FILED
SUPREME COURT
STATE OF WASHINGTON
5/15/2023 2:03 PM
BY ERIN L. LENNON
CLERK

Supreme Court No. 101908-4
Court of Appeals No. 83761-3-I

THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE LAKE TRUST,

Appellant,

v.

RICHMOND JPJ ENTERPISES, INC. and
NIELSEN BROTHERS, INC.

Respondents.

ANSWER TO PETITION FOR REVIEW

John T. Cooke
WSBA #35699
Houlihan Law P.C.
100 N. 35th Street
Seattle, WA 98103
(206) 547-1075
Attorneys for
The Lake Trust

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ANSWER TO THE STATEMENT OF CASE 2

III. ARGUMENT 6

A. Division I's Unpublished Decision is not in Conflict with Decisions of this Court and does not Warrant Review Under RAP 13.4(b)(1) 6

B. A Private Dispute Over the Interpretation of a Covenant Applicable to 244 Lots Is Not an Issue of Substantial Public Interest Under RAP 13.4(b)(4) 12

IV. CONCLUSION... 14

TABLE OF AUTHORITIES

Cases

Hearst Communications Inc. v. Seattle Times Co 154 Wn.2d
493, 115 P.3d 262 (2005) 8, 9
Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990). 6
Hollis v. Garwall, 137 Wn.2d 683, 974 P.2d 836 (1999) 7, 8, 11
Wilkinson v. Chiwawa, 180 Wn.2d 241,
327 P.3d 614 (2014) 7, 9, 10

Rules

RAP 13.4(b)(1) 6
RAP 13.4(b)(4) 13
RAP 18.17 2

I. INTRODUCTION

This case does not warrant Supreme Court review. It involves the application of well-established, long-standing, and predictable rules governing the appropriate use of extrinsic evidence in contract interpretation.

At issue is a property covenant that prohibits lots in a subdivision from being used for "commercial business or manufacturing purposes." The trial court found that (1) JPJ and Nielsen acquired a lot in the subdivision solely for their commercial logging business; and, (2) that the term "commercial business" would "normally apply to a logging operation". Nevertheless, the trial court relied on extrinsic evidence—historical evidence of logging in the area at the time the subdivision was created in 1948—to conclude that the covenant drafter's unexpressed, subjective intent was to exclude commercial logging businesses from the otherwise ordinary and reasonable meaning of "commercial business". In doing so, the trial court re-wrote the covenant to include an unarticulated exception for a commercial logging business from the otherwise unqualified commercial business prohibition.

Division I of the Court of Appeals reversed the trial court's decision.[1] Division I determined that the trial court improperly used extrinsic evidence to vary, contradict and modify the written

[1] The trial court's decision is attached as Appendix A.

words of the covenant and to show an intention independent of the instrument. Division I's opinion is sound in fact and well-settled Washington law. It neither conflicts with the established precedent of this Court nor affects a substantial public interest. The Court should deny review.

II. ANSWER TO THE STATEMENT OF CASE[2]

The Court of Appeals accurately describes the relevant facts in this case.[3] This Answer will not recite those facts; however, certain facts do bear emphasis in response to the Petition's Statement of the Case.

A. Evidence of Logging in the Subdivision After the Plat was Recorded is Consistent with Pre-Existing Easement Rights Burdening the Subdivision That Existed at the Time

JPJ and Nielsen's recitation of logging in the area at the time the subdivision was created omits a key fact. When the English Lumber Company ("ELC") sold its timber holdings to Puget Sound Pulp and Timber Company ("PSPT") on January 1, 1945 it granted PSPT a ten-year easement right to permit passage through the lands it retained around Lake Cavanaugh ("Lake Cavanaugh Lands"), that would later be subdivided, to transport timber from the lands PSPT had acquired to the logging roads located on the property retained by ELC.

At the time ELC severed its title to the property around Lake Cavanaugh, a network of roads and rail lines existed on the

[2] RAP 18.17 limits parties to 5,000 words. The Petition evades the intent and spirit of the word limit by attaching its Response Brief to provide a factual history that it would not otherwise be able to provide had those facts been included in its statement of the case.
[3] Opinion at 2-10.

