed and that the release was extinguished because the deed did not contain it.

10. Covenants--Covenants Running With the Land--Elements

Person who took property benefited by a covenant could enforce the covenant only if it ran with the land, and to run with the land, a writing, intent, touch and concern, and notice, were required.

11. Covenants--Covenants Running With the Land--Particular Cases

Where deeds for lots in recreational second home development contained covenant for annual charge per lot for upkeep of common lands and the covenant was on record and the intent was to benefit grantor, who was the owner of the common lands, the covenant ran with the land and was enforceable by property owners association which took title to the common lands and an assignment of the right to the upkeep charges.

COUNSEL: *John S. Burgess*, Brattleboro, and *Keil & Freeman*, Springfield, for Plaintiff.

McCarty & Rifkin, Wilmington, for Defendants.

JUDGES: Barney, C.J., Daley, Larrow, Billings and Hill, JJ.

OPINION BY: HILL

OPINION: [*448] [**425] The plaintiff brought these actions to recover assessments allegedly due on lots owned by the defendants in Chimney Hill in Wilmington, Vermont. After a trial, findings of fact, conclusions and an order were filed by the district court awarding judgment to the defendants. The plaintiff appeals.

Chimney Hill is a recreational second home development begun in 1966 by Chimney Hill Corporation. The area consists of in excess of 900 lots. Most owners in the [***2] development have purchased only one lot; approximately 30 owners, however, including these defendants, hold multiple lots in Chimney Hill.

[*449] In addition to lots, Chimney Hill has a large area, between 300 and 500 acres, that is "common land." On this land, there is a large clubhouse, indoor and outdoor swimming pools, and three tennis courts. Also, the common land includes about 18 miles of roads and a complete underground private water system, which services the community. Chimney Hill Corporation owned and maintained the common land until 1975, when it was conveyed to the plaintiff.

A Declaration of Protective Covenants, Restrictions and Reservations pertaining to Chimney Hill was executed by Chimney Hill Corporation and recorded in the Town Clerk's office in Wilmington. The Declaration was included in each purchase and sales agreement and each deed executed for lots in Chimney Hill. Paragraph 10 of the Declaration is the focus of the dispute in these actions.

Paragraph 10 states that an annual charge shall be assessed against each lot in Chimney Hill and paid "to the grantor, its successors and assigns" for the right to use the common lands, facilities and services [***3] maintained and provided by the "grantor, its successors and assigns." The charge is made a debt collectible by suit in a court of competent jurisdiction and a lien on the lot conveyed until paid. Paragraph 10 further provides that acceptance of a deed bound by the Declaration shall be construed to be a covenant by the grantee, his heirs, successors and assigns to pay the charge to the grantor, its successors and assigns. Lastly, Paragraph 10(E) states:

That this charge shall run with and bind the land hereby conveyed, and shall be binding upon the grantee or grantees, his, her, their, or its heirs, executors, administrators, successors and assigns, until May 31, 1988, unless earlier terminated by written release of the grantor, its successors or assigns.

Defendant Eastern Woodworking Company (hereinafter Eastern) is the owner of 11 lots in Chimney Hill acquired in 1968 from the Chimney Hill Corporation. The purchase and sales agreement executed by Eastern contains the usual provisions and has the Declarations printed on the reverse side. Also, the agreement states: "There will be one annual charge . . . until one or more of the lots have been improved. . . ." **[*450]** **[***4]** The agreement was signed by a Mr. Cullen, then president of Chimney Hill Corporation.

Defendants Keatinge purchased three lots from the Chimney Hill Corporation in December, 1967. Defendants Antignani became the owners of two lots in 1969. Eastern, the Keatinges and Antignanis were each billed for only one assessment yearly by Chimney Hill Corporation during the period that Chimney Hill Corporation owned and maintained the common lands, facilities and services.

[426]** The plaintiff is an association of owners of property in Chimney Hill. On May 25, 1975, the plaintiff accepted a quitclaim deed from Chimney Hill Corporation that conveyed to the plaintiff the common lands and facilities of Chimney Hill. Also, Chimney Hill Corporation assigned the right to collect the assessments to the plaintiff, which again was accepted by the plaintiff on May 25, 1975. The plaintiff thus now owns and maintains the common lands and facilities of Chimney Hill. The trial court found that prior to receiving the quitclaim deed and the assignment the plaintiff "was aware that at least some owners of multiple lots paid only a singular assessment." Finally, in 1975, the plaintiff billed the Keatinges **[***5]** for three assessments, the Antignanis for two assessments, and Eastern for eleven assessments. Each of the defendants paid only a singular assessment, and these actions followed.

The trial court awarded judgment to all three defendants. The court concluded that Chimney Hill Corporation released Eastern from any obligation to pay on ten of its lots, as long as the lots remained unimproved, by virtue of the language in its sales agreement specifying one annual charge. Concerning all defendants, the court concluded that the Chimney Hill Corporation had waived all but singular assessments. This conclusion, the court stated, followed from the fact that Chimney Hill Corporation had never billed any of the defendants for more than one assessment, demonstrating a clear intent to waive multiple assessments. The court also noted Mr. Cullen's testimony that it was the corporate policy of Chimney Hill Corporation to bill every multiple lot owner for only one assessment. Finally, the court concluded that these defenses of release and waiver were available and binding on Chimney Hill Corporation's assignee, the plaintiff.

[*451] In these actions, the plaintiff urges a right to recover **[***6]** the assessments in three separate capacities. First, the plaintiff seeks a recovery as the representative of all the property owners in Chimney Hill. Secondly, the plaintiff alleges rights based on the assignment made by Chimney Hill Corporation to it. Lastly, the plaintiff claims rights based on the assessment covenant in the Declarations, which are recorded with the Town Clerk and recited in each sales contract and deed pertaining to Chimney Hill.

In its briefs, the plaintiff asserts the rights of all the property owners of Chimney Hill by claiming that no release or waiver by Chimney Hill Corporation is binding on the plaintiff absent consent to the release and waiver by all who owned property in Chimney Hill at the time the release and waiver were effectively made. The plaintiff contends that each of these property owners has an interest in enforcing the covenant that must be released or waived by that owner. Absent such actions, the plaintiff states that any alleged release or waiver by Chimney Hill Corporation binds only that corporation.

The plaintiff has the ability to enforce the rights of its members in general in actions such as these. *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*, 278 N.Y. 248, 262, 15 N.E.2d 793, 798 (1938). As the plaintiff recognizes, however, the existence of any such rights in the membership in general depends upon the existence of a

common scheme or general plan for the development of the area. Although the question is close, a careful weighing of the evidence does not support the existence of a common plan on these facts.

It is true that Chimney Hill is a distinct area developed as one tract by the Chimney Hill Corporation. Also, the covenants in issue were filed with the Town Clerk and were in each sales agreement and each deed to the lots in Chimney Hill. These factors are suggestive of a common scheme. 5 R. Powell, *The Law of Real Property*, para. 679, at 203-04 (rev. ed. 1977).

These factors, however, are outweighed by the following. At the time of the conveyances to the lot owners, Chimney [*452] Hill Corporation retained the common lands including the clubhouse, swimming pools, tennis courts, roads and water system. The [**427] assessment covenant provides that the annual charge is paid for the right to enjoy, subject to certain rules, these lands and facilities. [***8] There is no provision in the Declarations, nor any other evidence, tending to show that any transfer to a property owners' association was contemplated by Chimney Hill Corporation at the inception of the development. On the contrary, Mr. Cullen, past president of the Corporation, testified that the initial intent of the Corporation was not to turn over the common lands and the assessment income to a property owners' association. This suggests that the intent of the covenant was to benefit Chimney Hill Corporation in its capacity as owner of the common lands and not to benefit the lot owners in their capacity as lot owners; it negates the proposition that a common scheme was here intended. See *id.* para. 679, at 205.

Additionally, Paragraph 10(E) of the Declarations, quoted above, allows Chimney Hill Corporation, its successors or assigns n1 to release payment of the charge in writing. "A retention by the common grantor of a power either to release or to alter substantially the restrictions is strong evidence against the existence of an enforceable building development scheme." *Id.* para. 679, at 205-06. This is because the essence of a common scheme is that the benefit [***9] and the burden fall upon each lot in the development. A power retained by the common grantor to alter substantially this arrangement negates the reciprocity and mutuality necessary for a common scheme to exist.

----- Footnotes -----

n1 It is clear from the provisions of Paragraph 10 that "successors" and "assigns" refer to subsequent owners of the common lands.

----- End Footnotes -----

No common scheme has been shown on the facts presented. The benefits of the assessment covenant do not extend to the lot owners in general. Therefore, they have no common right to enforce this covenant that the plaintiff can urge. The assessment covenant was susceptible of release or waiver by the Chimney Hill Corporation.

