No. 47022-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARK C. LEWINGTON, a Washington Resident; NOEL P. SHILLITO and LAURIE A. SHILLITO, Husband and Wife and Washington Residents; DANIEL P. OSTLUND and MARIE F. OSTLUND, Husband and Wife and Washington Residents; and ELIZABETH T. WIGHT, a Washington Resident,

Respondents,

v.

FRANK I. PARSONS and NANCY A. PARSONS, Husband and Wife and Washington Residents,

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants Frank ("Iain") and Nancy Parsons (collectively, "the Parsons"[1]) are homeowners residing in the West End of Tacoma. They purchased their home in the Narrowmoor Third Addition in March 2014, fulfilling their long-held dream to retire in that area. CP 229-30, 279-80.

The Narrowmoor Third Addition is governed by restrictive covenants written in 1947. CP 236-37. One of those covenants limits residences to "two stories in height." CP 236. When the Parsons purchased their home—a one-story house with a daylight basement—they did not contemplate that their basement might be considered a "story in height" under the covenant. CP 229-30, 280. Rather, they believed that "stories in height" meant above-ground floors. CP 230, 280. This belief was bolstered by the Parsons' pre-purchase tour of the Narrowmoor neighborhood, during which they saw several multi-story homes with basements. CP 230-31, 238-62, 280.

In fact, twenty-five years ago, this Court considered the meaning of the Narrowmoor Third Addition's "two stories in height" covenant and determined that there was "no support for a finding that the drafters intended a daylight basement to constitute a story." *Lester v. Willardsen*,

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[1] Although the proper plural form is Parsonses, for ease of reference, "Parsons" is used throughout this briefing.

No. 12172-7-II, Unpublished Opinion at 4 (Aug. 23, 1990) (CP 348-53) (attached as App'x B). The *Lester* case was brought as a class action, in which every Narrowmoor Third Addition property owner received notice of the lawsuit and was either a member of the plaintiff class or opted out, declining to seek enforcement of the covenant. *See* CP 284-85, 315-36.

Prior to closing on their home, the Parsons spent considerable time with an architect and the City of Tacoma on plans to renovate the existing house to add a low-profile second story. CP 230, 280, 383. The Parsons paid particular attention to minimizing view impacts on neighboring properties. After incorporating a low-profile roof, the height of the new roofline is approximately 4.62 feet above the height of the old roof. CP 231, 383. Additionally, the vast majority of the addition is built directly over foundation, not over the existing basement. *See id.*

In the months prior to construction, the Parsons met with the plaintiffs in this case. CP 231-32, 280-82. The Parsons were open about their plans and provided their contact information in case of any questions. *Id.* After they began construction in July 2014, the Parsons received a letter in August from counsel for plaintiff Mark Lewington, threatening litigation for violation of the restrictive covenants. CP 194, 232, 282. By that time, construction was well underway, and the Parsons could not alter their building plans without incurring significant expense. CP 232, 282.

The Parsons also believed they were in compliance with the covenants. *Id.* This litigation followed. CP 1-6, 57-63.

The plaintiff neighbors moved for summary judgment on the meaning of "two stories in height" in the covenant and sought to enjoin construction of the Parsons' second story. CP 117-40. The Parsons asserted that their renovated home complies with the covenant. Not only does the express language of the covenant restrict only stories "in height" (not subterranean levels), but the Parsons' basement was not considered a "story" under the City of Tacoma Building Code in effect when the covenant was drafted. CP 219-26, 366-81, 383. The Parsons asserted several defenses, including collateral estoppel based on the *Lester* class action, acquiescence, and abandonment of the covenant. CP 213-18.

Despite plaintiffs' failure to prove they were entitled to judgment as a matter of law and despite this Court's *Lester* holding, the superior court found that the covenant is unambiguous that basements are a "story in height" under the covenant. CP 547-48; RP 28. Further, without any analysis of the factors for injunctive relief and without any consideration of alternate remedies, the superior court issued an injunction. CP 547-48; RP 28. The court did so even though the portion of the Parsons' home allegedly obstructing the plaintiffs' views is not built over the basement. *See, e.g.*, CP 231, 383, 553. The Parsons appeal. CP 554-57.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in ruling on summary judgment that a "basement" is a "story in height" under the Narrowmoor Third Addition restrictive covenant.

2. The superior court erred in not barring the plaintiffs' claims under the doctrine of collateral estoppel based on the *Lester* litigation.

3. The superior court erred in not barring the claims of Ms. Wight and the Ostlunds under the doctrine of acquiescence, as their predecessors-in-interest opted out of the *Lester* class and declined to enforce the covenant. At minimum, there was a genuine issue of material fact as to this defense.

4. The superior court erred by not applying the defense of abandonment to bar all of the plaintiffs' claims. At minimum, there was a genuine issue of material fact as to this defense.

5. The superior court erred in granting summary judgment for the Shillitos because they do not live in Narrowmoor Third Addition and have no rights to enforce its restrictive covenants.

6. The superior court erred by granting injunctive relief to the plaintiffs on summary judgment without analyzing whether injunctive relief was appropriate under the facts.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The primary objective in interpreting a restrictive covenant is to determine the drafter's intent. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). Here, the drafter restricted homes in the Narrowmoor Third Addition to "two stories in height." CP 236. Did the superior court err in ruling on summary judgment that a basement is a "story in height"? (Assignment of Error 1.)

2. The doctrine of collateral estoppel prevents relitigation of issues already determined by the courts and is intended to ensure finality in adjudications. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). This Court already determined that "stories in height" under the Narrowmoor Third Addition covenant does not include basements. *Lester v. Willardsen*, No. 12172-7-II (Aug. 23, 1990) (App'x B). Did the superior court err in not applying collateral estoppel to bar plaintiffs' claims? (Assignment of Error 2.)

3. The doctrine of acquiescence bars plaintiffs who have failed to enforce a restrictive covenant against some offending properties from enforcing the same restriction against other property owners (in other words, selectively enforcing the covenant). *Tindolph v. Schoenfeld Bros.*, 157 Wash. 605, 289 P. 530 (1930). Plaintiff Wight and the Ostlunds' predecessor-in-interest received notice of the *Lester* lawsuit, opted out of

the class action to enforce the covenant, and then declined to pursue enforcement against the *Lester* defendants or any other property owners purportedly in violation of the covenant. CP 285, 328, 330, 332-36. Did the superior court err in ruling on summary judgment that acquiescence did not apply? (Assignment of Error 3.)

4. The doctrine of abandonment prevents enforcement of a covenant that has been "habitually and substantially violated so as to create an impression that it has been abandoned." *Sandy Point Improv. Co. v. Huber*, 26 Wn. App. 317, 319, 613 P.2d 160 (1980). The first homes one sees when entering the Narrowmoor neighborhood are two-story homes with daylight basements, as are several other houses located in Narrowmoor. CP 278. Did the superior court err in ruling on summary judgment that abandonment of the covenant did not apply? (Assignment of Error 4.)

5. Restrictive covenants that only permit enforcement by properties in the subdivision cannot be enforced by owners in adjoining plats, even if the plats have identical covenants. *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wn. App. 411, 415, 166 P.3d 770 (2007). The Shillitos do not own property in Narrowmoor Third Addition. CP 120. Did the superior court err by failing to dismiss the Shillitos' claims and by granting summary judgment in their favor? (Assignment of Error 5.)

6. Permanent injunctive relief based on a restrictive covenant requires satisfaction of the three-part test for injunctive relief and a balancing of the equities and relative hardships of the parties. *Doyle v. Lee*, 166 Wn. App. 397, 404, 272 P.3d 256 (2012); *Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn. App. 70, 74-78, 587 P.2d 1087 (1978). The superior court did not analyze the three-part injunctive relief test or balance the equities in this case. RP 28; CP 547-48. Did the superior court err in granting permanent injunctive relief to the plaintiffs without conducting the required analysis for whether injunctive relief was appropriate in this case? (Assignment of Error 6.)

IV. STATEMENT OF THE CASE

A. The Parties.

The Parsons begin with an overview of the parties to this litigation, as this information is relevant to the historical facts. A map showing the relative locations of the parties' properties is attached hereto as Appendix A (CP 264-65). The Puget Sound is west of the properties.

- Iain and Nancy Parsons (Defendants-Appellants) purchased their home at 1502 South Ventura Drive in March 2014. CP 229-30, 279-80. Their home was originally one story constructed in part over a basement. *Id.* The addition of a second story to their home is the subject of this litigation.