Lake Cavanaugh Lands retained by ELC that connected the larger area, including the land sold to PSPT, to the timber mills.[4] So, as part of the sale to PSPT, ELC conveyed to PSPT a short-term (ten year) right to use portions of the Lake Cavanaugh Lands to access the adjacent timber land so they could connect to the existing road and rail network on the Lake Cavanaugh Lands. The grant of easement was made pursuant to a separate agreement of even date with the sale—January 1, 1945:

> 32. Seller [ELC] hereby grants to the purchaser [PSPT], for the purpose of logging its timber:
> (a) Reasonable rights of way over the Lake Cavanaugh lands excepted from the sale under subdivision (3) of Schedule 'B'; "(these being the lands above described, in Section 21 to 28, inclusive)" and
> (b) The right to use the shore of said lake in the dumping and loading of said logs.
> The location of said rights of way shall be selected by purchaser with the consent of the seller, which consent shall not be unreasonably withheld. The rights of way and rights of user in this paragraph granted to purchaser shall cease and terminate ten (10) years from the date hereof. . . . .

("January 1, 1945 Agreement").[5] The evidence of logging access on lots following the subdivision that JPJ and Nielsen present is consistent with these pre-existing, time limited easement rights.

Notably, the trial court did not find that lots in the subdivision were used for logging after expiration of the January 1, 1945 Agreement. To the contrary, the only finding made by the trial court in that regard was that there was no evidence that Road B (a historical logging road on the lot in question) remained

[4]CP 446 at ¶15; Exs. 116 and 117.
[5] CP 446-447 at ¶18.

in use after the temporary logging road easement would have expired on January 1, 1955.[6]

B. Eastman Intended to Create and Preserve a Residential Subdivision

Eastman acquired large parcels from the ELC and subdivided them into 244 small lots. The trial court found that the "intention in subdividing the property was to create a more residential area around Lake Cavenaugh [sic]."[7]

Eastman was not a party to the January 1, 1945 Agreement. Eastman acquired and subdivided the Lake Cavanaugh lands *after* the January 1, 1945 Agreement and took title subject to the January 1, 1945 Agreement. Therefore, there is nothing unusual about the fact that lots were used for timber access after the subdivision was recorded. Nevertheless, the trial court concluded that because the easement conveyed by the January 1, 1945 Agreement was granted before Eastman acquired the property that it was his intention to allow logging to continue in perpetuity after the easement rights expired and despite Eastman's decision to impose a covenant prohibition on commercial business uses on lots within the lakeside residential subdivision.[8]

---

[6] CP 545 at ¶21.
[7] CP 548, lns 14-15.
[8] CP 548, lns 16-18.

C. Extraneous and Irrelevant Statements and The Trial Court's Factual Findings

The Petition's Statement of Facts and Argument include many extraneous facts that have no relevance to the issue it requests this Court review but are included to create a false sense of inequity. For example, JPJ and Nielsen aver that the Lake Trust's motives for enforcing the covenant are impure.[9] Yet, at no point did JPJ and Nielsen argue that the Lake Trust does not have standing to enforce the covenant. And, the trial court made no findings regarding the motives of the Lake Trust.

JPJ and Nielsen also state that the covenants have not been enforced as to other alleged instances of commercial businesses.[10] The trial court did not find that any of the alleged instances of violations raised by JPJ and Nielsen violated the covenant, but did conclude that the covenant was abandoned in the 1950s because of the logging.[11] Division I reversed that decision as well. JPJ and Nielsen do not appeal Division I's decision reversing the trial court's decision that the covenant was abandoned and references to alleged violations are irrelevant.

---

[9] Petition for Review at 6-7.

[10] Petition for Review at 19 and 31 (suggesting there is evidence that the covenants have been "repeatedly ignored" and stating "some lots are used for non-residential purposes, and even a few businesses exist" and "the character . . . is not one of a pristine neighborhood").

[11] The trial court did find the covenants had been abandoned shortly after they were adopted because of the historical logging. This decision was also reversed by Division I. JPJ and Nielsen do not challenge that portion of the Division I decision.

