No. 101345-1

THE SUPREME COURT
OF THE STATE OF WASHINGTON

MIKI M. MULLOR and MICHAEL MULLOR,
a marital community,

Appellants,

v.

RENAISSANCE RIDGE HOMEOWNERS' ASSOCIATION,
a Washington Non-Profit Corporation; and SURESH
ANNAMREDDY and DIVYA KIRON ANNAMREDDY,
a marital community,

Respondents.

RESPONDENTS JOINT ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION[1]

This is not a Supreme Court case. This case involves one neighbor's aesthetic objection to a single fence between two residential properties in Renaissance Ridge, a community governed by a homeowners' association. Division I of the Court of Appeals properly found that even if the Association's CC&Rs technically prohibited that style of fence – which is ambiguous based on the CC&Rs and the evidence in the record – the Association had the discretionary and final authority under the CC&Rs to grant a variance, which it properly did in this case.

The Mullors refuse to accept that decision. They move for Supreme Court review of a case based on hyper-specific facts and aesthetic considerations specific to a single community in Sammamish that will have little to no effect beyond these two

[1] Respondents, Renaissance Ridge Homeowners Association ("Association") and Suresh and Divya Kiron Annamreddy ("the Annamreddys"), submit this single joint response, RAP 10.1(g), 13.4(d)-(e), and together ask that this Court deny review.

neighbors. Division I's opinion merely confirms longstanding rules that aesthetic decisions are left to the homeowners' associations elected to apply them and CC&R language giving those associations final authority over aesthetic variances controls. Because Division I's opinion was soundly based in fact and law and neither conflicts with established precedent nor affects a substantial public interest, the Court should deny review.

B. ANSWER TO STATEMENT OF THE CASE

The Court of Appeals accurately describes the facts in this case, involving a single fence between neighbors in Renaissance Ridge. Op. at 2-5 (facts), 7-13 (opinion describing evidence in context of the parties' arguments). This answer will not repeat them wholesale, but certain facts bear emphasis.

This dispute involves a single fence separating residential property owners at Renaissance Ridge. Suresh Annamreddy needed to replace a dilapidated fence and obtained verbal permission from the homeowners' association to do so. CP 35-

36. He chose a "solid cedar style" replacement fence, a style used by at least 52 of the approximately 300 lots in Renaissance Ridge; one in every six. CP 138-40, 326-27, 352-55 (selected pictures), 403-04 (list of properties). This style of fencing existed within the community from the outset of its founding. CP 323-24. Since that time, more solid cedar style fences have been installed over the years, either as new or replacement fencing. *E.g.*, CP 352-55, 403-04.

The Mullors protested this replacement fence, claiming that solid cedar style fencing violated the CC&Rs. They claimed that one sentence in Article XII, Section 4 of the CC&Rs mandates that all fencing throughout Renaissance Ridge must comply with the community's Wildlife Management Plan, which generally requires open slatted fencing. CP 3, 260-82. But the CC&Rs state that the Wildlife Management Plan only relates to certain "sensitive area tracts" within the community. CP 50-51, 147-148. Neither the Mullor nor the Annamreddy properties are in the "sensitive area tracts" identified as subject to the Wildlife

Management Plan, nor are they next to any wetlands or wildlife networks described in the plan. *Id.* And the CC&Rs expressly allow for "open *and solid*" fencing in the community, as approved by the Association's Architectural Control Committee ("Committee"), showing that the open style fencing discussed in the Wildlife Management Plan does not govern *all fencing* within the community. CP 148.

Even if the fencing restrictions in the Wildlife Management Applied, the CC&Rs provide that the Committee has the sole and exclusive authority to grant variances to restrictions in the CC&Rs in certain circumstances:

> The Committee, and the Declarant acting as the Committee, shall have the sole and exclusive authority to approve plans and specifications which do not conform to these restrictions in order to (1) overcome practical difficulties, or (2) prevent undue hardship from being imposed on an owner as a result of applying these restrictions, or (3) allow alternative construction upon specific request by an owner. However, such variations will only be approved in the event that the variation, in the sole and exclusive discretion of the Committee, or the Declarant acting as the Committee, will not (1) detrimentally impact the overall appearance of the

> development, (2) impair the attractive development of the subdivision, or (3) adversely affect the character of nearby lots to a significant degree."

CP 151-52. The CC&Rs then state that "[f]or purposes of approval of architectural design requirements, structure placement, analysis of view restrictions and all other aspects of review authority granted to the Committee…*the decision of the Committee…shall be final*." CP 152 (emphasis added). Moreover, Division I correctly noted that the CC&Rs give the Association further discretion to decide whether to enforce every technical violation of the CC&Rs. CP 211 ("In the event that an owner shall fail to comply with any section or provision of the Declaration, and any Amendments thereto, the Board *may* undertake to enforce compliance.") (emphasis added). In other words, the Association has the discretion to choose whether certain situations warrant moving forward with enforcement action." Op. at 11.