- Mark Lewington (Plaintiff-Respondent) owns property located uphill and across the street to the east of the Parsons, which he purchased in April 2012. CP 363. Mr. Lewington's predecessors-in-interest had owned the property since 1971 and were members of the *Lester* class action. CP 285, 334, 365.
- Elizabeth Wight (Plaintiff-Respondent) owns property immediately next door to the Parsons to the south. She lived there at the time of the *Lester* litigation. *See* CP 330. Her west-facing views of the Puget Sound and Olympic Mountains are not impacted by the Parsons' residence, regardless of the addition. CP 233 (¶ 17), 264-71.
- The Ostlunds (Plaintiffs-Respondents) own property across the street from the Parsons and next door to Mr. Lewington. The Ostlunds acquired their property from Signa Simkins, who owned the property at the time of the *Lester* litigation. *See* CP 328, 334.
- The Shillitos (Plaintiffs-Respondents) own property located downhill and to the north of the Parsons' home. The Shillitos' property is not located within the Narrowmoor Third Addition, but rather within the neighboring

Narrowmoor Second Addition. CP 120. Their views are not impacted by the Parsons' residence, regardless of the addition. CP 233 (¶ 17), 264-71.

B. The Narrowmoor Covenants.

The Narrowmoor area of Tacoma's West End (also known as part of the West Slope) was developed in four additions, called Narrowmoor First, Second, Third, and Fourth Addition, respectively. *See* CP 145-157. These subdivisions were approved between 1944 and 1955. *Id.*

On the face of each plat, Eivind Anderson recorded various covenants to apply to all properties within each subdivision. *Id.* These covenants are largely identical across the four subdivisions. *Id.* Central to this litigation is Covenant A of the Narrowmoor Third Addition:

> Except as otherwise herein specifically stated, no structure shall be erected, placed or permitted to remain on any residential building plat other than one detached single family dwelling not to exceed *two stories in height*, and a private garage.

CP 236 (emphasis added). Also relevant is Covenant D, which prohibits tall growing trees that would obstruct the panoramic view of the Puget Sound, but only as to properties west of Fairview Drive. *Id.*

C. The Tacoma Building Code When The Covenants Were Drafted Defined When A Basement Is A "Story."

Although the drafter of the Narrowmoor covenants did not elaborate on his intended meaning of "stories in height," the

contemporaneous building code illuminates this issue and shows what a builder constructing a home at the time would have referenced.

The operative City of Tacoma Building Code when the Narrowmoor Third Addition covenants were drafted in 1947 was Ordinance No. 11689, passed by the Tacoma City Council in 1939. CP 283-84, 288-91. The 1939 Building Code directly addresses the issue of when a basement or cellar constitutes a story, providing a straightforward method of calculation:

> **Story** means that portion of a building included between the upper surface of any floor and the upper surface of the floor next above, except that the topmost story shall be that portion of a building included between the upper surface of the topmost floor and the ceiling or roof above. *If the finished floor level directly above a basement or cellar is more than six feet (6') above grade such basement or cellar shall be considered a story.*

CP 291 (italics added); *see also* CP 290 (defining "basement" and "grade"). Thus, if the floor level directly above a basement is less than 6 feet above grade, the basement is not a "story" under the code.

D. In *Lester v. Willardsen*, This Court Determined That Daylight Basements Do Not Qualify As "Stories In Height" Under The Narrowmoor Covenant.

Nearly 30 years ago, a class of Narrowmoor Third Addition homeowners litigated this very issue against another property owner in the subdivision. Those homeowner plaintiffs asserted the same argument advanced by the plaintiffs here—that the covenant drafter intended to

include daylight basements as a "story in height." This Court rejected their interpretation.

Lester v. Willardsen was filed as a putative class action in Pierce County Superior Court in 1985. CP 284 (¶ 3). Aside from separate claims asserted against the City of Tacoma, the plaintiff homeowners sought to enjoin construction of a second story on the Willardsens' home, which had a daylight basement. CP 294-95 (¶¶ 1.2, 1.4), 298 (¶ 6.2), 300-01 (¶¶ 10.1, 10.2, 12.1). Just as in this case, the *Lester* plaintiffs characterized the Willardsens' second story addition as a "third story." *See, e.g.*, CP 294 (¶ 1.4).

1. A Class Was Certified For All Narrowmoor Third Addition Property Owners.

In December 1985, the superior court certified the case as a class action for all owners of real property located within the Narrowmoor Third Addition. CP 315-18. One of the essential purposes of proceeding as a class action was to protect the rights of future owners, as stated in a declaration submitted in support of certifying the class: "[F]uture owners of such property deserve representation. It is impossible to join as plaintiffs such unknown future owners." CP 312. Additionally, the representative plaintiffs were concerned about the risk of inconsistent or varying adjudications as to Narrowmoor Third property owners. CP 313.

All Narrowmoor Third Addition properties were included in the class unless their owners specifically opted out, and they were all specifically advised that they would be bound by the judgment whether favorable or unfavorable. CP 323. Class counsel provided notice of the class action to Narrowmoor Third Addition property owners in January 1986. CP 332-36.

2. The Plaintiffs Or Their Predecessors Received Notice Of The *Lester* Litigation.

All of the plaintiffs in the present case or their predecessors-in-interest received notice of the *Lester* lawsuit and an opportunity to opt out, except for the Shillitos, whose property is not in the Narrowmoor Third Addition. CP 120, 332-36.

Plaintiff Lewington purchased his property in 2012 from the estate of Rosemary Moore, who had lived there since 1971. CP 363, 365. Ms. Moore's husband, Donald Moore, received notice of the class action and was a member of the *Lester* class. CP 285, 334.

Plaintiff Wight also received notice of the class action, but expressly declined to participate in the lawsuit, which she referred to as "frivolous." CP 330. In fact, Ms. Wight was adamant regarding her and her husband's "firm desire that we would have nothing AT ALL to do with this suit." *Id.* (emphasis in original).

Finally, Mr. and Ms. Ostlunds' predecessor-in-interest, Signa Simkins, received notice and declined to participate in the class action lawsuit to enforce the covenant. CP 328, 334.

Neither Ms. Wight nor the Ostlunds' predecessor, Ms. Simkins, filed their own lawsuits to enforce the covenant against the Willardsens or any of the other Narrowmoor properties that do not comply with the plaintiffs' interpretation of the covenant. *See* CP 232-33, 282, 285.

3. This Court Held As A Matter Of Law That A Daylight Basement Is Not A "Story In Height" Under The Narrowmoor Covenant.

The *Lester* case was ultimately heard by this Court on appeal. The primary issue was identified as "whether a basement constitutes a story." App'x B at 2. This Court rejected the class plaintiffs' assertion that a daylight basement was a "story in height" under the Narrowmoor Third Addition covenant, holding that "there is no support for a finding that the drafters intended a daylight basement to constitute a story." *Id.* at 4. The Court further ruled that there was "no evidence that the offending home exceeded the height it would have attained had it been constructed as a conventional two-story house with the first story constructed at ground level." *Id.* The Washington Supreme Court denied review. *Lester v. Willardsen*, 116 Wn.2d 1004 (1991).

E. The Parsons Purchase Their Home And Plan To Construct A Low-Profile Second Story.

Nearly twenty-five years later, in March 2014, the Parsons purchased their one-story home with a basement in the Narrowmoor Third Addition. CP 229-30, 279-80. Prior to closing, they spent significant time with an architect and the City of Tacoma's planning department to ensure compliance with all land use and zoning regulations in anticipation of renovating the existing house to add the low-profile second story. CP 230, 280, 383.

The Parsons' addition is primarily an extension of the existing house to the northeast. CP 231, 383. This extension is two stories on top of a foundation wall and footings. *Id.* The bottom story of the extension is primarily a garage, while the upper story is the Parsons' bedroom. *Id.* Only a small portion of the addition is above the footprint of the preexisting building—also the most subterranean portion of the basement. *Id.* The majority of the addition is located directly on foundation, with no basement beneath it. *Id.* The Parsons' addition also incorporates a low-profile roof that minimizes view impacts. *Id.* All told, the height of the Parsons' new roofline is 4.62 feet above the height of their old roof. *Id.* The renovated home complies with the local 25-foot zoning height limitation and was approved by the City of Tacoma. *Id.*

The Parsons' remodel has minimal view impacts on the plaintiffs' neighboring houses, as illustrated by Mr. Parsons's testimony and the various exhibits attached to his declaration. CP 233, 264-71. While the two uphill plaintiffs, Mr. Lewington and the Ostlunds, also submitted photographs allegedly showing their damaged views, the portions they complained of are not located above the Parsons' existing basement. *See, e.g.*, CP 551-53. Instead, their photographs show a two-story building on ground level. *Id.* Indeed, had the Parsons chosen to demolish the existing home and rebuild on a concrete slab, they could have built to the same height specifications without any basement at all. CP 233.

