

67762-4

67762-4

NO. 67762-4-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

POINTE II ON SEMIAHMOO OWNERS ASSOCIATION dba SUNSET
POINTE OWNERS' ASSOCIATION,
Appellant,

vs.

CLYNT NAUMAN and JAN NAUMAN, husband and wife and the
marital community comprised thereof,
Respondents,

and

DEAN FRANCIS and ROSEMARIE FRANCIS, husband and wife and
the marital community comprised thereof,
Cross-Appellants.

APPELLANT/CROSS-RESPONDENT POINTE II ON SEMIAHMOO
OWNERS ASSOCIATION'S REPLY/RESPONSE TO BRIEF

FILED
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
2012 JUL 15 PM 4:44

Lawrence A. Costich, WSBA #32178
Averil Rothrock, WSBA #24248
Jamila A. Johnson, WSBA #39349
SCHWABE, WILLIAMSON & WYATT, P.C.
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711
Fax 206.292.0460

Attorneys for Appellant Pointe II on Semiahmoo Owners Association

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. LEGAL ARGUMENTS.....	5
A. The Association’s Denial Of The Application Was Proper Where It Is Uncontested That The <i>Covenants</i> Confer A Broad Scope Of Authority Over Architectural Control And The Use Of The Common Areas	5
1. The Trial Court Failed To Recognize That The <i>Covenants</i> Give Broad Authority To The Architectural Reviewer For The Benefit Of The Community As A Whole.	6
2. Contrary To The Naumans’ Argument, The <i>Architectural Guidelines</i> Conform To The General Restrictions Prescribed By The <i>Covenants</i>	10
3. The Record Demonstrates That The Association’s Use Of An Independent Architectural Reviewer For The Naumans’ Proposed Project Was Consistent With Its Past Practices And Not In Bad Faith, And Conclusions To The Contrary Are Unsupported By Substantial Evidence.....	12
4. Denial of Access Over the Gravel Access Drive Was Reasonable and Within the Association’s Authority, And This Court Should Reject The Trial Court’s Substituted Evaluation Of The Issue.....	16
B. Substantial Evidence Does Not Support The Court’s Finding That The Association Applied Inconsistent Standards.	19
C. Reversal of the Fee Award Is Proper Where the Record Demonstrates That Segregation Was Required and the Trial Court Only Awarded Fees to the Naumans on Three Claims.....	24
D. The Court Erred By Finding That The Association Breached The <i>Covenants</i> and Its Fiduciary Duty When It Allowed Owners To Landscape The Common Area.....	30
1. The <i>Covenants</i> Allow The Association To Landscape Common Areas As A Matter Of Law.....	30

TABLE OF CONTENTS

	<u>Page</u>
2. Substantial Evidence Does Not Support The Finding The Common Area Was "Usurped."	31
E. The Breach of Fiduciary Duty and Breach of Covenants Claims Accrued in October 2002 and Are Properly Time Barred.	32
III. CONCLUSION.....	36

TABLE OF AUTHORITIES

Page

STATE CASES

<i>1515-1519 Lakeview Blvd. Condo. Association v. Apt. Sales Corp.</i> , 146 Wn.2d 194, 43 P.3d 1233 (2002).....	35
<i>Eagle Point Condo. Owners Association v. Coy</i> , 102 Wn. App. 697, 9 P.3d 898 (2000).....	28
<i>Green v. A.P.C.</i> , 136 Wn.2d 87, 960 P.2d 912 (1998).....	33
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 120 P.3d 56 (2005).....	29
<i>Hawkins v. Diel</i> , 166 Wn. App. 1, 269 P.3d 1049 (2011).....	27
<i>Heath v. Urga</i> , 106 Wn. App. 506, 24 P.3d 413 (2001), <i>review denied</i> 145 Wn.2d 1016, 41 P.3d 482 (2002).....	21, 22
<i>Hollis v. Garwell, Inc.</i> , 137 Wn.2d, 683, 698, 974 P.2d 836 (1999).....	17
<i>Jensen v. Lake Jane Estates</i> , 165 Wn. App. 100, 267 P.3d 435 (2011).....	1, 31
<i>Keever & Associate, Inc. v. Randall</i> , 129 Wn. App. 733, 119 P.3d 926 (2005).....	25
<i>LaHue v. Keystone Investment Co.</i> , 6 Wn. App. 765, 496 P.2d 343 (1972).....	33, 34
<i>Marrassi v. Lau</i> , 71 Wn. App. 912, 859 P.2d 605 (1993).....	29
<i>Phillips Building Co. v. Bill</i> , 81 Wn. App. 696, 915 P.2d 1146 (1996).....	29

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Riss v. Angel</i> , 131 Wn.2d 612, 934 P.2d 669.....	7, 10, 11, 21
<i>Roats v. Blakely Island Maintenance Commission</i> , __ Wn. App. __, 2012 Wash. App. LEXIS 1546 (2012).....	8, 13
<i>Shafer v. Sandy Hook Yacht Club</i> 76 Wn. App. 267, 275, 883 P.2d 1387 (1994).....	8, 9, 10, 11, 13
<i>Smith v. Behr Process Corp.</i> , 113 Wn. App. 306, 54 P.3d 665.....	26, 27
<i>Smith v. King</i> , 106 Wn.2d 443, 722 P.2d 796 (1986).....	25
<i>Smoke v. City of Seattle</i> , 79 Wn. App. 412, 902 P.2d 678 (1995).....	28, 29
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629 (1995).....	25
<i>State v. Sims</i> , 171 Wn.2d 436, 256 P.3d 285 (2011).....	28
<i>Sunnyside Valley Irrigation District v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003).....	31
<i>Viewcrest Cooperative Association v. Deer</i> , 70 Wn.2d 290, 422 P.2d 832 (1967).....	34
<i>Wachovia SBA Lending, Inc. v. Kraft</i> , 165 Wn.2d 481, 200 P.3d 683 (2009).....	29
<i>Wimberly v. Caravello</i> , 136 Wn. App. 327, 149 P. 3d 402 (2006).....	31