Upon receiving the Mullors' protest of the Annamreddy fence, two of the three Association's Board and the Committee

members together with the Association's legal counsel, visited the Mullors' property for a site visit to inspect the disputed fencing. The Committee determined that the Annamreddys' replacement fence (a) is neat, modern and more attractive than the original dilapidated fencing; (b) harmonizes well with the surrounding structures and environment; (c) matches the many other solid cedar style fences widely used throughout the community; (d) does not block any significant view or light to the Mullors' property;[2] and (e) does not adversely impact the appearance or character of the development or nearby lots, but likely improves the value of neighboring properties. CP 31-32, 187-88.

Unhappy with the Committee's discretionary and final

[2] As the photographs plainly show, that solid fence is placed in front of large privacy shrubs that block out sunlight anyway, regardless of the fence style in front of them. *E.g.*, CP 288, 1016 (photos). The Mullors' claim that the solid fence blocks significant sunlight is bogus, just like this entire lawsuit which has consumed far too much time and expense over a single fence.

decision on the fence design, the Mullors sued. The trial court granted summary judgment in the Association and Annamreddys' favor, awarding attorney fees as permitted by the CC&Rs. Division I affirmed in a well-reasoned decision. It found that even if there were fact questions about whether the Wildlife Management Plan's fencing restrictions applied, the Architectural Control Committee retained final, discretionary authority to grant a variance to the CC&Rs which they properly did in this case. Again, the Committee found that the fence did not harm the Mullors and likely *increased* the surrounding property values. CP 31-32, 187-88.

Now the Mullors petition this Court to accept review of this case involving the aesthetics of a fence within the Renaissance Ridge community. It should deny review.

C. ARGUMENT

This case over a small strip of fencing between two private litigants is not a Supreme Court case. The Mullors cannot meet the RAP 13.4(b) criteria for review, and they barely try to do so.

They cite RAP 13.4(b) once, at page 25 of their petition, claiming that Division I's opinion creates conflicts with published precedent under RAP 13.4(b)(1). Elsewhere, they vaguely invoke RAP 13.4(b)(4), without citing it, claiming twice in their petition that this case involves an issue of "substantial public interest" that this Court should determine. Pet. at 2, 15. Even if adequately briefed, both criteria fail.

(1) Division I's Decision Creates No Conflicts Warranting Review Under RAP 13.4(b)(1)

The Mullors are wrong that Division I's well-reasoned opinion creates conflicts in precedent justifying review under RAP 13.4(b)(1). The Court of Appeals merely applied longstanding rules that "[i]nterpretation of covenants is a question of law based on the rules of contract interpretation." Op. at 6 (citing *Bangerter v. Hat Island Cmty. Ass'n*, 199 Wn.2d 183, 189, 504 P.3d 813 (2022)). "The court's primary objective is to determine the intent of the original parties that established the covenants." *Id.* (citing *Bangerter*, *supra*). "'In determining

intent, language is given its ordinary and common meaning.'" *Id.* (quoting *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997)). Courts "may resolve any ambiguity as to the parties' intent by considering evidence of the surrounding circumstances." *Id.* (citing *Riss*, 131 Wn.2d at 623)). "The court will place special emphasis on protecting the homeowners' collective interests." *Id.* "A covenant is ambiguous when its meaning is uncertain or two or more reasonable and fair interpretations are possible." *Id.* (citing *White v. Wilhelm*, 34 Wn. App. 763, 771, 665 P.2d 407 (1983)).

Here, Division I applied these settled interpretation principles faithfully. It determined that both sides had reasonable arguments with regard to whether solid cedar style fencing was prohibited throughout the community, or just in sensitive area tracts subject to the community's Wildlife Management Plan. Op. at 7-9.

Those arguments need not be repeated in detail. But generally, the Mullors pointed to testimony from one of the

community's founders and language in the CC&Rs that seemingly references fencing according to the Wildlife Management Plan, which does not include solid cedar style fencing.

The Association and the Annamreddys pointed to language in the CC&Rs state that the Wildlife Management Plan only relates to certain "sensitive area tracts" within the community. Neither the Mullor nor the Annamreddy properties are located in the "sensitive area tracts" identified as subject to the Wildlife Management Plan, nor are they next to any wetlands or wildlife networks described in the plan. And the CC&Rs expressly allow for "open and solid" fencing in the community, as approved by the Committee, showing that the open style fencing discussed in the Wildlife Management Plan does not govern all fencing within the community. And, as part of the community's original construction, many lots in Renaissance Ridge included solid cedar style fences. Since that time, additional solid cedar style fences have been installed over the

years, either as new or replacement fencing, in the solid cedar style, at least 52 of the 300 lots have this style. CP 138-40, 326-27, 352-55 (selected pictures), 403-04 (list of properties). The Association and the Annamreddys argued that this showed that even if some fencing restriction applied outside sensitive area tracts, it had been abandoned.[3]

Division I weighed these arguments and considered the evidence and CC&R language and ruled that the existence of an

[3] Property owners have an equitable right to enforce restrictive covenants, but this right is not absolute. *Mt. Park Homeowners' Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1993). When a restrictive covenant has been abandoned, later enforcement becomes inequitable. *Id.* at 342 (citing *Mt. Baker Club, Inc. v. Colcock*, 45 Wn.2d 467, 471, 275 P.2d 733 (1954)). The abandonment of a restrictive covenant through non-enforcement renders the restrictive covenant toothless. *Id.* at 341-42. "The defense of abandonment requires evidence that prior violations by other residents have so eroded the general plan as to make enforcement useless and inequitable." *Id.* "[I]f a covenant which applies to an entire tract has been habitually and substantially violated so as to create an impression that it has been abandoned, equity will not enforce the covenant." *Id.* at 342 (citing *White v. Wilhelm*, 34 Wn. App. 763, 769, 665 P.2d 407 (1983)). Nothing in Division I's opinion upsets this precedent.

applicable restriction was ambiguous. That fact-sensitive question created no conflict with published authority, warranting this Court's review.