III. ARGUMENT

A. Division I's Unpublished Decision is not in Conflict with Decisions of this Court and does not Warrant Review Under RAP 13.4(b)(1)

JPJ and Nielsen's claim that Division I's decision conflicts with a decision of this Court is unsupported and wrong. JPJ and Nielsen provide a prolonged, incomplete and inaccurate recitation of this Court's decisions involving the appropriate use of extrinsic evidence when interpreting a property covenant. Their winding narrative of this Court's decisions contrives "an inconsistency in how these rules are applied" where none exists in order to manufacture a conflict between this Court's decisions and the decision of Division I.[12]

Contrary to JPJ and Nielsen's description, this Court's post-*Berg* decisions involving the appropriate use of extrinsic evidence when interpretating contracts (and covenants) are as clear as they are decisive. In *Berg* this Court adopted the "context rule" and overruled cases the held that ambiguity must exist before evidence of the context surrounding a contract is admissible. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990). What has been often overlooked in that decision (and is overlooked in JPJ and Nielsen's recitation of this Court's decisions) is that the *Berg* Court also endorsed the "general rule that parol evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract." *Id.* In every post-*Berg* case cited by JPJ and Nielsen that

[12] Petition at 17.

addressed the use of extrinsic evidence when determining intent, this Court has re-stated these foundational principles of contract interpretation: language should be given its ordinary and customary meaning and while extrinsic evidence may be used to help discern intent (or illuminated what was written), it may not be used to vary, modify or contradict the written word or show an intention independent of the instrument. *Hollis v. Garwall*, 137 Wn.2d 683, 697, 974 P.2d 836 (1999) ("court's primary objective is to determine the intent of the parties, giving the language of the covenant its ordinary and common meaning" and "admissible extrinsic evidence does not include "[e]vidence that would vary, contradict or modify the written word."); *Wilkinson v. Chiwawa*, 180 Wn.2d 241, 250-51, 327 P.3d 614 (2014) ("we give covenant language 'its ordinary and common use' and will not construe a term in such a way 'so as to defeat the plain and obvious meaning'" and "[w]e . . . do not consider extrinsic '[e]vidence that would vary, contradict or modify the written word'").

It is true that there was confusion in the application of *Berg* as this Court has acknowledged. *See Hollis*, 137 Wn.2d at 693 ("Initially *Berg* was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation."); *see also Hearst Communications Inc. v. Seattle Times Co* 154 Wn.2d 493, 503-504, 115 P.3d 262 (2005) ("Unfortunately, there has

been much confusion over the implications of *Berg*."). Any confusion that did exist has been resolved by this Court.

In *Hollis* this Court reiterated the limitations on the use of extrinsic evidence to derive intent clarifying that, despite *Berg*, "admissible extrinsic evidence does not include: . . . Evidence that would show an intention independent of the instrument; or Evidence that would vary, contradict or modify the written word." 137 Wn.2d at 697. Later, in *Hearst*, the Court reaffirmed Washington's commitment to the objective manifestation theory of contract interpretation which requires, among other things, that courts "impute an intention corresponding to the reasonable meaning of the words used." 154 Wn.2d at 493.

Most recently, in *Wilkinson* this Court applied these principles in a detailed analysis that, when contrasted with the dissent, provides a plain and predictable framework for lower courts to follow and that Division I did follow. At issue was whether rentals violated a covenant prohibiting commercial use of the property. The covenants at issue also included a covenant limiting the size of "rental" signs in the subdivision. The Court concluded that because the covenants allowed "rental" signs that they did not intend to prohibit rentals as a commercial use (reasoning that it would be illogical to allow rental signs if rentals were intended as a prohibited commercial use). The majority concluded that the covenant limiting rental signage signified that the drafter's "anticipate rentals and consciously

decided not to limit their duration". The dissent argued that the rental sign restriction signified an intent to prohibit only certain rentals and that extrinsic evidence was necessary to determine the type and duration of rentals the drafter's intended to prohibit as commercial business. 180 Wn.2d at 251. The majority rejected this approach as an improper use of extrinsic evidence. In discussing their disagreement with the dissent, the majority noted that had the drafter's included a qualitative limitation on the restriction, such as prohibiting "long-term" rentals, that extrinsic evidence could then be admitted to determine what was meant by long-term. *Id.* at 251-252. What is "long-term" is relative and therefore, use of extrinsic evidence—to the extent it exists, can be used to "illuminate what was written" without contradicting or adding to the language that exists.