TABLE OF AUTHORITIES

Page

STATE STATUTES

RCW 4.16.040	35
RCW 4.16.040 (1).....	35
RCW 4.16.080(2).....	34
RCW 4.16.080(4).....	32, 34
RCW 4.16.130	34

I. INTRODUCTION

The Naumans incorrectly characterize the Association's appeal as limited to whether "it acted reasonably in denying the Naumans' boathouse application." (Naumans Br., p. 25) To the contrary, this appeal presents the issue whether the Association acted within the scope of its authority under the *Covenants* when it:

- Denied the Naumans' application to build a garage (Statement of Issue No. 1);
- Denied the Naumans' application to access their proposed garage across the "gravel access drive" as identified on the plat map (Statement of Issue No. 1); and
- Permitted members to install landscaping enhancements to the common areas directly adjacent to members' lots (Statement of Issue No. 2).

(Assoc. Br., p. 3)

The basis of the Association's appeal is the correct interpretation of the restrictive covenants, which is a question of law that the court reviews *de novo*. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006); see *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 105, 267 P.3d 435 (2011).

This Court should recognize what the trial court failed to: the *Covenants* grant broad authority to the Association and its architectural reviewer. This authority supports reversal. The *Covenants*, whose enforceability the Naumans do not dispute, accord the Association broad authority over use of the common areas and architectural control of improvements on members' lots. The *Covenants* give the Architectural Reviewer exclusive authority to adopt rules (i.e., the *Architectural Guidelines*) concerning architectural control and to implement "the objectives and purposes stated" in the *Covenants*. (Tr. Ex. 2, p. 13) The Architectural Reviewer has exclusive authority to approve or "disapprove" proposed improvements on lots that are: "not in accordance with all of the provisions" in the *Covenants*; "not in harmony with the general surroundings"; "incomplete"; or deemed by the Architectural Reviewed to be "contrary to the interests, welfare or rights of all or any part of the real property" subject to the *Covenants* or property owners within the subdivision. (Tr. Ex. 2, p. 13) This broad, undisputed grant of authority supports the Association's actions and, therefore, reversal of the trial court's invalidation of the building application denials.

The record demonstrates that both the Association and Architectural Reviewer reasonably exercised this authority, relying on *objective criteria and standards consistently applied* and enforced

throughout the subdivision. The trial court fundamentally erred by disregarding or misconstruing the express scope of authority, the history of building and enforcement in the subdivision and the deliberative process of review employed by the Association. This Court should not permit the trial court to substitute its judgment for that of the Association.

The Naumans rely on the vitally incorrect premise that the Board denied the application for improper reasons and to favor “influential members.” (Naumans Br., pp. 4 and 31) What the record in fact shows is that the Board, acknowledging the tense relationships within the subdivision, returned to the independent architectural review process that had been used on four of six houses in the subdivision to avoid any appearance of bias or cause for *any* member to fault the process whatever the results. The trial court incorrectly ~ and somewhat ironically ~ construed this as evidence of singling out the Naumans, when in fact it was an attempt to secure a decision above reproach based on the historical use of an independent reviewer applying the *Architectural Guidelines*.

The record at trial in this regard is clear and uncontested: the independent architectural reviewer, Craig Telgenhoff, provided an objective and detailed decision. (See Assoc. Br., p. 30) The evidence, discussed below, does not support an inference of bias against the Naumans. Mr. Telgenhoff’s comments and conclusions were *consistent*

with the second independent Architectural Review, Doug Landsem. (*See* Assoc. Br., pp. 30–31) Despite these consistent results, the trial court inexplicably found Mr. Telgenhoff's conclusions improper and Mr. Landsem's proper.

Finally, the trial court itself refused to approve the Naumans' proposal, instead approving a garage with required modifications that were the basis for the Association's denials. On this record, this Court should reverse the trial court's conclusion that the denials were in bad faith and not permitted under the *Covenants*.

Reversal also is appropriate concerning the Board's actions permitting individuals to landscape the common areas. The Association, through its Board, has exclusive control over the "regulation, use, care, construction, operation, repair and maintenance and preservation of all common areas, including the roads, easements and other common areas." (Tr. Ex. 2, pp. 6–7; *see also* Tr. Ex. 3, p. 3 [Art. IV, § 2] (providing for broad general management of the property of the Association)). The Naumans acknowledge this. (Naumans Br., p. 37) Permitting landscaping of the common areas by individuals was not a breach of this responsibility, but a discharge of this responsibility. Liability is unwarranted.

The Court should reverse the judgment against the Association.

II. LEGAL ARGUMENTS

A. The Association's Denial Of The Application Was Proper Where It Is Uncontested That The Covenants Confer A Broad Scope Of Authority Over Architectural Control And The Use Of The Common Areas

The trial court erred by interpreting the *Covenants* to limit the authority of the Association and the Architectural Reviewer, to the prejudice and detriment of the community as a whole. Had the trial Court interpreted the *Covenants* properly, the Association would have prevailed. The Architectural Reviewer denied the Naumans' application primarily because it was incomplete and did not comply with the *Architectural Guidelines*. (Tr. Ex. 12) The trial court agreed that the Naumans' application did not comply with the *Architectural Guidelines* and would have been incomplete under the guidelines. (CP 965–992 at FF 22 and CL 10; Tr. Exs. 8, 12) Because the trial court incorrectly interpreted the *Covenants* to require a “formal adoption” of the *Architectural Guidelines*, it incorrectly rejected the Association's denial of the Naumans' application.