The plaintiff next seeks to recover the assessments, in its own right, under the assignment from Chimney Hill Corporation. [*453] In the assignment, the Corporation assigned to the plaintiff the right to collect from each owner in Chimney Hill the annual charge provided for in Paragraph 10 of the Declarations. As assignee, however, the plaintiff [***10] takes the right to collect subject to all defenses of the obligor against the assignor that have not been acquired or set up in fraud of the rights of the assignee after notice has been given of their existence. *Downer v. South Royalton Bank*, 39 Vt. 25, 32 (1866).

As to the defendants Keatinge and the defendants Antignani, the trial court concluded that

plaintiff's assignor had waived all but singular assessments. The court rested this conclusion on Chimney Hill Corporation's practice to bill these defendants for only one assessment and on its policy, as stated by past president Cullen, to bill every multiple lot owner for only one assessment.

HN1 A waiver is the intentional relinquishment or abandonment of a known right and may be evidenced by express words as well as by conduct. *Lynda Lee Fashions, Inc. v. Sharp Offset Printing, Inc.*, 134 Vt. 167, 170, 352 A.2d 676, 677 (1976). A waiver of a covenant may be made orally by the party for whose benefit it was inserted, even if the instrument containing the covenant requires a writing. *Martin v. Martin & Carpenter*, 98 Vt. 326, 327-28, 127 A. 292, 292-93 (1925). As discussed above, the assessment covenant was *****11** for the benefit of Chimney Hill Corporation, its successors and assigns, as owner of the common lands, and therefore it was waivable by the corporation during the period it owned the common lands.

We are unable to agree that Chimney Hill Corporation's policy and practice to bill multiple lot owners for only one assessment can be construed to be an intentional permanent relinquishment of the right to *****428** charge for every lot. This policy and practice merely evidences a year by year waiver, especially in light of the provision in Paragraph 10(E) requiring a written termination and the Corporation's use of same with regard to Eastern. More substantial evidence is necessary to sustain a conclusion of waiver. See *Lynda Lee Fashions, Inc. v. Sharp Offset Printing, Inc.*, *supra*. The judgment of the *****454** trial court with regard to the defendants Keatinge and the defendants Antignani must be reversed.

As to defendant Eastern, the trial court concluded that it possessed a valid release from Chimney Hill Corporation concerning the ten unimproved lots, which was a valid defense to the plaintiff's claim. Paragraph 10(E) of the Declarations reserves to the grantor, Chimney *****12** Hill Corporation, its successors and assigns, the right to terminate the annual charge on any of the lots. Eastern's sales agreement, executed by both Eastern and Chimney Hill Corporation, provides that one annual charge only will be assessed on Eastern's eleven lots until one or more have been improved. The sales agreement contains just the release contemplated by Paragraph 10(E).

The plaintiff argues that the sales agreement merged into the deed, thus extinguishing the release because the deed does not contain it, citing *Thomas v. Johnson*, 108 Vt. 363, 187 A. 375 (1936). The rule in *Thomas* applies when the new contract has the same subject matter and scope as the earlier contract and the terms thereof are inconsistent either in whole or in a substantial part, so that they cannot subsist together. 108 Vt. at 367-68, 187 A. at 377. Here Paragraph 10(E) of the Declarations in the deed expressly contemplates the possibility of a written release by separate instrument. Thus, the written release in the sales agreement does not contradict the deed, nor is it inconsistent with the deed in substantial part. The doctrine of merger stated by *Thomas* is not applicable here. *****13** Eastern's defense based on the release is valid against the plaintiff as assignee of Chimney Hill Corporation.

Finally, the plaintiff asserts rights based on the assessment covenant that is in the deed of each of these parties and on record in the Town Clerk's office in Wilmington. Because the plaintiff is not the original covenantee of the assessment covenant, the plaintiff may enforce the covenant only if it "runs with the land." *Albright v. Fish*, No. 36-78 (handed down September 11, 1978). **HN2** For a covenant to be enforceable as running with the land, four requirements must *****455** be met: a writing, intent, touch and concern, and notice. See *Albright v. Fish*, *supra*; *McDonough v. W. W. Snow Construction Co.*, 131 Vt. 436, 306 A.2d 119 (1973); *Welch v. Barrows*, 125 Vt. 500, 218 A.2d 698 (1966); *Latchis v. John*, 117 Vt. 110, 85 A.2d 575 (1952); *Queen City Park Association v. Gale*, 110 Vt. 110, 3 A.2d 529 (1938). Here there is a writing. The intent of the covenant is to benefit the owner of the common lands, its successors and assigns. A covenant to pay assessments meets the touch and concern requirement. See *Queen City Park Association* *****14** *v. Gale*, *supra*. Notice

is amply provided by recording the Declarations and by placing the covenant in each deed to property in Chimney Hill. Thus, the assessment covenant runs with the land and is enforceable by the plaintiff as owner of the common land benefitted by the covenant.

Defendant Eastern has a valid written release signed by Chimney Hill Corporation, which unequivocally waives the right to annual charges on ten unimproved lots and which is binding on Chimney Hill Corporation. See *Martin v. Martin & Carpenter, supra*; 5 R. Powell, *supra*, para. 683, at 228.7. The court found at the time the plaintiff acquired the common lands and facilities it was aware that some multiple lot owners were being charged one assessment. The issue is whether with this knowledge the plaintiff is charged with the duty to inquire further as to when and why such single assessments were made. We think such inquiry should have been made. If such inquiry had been made of the Chimney Hill Corporation, the existence of Eastern's written release would have been revealed. **[**429]** The judgment in favor of Eastern must be affirmed.

*Judgment for defendant Eastern Woodworking [***15] Company affirmed. Judgment reversed as to defendants Keatinge and Antignani, and cause remanded in each of these cases for computation of appropriate amount of assessment due and entry of judgment in favor of the plaintiff accordingly.*

Service: **Get by LEXSEE®**

Citation: **136 Vt 446**

View: Full

Date/Time: Wednesday, March 28, 2007 - 10:43 PM EDT

* Signal Legend:

-  - Warning: Negative treatment is indicated
-  - Questioned: Validity questioned by citing refs
-  - Caution: Possible negative treatment
-  - Positive treatment is indicated
-  - Citing Refs. With Analysis Available
-  - Citation information available

* Click on any *Shepard's* signal to *Shepardize®* that case.



About LexisNexis | Terms & Conditions

Copyright © 2007 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

Appendix 2

Service: **Get by LEXSEE®**
Citation: **267 Or 452**

*267 Ore. 452, *; 517 P.2d 1042, **;*
*1973 Ore. LEXIS 505, ****

FRANKLAND et al, Respondents, v. CITY OF LAKE OSWEGO et al, Petitioners

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF OREGON

267 Ore. 452; 517 P.2d 1042; 1973 Ore. LEXIS 505

June 6, 1973, Argued
December 31, 1973

SUBSEQUENT HISTORY: [*1]**

Petition for Rehearing Denied January 29, 1974.

PRIOR HISTORY:

On Review from the Court of Appeals.

DISPOSITION: Affirmed as modified, and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants appealed the Oregon Court of Appeals' reversal of the lower court's grant of defendants' motion to dismiss the action of plaintiffs seeking an injunction or, alternatively, an award of monetary damages as remedies for the construction of an apartment building by defendants.

OVERVIEW: Plaintiffs filed action against defendant developers challenging validity of apartment building erected adjacent to plaintiffs' property. Plaintiffs contended that construction was not accomplished according to planned unit development plans as submitted to city. Plaintiffs sought building's removal or damages. At trial, after plaintiffs' case was presented, lower court granted defendants' motion to dismiss. This was overturned on appeal and defendants filed appeal. Court held that defendants were bound by law to construct building as depicted in submitted sketches and only permitted to change plans after complying with amending procedures. As defendants failed to do this, court held that if plaintiffs could show that deviation from plan caused depreciation in value of their property, they were entitled to damages equal in amount to that difference. Defendants permitted to produce all relevant defenses at trial.

OUTCOME: Court affirmed, finding that zoning action existed where building was not constructed in accord with sketches. Case remanded; plaintiffs permitted to seek damages equaling depreciation of their property minus predicted depreciation of property if building had been constructed pursuant to sketches.

