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NO. 74057-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STEVEN MARSHALL and DEANNA MARSHALL a.k.a. DEANNA NELSON, a married couple,

Appellants,

v.

ROGER RESSMEYER,

Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Steven Marshall and Deanna Nelson ("Appellants" or "Marshalls") were sued by an upslope neighbor, Roger Ressmeyer ("Respondent" or "Ressmeyer") who claims he is entitled to an unimpeded view of Lake Washington over the Marshalls' property. The sole issue in this appeal is whether or not the applicable CC&R's require the Marshalls to maintain their vegetation at an absurdly low height of approximately 3-4 feet above Ressmeyer's driveway pad. The superior court disregarded the plain language of the CC&R's in concluding that vegetation height is controlled not by the height of the "nearest" roof peak—as unambiguously set out in the CC&R's—but by the Marshalls' roof peak, which is not the closest roof peak to the vegetation in question.

In so doing, the superior court misapplied at least the following rules of contract interpretation:

- Plain language in a contract cannot be ignored;
- Specific language in a contract controls over general language;
- The objective manifestation of intent as expressed in the contract controls over the unexpressed subjective intent of one party;
- Words are given their ordinary meaning;

- An interpretation that gives effect to all contractual provisions is favored;
- Ambiguity should not be read into a contract where none exists;
- Extrinsic evidence may be considered to ascertain the parties' intent under the context rule, but not to vary, modify, or contradict the written word.

Ressmeyer does not dispute that all of these rules apply here. Instead, he dodges the plain language of the CC&R's and hopes that a sympathetic court will decide that he should get an expansive view easement that he never bargained for, and that is not provided for in the CC&R's. The trial court erred in adopting Ressmeyer's arguments on summary judgment. On this Court's de novo review, the Marshalls ask the Court to adopt the plain meaning of the CC&R's, and remand for entry of judgment in the Marshalls' favor.

II. ASSIGNMENT OF ERROR

The trial court erred in entering the order of June 23, 2015, denying the Marshalls' motion for summary judgment and granting relevant parts of Ressmeyer's motion for summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Does Ressmeyer have a right under the CC&R's to force the Marshalls to keep their vegetation trimmed to a height equal to or lower than the Marshalls' roof peak, when it is undisputable that *Ressmeyer*'s roof peak is "nearest" to the vegetation in question?

IV. STATEMENT OF THE CASE

A. The Physical Layout of the Parties' Properties.

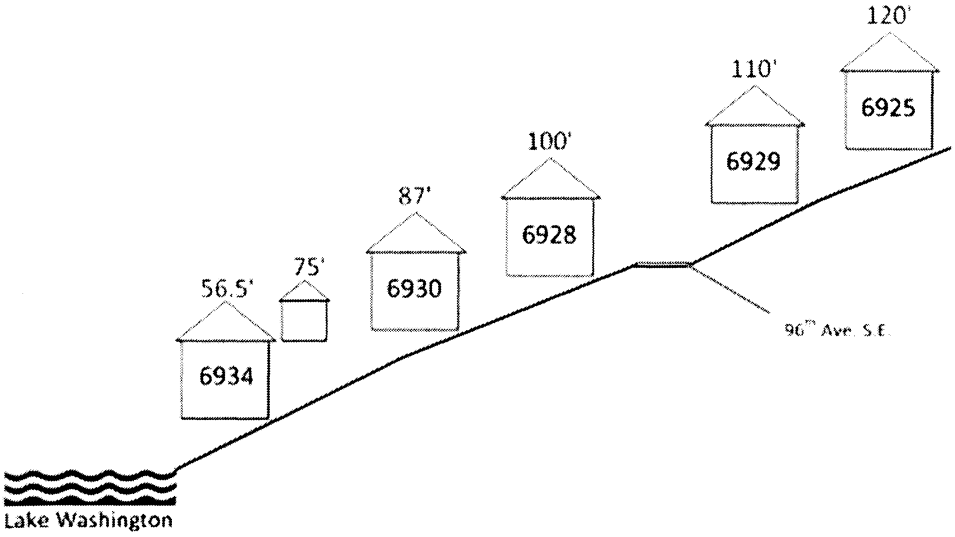
In 2001, the Marshalls purchased an undeveloped lakefront parcel on Mercer Island (the "Marshall Property"). The Marshalls had a young child at the time (soon to be joined by another), and wanted to design and build a home to their own specifications. They ultimately fell in love with the Marshall Property due to the secluded, forested feel of the neighborhood, the waterfront location, and the local schools. Clerk's Papers ("CP") 83-84 ¶ 2. They thought it would be a good place to raise their children. Although the yard is on a very steep slope, they envisioned constructing a tree house, basketball courts, and other typical kid-focused structures. *Id.*

The Marshall Property was marketed and sold with a set of approved architectural plans that included an elevated detached garage structure. But the Marshalls instead decided to hire an independent architect to create a new house plan. CP 93 ¶ 12; CP 84 ¶ 3. Their architect also encouraged them to build a detached garage at the northwest corner of the property. CP

93-94 ¶ 13; CP 84 ¶ 4. This design style is very common on Mercer Island and other waterfront properties with steep slope typography. Due to the sloping nature of the property, the garage would have been approximately 12-13 feet taller than their existing home (for an elevation of approximately 69-70 feet). CP 93-94 ¶ 13. However, they decided to build their home (including the garage) downslope on the eastern section of property, near Lake Washington. CP 94 ¶ 14; CP 84 ¶ 4.

Ressmeyer, the plaintiff in the action below (and Respondent on appeal), owns the property (the "Ressmeyer Property") directly upslope of the Marshalls. He purchased his home in 1996. CP 91 ¶ 6(d).

There are three additional houses (for a total of five) located directly upslope of the Marshall Property and the Ressmeyer Property. CP 92-93 ¶¶ 10-11. The five properties are subject to the Declaration of Covenants, Conditions and Restrictions of Mariner Cove ("CC&R's") that are at the center of this dispute. CP 90-91 ¶¶ 3-6. With the exception of the Marshalls' home (which was completed in 2004), the other four properties were all built in the 1980s or early 1990s. CP 90-91 ¶ 6(a)-(e); CP 114-128. An approximate visual representation is provided below:



CP 92-93 ¶¶ 10-11.

When Ressmeyer purchased his home in 1996, the Marshall Property was vacant, and would remain so until the Marshalls' home was completed in 2004. CP 91 ¶ 6(d); CP 95 ¶ 16. Therefore, for several years Ressmeyer enjoyed an unobstructed view of Lake Washington from not only the third level of his home, but also from the middle level, and even the garage/driveway area. CP 95 ¶ 16.

Ressmeyer has acknowledged that he hired a surveyor prior to purchasing his home to determine the maximum height of a structure on the Marshall Property. *Id.* To the Marshalls' knowledge, the applicable Mercer Island City Code ("MICC" or "Code") has not changed substantially since then, and as a consequence, Ressmeyer could, and should, have anticipated that a structure up to approximately 75 feet in elevation might be constructed

in front of him on the Marshall Property. CP 91-92 ¶ 7 & n.1. At 75 feet in elevation, such a structure (whether a residence or a detached garage) would be approximately 12 feet lower than Ressmeyer's roofline and consistent with the average view enjoyed by Ressmeyer's uphill neighbors. CP 92-93 ¶¶ 10-11.