On de novo review, this Court should instead properly interpret the *Covenants* to hold that the Association and the Architectural Reviewer had rulemaking authority under the *Covenants*, and could apply the *Architectural Guidelines* (that had long been used in the community)

without any formal adoption or recording. There is no authority to the contrary. The Court also should hold that because the Naumans' application was incomplete, denial was proper.

Similarly, the Court should reject the Naumans' argument that the *Architectural Guidelines* are more restrictive than the *Covenants*. The *Covenants* set forth the very principles, values and restrictions that the *Architectural Guidelines* reflect. A proper interpretation of the *Covenants* shows that the *Architectural Guidelines* are consistent with the *Covenants*. The trial court reasoned that if the *Architectural Guidelines* had been properly adopted, denial would have been justified. Because use of the *Architectural Guidelines* was proper without formal adoption, this Court should reverse. Additionally, because the *Architectural Guidelines* merely implement the principles, values and restrictions set forth in the *Covenants* themselves, reversal is proper under the *Covenants* alone.

1. The Trial Court Failed To Recognize That The *Covenants* Give Broad Authority To The Architectural Reviewer For The Benefit Of The Community As A Whole.

The Naumans' defense of the trial court rulings is incompatible with the broad authority granted by the *Covenants* to the Architectural Reviewer. The Naumans argue that the Architectural Reviewer's reliance on the *Architectural Guidelines* created "a significant' change from

anything set forth in the [*Covenants*], which contains no setback or height restrictions, and went beyond merely ‘accomplishing’ the ‘objectives’ of the [*Covenants*].” (Naumans Br., p. 28). This Court easily should reject the argument when it reads the *Covenants*. Further, acceptance of the Naumans’ argument would leave the Association entirely without power to establish any specific architectural standards and would render the Architectural Reviewer a useless functionary. This is contrary to the intent of the *Covenants*.

The Naumans’ approach contradicts the holding in *Riss*, which recognized that an association’s discretion can apply to determining aesthetic standards, such as “conformity and harmony of external design” and “location of the building with respect to topography and finished ground elevations.” *Riss v. Angel*, 131 Wn.2d 612, 625, 934 P.2d 669. “‘Design’ [subject to an association’s approval] commonly involves the whole of a structure, including size, configuration and height.” *Id.* at 626 (citations omitted). As the *Riss* court concluded, covenants that require consent before construction are enforceable even where such covenants do not set forth all applicable criteria such as setbacks and height restrictions, but where they vest broad discretion in a homeowners association. *See id.*, 131 Wn.2d at 624 (citations omitted). This Court should dismiss the Naumans’ argument pursuant to *Riss*.

Contrary to the Naumans' argument, Washington courts give full meaning and credit to the broad grant of authority conferred on an association by its governing documents. *Roats v. Blakely Island Maintenance Commission*, __ Wn. App. __, 2012 Wash. App. LEXIS 1546 (2012). In so doing, the courts apply the "context rule" of contract interpretation to determine the parties' intent. *Roats* at *13–*14, ¶ 23, citing *Shafer v. Sandy Hook Yacht Club*, 76 Wn. App. 267, 275, 883 P.2d 1387 (1994).

In *Roats*, Division I recently held that an association could operate marina facilities and levy assessments for such costs, even though the covenants did not expressly identify those specific activities. *Id.* at *21 and *30. The court refused to apply strict construction of the governing documents, choosing to interpret "the documents collectively and taking into account the circumstances leading to their adoption and the subsequent conduct of the parties." *Id.* at *20.

Similarly, in *Shafer* the association adopted certain restrictions on its members' use of their private property. *Shafer*, 76 Wn. App. at 275–77. Again, Division I relied on the "subsequent conduct" of the association, which included the adoption of restrictions applicable to its members' privately owned property. *Id.* at 276. In upholding the association's actions, the court noted that the association exercised its

authority “in a reasonable manner so as not to destroy the general scheme or plan of development.” *Id.* at 273, citing *Lakemoor Community Club, Inc. v. Swanson*, 24 Wn. App. 10, 15, 600 P.2d 1022 (other citations omitted).

Like in both *Roats* and *Shafer*, the *Covenants* in the present case confer broad authority on the Architectural Reviewer with regard to consent for construction projects. That the *Covenants* do not themselves set forth explicit setbacks is immaterial. The *Covenants* empower the architectural reviewer with exclusive and broad authority over lot improvements that, this Court should hold, includes the authority to impose setbacks, stating:

In order to preserve and protect against improper use of building sites; to preserve and protect the value of the property to the extent possible; to guard against construction of buildings using improper or unsuitable materials; to insure the reasonable development of the property; to encourage erection of attractive buildings thereon; and in general to maximize the type and quality of improvements on said property there is hereby designated an Architectural Reviewer.

(Tr. Ex. 2, p. 10, Art. VI) Read in conjunction with the mandates for preservation of view corridors and maintenance of privacy between existing lots (*see* § II.A.2 *infra*), the *Covenants* confer “an express reservation of power” on the Architectural Reviewer over general criteria such as aesthetics and harmony, as well as specific criteria such as height

and setbacks. *See Shafer* at 274; *see also Riss*, 131 Wn.2d 624–25. The Associations denial was in conformity with this power.