In the instance case, Division I properly analyzed and applied these rules governing the use of extrinsic evidence in its decision reversing the trial court:

> [T]he trial court used extrinsic evidence to conclude that even though a logging operation was a commercial business, Eastman intended to exclude logging operations from the scope of the restrictive covenant. But the covenant contained no such exclusion, and instead stated without qualification that use for commercial business purposes was prohibited.

> The Supreme Court in *Wilkinson* was clear: courts "do not consider extrinsic '[e]vidence that would vary, contradict or modify the written word' or 'show an intention independent of the instrument.'" 180 Wn.2d at 251 (quoting *Hollis*, 137 Wn.2d at 695). But that is exactly what the trial court did here. The court essentially rewrote the covenant to state that use of lots for commercial business purposes was prohibited except for commercial logging operations.[13]

This reasoning is not inconsistent or in conflict with *Hollis, Wilkinson* or any other decision from this Court. Rather, it is JPJ and Nielsen's position that conflicts with this Court's decisions.

JPJ and Nielsen argue that this Court's decisions allow for the unfettered use of extrinsic evidence to otherwise vary, modify or contradict the reasonable and ordinary meaning of words used by a drafter. The position advanced by JPJ and Nielsen reinvites the unpredictability in contract interpretation that this Court in *Hollis* sought to rectify. 137 Wn.2d at 693 ("Initially *Berg* was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation. . . . During the past eight years, the rule announced in *Berg* has been explained and

---

[13] Opinion at 15-16 (emphasis added).

refined by this court, resulting in a more consistent, predictable approach to contract interpretation. . .").

Reluctantly, JPJ and Nielsen concede the possibility that Division I's decision does not conflict with this Court's decisions. In the final two pages of the Petition JPJ and Nielsen state that this Court's decisions governing the use of extrinsic evidence do create a "bright line rule" but plead to this Court to create an exception for their situation:

> [A]s with any bright line rule, creating *exceptions for specific circumstances* through binding precedent is important.[14]

JPJ and Nielsen do not seek review because of a conflict with this Court's decisions. Rather, JPJ and Nielsen seek review because they believe this Court should create for them a one-off exception to the admittedly "bright line rule[s]" set forth in *Wilkinson* and applied by Division I.

JPJ and Nielson claim that this Court's "bright line rule" regarding the use of extrinsic evidence should not apply here because the covenant at issue is old and is not part of a larger more-detailed scheme of covenants like those at issue in and *Wilkinson*.[15] Contrary to JPJ and Nielsen's position, age and concise language do not obfuscate intent in this case or generally. Both the trial court and Division I determined that there was little question that the ordinary, common, plain and obvious meaning

[14] Petition at 34 (emphasis added).
[15] Petition at 2, 4, 19; 28-31

of the term “commercial business” includes JPJ and Nielsen’s logging activities on the lot in question. JPJ and Nielsen do not seriously argue otherwise. Moreover, JPJ and Nielsen make no attempt to address how courts would apply such an exception and how a judge would determine when a covenant is too old or too concise for the traditional rules governing extrinsic evidence to apply. The exception sought by JPJ and Nielsen is a means to an end and would be incapable of predictable repetition.

This Court should deny review.

B. A Private Dispute Over the Interpretation of a Covenant Applicable to 244 Lots Is Not an Issue of Substantial Public Interest

The case does not present an issue of substantial public interest as contemplated by RAP 13.4(b)(4). Division I did not publish the decision because it presented a routine application of existing law to a private dispute.[16] As noted above, there is no need for further clarification of the proper use of extrinsic evidence and this particular dispute does not present unique issues that this Court has not already addressed in *Wilkinson* and elsewhere.