B. The Marshalls' Accommodation of Ressmeyer.

When the Marshalls began construction in 2001, it quickly became clear that Ressmeyer was not interested in having new neighbors. CP 84 ¶ 5. Ressmeyer was argumentative to many people involved with the construction of the Marshalls' home, and the Marshalls even became concerned that altercations might turn violent. CP 95-96 ¶ 18. It was an ongoing concern that only compounded as construction progressed. Ressmeyer consistently parked his car on the shared 96th Avenue SE driveway, blocking access to and from the Marshall Property. He became rude and angry when construction people would politely ask him to move. He also became agitated, impatient, and unreasonable when a construction vehicle might temporarily block his access. After construction was complete, Ressmeyer's hostility spilled over to guests visiting the Marshalls, including, on separate occasions, Mr. Marshall's mother and brother. CP 78-79 ¶¶ 2-3; CP 81 ¶¶ 2-3; CP 96 ¶ 19.

In the course of construction, the Marshalls planted a row of bushes and other vegetation approximately 1-2 feet inside the western property line that they share with Ressmeyer (the "Hedge Row"). CP 96-97 ¶ 20. Up until recently, the Hedge Row was kept trimmed to an elevation of 56.5 feet (equal to the Marshalls' roof peak), not because that was the maximum height allowed by the CC&R's, but simply because that is what Ressmeyer demanded. *Id.* Due to the slope in the area, Ressmeyer having installed a retaining wall near the shared property line, and the fact that the Hedge Row is not planted directly on the property line, the trees reached perhaps shoulder level—or approximately 3-4 feet—to someone standing in Ressmeyer's driveway. *Id.*

C. The CC&R's Tie Vegetation Height to the "Nearest" Roof Peak.

The CC&R's do not restrict the height or placement of physical structures. CP 108-09 at Art. II, § 1-4. They do, however, require vegetation to be kept trimmed to "a height equal to or lower than the nearest roof peak/ridge height." CP 111 at Art. III, § 2. Therefore, on their face, the CC&R's currently permit the Marshalls to grow vegetation to a height equal to Mr. Ressmeyer's roof peak. The relevant portion of the CC&R's provides as follows:

> Section 2. Maintenance of Landscaping and Trees. To protect the outlook from each lot, and to maintain the

> overall desirability of the subject properties, all owners are required to maintain visible landscaping in a neat and sightly condition. Planted trees (not including the natural large trees on the plat), shrubs, and/or hedges must be maintained at a height equal to or lower than the nearest roof peak/ridge height, unless the owner has secured an instrument allowing a deviation from this restriction signed by all owners of Mariner Cove lots uphill of the lot/owner seeking the deviation.

Id.

D. The Marshalls Suffer Negative Impacts from Their Efforts to Placate Ressmeyer.

Even though the Marshalls have at all times been permitted under the CC&R's to grow their vegetation to a higher level, for many years they chose to honor their neighbor's (sometimes quite aggressive) demands. However, maintaining their landscaping at the height demanded by Ressmeyer resulted in an unsightly and unnatural appearance. As the landscaping matured over the years, it naturally grew vertically as well as horizontally. From 2005 to 2008, the Marshalls could trim the landscaping in such a way that it still had a natural shape. CP 86 ¶ 11. However, as the bushes and trees matured they appeared truncated when trimming the tops to the low levels that Ressmeyer demanded. For example, to meet Ressmeyer's "requested level" they had to literally cut the top off a palm tree, leaving a 4-foot-tall stump. *Id.*

Having a vegetation screen on the shared property line has always been critical to the Marshalls in order to maintain a degree of privacy, aesthetic appearance, and safety. Due to the sloping nature of the property, Ressmeyer's home towers 30 feet over theirs, and the Marshalls have effectively been denied any visual barrier between the respective homes. CP 86 ¶ 12. Ressmeyer's middle and top floors are floor to ceiling walls of glass that all look directly at their house. The Marshalls' teenage daughter and young son's bedroom and bathroom windows face directly at Ressmeyer's house with no buffer. They have not opened the bedroom blinds in their son's room in many years. *Id.*

Ressmeyer is a world-class NASA and space photographer. Initially, this seemed like a good thing to the Marshalls. But then he sent them high-definition photographs chronicling his complaints about the height of their landscaping. CP 87 ¶ 13. This brought to the Marshalls' attention a number of high-end, high-powered cameras in his windows pointed directly at their house, windows and property. They naturally felt extremely uncomfortable with him peering into their family home while raising a young family. *Id.*

Over the years, the Marshalls also grew tired of the many annoyances emanating from Ressmeyer's property. For example, Ressmeyer apparently operates a business out of his home (he installed

parking lot stripes on his driveway and even painted his name "Roger" into one of the parking stalls), and vehicles come and go frequently during business hours. CP 87 ¶ 14. He has bright exterior flood lights on a motion sensor that are pointed directly at the Marshalls' house. These lights are unsightly and annoying. *Id.* In violation of the CC&R's, Ressmeyer has parked large storage trailers on his property year round, boat trailers throughout the winter, and a series of cars outside overnight. *Id.* The CC&R's specifically require him to screen these items from view. CP 110 at Art. II, § 8.

Ressmeyer's aggressive posture has caused the Marshalls to defer the most basic improvements. Even the installation of a Seattle Seahawk flag, flown only on game weekends, was met with threats of litigation. CP 98 ¶ 23. Efforts to construct a garden shed resulted in Ressmeyer throwing the construction materials down the Marshalls' driveway. CP 81 ¶ 2. The truncated vegetation height has greatly impacted the beauty and aesthetics of the Marshalls' yard. The height is too low to provide any noise buffer from the sounds of his many vehicles coming and going. CP 88 ¶ 17.

V. ARGUMENT

A. The Standard of Review is De Novo.

On appeal from summary judgment, the appellate court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyard Corp.*, 151

Wn.2d 853, 860-61, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). The standard of review is de novo. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted. *LaMon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027 (1989). This court will consider only evidence and issues called to the attention of the trial court. RAP 9.12.

Here, there are no material disputed facts: Both parties' summary judgment motions (as applicable to the vegetation height issue) turned on application of a set of CC&R's that indisputably govern the litigants and the owners of three additional upslope properties. The question, then, is whether either party here can demonstrate that the undisputed facts in evidence entitle them to judgment as a matter of law. For the reasons described herein, the Marshalls submit that they can, and have. Ressmeyer also claims that he is entitled to judgment as a matter of law (a conclusion the trial court improperly accepted), but his case rests on a misapplication of the rules governing contract interpretation in

Washington, particularly the effect of plain language, such as the CC&R's use of the term "nearest roof peak." The undisputed facts—properly applied—can result in only one reasonable interpretation of the CC&R's; to wit, they do not require the Marshalls to maintain their hedge row at the low height demanded by Ressmeyer. The trial court's summary judgment order should be reversed, and remanded with instructions to enter judgment in favor of the appellants.

B. A Plain-Language Reading of the CC&R's Compels a Conclusion that the Maximum Vegetation Height Is Governed by Ressmeyer's Roof Peak.