The same goes for the second part of Division I's analysis – it applied settled contract interpretation principles to determine that the Committee had sole and final authority to grant variances based on the plain language of the CC&Rs. Op. at 9-12. The CC&Rs emphasize that the Committee retains the "sole and exclusive discretion" to approve plans and grant variances to construction that does not meet the community's aesthetic restrictions. CP 151-52 (emphasis in original). Again, such variances can be granted to "(1) overcome practical difficulties, or (2) prevent undue hardship from being imposed on an owner as a result of applying these restrictions, or (3) allow alternative construction upon specific request by an owner." *Id.* The Committee merely needs to determine that the variance "will not (1) detrimentally impact the overall appearance of the development, (2) impair the attractive development of the

subdivision, or (3) adversely affect the character of nearby lots to a significant degree." CP 152. No one disputes that the Committee made these determinations in this case.

The Mullors' petition points not to conflicts in published precedent, because there are none. Instead, they raise factual arguments that the trial court and Division I both rejected. For example, they claim that at times the CC&Rs highlight the Committee's discretion over certain items like driveways and setbacks, so therefore the Committee must have no discretion over fending. Pet. at 17-18. But this ignores the CC&Rs which state that "All fences, open and solid, are to meet the standards set by the Committee and must be approved by the Committee prior to construction." CP 148. And, again, the Committee's decisions are *final*, including its decision to grant variances. CP 152 ("[f]or purposes of approval of architectural design requirements, structure placement, analysis of view restrictions and *all other aspects of review authority granted to the Committee…the decision of the Committee…shall be final*.")

(emphasis added). Clearly, the Committee has authority over fencing designs, including the authority to grant variances.

Contrary to the Mullors' arguments, the Committee's authority includes the authority to grant variances after a fence is already constructed, in certain situations. As Division I points out, the plain language of the CC&Rs grants them discretionary authority to grant variances for undue hardship and the Association has discretion to choose whether certain technical violations of rules or procedures warrant an enforcement action. Op. at 11-12. Thus, even if the Annamreddys technically failed to get prior approval *in writing*[4] before constructing the fence, the CC&Rs to not require them to tear it down, obtain written approval, and then construct it again. Such an interpretation would be nonsensical. Nothing about Division I's logical opinion conflicts with published precedent. *See, e.g.*, *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 762, 271 P.3d

[4] No party disputes that the Annamreddys obtained verbal permission prior to constructing the fence.

331 (2012) (We "avoid 'a strained or forced construction'" of contract provisions "and avoid interpretations 'leading to absurd results.'") (quoting *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 341, 738 P.2d 251 (1987)).

At the end of the day, the Mullors chose to buy their lots subject to CC&Rs that grant an elected Committee the *final, discretionary* authority to approve "open and solid" style fencing if the Committee determines that the fencing aesthetically fits with the community and that does not negatively impact neighboring lots. Division I's decision that they are bound to the plain language of the CC&Rs they bought into does not create conflict with any published authority warranting this Court's review.

In fact, Division I's opinion falls squarely in line with Washington precedent. Courts have held many times that discretionary decisions over the aesthetics of a community association are typically not reviewable and left to the broad discretion of a homeowners' board. In *Riss,* 131 Wn.2d at 629,

this Court determined that "decision[s] based upon standards such as *aesthetics and harmony* with the neighborhood are not substantively reviewable in court." Avoiding judicial review of aesthetic decisions makes sense. "Neighborhood harmony and community aesthetics are not easily reducible to neutral legal standards that courts can apply in case after case." *Bangerter*, 199 Wn.2d at 197-98 (Stephens, J., dissenting) (surveying cases from around the country where courts defer to homeowners' associations' aesthetic decisions).

That aesthetic decisions are not substantively reviewable makes sense in the context of case law, but also in the context of the CC&Rs themselves. The inability to distill aesthetic standards down to "neutral…standards" is precisely why the CC&Rs in this case allow for variances in the first place. The CC&Rs recognize that variances may be necessary to "(1) overcome practical difficulties, or (2) prevent undue hardship from being imposed on an owner as a result of applying these restrictions, or (3) allow alternative construction upon specific

request by an owner." CP 151-52. The Committee, elected by the community members, has the "final" say on whether these criteria apply in any given case.

Again, this variance provision runs with the land, just the same as any fencing provision that may or may not apply to the Annamreddy lot. Thus, the Mullors knew full well when they acquired their property that variances could be granted, including fencing variances for several, broad reasons. They also knew the Committee would have the "final" say over granting variances. Not to mention they knew that many lots throughout the community, around one in six, had solid cedar style fencing for years. Division I did not create any conflicts in law when giving effect to the plain meaning of the CC&Rs with respect to final decisions on fencing aesthetics.