When the Parsons were planning their remodel, they did not even contemplate that someone might consider their basement to be a "story in height" under the Narrowmoor covenant. CP 230, 280. To them, the common sense reading of the covenant was that it applied to above-ground floors. *Id.*; *see also* CP 383 (architect's opinion). This belief was reinforced by the Parsons' experience touring the Narrowmoor neighborhoods. They saw numerous homes with greater height profiles than the home they were contemplating building, including several multi-story homes with basements. CP 230-31, 280. Examples of such houses were submitted to the court with Mr. Parsons's declaration. CP 238-62.

F. The Parsons Were Up Front With Their Neighbors Regarding Their Remodel Plans.

During the several months leading up to the commencement of construction on the Parsons' remodel, the Parsons met plaintiffs Mr. Lewington, Mr. Ostlund, Ms. Shillito, and Ms. Wight. CP 231-32, 280-82. In their discussions with the plaintiffs, the Parsons were up front about their intention to renovate their home and provided each of the plaintiffs with contact information in case they had questions or concerns. *Id.* The Parsons' remodel plans were also available from the City of Tacoma. CP 232.

The Parsons' interactions with the plaintiffs were generally pleasant. CP 231-32, 280-82. Prior to beginning construction, only Mr. Ostlund raised any concerns regarding their plans to build a second story. CP 231-32, 281. The Parsons told Mr. Ostlund that they intended to minimize view impacts and would be installing a low-profile roof on the new upper story. *Id.* In response, Mr. Ostlund left Nancy Parsons a voicemail in which he told her, "no worries," and said that he was "excited to have them come to the neighborhood." CP 281.

Construction commenced on the Parsons' property on July 22, 2014. CP 232, 282. On August 13, 2014, counsel for Mr. Lewington (also an attorney) sent a letter to the Parsons, claiming that their remodel

violated the Narrowmoor Third Addition restrictive covenants. CP 194, 232, 282. By this time, construction on the Parsons' home was well underway, and the Parsons could not alter their building plans without incurring significant costs to redraw the plans, redo the permitting, and to alter their plans with their contractor and subcontractors. CP 232, 282. Further, the Parsons believed they were within their rights. *Id.*

G. Litigation And Summary Judgment Proceedings.

The plaintiff neighbors commenced this lawsuit on August 22, 2014, and filed an amended complaint on September 8, 2014. CP 1-6, 57-63. They sought declaratory and injunctive relief that the Parsons' construction violated the Narrowmoor covenants and claimed that the new construction harmed plaintiffs' views. CP 57-58.

In November 2014, the plaintiffs moved for summary judgment on their interpretation of the covenant. CP 117-140. They also requested injunctive relief; however, the plaintiffs presented a fairly limited analysis on this issue, as the primary focus of the motion was securing their interpretation of the covenant. CP 137-40; *see* CP 120 (identifying the issue presented).

The Parsons opposed the motion and requested summary judgment in their favor. CP 200-28. Not only was the Parsons' interpretation consistent with the plain language of the covenant that it only restrict

stories "in height," it was consistent with this Court's prior ruling in *Lester* and with the 1939 Building Code. *See* CP 219-26. The Parsons further asserted that collateral estoppel barred the plaintiffs from re-litigating the exact arguments presented and rejected in *Lester* and that the equitable defenses of acquiescence and abandonment applied. CP 213-18. Finally, the Parsons requested that any remedy be reserved for another day, as the plaintiffs' analysis of injunctive relief was meager, did not explore possible alternatives, and relied on conclusory assertions that the Parsons were not "innocent" defendants. CP 226-27.

At the conclusion of oral argument, the superior court ruled that the Narrowmoor covenant unambiguously included basements as "stories in height," despite the plain language of the covenant and this Court's holding to the contrary in *Lester*. CP 547-48; RP 28. Additionally, without any substantive analysis or consideration of alternate remedies, the court granted the plaintiffs' request for injunctive relief to enjoin the Parsons' construction. *Id.*

V. SUMMARY OF ARGUMENT

This Court should reverse the ruling of the superior court and enter judgment for the Parsons. The Narrowmoor covenant, by its express terms, restricts homes to two stories *in height*, not subterranean levels—as this Court already held in the *Lester* litigation addressing this very issue. The plaintiffs' claims are barred by the doctrine of collateral estoppel. Additionally, the equitable defenses of acquiescence and abandonment should preclude the relief sought by the plaintiffs. At minimum, the Parsons presented sufficient evidence to demonstrate a genuine issue of material fact as to the foregoing issues.

Moreover, injunctive relief was improperly entered against the Parsons. The superior court performed no analysis as to whether an injunction is appropriate—it did not apply the three-prong injunction test or balance the equities. Even assuming *arguendo* that basements are "stories in height," several factors support the denial of injunctive relief, particularly the sweeping relief granted in this case.

VI. ARGUMENT

A. Standard Of Review.

This Court reviews an order of summary judgment *de novo*. *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 470, 209 P.3d 859 (2009). Summary judgment should only be granted when no genuine

issue of material fact exists and the party is entitled to judgment as a matter of law. CR 56(c); *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Where the facts are not in dispute or where disposition of the case is a question of law, summary judgment may be granted to the non-moving party. *Barber v. Peringer*, 75 Wn. App. 248, 255, 877 P.2d 223 (1994) (citing *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992)).

Additionally, when an injunction is reviewed on appeal from a summary judgment order and its validity solely involves questions of law, the court of appeals conducts *de novo* review. *Doyle v. Lee*, 166 Wn. App. 397, 404, 272 P.3d 256 (2012). Because the superior court here did not make any factual determinations in connection with its grant of injunctive relief to the plaintiffs, this Court's review of the order is *de novo.*

B. The Superior Court Erred In Ruling On Summary Judgment That A "Basement" Is A "Story In Height" Under The Narrowmoor Covenant.

The Parsons' first assignment of error is that the superior court incorrectly ruled on summary judgment that "stories in height" includes basements under the Narrowmoor covenant. The court's determination is contrary to the covenant's plain language and ignores the drafter's intent.

1. Interpretation Of Covenants Is Focused On The Drafter's Intent.

Interpretation of a restrictive covenant presents a question of law and applies the rules of contract interpretation. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). The primary objective is determining the drafter's intent. *Id.* at 250. Although Washington courts no longer strictly construe covenants in favor of the free use of land, the drafter's intent remains the focus of the inquiry. *Id.*; *see also Riss v. Angel*, 131 Wn.2d 612, 621-24, 934 P.2d 669 (1997) (rejecting strict construction rule that had been applied in doubtful cases or where language was ambiguous). The drafter's intent is a question of fact, but where reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law. *Wilkinson*, 180 Wn.2d at 250.

When examining the language of a restrictive covenant, the court considers the instrument in its entirety. *Id.* Extrinsic evidence may be used to illuminate what was written, but not what was intended to be written. *Id.* at 251. The court will not consider extrinsic evidence that would vary, contradict, or modify the written words or show an intention independent of the instrument. *Id.* Words are given their "ordinary and common use." *Id.*

2. The Narrowmoor Covenant Restricts Stories "In Height."

Here, the covenant states that homes in Narrowmoor Third Addition are "not to exceed two stories *in height.*" CP 236 (emphasis added). By adding the term "in height," the drafter must have intended that modifier to mean something; otherwise, this provision could have simply been written as "not to exceed two stories." The clear import of this language is that subterranean levels are not counted as stories in height. This reading is consistent with this Court's determination in *Lester*, as well as with the common sense understanding of the phrase and with the interpretation of others in the Narrowmoor neighborhoods who have constructed homes with two stories above daylight basements. CP 230-31, 239-62, 278, 280; App'x B.

On summary judgment, the plaintiffs relied on declaration testimony from other homeowners advocating the plaintiffs' interpretation and contended that the "over-arching purpose" of the covenants was to protect views, as evidenced by Covenant D, the fast-growing tree provision. CP 121, 141-44, 158-62. None of this evidence supports the plaintiffs' argument that a subterranean level would be a "story in height" under Covenant A.