This lawsuit can, and still should be, resolved with a tape measure. As a matter of basic math the Marshalls should prevail in this appeal, because ***Ressmeyer's roof peak is the "nearest" to the disputed vegetation***. *See* CP 31-32 (arguing only that "the Marshall Residence is the nearest roof peak/ridgeline *on the Marshall Property*") (emphasis added); *see also* CP 95 ¶ 17. Therefore, the Marshalls' hedge row can reach an elevation of 87 feet (equal to Ressmeyer's roof peak) without violating the CC&R's. CP 92-93 ¶ 10. Because the hedge row is not nearly that high (*see* CP 98 ¶ 23), Ressmeyer's claims should be dismissed on remand.

Ressmeyer is expected to argue that a vegetation height limit that is governed by the height of his own roof would be an absurd result, and

one that was not intended by the drafter of the CC&R's. However, there is no way to avoid the plain language of the instrument, which provides as follows:

> Section 2. Maintenance of Landscaping and Trees. To protect the outlook from each lot, and to maintain the overall desirability of the subject properties, all owners are required to maintain visible landscaping in a neat and sightly condition. Planted trees (not including the natural large trees on the plat), shrubs, and/or hedges must be maintained at a height equal to or lower than the nearest roof peak/ridge height, unless the owner has secured an instrument allowing a deviation from this restriction signed by all owners of Mariner Cove lots uphill of the lot/owner seeking the deviation.

CP 111 at Art. III, § 2.

That is, the maximum vegetation height under the CC&R's is governed by whatever structure happens to be "nearest." That plain language simply cannot be ignored. *See, e.g.*, *Mains Farm Homeowners Assoc. v. Worthington*, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993) ("[W]e give the language [of the restrictive covenant] its ordinary and common use and do not read the covenant so as to defeat its plain and obvious meaning."); *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891, 167 P.3d 610 (2007) (courts do not have the power, under the guise of interpretation, to rewrite contracts); *Little Mt. Estate Tenants Ass'n v. Little Mt. Estates MHC LLC*, 169 Wn.2d 265, 269 n.3, 236 P.3d 193 (2010) (collecting cases).

Indeed, Ressmeyer seems to accept that, in order for his interpretation to prevail, the CC&R's would have to be re-written to say "the nearest roof peak/ridge height ***on the same lot as the vegetation***." *See* CP 31 (stating that there is no genuine issue of material fact that "the Marshall Residence is the nearest roof peak/ridgeline ***on the Marshall Property***") (emphasis added); CP 34 (arguing that "the Height Restriction must be construed to limit the height of Marshall's vegetation to the height of the roof peak/ridge ***of the Marshall Residence***") (emphasis added). But that is not contract interpretation: It is a wholesale re-writing of the CC&R's. If the drafter of the CC&R's intended them to say "on the same lot as the vegetation" they could—and presumably would—have done so. They did not, and Ressmeyer's proposed amendment therefore fails without need of any exegesis on the meaning of the term "outlook."

C. Ressmeyer's Interpretation Is at Odds with the Principal Objectives of the CC&R's.

Ressmeyer tries to duck this fatal problem by arguing that an interpretation that ties maximum vegetation height to his roof peak would ignore the "outlook" language in the CC&R's, or that it would make the language of the CC&R's "unreasonable." *See* CP 32. Not so. The CC&R's have a much broader purpose than protecting his own view of Lake Washington. Indeed, view protection is, at best, a tertiary goal of the

CC&R's. A principal purpose of the CC&R's is to enable property owners to construct physical structures to their liking, with very limited exceptions. The CC&R's also guarantee each property owner a generally neat, sightly, and appealing perspective from their property: thus RV's and boats need to be garaged or screened, unpermitted home businesses and other disruptive activities are not permitted, yards need to be kept clear of debris, and trees must be kept neatly trimmed. CP 108-09 at Art. II, § 1; CP 110 at Art. II, § 8; CP 110-11 at Art. III, §1. Ressmeyer's interpretation fails because it seeks to elevate his unilateral desire for an expansive view above the primary goals set out in the CC&R's.

1. The CC&R's Respect Each Owner's Default Property Rights by Declining to Restrict the Height and Heft of Physical Structures.

The CC&R's are careful to place only limited restrictions on the ability of property owners to construct physical improvements on their property. The CC&R's restrict the height of vegetation, as discussed elsewhere. They do not restrict the height, bulk, or scope of physical structures. Three-story residences, two-car detached garages, and other

structures are all *specifically allowed.*[1] The relevant provisions of the CC&R's provide that:

> Section 1. Land Use. No lot shall be used for anything other than residential purposes except that home occupations may be allowed as permitted by applicable public ordinances, codes, laws or regulations. No dwelling shall be erected, altered, placed or permitted to remain on any lot other than **one detached single family dwelling not to exceed three stories in height**, inclusive of basement, ***and*** **a private enclosed car shelter for not less than two cars.** No single structure shall be altered to provide residence for more than one family.
>
> ....
>
> Section 4. Landscaping and Fencing. No permanent structures or landscaping of any kind, including fences, walls or shrubs, may be built or placed within any of the road right-of-ways and easements as delineated on the plat, except as noted below, provided wood fencing may be erected on or within the property of the owner subject to same being temporarily moved, as is necessary to obtain access to the easement area as set forth on the plat herein.
>
> **Fences, walls or shrubs are permitted to delineate the lot lines of each lot**, subject further to the possible necessity of removal of said fences, walls or shrubs due to use of utility easements as contained on the face of the plat and other easements elsewhere recorded.
>
> No barbed wire, chain link or corrugated fiberglass fences shall be erected on any lot.

CP 108-09 at Art. II, § 1-4 (emphasis added).

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[1] *Cf. Wimberly v. Caravello*, 136 Wn. App. 327, 338, 149 P.3d 402 (2006) (CC&R's specifically restricted "number and size of buildings" in order to preserve lake views).

And as a matter of law, "[r]estrictions on the right to use land will not be extended to forbid any use not clearly expressed." *See Holmes Harbor Water Co., Inc. v. Page*, 8 Wn. App. 600, 604, 508 P.2d 628 (1973). In actual fact, Ressmeyer and his upslope neighbors have all built large, tall residences on their property. CP 92-93 ¶ 10. As a consequence, the three properties subject to the CC&R's that lie upslope of Ressmeyer have only limited, obstructed views over the top of the nearest downslope home: On average, each property has 11 feet of visual clearance below their own roof peak. CP 92-93 ¶¶ 10-11. Thus, at most, Ressmeyer might have expected that he would retain a similar view window—that is, a partial view from the top level of his residence—when physical structures were inevitably built on the property downslope of his home.

The fact that he has enjoyed a significantly greater view for years was a windfall owing the fact that the Marshalls were the last to develop their property, and further owing to the Marshalls' misguided willingness to tolerate Ressmeyer's unreasonable demands regarding vegetation height. CP 96-97 ¶¶ 20-21. Ressmeyer's position that the Marshalls should be forever prohibited growing vegetation to a height that gives them a reasonable degree of privacy simply cannot be reconciled with the language or intent of the CC&R's. The CC&R's are manifestly designed

to *protect* the Marshalls' and the other property owners' right to build and grow things on their property.

