

NO. 67652-1-I
 COURT OF APPEALS
 DIVISION I
 OF THE STATE OF WASHINGTON

KEVIN and ALICIA AUSTIN,
 Appellants,
 vs.
 SUNSETS FOREVER, LLC, et al,
 Respondents,
 And
 WHALER'S COVE ASSOCIATION OF APARTMENT OWNERS,
 Cross-Appellants.

2012 JUN 18 PM 4: 50
 COURT OF APPEALS DIV 1
 STATE OF WASHINGTON

APPELLANTS KEVIN AND ALICIA AUSTIN'S CORRECTED
 OPENING BRIEF

G. Michael Zeno, Jr., WSBA #14589
 ZENO DRAKE BAKALIAN, P.S.
 4020 Lake Washington Blvd. NE, Suite #100
 Kirkland, WA 98033
 Telephone 425-822-1511
 Fax 425-822-1411
 Email mzeno@zdblawn.com

Attorneys for Appellants Kevin and Alicia Austin

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERRORS AND ISSUES	3
III.	STATEMENT OF THE CASE	5
IV.	ARGUMENT	12
	1. The trial court erred in concluding that the changes to the Reeds’ unit caused no “imminent harm” to the Austins.	12
	1.1. The changes to the Reeds’ unit have harmed the Austins.	12
	1.2. The harm should be remedied now rather than waiting until the Reeds’ unit is occupied.	28
	1.3. The doctrines that sometimes justify withholding injunctive relief are inapplicable here.	31
	2. The trial court erred in concluding that neither the Reeds nor the Association breached any legal duty to the Austins (other than the Reeds’ breach that led to the damage award).	34
	2.1. The Reeds failed to meet the conditions attached to the approval of their remodel project and the requirements of the Condominium’s governing documents.	35
	2.2. The Association’s quick review of the Reeds’ oral proposals, without independent investigation, did not satisfy its duty of careful scrutiny under the governing documents and applicable law.	38

	2.3. The Association's conditioning of its approval on after-the-fact testing and consultation insufficient to meet its legal responsibilities, particularly when it failed to enforce those conditions.	43
	2.4. The Association is responsible for remedying the sound transmission problems through the common elements because of its legal responsibility for the common elements.	44
V.	CONCLUSION	45

APPENDIX

- A. Findings of Fact and Conclusions of Law, (CP 1030-45)
- B. Condominium Rules and Regulations (Ex. 3, pgs. 6-8)
- C. April 15, 2009 Board Minutes (Ex. 5)
- D. May 13, 2009 Board Minutes (Ex. 7)
- E. October 27, 2009 letter, Zeno to Reed (Ex. 30)
- F. November 13, 2009 letter, Zeno to Reed (Ex. 31)
- G. Table of acoustical measurements and points of reference (Ex. 50)

TABLE OF AUTHORITIES

CASE LAW

Bach v. Sarich, 74 Wash.2d 575, 445 P.2d 648 (1968) 33

Baum v. Coronado Condominium Association, 376 So.2d 314 (Fla 1979)
..... 32

Bauman v. Turpen, 139 Wn.App. 78, 92-94, 160 P.3d 1050 (2007)..... 33

Candib v. Carver, 344 So.2d 1312, Fla.3d DCA (1977) 31

Day v. Santorsola, 118 Wn.App 746, 760, 76 P.3d 1190 (2003) 39

Erwin v. Cotter Health Centers, 161 Wn.2d 676, 687, 167 P.3d 1112
(2007) 12

Foster v. Nehls, 15 Wash.App. 749, 551 P.2d 768 (1976), *review denied*,
88 Wash.2d 1001 (1977) 34

Green v. Normandy Park, 137 Wn.App. 665, 693, 151 P.3d 1038 (2007)12

Lake v. Woodcreek Homeowners Ass'n, 169 Wash. 2d 516, 526, 243 P.3d
1283, 1287 (2010) 35

Mahon v. Haas, 2 Wn.App. 560, 468 P.2d 713 (1970) 34

Mariners Cove Beach Club v. Kairez, 93 Wn.App 886, 890, 970 P.2d 825
(1999) 35

Mitchell v. Washington State Institute of Public Policy,153 Wn.App. 803,
814, 225 P.3d 280 (2009) 12

Radach v. Gunderson, 39 Wn.App. 392,397-398, 695 P.2d 128 (1985).. 32

Riss v. Angel, 131 Wn.2d 612, 679, 934 P.2d 669 (1997) 39

San Juan County v. No New Gas Tax, 160 Wn. 2d 141, 153, 157 P.3d 831,
837 (2007) 31

State v. Kaiser, 161 Wn. App. 705, 726, 254 P.3d 850, 861-62 (2011). .. 31

Tapper v. State Employment Sec. Dept., 122 Wn.2d 397, 403, 858 P.2d
494, 498 (1993) 12

Tunstall ex rel. Tunstall v. Bergeson, 141 Wash. 2d 201, 239-40, 5 P.3d
691, 711 (2000) 13

Vance v. XXXL Development, 150 Wn.App 39, 42, 206 P. 3d 679 (2009)13

STATUTES

RCW 64.34.455.....45

RCW 64.34.328.....	44
RCW 64.34.020(6) and .204.....	44

OTHER AUTHORITY

42 Am. Jur. 2d <i>Injunctions S 16</i>	31
Seattle Municipal Code §§ 25.08.400-420.....	26
Bellevue City Code §19.18.030.....	26
King County Code §§ 12.88.010-030.....	26

I. INTRODUCTION

At the outset, the Austins would like to make clear what parts of the trial court's decision they are appealing and which ones they are not.

In this action the Austins have sought (a) damages for harm caused by construction activities in the Reeds' unit, including water damage, damage to their ceiling, and loss of use of their unit, and (b) injunctive relief to remedy changes to the Reeds' unit that have permanently diminished the peace and quiet of the Austins' home. The injunctive relief they have sought is (i) removal of the Reeds' heat pump and its replacement by a reasonably quiet alternative—either that described by expert Thomas E. Pressler, P.E. or one equally suitable, and (ii) removal of the improvised subfloor installed by the Reeds (the “Homasote sandwich”) and the restoration of the original material, known as “gypcrete,” or a similar lightweight concrete material.

The Austins are reasonably satisfied with the award of monetary damages and have not appealed this aspect of the judgment. They appeal the denial of injunctive relief.

In their opening brief, the Austins will describe the excessive noise that has resulted and will continue to result from the Reeds' changes to the floor and HVAC system. So far they have only experienced this harm occasionally because the Reeds' unit is vacant. There are no occupants to

subject the Austins to daily noise, and the heat pump has either been turned off or its thermostat turned so low that it does not come on.

However, it is inevitable that they will experience excessive noise once the Reeds' unit is occupied. It would be extremely foolish to wait until the unit is occupied to remove and replace the subfloor and HVAC system.

The Austins will also describe how the Reeds and the Association each breached their legal duties under the Condominium's governing documents. (The phrase "governing documents" refers to the Whaler's Cove "Amended and Restated Declaration and Covenants, Conditions, Restrictions and Reservations," Bylaws, and Rules and Regulations.) However, it is not necessary, for the purposes of this appeal, to apportion responsibility between the defendants. The defendants chose to present a united front in this case; they can allocate responsibility between themselves in a subsequent action, should they choose to do so. Indeed, it may be that one defendant or the other is primarily or even wholly to blame. Thus, while both defendants breached their legal duties, it is not necessary to prove that both of them did so in order to warrant injunctive relief.

On the other hand, it is essential that the injunctive relief be binding upon both defendants, and therefore each is a necessary party to this action. The injunctive relief requested necessarily affects all of the

defendants, because some of the remedial work will occur within the Reeds' unit and some will affect the walls, floor assemblies, and other common elements for which the Association is responsible and over which it has control.

Also, it is important to note that the Austins have not sued the Board members individually, although such claims are commonplace in disputes between owners' associations and their members. They simply want the problems fixed through injunctive relief binding on both the Reeds and the Association.

II. ASSIGNMENTS OF ERROR AND ISSUES

1. First Assignment of Error: The trial court erred in concluding that the changes to the Reeds' unit caused no "imminent harm" to the Austins.

Issue 1.1: Have the changes to the Reeds' unit harmed the Austins?

Issue 1.2: Should the harm be remedied now rather than waiting until the Reeds' unit is occupied?

Issue 1.3: Are the doctrines that sometimes justify withholding injunctive relief inapplicable here?

2. Second Assignment of Error: The trial court erred in concluding that neither the Reeds nor the Association breached any

legal duty to the Austins (other than the Reeds' breach that led to the damage award).

Issue 2.1: Did the Reeds fail to meet the conditions attached to the approval of their remodel project and the requirements of the Condominium's governing documents?

Issue 2.2: Did the Association's cursory review of the Reeds' oral proposals, without independent investigation, fail to satisfy its duty of careful scrutiny under the governing documents and applicable law?

Issue 2.3: Was the Association's conditioning of its approval on after-the-fact testing and consultation insufficient to meet its legal responsibilities, particularly when it failed to enforce those conditions?

Issue 2.4: Is the Association responsible for remedying the sound transmission problems through the common elements because of its legal responsibility for the common elements?

Erroneous Findings of Fact:

16, 18, 19, 21, 23, 24, 25, 26, 33, 37, 38, 39, 42, 43, 46, 48, 49, 52, 54

III. STATEMENT OF THE CASE

Whaler's Cove is a condominium complex in Bellevue, Washington, with 24 condominium units spread over four buildings.

Exhibit 52, an aerial photograph, gives a sense of the appearance and layout of Whaler's Cove. [RP 625-26.]

The Austins' and Reeds' units are in Building C. They are part of a stack of three units sharing a common stairway. The community room is on the ground level of the stack, with the Austins' unit above it and the Reeds' unit above the Austins'. Exhibit 19 is a photograph of the entrance to the Reeds' unit (9939), taken during their remodeling project. Exhibit 20 is a photograph of the Austins' entryway (9937), taken a little later. The ceiling in the upper left part of the Exhibit 20 is the underside of the Reeds' front porch. [RP 359-60.]

The Austins settled at Whaler's Cove with their children in 2002, after several years of moving from place to place because of work and school. [RP 285-86.] It was a peaceful and restorative place with a view of the water. [RP 287.] The condominium served as a pleasant venue for entertaining clients and colleagues as well as a comfortable place to live. [RP 953-54.]

The three Reed defendants, Richard, Darrelyn Jo ("D. J."), and Faith, own the unit directly above the Austins', through an entity known as Sunsets Forever LLC II. The Reed defendants inherited the unit from their father in 2008 and have held it as investment property since then.

No one has been living in the Reeds' unit during the course of this dispute.

[RP 392, 958.]

On April 15, 2009, D. J. Reed presented a written remodel application at the regular monthly meeting of the Board of Directors of Whaler's Cove Condominium. [Ex 4.] (The Reeds had actually started work already, in violation of the Condominium's Rules and Regulations. [RP 300, Ex. 3.]) She proposed to replace the carpet in one of the bathrooms with tile, to replace existing hard floor surfaces with tile, and to replace the rest of the carpet with new carpet. [RP 298, Ex. 4.] The Association, after about 15 minutes of consideration [RP 301], approved the Reeds' application, with the proviso that "a test for soundproofing re: flooring will need to be accomplished." [Ex 5.]

Although the Austins had not known that the Reeds would be presenting a remodel application at the April board meeting [RP 292], Kevin Austin happened to be present, because he was a Board member. He did not object to the remodel; in fact, Kevin brought a motion at the May Board meeting to lower the contractors' insurance requirement from \$2,000,000 to \$1,000,000, so the Reeds could continue their work. [RP 304.]

The floors between the units at the Whaler's Cove condominium include a 1 ½" thick layer of a lightweight concrete material, called

“gypcrete.” At some point the Reeds discovered that their lightweight concrete layer was cracked. [FF 14.] Rather than patch it or pour new lightweight concrete, as another owner had done¹, they decided to install something else—an improvised “sandwich” consisting of three ½” layers of material (plywood, a material known as “Homasote” in the middle, and gypsum board).² [FF 15.] According to some of the trial testimony, the Reeds approached the Board at its next regular meeting—May 13, 2009—and asked its approval to remove the massive amount of lightweight concrete and replace it with the “Homasote sandwich.” [FF 16.] There was testimony that the Board orally approved the Reeds’ request at that meeting, and the Court found this to be so. [FF 20, 22.] On the other hand, the Board’s minutes of the May 13, 2009 meeting, while they talk about various aspects of the Reeds’ remodel project and many other topics, say nothing about any request to replace the subfloor. [Ex 7.] The Austins, who testified that they attended that meeting and whose attendance is confirmed by the minutes, did not recall any discussion of the condition of the Reeds’ subfloor or the need to replace it while they were present. [RP 400: 6-10; 969-971.]

¹ See testimony of Joe Morton. [RP 1245-46.] Morton’s unit is next to the Reeds. It took one day to replace the lightweight concrete.

² The Austins did not know what had replaced the lightweight concrete, if anything, until they learned about it through discovery. [RP 631.]

In any case, the Reeds proceeded to demolish and haul away the lightweight concrete subfloor—12.9 tons of it—during the week of May 18. [Ex. 15, p. 1.] Alicia Austin came home from teaching school on May 21 to find holes in her ceiling, dislodged ceiling lights, exposed nail heads, and plaster and plaster dust on the floor. [RP 972-73.] This was the beginning of five months of distress, damage, and disruption inflicted by the Reeds on the Austins, which ultimately led to an award of damages against the Reeds at trial. The details will not be described here because the Austins are not appealing the damage award.