As an initial matter, current homeowners may not speak for the drafter. *See Bloome v. Haverly*, 154 Wn. App. 129, 138-39, 225 P.3d 330 (2010) (property owners' personal beliefs as to scope and meaning of restrictive view covenant inadmissible to determine meaning of the covenant). The declaration testimony of Dean Wilson and Mike Fleming attempted to do exactly that—speak for Eivind Anderson. CP 141-44, 158-62. Their testimony not only ignores the *Lester* decision,[2] it simply repeats the same problem identified by this Court in *Lester*: "Although many of the current homeowners believe that the drafters intended to protect the view, there simply is no evidence to that effect." App'x B at 3-4 (emphasis in original).

Plaintiffs' arguments about view protection, relying on Covenant D, are likewise unfounded. Covenant D states:

> No tall growing trees, such as Southern Poplar, Maple or any other similar species that would obstruct the panoramic view of the sound shall be planted or permitted to grow west of Fairview Drive, nor shall any commercial billboard be so located.

CP 236.

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[2] Indeed, Mr. Wilson's credibility is compromised by his failure to even acknowledge the existence of the *Lester* litigation. Mr. Wilson stated, "Having served continuously on the WSNC Board since 1988, I am extremely familiar with the Restrictive Covenants of the Narrowmoor Additions and how they have been interpreted and implemented over time to preserve the views and character of the Neighborhood." CP 142 (¶ 4). Given this representation, it is implausible that Mr. Wilson was not aware of the *Lester* decision. His testimony in paragraphs 5 and 6 of his declaration is irreconcilable with historic fact.

This covenant is notably different from the "two stories in height" restriction in Covenant A. First, Covenant A does not make any references to views. *Id.* Second, Covenant A does not exclude any properties from its restrictions. *Id.* All properties in Narrowmoor Third Addition, even those at the top of the hill, are subject to the "two stories in height" restriction. *Id.* The drafter could have included this type of language in Covenant A, but he did not do so. Plaintiffs' argument that the purpose of Covenant A should be garnered from language contained exclusively in Covenant D requires a tortured construction.[3]

3. The Parsons' Interpretation Is Supported By The Contemporaneous Building Code.

To any extent the term "stories in height" is ambiguous, no better evidence exists regarding how a Tacoma builder in 1947 would construe the term "story" than the existing building code. Indeed, under the rules of contract interpretation, it is well settled that the law existing when a contract is made becomes a part of that contract and must be read into that contract unless the parties indicate a contrary intent. *Reynolds v. Ins. Co.*

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[3] The plaintiffs also argued that Covenant A of the Narrowmoor Third Addition is clarified by Covenant A for the Narrowmoor *Fourth* Addition, which restricts homes to "one story in height, exclusive of a basement story." CP 157. Aside from being a covenant from a different subdivision, this provision merely demonstrates that the drafter was distinguishing a "story in height," from a "basement story," making it clear that a basement is *not* a story in height. Otherwise, it would have made more sense to have written the covenant to read, "not to exceed two stories in height, inclusive of a basement story."

of N. Am., 23 Wn. App. 286, 290-91, 592 P.2d 1121 (1979); *accord Fischler v. Nicklin*, 51 Wn.2d 518, 522, 319 P.2d 1098 (1958); *Wagner v. Wagner*, 95 Wn.2d 94, 98-99, 621 P.2d 1279 (1980); *In re Kane*, 181 Wash. 407, 410, 43 P.2d 619 (1935).

Tacoma's 1939 Building Code sets forth an unambiguous, straightforward method to determine if a basement is a "story":

> If the finished floor level directly above a basement or cellar is more than six feet (6') above grade such basement or cellar shall be considered a story.

CP 291. Applying the 1939 Building Code, the Parsons' basement is not a story because the finished floor level of the first floor is less than six feet above grade, as shown by the calculations and evidence submitted by surveyor Thomas Gold, PLS. CP 366-81. The Parsons' architect likewise noted that designs such as the Parsons' are commonly referred to as a two-story home with a daylight basement. CP 383 (¶ 6).

In their summary judgment briefing, the plaintiffs argued that the 1939 Building Code should be ignored in favor of the 1945 Tacoma Zoning Code, which defines a story as, "[t]hat portion of a building included between the surface of any floor and the surface of the floor next above...." CP 89, 131-33. The plaintiffs then argued that because the zoning code does not specifically exclude basements as stories, all levels

with a floor and a ceiling, even subterranean levels, are stories in height. CP 131-33.

Plaintiffs' interpretation of the contemporaneous codes turns common sense on its head. The definitions in the two applicable codes are not inconsistent. In fact, they are virtually identical,[4] with the exception that the building code provides additional language to clarify when a partially subterranean level (either a basement or cellar) is considered a "story." CP 89, 291. Because that is the central dispute in this case, the building code's language is more relevant to determining the drafter's intent.[5]

4. The Parsons' Interpretation Is Supported By Analogous Case Law.

Analogous case law further warrants interpreting the Narrowmoor covenant to not include basements as "stories in height." Specifically, *Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190 (2003), presents a similar fact pattern. *Day* involved a subdivision located on a hillside in

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[4] The zoning code defines a story as "[t]hat portion of a building included between the surface of any floor and the surface of the floor next above...", CP 89, while the building code defines a story as "that portion of a building included between the upper surface of any floor and the upper surface of the floor next above...." CP 291.

[5] In the *Lester* litigation, a local architect performed a detailed analysis of the interplay between the Tacoma building and zoning codes that reaches similar conclusions. CP 338-46. Although that analysis also incorporates changes made to the codes in the 1980s, the Parsons do not contend here that current building and zoning codes would illuminate the intent of the drafter of a covenant in 1947.

the Juanita/Kirkland area. *Id.* at 749. The plaintiffs in *Day* sued other property owners within the subdivision after a subdivision committee rejected the plaintiffs' plans for a two-story house with a daylight basement. As with the Narrowmoor Third Addition, the *Day* covenants had distinct covenants relating to restrictions on building heights and tree heights. *Id.* at 750.

The covenant language in *Day* closely tracks the language at issue in this case. For example, the *Day* covenant relating to limitations on dwelling heights stated: "No structure shall be erected ... other than one detached single family dwelling for single family occupancy only, not to exceed two stories in height...." *Id.* As is true here, the *Day* covenant did not reference views and applied to every property in the subdivision. *Id.* at 749-51. Further, as in our case, the *Day* subdivision had a separate restriction relating to tree height limitations that specifically referenced views: "No 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." *Id.* at 750.

The *Day* court found that the plaintiffs' plans should have been approved. In so holding, the court stated that the dwelling height restrictive covenant was more properly categorized as a height restriction rather than a view restriction. The court explained that, unlike the

restrictive covenant pertaining to trees which specifically called out view protection as its purpose, the dwelling restriction contained no similar language. To this end, the *Day* court stated, "[h]ad the developer intended to make view a specific consideration with respect to the permissible height of houses, it could have included a provision similar to the one regarding the height of shrubs and trees." *Id.* at 756.

The *Day* court also pointed out that the covenant had a very specific reference to allowable height ("two stories in height") and that several other homes similar to the plaintiffs' home had been approved. *Id.* at 756-58. This analysis supports a similar ruling here. *See* CP 239-62 (showing numerous Narrowmoor homes that exceed two stories in height under plaintiffs' interpretation of the covenant). Consistent with *Day* (and *Lester*), this Court should hold that "stories in height" in the Narrowmoor covenant is a height limitation that does not include daylight basements.

5. The Plaintiffs' Interpretation Would Lead To An Absurd Result.

Adopting the plaintiffs' interpretation that basements, regardless of their relationship to grade, are "stories in height" would lead to absurd results. Under the plaintiffs' reading, even if a basement is completely underground on all sides, it would be a story in height. This undermines the entire purpose of the drafter's use of the modifier, "in height," and

goes against the common sense interpretation of the covenant language. Such an approach would contradict the basic principles of covenant interpretation. *See Wilkinson*, 180 Wn.2d at 249-51.