JPJ and Nielsen suggest all cases involving covenants are of substantial public interest because each case is factually different from other covenant cases decided by this Court.[17]

---

[16] The Petition attempts to make the case seem more of a public interest than it is by stating, wrongfully, that “Lake Cavanaugh Subdivision” is comprised of 766 lots. Petition at 2. That is not correct. JPJ and the Lake Trust own parcels in the Plat of Lake Cavanaugh Subdivision No. 3 which contains 244 lots.
[17] Petition at 35.

Taken to its extreme, JPJ and Nielsen's argument would require that every petition to this Court raising issues of covenant interpretation merits review under the substantial public interest prong. This is not the case.

JPJ and Nielsen further state as grounds for review that this Court's reasoned decision in *Wilkinson* does a "disservice to litigants who are faced with restrictive covenants that are 70+ years old and have very little by way of definitions or expressions or intent."[18] This is hyperbole. *Wilkinson* may frustrate JPJ and Nielsen, but by their own admission it provides a predictable, bright line rule that litigants and prospective purchasers of property burdened by covenants alike can rely upon. JPJ and Nielsen have not demonstrated a substantial public interest meriting review.

//

//

//

//

[18] Petition at 34-35.

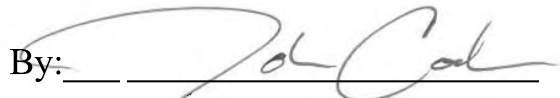
IV. CONCLUSION

The Division I Court of Appeals decision does not conflict with a decision from this Court and is not of substantial public interest. The Court should deny review.

I certify that this document contains 3,365 words as required by RAP 18.17.

RESPECTFULLY SUBMITTED this 15thday of May, 2023.

Houlihan Law, P.C.



By:___ ______________________

John T. (JT) Cooke, WSBA #35699
Attorneys for Plaintiff/Appellant
The Lake Trust

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR SKAGIT COUNTY

THE LAKE TRUST, Plaintiff, vs. RICHMOND JPJ ENTERPRISES, INC., and NIELSEN BROS., INC. Defendants.	No. 19-2-01188-29 MEMORANDUM AND ORDER FOLLOWING TRIAL

THIS MATTER having come on regularly before the undersigned judge on the following trial, the court now enters the following findings of fact, conclusions of law, and order on the issues presented at trial.

The parties have thoughtfully distilled the issues at trial into their trial briefing, so the court will not revisit them here. What bears mentioning and appreciation is the parties' ability to limit the issues and contested exhibits at trial to those that were truly in dispute.

For purposes of this order, and consistent with the parties' stipulated facts and the testimony received at trial:

"ELC" refers to the English Lumber Company;

"PSPT" refers to Puget Sound Pulp and Timber Company;

"the timberlands" refers to the property conveyed by English Lumber Company to Puget Sound Pulp and Timber on January 1, 1945 that has subsequently been conveyed to other owners. When used in reference to the current period, use of "the timberlands" relates property owned in that area by NBI.

"January 1, 1945 Agreement" refers to Exhibit 113, the unrecorded agreement between English Lumber Company and Puget Sound Pulp and Timber, entered into on January 1, 1945;

"Lake Cavenaugh Lands" refers to the properties retained by the English Lumber Company after that January 1, 1945 conveyance that were sold to Leslie Eastman later that same year;

references to subdivisions relate to the three divisions of the Lake Cavenaugh Lands by Leslie Eastman or his estate or successors in interest between 1946 and 1948;

"Subdivision 3" refers to the area displayed in Exhibit 103 which includes the JPJ Property;

"the JPJ Property" refers to property at issue in this case at 33242 South Shore Drive, recorded as Skagit County Parcel No. P66954, and;

"the Timber Property" refers to the area in the timberlands currently owned by "JPJ" refers to Defendant Richmond JPJ Enterprises, Inc.; and "NBI" refers to Nielsen Bros, Inc.