This petition is meritless, if not frivolous, and the Court should deny review.[5]

[5] Division I also properly affirmed dismissal of the Mullors' nuisance claim under RCW 7.48.120. Op. at 12-13.

(2) A Private Dispute Over a Small Fence and the Interpretation of a Variance Clause in One Community's CC&Rs Is Not an Issue of Substantial Public Interest Under RAP 13.4(b)(4)

Although the Mullors' petition does not actually cite to RAP 13.4(b)(2), their petition appears to try and satisfy this criterion anyway. Pet at 15. They cannot; review is inappropriate on this basis.

The Mullors assert that the Court of Appeals made an expansive ruling that "creates a trap for unsuspecting

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The Mullors do not rely on this portion of Division I's opinion in their petition. Still, it is worth noting that Division I properly determined that the "Mullors' nuisance claim was premised on the allegation that the fence was unapproved and violated the CC&Rs. But the fence was not unapproved, and it did not breach the CC&Rs because the Committee granted a variance.' Op. at 12. The Mullors could not show breach of any other duty that would support a nuscience claim because "[a]t common law a [person] has a right to build a fence or other structure on [their] own land as high as [they] please[], although [they] thereby completely obstructs [a] neighbors' light and air, and the motive by which [they are] actuated is immaterial." *Karasek v. Peier*, 22 Wash. 419, 427, 61 P. 33 (1900). Not that the Mullors could show any harm by way of a blocked view because the fence stands in front of privacy shrubs on the Annamreddys' property. CP 1000-04. There is no basis to grant the petition to review any dismissed claim, including the nuisance claim.

homeowners and prospective buyers of properties with CC&Rs." *Id.* In support of this argument, the Mullors rely on pure hyperbole. The Mullors argue that Division I's decision is so broad it opens the community up to "oil derricks" or "dairy cattle" if approved by the Committee. Pet. at 16-17. Nonsense. This "parade of horribles" argument has no factual basis – this single fence that conforms to fences found on 52 other lots is nothing like an oil derrick. Nor does this argument have any basis in the language of the CC&Rs, which permit variances only after approval by elected Committee members applying specific criteria that the variance conforms with the community and will not harm nearby lots. The Mullors' hyperbolic arguments have no merit.

Moreover, the standard established by RAP 13.4(b)(4) requires *substantial* public importance. Again, the Mullors chose to buy their lots subject to CC&Rs that grant an elected Committee the final discretionary authority to approve "open and solid" style fencing applying standards listed in the CC&Rs. The

Mullors' remedy for any harm caused by this decision over aesthetics is political, not legal. The Mullors could run for membership on the Committee or Association Board or otherwise campaign to amend the CC&Rs. The consequences of the Mullors buying a lot subject to CC&Rs, and disagreeing with the aesthetic decisions made by the Committee that they participated in electing, does not transform this case into a matter of substantial public importance under RAP 13.4(b)(4).

Review is not appropriate under RAP 13.4(b)(4); this case does not involve issues of substantial public interest. Rather, it involves the application of CC&R language specific to a single Association, and a *single fence* that the Association's elected Committee determined harmonizes with the community, does not negatively impact the Mullors' (or any other) lot, and likely *increases* nearby property values. The Mullors misguided attempt to overrule that "final" decision has wasted enough time, energy, and expense. The Court should deny review.

(3) <u>The Court Should Award Attorney Fees for</u>

Responding to the Petition

Upon rejecting the Mullors' petition for review, the Court should award attorney fees to the Association and the Annamreddys under RAP 18.1(j). That rule provides:

> If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review.

The Court of Appeals awarded the Association and the Annamreddys their attorney fees on appeal as permitted by the CC&Rs. Op. at 15-16. Upon denial of the petition, this Court should likewise award them their attorney fees under RAP 18.1(j) for having to respond to this baseless petition involving a single fence between neighbors that the Association, the final arbiter of this aesthetic decision, approved.

D. CONCLUSION

This case involving a single fence and aesthetic decision in a homeowners' association does not meet the criteria for

review under RAP 13.4(b). The Court should deny review and award the Association and the Annamreddys their attorney fees.

This document contains 3,638 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 3rd day of November, 2022.

Respectfully submitted,

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APPENDIX

FILED
8/1/2022
Court of Appeals
Division I
State of Washington

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

MIKI M. MULLOR and MICHAL MULLOR, a marital community, Appellants, v. RENAISSANCE RIDGE HOMEOWNERS' ASSOCIATION, a Washington Non-Profit Corporation; and SURESH ANNAMREDDY and DIVYA KIRON ANNAMREDDY, a marital community, Respondents.	)	No. 83025-2-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, C.J. — Miki and Michal Mullor appeal the summary judgment dismissal of claims against neighbors Suresh and Divya Annamreddy, and the Renaissance Ridge Homeowners Association (the Association), for alleged violations of Association covenants relating to the style of cedar fence the Annamreddys erected on the boundary of the two parcels. Because the Association exercised its lawful authority under the covenants to grant a variance to the Annamreddys for the cedar fence, we affirm. But because the trial court failed to enter findings of fact and conclusions of law to support its fee award to the Annamreddys, we remand to the trial court to do so.