CORE TERMS: apartment, ordinance, sketch, apartment building, developer, planning commission, zoning, constructed, architectural, zoning ordinance, planned, planning, acres, planned-unit, garden, built, bulk, height, phase, depreciation, injunction, single family, garden apartment, zone change, twenty-five, motel, development plan, public hearing, adjoining, nuisance

LexisNexis(R) Headnotes ♦ [Hide Headnotes](#)

[Real Property Law](#) > [Zoning & Land Use](#) > [General Overview](#) 

HN1 ↓ The burden of proof in zoning case is upon the one seeking the zoning change and it is necessary that a record be made before the local governing body when a change is under consideration. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Zoning & Land Use](#) > [Comprehensive Plans](#) 

[Real Property Law](#) > [Zoning & Land Use](#) > [Planned Unit Developments](#) 

HN2 ↓ The objectives of planned unit developments are: (1) to achieve flexibility; (2) to provide a more desirable living environment than would be possible through the strict application of zoning ordinance requirements; (3) to encourage developers to use a more creative approach in their development of land; (4) to encourage a more efficient and more desirable use of open land; and (5) to encourage variety in the physical development pattern of the city. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Zoning & Land Use](#) > [Comprehensive Plans](#) 

[Real Property Law](#) > [Zoning & Land Use](#) > [Planned Unit Developments](#) 

HN3 ↓ The planned unit development (PUD) concept necessarily allows for a great deal of discretion in the hands of planning authorities in implementing a PUD ordinance, but that discretion is properly in their hands and not those of the developers. Obviously, in order to guarantee a well conceived and well designed planned unit development, the planning authorities must have the necessary plans and information from the developer before making a decision. Once approved, the developer should be bound by the plans unless any changes are approved by the planning authorities in accordance with the PUD ordinance. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Zoning & Land Use](#) > [Comprehensive Plans](#) 

HN4 ↓ The City of Lake Oswego Planned Unit Development Ordinance, § 53.330, requires a developer to submit architectural sketches showing the type of buildings to be constructed, their prospective locations in the development, and their general height and bulk characteristics. Implicit in this requirement is that the developer build in accordance with these sketches so that the City's approval of the sketches acts as a device to control development. Thus, if a developer fails to comply with the sketches he has submitted, he is in noncompliance with the final plan and the zoning ordinance that was passed to implement that final plan. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Zoning & Land Use](#) > [Comprehensive Plans](#) 

[Real Property Law](#) > [Zoning & Land Use](#) > [Nonconforming Uses](#) 

HN5 ↓ Under the City of Lake Oswego Planned Unit Development Ordinance, § 53.420, a developer must submit sketches of actual structures to be built, and he is thereafter bound by these plans and may later change them only by complying with the appropriate procedures delineated by the ordinance. [More Like This Headnote](#)

[Civil Procedure](#) > [Remedies](#) > [Injunctions](#) > [Mandatory Injunctions](#) 

[Real Property Law](#) > [Adjoining Landowners](#) > [General Overview](#) 

[Torts](#) > [Premises Liability & Property](#) > [General Overview](#) 

HN6  An adjoining landowner may sue to enjoin the violation of a zoning ordinance where such violation will reduce the use value of his property. An injunction, as an exercise of equity power, is based on equitable principles. Under proper circumstances, the court may order the cessation of a prohibited use of the property or demolition of the structure. The court, in lieu of granting a mandatory injunction, may award damages to the adjoining owners for a depreciation in value of their property resulting from the ordinance violation. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Governments](#) > [Local Governments](#) > [Police Power](#) 

[Real Property Law](#) > [Zoning & Land Use](#) > [Comprehensive Plans](#) 

[Real Property Law](#) > [Zoning & Land Use](#) > [State & Regional Planning](#) 

HN7  A local government can, pursuant to its police powers and after complying with proper procedures, act in the public interest to zone an area, resulting in the diminution of the value of property within or without the zoned area. In such a case, any damage to a landowner need not be compensated. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Zoning & Land Use](#) > [Nonconforming Uses](#) 

[Real Property Law](#) > [Zoning & Land Use](#) > [State & Regional Planning](#) 

HN8  A plaintiff is not entitled to a recovery of the full depreciation of property caused by the construction of a developer's building, but only to such depreciation as resulted from the difference between the apartment constructed and the apartment represented in the sketches which had been approved by the local government. [More Like This Headnote](#)

[Civil Procedure](#) > [Dismissals](#) > [Involuntary Dismissals](#) > [General Overview](#) 

[Civil Procedure](#) > [Pretrial Judgments](#) > [Nonsuits](#) > [General Overview](#) 

HN9  The court has recently held that defendant in a law action tried to the court without a jury may not test the legal sufficiency of plaintiff's evidence at the close of plaintiff's case. If he wishes to challenge the sufficiency of the evidence, he must rest his case and submit the matter to the court on its merits; however, if a case was adjudicated prior to this decision, the defendant will be permitted to put on his evidence. [More Like This Headnote](#)

COUNSEL: *Gerson F. Goldsmith*, Portland, argued the cause for petitioners. With him on the briefs for petitioner Mountain Park Corporation were J. Brad Littlefield, and Goldsmith, Siegel & Engel, Portland.

Also on the briefs were Garry P. McMurry, Patric J. Doherty, and McMurry, Sherry & Nichols,

Portland, for petitioners City of Lake Oswego and John C. MacLean, H. J. Ferguson, William Cook, Robert Dent, Mary Goodall, William Knowles, and Charles Needham;

Kenneth W. Baines, and Wheelock, Richardson, Niehaus, Baines & Murphy, Portland, for petitioner Dave Christensen, Inc.; and

David J. Krieger, and Black, Kendall, Tremaine, Boothe & Higgins, Portland, for petitioner Security Bank of Oregon.

David P. Templeton, Portland, argued the cause for respondents. With him on the briefs were Charles Robinowitz, Robert E. Glasgow, and Dusenbery, Martin, Bischoff & Templeton, Portland.

Whitaker & Whitaker, Portland, filed an amicus curiae brief on behalf of The Homebuilders Association of Metropolitan Portland.

JUDGES: Howell, Justice. McAllister, [***2] Denecke, Holman and Tongue, Justices. O'Connell, Chief Justice, dissenting.

OPINION BY: HOWELL

OPINION: [*455] [**1044] Plaintiffs filed this action for a declaratory judgment seeking an injunction or, alternatively, an award of monetary damages as remedies for the construction of an apartment building by the defendant Dave Christensen, Inc. At the close of plaintiffs' case, the trial court allowed defendants' motion to dismiss. On appeal, the Court of Appeals reversed and remanded the case to the trial court, 8 Or App 224, 493 P2d 163 (1972). We granted review.

The plaintiffs, adjoining property owners, challenge the validity of the construction of the apartment building which was erected pursuant to a planned unit development ordinance enacted by the City of Lake Oswego. Plaintiffs contend that the construction was not accomplished according to the planned unit development plan as submitted to the City, and that they are entitled to have the apartment building removed or be awarded damages for the depreciation in value of their property resulting from such construction.

We adopt a portion of the opinion of the Court of Appeals which states the background and the facts leading [***3] up to the filing of this suit.

In 1967 various entities in which Carl Halvorson had a dominant interest acquired the right to purchase the property designated (B) and (C) in the accompanying map (hereinafter the Kerr property). The segment of the Kerr property around which this suit revolves is in Multnomah County and lies north of the [*456] east-west Clackamas-Multnomah county line and is designated (B) on the map. It is separated by a dotted line from the balance of the Kerr property, marked (C) on the accompanying map. This land was undeveloped. Plaintiffs live on their own property on the strip of land immediately west of (B), extending southward from Stephenson Street and [**1045] designated (A) (hereinafter called Arrowood). Arrowood was substantially developed with single family residences. Immediately east of (B) is other land, not involved here, which also was developed with single family residences.

Prior to the events which led to this litigation, all of the land mentioned above which lay in Multnomah County had been zoned under a comprehensive plan as R-20 -- single family residential -- upon which residences could be built only if the lot occupied an area [***4] of 20,000 square feet or more. Arrowood had been annexed to the City of Portland several years earlier and remained zoned by Portland for single family residences. The accompanying map illustrates that Arrowood is surrounded by the Kerr property except for its northerly tip. Conversely, the strip of land in controversy, (B), is surrounded by and a part of land which

already had been comprehensively zoned single family residential, except for its southerly tip.

When Carl Halvorson acquired the right to purchase the Kerr property in 1967, he embarked upon a plan for developing approximately 600 acres into what is termed a "Planned Unit Development" (hereinafter called PUD). This development includes a town center, commercial area, park, equestrian and other recreational facilities, and areas for garden apartments, town houses, duplexes, single family dwellings, etc. Defendant Mountain Park Corporation, of which Mr. Halvorson **[*458contd]**
[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.]

was the dominant owner, took title to **[***5]** the land and began the development. In order to obtain a water supply and sewer system, as well as other city services, negotiations were carried on with various municipal corporations. Mountain Park concluded that the best opportunity for development conforming to its own plans lay with the City of Lake Oswego (hereinafter called City). City, which was comprehensively zoned under a zoning code, passed an enabling ordinance permitting planned unit development in new areas. Negotiations ripened into a contract between City, Mountain Park, and Sylvania Properties, another of the entities dominated by Mr. Halvorson. The contract contemplated City would annex the PUD in phases. A section of the contract **[**1046]** dealt with annexation and development. Its tenor is that City agreed to accept the PUD submitted by Mountain Park under its planned unit development ordinance (except for changes or amendments agreed upon by the City of Lake Oswego Planning Commission and Mountain Park) in return for annexation.