By November 2009, when the construction activity was over, the Austins discovered that the changes the Reeds had made to the floor had drastically impaired its sound-insulating capability. Before the remodel, the Austins could hear muffled voices from upstairs. Now they could hear what was being said with disturbing clarity. [RP 959.] Footsteps echo through the floor assembly like the pounding of a drum. [RP 393, ll. 17-18.]

Although the Board had required testing for soundproofing when it approved the Reeds' initial application to replace their floors, no such testing was done. [RP 381, 609.]

As another part of their remodel project, the Reeds orally proposed to replace the unit's HVAC system with a heat pump. A heat pump is a

device that provides both heating and cooling. It has a compressor, like an air conditioner's, which typically makes a lot of noise. Unlike an air conditioner, a heat pump runs and makes noise all year, whenever heating or cooling is required. [RP 309; 1115-21.]

There are other heat pumps at Whaler's Cove. All their compressor units are outside, enclosed or isolated to reduce noise. [RP 309-10; 319-24; Ex 23.] The Reeds, however, were proposing to install the compressor inside their unit, directly above the Austins' living space. The compressor would vent into the same enclosed shaft where the Austins' and Reeds' entrances were located. [See Ex. 19 and 20.] This seemed problematic, and the Austins objected when the Reeds made this proposal at the May 13, 2009 Board meeting. [RP 308-24; 966-69.] The Board approved the Reeds' request anyway, but added the conditions that "testing be done...." and that the Reeds "work with the Austins." [Ex 7.]

The Reeds refused to "work with the Austins" about the potential noise problems from their heat pump. [RP 620-21.] In early October 2009 they enlarged the exhaust vent for their soon-to-be-installed heat pump and moved it closer to the Austins' front door, thereby modifying the common elements without board approval. [RP 619:24-622; 1192.] At this point Kevin Austin tried again to get the Association to take some action about the heat pump. [RP 362-65; 374-75; 642-43; Ex. 53.] The

Board nonetheless allowed the Reeds to proceed. The chairman of the Board, Ray Waldman, took the position that the Association was powerless to constrain the Reeds in any way. [RP 1092-93.]

The Austins' counsel wrote the Reeds on October 27, 2009. [Ex. 30.] Kevin sent copies to the board members by email. [RP 621-22.]

Among other things, the letter said:

The Austins urge you not to install a heat pump above their bedroom unless it can be determined, with a reasonable degree of confidence, that it will not cause excessive noise or vibration in their condominium....

You should not install the heat pump without professional advice about the noise impacts. I encourage you to work with the Austins about obtaining this advice, to avoid disagreement in the future about whether the expert had the right qualifications or addressed the right issues.

The Reeds ignored the letter. [RP 381.] The Austins wrote the Reeds again on November 13, 2009, asking for several times and days in the next ten days when testing could be done. [Ex. 31.] The Reeds ignored this letter as well. [RP 381.] Having been ignored by the Reeds and rebuffed by the Association, the Austins saw no recourse but to file suit. They filed this action on January 11, 2010.³ In addition to monetary relief for the damages caused by the Reeds' remodel project, their suit sought information that they had been unable to obtain any other way and

³ They filed an Amended Complaint two days later to add exhibits that had been inadvertently omitted from the Complaint initially filed.

injunctive relief based on the information to be obtained. Their first request for relief in the Complaint was for “access to the Reeds’ unit to do sound and vibration testing and explore possibilities for mitigation of the effects of the defendant’s remodeling project and heat pump.” [CP 1.]⁴

A ten-day bench trial ensued from June 29 to July 14, 2011. On August 11, 2011, the court entered a monetary judgment for the Austins against the Reeds for \$24,908.27, in compensation for damages from the Reeds’ construction activities, plus an additional \$12,233.71 to defray the cost of anticipated future repairs. The court denied the Austins’ request for injunctive relief. [CP 1027-29.] The Austins filed a Notice of Appeal on September 8 [CP 1131-37], and the Reeds cross appealed on September 19. [CP 215-30.] Post-trial motions for attorneys’ fees were denied on September 15, 2011. [CP 485-94.] The Association appealed the denial of attorneys’ fees on September 26, 2011. [CP 495-506.]

IV. ARGUMENT

⁴ They ultimately did this testing during the course of discovery. This did not occur right away, because the Reeds’ unit was not occupied and the noise disturbances, at that point, were infrequent.

1. The trial court erred in concluding that the changes to the Reeds' unit caused no "imminent harm" to the Austins.

Standard of Review: Questions of fact are reviewed under the substantial evidence standard. *Green v. Normandy Park*, 137 Wn.App. 665, 693, 151 P.3d 1038 (2007). The process of determining the applicable law and applying it to the facts, however, is a question of law and is subject to de novo review. *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007), citing *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 403, 858 P.2d 494, 498 (1993). Whether the findings of fact and conclusions of law support the judgment is a question for the Court of Appeals. *Mitchell v. Washington State Institute of Public Policy*, 153 Wn.App. 803, 814, 225 P.3d 280 (2009).

1.1. The changes to the Reeds' unit have harmed the Austins.

The harm inflicted on the Austins is the infringement of their right to peace and quiet in their home. Their right to peace and quiet includes general rights derived from the common law, general rights derived from the Whaler's Cove Declaration and Rules and Regulations, and specific rights derived from Section 10k of those Rules.⁵

⁵ The Austins' rights are the consequence of certain duties under the common law and governing documents. Duties entail correlative rights. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn. 2d 201, 239-40, 5 P.3d 691, 711 (2000) ("Flowing

The common law right referred to above is the right recognized by nuisance law to be free from unreasonable interference with the use and enjoyment of one's property. *Vance v. XXXL Development*, 150 Wn.App 39, 42, 206 P. 3d 679 (2009).

Section 3.8 of the Declaration for Whaler's Cove recognizes a similar but not identical right when it says that nothing shall be done in any unit or common element "which may be or become an annoyance or nuisance to other Unit Owners..." The right implied by Section 3.8 is broader than the right inherent in the common law of nuisance, because it prohibits "annoyance" as well as nuisance—a more exacting standard. See *Candib v. Carver*, 344 So.2d 1312, Fla.3d DCA (1977), which held that even if an "annoyance" falls short of a "legal nuisance," it is still actionable when freedom from annoyance is "expressly conferred on the unit apartment owners by contract [i.e., by the condominium's governing documents]."

Section 5.1 of the Declaration also recognizes the right to peaceful enjoyment of one's home when it says that a unit owner's right to repair and replace fixtures "shall not be construed to permit interference with the use and enjoyment of the Common Elements or of the other Units."

from this constitutionally imposed "duty" is its jural correlative, a correspondent "right" permitting control of another's conduct").

Applied to the present case, this means that the Reeds' substitution of a heat pump, which is a fixture, for their existing HVAC system may not interfere with the Austins' "use and enjoyment" of their unit or of their front porch, which is a common element.

Section 10 of the Rules and Regulations reflects an intense concern with the potential deleterious impacts of remodel projects. [Ex. 3, pages 6-8.] It implies that unit owners have a right to protection from such impacts. In addition, paragraph K of the "General" portion of Section 10 sets forth quantitative requirements, to be met whenever new hard surface flooring is to be installed. The requirements for a ceramic floor—such as the tile installed by the Reeds—are an airborne sound or "STC" rating of 54 and an impact or "IIC" rating of 59. As will be explained below, the Reeds' floor installation did not meet these standards.⁶ The Reeds therefore deprived the Austins of a very specific, measurable right to quiet, as well as the more general rights to peace and quiet entailed by nuisance law, the Declaration, and Section 10 of the Rules and Regulations.

⁶ Section 10 pgh "k" contemplates that cork underlayment will be used, but allows for alternatives. However, nothing in Section 10 pgh. "k" suggests that a remodeler who eschews cork is excused from complying with the quantitative standards. To the extent that the second to last sentence of Finding of Fact 24 implies something different, it is (a) not supported by substantial evidence, and (b) a conclusion of law improperly designated as a finding of fact.

(a) The Reeds' rebuilt floor transmits excessive sound. By removing the lightweight concrete from the floor-ceiling assembly, the Reeds increased the noise in the Austins' unit in two ways: First, the sounds of people moving about and talking upstairs became acutely audible. Alicia Austin described the intrusiveness of the sound this way:

But every time somebody comes in, we hear them. When I say we hear them, I don't mean we know there's somebody upstairs. What I mean is if there's somebody standing directly above me I know they're standing directly above me. If they walk 5 feet in one direction, I know they've moved 5 feet in one direction. I can usually tell how many people are upstairs, if they're adults or children. I can tell if one person is talking and another person is answering. It's very different.

[RP 959.] Kevin Austin testified that now when people speak he can “recognize their accents” and “understand sentences.” [RP 393-99.] Second, the floor itself started to make noise when people walked on it. Kevin Austin described “the noise we hear when somebody walks across” as “like beating on a drum.” [RP 393.] Alicia said she could hear “our ceiling moving” and the beams “squeaking, bending, flexing.” [RP 958.] No one in the Association refuted these statements. For that matter, neither the Reeds nor the Board members had visited the Austins' unit to hear the sound, though the Austins had invited them to do so. [see, e.g., RP 1059, 1075, 1214, 1302.]

Even the defendant's own engineering expert reacted with surprise to the noise caused by movement in the Reeds' unit, asking Mr. Austin, "Do you hear *every* footstep upstairs?" [RP 395-97.]

In addition to the personal observations described above, the Austins offered objective, scientific evidence from acoustics expert Michael Yantis. The Court found him to be "credible and helpful." [FF 37.] He has nearly 40 years' experience in acoustical testing and design, including performing and evaluating measurements like the ones made in this case; consulting with developers, contractors and condominium associations about noise attenuation; and advising cities and counties about noise ordinances. [Yantis' testimony, RP 682-86 and *passim*.]

Mr. Yantis measured the transmission of airborne sound and impacts through the Reeds' floor into the Austins' unit. [RP 690-94.] The measurements are expressed in units that describe the ability of the floor to reduce the transmission of sound. The units are called ASTC (or STC) for airborne sound and FIIC (or IIC) for impacts.⁷ A higher value is better; it means the floor has a greater ability to stop sound from getting through. [RP 691.]

⁷ "ASTC" and "FIIC" are more technically precise terms than the "STC" and "IIC" used in Section 10, pgh. "k" of the Rules. [RP 691-94.]

Yantis' measurements are summarized in a table introduced as Exhibit 50 at trial.⁸ Among other things, Exhibit 50 shows that the Reeds' floor was letting considerably more sound into the Austins' unit than allowed by Section 10k of the Condominium's Rules and Regulations. In the tile entryway inside the Reeds' unit, Yantis measured an ASTC value of 45 for airborne sound attenuation, compared with 54 required by the Condominium's rules—a difference of nine units. He measured 42 for impact attenuation, compared with 59 required by the Condominium's rules—a difference of 17 units. As Yantis explained, ASTC and FIIC values are based on a decibel scale. A difference of 10 units corresponds to a difference in perceived loudness of a factor of two. [RP 700-01.] Thus airborne sounds were being heard almost twice as loudly through the Reeds' floor as the rules permitted, and impacts were being heard between three and four times as loudly.

In addition to Section 10k of the Rules, Mr. Yantis offered other points of reference against which to judge the sound transmission through the modified floor. [See Ex. 50.] He testified about what the owner of a condominium of comparable value might reasonably expect in the way of airborne sound and impact attenuation in both carpeted and hard-surface

⁸ Exhibit 16, a floor plan of the Austins' unit, is helpful to understand where the measurements were made.

areas. He was well-qualified to give such testimony, because of his experience working with other condominium associations:

I should say that part of our work is working with other condominium associations and helping them identify appropriate guidelines and rules for their own buildings, and so on a number of occasions, I have been asked to either create an entire portion of their guidelines that would relate to all of the acoustic and separation in the building, and other times they've got most of the language. They just want to update basically the IIC -- FIIC numbers or their requirements, much as these guidelines have tried to do. And so this, this column that -- this last column [in Exhibit 50] also is consistent with numbers that you would see in guidelines around the City for requirements from other quality buildings in the Association guidelines.

[RP 706.] Every ASTC or FIIC value measured for the Reeds' floor was 10 units or more less than what one would reasonably expect from a comparable condominium—i.e., at least twice twice as loud.⁹

In the absence of either personal observation or scientific measurements to refute the Austins' evidence, the defendants argued that the removal of the lightweight concrete and its replacement with an improvised "Homasote sandwich" was not the cause of the very poor sound insulation properties of the modified floor. However, the Austins' had strong evidence of causation and the defendants had none to refute it. The Austins' testified that sound transmission through the Reeds' floor got

⁹ If one corrects for the difference between "laboratory" and "field test" values, the differences would be reduced by 5 units [RP 691-94, Ex. 50], but the Reeds' floor would still fail to meet the condominium standards by a significant margin.

much worse after they replaced the subfloor. In addition, there was scientific data showing that the Reeds' floor was worse than the floors in two reference units at Whaler's Cove. The Association's acoustics expert, Julie Wiebusch, had measured the sound transmission between two pairs of units elsewhere in the condominium. These were her "control" units—i.e., points of reference against which to compare the measurements she made of Reeds' floor. [RP 832-33.] Yantis reviewed Wiebusch's data and interpreted it for the Court. He testified that for airborne sound, the Reeds' floor (with its ASTC values of 39-45, depending on location) was approximately twice as loud as the floors in the two control units (with ASTC values of 52). [RP 715-17.] The difference was even greater with respect to impact transmission over carpeted areas: Wiebusch measured 69 for the reference floor, compared with 54 for the Reeds' floor, a three-fold difference in perceived loudness. [RP 719:19 to 720:7.]