FACTS

Miki and Michal Mullor own a home in a residential neighborhood known as the Renaissance Ridge in Sammamish, Washington. Suresh and Divya Annamreddy own a home adjacent to the Mullors' property, also in Renaissance Ridge. The Mullors' property is northwest of the Annamreddys' property, and a portion of the Mullors' property sits 10 feet below the Annamreddy backyard, with the two properties separated by a retaining wall and fencing.

Homeowners living in Renaissance Ridge are members of the Association and subject to a set of Covenants, Conditions, and Restrictions (CC&Rs). The CC&Rs set out land use restrictions for all lots within the development, including the style of fencing permitted in various locations on a lot or within the residential neighborhood. Article XV of the CC&Rs established an Architectural Control Committee (the Committee), appointed by the board of directors, to review plans and specifications for fences that residents propose to place on their properties. Currently, the Association's three board members act as the Committee.

Article XII, section 4 of the CC&Rs identifies the type of fences that homeowners may use in Renaissance Ridge:

> Fences, walls or shrubs are permitted on side and rear property lines, . . . subject to (1) the approval of the Committee and (2) determination whether such fences, walls or shrubs would interfere with utility easements reflected 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, except that vinyl coated chain link fencing for sports [facility] or galvanized or vinyl coated chain link dog kennel enclosures (providing dog kennel is fully screened from view of adjacent lots or public right-of-way) or county owned facilities may be considered for approval by the Committee upon request. All fences, open and solid, are to meet the standards set by the Committee and must be approved by the

> Committee prior to construction. . . . All [fencing] must be of the style shown on the attached Exhibit "C," and location approved by the Architectural Control Committee.

(Emphasis added.) Exhibit "C," referenced in article XII, section 4, is a "Wildlife Network Management Plan" (Plan), approved by King County to provide "guidelines and ongoing restrictions to preserve and protect the wildlife habitats located within" the Renaissance Ridge plat. The plan notes that the residential development contains a 150' wide wildlife network at the two entries into the plat and near a stormwater detention facility needed for the development. The county approved encroachments into this wildlife network conditioned on approval of the plan. The relevant provision of the plan provided:

> Preservation of wildlife habitat will be accomplished by limiting the disturbed area for development. . ..
>
> Protection of the non-disturbed areas will be accomplished in several ways. Fencing along wetlands and wildlife networks will be provided as shown in Figure One. Back yards of all lots adjacent to the wildlife network will be fenced with a solid type 5' – 6' fence per Exhibit "A." The wildlife network adjacent to SE 8th St. will be fenced with a combination of a low open fence as shown in Exhibit "B" and our standard 3' split rail fence as shown in Exhibit "C." Fencing will be provided as shown in Exhibit "D" (fencing diagram).

Exhibit "A" to the plan in turn contains a diagram of a fence, in plan view, comprised of cedar boards, 5 feet in height, with 1/2 inch spacing between the vertical boards.

The Annamreddys' fence, consisting of 5-foot vertical cedar boards spaced a 1/2 inch on alternating sides of horizontal boards, was in poor condition and needed to be replaced. In January 2020, Suresh Annamreddy attended an Association board meeting and received verbal approval to replace the fence. In late January or early February 2020, a windstorm damaged a portion of the fencing

bordering the Annamreddy and Mullor properties, and Suresh Annamreddy removed the damaged fencing. He arranged to replace the remaining dilapidated fencing with a "solid cedar style wood fence" similar in design to existing fencing in various areas of Renaissance Ridge and lacking the 1/2 inch space between the vertical boards.

Before the Annamreddys had completed the fence replacement project, Mullor submitted a written complaint to the Association asking the board to order the Annamreddys to remove any new fencing and to replace it with an alternating cedar slat fence. Mullor argued that under article XII, section 4 of the CC&Rs, the only permissible fence style is that described in Exhibit "A" to the Wildlife Network Management Plan.

On August 13, 2020, two board members and the Association attorney visited the Mullors' property to inspect the Annamreddys' new solid cedar fence, the remaining pre-existing "alternating slat style" fencing, and the gap along the property line where a portion of the old fencing had blown over during the windstorm. On August 31, 2020, the Committee issued a written approval of the Annamreddys' fence. It stated that

- The remaining portion of the original fence and the portion of the fence that was removed after it fell must be replaced for safety and aesthetic purposes. The fence is dilapidated and sits on top of a retaining wall, creating safety concerns.
- The Association will not require you to remove the new fencing you installed. That fencing is approved, so long as you stain the fencing in the required cappuccino color. Please complete this staining within 30 days.
- The Association approves your request to replace the remaining original fencing and missing fencing with fencing of the same style and height as that fencing already replaced, so long as that new fencing is stained the required cappuccino color. Please

> complete this replacement within 30 days to ensure that the dilapidated and missing fencing is promptly addressed.

The Annamreddys complied with this letter, installing solid cedar style fencing in the gap atop the retaining wall bordering the Mullors' lot.

By letter of the same date, the Association's attorney notified the Mullors that it was rejecting their complaint. The Association determined that the CC&Rs did not mandate fencing of a design and height described in the Wildlife Management Plan unless the fencing ran along wetlands and wildlife networks. It further concluded that the solid cedar fencing that the Annamreddys had erected was the same as the type erected by many homeowners within the community. The Committee found the style to be "more modern" and "more attractive" than the original fencing, and found that the new fence did not unreasonably block sunlight in a manner that could be characterized as a nuisance or a violation of the CC&Rs.