[*457contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of **[***6]** the original published documents.] [SEE ILLUSTRATION IN ORIGINAL]

[*458] As contemplated by the contract, Mountain Park proposed annexation of Phases I, II and III of the PUD, and City annexed these areas; later, it annexed Phase IV consisting of 55 acres which included the controversial strip (B). Thereafter, it changed the zoning of Phase IV to allow, among other things, the building of apartments in the southerly part of strip (B) in accordance with the PUD plan submitted by Mountain Park.

Shortly after the rezoning, Mountain Park deeded 3.5 acres in the southerly part of Phase IV, (B), to defendant Dave Christensen, Inc. (hereinafter called Christensen). The latter obtained a commitment for **[*459]** financing from defendant Security Bank of Oregon and submitted to Mountain Park (pursuant to a contract) suggested sketches of an apartment building or buildings which Christensen proposed to construct thereon. After Mountain Park rejected several proposals, it approved the plan effected for the construction of the apartment building, which is the subject of this litigation.

Plaintiffs, adjoining landowners, testified that they learned for the first time about **[***7]** the real bulk, size, and nature of the proposed apartment when Christensen's bulldozers arrived and stripped the area of trees and other vegetation and put in a fill 27 feet high toward the south end of strip (B). They protested by submitting a petition to the City Council on October 21, 1969. The Council referred the matter to the Planning Commission to determine whether the proposed structure was in conformance with the final plan. On November 4, 1969, the Planning Commission ruled against the plaintiffs. City issued a temporary building permit. Thereafter, on November 20, after having previously warned the defendants in writing of such intention, plaintiffs brought this suit. On November 21, City issued a final building permit. n1

----- Footnotes -----

n1 During the pendency of this suit the trial court issued an interim order which declared the annexation of Phase IV invalid and therefore declared that the City acted without jurisdiction when it rezoned that area. Subsequently, the City reannexed and rezoned Phase IV. These actions were taken after giving the requisite notice and hearing demanded under the statute, but we have no record of what transpired at these hearings.

Because this second approval was apparently merely *pro forma* to remedy a procedural defect concerning the annexation of the area, our focus shall be on the procedures, requirements, and approvals given in 1969 as part of the original proceeding.

----- End Footnotes----- [***8]

The Court of Appeals held that the portion of the [*460] PUD ordinance annexing Phase IV which included the 3.5 acres adjacent to plaintiffs' propoerty was invalid because insufficient or no consideration was given to plaintiffs' property and its single family use. The court quoted *Roseta v. County of Washington*, 254 Or 161, 458 P2d 405, 40 ALR3d 364 (1969), and *Smith v. County of Washington*, 241 Or 380, 406 P2d 545 (1965), to the effect that a change of zoning must first consider whether any changes have occurred in the neighborhood and whether the changes are consistent with the original comprehensive plan. The trial court, on the other hand, used the test of whether the City acted arbitrarily in enacting the PUD ordinance.

Subsequent to the trial of the instant case, and the decisions in *Roseta* and *Smith*, this court decided *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973). There, we stated that ^{HN1}the burden of proof is upon the one seeking the change and that it is necessary that a record be made before the local governing body when a change is under consideration.

Because the case at bar was tried before our decision in *Fasano*, we [***9] do not have the benefit of any record before the City Council. [**1047] and do not know what factors were considered by the Council in enacting the PUD ordinance annexing Phase IV.

It is not necessary, however, that we attempt to decide whether sufficient consideration was given to plaintiffs' properties in annexing Phase IV because we find that the final plan was violated by the construction of the apartment house in question.

Because this case involves a planned unit development concept as a zoning device, we shall first generally [*461] describe its characteristics and differentiate it from other more traditional concepts of zoning.

THE PLANNED UNIT DEVELOPMENT CONCEPT

The concept of a planned unit development was initiated by planners and public officials to remedy the defects in traditional zoning theory and practice. n2 While not a new concept, n3 it has been only in recent years that zoning authorities have made this option practicable to planners and developers by providing enabling ordinances allowing such development. n4

----- Footnotes -----

n2 Prior to the advent of the concept of zoning as a means to restrict and control the private

use of land by public officials, a landowner was entitled to make improvements upon and to use land without restriction. With the arrival of the twentieth century, however, state and municipal governments became increasingly aware of the need for some controls and planning to ensure growth which would tend to ameliorate the blight and decay which infected urban communities at that time. 1 Anderson, American Law of Zoning 5, § 1.02 (1968). The legal framework which was proposed and utilized to effectuate this awareness took the form of zoning regulations by districts under the police power of set-backs, the height, bulk, and use of buildings, the use of land, and the density of population. Bassett, Zoning 45 (1936). Further, most state enabling acts for zoning required that these regulations be uniform throughout the district for buildings constructed therein. Bassett, supra.

The unfortunate and unintended effect of these regulations was to create "cookie cutter" developments in which all houses in a residential district resembled one another in architectural style, set-backs, and yard sizes. Also, no "incompatible" uses such as commercial centers or multi-family dwellings were allowed in a residential district unless they had existed prior to the zoning. Finally, because development was left to market forces, no provision could be made for the preservation of open space or public areas. See Krasnowiecki, Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control, 114 Pa L Rev 47 (1965). [***10]

n3 See 7 Regional Survey of New York and Its Environs, Law of Planning Unbuilt Areas, Part II, 272-73 (1929).

n4 See Urban Land, New Approaches to Residential Land Development (Tech Bull 40, 1961).

----- End Footnotes-----

[*462] ^{HN2} The objectives of planned unit developments are: (1) to achieve flexibility; (2) to provide a more desirable living environment than would be possible through the strict application of zoning ordinance requirements; (3) to encourage developers to use a more creative approach in their development of land; (4) to encourage a more efficient and more desirable use of open land; and (5) to encourage variety in the physical development pattern of the city. n5

----- Footnotes-----

n5 Id; see also Symposium: Planned Unit Development, 114 Pa L Rev 3-170 (1965); Cheney v. Village 2 at New Hope, Inc., 429 Pa 626, 241 A2d 81, 83 (1968).

----- End Footnotes-----

We agree that a planned unit development which is well conceived and well designed will achieve [***11] these objectives. However, while the primary benefits of a PUD ordinance are flexibility in design and improved development and use of land areas, these objectives can be secured only if the planning authority retains its control by, at a minimum, overseeing and approving general development plans of a developer. See Krasnowiecki, Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control, 114 Pa L Rev 47, 79-88 (1965); Mandelker, Reflections on the American System of Planning Controls: A Response to Professor Krasnowiecki, ^{HN3} 114 Pa L Rev 98, 99, 101-104 (1965). The

planned unit development concept necessarily allows for a great deal of discretion in the hands of planning authorities in implementing a PUD ordinance, but that discretion is properly in their hands and not those of the developers. **[**1048]** Obviously, in order to guarantee a well conceived and well designed planned unit development, the planning authorities must have the necessary plans and information from the developer before making a decision. Once approved, the developer should be bound by the plans unless any changes are **[*463]** approved by the planning authorities in **[***12]** accordance with the PUD ordinance.

THE LAKE OSWEGO P.U.D. ORDINANCE

The ordinance delineates the procedure to be followed for a planned unit development:

The developer is required to submit to the Planning Commission a preliminary plan showing *inter alia* the building types and coverage of the real property, the proposed land use and densities, open spaces, and vehicular and pedestrian traffic plans. After submission of the preliminary plan, the City Planning Director is required to submit to the Planning Commission a staff report showing the existing zoning of the subject property and the "adjoining properties within or without the boundaries" of the City, plus comments on the proposed PUD.

After receiving the Planning Director's report, the Planning Commission is required to hold a public hearing on the application. After the hearing, the Planning Commission may approve in principle the preliminary plan, modify or reject it. Within six months from approval of the preliminary plan, the developer is required to file a final development plan showing land use, contours and drainage, traffic circulation, and landscaping. Section 53.330 of the PUD ordinance also requires, **[***13]** as part of the final plan, the submission of architectural sketches of the buildings proposed to be built in the PUD area. That section of the ordinance which is important to this case states:

HN4"53.330. In planned-unit developments containing less than twenty-five acres the developer shall submit preliminary architectural sketches depicting the types of buildings and their approximate location on lots. The sketches to also depict the **[*464]** general height, bulk and type of construction and proximity of structures on lots.