Moreover, as observed in *Lester*, the Parsons could have demolished their existing home and placed the house directly on a concrete slab or foundation, which would not have changed the final roof elevation. CP 233 (¶ 18), 273-76; App'x B at 4. While this would comply with the plaintiffs' interpretation of the covenant, it would do nothing to benefit their views. In fact, it could lead to the construction of homes with larger footprints to make up for lost basement space. Rather than being problematic, basements provide additional space to the homeowner while having minimal view impacts to neighboring properties. The court should not read language out of the covenant as plaintiffs' propose, particularly when that reading results in no real benefit to the interests plaintiffs purport to protect.

In sum, interpreting the covenant as it is written—limiting homes to two stories *in height*—is consistent with the covenant's express language, the contemporaneous building code, this Court's decision in *Lester* and the *Day* decision, and it produces common sense results. The superior court's ruling that "stories in height" unambiguously includes basements runs counter to all of the above. The plaintiffs wholly failed to

meet their burden on summary judgment of proving their interpretation was correct as a matter of law, and this Court should reverse.

C. The Superior Court Erred In Not Applying Collateral Estoppel Based On The *Lester* Litigation.

The Parsons' interpretation of the Narrowmoor Third covenant is not new or novel. It is the same interpretation adopted by this Court in *Lester* nearly twenty-five years ago.[6] The doctrine of collateral estoppel prevents relitigation of issues already determined by the courts. "The purpose of the rule is to encourage respect for judicial determinations by ensuring finality, and to conserve judicial resources by discouraging the same parties from re-litigating the same issues time and again." Karl B. Tegland, 14A *Wash. Practice, Civil Procedure* § 35:32 (2d ed.); *accord Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004) (doctrine promotes judicial economy and finality in adjudications, prevents inconvenience and harassment of parties, and addresses concerns about the resources entailed in repetitive litigation). A judgment entered in a class action is binding on all class members and will have preclusive effect. *See Knuth v. Beneficial Wash., Inc.*, 107 Wn. App. 727, 31 P.3d 694 (2001).

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[6] Although the *Lester* decision was unpublished, the Parsons do not cite the case for its precedential value, but to establish their collateral estoppel and equitable defenses.

Collateral estoppel is established if (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Christensen*, 152 Wn.2d at 307; *Reninger v. State Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). It is not necessary that the Parsons be in privity with a party to the *Lester* proceedings to assert collateral estoppel against the plaintiffs.[7] *See Lucas v. Velikanje*, 2 Wn. App. 888, 893-94, 471 P.2d 103, *review denied*, 78 Wn.2d 994 (1970); *see also State v. Mullin-Coston*, 152 Wn.2d 107, 113, 95 P.3d 321 (2004).

Each of the elements of collateral estoppel is met here. First, the central issue in this case is identical to the issue presented in *Lester*—whether a daylight basement is considered a "story in height" under Narrowmoor Third Addition's Covenant A. *Compare* CP 57-63 (Amended Complaint) *with* App'x B at 1-2 (*Lester* opinion). Second, after a multi-day trial before the superior court, *Lester* was reversed on appeal on the specific issue in dispute here. CP 285 (¶ 6); App'x B. The

[7] Nevertheless, one of the Parsons' predecessors-in-interest, Theodore Dedden, was a member of the *Lester* class. CP 285 (¶ 4), 334.

Washington Supreme Court denied review, 116 Wn.2d 1004 (1991), and judgment was entered against the plaintiffs in March 1991, CP 358-61.

The third element, requiring that the party estopped was a party to or in privity with a party to the prior litigation, is also met. Washington courts have defined privity as "a mutual or successive relationship to the same right or property." *United States v. Deaconess Med. Ctr. Empire Health Serv.*, 140 Wn.2d 104, 111, 994 P.2d 830 (2000) (quoting *Owens v. Kuro*, 56 Wn.2d 564, 568, 354 P.2d 696 (1960)). This is based in part on the premise that "[o]ne whose property interests have already been asserted and litigated by his or her predecessor should be prevented from reasserting and relitigating the same interests." *State ex rel. Dean v. Dean*, 56 Wn. App. 377, 381, 783 P.2d 1099 (1989). "The binding effect of the adjudication flows from the fact that when the successor acquires an interest in the right it is then affected by the adjudication in the hands of the former owner." *Deaconess*, 140 Wn.2d at 111 (quoting *Owens*, 56 Wn.2d at 568).

Privity exists in this case by virtue of the successive ownership interests in the Narrowmoor Third Addition properties and the contractual relationship created by the covenants. The Narrowmoor Third Addition covenants are a contract between all homeowners within Narrowmoor Third Addition and are interpreted as such. *See Wilkinson*, 180 Wn.2d at

249; *Leighton v. Leonard*, 22 Wn. App. 136, 139, 589 P.2d 279 (1978). The covenants run with the land and are binding on successors-in-interest. *See Leighton*, 22 Wn. App. at 139; CP 235-37.

The *Lester* court certified a class of all Narrowmoor Third Addition property owners for purposes of enforcing Covenant A. CP 315-18. Plaintiff Lewington's predecessors-in-interest, Donald and Rosemary Moore, were undisputedly members of the *Lester* class. CP 285 (¶ 4), 334. At minimum, his claims must be dismissed. Plaintiff Wight and the Ostlunds' predecessor opted out,[8] but neither pursued relief for violation of Covenant A. CP 285 (¶ 5), 328, 330. And, they are still bound by the exact same covenants as the class members. In other words, the plaintiffs have a mutual or a successive relationship to the same covenant right or property as they or their predecessors had in *Lester*. *See Deaconess*, 140 Wn.2d at 111 (defining privity).

Finally, collateral estoppel does not work an injustice here. This element of collateral estoppel is generally concerned with procedural, not

[8] It is somewhat curious that any class members were permitted to opt out of the class regarding the declaratory and injunctive relief requested as to Covenant A. Typically, such classes do not provide for exclusion, as a primary purpose of certification is to avoid inconsistent adjudications or standards. *See* CR 23(b)(1)-(2); 5 *Moore's Federal Practice*, §§ 23.42[6][b] & 23.43[6][b] (3d ed.) (class members generally may not opt out of (b)(1) or (b)(2) classes). In fact, this precise reason for certification was articulated by the class representatives. CP 313. Nevertheless, the approved notice to class members permitted opt-outs for both subclasses, including the Covenant A class, perhaps due to a request for money damages. CP 323.

substantive, irregularity. *Christensen*, 152 Wn.2d at 309. The overarching concern is that the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding. *Id.* As stated above, the *Lester* plaintiffs prosecuted a multi-day trial in Pierce County Superior Court, defended the trial court's findings and conclusions on appeal, and then pursued relief from the Washington Supreme Court. The fact that they were ultimately unsuccessful in proving their claim is not grounds for relitigating the issue twenty-five years later. *See Hanson v. City of Snohomish*, 121 Wn.2d 552, 852 P.2d 295 (1993) (collateral estoppel will not work an injustice when the party opposing preclusion had the opportunity to present his evidence and arguments on the issue to the trial court and the Court of Appeals). To the contrary, application of estoppel here promotes the very purpose of the doctrine—promoting the finality of adjudications. *See Christensen*, 152 Wn.2d at 306. The superior court committed error by not applying collateral estoppel in this case.

D. The Superior Court Erred In Not Applying The Defense Of Acquiescence.

In addition to collateral estoppel, principles of equity should bar the plaintiffs' attempt to reinterpret and enforce Covenant A against the Parsons. When a plaintiff has previously failed to enforce a restriction

against other properties subject to covenants and now seeks to enforce the same restriction against the defendant, that plaintiff is barred from enforcing the restriction. *See Tindolph v. Schoenfeld Bros.*, 157 Wash. 605, 289 P. 530 (1930); *Ronberg v. Smith*, 132 Wash. 345, 232 P. 283 (1925). Even a "slight degree of acquiescence" is sufficient to preclude injunctive relief. *Tindolph*, 157 Wash. at 611.

Here, every homeowner in Narrowmoor Third Addition received notice of the *Lester* lawsuit. CP 315-26, 332-36. That notice specifically identified the claim against the Willardsens: "an alleged violation of a restrictive covenant in the Narrowmoor Third Addition, limiting structures to two stories," and seeking an injunction for the Willardsens to remove their addition. CP 322.