Finally, Mr. Yantis testified that there were logical, physical reasons for the change. He said that in his expert opinion, the excessive sound transmission through the Reeds' floor resulted from their removal of the light-weight concrete subfloor. He explained that one would expect this result because the replacement material used by the Reeds was only about 40% as dense as lightweight concrete. [RP 723-24.] The degree of sound attenuation increases or decreases with the mass of the floor-ceiling

assembly. [RP 722, ll. 6-7.] He also found support for his opinion in the technical literature. [RP 724:3 – 725:12.]

Lacking any contrary evidence on causation, the defendants pecked and poked Mr. Yantis' testimony. On cross-examination Mr. Yantis admitted did not know the square footage of the control units or whether they had recessed can lights or resilient channels [FF 38(b)]. Apparently the Court concluded from this that "the evidence did not show" that the "control units" were "comparable." [FF 39.] This was error. It is proper, in scientific investigation, to rely on the data gathered by other scientists—in this case, the Association's own expert, Julie Wiebusch, whom Yantis knew well and considered very competent. [RP 833; 835:16-23.] Wiebusch had chosen the units used as controls. She had tested them and then gone on to test the Reed/Austin floor-ceiling assembly. The Association's attorneys had described them as "control units" in their interrogatory responses. [Clerk's sub no. 161, 162; suppl. designation of Clerk's Papers to be filed.] "Control" has a specific meaning in science and engineering—a point of reference, a standard against which to compare data one is collecting. It was more than

reasonable for Yantis to use the Association's control units as a point of reference.¹⁰

The defendants presented no evidence that the characteristics of the control units about which they questioned Mr. Yantis were relevant to the acoustical issues in this case.¹¹ For example, they asked about the square footage of the control units, as if a difference in area would invalidate the sonic comparison, but without presenting any evidence that it would. Here is the exchange:

Q. (By Mr. Nichols) Do you know that the unit that -- the lower unit where she [Wiebusch] took the measurement, do you have any idea of what the square footage is?

A. No. She has -- *part of the measurement procedure gathers data in which to normalize out information in terms of areas and volumes and square footage*, so -- but I have not checked that directly. [Emphasis added.]

¹⁰ The defendants had brought a Motion in Limine to bar Yantis from relying on Wiebusch's data, which the trial court denied on the first day of trial. [RP 179: 7.] The facts surrounding Wiebusch's and defense counsel's designation of "control units" are described in the Austins' response to this Motion in Limine. [Clerk's sub no. 161, 162, suppl. designation of Clerk's Paper to be filed.] The defendants raised this issue again at trial and the trial court denied their objection. [RP 711-15.]

¹¹ The only characteristic they asked about that might have mattered, sonically speaking, is the presence or absence of resilient channels. The Reed/Austin floor-ceiling assembly had no resilient channels. There is absolutely no reason to believe that the control units were any different in this regard. Furthermore, as explained below, it was incumbent upon the Association to come forward with evidence showing why its own choice of controls was invalid.

Translation of Mr. Yantis' answer: "No I don't know, but the measurement process is designed to correct for ("normalize") differences in area and volume." [RP 708.] There was a similar exchange about whether Yantis knew if the control units had "recessed can lights." He admitted he did not, but, again, so what? The defendants presented no evidence that the presence or absence of can lights makes a difference, and, in fact, Yantis later testified that they did not. [RP 728:15-18.] The trial court erred by considering these sorts of factors relevant when there was no competent testimony from acoustics experts that they had any sonic significance.

On the other side of this question, the defendants failed to come forward with evidence that the two pairs of control units differed from the Reed-Austin pair in any way that would affect their acoustical properties, even though the Association was uniquely able and motivated to present such evidence. The Austins had no reason to try to obtain such information through discovery, because they did not know until just before trial that the Association would repudiate its own choice of control units. Nor did the Austins have the ability to examine the components of the subfloor between the control units without obtaining access to them and doing destructive testing (i.e., removing or drilling through the floor surface), which would have been difficult to justify without some reason

to expect this about-face by the Association. By contrast, the Association had free access to the control units and the ability to obtain and present evidence to refute their comparability to the Reed/Austin units—if any such evidence existed. The Association did not produce any such evidence.

The defendants also tried a different approach on the causation question, arguing that the Austins' themselves had caused excessive noise transmission by replacing certain recessed can lights in their living room and family room. This contention had absolutely no evidentiary support and the Court did not enter any finding of fact that it was true, but the Court did refer to it in passing in one of its Findings of Fact.¹² The fatal flaws in the defendants' "can light" theory include the following: (a) The increase in sound transmission started *well before* the Austins replaced their can lights, according to the Austins' unrebutted testimony. [RP 377:17- 24; 392-93.] (b) If the change in can lights had had any effect, it would have improved the sound attenuation properties of the ceiling. The new can lights, while more numerous than the old ones, were also smaller

¹² In the absence of any findings that the "can light" theory was true, Finding of Fact 38(e), which refers to can lights, is irrelevant to the Court's decision. It is also potentially misleading. The Finding says that Yantis could not "quantify" the effect of can lights because he did not know the details of their installation. But there was nothing to "quantify" because there was no effect, and the Court did not find any effect.

and, in the aggregate, occupied a smaller area than the old can lights. Also, the new can lights (unlike the old ones) were sealed within metal boxes. [RP 725:13 to 726:16.] (c) Yantis measured the greatest degree of excessive sound transmission in locations where the can lights had *not* been replaced. [RP 727:10 – 728:9.] (d) In Yantis’ unrebutted expert opinion, the can lights had not affected sound transmission. [RP 728:15-18.]

(b) The Reeds’ heat pump installation is unreasonably loud. As in the case of the excessive noise from the new floor, the Austins presented both personal observations and expert testimony about the excessive noise from the Reeds’ heat pump. Alicia Austin testified that “when I stand at my front door and it’s operating it sounds like the back end of a garbage truck is at my front door.” [RP 961.] She said that she could hear it in every room of her house and had heard it over the noise of the shower with the bathroom fan running. [RP 962.]

The Austins presented the testimony of Thomas E. Pressler, P.E., an exceptionally well-qualified HVAC expert. Mr. Pressler has designed HVAC systems for 40 years and consults with condominium associations about heating and cooling issues. [RP 1113-14.] Defense counsel acknowledged his “impressive resume.” [RP 1137.]

Mr. Pressler testified that the unit installed by the Reeds was not a suitable system for that location because “it generates too much noise.” [RP 1112.] He said the heat pump was as loud as any HVAC unit he had heard. RP [1126:24 - 1127:1.] He explained that “the condensing unit section,” which produces about 90% of the noise, discharges directly into the exterior “in close proximity to both homeowners.” The heat pump discharges into what was essentially an air shaft that contains the stairway serving the Austin and Reed units. [RP 360-61; Ex. 19, 20; RP 620, 969; *see also* Ex. 137, floor plan for Building C.]

Mr. Pressler further explained that there are much quieter alternatives—split systems in which the condenser is located outside the condominium unit, with a refrigerant line running to a fan inside the residence. He presented photographs he had taken at Whaler’s Cove showing other heat pumps, none of which are one-piece, through-the-wall units like the Reeds’--some with the condenser located on the ground outside the condominium building, some in wells on the roof of the condominium unit’s garage. [RP 1119 - 1121; Ex 23.] He described a specific alternative to the Reeds’ heat pump, manufactured by Mitsubishi, with a decibel rating 20 units lower than the Reeds’ heat pump. As noted above, a difference in 20 decibels corresponds to a four-fold difference in perceived loudness. In this case the difference would be far greater,

because the condenser unit for the split system would be located outside, at a remove from the living spaces.

Mr. Yantis provided measurements of the noise produced by the Reeds' heat pump. At the Austins' front door, the sound measured 69 decibels. [RP 738-39] The heat pump produced 63 decibels three feet inside the Austins' front door and 54 decibels in the "piano room," also referred to as "the south end of the entry." [Id.; see also Ex. 16.] As a point of comparison, the Seattle Municipal Code, the Bellevue City Code, and the King County Code each provide that sound may not intrude upon the residential real property of another at a level in excess of 55 dbA during the day and 45 dbA at night. *See* Seattle Municipal Code §§ 25.08.400-420; Bellevue City Code §19.18.030; King County Code §§ 12.88.010-030. With one exception, the sound levels produced by the heat pump at these locations (69, 63, and 54 dbA) substantially exceed the typical municipal code limits of 55(daytime) and 45(night). As noted above, a difference in 10 decibels corresponds to a difference of two times; a difference of 20 units corresponds to a factor of four.

To counter these facts, the defendants pointed out that the sound levels inside the Austins' unit were significantly lower when their doors and windows were closed; and therefore that the Austins could avoid the most extreme heat pump noise as long as they stayed inside their

condominium with the doors and windows closed. Of course, even then the Austins would be subjected to the excessive noise when coming and going, and they would still be awakened from their sleep when the compressor above their bedroom cycled on and off. But it would not be appropriate to interpret the governing documents' concern with the prevention of excessive noise as applying only when an owner is inside his or unit behind closed doors and windows. Furthermore, the Austins' condominium is not air conditioned, and they rely on cross-ventilation for cooling. [RP 737-40.]

The Association also spent considerable time arguing about how the City of Bellevue measures noise. However, the specific enforcement practices of the City of Bellevue are not at issue. Moreover, the Austins' case is not based, to any significant degree, on establishing a violation of the Bellevue Code.¹³ The Austins provided information about the Bellevue Code mainly to give another point of reference against which to compare the sound characteristics of the Reeds' floor and heat pump. The

¹³ Whether the Reeds violated the Bellevue Code is only relevant to determine whether they violate that part of Section 3.8 of the Declaration that requires compliance with local ordinances. Thus the Reeds' violation of the Bellevue Code is only one relatively minor breach of their legal duties to the Austins. For the discussion of the sources of the defendants' duties and the Austins' rights, see Section 1.1, above.

rights the Austins are seeking to enforce derive from the common law and the condominium's governing documents, not the Bellevue Code.

In summary, then, the Austins presented both personal and expert testimony that the Reeds' replacement of the lightweight concrete subfloor with a much lighter material and their installation of a heat pump near the Austins' front door each resulted in excessive noise in the Austins' unit. The defendants challenged some of this evidence, but did not refute it with expert testimony or any substantial evidence of their own.¹⁴

1.2. The harm should be remedied now rather than waiting until the Reeds' unit is occupied.

The defendants argued, and the Court found, that the harm to the Austins was not "imminent." [FF 54.] It is true that, after the damage and disruption during the course of the Reeds' construction project, the Austins have not been disturbed by sound from the Reeds' unit very often, because the Reeds' unit is vacant. They have heard excessive noise when the Reeds, prospective purchasers and real estate agents, and attorneys and experts have walked and talked upstairs and when the heat pump has come on. However, it will only be a matter of time before the Reeds sell or rent

¹⁴ The defendants did present testimony from James Tinner, as an expert on building codes. But Mr. Tinner is not an acoustical expert, like Mr. Yantis, or an HVAC expert, like Mr. Pressler. His testimony was largely irrelevant, because the Austins' theory of the case is not based on establishing code violations.

their unit, at which point the Austins will lose the quiet enjoyment of their home.

It would have been inappropriate, even foolish, for the Austins to wait for someone to take up residence in the Reeds' condominium before trying to remedy the conditions that will inevitably give rise to excessive noise on a daily basis. Waiting until after occupancy would harm the innocent third party who buys or rents the unit. The problem would become much harder to rectify; it would likely require increased remediation costs, alternative lodging for the unit's inhabitants, removal of their furniture and belongings, and general disruption to their lives.

In another version of their argument that the Austins acted prematurely, the defendants observed and the court found that the Austins brought suit before hearing the heat pump in operation. [FF 46.] There is no dispute about this, but it does not have adverse implications for the Austins' case. The Austins brought suit in part *because* they had not heard the heat pump in operation, the Reeds had refused their pleas to test it [*see* Ex. 30 and 31], and the Association had refused to enforce the conditions of testing and cooperation that it had laid down when approving the Reeds' application.

Moreover, this line of argument ignores the fact that the Austins had reason to fear the consequences of the heat pump even if they had not

yet heard it operating. It appeared from the outset that installing a heat pump inside the Reeds' unit, above the Austins' bedroom, discharging into an enclosed space outside the Austins' front door, was a very bad idea. One did not need to hear the heat pump in operation to be concerned.

Finally, there is a statement in Finding of Fact 46 that the heat pump was "not ready for testing" because the City of Bellevue has not "signed off on the mechanical permit." This Finding is erroneous and is not supported by substantial evidence. There is no question that the heat pump is currently operational and had been for quite a while before trial, probably since it was installed in October 2009. As noted above, the heat pump awakened the Austins when it came on around December 30, 2010. It continued to run for the following few months. [RP 962-63.] Not only *could* its noise levels be tested, they have, *in fact*, been tested, both by the defendants' expert (Wiebusch) and by Mr. Yantis. Furthermore, there was no evidence that (a) Bellevue's criteria for signing off on the mechanical permit have anything to do with sound levels, or that (b) the Association or the Reeds had any particular concern about whether Bellevue had signed off on the mechanical permit, other than as part of their litigation strategy in this case. They only learned that the mechanical permit file was open by happenstance, a few months before trial. There was no mention of this issue during the Board's consideration of the Reeds' heat

pump installation. The Bellevue inspection issue, like the can light defense, is a red herring.