Furthermore, the CC&R's choice *not* to create a view easement or corridor—which they could have done by restricting the height, heft, or placement of physical structures (*see Wimberly*, 136 Wn. App. at 338)—not only shows an intent to enshrine the owners' default development rights, but it is also consistent with public policy favoring the free use of land. *See, e.g.*, *Foster v. Nehls*, 15 Wn. App. 749, 751, 551 P.2d 768 (1976) ("Doubtful intent must be resolved in favor of the free use of land. Ambiguous intent is to be clarified by reference to the instrument, together with all surrounding facts and circumstances."). "Restrictions, being in derogation of the common law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of the free use of land." *Burton*, 65 Wn.2d at 623. Thus, while ascertaining the *intent* of the restrictive covenant is the chief goal (*see Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 250, 327 P.2d 614 (2014) (declining to "place a thumb on the scales in favor of the free use of land")), where the intent is doubtful, default property rights should prevail. *See, e.g.*, *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 222, 232 P.3d 1147 (2010) ("We resolve any doubts in favor of the free use of land.").

Here, the default presumption in favor of the free use of land, combined with the CC&R's choice to allow structures of maximum height and heft—regardless of their impact on view—sets a very high bar for Ressmeyer. It is one that he cannot overcome.

2. Other Objectives Set Out in the CC&R's.

Another chief objective of the CC&R's is to protect property owners from having to look at eyesores, and to generally ensure an aesthetically pleasing appearance from each property. *See, e.g.*, CP 110 at Art. II, § 8 (lots not to appear in an "unclean, disorderly or untidy condition"); CP 110-11 at Art III, § 1 ("[e]ach lot shall be maintained ... in a neat, clean and sightly condition") and ("[n]o storage of goods, vehicles, boats, trailers, trucks, campers, recreational vehicles or other equipment or device"); CP 109 at Art II, § 3 (homes to be built "of new materials"); CP 109 at Art II, § 4 (prohibiting barbed wire, chain link, and corrugated fiberglass fencing); CP 109 at Art II, § 6 (limiting signage); CP 110 at Art II, § 10 (prohibiting satellite dish antennae "unless fully screened from view from the road and adjoining property owners").

Article III, Section 2 of the CC&R's also gives upslope property owners assurance that their downslope neighbors will not allow

vegetation, with some exceptions,[2] to grow taller than the nearest roof peak, or to be maintained in a way that is not "neat and sightly." CP 111. In practical effect, the language provides limited view protection for the upslope property owners, while at the same time reinforcing the CC&R's chief goals of ensuring full development rights and aesthetic appeal. However, the language of this provision—including the term "outlook"—was *not* intended to create an expansive Lake Washington view for Ressmeyer, at the expense of the CC&R's other stated objectives. If the CC&R's intended to create a view easement or corridor, they would have done so. *See, e.g.*, *Day v. Santorsola*, 118 Wn. App. 746, 750, 76 P.3d 1190 (2003) (restrictive covenant providing that "[n]o trees or shrubs shall be permitted to remain or allowed to grow to a height exceeding 20 feet, *nor to any height which tends to block the view from other tracts within said premises*") (emphasis added). Here, in contrast, the CC&R's singular inclusion of the term "outlook" does not come close to manifesting an intention to guarantee Ressmeyer an expansive view corridor.

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[2] The "natural large trees on the plat" are excluded. *See* CP 111 at Art. III, § 2.

a. The Dictionary Definition of the Word "Outlook" Is Consistent with the Marshalls' Position.

There is in no dispute about the dictionary meaning of the word "outlook." As Ressmeyer stated below, "the primary definition for 'outlook' is 'the view or prospect *from* a particular place.'" CP 32 (emphasis retained). However, the term "outlook" does not have the talismanic powers Ressmeyer attributes to it. The definition actually helps to prove *the Marshalls'* point.

The definition (and Ressmeyer's italics) emphasize that the word "outlook" is place-centric. That is, the focus of the word "outlook" is *not* the thing that is being looked at (such as a forest or a lake), but rather, *the place from which it is being observed.* On the other hand, the applicable dictionary.com meaning of the word "view" is "a sight or prospect of a landscape, the sea, etc.: *His apartment affords a view of the park.*" http://dictionary.reference.com/browse/view?s=t (last visited Dec. 22, 2015) (emphasis retained). The difference between "view" and "outlook" is therefore that a "view" is something that is looked at, while "outlook" is the place *from which* that something is looked at. An "outlook" is more a "prospect" or a "view*point*" than a "view."

The distinction is important because Ressmeyer claims that the word "outlook" was included in the CC&R's in order to protect his view

of Lake Washington. But if that were the case, the CC&R's could, and presumably would have, just used the word "view." They instead chose a broader word that is focused on honoring each property owner's right to protect the *place* from which they look at things. This is not to say that the CC&R's are blind to the fact that a derivative purpose of protecting the "place" is to ensure that views of water, mountains, a city skyline, or a pleasing territorial vista are not needlessly impaired. *But the nature and extent of each property owner's right to an "outlook" is not defined.* That is, including the term "outlook" does not give a property owner any new or unique rights under the CC&R's; they arise only at law or from other provisions of the CC&R's. But the CC&R's do not give Ressmeyer a right to a view, never mind a water view. Ressmeyer's rights, such as they are, are much more limited than he claims, and cannot be read to correspondingly destroy the *Marshalls*' rights under the CC&R's.

Even if the word "outlook" was intended to mean "view" as Ressmeyer claims, there is nothing in the dictionary.com definition or the CC&R's that suggests that it is *water* views that are intended to be protected. The dictionary.com definition of "view" specifically identifies "a **landscape**, the sea, etc.," and the related example refers to a "park." http://dictionary.reference.com/browse/view?s=t (last visited Dec. 22, 2015) (emphasis added). Thus, while "water" or "lake" obviously fit into

the accepted definition of "view," *so does the term landscape*. Ressmeyer makes an untenable leap of logic when he claims that the CC&R's protect water views, but not landscape views. In fact, the CC&R's (in addition to not using the word "view") *also never once use the word "lake" or "water" or "Lake Washington" or any other phrase that might even remotely suggest an intention to protect water views*. On the other hand, "landscaping" is referred to repeatedly. Ressmeyer has provided no evidence that "outlook" is intended to encompass anything more than that.

b. The First Sentence of Article III, Section 2 of the CC&R's Requires the Property Owners to Maintain "Neat and Sightly" Vegetation.

The term "outlook" as used in the CC&R's is expressly designed to promote attractive landscaping and a generally pleasing view or prospect from each property. It is *not* intended to create a grandiose view easement for Ressmeyer, and Ressmeyer alone.[3] The first sentence of Article III, Section 2 provides as follows:

> To protect the outlook from each lot, **and** to maintain the overall desirability of the subject properties, **all owners are**

[3] Ressmeyer claims he is entitled to a view easement from all three levels of his home, or a total of 30.5 feet in height (the difference between the elevation of his home (87 feet) and the elevation of the Marshalls' existing residence (56.5 feet). However, his upslope neighbors (who are subject to the same CC&R's) have views that average only 11 feet in height. CP 92-93 ¶¶ 10-11.

> **required to maintain visible landscaping in a neat and sightly condition.**

CP 111 at Art. III, § 2 (emphasis added).

The sentence thus establishes not one, but *two* goals: outlook protection *and* "overall desirability of the subject properties." Ressmeyer's interpretation puts these two goals at odds, and would enshrine the first goal (outlook) at the expense of the second (overall desirability). It would also protect one feature of one property (i.e. an expansive lake view) at the expense of a neighboring property, despite the fact that the CC&R's are expressly intended to benefit *all* of the "subject *properties*"—stated in the plural. "Overall desirability" is not achieved by aesthetically unappealing truncated vegetation, needlessly limited noise and visual separation between the properties, or a general lack of privacy.