FINDINGS OF FACT

1. The court adopts the parties' extensive stipulated facts, entered June 28, 2021.

2. JPJ purchased the JPJ Property solely for purposes of using it as an access road for NBI's logging on the timberlands.
3. JBJ and NBI's interests on the property are purely related to the commercial business of logging.
4. The JPJ Property's only structures are outbuildings. While the property once had a home and still has a site where a home could be located, no residential structures are currently on the property or planned to be installed on the property.
5. Defendants' anticipated use of the JPJ Property is to have logging and dump trucks pass through the lot for at least eight weeks each year over the course of three or four years. The logging trucks would be expected to cross the property up to 24 times a day while going to and from the timberlands. It takes a couple of minutes for trucks to transit the Richmond JPJ Property.
6. Defendants' timber harvest on the timberlands is expected to produce a gross amount of $4,000,000 of timber.

7. Prior to 1945, the primary use of the area surrounding Lake Cavenaugh was owned by ELC for the main purpose of logging operations. At that time, most of the logging conducted in the timberlands was facilitated by the use of railroads to transport materials between the timberlands and South Shore Drive.
8. On January 1, 1945, ELC conveyed the timberlands to PSPT. The January 1, 1945 Agreement (Exhibit 113) was entered into at that same time, although it was never recorded. That agreement has been memorialized and included in the conveyance of the Lake Cavenaugh Lands from ELC to Leslie Eastman.
9. The January 1, 1945 Agreement allows for PSPT to have an easement for purposes of transporting timber across the Lake Cavenaugh Lands.

10. Because Leslie Eastman was aware of the January 1, 1945 Agreement, PSPT's logging operations in the timberlands, and PSPT's continued rights of way over what was to become Subdivision 3 when he created the subdivision. It was his intention to exclude logging transit to and from the timberlands from the term "commercial business."

11. After the timberlands were conveyed to PSPT, PSPT used the timberlands for purposes of harvesting timber.

12. In the late 1940s and early 1950s, the PSPT removed the railroads and converted those grades to trucking roads.

13. Road C and portions of Road A were originally railroad grades in the timberlands. Remnants of the railroad remain, however both roads were converted to truck roads by the mid-1950s.

14. When Roads A and C were in use as a railroad, a trestle crossed a ravine to connect what the parties refer to as Unit 1 with Units 2 and 3. Exhibit 132. Neither a trestle nor a bridge is currently in place to connect those units.

15. Without the use of Road B, the only way to harvest and remove timber within Units 2 and 3 through the right of way between lots 20 and 21 would be through use of a bridge connecting Roads A and C. Such construction would be expensive and involve regulatory hurdles.

16. It is possible that another lot along South Shore Drive also connects to the old railroad grade for Road C. No evidence was presented to suggest whether that lot is governed by restrictive covenants.

17. Road B connects the Timber Property to South Shore Drive via the JPJ Property. Road B was in existence, either as a road or a railroad grade, prior to the ELC

1 sales to PSPT and Leslie Eastman, as demonstrated by 1941 aerial
2 photography. Exhibit 132, pp. 34 and 45.
3 18. At the time when use of Road B ceased, it was purely a truck road. Until Spring
4 2020, Road B sat dormant and became overgrown.
5 19. There are other grades similar to that of Road B connecting South Shore Drive
6 with the timberlands that were in use when ELC and PSPT were logging the
7 timberlands in the 1940s and 1950s.
8 20. PSPT stopped logging the timberlands by the 1960s.
9 21. There is no evidence that Road B remained in use on or after January 1, 1955,
10 however it was in use after the conveyance of the timberlands to PSPT and into
11 the 1950s.
12 22. Road B provides access to Road C and Units 2 and 3 (Exhibit 123) without
13 requiring the construction of a bridge over a ravine to connect those segments
14 with Unit 1 and Road A. The maps in Exhibits 110, 111, and 114 are instructive
15 as to the location of the logging roads, the JPJ Property, and the right of way
16 between lots 20 and 21.
17 23. Road A connects Road A to South Shore Drive on a right of way located between
18 lots 20 and 21 of Subdivision 3.
19 24. The right of way between lots 20 and 21 in Subdivision 3 through which Road A
20 passes was recorded on the 1948 plat map for Subdivision 3 (page 3 of Exhibit
21 103). This right of way was created to allow access to the timberlands.
22 25. The restrictions for Subdivision 3 include a prohibition on use "for commercial
23 business or manufacturing purposes."
24 26. Defendants JBJ and NBI's intended use of the JBJ Property is for commercial
25 business.