1.3. The doctrines that sometimes justify withholding injunctive relief are inapplicable here.

Standard of Review. As a form of equitable relief, the trial court's decision to grant or withhold an injunction is reviewed under an abuse of discretion standard. *San Juan County v. No New Gas Tax*, 160 Wn. 2d 141, 153, 157 P.3d 831, 837 (2007). Although generally exercised as a matter of discretion, the power to grant or deny injunctive relief is not arbitrary or unlimited but must be exercised with the guidance of established principles of equity jurisprudence. 42 Am. Jur. 2d *Injunctions* § 16. A trial court abuses its discretion when its decision is based on untenable grounds, is manifestly unreasonable, or is arbitrary. *San Juan County, supra* at 153; *State v. Kaiser*, 161 Wn. App. 705, 726, 254 P.3d 850, 861-62 (2011).

Courts have held, in two condominium cases, that the refusal to award injunctive relief is untenable where the refusal rests on incorrect legal criteria. One example is *Candib v. Carver*, 344 So.2d 1312, Fla.3d DCA (1977), where the trial court had imposed too exacting a standard against which to measure interference with an owner's peaceful enjoyment of his unit. Another example is *Baum v. Coronado Condominium*

Association, 376 So.2d 314 (Fla 1979), where the owner living below the lobby sought to compel the Association to mitigate the sound from the terrazzo floors. The trial court denied the requested injunction, holding that the majority's preference for the hard floors overrode the interests of one particular owner. The appellate court found this standard inappropriate and remanded for issuance of the requested injunction.

The Washington case of *Radach v. Gunderson*, 39 Wn.App. 392, 397-398, 695 P.2d 128 (1985) also has many similarities to the present case. There the Gundersons (occupying a position analogous to the Reeds in the present case) submitted building plans to the City of Ocean Shores (in the Association's role of reviewing authority). The City conducted minimal review of the plans and issued the building permits. The house was substantially constructed when a zoning violation was discovered by the Gundersons' neighbor, the plaintiff Radach (analogous to the Austins here). Eventually Radach brought suit to require the home to be moved. The trial court refused to grant injunctive relief, but the Court of Appeals reversed and issued an injunction. The Court ultimately concluded that, while there was no demonstrative financial impact on the plaintiffs, the injunction should issue requiring the Gundersons to move the home and that the City should pay the costs associated with the move.

The defendants may argue that injunctive relief was properly denied because there is an adequate remedy at law. However, there are some types of claims for which injunctive relief is generally regarded as the appropriate remedy. These include claims, such as those brought by the Austins, to enforce protections afforded by neighborhood rules and covenants. *Bauman v. Turpen*, 139 Wn.App. 78, 92-94, 160 P.3d 1050 (2007).

The cases that accord the trial court the greatest degree of discretion are those where the court withholds the injunction based on the “balance of hardships.” Because the Reeds plowed ahead, refusing to “work with” the Austins or test their installations, they exposed themselves to the risk of having to remove them without consideration of any hardship that might ensue. *Bauman v. Turpen*, supra, 94-97, *Radach v. Gunderson*, supra, at 398. “The protection afforded by this process [balancing of the hardships] is not available to one who proceeds with knowledge that his actions encroach on the property rights of others.” *Bach v. Sarich*, 74 Wn.2d 575, 445 P.2d 648 (1968); *Foster v. Nehls*, 15 Wn.App. 749, 551 P.2d 768 (1976), *review denied*, 88 Wn.2d 1001 (1977); *Mahon v. Haas*, 2 Wn.App. 560, 468 P.2d 713 (1970).

In short, the trial court’s withholding of the requested injunctive relief was untenable, because (a) it was based on incorrect legal principles,

and (b) because balancing the hardships--a generally recognized basis for withholding injunctive relief that would otherwise be justified—is not appropriate here.

2. The trial court erred in concluding that neither the Reeds nor the Association breached any legal duty to the Austins (other than the Reeds' breach that led to the damage award).

As noted in the Introduction to this brief, the Austins seek an injunction binding on both the Reeds and Association, regardless of which of them is responsible for causing the problem or the degree of responsibility of each. In fact, each breached its legal duties to the Austins, as they will explain below. But even if only one of them breached its duties to the Austins, the injunction should issue. The Association and the Reeds can decide between themselves who is responsible for any costs of compliance with the injunction, by subsequent litigation if necessary.

Standard of review: It is well-settled that the interpretation of a covenant and the determination of its legal consequence is a question of law, to be reviewed de novo. See *Lake v. Woodcreek Homeowners Ass'n*, 169 Wash. 2d 516, 526, 243 P.3d 1283, 1287 (2010) (“The declaration's legal consequences are questions of law, which we review de novo”); *Bauman v. Turpen, supra*, at 92 (“Whether the Turpens violated the one-

story covenant is a conclusion of law, not a finding of fact”); *Mariners Cove Beach Club v. Kairez*, 93 Wn.App 886, 890, 970 P.2d 825 (1999) (“The interpretation of language in restrictive covenants is a question of law”). By contrast, the determination of the intent of the drafter is a question of fact; provided, however, that such intent is to be determined from the face of the document. *Lake, supra*, at 526. *Mariner’s Cove, supra*, at 890.

The interpretation of a statute, such as the Washington Condominium Act, is a question of law, to be reviewed de novo.

2.1. The Reeds failed to meet the conditions attached to the approval of their remodel project and the requirements of the Condominium’s governing documents.

Section 4.2 of Whaler’s Cove’s Declaration requires a unit owner to “*comply strictly with the provisions of this Declaration and with the Bylaws and rules and regulations of the Association, as they may be lawfully amended from time to time, and with all decisions of the Board or the Association,*” and it gives each unit owner a private right of enforcement. Here is the text of Section 4.2:

Failure of any Unit Owner to comply strictly with the provisions of this Declaration and with the Bylaws and rules and regulations of the Association, as they may be lawfully amended from time to time, and with all decisions of the Board or the Association adopted pursuant to this Declaration and the Bylaws and rules and regulations shall be grounds for (a) an action against the noncomplying Unit

Owner to recover sums due for damages, or for injunctive relief, or both, maintainable by the Board acting through its officers on behalf of the Unit Owners, or by any aggrieved Unit Owner on his own.

The Reeds failed to strictly comply with the Declaration, condominium Rules, and conditions of project approval in numerous ways: (1) They failed to comply with the Board's condition of approval of their modification to the floor of their condominium by failing to test for sound. There is no dispute about this fact. As noted above, Section 4.2 of the Declaration gives the Austins the power to enforce the "decision of the Board," which decision included the requirement that the Reeds test for soundproofing. (2) The Reeds failed to comply with the Board's condition of approval of their heat pump installation by failing to test for sound and failing to "work with the Austins." Section 4.2 of the Declaration gives the Austin the power to enforce this decision as well. Finding of Fact 23 says that the requirement that the Reeds work with the Austins did not give the Austins "veto power." The Austins do not claim to have been granted "veto power," so they do not assign error to this finding. However, the finding may mean to imply that the Reeds did not have to communicate with the Austins and work with them concerning sound issues. Such an inference would be unwarranted and unsupportable. (3) The Reeds' floor installation does not meet the sound

insulation requirements of Section 10k of the Rules and Regulations. (4) The Reeds violated § 5.7(b)(1) of the Declaration by enlarging the existing air conditioner's exhaust vent and moving it closer to the Austins' door, without the Board's permission to do so. (5) The Reeds violated §5.1 of the Declaration by installing a fixture (the heat pump) that interferes with the Austins' use and enjoyment of their unit and the common elements. (6) The changes to the Reeds' unit violate §3.8 of the Declaration by creating an "annoyance or nuisance." (7) The changes to the Reeds' unit violate §3.8 of the Declaration because they violate Bellevue ordinances concerning sound attenuation and noise. The determination of what the Bellevue noise ordinance says is a question of law. The noise levels measured in the Austins' unit and the sound attenuation ratings of the Reeds' floors exceed the legally permissible limits. (8) The Reeds did not obtain written approval for their work on the subfloor or their heat pump installation before beginning the work, as required by ¶ b of the "General" section and ¶ d of the "Administrative Procedure" section of Rule 10. [Ex. 3, pp. 6-9.] For that matter, the Reeds did not obtain written approval for these, the most significant parts of their work, at any time. As noted above, Section 4.2 of the Declaration requires the Reeds to strictly comply with the condominium's governing documents, including the Rules and Regulations. (9) The

Reeds did not submit written applications for the subfloor and heat pump portions of their work. Written applications are required by ¶¶ a and b of the “Administrative Procedures” section of Rule 10 ¶k.

2.2. The Association’s cursory review of the Reeds’ oral proposals, without independent investigation, did not satisfy its duty of careful scrutiny under the governing documents and applicable law.

The governing documents are binding on the Association. *See*, for example, *Lake v. Woodcreek Homeowners Ass’n*, 169 Wash. 2d 516, 526, 243 P.3d 1283, 1287 (2010); *Mariners Cove Beach Club v. Kairez*, 93 Wn.App 886, 890, 970 P.2d 825 (1999); *Shorewood West. Condo. Ass’n v. Sadri*, 140 Wash. 2d 47, 53, 992 P.2d 1008, 1011 (2000). The Association is not excused from complying with them even if it may seem reasonable to ignore them.

Section 10 of the condominium’s Rules and Regulations requires the Association to scrutinize proposed changes that might affect the peace and quiet of neighboring owners. The first paragraph under the “Administrative Procedures” portion of Section 10 says, “In conducting its review [of a remodel proposal], the Board shall *identify and focus on* any portion of proposed work that could negatively impact the building structural integrity, *or result in excessive noise or sound transmission or other nuisance to an adjoining or other unit in the building* (emphasis added).” To similar effect, the Rule says: “Of particular importance will

be to identify...any modifications that...*can have a disturbing effect to adjoining units, including but not limited to...HVAC units* (emphasis added).” [Second par. under ¶ c of “Administrative Procedures.”] Preventing the long-term loss of peace and quiet is one of the central themes of Section 10.

Even where the governing documents are not so explicit and emphatic, Courts have held that an Association has a duty of independent investigation. In *Riss v. Angel*, 131 Wn.2d 612, 679, 934 P.2d 669 (1997), the Court criticized the Association for failing to visit the site, for failing to make objective comparisons, and for relying uncritically on inaccurate information. Similarly, the Court in *Day v. Santorsola*, 118 Wn.App 746, 760, 76 P.3d 1190 (2003) faulted the Architectural Control Committee for relying on information from the applicant, rather than “independently” evaluating their proposed plans. The consequences of these failures of independent investigation were severe; in each case, Association members were held personally liable. In the present case the Austins have not sued the Board members; they seek only relief against the Association and the Reeds.

The Rules and Regulations give the Association the power to meet its investigatory responsibilities. Among other things, they give the Association the right to retain a consultant or attorney, *at the applicant’s*

expense. [¶ g. of Adm. Proc., Rule 10.] Such consultants exist; in fact, both of the Austins' experts, Michael Yantis and Thomas Pressler, consult for owners' associations on acoustical and HVAC matters, respectively.

Careful scrutiny is facilitated and encouraged by the requirement that applications and approvals be in writing. These requirements discourage the casual, on-the-fly approval of ambiguous and incomplete proposals, as happened here. The writing requirements also facilitate review by and consultation with affected owners, who may not be present for an oral presentation. The importance of review and consultation by neighbors who might be adversely affected by increased sound transmission is reflected in Section 5.7.1 (d) of the Declaration. It provides that when an owner wants to install a "flooring product that causes an increase in sound transmission to the lower Unit," the Board "shall consult with the Unit Owner of the Unit below the Unit in which the flooring change is proposed to be made prior to approving any such substitution." The Board violated this section of the Declaration by failing to consult with the Austins about the Reeds' subfloor replacement.

The Association's duty to scrutinize a remodel project to identify potential harm presupposes a duty to prevent or mitigate that harm. It is not enough to gather information; the Association must also act on what it learns. Section 10 of the Rules empowers the Association to act.

Paragraph d. under Administrative Procedures says the Board may condition its approval on sound mitigation or the location of HVAC equipment. The opening paragraph of “Administrative Procedures” gives the Board “the right to require additional sound insulation, structural modifications, or other work that it believes is necessary to protect the interests of the Association *or other Owners* [emphasis added].”

Overall, the Associations’ review of the Reeds’ subfloor and heat pump proposals was hasty (though there was no emergency), casual, and perfunctory. If it had asked the Reeds or their contractor some simple questions, it could have learned that the Reeds’ contractor had never done a project in a condominium before [Dep. of Byung “Mike” Lee, 11:12-11:17]; that this \$30,000 project for the Reeds was the largest project it had ever done; and that it had relied primarily on a salesperson at Gray’s Lumber for acoustical engineering [Dep. of Lee, p. 109:5-110:10]. The “product literature” referred to in Finding of Fact 16 was a 3-page sales brochure from the Homasote manufacturer. [Ex. 18.] If the Association had looked at the brochure or asked the contractor about it, it might have noticed that (a) the Homasote sandwich proposed by the Reeds is not an approved configuration shown in the brochure, and (b) none of the floor configurations shown in the brochure meets the quantitative requirements of Section 10k of the Rules (STC of 59, IIC of 54). The Board did no

independent investigation, as contemplated by *Riss v. Angel, supra*, nor did it ask for supplemental or expert advice, at the Reeds' expense, as authorized by ¶ g. of the Administrative procedure section of Rule 10.