The second problem with Ressmeyer's use of the term "outlook" is that it imposes an obligation on the Marshalls that does not exist: *The CC&R's do not actually say that the Marshalls are required to trim their trees in furtherance of Ressmeyer's outlook.* Ressmeyer's interpretation in fact ignores the specific way in which the CC&R's were drafted to effectuate the twin goals of outlook and overall desirability; to wit, by requiring the owners to maintain landscaping "**in a neat and sightly condition**." Put another way, the obligation that the Marshalls (and all of

the other property owners subject to the CC&R's, including Ressmeyer) have to "protect outlook" is accomplished *not* by maintaining vegetation to a certain height. Instead, their obligation is to maintain "neat and sightly landscaping." If the chief goal of the word "outlook" was the protection of water views, the CC&R's presumably would have said that the protection of outlook is to be achieved not by requiring "neat and sightly" vegetation, but by complying with the vegetation height restrictions in the next sentence. But the CC&R's say no such thing. Thus, Ressmeyer's interpretation improperly elevates his subjective desire for a view corridor over the manifested objective of neat and sightly landscaping.

The third, and related, problem with Ressmeyer's argument is that his interpretation would actually *prevent* the Marshalls from maintaining their landscaping in the "neat" and "sightly" condition actually commanded by this sentence of the CC&R's. Ressmeyer would have vegetation grow no more than 3-4 feet in elevation above his driveway pad, in stark (and aesthetically unappealing) contrast to the vegetation maintained along the property lines of the other properties subject to the CC&R's. *See* CP 97-98 ¶ 22. Ressmeyer himself maintains vegetation at heights of up to approximately 30 feet on the upslope portion of *his* property, and has also historically maintained vegetation near the disputed

hedge row at heights much greater than the 3-4 feet he wants to limit the Marshalls to. *See* CP 294-95 ¶¶ 5, 7. For good reason. Truncated vegetation is not "neat" and "sightly," and does not provide shade, privacy, or sound control. Under the CC&R's, the Marshalls have the same rights to these benefits that Ressmeyer enjoys.

c. The Second Sentence Article III, Section 2 Is Also Consistent with the Marshalls' Position.

The second sentence of Art. III, § 2 contains the "nearest roof peak" language that is the heart of this dispute. CP 111. The Marshalls submit that the language either means what it says, resulting in a maximum vegetation elevation of 87 feet, or that the maximum elevation should be set at 75 feet, a height consistent with the views enjoyed by Ressmeyer's upslope neighbors, and with any reasonable expectation of a view that he might have had at the time he purchased his home. *See* CP 76-77.

Ressmeyer, on the other hand, argues that this sentence of the CC&R's should be rewritten to tie vegetation height not to the "nearest roof peak," as they currently provide, but rather to the "nearest roof peak *on the same lot*." CP 30. The consequence of the amendment Ressmeyer proposes would be to limit vegetation to an elevation of 56.5 feet, or 3-4 feet tall as measured from Ressmeyer's driveway. This would give him a

completely unobstructed view of Lake Washington from all three levels of his home, including his driveway, irrespective of the negative impacts on neighboring property owners. As explained *infra* this interpretation is not reasonable, is not tenable under any plain reading of the language, and would be in direct conflict with the other provisions of the CC&R's.

The provision in this sentence allowing for a deviation from the "nearest roof peak" height restriction (with permission of the uphill property owners) does not help Ressmeyer because it merely shows that the height restriction is capable of amendment by consensus of the neighbors. By anticipating consensual deviations from the "nearest roof peak" limitation, it also strongly suggests that concerns for "outlook" are to be balanced with the property owners' natural desire for taller vegetation and trees. The expressed hope of the CC&R's is that the property owners subject to the CC&R's will be able to work these issues out themselves, *and* that the upslope neighbors will allow vegetation to grow taller than the nearest roof peak when it furthers the overall desirability of the neighborhood to do so. Thus, the inclusion of this language again shows that the CC&R's do not support the rigid conception of "outlook" proffered by Ressmeyer.

Ressmeyer's linguistic argument also fails. As Ressmeyer points out, the CC&R's require the approval of "*all* uphill neighbors." CP 33

(emphasis added). Ressmeyer is expected to argue that "there would be no need to get Ressmeyer's approval to go higher" if the Marshalls are already allowed to grow vegetation to an elevation equal to Ressmeyer's roof peak. CP 32-33.

Not so.

For one thing, the middle or bottom of a tree, shrub, or hedge does not necessarily look the same as the top. Trees, particularly evergreens common to the northwest, tend to be roughly *triangular* in shape. Other trees, including many common deciduous species, tend to have a *rounded* shape. A row of triangular or rounded trees planted along a property line would thus have large gaps at the top of the trees due to the greater bulk in the middle and bottom. An upslope property owner could still have a significant view through the trees, even if the tops reached his roof peak. It is therefore not true that the CC&R's approval requirement is inconsistent with a situation where the tops of the downslope neighbor's vegetation already reach the upslope neighbor's roofline: The upslope neighbor might have a view through the top of the trees that they would not enjoy through the middle of the same trees. Ressmeyer's attempt to invoke an image of a monolithic square wall of vegetation is not right. In 1989, when the CC&R's were recorded, the current properties had not been developed. CP 90 ¶ 5. The drafter specified that trees, shrubs, and

hedges could all be grown, but did not know what would *actually* be grown.[4] Ressmeyer's argument is not only an improper post-hoc attempt to divine the intent of the drafter, but it also ignores the natural condition of trees.

There are also a number of other good reasons why a property owner in Ressmeyer's position would want to have a say about vegetation growing taller than their own roof peak. A property owner might be concerned about the damage a taller tree might cause if it fell in a windstorm. Or the effect of sun and shade on the property from a taller tree. The property owner might want to condition taller heights on the placement of the tree, or have a say about the species of the tree or vegetation. Vegetation height is not exclusively about view considerations.

Lastly, for Ressmeyer's argument to have any force, it would require an *additional* re-writing of the CC&R's. He concedes, as he must, that ***all*** uphill property owners are required to agree to deviations from the "nearest roof peak" restriction on height. CP 29. But if there would be "no need" to get Ressmeyer's permission to grow vegetation to an

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[4] And neither does Ressmeyer. Not only will the Marshalls' existing plantings not necessarily remain in perpetuity, but because they have been kept so low, nobody knows what sort of view Ressmeyer will have, even if the tops are allowed to reach an elevation of 87 feet.

elevation of 87 feet (as he argues), there would just as logically be "no need" to get the permission of the three additional property owners uphill of Ressmeyer. If the Marshalls were to grow their landscaping to 87 feet (or 75 feet) it would not negatively affect the outlook of properties upslope of Ressmeyer, since the Marshall landscaping would be at or below the Ressmeyer landscaping and structures. There would be no point to requiring the Marshalls to get their consent. Ressmeyer already impedes the views of upslope neighbors with his own massive structure and corresponding tall landscaping.

d. All Properties Subject to the CC&R's are Entitled to an Attractive "Outlook," not Just Ressmeyer.

Ressmeyer also fails to consider that the term "outlook" was included not just for his benefit, but for the benefit of others. Even if "outlook" is read as a synonym for "view" (which it is not), the term is nevertheless broad enough to encompass not just views of Lake Washington, but also general appearance of the neighborhood and surrounding countryside, as explained above. In fact, this is the predominant purpose. The Marshalls and the other property owners are entitled to an aesthetically pleasing outlook from their properties, not just Ressmeyer.