"In planned-unit developments containing more than twenty-five acres the developer shall submit architectural sketches as required above for each phase of development containing less than twenty-five acres before the time such phase begins actual construction. For a planned-unit development or phase thereof in excess of twenty-five acres the developer shall submit architectural sketches depicting the types of buildings (single family, duplex, multi-family, commercial, etc.) and their prospective locations in the development showing their general height and bulk in relationship to the other improvements in the development and upon adjacent land."

[*14]**

At the time the applicant submits his final development plan, he is required to submit an application for a zone change. Thereafter, after notice is given, a public meeting is held and the Planning Commission considers the final plan and application for a zone change.

Finally, the City Council, after notice, holds a public hearing on the final plan and zone change, and if the Council approves the plan and change, an ordinance to that effect is adopted. The developer is then required to file with the City Recorder and the City Planning Director the final approved development plan.

DEFENDANTS' VIOLATIONS OF THE P.U.D. ORDINANCE

Section 53.330 of the PUD ordinance requires, *inter alia*, a developer to submit architectural sketches showing the type of buildings to be constructed, their prospective locations in the development, and their general height and bulk characteristics.

[*465] Implicit in this requirement is that the developer build in accordance with these sketches so that the City's approval of the sketches acts as a device to control development. Thus, if a developer fails to comply with the sketches he has submitted, **[**1049]** he is in noncompliance **[***15]** with the final plan and the zoning ordinance which was passed to implement that final plan.

In this case the totality of the information submitted, which was apparently directed at compliance with Section 53.330, was two sketches of apartment buildings, a generalized development map showing that the area in question was to contain 246 "garden apartments," and a brochure which contained the following statement relating to garden apartments:

"Phase four contains 246 garden apartments on two sites containing 12.3 acres just above McNary Parkway. The design of these units will be similar to those in Phase one. The unit will vary in size from 900 square feet to 1500 square feet with the average rent approximately \$ 225.00 per month."

[1050]** The sketches submitted to the Planning Commission and the City Council, Exhibits 3 and 5, bear no resemblance, either generally or specifically, to the apartment building constructed. Exhibit 5 is a sketch showing a portion of a three-story apartment building on the right, a smaller portion of a similar building on the left, and in the center a two-story apartment building consisting of three apartments on each floor, the buildings **[***16]** having been separated by open space and a pool. Exhibit 3 shows an apartment building apparently five stories high at one end which resembles a tower, with the remainder of the apartments being substantially lower and more elongated, with only two levels.

[*466] EXHIBIT 3

[SEE ILLUSTRATION IN ORIGINAL]

[*467] EXHIBIT 5

[SEE ILLUSTRATION IN ORIGINAL]

[*468] The apartment actually constructed is a monolithic, large, gray rectangular building 375 feet long and 75 feet wide, with five stories at one end and four stories at the other.

The witnesses agreed that the apartment constructed was a departure from the sketches submitted.

The Chairman of the Lake Oswego Planning Commission, while he did not vote at the hearing of the Commission in November, 1969, testified that the apartment did not conform to the sketches presented because of its difference in size, height, and bulk.

The Lake Oswego City Planning Director testified that the building was a "departure" from the drawings submitted, but that in relation to its height and bulk there was "room for definition."

Mr. Nelson, a representative of Mountain Park Corp., admitted that the exhibits shown the [***17] Planning Commission were not a "direct portrayal" of "what the actual structure turned out to be."

The map which depicts what Phase IV will contain shows only that "garden apartments" will be built in the area where the apartment in question was to be built, but does not show any height or bulk characteristics.

The record is not entirely clear as to whether any garden apartments had been constructed in Phase I, although the brochure had described the garden apartments in Phase IV to be similar to those in Phase I. However, it is clear from the evidence that nothing resembling the apartment constructed [**1051] was built elsewhere in the development. The brochure states that 246 garden apartments are planned on two sites in 12.3 [*470contd] [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.] acres of Phase IV. Eighty of these 246 apartments are located in the building constructed. No information was given as to whether the other 166 apartments will consist of one building 10 stories high, or several buildings of two stories, [***18] or where they will be located in the area. The same uncertainty still existed at the time of trial. Christensen, who built the present apartment building and intended to construct at least one more, testified that he did not know what the height of the second apartment building would be, and that he had merely "squared off an area similar to the first building" as a preliminary step to construction of that apartment.

[*469contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.] CHRISTENSEN APARTMENT

[SEE ILLUSTRATION IN ORIGINAL]

[*470] The record also discloses that after the City Council had approved the final plans, enacted the PUD ordinance, and allowed the zone change, Mountain Park and Christensen were still negotiating between themselves as to the type of apartment building to be constructed.

We conclude that the defendants Mountain Park and Christensen failed to build the apartment in accordance with the final plan submitted pursuant to Section 53.330 of the ordinance. n6

----- Footnotes -----

n6 Our conclusion from examining the record is in complete agreement with the following statement of the trial judge: "Nobody ever really knew what Mr. Christensen was going to

put up, did they?"

----- End Footnotes----- *****19**

A requirement in a PUD ordinance that a developer submit final plans showing with some particularity the various features involved in his planned unit development, and that thereafter he is bound to these plans, serves at least two desirable purposes. First, it gives the planning authorities and the City Council full knowledge of what they are asked to approve before they grant a zone change. Secondly, it gives any opponent ***471** complete information about the project. It serves no worthwhile purpose for an ordinance to allow a full public hearing on a proposed planned unit development and zone change if the facts are not available. There is nothing to debate. Neither the opponents nor the proponents would know the issues, and the governing body charged with making a decision would be doing so in a vacuum. In so holding, we are aware of the need for flexibility in planning, but flexible planning does not, in our view, justify delegation of the planning function to a private developer, nor does it allow a developer to build without regard to plans as presented to the appropriate planning authorities.

In this case the defendants Mountain Park and Christensen presented *****20** Exhibits 3 and 5 and used the term "garden apartment" as definitional and descriptive vehicles to comply with Section 53.330. The term "garden apartment" is without any definitive meaning as shown by the various definitions presented at trial, and thus cannot be used as a tool for control of development. Exhibits 3 and 5, then, are the only bases from which a comparison with what was actually constructed can be made. Even assuming that these sketches alone would comply with the requirements of Section 53.330, as above described, there simply is no resemblance between those sketches and the Christensen apartment.

While it might be said that the term "sketches" in the ordinance should not be read so expansively, n7 we note that this is the only tool which the City can use ***472** to oversee the type, height, and bulk of structures to be built in advance of construction and thus has enhanced importance under the scheme of development envisaged by the general Lake Oswego PUD ordinance. n8 ****1052** Therefore, because the Christensen apartment did not comply with the sketches submitted, that structure violated the final plan and the zoning ordinance which implemented that plan. *****21**.

----- Footnotes -----

n7 We view the Lake Oswego ordinance as establishing a very minimal control as to the type, height, and bulk of structures to be built. We believe that it would be advantageous to the City, the developer, and the owners of adjacent property if the PUD ordinance would more explicitly delineate what the City must have before it prior to giving approval to a final plan of development.

n8 In so holding, we expressly reject the defendants' position that they did not need to submit specific sketches of what was to be built and therefore they were not bound to build in compliance therewith.

----- End Footnotes-----

Defendants contend that the apartment constructed was in accordance with the plans submitted and that it was so declared by the Planning Commission.

In June, 1969, the City Council gave its approval to the final plans. Defendant Christensen then began excavation. When the plaintiffs saw the extent of the excavation and the large fill, they filed remonstrating petitions with the City Council. The City Council referred [***22] them to the Planning Commission. A "courtesy" public hearing was given to plaintiffs on November 4, 1969, and the Planning Commission decided that the apartment complied with the final development plan and gave its approval. Defendants argue that the decision of the Planning Commission should be given a presumption of validity. Compare *Murphy v. S.A. Hutchins & Assoc.*, 263 Or 245, 501 P2d 1273 (1972), with *Fasano v. Washington Co. Comm.*, supra.

The defendants' argument must fail because the Planning Commission's action on November 4, when they first saw and approved the plans of the apartment to be constructed, is without legal effect. That hearing was called only after objections arose from the plaintiffs [*473] concerning the height and bulk of the proposed apartment and was deemed merely a courtesy hearing for their benefit. It was not part of the planning process, but only an *ad hoc* after-the-fact adjudication of the issue of whether the apartment complied with the architectural sketches submitted. Moreover, under the ordinance, it is the City Council and not the Planning Commission which must, as part of the approval of the final plan, review the types [***23] of buildings to be constructed. This approval is given after a public hearing where affected or interested individuals may inform the City Council of their concerns. To allow the Planning Commission to unilaterally alter the final plan when the developer subsequently prepares the actual plans for construction circumvents the ordinance's requirement of vesting final review in the City Council. See generally, *Millbrae Ass'n for Residential Survival v. City of Millbrae*, 262 Cal App 2d 222, 69 Cal Rptr 251 (1968).