The review of the heat pump was no better. The Reeds did not even specify which of the many models in the MagicPak brochure they would be installing. There was no serious consideration of alternatives; the Board simply let the Reeds install the heat pump in a grossly unsuitable location because D. J. Reed had decided to put it there [*see* Debra Coons testimony, RP 1011], or because Board member Robert Buckley would not consider allowing them to place it in a well in the garage roof, because then he could see it from his residence in building A, where he and most of the other Board members lived. [RP 1218]. The MagicPak was not a quiet or desirable heat pump; it was simply the only one Glendale Heating could find that would fit in the location. [RP 1012-13.] Debra Coons testified that D. J. Reed did not ask her to find a unit quieter than the existing unit. [RP 1013.] Glendale Heating had never installed a MagicPak before and had never done a through-the-wall installation like this before. [RP 1013.] These were Ms. Coons' answers to a few simple questions, which the Board apparently did not ask before approving the Reeds heat pump installation, if ever.

2.3. The Association's conditioning of its approval on after-the-fact testing and consultation was insufficient to meet its legal responsibilities, particularly when it did not enforce those conditions.

The Association's imposition of some ill-defined conditions to its approvals was not sufficient to meet its duties under the governing documents or any duty of reasonableness under the case law. While the governing documents authorize (indeed, encourage) appropriate conditions of approval, they *require* scrutiny at the application stage. The course of events in this case shows the wisdom and necessity of this approach, because once something is built or installed, it becomes difficult or impossible to change it.

In any case: the Association cannot defend its lax review of the Reeds' proposal on the grounds that it imposed certain conditions *when it did not enforce those conditions*.

The Association's failure to scrutinize the Reeds' application and protect the Austins is particularly disturbing given how it has handled similar matters in the past. In the past, when Joe Morton wanted to install a new lightweight concrete subfloor, the Board required him to obtain the written consent of the downstairs neighbor, and he did. [RP 1246.] Robert Buckley described how, when a heat pump disturbed his peace and quiet, he complained to the Board and the heat pump was moved. [RP 1234-35.] When Clark Nichols proposed to install hard surface flooring,

he proposed to prepare a sample of the new floor and test it before installing it. [RP 1313.]

2.4. The Association is responsible for remedying the sound transmission problems through the common elements because of its overall responsibility for the common elements.

Injunctive relief, binding on the Association, requiring restoration of the lightweight concrete and replacement of the heat pump with a quiet split system (or installation of a suitably quiet alternative), would be appropriate here even if the Association had done its job properly. This is true because the Association is responsible for the condition of the common elements and has legal control over them. RCW 64.34.328. The subfloor damaged by the Reeds is a common element. So is the wall through which the heat pump vents into the space above the Austins' front door. RCW 64.34.020(6) and .204. If the Association incurs expenses complying with the injunction, it can likely shift the cost to the Reeds by exercising its indemnity rights.

V. CONCLUSION.

The Reeds ruined their floor's sound insulation capability when they removed the lightweight concrete material and replaced it with a much lighter, improvised "Homasote sandwich." They installed a heat pump in a clearly unsuitable location, where it makes too much noise. An

injunction should be issued to remedy these conditions, so that the Austins are not deprived of the peaceful enjoyment of their home.

The Austins ask the Court to award their attorneys fees incurred on this appeal, in it discretion, pursuant to RCW 64.34.455.

Respectfully submitted this 18th day of June, 2012.

ZENO DRAKE BAKALIAN P.S.

A handwritten signature in black ink that reads "G. Michael Zeno, Jr." The signature is written in a cursive style with a large, stylized initial "G".

G. Michael Zeno, Jr., WSBA 14589
4020 Lk. Wash. Blvd. NE, Ste 100
Kirkland, WA 98033
Telephone 425-822-1511
Fax 425-822-1411
Email mzeno@zdblaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2012, I caused to be served the foregoing Appellant Austin's Corrected Opening Brief on the following parties at the following addresses:

Philip Sloan
Sloan Bobrick PS
7610 40th St. West
University Place, WA 98466
psloan@sloanbobricklaw.com

Joanne Henry
Sloan Bobrick PS
7610 40th St. West
University Place, WA 98466
jhenry@sloanbobricklaw.com

Vasudev N Addanki
Betts, Patterson & Mines, P.S.
One Convention Place
701 Pike Street, Ste 1400
Seattle, WA 98101-3927
vaddanki@bpmlaw.com

Clark R. Nichols
Perkins Coie LLP
10888 NE 4th Street, Ste 700
Bellevue, WA 98004-5579
cnichols@perkinscoie.com

Richard D. Reed
Attorney at Law
12502 SW 148th Street
Vashon, WA 98070-3724
reedlo@aol.com

A handwritten signature in black ink, appearing to read 'Mica Rabchuk-Wylie', written over a horizontal line.

Mica Rabchuk-Wylie

EXHIBIT A

Working Copies
The Honorable Carol A. Schapira
Aug. 2, 2011
w/o oral argument

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

KEVIN and ALICIA AUSTIN,
Plaintiffs,

NO. 10-2-02721-1

v.

~~PROPOSED~~ REVISED FINDINGS OF
FACT AND CONCLUSIONS OF LAW
OF WHALER'S COVE ASSOCIATION
OF APARTMENT OWNERS

SUNSETS FOREVER LLC II, a Washington
limited liability company; RICHARD REED,
FAITH REED, D. J. REED, the spouses or
domestic partners of each of them; and
WHALER'S COVE ASSOCIATION OF
APARTMENT OWNERS, a Washington
nonprofit company,

Defendants.

THIS MATTER having come on duly and regularly for trial on June 29, 2011 before the
Honorable Carol Schapira, Plaintiffs Kevin and Alicia Austin ("Plaintiffs") having been
represented by their attorneys of record, G. Michael Zeno Jr. and Leslie Drake of Zeno Drake
Bakalian PS, and Defendants Sunsets Forever LLC II, Richard Reed, Faith Reed and D.J. Reed
having been represented by Richard D. Reed, and Defendant Whaler's Cove Association of
Apartment Owners having been represented by Joseph D. Hampton and Vasudev N. Addanki of
Betts Patterson & Mines, P.S., Clark R. Nichols of Perkins Coie LLP and Philip Sloan of Sloan
Bobrick P.S., and the Court having reviewed all of the pleadings and exhibits herein and heard the

("Reed")

[PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION

500050/080211 1253/77180039

ORIGINAL

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

1 testimony of all witnesses and the arguments of counsel, and being otherwise fully advised in the
2 premises, the Court hereby enters the following findings of fact and conclusions of law.

3 Insofar as any finding of fact may constitute a conclusion of law, and insofar as any
4 conclusion of law may constitute a finding of fact, then each shall be incorporated into and are
5 hereby incorporated under the appropriate categories of findings of fact or conclusions of law.

6 I. FINDINGS OF FACT

7 1. This case arises out of a remodel project of a condominium unit owned by
8 Defendants Sunsets Forever LLC II, whose members are Richard Reed, Faith Reed and D.J. Reed
9 (“the Reeds”) at the Whaler’s Cove Condominiums in Bellevue, Washington.

10 2. The Reeds’ condominium unit, Unit #9939, is the upper unit of a two-unit stack
11 (“the Reeds’ Unit”) in Building C.

12 3. The Plaintiffs (“Austins”) own Unit #9937, the lower unit of a two-unit stack (“the
13 Austins’ Unit”) in Building C. The Association’s Community Room (also referred to as the party
14 room) is located beneath the Austins’ unit.

15 4. The Whaler’s Cove Condominiums were built in 1979.

16 5. The Reeds’ and the Austins’ units at Whaler’s Cove were constructed pursuant to
17 building permits issued at a time that Bellevue’s Building Code did not include Sound
18 Transmission Class (“STC”) and Impact Insulation Class (“IIC”) values for sound transmission in
19 the floor/ceiling assemblies between condominium units, that are applicable today to new
20 construction.

21 6. The Austins purchased their lower unit (#9937) in 2002.

22 7. When the Austins purchased their unit (#9937), the Reeds’ father, Richard C. Reed
23 (aka “Dick Reed”), owned the upper unit (#9939). Dick Reed was retired, in poor health,
24 sedentary, and resided a significant portion of each year at another condominium unit that he

25 [PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION

500050/080211 1253/77180039

1 owned in Hawaii. After 2005, Dick Reeds' failing health required him to enter an assisted living
2 facility, and he no longer resided in Unit #9939.

3 8. While Dick Reed was residing in the upper unit, the Austins and the Reeds reported
4 some sound transmission between the upper and lower units. For example, the Austins could hear
5 sounds from the upper unit including footsteps, the toenails of Dick Reed's nurse's dog as it ran
6 across the hard-surface flooring, the radio, Dick Reed's voice on telephone calls, Dick Reed
7 playing "big band" music, etc. The Reeds could also hear sounds of everyday life from the
8 Austins' Unit transmitted through the Austins' ceiling to the Reeds' Unit.

9 9. Dick Reed died in January 2008. Unit #9939 was transferred from his estate to
10 Sunsets Forever LLC II on April 2, 2009. Dick Reed's three children (Richard Reed, Faith Reed,
11 and D.J. Reed) (collectively "the Reeds") are the members of the LLC. In May and June of 2008
12 the Austins offered to purchase the Reeds' Unit. When the sale fell through as housing prices
13 dropped precipitously in late fall 2008, the Reeds decided to remodel the upper unit (#9939) before
14 putting it on the market to sell.

15 10. The Reeds submitted a Homeowner Remodel Project Agreement ("Remodel
16 Application") (Exhibit 4), signed April 6, 2009, to the Board of the Whaler's Cove Association of
17 Apartment Owners ("the Association"). The Reeds were responsible for having knowledge that the
18 terms and conditions of the Association's Governing Documents (Amended and Restated
19 Condominium Declaration and Rules & Regulations) applied to their Remodel Application.

20 11. The Reeds' Remodel Application did not initially anticipate removal of the original
21 lightweight concrete in the floor/ceiling assembly between their unit and the Austins' Unit.

22 12. On April 7, 2009, Mr. Lubo Dolak, the Association's Resident Manager,
23 acknowledged receipt of the Reeds' Remodel Application. As the Board's liaison on the Reeds'
24 remodel, Mr. Dolak directed the Reeds to review the Association's Rules & Regulations.

25 [PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION

500050/080211 125377180039

1 13. The Board initially considered the Reeds' Remodel Application at its meeting on
2 April 15, 2009. The Board had not seen the Application previously, and only one copy was
3 furnished, which the Board Members shared. The Reeds had hired CLC Design and Construction
4 LLC ("CLC"), a licensed and insured contractor, as the general contractor to perform the remodel.
5 D.J. Reed and a representative of CLC attended the meeting and made a presentation to the
6 Association's Board of Directors ("the Board") to explain the proposed remodel. Kevin Austin, as
7 a member of the Board, attended the meeting. The Board minutes show that the Board
8 conditionally approved the Remodel Application noting "a test for soundproofing re: flooring will
9 need to be accomplished." The Board deferred approval for installation of a heat pump "until
10 further down the road."

11 14. The Reeds commenced the remodel in April 2009. When CLC began removing
12 carpet in the Reeds' Unit, CLC and the Reeds discovered that the original 1-1/2" lightweight
13 concrete sound and fire resistant barrier in the subfloor that had been installed in 1979 was broken
14 and deteriorated to such an extent that it was not repairable and required removal.

15 15. Mike Lee, one of CLC owners, conducted substantial research to determine what
16 would be a viable sound and fire resistant barrier replacement for the deteriorated lightweight
17 concrete. CLC learned that Homasote Sound Barrier 440 was a good option. CLC also learned
18 that adding layers of plywood and gypsum board to the Homasote would increase the sound
19 dampening properties of the three-layer assembly. CLC consulted with Gray Lumber Company
20 and other experts in the construction industry to determine that a "Homasote sandwich" (Kraft
21 paper, 1/2" gypsum board, 1/2" Homasote & 1/2" CDX plywood) would create a 1-1/2" subfloor
22 barrier that CLC reasonably believed was a more modern type of subflooring that would decrease
23 sound transmission as compared to the original lightweight concrete between the Reeds' Unit and
24 the Austins' Unit.

25
[PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION

500050/080211 1253/77180039

1 16. As a result of discovering the deteriorated lightweight concrete, the Reeds orally
2 requested a modification to their Remodel Application at the Board meeting on May 13, 2009.
3 CLC explained that the original lightweight concrete was not repairable. Mr. Dolak also described
4 the lightweight concrete as having broken into a thousand pieces. CLC presented in detail its
5 proposal to remove the broken lightweight concrete and to install the "Homasote sandwich."
6 CLC's presentation included product literature and specifications. CLC assured the Board that the
7 Homasote sandwich would be a superior sound barrier to the original lightweight concrete that had
8 deteriorated, cracked and broken. Kevin Austin, as a member of the Board, attended the meeting.
9 Alicia Austin also attended the Board meeting. CLC answered all questions that the Board
10 Members and other homeowners had about the Homasote sandwich that the Reeds and CLC
11 recommended installing as a replacement for the broken lightweight concrete. Board Members
12 were aware that there had been numerous problems with the original lightweight concrete that had
13 deteriorated in other units. The Board Members reasonably believed that the Homasote sandwich
14 was a more modern product that would perform better than the original lightweight concrete.