Ressmeyer's self-serving conception of the term "outlook" also comes through when he claims that the Marshalls' vegetation "significantly reduces the value and desirability of [his] property." CP 48 ¶ 13. It is probably true that the value of his property would be negatively impacted if vegetation is ultimately grown to an elevation of 87 feet (though the Marshalls have no intention to actually allow vegetation to grow that high). It is less clear that his property value would be affected in any cognizable way if the Court decides that a 75-foot elevation is more consistent with the intentions of the CC&R's.[5] *But it is equally true that short stunted vegetation hurts the Marshalls' property values. See* CP 97-98 ¶ 22.

But the "whose value is more impaired" debate begs the actual question. Rather, the focus should be, first, on the rights granted to the parties under the CC&R's, and, arguably, their reasonable expectations at the time they purchased their respective properties. If Ressmeyer has no right to an expansive view of Lake Washington, he obviously cannot be

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[5] Any future purchaser of Ressmeyer's property would be able to determine from a plain reading of the CC&R's, and an evaluation of the properties as currently situated, that: 1) downslope vegetation might grow to a maximum of 87 feet in elevation; and 2) that a future structure on the downslope (Marshall) property could be up to 75 feet in elevation (which would reduce maximum vegetation height accordingly). Either way, an appraiser or purchaser obviously would not, and could not, calculate the "value" of a view from Ressmeyer's property based on the height of the Marshalls' existing main residence.

damaged by its loss. (Likewise for the Marshalls.) Ressmeyer has enjoyed a windfall that he is not entitled to enjoy in perpetuity.

Ressmeyer's position is also inconsistent with any reasonable expectation that he may have had at the time he purchased his property (when the Marshall property was a vacant lot). CP 94-95 ¶¶ 15-17. At the time, Ressmeyer must have known that there were two possible long-term outcomes for the property downslope of his home. First, and most likely, it would be developed within a few years. (And this is what actually happened.) Ressmeyer has in fact acknowledged surveying the property to determine the maximum height of a structure on the property. CP 95 ¶ 16. He therefore must have expected that a home and/or garage would be constructed that would block his view from at least the bottom two levels of his home. The second long-term option would be for the lot to remain vacant. But under Ressmeyer's reading of the CC&R's (which would eliminate *any* vegetation height restriction if there is no structure on the same parcel), trees and other vegetation would be allowed to grow to an *unlimited* height. That might or might not have been worse from a view standpoint than a structure built to an elevation of 75 feet, but either way it is clear that he could have had only a very modest expectation of a lake view.

e. Ressmeyer's Own Actions Contradict His Expansive Interpretation of the Term "Outlook."

Ressmeyer's strained conception of the term "outlook," and his denial of the Marshalls' interest in having vegetation for privacy (or any other reason) is also belied by his own actions. Houses (including those subject to the CC&R's) obviously have windows on three or four sides, not just one. Therefore, Ressmeyer would naturally be expected to want to preserve his "outlook" not just along the property he shares with the Marshalls, but also to the north and south. *But Ressmeyer has kept a hedge of 66-70 feet in elevation (or approximately 10-14 feet in height above the Marshalls' existing roof peak) along the 25-30 feet southern property line directly facing Lake Washington.* CP 295 ¶ 7.[6] And he has historically maintained vegetation at heights even taller than that. CP 294 ¶ 4. This demonstrates that Ressmeyer himself values the privacy and aesthetic benefits provided by vegetation, even at the expense of water views. Yet he would deprive this same benefit to the Marshalls.

Ressmeyer has also generally taken advantage of the same benefits he would deny the Marshalls. His home is three-stories tall—the tallest possible height under the CC&Rs—and completely without regard to the

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[6] This hedge was recently maintained at an elevation of approximately 63-64 feet, or approximately 8 feet higher in elevation than the Marshalls' roof peak. CP 295.

view of *his* upslope neighbors. CP 92 ¶ 8. Yet, one of his arguments below which is not at issue on appeal was that *any* structure that the Marshalls' might want to build on their property should be restrained as a "spite structure." CP 4 ¶ 5.2. Ressmeyer's landscaping choices on the remainder of his property also contradict his position. While he wants to restrict the vegetation along the property line he shares with the Marshalls to 3-4 feet above his driveway pad, he has grown vegetation elsewhere up to his roof peak. CP 294-95 ¶ 5. Ressmeyer obviously has good reasons to maintain vegetation in this way. Growing tall landscaping improves his privacy, improves the general outlook from his property, and improves the curb appeal and market value of his home. The Marshalls are entitled to the same benefits under the CC&R's that Ressmeyer enjoys.

D. The CC&R's Do Not Grant Ressmeyer a View Easement.

At bottom, Ressmeyer wants the Court to prohibit the Marshalls from doing anything on their property that would have even the slightest effect on his view of Lake Washington. That is, he wants the Court to give him a comprehensive view easement. But the CC&R's are not nearly as expansive in their scope as Ressmeyer would have them. As described above, the height of physical structures is, for the most part, limited only by the constraints of the MICC. And the maximum vegetation height

contained in Article III, Section 2 of the CC&R's is tied to the height of the same physical structures.[7] CP 111 at Art. III, § 2. Due to the sloping nature of the property governed by the CC&R's, the logical and practical consequence (and intention) is to give each upslope property owner a view from the upper level(s) of their home. But there is absolutely no manifested intention in the CC&R's (or anywhere else) to give upslope property owners like Ressmeyer an unobstructed view from their first-story garage.[8]

In discerning the intent of the CC&R's, it is also important that they do not contain a paragraph or section with a specific aim of protecting views of Lake Washington. Obviously, if preserving water views (as opposed to outlook generally) was an intended purpose of the CC&Rs, restrictions directly aimed at achieving that end could—and should—have been included. But no such paragraph or section exists. "As a general rule, a landowner has no natural right to air, light or an unobstructed view and the law is reluctant to imply such a right." *Pierce v. Ne. Lake Wash. Sewer & Water Dist.*, 123 Wn.2d 550, 557, 870 P.2d

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[7] So long as the structure is capable of having a "roof peak/ridge height." CP 111 at Art. III, § 2.

[8] Notably, the builder of Ressmeyer's home chose to place the garage and driveway on the east (water) side of the home. CP 18-19 ¶ 3.12. Given that cars parked in a garage or driveway do not have any use for water views, this design choice is manifestly inconsistent with an understanding that there would be any sort of view from the lower level of Ressmeyer's home.

305 (1994) (citation and internal quotation marks omitted). The absence of language that is unambiguously protective of Lake Washington views—combined with language clearly stating that *three-story residences*, walls, fences, etc., are permissible[9]—strongly suggests a lack of intent to vest Ressmeyer with a comprehensive view easement, or to correspondently deprive the Marshalls of the ability to improve their property. "Restrictive covenants will not be extended by implication to include matters not clearly expressed in the agreement." *See Burton v. Douglas Cnty.*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965).