For those owners who opted out of the lawsuit, they consciously declined to pursue enforcement of Covenant A. This includes Ms. Wight and the Ostlunds' predecessor, Signa Simkins. CP 328, 330. These individuals did not pursue enforcement actions after opting out—against the Willardsens or against the other properties in Narrowmoor Third Addition that purportedly violate Covenant A. CP 232-33, 282, 285. The plaintiffs also admitted that no one sought to enforce Covenant A as to another Narrowmoor Third home allegedly in violation of the covenant. CP 160 (¶ 9). And, as illustrated by the evidence submitted with

Mr. Parsons's declaration, these are not the only violations of Covenant A in Narrowmoor Third Addition under the plaintiffs' interpretation. CP 230-31, 251-54; *see also* CP 239-49, 256-62, 278.

The superior court erred in not applying the doctrine of acquiescence here. At a minimum, the Parsons presented evidence demonstrating a genuine issue of material fact as to the applicability of this defense.

E. The Superior Court Erred In Not Applying The Defense Of Abandonment.

If a restrictive covenant has been "habitually and substantially violated *so as to create an impression that it has been abandoned*," it is not equitable to enforce it. *Sandy Point Improv. Co. v. Huber*, 26 Wn. App. 317, 319, 613 P.2d 160 (1980) (emphasis added). Courts look to the visibility of violations when considering whether such violations constitute abandonment of the restriction. *See, e.g., id.* ("one or two" storage sheds built in violation of covenant did not constitute abandonment in 1000-lot development). In contrast to the example cited, the violations of the Narrowmoor covenant are more widespread and are easy to detect, giving the impression that the covenant is not interpreted as the plaintiffs propose. It makes sense that a person buying a home in the Narrowmoor Third Addition would expect to be able to build a two-story

home above a basement—the very first homes that one sees when entering Narrowmoor are two, two-story homes with basements. CP 278.

By its terms, Covenant A applies to *all* homes in Narrowmoor Third Addition. CP 236. Restrictive covenants are interpreted uniformly for all properties subject to them to promote the collective interests of the neighborhood (a policy that the plaintiffs repeatedly emphasized to the superior court). But the plaintiffs cited no authority that they should get to selectively enforce Covenant A against the Parsons. Their argument is particularly problematic considering this Court rejected the plaintiffs' exact interpretation of Covenant A twenty-five years ago in *Lester*. This issue was settled long ago and should not be revived here. There is at minimum sufficient evidence to raise a genuine issue of material fact that enforcement against the Parsons is inequitable.

F. The Superior Court Erred In Not Dismissing The Shillitos' Claims, As The Shillitos Do Not Own Property In The Narrowmoor Third Addition.

The plaintiffs acknowledged in their motion for summary judgment that the Shillitos do not reside in the Narrowmoor Third Addition, but instead are in Narrowmoor Second Addition. CP 120. By their very terms, the Narrowmoor Third Addition covenants may only be enforced by other Narrowmoor Third Addition property owners. CP 236 (granting persons owning real property "in said subdivision" the right to

pursue enforcement). Restrictive covenants that contain this type of language cannot be enforced by owners of adjoining plats, even if the plats have identical covenants. *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wn. App. 411, 415, 166 P.3d 770 (2007). The Parsons therefore requested dismissal of the Shillitos' claims. CP 226. The superior court erred by failing to dismiss the Shillitos and granting summary judgment in their favor.

G. The Superior Court Erred In Granting Permanent Injunctive Relief On Summary Judgment Without Any Analysis Of Whether Injunctive Relief Was Appropriate Under The Facts.

Finally, the superior court did not consider whether injunctive relief was the appropriate remedy in this case—it neither mentioned the three-prong injunction test nor balanced the equities. RP 28; CP 547-48. Instead, based upon its summary judgment ruling that a basement is a story, and without any further analysis, the court ruled that the Parsons are "ENJOINED from constructing a three-story addition with two upper stories over a daylight basement story, to their Narrowmoor Third home at 1502 S. Ventura Drive in Tacoma, WA." CP 548; *see also* RP 28.

A party seeking an injunction must show: "(1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of the right, and (3) that the acts complained of are either

resulting in or will result in substantial injury to him." *Doyle*, 166 Wn. App. at 404. Further, in cases involving restrictive covenants and innocent defendants, courts are to balance the relative hardships of the parties before ordering any injunctive relief. *See, e.g., Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn. App. 70, 74-78, 587 P.2d 1087 (1978) (dissolving mandatory injunction requiring removal of home in light of severe hardship to defendants and minimal hardship to plaintiffs); *Holmes Harbor Water Co. v. Page*, 8 Wn. App. 600, 605-06, 508 P.2d 628 (1973) (denial of injunction was appropriate as landowner acted innocently and attempted to comply with the restrictive covenants, violation was unintentional, plaintiffs delayed bringing suit, plaintiffs failed to prove any injury, and cost of removing the violation was exorbitant when compared with the slight violation of the covenant).

Even assuming *arguendo* that basements are "stories in height," the superior court should have considered whether, based upon the facts of this case, the mandatory injunction sought by the plaintiffs is the appropriate remedy. Several factors support the denial of injunctive relief in this case, particularly the sweeping injunction sought by the plaintiffs.

First, the Parsons had a good faith belief that their basement was not a "story in height," which is a common-sense reading of the covenant. The very first homes one sees when entering Narrowmoor are two-story

homes with daylight basements. CP 278. This includes the home that was the subject of the *Lester* litigation. *Id.* Further, in touring the Narrowmoor neighborhood generally, there are dozens of homes with multiple stories and basements. CP 230-31, 239-62, 278.

Second, during the several months leading up to the commencement of construction on the Parsons' remodel, the Parsons met the plaintiffs, and in those discussions were up front about their intention to renovate their home. CP 231-32, 280-82. Prior to beginning construction, only Mr. Ostlund raised any concerns regarding the Parsons' plans to build a second story. CP 231-32, 281. However, upon being told by the Parsons that they intended to minimize view impacts and would be installing a low-profile roof on the new upper story, Mr. Ostlund responded, "no worries," and said that he was "excited to have them come to the neighborhood." *Id.*

Third, the plaintiffs waited several weeks *after* construction commenced to notify the Parsons of their belief that the construction of a second story violated the covenants. CP 194, 232, 282. At that point, construction was advanced, and the Parsons could not alter their building plans without incurring significant costs to redraw the plans, redo the permitting, and to alter their plans with their contractor and subcontractors. CP 232, 282.

Fourth, the Parsons diligently worked to minimize the impact of their addition. CP 231, 383. They incorporated a low-profile roof that added only 4.62 feet to the height of their home and complied with all local zoning and permitting requirements. *Id.*

Fifth, the alleged harm to the plaintiffs is actually illusory. Under the plaintiffs' interpretation of the covenants, the Parsons could build an identical house, but with a simple foundation and no basement, and have the same view impacts complained about by the plaintiffs. *See* CP 233, 273-76. Indeed, as stated above, the addition about which the plaintiffs complain is not even above the Parsons' basement. *See, e.g.*, CP 264-71, 551-53.

In sum, even if plaintiffs are correct that subterranean levels are "stories in height" under Covenant A, the superior court erred by not analyzing whether an injunction was the appropriate remedy in this case.

VII. CONCLUSION

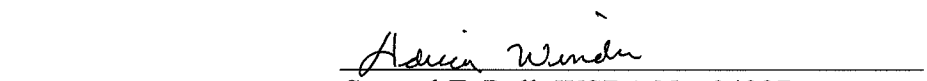
The superior court improperly granted summary judgment in the plaintiffs' favor. It was error to conclude on summary judgment that the term "stories in height" includes basements under the Narrowmoor covenant, particularly in light of this Court's decision in *Lester v. Willardsen.* The court further erred in failing to apply the doctrines of collateral estoppel, acquiescence, or abandonment to bar the plaintiffs'

claims and in not dismissing the Shillitos, who do not reside in the Narrowmoor Third Addition. Finally, the superior court erred in granting the sweeping injunctive relief requested by the plaintiffs without properly analyzing whether such relief was warranted under the circumstances and where such relief was not, in fact, appropriate.

This Court should reverse the decision of the superior court and enter judgment for the Parsons. In the alternative, the Court should reverse and remand the matter for further proceedings.

RESPECTFULLY SUBMITTED this 23rd day of April, 2015.