1 27. The Weppler property is at Skagit County Parcel P67017 at 32702 South Shore
2 Drive, which is lot 27 in Subdivision 3. At the time in question, it was owned by
3 James and Amy Weppler.
4 28. In 2004, James and Amy Weppler were granted a permit as a result of their
5 Forest Practices Application for the purposes of "[h]arvesting of all merchantable
6 timber, with road construction" on their lot within Subdivision 3. Exhibit 129, p. 7.
7 The permit was renewed in 2006, with all logging to be completed on that lot by
8 2008. The logging was not for purposes of clearing the lot for installation of a
9 residence. Replanting was required under the permit.
10 29. The Weppler property was logged at some point between 2004 and 2008. It was
11 a one-time operation. The property has since been replanted and is regrowing.
12 There is currently either a new garage or shed on the property, however there is
13 not a residence.
14 30. Many lots within the subdivision, particularly on the non-lake side (also known as
15 "the back lots,") are vacant wooded lots with no residences.
16 31. Most of the residences in Subdivision 3 are vacation or seasonal homes.
17 32. Industrial forestlands are transited on the way to and from Lake Cavenaugh.
18 Logging is visible from the lake.
19 33. South Shore Drive is frequently used to transport timber to mills given its location
20 amid timberlands.
21 34. Robert McCullough has a vacation residence on 32927 South Shore Drive and
22 also owns the lot at 382926 South Shore Drive. He has removed trees on his
23 property for purposes of building a garage.
24
25

35. The Linert Property is also in Subdivision 3, at 32976 South Shore Drive as Lot 29 of the subdivision. The property's primary use was as a single family residence. The property owner, Brett Linert, has lived there for 25 years.

36. Mr. Linert operates a business called Linert Services, Inc., which is a handyman business. He goes to other properties to do work on them. The Secretary of State's address for that business is 32976 South Shore Drive. Mr. Linert has a small pickup truck for Linert Services, Inc. that is sole mode of transportation. He parks that vehicle on his property in Subdivision 3.

37. Within Subdivision 3, 32962 South Shore Drive had a connection with Happy Valley Trucking, Inc. That address was registered with the Secretary of State as the principal mailing address for the business and its registered agent.

38. The Happy Valley Trucking lot had several commercial vehicles parked on it, primarily dump trucks, a trailer, and piles of rocks that were likely gravel until the property changed hands shortly before trial.

39. While 32962 South Shore Drive was the registered address for Happy Valley Trucking and trucks were parked at that location, the lot also contained an occupied residence.

40. Trucks for Happy Valley Trucking have been observed entering and exiting that property over the last several years. Happy Valley Trucking was actively running its operations from that address. The extent of its activities was not clear from any testimony or other evidence at trial, however the trucks were not abandoned but were in working order.

41. At least one home within Subdivision 3 was rented as a VRBO vacation property, located at 33472 East Tree Bark Lane, Skagit County Parcel P66916 or Lot 142

1 within the subdivision. Nothing about the outward appearance of that building
2 would suggest to observers that it was anything other than a residence.
3
4 **CONCLUSIONS OF LAW**

5 *Breach of Covenant Claim*

6 The crux of Plaintiff's claim with respect to breach of the restrictive covenant is
7 related to what constitutes "commercial business" in the plat for Subdivision 3.

8 Here, PSPT was actively logging the timberlands at the time that phrase was
9 added to the plat restrictions. The January 1, 1945 Agreement and evidence of multiple
10 old railroad grades and truck roads leading into South Shore Drive indicate that the
11 Lake Cavenaugh Lands and specifically Subdivision 3 would be used for access to the
12 timberlands at least through 1954 and potentially longer depending on the use of the
13 right of way or the easement contemplated in the January 1, 1945 Agreement.