E. The Specific Language of Article III, Section 2 Trumps Ressmeyer's General Interest in His "Outlook."

While it is true that one of the general goals of Article III, Section 2—along with maintaining the "overall desirability of the subject properties"—is to "protect the outlook from each lot," CP 111 at Art. III, § 2, the CC&Rs also set forth the specific way in which those goals are to be achieved. "Where the contract provides a general and a specific term, the specific controls over the general." *See, e.g.*, *Diamond "B" Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70

[9] For example, in addition to allowing main structures up to three stories in height, CP 108-09 at Art. II, § 1, the CC&R's do not impose any height restriction on car shelters, *id.*, or on any other man-made structures, such as fences and walls, CP 109 at Art. II, § 4. Signs are restricted in area, but not in height or placement. CP 109 at Art. II, § 6. If the CC&R's had intended to preserve water views at all cost, they obviously would have limited the height and bulk of man-made structures, not just natural ones.

P.3d 966 (2003); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.2d 773 (2004) ("It is a well-known principle of contract interpretation that specific terms and exact terms are given greater weight than general language.") (citation and internal quotation marks omitted).

The section then goes on to say that, in addition to being neat and sightly, vegetation must also not get too tall: It must "be maintained at a height equal to or lower than the nearest roof peak/ridge height." CP 111 at Art. III, § 2. Here again, this specific term controls over any general desire to protect the "outlook" from each lot, even to the extent that the term "outlook" was intended to protect water views. *Id.* The Marshalls are entitled to judgment as a matter of law under a plain reading of the CC&R's because the specific "nearest roof peak" language controls, and that roof peak is Ressmeyer's and not the roof peak of any other structure.

F. Ressmeyer's Subjective Beliefs About Vegetation Height Are Inadmissible and Must Be Disregarded.

Ressmeyer's reading also fails because it requires the inclusion of improper evidence of his subjective intent. The specific problem is the trial court's consideration of Ressmeyer's statement that "I have always understood Article III, Section 2 to mean that the vegetation on my property must be at or below the roof peak/ridge of the residence on *my* property ...." CP 47 ¶ 6 (emphasis retained). The statement is

impermissible under Washington contract law. *See Lietz v. Hansen Law Offices, P.S.C.*, 166 Wn. App. 571, 585, 271 P.3d 899 (2012) ("A court may consider extrinsic evidence as an aid in interpreting a contract, but it cannot import one party's unexpressed, subjective intentions into the writing."); *see also Multicare Med. Ctr. v. State, Dep't. of Soc. & Health Servs.*, 114 Wn.2d 572, 587, 790 P.2d 124 (1990) (unexpressed subjective intention of the parties is irrelevant; the mutual assent of the parties must be determined by their objective acts or outward manifestations), *superseded on other grounds*, *Neah Bay Chamber of Commerce v. Dep't of Fisheries*, 119 Wn.2d 464, 832 P.2d 1310 (1992).

The Court should have disregarded evidence of Ressmeyer's subjective beliefs, and instead decided this case based on the terms and structure of the CC&R's, informed by the extrinsic evidence of the drafter's intent. Such a reading can result in only two reasonable interpretations: either vegetation can be grown to a height equal to the "nearest roof peak"—the 87-foot elevation of Ressmeyer's roof peak; or to a height equal to the maximum building elevation on the Marshall property—an elevation of 75 feet.

G. The Marshalls' Prior Concessions to Ressmeyer's Demands Are Not Relevant to Determining the Intent of the CC&R's.

The Marshalls do not dispute the fact that their vegetation was kept to a height of approximately 3-4 feet above Ressmeyer's driveway pad for a number of years. CP 96-98 ¶¶ 20-22; CP 85-86 ¶¶ 10-11. This was done in an effort to promote neighborly harmony and assuage Ressmeyer's aggressive and unreasonable demands. CP 97 ¶ 21; CP 85 ¶ 10. The Marshalls felt cowed by Ressmeyer, and did not want the emotional drain of a poor relationship with their neighbor, or the financial drain of the lawsuit Ressmeyer repeatedly threatened to file against them. CP 97-98 ¶¶ 21-22. Ressmeyer argued below that the Marshalls' prior willingness to tolerate his demands should be held against them. *See* CP 33 ("Marshall's arguments ignore Marshall's own prior behavior. From 2001 when Marshall purchased the property until 2011, Marshall abided by the Height Restriction without complaint or argument."). Nonsense. The Marshalls' failed efforts to get along with Ressmeyer do not constitute a waiver or estoppel, as he may claim, nor do they have any bearing on the interpretation of the CC&R's.

First, Ressmeyer's argument is factually disingenuous. While the Marshalls purchased the property in 2001, their home was not completed, and they did not move in, until *2004.* CP 84 ¶¶ 5-6. Then, for several

years after that, the vegetation was not an issue because it had not yet grown to a height that gave Ressmeyer any concern. *See* CP 86 ¶ 11. It was not until 2009 that the problems associated with low vegetation began to truly manifest themselves. CP 97-98 ¶ 22. At that point the Marshalls objected to Ressmeyer's demands for truncated vegetation. *Id.* However, Ressmeyer offered to trim the Marshalls' trees at his own expense, and the Marshalls reluctantly agreed. *See, e.g.*, CP 48 ¶ 9; CP 97-98 ¶ 22 (explaining that Mr. Marshall felt bullied, but nevertheless "grudgingly" kept the trees trimmed in "hopes of a neighborly relationship"). By no later than 2013, the Marshalls had had enough of Ressmeyer's unreasonable demands, intimidation, and threats of litigation. *See* CP 98 ¶ 23. The Marshalls acquiesced for only a comparatively short amount of time, not the ten-year period intimated by Ressmeyer.

Second, "[t]he law should, and does, encourage acts of neighborly courtesy." *Roediger v. Cullen*, 26 Wn.2d 690, 709, 175 P.2d 669 (1946). The *Roediger* court emphasized that any other result would "have a tendency to destroy all neighborhood accommodation" for fear of losing property. *Id.* at 711; *see also Gamboa v. Clark*, 183 Wn.2d 38, 45-46, 348 P.3d 1214 (2015) (emphasizing presumption in favor of neighborly courtesy in prescriptive easement context). The Marshalls should not be

punished for their effort (albeit ultimately unsuccessful) to resolve their present differences with Mr. Ressmeyer in a neighborly fashion.

H. The Marshalls' Interpretation of the CC&R's Is Reasonable.

Ressmeyer ultimately hangs his hat on the idea that it would be unreasonable to allow vegetation to grow any higher than 3-4 feet in height above his driveway pad. Not so. It is Ressmeyer's construction that is unreasonable, for the reasons already stated above, and for the following additional reasons:

First, many properties in Mercer Island have tall trees. Indeed, the majority of Mercer Island is heavily landscaped and forested with 35-100 foot tall trees, especially those houses near the waterfront running parallel to the Marshall and Ressmeyer homes. CP 294 ¶ 2. Ressmeyer argues that is absurd to allow trees grow to height to partially block water views, yet there are hundreds (possibly thousands) of nearby Mercer Island properties that have done just that. Both neighbors to the immediate north and south of Ressmeyer have towering trees substantially taller than their roof peak or Ressmeyer's roof peak. CP 294 ¶ 3. It is not "absurd" for a tree or multiple trees to be grown tall and partially impede water views. Furthermore, just because a downslope neighbor may grow a tall tree to provide privacy, shade, or improve the aesthetics of their property,

doesn't mean that they will go out of their way to completely block all of the view of the uphill neighbors. The Marshalls don't intend to do so either. They have only requested a reasonable amount of privacy and outlook preservation.