The effect of the defendant Christensen's testimony is that he did not know what form future apartments would take, but whatever it may be, the form had already been approved by the Planning Commission. Approval of this procedure would render meaningless the requirement that final approval must come from the City Council after notice and a hearing have been afforded to interested parties.

We find, therefore, that ^{HNS} under the ordinance a developer must submit sketches of actual structures to be built, and that he is thereafter bound by these plans and may later change them only by complying with the appropriate procedures delineated by the ordinance. n9.

----- Footnotes -----

n9 See Section 53.420 of the Lake Oswego ordinance.

----- End Footnotes----- [***24]

[*474] RIGHTS OF ADJOINING LANDOWNERS

The nature of the right of an adjoining landowner to bring suit to enjoin the violation of a zoning ordinance has been variously described by the courts, but all seem to reflect the policy consideration expressed in 3 Anderson, American Law of Zoning 636, § 23.11 (1968), where the author states:

"Since many municipalities lack sufficient personnel to carry out an effective program of zoning inspection and enforcement, actions commenced by private persons to enjoin violation of the zoning ordinance are an important part of the

enforcement program. In these actions, which are more numerous than those commenced by taxpayers or by municipalities, **[**1053]** the person who institutes the proceedings acts in his private capacity, not as a taxpayer seeking to vindicate a taxpayer's interest in law enforcement. * * *

Four theories have been advanced: (1) that a zoning ordinance is similar to a third party beneficiary contract; (2) that the zoning ordinance is similar to a covenant running with the land; (3) that the cause of action is similar to a nuisance action; and (4) that a zoning ordinance creates rights in favor of individuals **[***25]** as well as public authorities which are enforceable in a civil suit.

One of the theories underlying a suit by an adjoining landowner is that expressed in *Pritz v. Messer*, 112 Ohio St 628, 149 NE 30 (1925), where the Ohio Supreme Court drew an analogy between rights accruing to a third party beneficiary under a contract and the rights of adjoining landowners under a zoning ordinance. This theory was characterized as:

"* * * We have here an application for injunction under a zoning ordinance which zones the entire **[*475]** city for the benefit of the community. The benefit to be derived from the observance of these zoning regulations accrues, not only to the municipality, but to the abutting property owner. The plaintiff, therefore, as to her capacity to bring this suit, is in a position analogous to that of one for whose benefit a contract has been made by another party. Having a substantial interest in the enforcement of the zoning restrictions, she is a proper party to enforce their observance by a suit for injunction." 149 NE at 32.

A variant of this approach would analogize a covenant running with the land in a deed with a zoning ordinance. In *DeBlasiis v. Bartell*, 143 Pa Super 485, 18 A2d 478 (1941), the court said:

"* * * [T]he benefits flowing from the enactment of zoning regulations, *in return for the restrictions imposed by them*, accrue not only to the municipality, representing the general public, but also to the abutting property owners; and while their rights are not strictly *contractual* * * * they are, to a degree analogous to building restrictions, running with the land, imposed in a deed for the benefit of adjoining or adjacent property owners. * * *" (Emphasis in text.) 18 A2d at 481.

Another approach is identified in *Fitzgerald v. Merard Holding Co.*, 106 Conn 475, 138 A 483 (1927). There, the Supreme Court of Errors of Connecticut used the analogy of nuisance. Recognizing that the structure built in violation of the zoning ordinance was not a nuisance *per se*, the court held that a sufficient similarity existed between a nuisance *per accidens* and the violation of the ordinance to permit **[*476]** injunctive relief to lie in the plaintiff's

favor. In so holding the court stated:

"* * * The erection of a structure, though it is not in itself a nuisance, becomes such when [***27] it is located in a place forbidden by law. * * *" 138 A at 486.

See also McIvor v. Mercer-Fraser Co., 76 Cal App 2d 247, 172 P2d 758 (1946).

----- Footnotes -----

n10 A nuisance *per accidens* is an act, occupation or structure which is a nuisance only because of its location, surroundings, or manner of operation. Comment, The Effect of Zoning Ordinances on the Law of Nuisance, 54 Mich L Rev 266 (1955).

----- End Footnotes-----

A fourth theory is expressed in Sapiro v. Frisbie, 93 Cal App 299, 270 P 280 (1928), where the California District Court of Appeals for the Third District held that a private cause of action accrues to injured landowners from the violation of a zoning ordinance. There, the defendants converted a residence into a funeral parlor in violation of a city ordinance and the plaintiffs, adjoining property owners, sued to recover for past damages to their property and to enjoin the defendants from future use of the premises in that manner. In so holding, the court said:

"The right of the plaintiffs to claim and [***28] recover damages for any injuries which they may have sustained, and may sustain pending the final disposition of [**1054] this litigation, by reason of any depreciation in the value of their real property caused by the acts with the commission of which the complaint charges the defendants, seems to us to be a proposition which is not subject to serious controversy. It is a well-established and commonly recognized general rule that, where a right is given by statute or municipal ordinance to a particular class of persons and for their special protection, and not merely for the protection of the public at large, a liability is thereby created in favor of any such particular class as against any person who violates such right, and as a result injures the person or property of the former, which liability may be enforced by means of a civil action or civil remedy appropriate [*477] to the circumstances peculiar to the particular case. * * *" 270 P at 282.

See also Cook v. Normac Corp., 176 Md 394, 4 A2d 747 (1939); 58 Am Jur 1044, Zoning § 191; 50 Am Jur 578, Statutes § 584; compare Smith v. Home Echo Club et al, 69 NE2d 414 (Ohio Ct App 1943). This concept [***29] also takes the form of the maxim, "Ubi jus, ibi

remedium." (Where there is a right, there is a remedy.)

Finally, in *Nestle v. City of Santa Monica*, 6 Cal 3d 920, 101 Cal Rptr 568, 496 P2d 480, 493 (1972), the California Supreme Court said:

"* * * In general the concept is longstanding that a private person who suffers identifiable harm by reason of a violation of a municipal zoning law may sue the violator for compensatory damages and may also seek injunctive relief when applicable. * * *"

This statement reflects the recognition that, regardless of the theory used, ^{HN6} it is well recognized that adjoining landowners may sue to enjoin the violation of a zoning ordinance. See also 8 McQuillin, *Municipal Corporations* 487, § 25.153 (3d ed 1965); 3 Anderson, *supra* at 566, § 21.10; 3 Rathkopf, *The Law of Zoning and Planning* 66-19, § 9; 3 Yokley, *Zoning Law and Practice* 14, § 22-5 (3d ed 1967). It is not necessary for us to decide which theory is appropriate as the defendants recognize the ability of adjoining landowners to bring such a suit and have not contended otherwise.

REMEDIES

The Court of Appeals remanded this suit to the circuit court for a decision [***30] whether a mandatory injunction should issue ordering removal of the apartment building or whether the plaintiffs should be [*478] awarded damages. In doing so, the Court of Appeals also held that evidence of a loss of view by plaintiffs was properly admissible as an element of damage.

The law is well established that the landowner is entitled to maintain an action to enjoin a violation of a zoning regulation where such violation will reduce the use value of his property. 3 Anderson, *supra* at 638, § 23.11. See also 3 Yokley, *supra* at 14, § 22-5. An injunction, as an exercise of equity power, is based on equitable principles. Under proper circumstances the court may order the cessation of a prohibited use of the property or demolition of the structure. *Welton v. 40 East Oak St. Bldg. Corp.*, 70 F2d 377 (7th Cir 1934); *McCavic v. DeLuca*, 233 Minn 372, 46 NW2d 873 (1951); *City of Beatrice v. Williams*, 172 Neb 889, 112 NW2d 16 (1961); 3 Rathkopf, *supra* at 66-25, § 10.