2. Contrary To The Naumans' Argument, The Architectural Guidelines Conform To The General Restrictions Prescribed By The Covenants

The Naumans are incorrect when they argue that “the *Architectural Guidelines* impose greater restrictions than those set forth in the [*Covenants*] by mandating the setback and height restrictions.” (Naumans Br., p. 28) Reversal should be the result even where only the *Covenants* are considered. (*See Assoc. Br.*, pp. 27–31, § V.B.2.b) The *Covenants* place particular emphasis on buffers and maintaining sight lines, as follows:

To minimize view blockage and restrictions, no buildings, improvements, structures, fences, planters, hedges shrubs, trees or other floras that are more than thirty (30) inches in height from ground level or that otherwise unreasonably restrict the view of adjoining lot owners shall be constructed, maintained or allowed on any lot westerly of the building set-back line as shown on the face of the short plat map. (Tr. Ex. 3, p. 5)

It is the further purpose and object of these covenants and restrictions to maintain privacy between the existing lots and to this extent, all trees within ten (10 feet) of the side yard boundary line of each lot shall be maintained to the extent possible ... (Tr. Ex. 3, p. 14, emphasis added)

Thus, the *Covenants* explicitly restrict side-yard obstructions. The

Covenants express value for lot separation and privacy, even requiring the maintenance of all trees and vegetation within ten feet of a side yard boundary. The placement of a gigantic garage within this ten foot corridor where trees and vegetation are to be maintained is incompatible with the *Covenants*. The Naumans' garage application ignored these restrictions and sought a side-yard setback of only 5½ feet for a structure that is 40 feet long by 26 feet wide by 32 feet tall. The trial court similarly disregarded the *Covenants* by concluding that 8 feet was an acceptable side-yard setback for a structure that is 28½ feet tall. (CP 989, CL 12(a)) These facts support reversal pursuant to the *Covenants*.

The Naumans ignore the language in the *Covenants* and case law when they insist that the *Architectural Guidelines* required approval of 80% of the Association's members to be enforceable. (Naumans Br., p. 29) The Court should reject the proposition. The governing documents are sufficient. They grant the Architectural Reviewer broad discretion in exercising architectural control and exclusive authority to adopt "rules and regulations to allow for the reasonable accomplishment of the objectives and purposes" under the *Covenants*. (Tr. Ex. 2, p. 13) Like in *Riss, Roats* and *Shaffer* discussed above, the Association's denials were permitted by the *Covenants*.

Also, the evidence demonstrated that the community was aware of

and accepted the *Architectural Guidelines*, including specifically the Naumans who referred to and relied on these same guidelines repeatedly. (See Assoc. Br., pp. 25, 26 n.4.)

The trial court erred as a matter of law by misinterpreting the *Covenants*. The Architectural Reviewer possesses the exclusive authority to adopt the *Architectural Guidelines*, which themselves conform to the general restrictions prescribed by *Covenants*. The trial court's error warrants reversal.

3. The Record Demonstrates That The Association's Use of An Independent Architectural Reviewer For The Naumans' Proposed Project Was Consistent With Its Past Practices And Not In Bad Faith, And Conclusions To The Contrary Are Unsupported By Substantial Evidence.

That the Board employed an independent architectural reviewer to review the Naumans' application does not support the trial court's conclusions. Use of an independent reviewer is proper under the express terms of the *Governing Documents*, in addition to being historically consistent. Contrary to the Naumans' suggestion (see Naumans' Br., p. 14), use of an independent architectural reviewer was far from unprecedented. Indeed, four of the six houses built in the subdivision were approved by the first Architectural Reviewer, who was independent of the Association. (See Tr. Exs. 22 and 24) The Naumans' house is among those

approved by an independent architectural reviewer. (Tr. Ex. 74, p. 4) The Association continues to rely on Mr. Landsem as its independent architectural reviewer.

This record of prior and subsequent “outsourcing” of architectural review, as the Naumans refer to it at p. 14 of their Brief, demonstrates the common use of an independent architectural reviewer for building applications within the community. Case law requires a court to consider such evidence of an Association’s scope of authority. *See Shafer*, 76 Wn. App. at 276 (holding that the subsequent conduct of the parties indicates that such operation is within the scope of the Association’s authority); *Roats*, 2012 Wash. App. LEXIS at *24–*25 (holding that multiple approvals by the association membership of marina operations demonstrated its authority under its covenants). The first Architectural Reviewer, Robert Aujila, had been designated by the developer. (*See* Tr. Ex. 23) When the members assumed control in October 2002, they dismissed Mr. Aujila and designated the officers of the Association as the architectural review committee (the “ARC”). (Tr. Ex. 16, p. 3) By that point, houses already had been built and/or were approved for Naumans (lots 10 and 11), Alfreds (lots 1, 2 and 3), Marshall (lots 4, 5 and 6) and Lee (lot 9). (*See* Tr. Exs. 22 and 24) The Association had the authority to dismiss the officers as the ARC and go back to appointment of an

individual. Nothing in the record shows that this act was designed to penalize, disadvantage or harm the Naumans.

Since engaging the use of an Architectural Reviewer for the Naumans' garage application, the Association has continued to employ an independent reviewer for all proposed projects. Mr. Telgenhoff was first designated as the Architectural Reviewer on December 2, 2007. (Tr. Ex. 78) All Association members, except the Naumans, voted in favor of the appointment of Mr. Telgenhoff. (Tr. Ex. 78) Subsequently, all projects were referred to him for review until Mr. Landsem was appointed in December, 2009. (See Tr. Ex. 81)

The Naumans suggest that the proposed garage was treated differently and subject to higher standards than any other project in the subdivision. (Naumans Br., §V.A.1). This is incorrect. The Naumans' application was reviewed under the same standards applied to other projects in the subdivision. The Naumans were not the first to have their application denied. The Francisces ~ "influential members" according to the Naumans ~ were denied their first application entirely. (Tr. Ex. 43) The Francisces sought to build a house and accessory building that the ARC, functioning as the architectural reviewer, denied because it was too big for the lot. (Tr. Ex. 43) The ARC expressly rejected the Francisces request for reduced setbacks. (Tr. Ex. 43) The ARC mandated that the

Francises maintain 15-foot setbacks from property boundaries adjoining another lot. (*Id.*) As with the Naumans, the Board allowed a reduced setback for property adjoining common area. (Tr. Ex. 48; Tr. Ex. 98, p. 5) The record, therefore, demonstrates that the Naumans' application was subjected to the same standards as all other members in the Association. All other houses within the subdivision have the same 15-foot side-yard setback on shared lot lines. (*See* RP 1174:4—1175:9) The trial court disregarded this standard by permitting a reduced setback that is without precedence for shared lot lines in the subdivision.