Second, the CC&Rs specifically exclude "the natural large trees on the plat" from the nearest roof peak height limitation. CP 111 at Art. III, § 2. Thus, the CC&R's themselves recognize the value of vegetation and tall trees, even to the exclusion of "outlook" or "view."

Third, vegetation reaching even an elevation of 87 feet is *not* a manifestly absurd result as alleged by Ressmeyer. Vegetation grown to that elevation would be approximately 33.5-37.5 feet in actual height.[10] This is not grossly inconsistent with the height of vegetation that is maintained along the upslope property lines of the other properties subject to the CC&R's. CP 92 ¶ 9; CP 294 ¶¶ 3-4. Ressmeyer himself maintains vegetation at the 87 foot elevation level, resulting in an actual vegetation height of approximately 25 feet. CP 294-95 ¶ 5. Similarly, Ressmeyer's three upslope neighbors each have only partial/obstructed views from the

[10] Vegetation kept to an elevation of 56.5 feet along the parties' shared property line results in an actual height of 6-7 feet (or 3-4 feet measured from Ressmeyer's driveway pad). CP 96-97 ¶ 20. Therefore, vegetation grown to an elevation of 87 feet in the same location would result in an actual height of approximately 36.5-37.5 feet (or 33.5-34.5 feet measured from Ressmeyer's driveway pad).

top 10, 10, and 13 feet of their homes, for an average of 11 feet. CP 92-93 ¶¶ 10-11. In contrast, Ressmeyer claims he is entitled to a view from the top 30.5 feet of his home—all but the lowest 3-4 feet of his home.

Fourth, Ressmeyer ignores the absurd consequences that could flow from his proposed amendment to the existing "nearest roof peak" language in the CC&R's. For starters, as noted *infra*, vegetation height tied to a roof peak "on the same property" would result in undeveloped properties—such as, for many years, the Marshalls'—being allowed to grow vegetation to an *unlimited* height. The proposed construction also makes no sense in a situation where a very tall home is constructed upslope, blocking a hypothetical shorter house that is farther away from the shared property line. It would be unreasonable to prohibit the shorter upslope house from growing vegetation to screen itself from the taller downslope home simply because the vegetation is on the shorter home's property. Lastly, Ressmeyer's construction could result in a *negative* vegetation height for any of the properties subject to the CC&R's. Indeed, if the Marshalls' current residence had been built 10 feet lower in elevation, Ressmeyer's interpretation would require a property boundary completely denuded of any vegetation whatsoever. Ressmeyer's post-hoc attempt to graft his desired outcome into the CC&R's should be rejected because *at the time the CC&R's were drafted*, tying vegetation height to

the roof peak of a structure "on the same property" would have rendered the instrument nonsensical. *See Long-Bell Lumber Co. v. Nat'l Bank of Commerce of Seattle*, 35 Wn.2d 522, 529, 214 P.2d 183 (1950) ("If reasonableness were to be gauged by hindsight, the contention would have some merit. Unfortunately for appellant, the wisdom of hindsight is not the test ... The first and best resort in the construction of contracts is to put oneself in the place of the parties at the time the contract was executed; to look at it in prospect rather than in retrospect.") (citations and internal quotation marks omitted).

I. Can the CC&R's Be Read in a Way that Is Not Absurd?

Ressmeyer is expected to say that a plain language reading of the CC&R's is absurd. *See Mid-Century Ins. Co. v. Henault*, 128 Wn.2d 207, 213, 905 P.2d 379 (1995) (contracts "must not be given a strained or forced construction that would lead to absurd results"). But a truncated four-foot-tall vegetation screen that provides no privacy is just as absurd. The Court might, therefore, decide that the CC&R's are not intended to be read in such a binary fashion.

The primary objective in interpreting restrictive covenants that run with a parcel of land is to determine the intent of the covenants, giving language its ordinary and common meaning. *Riss v. Angel*, 131 Wn.2d

612, 621, 934 P.2d 669 (1997). The document is to be construed in its entirety, and the relevant intent is that of those establishing the covenants. *Id.* For purposes of determining the intent or purpose of a restrictive covenant that runs with the land, it is appropriate to consider extrinsic evidence of the circumstances surrounding the agreement establishing the covenant, if such evidence will illuminate the meaning of specific words or terms used in the covenant. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999). In the search for the parties' intent, there are a number of relevant sources of inquiry. As Division One has explained:

> We may discern intent from the actual language of the disputed provisions, the contract as a whole, the subject matter and objective of the contract, the circumstances in which the contract was signed, the later acts and conduct of the parties, and the reasonableness of the parties' interpretations. The court considers the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made in those negotiations, trade usage, and the course of dealing between the parties.

Diamond "B" Constructors, 117 Wn. App. at 161-62 (footnotes omitted).

Here, these factors support a conclusion that the maximum vegetation height might not be tied to the existing Ressmeyer residence, or to the existing Marshall residence, but rather to the maximum height of any structure that could be built on the Marshall Property.

The developer (and author of the CC&R's) is known to have sold lots with pre-approved plans. *See, e.g.*, CP 93 ¶ 12. The plans anticipated that homes would be constructed to the maximum allowable three stories,[11] and, in the case of the Marshall Property, would include a detached garage to be constructed along the existing Marshall/Ressmeyer property line. *See* CP 93 ¶ 12. If those plans had been implemented, the roof peak of the garage on the Marshall property would also become the "nearest roof peak/ridge height," and would result in a corresponding maximum vegetation height of approximately 69 feet. That is, the meaning of "nearest roof peak/ridge height" as stated in CC&R's was tethered to the expectation that the properties subject to the CC&R's would be built to the maximum height and heft, and in the case of the Marshall Property, would include a detached upslope garage. The fact that physical development has occurred somewhat differently should not defeat the CC&R's intentions with respect to vegetation height.

The way that the upslope homes were actually built reinforces the conclusion that the CC&R's were only intended to protect, if anything, a limited view from the upper level(s) of those homes. The homes upslope of the Marshall residence (including Ressmeyer's) are all built near or to the maximum permitted elevation under the MIBC. *See* CP 92 ¶ 9. The average

[11] CP 91-92 ¶ 7; CP 108-09 at Art. II, § 1.

difference in elevation is 11 feet, ranging between 10 and 13 feet. All four of the upslope houses (Ressmeyer's included) have allowed their upslope landscaping to grow up to their respective roof peaks. The consequence of these factors is that all of the upslope properties have partial water views, *but only from their upper level(s)*. The intention of the CC&R's therefore could not have been to grant Ressmeyer expansive water views from all three levels of his home. Rather, it was, if anything, to grant a view equal to the maximum height of a legal structure constructed below.

VI. CONCLUSION

The Court should reverse the superior court's order granting summary judgment in Ressmeyer's favor. The superior court failed to apply black-letter rules of contract interpretation, and instead adopted a strained reading of the CC&R's that places an overly broad vegetation height restriction on the Marshalls that was not intended by the instrument.

RESPECTFULLY SUBMITTED this 22nd day of December, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States. I am a resident of the state of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused a copy of the document, to which this certificate is attached, to be served on the following counsel of record by the method(s) shown:

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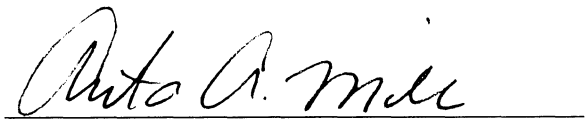
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 22nd day of December, 2015.