14 While the intention in subdividing the property was to create a more residential
15 area around Lake Cavenaugh, Leslie Eastman clearly contemplated that logging
16 operations would be a component of the area. Under the January 1, 1945 Agreement,
17 logging operations were required to transit through Subdivision 3 for several more years
18 after the subdivision was platted in 1948. The term "commercial business" would
19 normally apply to a logging operation, but it does not given the historical context of the
20 area surrounding Lake Cavenaugh. The intended use for Subdivision 3 at the time of its
21 creation was for it to be a residential area around the lake that allowed access to the
22 timberlands, where PSPT was actively harvesting timber and entitled to liberal rights of
23 way through Subdivision 3 through the end of 1954.

24 The Plaintiff's claims with respect to breach of covenant are denied.
25

Affirmative Defense: Abandonment

While this issue may be considered moot given the ruling on the breach of covenant claim, the court also examines whether the defense of abandonment would be successful. The other defenses of waiver and equitable cancelation will not be addressed.

Here, there is substantial evidence that the timberlands continued to be logged after Subdivision 3 was platted and that areas such as Road B within the subdivision continued to be used into the 1950s for purposes of accessing the timberlands for logging. Even if the restrictive covenant was intended to exclude that type of use, it was immediately abandoned by then-owners of lots in Subdivision 3 who permitted such use.

Further evidence of the continued use of Subdivision 3 for these purposes can be found in the conveyance of "Tracts A and B" in Subdivision 3 to Ralph Wood, who immediately conveyed those tracts to PSPT. Those conveyances note that "the easements and restrictions of record pertaining to said described real property shall never be construed by competent authority to limit or prohibit extraction or removal of forest products [on the] described premises or any portion thereof." Exhibits 114 and 115. Despite this language's creation after the 1948 restrictive covenants and potential conflict with those restrictions, it is reasonable to assume that PSPT's involvement on those properties was solely for purposes of engaging in logging practices on those tracts purchased under that 1952 conveyance. There is no evidence to suggest that any property owners within Subdivision 3 ever exercised their rights to contest those logging practices as violating the restrictive covenants.

As such, Plaintiff's predecessors in interest abandoned the restrictive covenants in the 1950s when Subdivision 3 experienced significant logging activity.

Counterclaim: Implied Easement

Defendants have also requested that the court address their implied easement counterclaim regardless of the result on the breach of covenant claims.

There is nothing to suggest that Road B was anything other than one of the temporary rights of way granted under the January 1, 1945 Agreement, with access that would have ended by January 1, 1955. There were multiple other similar grades accessing South Shore Drive from the timberlands that would have also served as temporary rights of way. Given the express language of the January 1, 1945 Agreement, the court concludes that Road B was a temporary right of way and that an implied easement does not exist for this potential access road to the timberlands.

IT IS HEREBY ORDERED THAT:

1. Plaintiff's claims are dismissed.
2. Defendant's counterclaim is dismissed.
3. The parties shall contact Court Administration should there be need for clarification of these rulings or additional requests related to this case.

DATED this 31st of January, 2022

Laura M. Riquelme
Skagit County Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on May , 2023, I electronically filed and served this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal and serve a copy of this document via e-mail, pursuant to agreement, on:

Peter R. Dworkin
Belcher Swanson Law Firm PLLC

pete@belcherswanson.com
mylissa@belcherswanson.com

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

DATED this 15th day of May, 2023, at Vancouver, WA.

/s/ John T. (JT) Cooke

HOULIHAN LAW PC

May 15, 2023 - 2:03 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,908-4
Appellate Court Case Title:	The Lake Trust v. Skagit County, et al.
Superior Court Case Number:	19-2-01188-5

The following documents have been uploaded:

- 1019084_Answer_Reply_20230515140033SC314474_4031.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 2023.5.15 Answer to Petition with App..pdf

A copy of the uploaded files will be sent to:

- mylissa@belcherswanson.com
- pete@belcherswanson.com

Comments:

Sender Name: John Cooke - Email: jt@houlihan-law.com
Address:
100 N 35TH ST
SEATTLE, WA, 98103-8606
Phone: 206-547-1075

Note: The Filing Id is 20230515140033SC314474