FOSTER PEPPER PLLC



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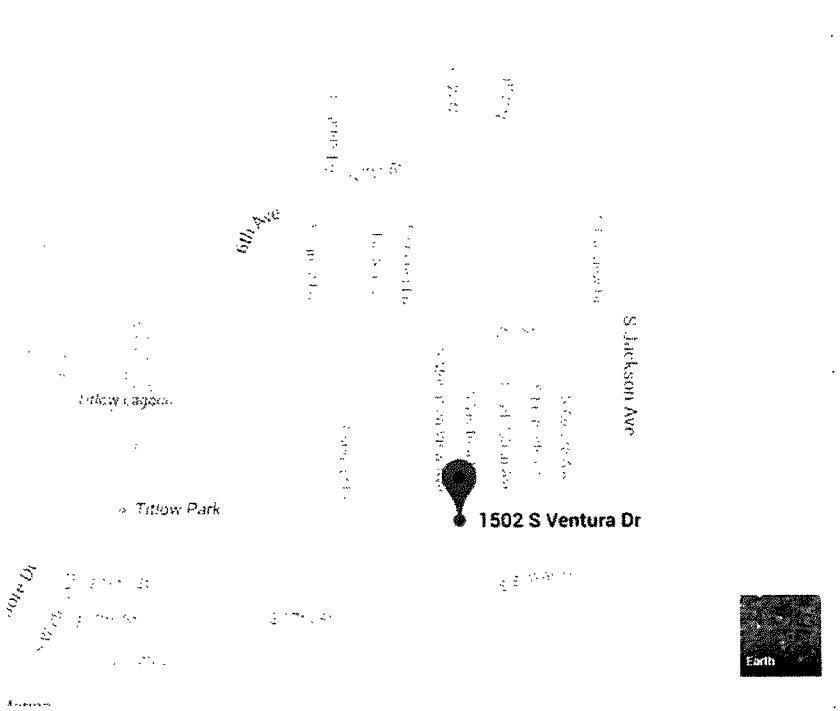
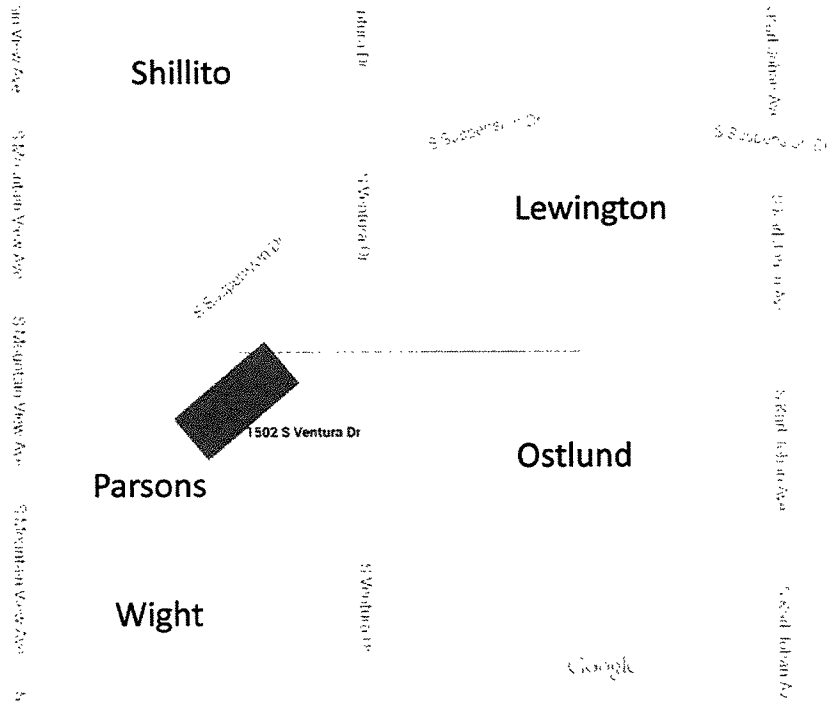
Attorneys for Appellants Frank I. Parsons and Nancy A. Parsons

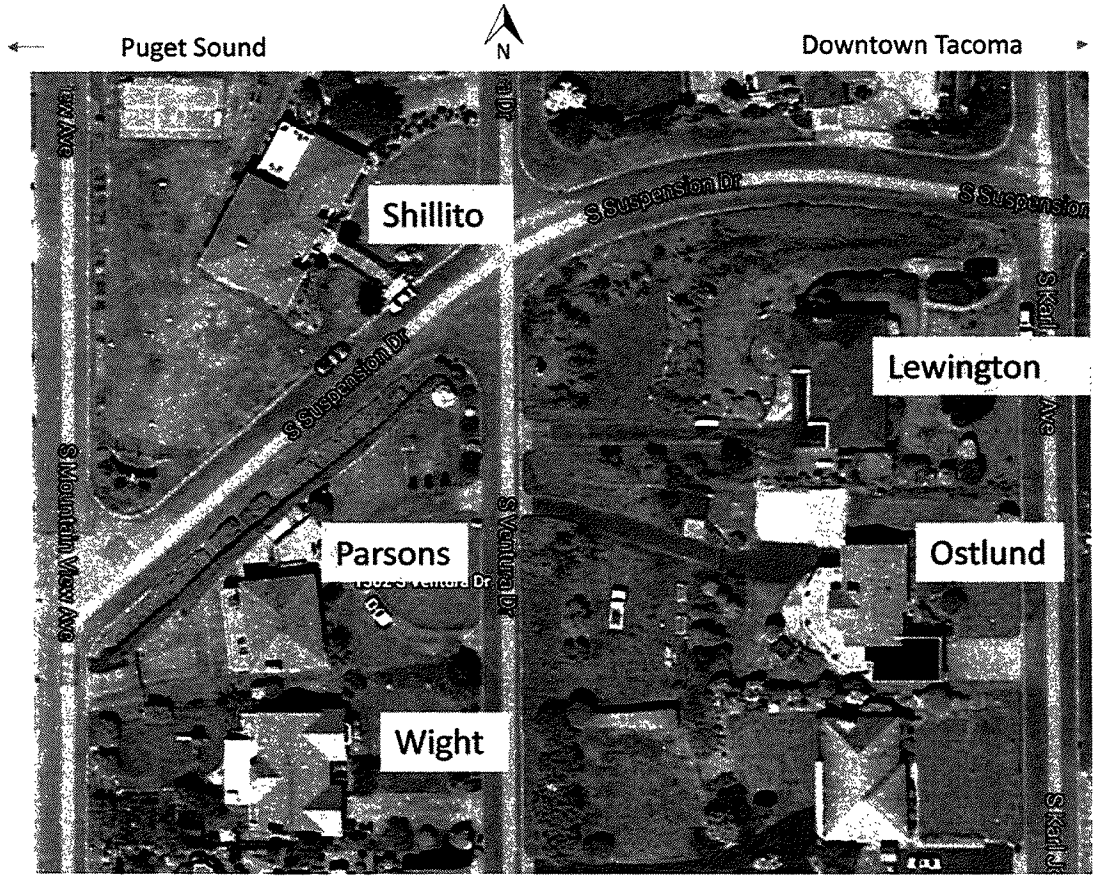
Appendix A

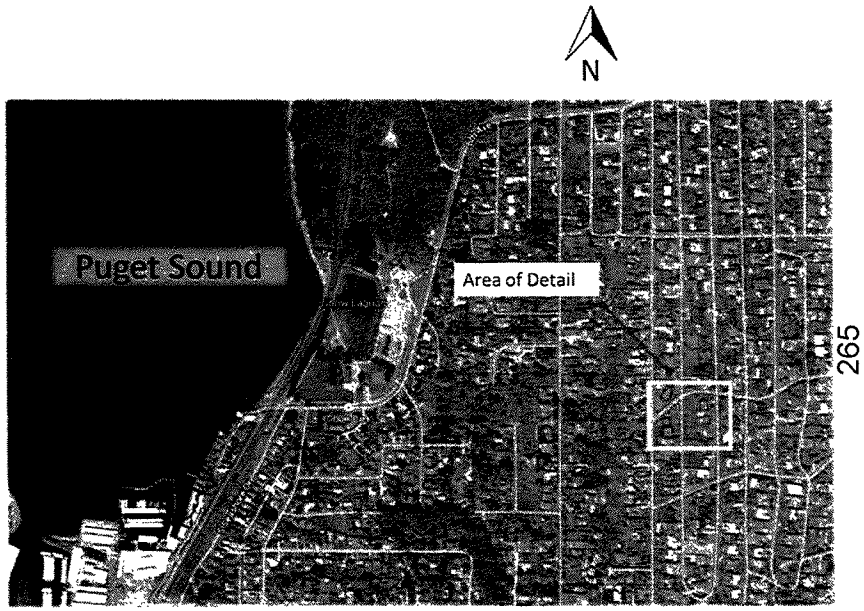
Relative Positions (Google Maps)





Relative positions (Google Maps)





Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

REX G. LESTER and ELIZABETH LESTER, husband and wife; LLOYD DAVIS and MARIE DAVIS, husband and wife; W. DOYLE WOOD and WINIFRED WOOD, husband and wife; JAMES L. GOHRICK and SHARON GOHRICK, husband and wife; JAMES P. GEORGE and PATRICIA A. GEORGE, husband and wife; on behalf of all persons similarly situated,	NO. 12172-7-II
	DIVISION TWO
Respondents,	UNPUBLISHED OPINION
v.	
S. M. WILLARDSEN and ANN WILLARDSEN, husband and wife,	
Appellants,	
and	
THE CITY OF TACOMA, a municipal corporation,	
Defendant.	FILED: August 23, 1990

REED, J. -- The Willardsens appeal from a judgment determining that the addition to their home "exceeded two stories in height" in violation of a restrictive covenant. They argue that their home conforms to the covenant because a daylight basement does not constitute a "story." They also appeal from the issuance of a permanent mandatory injunction requiring removal of the addition. Because we reverse on the first issue, we do not reach the second.