The Naumans also ignore that Mr. Telgenhoff's denial of their garage application was based on the Naumans' incomplete application. (*See* Naumans Br., pp. 33–34; *see also* Tr. Ex. 12, pp. 1–2; RP 1160:22—1161:23; *compare* Tr. Ex. 7) Under the express terms of the *Covenants*, Mr. Telgenhoff was obliged to deny a proposed project “if the plans and specifications submitted are incomplete.” (Tr. Ex. 2, p. 13) The subsequent architectural reviewer, Doug Landsem, also noted its incompleteness, stating, “[T]he drawings are lacking in dimensions and details. From my experience, there should be more drawings showing these essentials.” (Tr. Ex. 93, Tab 104) In his written denial, Mr. Telgenhoff also stated that a variance would be required to allow the proposed garage to be taller than 15 feet and to be placed within the 15-

foot side-yard setback. (Tr. Ex. 12, p. 7)

Mr. Telgenhoff therefore denied of the Naumans' garage application as directed by the *Covenants*. His denial, however, did not foreclose the ability of the Naumans to address his concerns and resubmit. (See Assoc. Br. pp. 30–31) They declined to do this and instead initiated construction without the Architectural Reviewer's consent.

4. Denial of Access Over the Gravel Access Drive Was Reasonable and Within the Association's Authority, And This Court Should Reject The Trial Court's Substituted Evaluation Of The Issue.

The trial court ignored and improperly interpreted the broad grant of authority conferred on the Association by the *Covenants* when it substituted its opinion that access to the Naumans' proposed garage should be permitted through the northern common area, the gravel access drive (the "GAD"). The Association is exclusively authorized to manage and control the use of the common areas for the benefit of all members. (Tr. Ex. 2, pp. 3 and 6) The Naumans imply that they are entitled to use the common area as they ~ not the Association ~ believe appropriate for *their* beneficial use. (See Naumans Br., pp. 23 and 47) The Naumans may believe that their use of the GAD as an unprecedented second access point is the best and most efficient use of *their property*, but such belief is irrespective of the impacts to the common areas, visual harmony in the

community and adjoining property owners. Their interpretation, accepted by the trial court, runs contrary to the express and unambiguous provisions in the *Covenants*.

The plat map depicts the Association's private road, Pointe Road North, separated from the adjoining subdivision Lots 3 through 11 by a narrow strip of common area. (Tr. Ex. 1) Access to all lots, must cross the common area. (See Tr. Ex. 71, p. 15)¹ All owners within the subdivision have benefitted from one point of access to their property across the common areas. Since inception of the subdivision, the identified gravel access drives have been the sole means of access to Lots 1 and 2 in the south and to lot 12 in the north. Lot 11, on which the Naumans' house and proposed garage are located, has had legal and physical access through the common area off the cul-de-sac on the northern end of Pointe Road North since 1998 when the Naumans bought the lot and constructed their house.

Courts may not change the plain language of a restrictive covenant in the guise of construing it. *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 698, 974 P.2d 836 (1999). Yet the trial court did just that by concluding that

¹ The decision by the Hearing Examiner who approved the preliminary plat stated, "As the proposed private access road does not abut any of the proposed lots, a blanket easement or a series of specifically located easements shall be established to ensure that each lot has legal and physical access to the private road through the common area."

the Association was obliged to provide a second point of access across the common area, in contrast to the long-standing practice of the Association. To that end, the Association has long interpreted the gravel access drives as driveways that serve the northern and southern lots. Denial of the Naumans' request to use the GAD as a second point of entry to their lot ~ a privilege which no other property enjoys ~ was consistent with the *Covenants*, regardless of whether the GAD is an exclusive easement for the benefit of the Francises.

The trial court's consideration of and conclusion as to the degree that the Naumans' proposed use would impede the Francises' use of their driveway is not determinative whether the Association had the authority, and properly exercised it, to reject the Naumans' request for a second access point through the GAD. Aesthetic harmony, balance within the community, and past practices are all factors that contributed to the decision to deny the unprecedented request which would have introduced a fundamental change into the community. Moreover, any subsequent owners of the Naumans' property would be entitled to use the garage and GAD without restrictions. The trial court's focus was improper and inconsistent with the *Covenants*.

B. Substantial Evidence Does Not Support The Court's Finding That The Association Applied Inconsistent Standards.

The trial court incorrectly concluded that Mr. Telgenhoff “refused to grant variances or to authorize reasonable uses of the common areas that had been freely granted to other members in similar circumstances.” (CP 989, CL 12; *see* Naumans Br., pp. 31–32) First, Mr. Telgenhoff advised the Naumans that the variances “need to be resolved” and expected the Naumans to resubmit their application to address identified shortcomings. (RP 1163: 14—21) Second, the *Covenants* empower the Architectural Reviewer to review projects only on building sites or lots ~ not on the common areas. (Tr. Ex. 2, pp. 6 and 10; *see* Tr. Ex. 3, p. 7) The trial court erred when it reached a different conclusion.

Even though Mr. Landsem, the second architectural reviewer, reached the same substantive conclusions on the Nauamans’ proposed garage as Mr. Telgenhoff, the trial court nevertheless contradicted itself by finding Telgenhoff was “likely improperly influenced and prejudiced” by the Board whereas Landsem was not: “The testimony by Mr. Landsem is the best indicator of what an unbiased, independent designated Architectural Reviewer would determine if allowed to make determinations without undue influence.” (CP 979, FF 27(b); *see* Association Br., pp. 30–31) The two conclusions are contradictory.