In September 2020, the Mullors filed a lawsuit against the Association and the Annamreddys, alleging breach of duty of reasonable and ordinary care and breach of the CC&Rs. They subsequently amended their complaint to add a claim for nuisance against the Annamreddys. They sought damages and a permanent injunction requiring the Annamreddys to remove the solid cedar fencing and replace it with a fence the "same design and dimensions as the previously existing fence on the property."

The trial court granted summary judgment in favor of the Annamreddys and the Association, dismissing the Mullors' claims. The Mullors appeal.

ANALYSIS

The Mullors assign error to the summary judgment dismissal of their claims for breach of the CC&Rs and nuisance. They contend the trial court erred in holding that the CC&Rs allow the Annamreddys to install a solid cedar fence. They argue the Committee lacked the authority to approve any fencing retroactively or to grant a variance that is inconsistent with the Wildlife Network Management Plan. They also argue the trial court erred in concluding that the fence is not a nuisance as a matter of law. We reject these arguments.

Standard of Review

We review a trial court's order on a motion for summary judgment de novo. *Bangerter v. Hat Island Cmty. Ass'n*, 199 Wn.2d 183, 188, 504 P.3d 813 (2022). Interpretation of covenants is a question of law based on the rules of contract interpretation. *Id. at 189*. (citing *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014)); *Kiona Park Ests. v. Dehls*, 18 Wn. App. 2d 328, 334-35, 491 P.3d 247 (2021). The court's primary objective is to determine the intent of the original parties that established the covenants. *Id.* (citing *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997)). "In determining intent, language is given its ordinary and common meaning." *Riss*, 131 Wn.2d at 621. We may resolve any ambiguity as to the parties' intent by considering evidence of the surrounding circumstances. *Id.* at 623. The court will place special emphasis on protecting the homeowners' collective interests. *Id.* at 623-24. A covenant is ambiguous when its meaning is uncertain or two or more reasonable and fair interpretations are possible. *White v. Wilhelm,* 34 Wn. App. 763, 771, 665 P.2d 407 (1983). While intent is a factual question, when the available evidence

warrants but one conclusion, assessing intent may be determined by this court as a matter of law. *Wilkinson*, 180 Wn.2d at 250.

Permissible Fences under Article XII, Section 4

The Mullors first maintain that article XII, section 4 unambiguously requires all homeowners to install only the types of fencing depicted in the Wildlife Network Management Plan, regardless of whether the parcel is adjacent to a wetland or the wildlife network. They focus on the language that provides that "[a]ll fencing must be of the style shown on the attached Exhibit "C," and location approved by the Architectural Control Committee."

On the record before this court, we conclude the language of article XII, section 4 is ambiguous. First, the Wildlife Network Management Plan, by its terms, places no restrictions on parcels other than those with "[f]encing along wetlands and wildlife networks." It is undisputed that the Annamreddy fencing is not along any wetland and their parcel is not adjacent to the wildlife network. Jason Kaufman, the current Association president, testified that neither the Mullor nor Annamreddy parcel is located within the tracts defined as "sensitive areas" in the CC&Rs and that neither is adjacent to any wetlands or wildlife networks. The Mullors submitted no evidence to dispute this testimony. The language reasonably supports the Association's understanding that the fencing style restrictions in the Wildlife Network Management Plan apply only to a limited number of parcels and not to the Annamreddy lot.

Second, the sentence preceding the one on which the Mullors rely provides that "[a]ll fences, open and solid, are to meet the standards set by the Committee

and must be approved by the Committee prior to construction." This provision also arguably supports the Association's interpretation that "solid" fences—i.e., fences lacking the 1/2 inch gap between slats, are generally permissible if approved by the Committee.

But the Mullors argue the word "solid" as used in article XII, section 4 must be interpreted in light of the way this word is used in the Wildlife Network Management Plan which labels the cedar fence depicted in the Plan's Exhibit "A" as "solid," even though the depiction shows a 1/2-inch gap between the vertical fence slats. The Wildlife Network Management Plan does state that "[b]ack yards of all lots adjacent to the wildlife network will be fenced with a solid type 5' – 6' fence per Exhibit 'A.' " (Emphasis added.) This language supports the Mullors' interpretation of the fencing restrictions.

So too does the testimony of Eric Wells, the agent for the developer and declarant involved in the drafting of the CC&Rs. Wells testified that even though the drawings of fencing originally related only to the wildlife network areas, it was his intent that all fencing in the development should be one of the three styles shown in the Wildlife Network Management Plan. The Wells testimony would support an interpretation that the reference to "solid" fencing in article XII, section 4 is merely a reference to the "solid" style of fencing depicted in the Wildlife Network Management Plan, and not a grant of broader authority for homeowners to erect any style of solid fence they choose.