The Willardsens reside in the Narrowmoor Third Addition, which is located on a hillside giving on a panoramic view of the Puget

Sound, the Narrows and the Olympic Mountains. Narrowmoor contains certain covenants and restrictions, which provide in pertinent part as follows:

> No structure shall be erected, placed or permitted to remain on any residential building lot other than the one detached, single family dwelling not to exceed two stories in height and a private garage. (Emphasis added).

Prior to the construction in question here, the Willardsens' home consisted of a daylight basement and an upper floor. After consulting a home builder and designer, the Willardsens concluded that a vertical addition would not violate the covenant and decided to add another floor. However, they never informed the neighbors of their intentions. When the addition was near completion, the surrounding homeowners brought this action for an injunction.

After hearing testimony from various witnesses living in the development or involved in architecture, building and construction, the trial court determined that the daylight basement need not be characterized as a "story" or a "basement." The court reasoned that since the Willardsens conceded that the upper floor and the addition constitute stories, and that the basement contributed to the height of the home, the home exceeded "two stories in height."

Unless the basement is considered a story, or at least a fraction of a story, the home cannot be considered in excess of two stories in height. By implication, the court has determined that the basement is a "story" and used "story" as a unit of measurement. Therefore, we must determine whether a basement constitutes a story.

The following rules govern the interpretation of restrictive covenants:

> 1. The primary objective is to determine the intent of the parties to the agreement, and, in determining intent, clear and unambiguous language will be given its manifest meaning.
>
> 2. 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 the land.
>
> 3. The instrument must be considered in its entirety, and surrounding circumstances are to be taken into consideration when the meaning is doubtful.

Burton v. Douglas Cy., 65 Wn. 2d 619, 621-622, 399 P. 2d 68 (1965).

First, we must determine if the term "stories" is ambiguous, for if the term is unambiguous, the drafter's intent is clear and our inquiry has ended. Ambiguity is a question of law for the court. McGary v. Westlake Investors, 99 Wn. 2d 280, 285, 661 P. 2d 971 (1983). The ordinary meaning of words will be given unless a different meaning clearly is intended. See Wasser & Winters Co. v. Jefferson Cy., 84 Wn. 2d 597, 599, 528 P. 2d 471 (1974). "Story" is defined as follows:

> [A] set of rooms on one floor level of a building excluding the attic level and [usually] the cellar or basement level.
>
> . . .
>
> [O]ne of a series of tiers arranged horizontally one over another.

Webster's Third New Int'l Dictionary 2253 (3d ed. 1969).

That definition renders the term "stories" reasonably susceptible to more than one construction, and, therefore, the term is ambiguous. See Ladum v. Utility Cartage, Inc., 68 Wn. 2d 109, 411 P. 2d 868 (1966). Thus, we must ascertain the intent of the drafters to the original agreement. Burton, 65 Wn. 2d at 621.

Because doubts must be resolved in favor of the free use of the land, the party seeking the more restrictive interpretation has the burden of showing that such a construction was intended by the drafters.

The record is bereft of any evidence to indicate how the drafters interpreted the term "stories." Although many of the current homeowners believe that the drafters intended to protect

the view, there simply is no evidence to that effect.[1] Consequently, there is no support for a finding that the drafters intended a daylight basement to constitute a story. There is no evidence that the offending home exceeded the height it would have attained had it been constructed as a conventional two-story house with the first story constructed at ground level. Therefore, the plaintiffs have failed to meet their burden of proof regarding intent, and the judgment must be reversed.

Reversed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

I. CONCUR:

Worswick, J.

[1]The offending home, as modified, is located on the topmost street (Jackson) of the Addition. Consequently, it does not obstruct the view from any lot in the Addition.

PETRICH, J. (dissenting) -- While I agree with the majority that the restrictive covenant is ambiguous, I disagree with both the conclusion that the term "story" is ambiguous and the disposition of reversal without a remand for further proceedings. I would adopt the reasoning of Foster v. Noble, 15 Wn. App. 749, 750-51, 551 P.2d 768 (1976), review denied, 88 Wn.2d 1001 (1977). The Foster court concluded that a covenant restricting construction to "one detached single-family dwelling not to exceed one and one-half stories in height" was ambiguous to describe a height restriction because the term "one and one-half stories" was also used to describe a common floor-space description. I believe that the term "not to exceed two stories in height" is similarly ambiguous.

Once an ambiguity is determined to exist, the court seeks to clarify that ambiguity by reference to the instrument, together with all surrounding facts and circumstances. Burton v. Douglas Cy., 65 Wn.2d 619, 621, 399 P.2d 68 (1965). In Foster, the court considered evidence from witnesses, including one of the original platters of the subdivision, that the purpose of the restrictive covenant "was to not obstruct any views from any house." 15 Wn. App. at 751. The court then affirmed the enforcement of the restrictive covenant, because the offending house did obstruct the neighbor's view.

In this case, the court found that "the height covenant was intended to protect panoramic views", that "the residences, with the notable exception of the WILLARDSEN and GOHRICK homes, generally conform to one another", and that "all other homes appear to conform in height." Finding of Fact 8. However, the court also found that the Willardsen residence "blocks no panoramic view

within" the subdivision. Finding of Fact 11. In my view, these findings are not sufficient to clarify the ambiguity as to the purpose of the restrictive covenant. Given that the Willardsen residence blocks no panoramic views of property within the subdivision, if the purpose of the covenant was solely view protection, then the enforcement of the covenant against Willardsen would be inequitable. However, evidence was presented as to the similarity and conformity of the other houses in the subdivision. If similarity and conformity can be shown to have been an intended purpose of the subdivision's restrictive covenants, then the ambiguity as to the term "not to exceed two stories in height" would be clarified, and enforcement of the covenant against Willardsen would be equitable.

Because the trial court determined that the restrictive covenant was unambiguous, it did not make findings as to the intended purposes of the covenant. The findings that the houses in the subdivision "generally conform to each other" and "appear to conform in height" are not sufficient to clarify the ambiguity. I would remand the case, with the instructions that the trial court make findings as to what purposes the drafters of the restrictive covenant intended it to serve at the time the covenant was recorded, and whether those purposes are violated by the Willardsen house.

Petrich J. AC

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARK C. LEWINGTON, a Washington Resident; NOEL P. SHILLITO and LAURIE A. SHILLITO, Husband and Wife and Washington Residents; DANIEL P. OSTLUND and MARIE F. OSTLUND, Husband and Wife and Washington Residents; and ELIZABETH T. WIGHT, a Washington Resident, Respondents, v. FRANK I. PARSONS and NANCY A. PARSONS, Husband and Wife and Washington Residents, Appellants.	No. 47022-5-II CERTIFICATE OF SERVICE

I certify that I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of eighteen, and I am competent to be a witness herein.

On April 23, 2015, I caused the following documents to be served as follows:

1. Brief Of Appellants; and
2. Certificate Of Service

Counsel for Plaintiffs Mark C. Lewington, et al.

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☒ Via Electronic Mail
☐ Via Fax
☒ Via U.S. Mail

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

EXECUTED in Seattle, Washington on April 23, 2015.

Jan Howell

Jan Howell

FOSTER PEPPER LAW OFFICE

April 23, 2015 - 4:44 PM

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