Additionally, the trial court was equivocal whether Mr. Telgenhoff's denial was affected by the Board. (See CP 988, CL 11(b)(v))

The trial court's own conclusions show that it also would have denied the garage application. The trial court rejected the Naumans' 5½-foot setback on the shared boundary with the Francises. (CP 989, CL 12(a)) The trial court rejected the Naumans' 32½-foot tall garage. (CP 989, CL 12(b)) The trial court rejected the exterior aesthetics of the Naumans original proposal. (CP 989, CL 12(c); see Association Br., p. 42) These were not "minor" changes as the Naumans would have it, but were the same substantive objections as the Architectural Reviewer's.

Contrary to the Naumans statement, (Naumans Br., p. 30), the building designer who designed the Naumans' proposed garage did not assist in the design of the Alfred, Lee and Marshall homes. Rather, he is not a licensed architect² and only assisted in the construction of these homes, and would not be expected to know of the *Architectural Guidelines*. (See RP 618:1-6; RP 608-609) The Naumans themselves were well aware of the *Architectural Guidelines* but simply chose to ignore them for their own project, even as they insisted that the Association apply these same guidelines to others, such as the Francises.

² Under the Association's governing documents, all plans for lot improvements and buildings "shall be prepared by a licensed architect." (Tr. Ex. 3 [Bylaws], p. 7)

(See Tr. Ex. 33, p. 002471 [From prior correspondence from Mr. Nauman to the Board: “Why did the Board allow the ARC Guidelines (section B(3) regarding low scale, narrow vertical masses, tall heights near property line etc etc. and section B(4) relating to homes being in general harmony etc. be so grossly violated.”]; see also Assoc. Br., p. 25 n.4)

The trial court substituted its own judgment for that of the Association’s architectural reviewers, warranting reversal. See *Riss*, 131 Wn.2d at 629, 632. Although the trial court reached the exact same substantive conclusions as the Association’s two architectural reviewers, it rendered an entirely different result by ignoring the express provisions in the *Covenants*. (Assoc. Br., pp. 40–43) Had the trial court faithfully and correctly applied the *Covenants*, it would have concluded that Mr. Telgenhoff’s disapproval of the Naumans’ garage application was reasonable and in good faith. The trial court’s contrary conclusion was an error of law and unsupported by substantial evidence.

The analysis in *Heath v. Urga*, 106 Wn. App. 506, 24 P.3d 413 (2001), review denied 145 Wn.2d 1016, 41 P.3d 482 (2002), is instructive and on-point with the present case. In *Heath*, the court recognized the authority and prescriptions given to the individual charged with architectural control under the covenants. *Id.* at 517. That individual “took extra care to assure an objective evaluation” and “independently

conducted a ‘reasonable investigation’” of the plans. *Id.* at 517–18. Similarly, here the Association retained an “independent architectural reviewer” to ensure that an objective evaluation was given to the Naumans’ project. (Tr. Ex. 78, p. 2) That architectural reviewer, Mr. Telgenhoff, conducted a thorough and detailed objective review of the application. (See Tr. Ex. 12; Assoc. Br., pp. 34–36) By way of example of the “extra care” Mr. Telgenhoff took, he interviewed staff members at the planning department of Whatcom County with respect to setback and height restrictions for a “boathouse,” which was the term applied by the Naumans for their garage. (RP 1062:13—1064:21)³ The review should be judged acceptable, as in *Heath*.

The *Heath* court also recognized that the lack of cooperation and “paucity” of information provided by the applicant to the architectural reviewer supported the result. *Id.* at 517, 519. The Naumans similarly provided insufficient information for an adequate review and refused to supplement or resubmit their application, insisting that access must be from the gravel access drive. (Naumans Br., p. 23) Their insistence was misplaced, because Mr. Landsem concluded that they could access the

³ Although not licensed, Mr. Telgenhoff was an architect with substantial experience in homeowner associations. (Assoc. Br., p. 34) The governing documents do not require that the Architectural Reviewer be licensed. (Tr. Ex. 2, Art. VI; Tr. Ex. 3, p. 7, Art. VIII) The *Bylaws* do require, however, that the improvements proposed by lot owners be a licensed architect. (Tr. Ex. 3, p. 7, Art. VIII) As previously above, the Naumans’ “building designer” was not licensed.

garage from their existing driveway or change the orientation of the proposed structure. (RP 730:12–733:18; 744:15–21; *cf.* Naumans Br., p. 13 [Access to their proposed garage could be accomplished from their existing driveway without impacting a reserve drainfield.]). As in *Heath*, the Naumans’ lack of cooperate on and the minimal information provided also supported the result.

The Naumans exaggerate the role of Kim Alfred in the denial of their project and emphasize the trial court’s conclusion that he “acted in bad faith and ‘abused[d] his director responsibilities and duties’ by not recusing himself” from the proceedings. (Naumans Br., p. 33) This emphasis ignores the *Covenants*, which empowers the Architectural Reviewer ~ not the Board ~ with exclusive authority to approve or deny an application. (Tr. Ex. 2, pp. 10–13) It also ignores the process employed, in which an independent reviewer evaluated the application, not the Board members. The record shows that Mr. Alfreds did not play any roll in the review of the Naumans’ garage application, which was entrusted to Mr. Telgenhoff specifically to avoid such allegations by any member in the Association who was dissatisfied with the results. When the record is viewed as a whole, this Court should hold that substantial evidence does not support the trial court’s conclusion that the denial was in bad faith. This Court should hold that the *Covenants* more than authorize the denial

of the garage as proposed by the Naumans.