As the Association and the Annamreddys point out, the credibility of Wells' testimony is undercut by what Renaissance Ridge homeowners have actually

done over the years. Kaufman testified that, when he surveyed the community, he counted at least 52 of the 300 lots, or nearly one in six, with fences of solid cedar planks. Kaufman's own property has two fences with two alternative slat style fences and two fences with the same solid cedar slats as the Annamreddys erected. The Association's treasurer, Yogesh Gupta, testified that he has lived in Renaissance Ridge since the development opened and when he moved into his new home, there were a number of lots with solid cedar style fences as part of the original construction. He stated "[t]hat style of fencing is and has always been commonly used in Renaissance Ridge." This testimony supports the Association's contention that the original intent in adopting fencing restrictions is not as Wells claims it to be.

Because the record supports two reasonable interpretations of article XII, section 4, we conclude the language is ambiguous and an issue of fact exists as to whether the fence limitations described in the Wildlife Network Management Plan apply to lots outside the wildlife network.

Variances under Article XV, Section 14

But even if a trier of fact adopted the Mullors' interpretation of article XII, section 4, we nevertheless conclude that the Committee has the authority to grant a variance, even retroactively, to the Annamreddys under article XV, section 14 of the CC&Rs. This section provides:

> The Committee . . . shall have the sole and exclusive authority to approve plans and specifications which do not conform to these restrictions in order to (1) overcome practical difficulties, or (2) prevent undue hardship from being imposed on an owner as a result of applying these restrictions, or (3) allow alternative construction upon specific request by an owner. However, such variations will

> only be approved in the event that the variation, in the sole and exclusive discretion of the Committee . . . will not (1) detrimentally impact the overall appearance of the development, (2) impair the attractive development of the subdivision, or (3) adversely affect the character of nearby lots to a significant degree. Granting such a variation shall not constitute a waiver of the restrictions or requirements articulated in this Declaration.
>
> For purposes of approval of architectural design requirements, structure placement, analysis of view restrictions and all other aspects of review authority granted to the Committee and the Declarant through this Declaration, the decision of the Committee and the Declarant shall be final.

(Emphasis added.) This language bestows sole and exclusive authority on the Committee to consider and grant variances from any restriction, and the Committee's decision is final. The Washington Supreme Court recently emphasized that homeowner association decision-makers are due significant deference in these situations: "[W]hen a homeowners' association makes a discretionary decision in a procedurally valid way, courts will not substitute their judgment for that of the association absent a showing of 'fraud, dishonesty, or incompetence (i.e., *failure to exercise proper care, skill, and diligence*)[.]'" *Bangerter*, 199 Wn.2d at 190 (quoting *Riss v. Angel*, 131 Wn.2d at 632 (quoting *In re Spokane Concrete Prods.*, *Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995))) (alteration in original).

The Mullors argue that the Committee did not render its variance decision in a procedurally valid way because the Annamreddys failed to submit formal plans before they erected the fence. But article XV, section 14 does not prohibit the granting of an after-the-fact variance. The language of the variance provision appears to contemplate just such an event by allowing the Committee to grant a

variance to "prevent undue hardship from being imposed on an owner as a result of applying these restrictions[.]"

The Mullors also maintain that the Committee's chief concern in granting the variance was not whether the Annamreddy fence met the criteria for a variance. There is no evidence to support this contention. It is undisputed that the Committee visited the property and determined that the replacement fence was more attractive than the original fencing, well-harmonized with the surrounding environment, matched many other solid cedar style fences in the community, did not significantly block light to the Mullors' property, and likely improved the value of neighboring properties.

The Mullors next contend that the Annamreddys' failure to submit plans in advance of building the fence was a procedural violation that can only be remedied by removal of the structure. While article XII, section 4 does require Committee approval of plans "prior to construction," article IX, section 4 of the CC&Rs grants the Association flexibility in its enforcement choices.

> In the event that an owner shall fail to comply with any section or provision of the Declaration, and any Amendments thereto, the Board may undertake to enforce compliance through the provisions of Section 3 herein, as well as Article XVI, Section 4 of the Declaration, or any other authority granted to the Board through this Declaration.

(Emphasis added.) In other words, the Association has the discretion to choose whether certain situations warrant moving forward with enforcement action. If the Committee did not deem the Annamreddys' failure to submit formal plans an egregious violation sufficient to warrant requiring them to remove the fence, we defer to that decision.

Because the Association has the authority to grant a variance to the Annamreddys to permit them to build a solid cedar fence along the border of their property, the Mullors failed to establish that either the Association or the Annamreddys violated the CC&Rs. Summary judgment was appropriate.[1]

Nuisance

The Mullors next argue that genuine issues of material fact remain regarding whether the Annamreddy's fence created a nuisance. We disagree.