15 17. In addition to decreasing the sound transmission through the floor/ceiling assembly
16 between the upper (#9939) and lower (#9937) condominium units, the Reeds wanted to replace an
17 old, noisy air-conditioning unit and electric furnace that were located in the Reeds' utility room
18 with a modern, quiet heat pump. The air-conditioner vented outside the Reeds' Unit into the entry
19 stairwell that serves both the Reeds' Unit and the Austins' Unit. The heat pump's vent was to be
20 placed in the general location vacated by the old A/C unit.

21 18. The Reeds hired Glendale Heating to research, recommend, and install a modern
22 heat pump that would be quieter than the old A/C unit for approval by the Board. Glendale
23 Heating researched heat pumps and found the MagicPak Unit, which was used for interior
24 installations in other multi-family residential buildings in the Seattle area because of its compact

25 **[PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION**

500050/080211 1253/77180039

1 size and quiet operating specifications. The MagicPak was the only unit Glendale found that
2 would fit in the space available in the Reeds' Unit.

3 19. In addition to orally requesting a modification to their Remodel Application due to
4 the deteriorated floor, the Reeds also requested a modification to their Remodel Application to
5 install a new heater/cooling unit at the Board meeting on May 13, 2009. A representative of
6 Glendale Heating, attended the meeting to explain the MagicPak interior heat pump and to answer
7 questions. The representative from Glendale Heating handed out a brochure that contained
8 operating specifications. The HVAC contractor explained that the MagicPak unit was a quiet unit
9 and would be an improvement over the old air conditioner unit that it was replacing.

10 20. Based upon CLC's recommendations and representations that the Homasote
11 sandwich would decrease sound transmission, the Board conditionally approved the removal of the
12 lightweight concrete and installation of the Homasote sandwich, subject to testing after completion
13 of the remodel of the flooring.

14 21. Based on Glendale Heating's recommendations and representations that the
15 MagicPak heat pump was a quiet unit, the Board conditionally approved its installation, subject to
16 testing after final installation.

17 22. The Board conditionally approved the installation of the Homasote sandwich
18 subfloor and the MagicPak heat pump, subject to post-installation testing. The Board also
19 conditionally approved the installation of the heat pump "with the condition that the contractors
20 work with the Austins (9937) regarding possible sound issues following actual installation."

21 23. The Board's requirement that the Reeds and their contractors "work with" the
22 Austins did not give the Austins veto power over the Reeds' Remodel Application or the
23 installation of the Homasote sandwich or the MagicPak heat pump. The Reeds did not respond
24

25 **[PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION**

500050/080211 1253/77180039

1 directly to the Austins' letters dated October 27, 2009 and November 13, 2009 inviting them to ~~do~~

2 *see address the heat pump issue. CLC*

3 24. The Associations' Governing Documents require that the Reeds' modification of the
4 subfloor by removal of the broken lightweight concrete and installation of the Homasote sandwich
5 not result in an increase in sound transmission between the Reeds' Unit (#9939) and the Austins'
6 Unit (#9937), and that the modified subfloor comply with Bellevue's Codes and that it not cause a
7 nuisance or annoyance. The Board's conditional approval of the Reeds' application to install the
8 MagicPak heat pump required that the installation conform to Bellevue Codes and that the sound
9 levels created by the new heat pump be no louder than the old air conditioner unit that it was
10 replacing. The Court reviewed Section 10(k) of the Association's Rules & Regulations and the
11 ambiguity of the STC and IIC values contained therein, including the limited applicability to cork
12 underlayment. Despite the language of Section 10(k) of the Rules & Regulations, the Board had
13 the right to conditionally approve an underlayment other than cork, *i.e.*, the Homasote sandwich
14 installed by CLC.

15 25. The Board acted reasonably in conditionally approving the Reeds/CLC's installation
16 of the Homasote sandwich in the subfloor without requiring pre-installation testing for sound
17 transmission of the new floor/ceiling assembly.

18 26. The Board acted reasonably in conditionally approving the Reeds' application to
19 install the MagicPak heat pump, subject to post-installation testing.

20 27. From mid-May through mid-July 2009 CLC removed the broken lightweight
21 concrete and installed the Homasote sandwich subfloor in the Reeds' Unit. This work by CLC
22 resulted in numerous nail pops, dust, loose recessed can light trim, and cracks in the ceiling of the
23 Austins' Unit. The Austins' piano was dusted with particles falling from their ceiling, which
24 required cleaning of the piano. The damage to the Austins' ceiling caused by CLC's work on the

25 [PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION

500050/080211 1253/77180039

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

1 Reeds' subfloor required the Austins to move furniture and to cover their piano to avoid further
2 damage.

3 28. During the course of the Reeds' remodel project, dust and debris continued to fall
4 and nail pops continued to occur. The Austins reasonably waited until the Reeds' remodel was
5 finished to repair their ceiling. During the five-and-a-half months between the commencement of
6 the damage (May 21, 2009) and the completion of the first repairs (end of October 2009), the use
7 value of the Austins' residence was diminished in the amount of \$1,500 per month.

8 29. CLC, while working on the Reeds' remodel, caused three water events on June 10
9 (p-trap water incident), June 11 (shower valve failure) and June 17 (toilet overflow). While the
10 first was not a "flood," the second and third would be considered the flooding of the Austins' unit
11 and were significant events. The water damage caused by the shower valve failure on June 11 and
12 by the toilet overflow on June 17 required the services of Superior Coit to inspect and dry out
13 portions of the Austins' Unit that were water-damaged. The June 17 water incident also caused
14 damage to the ceiling of the community room below the Austins' unit.

15 29. A. CLC promptly offered to repair damages to the Austins' Unit and to the
16 Associations' community room. The Reeds apologized to the Austins. The Austins permitted
17 CLC to make minor repairs to their ceiling such as installing screws where nails had loosened and
18 popped out of the gypsum board nailed to the joists. The Association permitted CLC to repair
19 damage to the community room.

20 30. The Association was an additional insured under CLC's liability insurance policy.
21 The Association (through a member of its Board) filed a claim with CLC's liability insurer,
22 Navigators Insurance Group ("Navigators"), on behalf of the Austins and the Association,
23 concerning damages caused by CLC. Navigators promptly appointed Mr. Bob Stewart of
24 Vericclaim to adjust the Austins' claim.

25 **[PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION**

500050/080211 1253/77180039

1 31. Navigators, through Mr. Stewart, authorized SPS Remodeling & Reconstruction
2 LLC ("SPS") to repair the damage to the Austins' Unit. The Austins contracted separately with
3 SPS for the remodeling work that was unrelated to the repairs. The Austins at the same time
4 expanded the scope of SPS's work by choosing to remodel their unit (#9937), which included the
5 installation of a large number of recessed can lights and other items that were unrelated to repairing
6 damage caused by CLC.

7 32. In December 2009, Navigators, through claims adjuster Mr. Stewart, offered to pay
8 the Austins \$9,422.98 to fully compensate them for all claims that the Austins had submitted to
9 him. The offer included a proposed release.

10 33. The Austins did not respond to Mr. Stewart's offer. The Austins were not credible
11 in stating that they did not respond because they did not approve of the proposed release. The
12 Austins are sophisticated, and Kevin Austin is an attorney. The Austins' failure to negotiate at all
13 with Mr. Stewart was not reasonable.

14 34. Simultaneously with the initial repair of their ceiling, the Austins engaged SPS to
15 partially remodel their unit. The remodel portion included the replacement of approximately
16 eighteen recessed can lights and the installation of five additional recessed can lights in their
17 ceiling. Following the initial repair of their ceiling, the Austins engaged SPS in connection with a
18 second remodel that included additional repairs to the Austins' ceiling. This work continued until
19 mid-July 2010.

20 35. The Austins now plan a third remodel/replacement of their ceiling to repair further
21 anticipated cosmetic damage to their ceiling. In conducting their remodel, the Austins are
22 obligated to comply with the Bellevue Building Code, including any applicable requirement for fire
23 resistance in the ceiling/floor assembly between their unit (#9937) and the Reeds' Unit (#9939).

24
25 **[PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION**

500050/080211 1253/77180039

1 36. The nail pops and ripples reappeared after SPS resurfaced the damaged areas. The
2 cost of a third and final set of repairs, based on a bid from SPS, is \$12,233.71. This is an element
3 of the damages recoverable by the Austins from the Reeds.

4 37. The Austins engaged Mr. Yantis as their acoustical expert. While Mr. Yantis was
5 credible and helpful, his testimony:

- 6 a) failed to establish that CLC's design and installation of the Homasote
7 sandwich subfloor resulted in increased sound transmission between the
8 Reeds' Unit and the Austins' Unit;
- 9 b) failed to establish that the Reeds' post-remodel sound transmission levels
10 violated any Bellevue Building Code; and
- 11 c) failed to establish that the MagicPak heat pump in its heat compressor mode
12 and/or cooling compressor mode of operation violated Bellevue's Noise
13 Control Ordinance.

14 38. Mr. Yantis's testified that:

- 15 a) he did not know if the 2006 International Building Code sound transmission
16 standards were applicable to the condominium units at Whaler's Cove that
17 were built under permits issued in 1979;
- 18 b) he did not know whether the "control" units in which Ms. Julie Wiebusch
19 conducted sound transmission measurements in November 2010 were
20 "comparable" to the Reeds/Austins' units because he did not know if the
21 ceiling in the "control" lower unit had resilient channels, did not know the
22 significantly smaller dimensions/square footage of the units, did not know if
23 the lower unit had recessed can lights, etc.;
- 24 c) he did not know if the STC and IIC ratings for a "comparable floor/ceiling
25 assembly with lightweight concrete and without resilient channels" that he
referred to for comparison of his measurements of sound transmissions to
those measured for the Reeds'/Austins' units were "laboratory values" or
were "field test" values;
- d) he could not explain the significant variances between his measurements of
sound transmission values and those measured by Ms. Wiebusch in the
Reeds'/Austins' units, nor could he explain the significant variances in his
own measurements throughout the Austins' unit; and

- 1 e) he could not quantify the increase in sound transmission between the Reeds'
2 Unit and the Austins' Unit attributable to the 42 recessed can lights installed
3 in the Austins' ceiling because he did not know the details of how the lights
4 were installed or whether the lights were sound-insulated or blanketed.

5 39. The evidence did not show that the "control" units for which Ms. Wiebusch
6 measured sound transmission were "comparable" to the Reed'/Austins' Units.

7 40. While Mr. Yantis' measurements of sound levels received in several locations in the
8 Austins' Unit from the MagicPak heat pump in its compressor mode were all below 45 dBA with
9 the Unit's doors and windows closed, he did not know if Bellevue Code Enforcement Officials
10 measured the sound levels in the receiving unit with door and windows open or with them closed.

11 41. The Association engaged Mr. James Tinner as its building code expert.
12 Mr. Tinner's testimony and exhibits that he referred to established that:

- 13 a) The Reeds' and Austins' Units at Whaler's Cove were built pursuant to
14 building permits issued at a time that Bellevue's Building Code did not
15 include STC and IIC values for sound transmission between condominium
16 units that are applicable today to new construction;
- 17 b) Bellevue's adoption of the 2006 International Building Code allowed existing
18 structures and existing uses to remain in effect without regard to the STC
19 and IIC sound transmission requirements for new construction;
- 20 c) The Reeds' removal of the broken lightweight concrete in the floor assembly
21 and the installation of the Homasote Sandwich constituted a "repair" of the
22 floor/ceiling assembly between the Reeds' Unit and the Austins' Unit; and
- 23 d) The deterioration over approximately 30 years of the lightweight concrete
24 originally installed in 1979 was due in part to deflection of the original
25 floor/ceiling assembly.

42. Throughout the Reeds' remodel, the Austins complained about delays in completing
the remodel. The delays to a large extent were not the fault of the Reeds, who were frustrated by
the delays. The Reeds' frustration was exacerbated by the posting of offensive signs by the

1 Austins on the door of the Reeds' Unit and the Austins' unpleasant treatment of the Reeds'
2 contractors.

3 43. Prior to installation of the MagicPak heat pump, six members of the seven-member
4 Board met with the Austins, the Austins' attorney, Faith Reed, and Ms. Coons of Glendale Heating
5 for an informational meeting. Glendale Heating has been in the heating and air conditioning
6 business since 1938, and has installed hundreds of heat pumps since that time. Ms. Coons opined
7 on the research and analysis that Glendale Heating performed that resulted in its recommendation
8 of the MagicPak heat pump. Ms. Coons explained that she had personally observed the MagicPak
9 interior heat pump operating in a large number of residential units at The Kenny Assisted
10 Living/Retirement Center ("The Kenny") located in West Seattle. Ms. Coons further indicated that
11 the MagicPak heat pumps were quiet and working well with no complaints from residents at The
12 Kenny. Ms. Coons explained that the Reeds' Unit was located in the middle of Building C (units
13 located on either side of the Reeds Unit), which prevented the installation of a "split" heat pump
14 system since the Reeds had no access to an exterior location to install a compressor unit.
15 Ms. Coons also told the Board that installation of a split heat pump system with the compressor
16 inside the Reeds' garage was not an option because such an installation would violate Bellevue's
17 Building Code. Ms. Coons also testified that the MagicPak was the only unit Glendale found that
18 would fit in the space available in the Reeds' Unit.

19 44. Glendale Heating installed the MagicPak heat pump in late October 2009.

20 45. The Austins filed their Complaint on January 10, 2010.