C. **Reversal of the Fee Award Is Proper Where the Record Demonstrates That Segregation Was Required and the Trial Court Only Awarded Fees to the Naumans on Three Claims.**

The record demonstrates error in the fee award, despite the Naumans' superficial resistance to the well-established law on this point. The trial court awarded fees to the Naumans *on only three claims*. (CP 981–82 at A.2; CP 990–91 at B.16; CP 2775) Where the record demonstrates that substantial segregation of fees unrelated to those three claims remained to be performed, reversal is warranted.

This Court first should reject the argument that the Association essentially waived this issue by inadequate assignment of error. (*See* Naumans Br., pp. 54–55) The Opening Brief contains sufficient argument, authority and clarity in support of its Assignment of Error #5 (Assoc. Br., p. 2), which explains the basis for the challenge together with Issue Statement #4 (Assoc. Br., p. 3). Ample authority and argument is provided in Section V.D., where the Association also states, “The findings that segregation was not possible are unsupported by substantial evidence.” (Assoc. Br., pp. 45–48 at 48) The issue whether the record required segregation was joined. The content of these sections of the Association’s Brief, therefore, is distinguishable from those in cases such

as *Keever & Assoc., Inc. v. Randall*, 129 Wn. App. 733, 741, 119 P.3d 926 (2005), and *Smith v. King*, 106 Wn.2d 443, 451–52, 722 P.2d 796 (1986), where assignments of error were considered waived when the basis for the assignment was nowhere stated or argued in the briefs and no supportive authority provided.

The Court should not consider the Association to have waived this issue, or inadequately assigned error to the trial court’s findings to challenge the issue, when considering all the sections of the Association’s brief devoted to it and the clarity of its argument. *See State v. Olson*, 126 Wn.2d 315, 318–19, 893 P.2d 629 (1995) (cases should be decided on their merits, promoting substance over form, and only where an appellant fails completely to raise an issue should the appellate court decline review); RAP 1.2(a) (“cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands”). In its discretion, this Court should reach the issue whether the trial court awarded fees that should have been segregated as unrelated to the three claims. *See id.* at 323 (“an appellate court may exercise its discretion to consider cases and issues on their merits.”).

The Court should reverse where the law and the record support segregation and compel a reduced fee award. The Naumans fail to address

or distinguish any of the controlling case law discussed at 46 of the Association Brief including *Fetzer*, *Gaglidari*, *Smith v. Behr Process Corp.*, or *Bowers v. Transamerica Title Ins. Co.* Particularly compelling is *Smith v. Behr Process Corp.*, where the appellate court rejected the trial court's conclusion that it "cannot" separate the work on "intertwined" issues, and that the work on all the claims was "necessary" to the work on the claims providing for fees. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 344–45, 54 P.3d 665 (addressing segregation of fees awardable under the CPA). "Regardless of the difficulty involved in segregation, the *Travis* court made it clear that the trial court had to undertake the task." *Id.* at 345–46, citing *Travis v. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 410, 759 P.2d 418 (1988). Here, like in *Smith*, the trial court erroneously avoided its responsibility to segregate.⁴

The record cited in the Association Brief at 46–48 shows that the Naumans failed to meet their moving burden to prove the reasonableness of the fees they sought and the relationship of the fees to the relevant three claims. The Naumans make no attempt on appeal to justify the awarded fees or expenditures concerning different lawsuits, lost claims, claims against the interveners, vague time entries, unrelated survey costs,

⁴ In its notice to the parties that it would award all requested fees with no segregation, the trial court explained that it "sees no reason" to "alter the amounts claimed." CP 2810. The reason is that case law requires segregation.

unrelated attorney letters concerning snow removal, and opposition to claims on which the Association prevailed. That the Naumans asserted in their trial court briefing that they had already segregated out unrelated fees (*see* Naumans Br. at 55 note 14 citing CP 522) does not make it so. The entries in the fee application identified by the Association, for which fees were awarded, demonstrate the lack of segregation. This Court should reverse and remand pursuant to *Fetzer, Gaglidari, Smith v. Behr*, and *Bowers v. Transamerica*.

The Naumans attempt to argue, apparently as an alternative ground for affirmance, that instead of awarding both parties fees for the claims on which they prevailed, the trial court should have found the Naumans the “substantially prevailing party” in the litigation and awarded them all fees, not just fees on three claims. (*See* Naumans Br., p. 55) The Court should reject the argument for multiple reasons. The trial court indeed rejected the Naumans’ assertion that they alone were entitled to fees as the substantially prevailing party in the litigation, and found that both parties were entitled to fees for their successful claims. (CP 981–82, CL A.2; CP 990–91, CL B.16; CP 2775. *See also* CP 861–62 at notes 1 and 2 [Naumans acknowledging trial court’s rulings]) Whether a party is a “prevailing party” is a mixed question of law and fact reviewed under an error of law standard. *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d

1049 (2011) (citing *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 706, 9 P.3d 898 (2000)). The Naumans' argument, therefore, is not an alternative ground for affirmance, but depends on affirmative relief for which a cross-appeal was required, i.e., reversal of the trial court's mixed law and fact ruling. The argument necessitates review and revision of the trial court's orders on this point, and would necessarily invalidate the award to the Association and provide a new ground for a fee award to the Naumans that was rejected. See RAP 2.4(a) (party must cross appeal to receive affirmative relief); *State v. Sims*, 171 Wn.2d 436, 442–43, 256 P.3d 285 (2011) (seeking partial reversal of trial court order requires cross-appeal). See also *Smoke v. City of Seattle*, 79 Wn. App. 412, 421–22, 902 P.2d 678 (1995) (monetary awards are inextricably intertwined with the claim upon which they were awarded, such that asking for the same monetary award under a claim rejected by the trial court constitutes a request for affirmative relief). The Naumans have not pursued a cross appeal on any fee issue (see Naumans Br. at p. 2), so the trial court's ruling that both parties were entitled to prevailing party fees only on their successful claims is not subject to review.