The Mullors alleged a violation of RCW 7.48.120, which provides:

> Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

The Mullors' nuisance claim was premised on the allegation that the fence was unapproved and violated the CC&Rs. But the fence was not unapproved, and it did not breach the CC&Rs because the Committee granted a variance. Mullor has not identified any other law that has been violated or any other common law duty

[1] The Association also argues that any Wildlife Network Management Plan fencing restrictions applicable to lots other than those adjacent to the wildlife network have been abandoned. Abandonment is an equitable defense available to preclude enforcement of a covenant. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341-42, 883 P.2d 1383 (1994). The defense requires evidence that prior violations by other residents have so eroded the general plan as to make enforcement useless or inequitable. *Id.* at 342. Generally, whether evidence supports a finding of abandonment is a question of fact. *Green v. Normandy Park Riviera Section Cmty. Club*, 137 Wn. App. 665, 697, 151 P.3d 1038 (2007). *See also White v. Wilhelm*, 34 Wn. App. at 770 ("Applicability of [the abandonment] doctrine, which is based on estoppel, is a factual determination.") We do not need to reach the issue of whether the Association members have abandoned the fencing restrictions for lots such as the Annamreddys' parcel because summary judgment was appropriate under article XV, section 4's variance provision.

breached. There is no common law duty independent of those listed in the nuisance statute or required by the CC&Rs. "At common law a man has a right to build a fence or other structure on his own land as high as he pleases, although he thereby completely obstructs his neighbors' light and air, and the motive by which he is actuated is immaterial." *Karasek v. Peier*, 22 Wash. 419, 427, 61 P. 33 (1900). *See also Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006) (a nuisance action fails when it is based on rights conferred by a statute and the statutory rights have not been violated). Mullor failed to establish the existence of a nuisance as a matter of law. Summary judgment dismissal of this claim was also proper.

Attorney Fees Awarded by the Trial Court

The Mullors ask us to reverse the trial court's award of attorney fees to the Association and the Annamreddys because summary judgment was improper and the trial court failed to enter written findings of fact as to the reasonableness of those fees. We reject the first argument and need not address it. We further conclude the Mullors waived their right to challenge the fee award to the Association. But we agree the fee award to the Annamreddys must be remanded to the trial court for entry of findings of fact justifying the reasonableness of the amount awarded.

First, the Mullors did not assign error to, or challenge the reasonableness of, the attorney fee award to the Association in their briefs to this court. If an appellant fails to raise an issue in the assignments of error and fails to present any

argument on the issue in their brief, we generally will not consider the merits of that issue. *State v. Olson,* 126 Wn.2d 315, 321, 893 P.2d 629 (1995).

Second, in response to the Association's motion for attorney fees, the Mullors "acknowledge[d] that an award of costs and attorneys' fees to the prevailing party is appropriate in this case and that the costs and fees claimed by defendant Renaissance Ridge Homeowners' Association are not unreasonable." The Mullors did not object to the fee award, did not challenge the amount awarded, and did not call any errors in computing the award to the trial court's attention. Under RAP 2.5(a), this court generally declines to review any claim of error not raised before the trial court. The Mullors do not argue that any exceptions to this rule apply. They have thus failed to preserve this claim of error.

Third, we conclude that the Mullors adequately preserved objections to the amount of attorney fees awarded to the Annamreddys. The Annamreddys requested an award of $19,156.91. The Mullors asked the court to reduce any award by $1,079.50, an amount they deemed to reflect paralegals performing clerical and administrative, rather than legal, tasks. The court awarded the full amount the Annamreddys requested without making any findings as to the reasonableness of the challenged paralegal services. Although the Mullors did not separately assign error to the Annamreddy attorney fee award, it adequately briefed the issue in its opening and reply briefs. While this type of flaw generally precludes review, we nevertheless have the discretion under RAP 1.2(a) to reach the issue because the record and briefing are adequate to do so.

The Mullors contend the trial court abused its discretion in failing to enter written findings of fact to support the Annamreddy fee award. We agree. Trial courts must articulate the grounds for a fee award, making a record sufficient to permit meaningful review. *White v. Clark County*, 188 Wn. App. 622, 639, 354 P.3d 38 (2015). This generally means the court must supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question. *Id.* (quoting *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014)). Our Supreme Court requires that the trial court create a specific record when awarding attorneys' fees and costs. "Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record." *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). If the trial court does not make findings of fact and conclusions of law supporting the attorney fee award, the appropriate remedy is to remand to the trial court for entry of proper findings and conclusions. *White*, 188 Wn. App. at 639.

The trial court did not enter findings of fact or conclusions of law in support of its Annamreddy fee award, despite the fact that the Mullors raised objections to certain charges. We thus remand for entry of findings of fact and conclusions of law relating to the trial court's award of attorney fees to the Annamreddys.

Attorney Fees and Costs on Appeal

The Annamreddys and the Association request an award of attorney fees and costs for this appeal under article XV, section 15 of the CC&Rs. This provision states that "[i]n any judicial action to enforce a determination of the Committee, the

losing party shall pay the prevailing party's attorneys' fees, expert witness fees, and other costs incurred in connection with such a legal action or appeal." The Annamreddys and the Association have substantially prevailed here, and we award them reasonable attorney fees and costs, subject to their compliance with RAP 18.1.

Affirmed but remanded for the entry of findings of fact and conclusions of law to support the attorney fee award to the Annamreddys.

Andrus, C.J.

WE CONCUR:

Coburn, J.

Smith, A.C.J.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***ANSWER TO PETITION FOR REVIEW*** in Supreme Court Cause No. 101345-1 to the following:

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Original E-filed via appellate portal:
Supreme Court
Clerk's Office

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

DATED: November 3, 2022, at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

November 03, 2022 - 1:28 PM

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Appellate Court Case Title:	Miki and Michal Mullor v. Renaissance Ridge Homeowners Assoc, et al.

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