21 46. The Austins filed their Complaint prior to hearing the MagicPak heat pump in its
22 compressor mode of operation and prior to any testing to determine the sound levels generated by
23 the heat pump. The installation of the Reeds' heat pump had not been completed and was not
24 ready for testing because the City of Bellevue had not yet signed off on the mechanical permit.

25 **[PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION**

500050/080211 1253/77180039

1 47. The Austins also filed their Complaint prior to any testing of sound transmission
2 (STC and IIC sound transmission values) between the Reeds' Unit and the Austins' Unit. The
3 Austins' engagement of SPS to repair and remodel their Unit prevented sound transmission testing
4 until that work was completed in July 2010.

5 48. Although the Association's Governing Documents (Declaration and Rule &
6 Regulations) contain alternative dispute resolutions procedures ("ADR"), the Austins allegations
7 against the Reeds and the Association did not require the Austins to pursue ADR prior to
8 commencing their lawsuit. However, if the Austins had requested ADR, the Reeds could have
9 joined with them in pursuing a resolution of their controversy through a process that would have
10 avoided the expense and delay inherent in litigation. The Austins' decision not to use the ADR
11 procedures is not fatal to their claims, but shows a lack of desire to resolve their complaints
12 efficiently.

13 49. While the Austins' decision to allege claims against the Association in their
14 complaint was not frivolous, the Association through its Board Members acted with reasonable
15 care with respect to each and every decision concerning the Reeds' remodel.

16 50. The Board consists of seven neighbors who serve as unpaid volunteers for this non-
17 profit Association.

18 51. The current and former Board Members who testified at trial (Bob Buckley, Jim
19 Powell, Ed Sweo, Mike Burkhalter, Amanda Nichols, Myrna Gile, and Ray Waldmann) and the
20 Associations' Resident Manager, Mr. Dolak, were educated, sophisticated, gracious and showed no
21 indication of pettiness, prejudice or bias with respect to either the Reeds or the Austins. Each
22 member testified that they also experienced sound transmissions from their neighbors.

23 52. The Board Member witnesses were credible in their explanations of the Boards'
24 weighing and balancing of the Reeds' and the Austins' interests and concerns in reasonably and

25 **[PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION**

500050/080211 1253/77180039

1 fairly applying the Association's Governing Documents to the Reeds' application for remodel and
2 to the Austins' concerns.

3 53. Although Aisha Allen, Rondi Egenes Holm and Lubo Dolak testified that the
4 Austins had turned up their radio to increase the sound levels transmitted to the Reeds' Unit while
5 prospective purchasers were viewing the Reeds' Unit, the Reeds have not carried their burden to
6 show that the Austins' conduct interfered with an actual sale that would have occurred in the
7 absence of the Austins' conduct.

8 54. The Austins have not shown that there is any imminent harm threatened by the
9 MagicPak heat pump, and therefore there is no basis for injunctive relief. The City of Bellevue has
10 approved the installation of the heat pump by its closure of the mechanical permit, and the parties
11 have indicated that they intend to promptly test the heat pump to measure the sound levels that it
12 creates in its four modes of operations (compressor heating, compressor cooling, electric heat, and
13 fan).

14 55. Prior to trial by Order dated June 27, 2011, Judge Spector granted the Association's
15 Motion For Partial Summary Judgment dismissing the Austins' claims for emotional distress,
16 vibration damages, and diminished value.

17 II. CONCLUSIONS OF LAW

18 Having made the foregoing Findings of Fact, the Court now enters the following
19 Conclusions of Law:

- 20 1. The Board acted on behalf of the Association with ordinary and reasonable care
21 pursuant to RCW 64.34.308.
- 22 2. The Association and the Board acted reasonably when the Board conditionally
23 approved the Reeds' application to remove the deteriorated lightweight concrete and
24 to install the Homasote sandwich, subject to testing to confirm that the modified
25

1 floor assembly complied with Bellevue Building Code and did not result in an
2 increase in sound transmission.

- 3 3. The Association and the Board acted reasonably when the Board conditionally
4 approved the Reeds' application to remove the old electric furnace and air
5 conditioner unit and to install the MagicPak heat pump, subject to post-installation
6 testing to confirm that the modified heat pump complied with Bellevue Codes
7 (including the Bellevue Noise Control Ordinance) and did not result in an increase
8 in sound levels over the sound levels generated by operation of the old air
9 conditioner.
- 10 4. The Association did not breach any duties to Austins under any of the Association's
11 governing documents or under Washington law.
- 12 5. The Austins have failed to prove that the Association proximately caused the
13 Austins' alleged damages. All of the damages to the Austins' Unit was caused by
14 CLC acting in its capacity as the general contractor for the Reeds.
- 15 6. The Association is not vicariously liable for damages caused by any negligent acts
16 or omissions of any of the Reeds' contractor(s), including CLC.
- 17 7. During cross-examination of Kevin Austin, the Court granted the Association's
18 motion for dismissal of the Austins' claims for discrimination as a matter of law.
- 19 8. The Austins are not entitled to an award of injunctive relief or damages against the
20 Association.
- 21 9. The Reeds are vicariously liable for the past damages to the Austins' Unit caused by
22 CLC's negligence, subject to an offset reduction for any amounts that the Austins
23 collect from CLC's liability insurer. These damages include:
- 24 a. Superior Coit (water mitigation services): \$483.42
 - 25 b. Superior Coit (water mitigation services): \$374.04
 - c. First repairs authorized by Mr. Stewart on behalf of CLC's liability insurer
(including SPS' first repair of the Austins' ceiling as quoted by SPS dated
9/29/2009 at \$6,339.83): \$9,422.98
 - d. SPS (second repair of ceiling as quoted by SPS: \$6,377.83 (Exhibit 64).
 - e. Compensation to Austins for inconvenience, disruption to their home during
repairs, loss of enjoyment and all non-economic damages past and future:
\$8,250 calculated at \$1,500 per month for five-and-a-half months.

**[PROPOSED] REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
ASSOCIATION**

500050/080211 1253/77180039

- 1 10. If the Austins repair/replace their ceiling for a third time, the Reeds will be liable to
2 the Austins up to \$12, 223.71, as quoted by SPS on June 6, 2011, subject to an
3 offset reduction for any amounts that the Austins collect from CLC's liability
4 insurer attributable to future work on the Austins' ceiling.
- 5 11. The Austins are not liable to the Reeds on the Reeds' counterclaims.
- 6 12. The present condition of the Austin ceiling potentially violates applicable Building
7 Codes because of the absence of one-hour fire barriers protecting the recessed can
8 lights and other penetrations into the Austins' ceiling, which may present fire
9 hazards. If such violations are determined to exist by a duly qualified expert or by
10 Bellevue Code Enforcement Officials, additional expenses attributable to correcting
11 Code violations, bringing the Austins' ceiling into compliance with applicable
12 Building Codes and/or modifying/upgrading the Austins' ceiling to decrease sound
13 transmission are not the ^{financial} responsibility of the Reeds or the Association.
- 14 13. The Association is the "prevailing party" with respect to the Austins' remaining
15 claims, and, therefore, may be entitled to an award of costs and reasonable
16 attorneys' fees pursuant to RCW 64.34.455.
- 17 14. The Austins are the "prevailing party" with respect to their property damage claims
18 against the Reeds, and, therefore, may be entitled to an award of costs and
19 reasonable attorneys' fees pursuant to RCW 64.34.455.
- 20 15. The Reeds are the "prevailing party" with respect to the Austins' claims for
21 injunctive relief. In addition, the Reeds are the "prevailing party" with respect to
22 the Austins' claims for emotional distress, diminution in value, and vibration
23 damages, which claims were dismissed by the Court in its granting of the
24 Association's Motion for Partial Summary Judgment, which the Reeds joined.
25 Therefore, the Reeds may be entitled to an award of costs and reasonable attorneys' fees pursuant to RCW 64.34.455.

DATED this ^{11th} day of August, 2011.



The Honorable Carol A. Schapira

EXHIBIT B

10. REMODELING AND/OR RENOVATION OF CONDOMINIUM INTERIORS

At all times, Owners and their contractors, subcontractors, employees and guests are responsible for full compliance with the Rules & Regulations set forth herein, and in the Declaration. During the planning stage and prior to beginning any remodel project, Owners should review the Declaration and Rules & Regulations in their entirety.

General

The following requirements shall apply to all remodel and renovation projects:

- a. No alterations, demolition or additions of any kind may be commenced without the prior written approval of the Board as outlined herein. This includes both work that requires a building permit and work that does not. Also included is cosmetic work like painting, replacement of floor coverings, cabinet and/or millwork installations and replacement/installation of built-in appliances.
- b. All work must be performed in strict compliance with the requirements of the City of Bellevue, King County, State of Washington and federal or other agencies having jurisdiction over the proposed project.
- c. No work, including demolition, may be commenced prior to obtaining permits from the appropriate governmental authorities, copies of which shall both posted conspicuously on the premises and included with the *Project Approval Documents* described below.
- d. All work performed must be completed by contractors that are licensed and bonded in the state of Washington, and possess general liability insurance in an amount no less than \$2,000,000 per occurrence. An Acord Certificate of General Liability Insurance naming the Association as an additional insured must be included in the *Project Approval Documents*.
- e. Homeowners recognize that the Whaler's Cove buildings were built over 20 years ago under different building code requirements that exist today. It follows that some construction methods and techniques that were allowed at the time these buildings were constructed are not permitted today. It is possible, when opening walls and ceilings, that some previous work will be exposed that does not meet present building codes. Depending on the magnitude of the proposed project and on the particular building inspector(s), some older work that does not meet today's code may have to be corrected as part of the proposed project. The correction of any such deficiencies shall be the sole responsibility of the homeowner and not of the Association, since it is the exposure of the defect or non-code-compliant condition by the homeowner that triggered the requirement for current code compliance.
- f. No work may be performed before 8:00 a.m. or after 6:00 p.m. on weekdays, nor at all on weekends or legal holidays.

- g. Contractor vehicles are permitted in front of unit being remodeled only during periods of unloading or loading materials, tools and equipment. At all other times, contractor vehicles must be parked in the diagonal parking area to the west of the condominium buildings, or on the public right-of-way in front of the Association development.
- h. Unit entries, driveways and other common areas are to be kept clean and free of all debris to the maximum extent possible. No materials, debris, tools, or equipment of any kind may be left in any unit entryway, driveway or other common area overnight or during weekends and holidays. At no time may Association garbage or recycling containers or the containers located behind the Whaler's Cove property accessible through the Marina parking lot be used for debris from remodeling and/or repair work inside of condominium units.
- I. At least one operating bathroom must be maintained inside the unit for workers' use during the entire project. If this is not possible, a portable toilet may be installed inside the homeowner's garage if permitted by the City of Bellevue. No portable toilet may be installed in the common area at any time.
- j. Extra care should be taken at all times to minimize the loud noise and inconvenience that will be imposed on adjacent owners. It is always helpful if adjacent owners are notified in advance of particularly noisy activities, or times when noxious painting will take place.
- k. When new hard-surface flooring such as hard wood or ceramic or marble tile is proposed for installation, cork underlayment shall be installed underneath all such new materials. Cork shall be furnished either in sheets or rolls and be at least 1/4-inches (6mm) thick and have at least the following technical ratings.

	<u>Ceramic Finish</u>	<u>Wood Finish</u>
Sound Transmission Class(STC)	54	59
Impact Insulation Class(IIC)	59	60

The Board has reserved the right to consider and approve other materials for underlayment, but only after careful consideration of the sound transmission and impact insulation characteristics of alternative materials. *(Added November 28, 2005)*

Administrative Procedures

In order to obtain approval from the Board for any proposed remodel or renovation work, the Owner shall give the Board the opportunity to review and understand all plans and specifications for the proposed work in accordance with the procedures included herein. In reviewing any proposed remodel or renovation project, the Board shall use its best efforts to complete its review and approve the proposed work or provide comments and/or conditions or other requirements for approval of proposed work in a timely manner. Board approval of proposed work shall not be unreasonably withheld. However, the Board retains the right to withhold approval of any portion of proposed work until it is satisfied that all reasonable requirements to protect the Association's and other Owner's interests have been

met by the project design drawings and specifications. In conducting its review, the Board shall identify and focus on any portion of proposed work that could negatively impact the building structural integrity, or result in excessive noise or sound transmission or other nuisance to an adjoining or other unit in the building. As directed by the Board, the Owner shall mitigate such negative impact or nuisance to the Owners of adjoining units in a manner satisfactory to the Board. Accordingly, the Board has the right to require additional sound insulation, structural modifications, or other work that it believes is necessary to protect the interests of the Association or other Owners.

The following are specific administrative procedures that all Owners must follow in obtaining approval from the Board and in performing any remodel or renovation project:

- a. Obtain Remodel Application Forms from Association Manager. These forms include an *Application for Remodel Project Approval, Project Permit(s) & Design/ Construction Team, Project Schedule, Homeowner Remodel Agreement* and *Remodel Project Approval*.
- b. Complete all forms with available information, and submit completed forms to an officer of the Board.
- c. Schedule a date with the Managing Agent to present a detailed description of the proposed project to the Board and other Owners who desire to attend the meeting. Proper advance notice of this meeting must be given to all Owners in accordance with the Association By-Laws. The Board shall not be required to meet or review any proposed remodel project until all of the Remodel Application Forms have been submitted to the Managing Agent. At the meeting with the Board, the Owner shall be prepared to show and discuss all plans and specifications for the project.