The court, in lieu of granting a mandatory injunction, may award damages to the adjoining owners for a depreciation in value of their property resulting from the ordinance violation. *Sapiro [***31] v. Frisbie*, *supra*; *Thompson v. Smith*, 119 Vt 488, 129 A2d 638 (1957). The latter case is very similar to the case at bar. There, the defendant, at a public hearing before the governing board, secured a zone change allowing the construction of a motel in an area zoned residential. However, approval to construct the motel was conditioned on the requirement that the motel be not less than 25 feet from the plaintiffs' property line. Subsequently, some members of the zoning [**1055] board, without a hearing and without notice to plaintiffs, informally granted the defendants' request to reduce the clearance from 25 feet to 10 feet. After the motel was constructed the plaintiffs filed a suit for a mandatory injunction. The Supreme Court of Vermont held that the informal [*479] variance was invalid for lack of notice and a hearing, and therefore the motel had been built in violation of the ordinance. The remaining issue was whether the plaintiffs were entitled to an injunction or damages. Balancing the relative injury to the plaintiffs against the relative hardship of removal on the defendants, the court allowed money damages in lieu of a

mandatory injunction. The court [***32] stated:

"* * * [P]roper resort to equity jurisdiction does not of necessity invoke the application of extraordinary and severe relief by way of a mandatory injunction. It is the duty of the court of chancery to consider and weigh the relative convenience or inconvenience, the relative injury sought to be cured as compared with the hardship of injunctive relief. 28 Am. Jur., Injunctions Sec. 54, p. 250. Such consideration may dictate an award of damages in lieu of injunction, and the doctrine has application to violations of building restrictions. Jackson v. Stevenson, 156 Mass. 496, 31 N.E. 691, 693; Amerman v. Deane, 132 N.Y. 355, 30 N.E. 741, 742. * * *" 129 A2d at 651-52.

The plaintiffs herein introduced evidence relating to a depreciation in the market value of their property, resulting from the construction of the apartment building. If property damages are to be awarded to plaintiffs, the damages should be measured by the depreciation in the value of plaintiffs' property which is attributable to the defendants' noncompliance with the final plan. ^{HN7} The City could, pursuant to its police powers and after complying with proper procedures, act in the public interest [***33] to zone an area, resulting in the diminution of the value of property within or without the zoned area. In such a case, any damage to a landowner need not be compensated. Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S Ct 114, 71 L Ed 303 [***480] (1926). Thus, in the instant case, the City did approve the submitted plans for an apartment building adjacent to plaintiffs' property. However, as we have stated, the building actually constructed bore no relationship to the plans submitted. As a result, the ordinance was violated.

In Thompson v. Smith, *supra*, the court recognized a concept of partial illegality when it held:

"* * * The plaintiffs are not entitled to a recovery of the full depreciation [in the market value of their property] caused by the construction of the motel on the lot adjoining, but only to such depreciation that resulted from the construction at an unauthorized proximity to the plaintiffs' property and beyond the limits prescribed by the ordinance. * * *" ^{HN8} 129 A2d at 653.

We agree with this characterization of the measure of the plaintiffs' damages. Consequently, plaintiffs are not entitled to a recovery of the full depreciation of [***34] their property caused by the construction of the Christensen apartment, but only to such depreciation that resulted from the difference between the apartment constructed and the apartment represented in the sketches which had been approved by the City. n11

----- Footnotes -----

n11 Ordinarily, parking, traffic, noise, etc., are factors which may be considered in determining market value. 3 Anderson, American Law of Zoning 638-639, § 23.11; 5 Nichols on Eminent Domain 18-44, § 18.11 (3d ed 1969) *et seq.* However, in the instant case no

damage should be included for those factors which would have been present in any event because the construction of an apartment building had been approved by the City.

----- End Footnotes-----

DISPOSITION OF CASE

The next issue is whether the cause should be remanded to the circuit court for the taking of additional evidence.

[*481] The trial court entered a conclusion of law which stated that plaintiffs' evidence was insufficient as a matter of law to establish **[**1056]** that the apartment building was in **[***35]** violation of the PUD ordinance. At the close of the trial, in allowing the defendants' motion to dismiss, the court stated that it did so because it could not find that the City acted arbitrarily or unreasonably. As a result the court did not pass upon the question of whether plaintiffs were entitled to an injunction or damages. Also, the defendants did not rest their case before moving for a dismissal, and consequently the defendants did not offer any evidence regarding damages, injunctive relief, or the defense of waiver, laches, or estoppel.

The specific question now presented is whether defendants are precluded from offering any evidence.

While this cause is a declaratory judgment action, it was tried, and properly so, as a suit in equity.

In *Newman v. Stover*, 187 Or 641, 213 P2d 137 (1950), an equity suit challenging the validity of a will, the trial court allowed the defendant's motion to dismiss made at the conclusion of plaintiff's case. We announced that it is "bad practice in equity for a defendant to move for a dismissal at the conclusion of the plaintiff's case," and that the trial court should have required the defendant to rest before considering his motion **[***36]** to dismiss. However, the suit was remanded for additional testimony "in the interest of justice."

In *In Re Estate of Andersen*, 192 Or 441, 235 P2d 869 (1951), we reiterated the rule of *Newman* that it is bad practice to move for a dismissal at the conclusion of plaintiff's case, but held the rule to be inapplicable where the party having the burden of **[*482]** proof failed to establish his contention of undue influence. Having failed to sustain the burden of proof, a motion to dismiss was proper.

^{HN9}In *Karoblis v. Liebert*, 263 Or 64, 501 P2d 315 (1972), we stated that "the defendant in a law action tried to the court without a jury may not test the legal sufficiency of plaintiff's evidence at the close of plaintiff's case. If he wishes to challenge the sufficiency of the evidence he must rest his case and submit the matter to the court on its merits." In *Petersen v. Thompson*, 264 Or 516, 506 P2d 697 (1973), we reiterated the rule of *Karoblis*, but because *Petersen* was tried in the circuit court before the *Karoblis* decision, we remanded the action to require the defendant to put on his evidence or rest his case before moving for a nonsuit.

The case **[***37]** at bar was tried before our decision in *Karoblis*. Perhaps the bar should have been alerted by *Newman v. Stover*, supra, where we stated that a defendant in an equity suit should "close" his case before moving to dismiss. However, as we have previously mentioned, the defendant in *Newman* on the remand was allowed to put on his case. Later, in *In Re Estate of Andersen*, supra, the rule of *Newman* was held not applicable where one party fails to sustain his burden of proof.

We believe that we should follow the same procedure in the instant case as we did in the law action in *Petersen v. Thompson, supra*, and remand this suit to allow both parties to introduce evidence relating to the issue of which remedy -- injunction or monetary damages -- is proper. As a part of the proceedings, the plaintiffs and defendants will also be allowed to introduce [*483] evidence relating to the issue of damages under the rules enunciated above. Finally, the defendants are allowed to offer any evidence relating to the defenses of waiver, laches and estoppel.

The decision of the Court of Appeals is affirmed as modified herein, and this cause is remanded to the circuit court [***38] for further proceedings consistent with this opinion.

DISSENT BY: O'CONNELL

DISSENT: O'CONNELL, C.J., dissenting.

The majority opinion disposes of this case upon a theory different from that employed either by the trial court or the Court of Appeals. This variation is not surprising in light of the ambiguous nature of plaintiffs' claim. Their initial request, directed to the Lake Oswego City Council, simply sought a reduction in the proposed [**1057] size of the Christensen apartment building. Once their complaint was filed, however, this simplicity disappeared despite repeated attempts by the trial court to identify the theory upon which plaintiffs were proceeding. It appears that at times plaintiffs' attack was upon the validity of the PUD zoning for the entire project, at times upon the validity of the approval for the final plan for Phase IV, and at still other times on the conformity of the Christensen building to the final plan adopted by the city.

As a result, we find three different courts applying three different hypotheses in reaching a decision. The Court of Appeals rested its opinion upon the "change in circumstance" test set forth in *Roseta v. County of Washington* [***39], 254 Or 161, 458 P2d 405, 40 ALR3d 364 (1969). The trial court, on the other hand, held that this test did not apply but that the test was "whether there has been a showing that the action [*484] taken by the city and its planning commission was clearly unreasonable and arbitrary and had no substantial relation to the legitimate objects sought to be gained, that is, the furtherance of public health, morals, safety or welfare."

We now decide, apparently, that the case is to be disposed of on the ground that the construction of the Christensen apartment building violated the Lake Oswego PUD ordinance because it did not conform to the architectural sketches submitted as part of the Phase IV final plan.

The majority does not say that the Christensen apartment is incompatible with the general plan or subject to attack because it violates plaintiffs' claimed interest in the continuance of the single-family dwelling zone; the rationale is that the apartment building does not comport with the sketches. One cannot be sure from the majority opinion, but apparently the majority would hold that if sketches had been presented showing an apartment building having the design of this apartment [***40] building, it would have been legally constructed under a valid ordinance.

The principal vice of the opinion is that it magnifies out of all proportion one aspect of planning (the architectural design of a building) at the cost of many other more important considerations in formulating a good land use plan.

The architectural character of the Christensen apartment could not be looked upon as an isolated feature in framing the planned-unit development. All of the other features of the plan relating to traffic circulation, parking, drainage, sewage disposal, population pressure, open areas, etc., had to be considered [*485] and, in fact, were thoroughly considered by both

the city and the developers over the course of at least two years. We may assume also that both the city and the developers located all of the housing units, including this apartment, consistent with the best possible planning objectives, other than the possible objection to the architectural style of the Christensen apartment building. In addition, the city complied with all notice and hearing requirements prior to approving the plan. Thereafter, when plaintiffs challenged the construction of this building **[***41]** before the City Council, the council referred the matter to the planning commission. After plaintiffs had been given an opportunity to be heard, the commission, with the actual building blueprints before it, ruled that the Christensen apartment building was in compliance with the Phase IV plan. Lake Oswego Code 53.420 vests the planning commission with the authority to approve the kind of change alleged by plaintiffs, since it is empowered to approve any change in a final plan which does "not alter total density, ratio of dwelling unit types, boundaries of the planned-unit development or location or area of public spaces." n1 **[*486]** Inherent in this authority is the **[**1058]** power to determine that no change has been made. Plaintiffs were given a hearing though none was required under Lake Oswego Code 53.420. n2

----- Footnotes -----

n1

"53.420 Changes to final development plan.

"The owner-applicant may make such changes in the approved final plan and program as are consistent with any subsequent subdivision plat approved by the planning commission, provided such changes do not alter total density, ratio of dwelling unit types, boundaries of the planned-unit development or location or area of public spaces. In the event a subdivision plat containing such changes is not submitted for approval to the planning commission, proposed changes to the approved final plan and program may be submitted in writing to the planning director for approval and amendment to the final plan and program on file with the city provided such changes do not alter dwelling unit density; do not alter the ratio of different types of dwelling units to each other; do not increase or change the type or location of commercial structures; do not change the boundaries of the planned-unit development and do not change the location and area of public open spaces and recreational area.

"Changes which alter or change dwelling unit density, ratio of number of different types of dwelling units, commercial uses, boundaries of the planned-unit development or affects location or area of open and recreational spaces shall be made in the form of a petition for approval of a new planned-unit development and shall be made in accordance with this article."

[*42]**

n2 At the hearing there was testimony to the effect that the Christensen building was a garden apartment. No record of the hearing exists because it took place prior to our decision in Fasano v. Washington County Comm., 264 Or 574, 507 P2d 23 (1973). Nevertheless, in the circuit court Carl Rohde, chairman of the Lake Oswego Planning Commission when the Christensen building was approved, gave the following account of certain testimony received

at the courtesy hearing:

"* * * [A] garden apartment in quotation marks, is not defined in general acceptance in the architectural profession or in land management. And one of our members at that special hearing testified or stated that he had specifically looked at various developments around the country -- he is an architect -- and that he saw garden apartments that were several stories higher than this one and larger in bulk and he also saw garden apartments which were one or two story, three or four unit buildings so that in the absence of any specific legally or generally accepted definition of a term, we in the design profession or the architectural profession, say that we just do what we individually think is correct."

----- End Footnotes----- **[***43]**

As of the date of the planning commission's decision, actual construction had not begun, no building permits had been issued, no construction-related financial commitments had been finally made, and no litigation was pending. From this and the other matters recited above, it can be seen that there is no evidence in this record to justify the inference that the planning commission acted arbitrarily, capriciously, in bad **[*487]** faith, or under the kind of pressure which precluded it from acting fairly. In this setting, its decision that the Christensen apartment building was a garden apartment should be conclusive.

I cannot join in an opinion which holds the entire planned-unit development scheme for Phase IV void because the final plan was somewhat indefinite with respect to the appearance of the structures designated as "garden apartments." This vagueness, I take it, would not be fatal to an ordinary Euclidean zoning ordinance. But, the opinion seems to say, because a planned-unit development by its nature is so flexible, there must be a crystallization of the plans prior to the enactment of the ordinance in order to avoid giving the developer carte blanche to construct **[***44]** any kind of a structure he pleases.

I repeat, to rest the validity of governmental action entirely upon the sufficiency of sketches overemphasizes a detail in the whole process of passing upon a land use plan. There is nothing in the PUD enabling ordinance requiring sketches showing specific architectural styles. It is consistent with the language of the ordinance to conclude that it contemplated only the conceptual portrayal of the type of building and its juxtaposition with other features of the plan, leaving the refinements of architectural style to be worked out sometime before actual construction begins. n3 The city must have assumed that the term **[*488]** "garden apartments" had sufficient meaning to **[**1059]** give it the necessary control over the kind of structure to be located in the designated area. The effect of our opinion is to say either that the term "garden apartment" has no meaning, or that if it does we, rather than the City Council, will decide which structures qualify under that term. We do not substitute our judgment for that of governmental agencies in other areas of the law; there is no reason for us to make an exception in case of zoning. The term **[***45]** "garden apartment" may be vague, but surely the planning commission is better equipped to apply it than is this court, and we have no right to second-guess or superimpose our judgment over that of the commission.

----- Footnotes -----

n3 Lake Oswego Code 53.330 provides in relevant part: "In planned-unit developments containing more than twenty-five acres the developer shall submit architectural sketches as required above [for developments less than twenty-five acres] for each phase of development containing less than twenty-five acres *before the time such phase begins actual construction.*" (Emphasis added.)

----- End Footnotes-----

Service: **Get by LEXSEE®**
Citation: **267 Or 452**
View: Full
Date/Time: Wednesday, March 28, 2007 - 10:43 PM EDT

* Signal Legend:

-  - Warning: Negative treatment is indicated
-  - Questioned: Validity questioned by citing refs
-  - Caution: Possible negative treatment
-  - Positive treatment is indicated
-  - Citing Refs. With Analysis Available
-  - Citation information available

* Click on any *Shepard's* signal to *Shepardize®* that case.



[About LexisNexis](#) | [Terms & Conditions](#)
Copyright © 2007 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

Appendix 3

RCW 64.32.010(1): "Apartment" means a part of the property intended for any type of independent use, including one or more rooms or spaces located on one or more floors (or part or parts thereof) in a building, or if not in a building, a separately delineated place of storage or moorage of a boat, plane, or motor vehicle, regardless of whether it is destined for a residence, an office, storage or moorage of a boat, plane, or motor vehicle, the operation of any industry or business, or for any other use not prohibited by law, and which has a direct exit to a public street or highway, or to a common area leading to such street or highway. The boundaries of an apartment located in a building are the interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof, and the apartment includes both the portions of the building so described and the air space so encompassed. If the apartment is a separately delineated place of storage or moorage of a boat, plane, or motor vehicle the boundaries are those specified in the declaration. In interpreting declarations, deeds, and plans, the existing physical boundaries of the apartment as originally constructed or as reconstructed in substantial accordance with the original plans thereof shall be conclusively presumed to be its boundaries rather than the metes and bounds expressed or depicted in the declaration, deed or plan, regardless of settling or lateral movement of the building and regardless of minor variance between boundaries shown in the declaration, deed, or plan and those of apartments in the building.

RCW 64.34.060(3): If part of the common elements is acquired by condemnation the portion of the award attributable to the common elements taken shall be paid to the owners based on their respective interests in the common elements unless the declaration provides otherwise. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element must be equally divided among the owners of the units to which that limited common element was allocated at the time of acquisition.

RCW 65.08.070: A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

Appellate Case No. 59211-4

COURT OF APPEALS,
DIVISION I OF THE STATE OF WASHINGTON

SANDRA LAKE,

Appellant

v.

WOODCREEK HOMEOWNERS ASSOCIATION,
a Washington homeowners association;
and GLEN R. CLAUSING, a single man,

Respondent.

PROOF OF SERVICE OF APPELLANT'S REVISED OPENING BRIEF

Marianne K. Jones, WSBA #21034
Mona K. McPhee, WSBA #30305
JONES LAW GROUP, P.L.L.C.
11819 NE 34th Street
Bellevue, WA 98005
(425) 576-8899
Co-counsel for Appellant

Christopher Brain, WSBA #5054
TOUSLEY BRAIN STEPHENS
1700 7th Ave, Ste 2200
Seattle, WA 98101-4416
(206) 682-5600
Co-counsel for Appellant

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2007 APR 13 PM 3:15

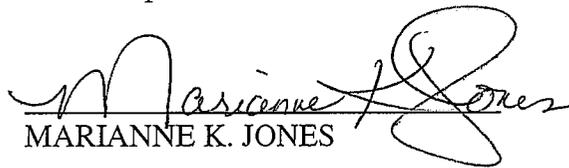
I hereby certify that I served copies of the foregoing Appellant's Revised

Opening Brief on the attorneys for the respondents:

Charles E. Watts
Oseran, Hahn, Spring & Watts, P.S.
10900 NE Fourth Street #850
Bellevue, WA 98004

Scott M. Barbara
Johnson Andrews & Skinner PS
200 W. Thomas St., Ste 500
Seattle, WA 98119-4296

by hand delivery via ABC Legal Services on April 13, 2007.


MARIANNE K. JONES

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 APR 13 PM 3:14