It may be helpful if the Owner's architect, designer and/or engineer attends this review meeting. Of particular importance will be to identify to the Board any modifications that can affect the structural integrity of the building, electrical wiring or plumbing that serves neighboring units, or that can have a disturbing effect to adjoining units, including but not limited to hard-surface flooring, HVAC units, washing machines and dryers, dishwashers and Jacuzzi tubs.

- d. Following this initial meeting, the Board may require additional information from the Owner prior to continuing its review of or approving the proposed project. Board approval may include conditions that are specific to the proposed project, such as sound mitigation or the location of HVAC equipment.
- e. Board approval must be obtained in writing prior to commencing any demolition or remodel work.
- f. At the time the Board approves a proposed project, an individual representing the Board will be assigned as a liaison as a communication point with the Owner ("Board Representative"). All communications between the Owner and Board must be made with the Board Representative.

- g. In the event that the Board requires (i) the assistance of the Managing Agent that is outside of its normal scope of services and for which the Association bears costs solely relating to a remodel project, or (ii) an outside consulting service or attorney to assist with administering a remodel project, the Owner shall reimburse the Association for the Association's actual costs incurred for such administration work.
- h. At the conclusion of the work, the Owner shall schedule a "walk-through" appointment with the Managing Agent during which the Board Representative and/or other Board members may observe the completed work. If all work has been completed in conformance with the approved *Remodel Application Forms* and project drawings and specifications, the Board shall issue a letter stating that the project has been completed and approved by the Board. If additional work is necessary to complete the project requirements as determined by the Board, the Board shall issue a letter identifying all remaining required work and only approve the final project after all required work has been completed.
- i. The Owner shall be responsible for completing the remodel project in a timely manner, and in strict compliance with the approved design and specifications, including all separate conditions imposed by the Board for project approval. If the Owner fails to comply with any reasonable requirements of the Board that were imposed for project approval, the Board shall have the right to take any legal action it deems necessary to obtain compliance with the project requirements at the Owner's expense.

12. SOLICITING

No canvassing or soliciting is allowed on the Whaler's Cove property.

13. RENTED OR LEASED RESIDENTIAL UNITS:

Owners may rent or lease their units, but only under terms as provided in the Declaration, and in accordance with the following additional requirements:

- a. The Owner shall engage the services of a professional property management firm properly licensed and bonded to perform such services in the state of Washington to manage the renting or leasing of the Owner's unit. The property management firm shall have a permanent office located in the greater Seattle or Eastside area that can be contacted by the Board or Managing Agent if necessary. Under no circumstances shall an owner be allowed to rent or lease a unit without such management services being performed by a professional property management firm. Prior to renting or leasing a unit, the Owner shall first obtain approval from the Board of the right to lease or rent the unit, and the selection of the property management firm. Approval of the right to rent or lease the unit shall be based on the Owner's meeting such requirements as stated in the Declaration. Approval of the professional property management firm shall not be unreasonably withheld.

EXHIBIT C

Whaler's Cove Association of Apartment Owners
Board of Directors Meeting
April 15, 2009

In Attendance: Robert Buckley, Mike Burkhalter, Amanda Nichols, Lubo Dolak,
Kevin Austin, Jim Powell, Ray Waldmann, Myrna Gile

Guests: Stevie Pyfer, Milka Dolak,
D.J. Reed (Richard Reed's daughter representing Unit #9939)
Danny Clemons (Contractor for Unit 9939 remodel)

1. Meeting called to order at 3:35 pm
2. Approval of the last Board Meeting Minutes: Motion to accept, seconded and approved.
3. Treasurer's Report: Jim reported a balance of appx. 272K in Wells Fargo and 114K in Charter Bank. Jim also mentioned that the request for an audit to be conducted by Ms. Terry White is still ongoing. Motion to accept, seconded and approved.
4. Renovation: Two remaining issues: a) Satisfaction between Kevin Austin (9937) and Remco Deacon. b) Final payment to Remco Deacon. To be continued at next Board Meeting.
5. Meydenbauer Bay Park: A walk-about Whaler's Cove was conducted by the City' Steering Committee. Discussion turned to Board members regarding the possibility of the removal of perimeter trees above the rockery along Lake Washington Blvd. A suggestion was made that a request be made to the City that a "privacy" wall be built should the final plan include removal of the trees. (Request to be finalized at a later date.)
6. Committee Reports: Driveway Study. Mike Burkhalter presented the study findings of the onsite meeting conducted by John Dickinson of Emil Concrete Construction. (Attended by Lubo and Mike). Milka brought up a "rockery issue" regarding those rocks located beneath the Vue's parking lot concrete blocks. Ray Waldmann to observe and if necessary, write letter regarding corrective measure. Discussion ensued regarding curbing issues. Some of the curbing is showing signs of wear and tear. The entry way to Jim and Bev

Hansen's (9945) is in disrepair. Lubo to get estimates for curbing repair and Hansen entry repair and/or new concrete.
Landscape Report: None given. Milka has already begun to plant spring flowers.

7. Reed Remodel (Unit #9939) DJ Reed and her contractor Danny Clemons discussed their plans for remodeling 9939. Upon completion "Sunsets Forever LLC" (Richard Reed's three children) would like to offer the unit as a long term lease or lease/purchase, until the selling market improves. It is necessary that the "LLC" hold onto the unit for at least two (2) years in order to be able to qualify for long term capitol gains.
Several motions were put forth by Board members:
 1. A second insurance policy for one (1) million dollars needs to be obtained and presented prior to work commencing.
 2. A test for soundproofing re: flooring will need to be accomplished.
 3. To defer installation of a heat pump until "further down the road."Motions were seconded and approved.
8. Roof Cleaning: Lubo presented cost estimates ranging from \$2,100 to \$13,000. Lubo to request additional cost estimates from the lowest bidders to include moss treatment. Lubo also to obtain references from same.
9. Bob presented a Reserve Study Proposal submitted by David Bach in accordance with RCW 64.34 for Whaler's Cove.
10. Annual Meeting: June 17, 2009. Potluck at 6:00 pm. Meeting to follow. Jim Powell to prepare budget. Two Board Member vacancies need to be filled. Lubo to post on bulletin board by mail boxes.
11. Other Issues: Bob Buckley mentioned he would like to open up the "soffit" beneath his kitchen in order to check the insulation.
12. Next board meeting: May 13, 2009 at 3:30 pm.
13. Meeting adjourned at 5:45 pm.

Amanda Nichols
Board Secretary

EXHIBIT D

Whaler's Cove Association of Apartment Owners
Board of Directors Meeting
May 13, 2009

In Attendance: Robert Buckley, Mike Burkhalter, Amanda Nichols, Lubo Dolak,
Kevin Austin, Jim Powell, Ray Waldmann, Myrna Gile

Guests: Stevie Pyfer, Milka Dolak, Alicia Austin, Mary Waldmann,
John Evans, Sharon & Ed Sweo
D.J. Reed (Richard Reed's daughter representing Unit #9939)
Two contractors for Unit 9939 remodel)

1. Meeting called to order at 3:35 pm
2. Approval of the last Board Meeting Minutes: Motion to accept,
seconded and approved.
3. Treasurer's Report: Jim reported a balance of appx. 272K in Wells
Fargo Bank, 74K in Charter Bank re: remodel account and 123K in
checking/reserve account.
The 2009-2010 Budget (see attached) was conducted by Jim Powell.
(Special mention was given to Milka Dolak for all her hard work in
administrating the budget).
Motion to accept, seconded and approved.
Motion to send copies of budget to all owners, seconded and approved.
4. Unit 9939: Request was made for new heater/cooling unit to be
installed. Discussion ensued regarding actual installation parameters.
Motion was made to install and test. Motion seconded and accepted
with the condition that the contractors work with the Austins (9937)
regarding possible sound issues following actual installation.
Motion was made to "drop second million dollar insurance coverage
as a requirement for the remodel."
Motion seconded and accepted.
5. Renovation: Ongoing due to discrepancies between Whaler's Cove
and Remco Deacon. Remedies: Whaler's Cove vs. Owner
responsibility. To be continued.
6. Review of Declarations, Bylaws and Rules/Regulations: To be tabled for
the future. Rather than to review sentence by sentence, it was suggested

that Board Members e-mail their specific concerns to Mike Burkhalter for further discussion at a later date.

7. Skylights: Discussion regarding Whaler's Cove vs. Owner responsibility. Rules/Regulations do not currently address this issue.
8. Board Nominees: Marjorie Morton, Richard Wagner.
9. Other Issues: Curb and Cement Repair Work. Motion was made to accept quote from Custom Fence & Masonry, Inc. to repair pertinent curb and cement issues. Motion seconded and approved.
Motion was made for the purchase of a new vacuum cleaner for Whaler's Cove. Motion seconded and approved.
Bob Buckley wrote a letter to the Vue at Meydenbauer concerning the concrete blocks above the corner of our (Whaler's Cove) driveway. The retaining wall is beginning to bulge out.
10. Next board meeting: Following June 17, 2009 annual meeting.
11. Meeting adjourned at 5:45pm

Amanda Nichols
Board Secretary

EXHIBIT E

ZENO DRAKE BAKALIAN P.S.

LEGAL AND ESCROW SERVICES

G. Michael Zeno, Jr.
Leslie A. Drake
Allan B. Bakalian *

4020 LAKE WASHINGTON BLVD. NE, SUITE 100
KIRKLAND, WASHINGTON 98033-7862

(425) 822-1511
FAX (425) 822-1411
mzeno@zdblawn.com

*also admitted in Oregon

October 27, 2009

Sunsets Forever LLC II
9939 Lake Washington Blvd NE
Bellevue WA 98004
reedlo@aol.com
reeddj@aol.mac.com

Re: Effect of heating-cooling unit proposed to be installed above Austins' residence

Dear Reed siblings:

The Austins urge you not to install a heat pump above their bedroom unless it can be determined, with a reasonable degree of confidence, that it will not cause excessive noise or vibration in their condominium.

The brochure for your heat pump says its sound level is 76. As a point of reference, the Bellevue City Code says the maximum night-time noise level in a residence is 45 decibels. A noise level of 76 decibels is more than 1000 times louder than the Code maximum of 45 decibels.

Of course, the sound level produced inside the Austins' unit by the heat pump may be less than 76 decibels. But as far as the Austins know, you have not tried to find out what that noise level is likely to be. This information is not that hard to come by. There are many engineers and other consultants with expertise in sound transmission, how to measure noise levels, and other matters relating to noise mitigation in residential structures.

You may say that the Board has approved your heat pump, and so you are free to proceed without considering the effect of your current plan on the Austins. This is incorrect for two reasons:

In the first place, the Board did not give you *carte blanche* to put a heat pump above the Austins' bedroom. In the May 2009 meeting where the issue came up, your request to use a heat pump was only tentatively approved; you were required to work with the Austins about possible sound problems. Furthermore, your proposal was not specific enough for the Board to reach a definitive conclusion at that time.

In the second place, the Austins have enforceable rights independent of the Board's. You need to be mindful of how your actions affect the Austins' quiet enjoyment of their home, regardless of what the Board chooses to do.

You should not install the heat pump without professional advice about the noise impacts. I encourage you to work with the Austins about obtaining this advice, to avoid disagreement in the future about whether the expert had the right qualifications or addressed the right issues.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Michael Zeno, Jr.", with a large, stylized flourish extending to the right.

G. Michael Zeno, Jr.

Cc Clients

EXHIBIT F

ZENO DRAKE BAKALIAN P.S.

LEGAL AND ESCROW SERVICES

G. Michael Zeno, Jr.
Leslie A. Drake
Allan B. Bakalian *

4020 LAKE WASHINGTON BLVD. NE, SUITE 100
KIRKLAND, WASHINGTON 98033-7862

(425) 822-1511
FAX (425) 822-1411
mzeno@zdblaw.com

*also admitted in Oregon

November 13, 2009

Sunsets Forever LLC II
9939 Lake Washington Blvd NE
Bellevue WA 98004
reedlo@aol.com
reeddj@aol.mac.com

Re: Request for access to your unit to do acoustical testing and for information about how the heat pump would be installed.

Dear Reed siblings:

My October 27 letter asked you not to install the heat pump without advice from an acoustical consultant about noise and vibration. I encouraged you to work with the Austins to hire a mutually acceptable consultant. You have not responded to this request.

The Austins are proceeding on their own to retain an acoustical consultant. They will need access to your unit to measure sound transmission and do the other things necessary to evaluate your proposed installation. Could you provide me with several dates and times in the next ten days when this testing could be done? It is also important to know exactly how you propose to install the heat pump. Whom should the consultant talk to about this?

By making this request, the Austins are not waiving their objection to your installing any heat pump inside your unit.

Sincerely,



G. Michael Zeno, Jr.

Cc Clients

EXHIBIT G

SOUND TRANSMISSION MEASUREMENTS AND STANDARDS, PER MICHAEL YANTIS

Location	<i>Measured value (FIIC)</i>	Minimum value per §10 of Condominium Rules and Regs	Minimum value allowed per Bellevue Code (field tested)	Standards for a comparable condominium per Yantis' experience
Living Room (carpet)	54		45	70+
Entry (tile)	42	59 (lab)/54(field)	45	55

Location	<i>Measured value (ASTC)</i>	Minimum value per §10 of Condominium Rules and Regs	Minimum value allowed per Bellevue Code (field tested)	Standards for a comparable condominium per Yantis' experience
Living room	40		45	55
Entry	45	54 (lab)/49 (field)	45	55
Family room	44		45	55
Master bedroom	39		45	55