The findings and conclusions of the trial court regarding the fees due the Naumans for claims 1–3, moreover, is not interchangeable with the fees and costs that would be due if they were the substantially

prevailing party. A change in the basis of the fee award would require new findings and conclusions approving the Naumans' fees and costs under that measure. *See, e.g., Smoke, supra.* Also, the deficiencies claimed by the Association remain where the award contains work on issues unrelated to these parties' dispute, such as attorney letters concerning snow removal, the costs of the Naumans' land survey, and the claims between the Naumans and the Francises. These un rebutted objections prevent affirmance.

Third, the Naumans offer scant authority and argument on this point, failing to set forth a standard of review, analyze the relevant case law, or apply the law to this case. (Naumans Br., p. 55) Such passing treatment does not warrant consideration. *See Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005).

Finally, if the Court were to revisit the issue of the basis for the fee award at the Naumans' invitation, it should affirm the trial court's "proportionality approach" under *Marrassi v. Lau*, 71 Wn. App. 912, 915–18, 859 P.2d 605 (1993), abrogated in part on other grounds *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 490–91, 200 P.3d 683 (2009), and *Phillips Bldg. Co. v. Bill*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996), but correct the proportions awarded. The Association commenced the lawsuit on the basis of trespass and other claims related to the events

of December 6, 2007, and prevailed on these claims. The Naumans later added cross claims arising from different events, on which they prevailed on three of five claims. Fees were awarded to both parties on the claims on which they prevailed under *Marassi v. Lau* because each party asserted distinct and severable claims under the governing documents on which each was successful. Where the trial court erred was its failure to correctly apportion this award. The Naumans offer no argument or case analysis to the contrary.

The trial court having awarded the Naumans' fees only on three claims was obliged to segregate the fees, as the record permitted. This court should reverse and remand for that segregation.

D. The Court Erred By Finding That The Association Breached The Covenants and Its Fiduciary Duty When It Allowed Owners To Landscape The Common Area.

1. The Covenants Allow The Association To Landscape Common Areas As A Matter Of Law.

In its opening briefing, the Association challenged the trial court's legal interpretation that the *Covenants* prevented the Association from unanimously voting to allow all members to choose to landscape the common area adjacent to their homes. (Assoc. Br., pp. 17–21) The Naumans failed to provide any response to these interpretative arguments. Interpretation of a restrictive covenant is a question of law reviewed de

novo, *Wimberly*, 136 Wn. App. at 336, and this Court should reverse.

2. Substantial Evidence Does Not Support The Finding The Common Area Was “Usurped.”

Reversal is also appropriate because substantial evidence does not support a finding that the common area was “usurped.” Substantial evidence is the “quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 104, 111, 267 P.3d 435 (2011), citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Usurp means “to seize and hold in possession by force or without right.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1302 (10th ed. 1993).

The Naumans’ brief provides no evidence to support the one sentence in finding of fact 29 regarding “usurping.” (Naumans Br., pp. 51–53)⁵ The most stated is that the enhancements may make people think an owner’s property is larger than it is. (RP 558–59) This is not allowing the common area to be usurped under the definition. The evidence does not show conduct at odds with the Association’s obligations. There is also

⁵ The Naumans cite RP 490-91; 503-05; 558-59 and 807. The statement on RP 490-91 is Mr. Nauman’s testimony that “It’s, in fact exclusionary, you know, to other members of the community.” But Mr. Nauman also testifies at RP 503-05 that no member was ever prevented from *using*, or excluded from, the common areas. He testifies that he has never been excluded from the common area and walks on it. (RP 503-05) The Naumans’ own expert, William T. Follis, testified that the landscaping was well done (“very, very nicely landscaped part of the entire subdivision”) and added to the attractiveness of the subdivision. (RP 580:13–21) The enhancements benefitted the Association and the membership. (RP 579:23–580:3; 593:4–11) No member was ever prevented from using, or excluded from, the common areas. (RP 580:13–581:2)

no finding of fact in the trial court's decision to support any conclusion that the Association exceeded its authority. By authorizing the landscaping enhancements, the Association acted in a manner that protected the homeowners' collective interests. The evidence presented was insufficient to establish usurping.

The Naumans also argue as a conditional cross appeal that if the Association's conduct was not a breach of the covenants, than neither was their conduct on December 6, 2007, a trespass. (*See Naumans Br.*, p. 53 (relating to Naumans' Assignment of Error #2) The Court should reject this *quid pro quo* argument. The Naumans do not seriously address whether substantial evidence supported the trespass finding, which it clearly did. Moreover, the Naumans compare apples to oranges when they equate landscaping of the common area pursuant to an adopted, subdivision-wide policy with their pre-construction activities in the common area. The "cross appeal" should be rejected.

E. The Breach of Fiduciary Duty and Breach of Covenants Claims Accrued in October 2002 and Are Properly Time Barred.

The Naumans brought claims against the Association for breach of fiduciary duty and breach of covenants five years and seven months after the Naumans discovered the facts constituting the breach. RCW 4.16.080(4) ("the cause of action in such case not to be deemed to have

accrued until the discovery by the aggrieved party of the facts constituting the fraud”), *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 784, 496 P.2d 343 (1972); (Tr. Exh. 16); CP 2731–2748. The Naumans now argue that the breach did not occur when the Association adopted a policy “permitting” the homeowners to landscape on the common area, but rather when they experienced an implementation of that policy they disliked.⁶ (Naumans Br. pp. 50–51). This is inconsistent with *Green v. A.P.C.*, 136 Wn.2d 87, 96–97, 960 P.2d 912 (1998), which holds that a statute of limitations is not tolled by the fact that further harm may flow from the wrongful conduct or because the specific damages for which the party seeks recovery have not yet occurred. The Naumans also identified their cross-claims as arising from the Association’s giving of *permission* to owners to landscape common area adjacent to their homes. (CP 2744–2745) The very nature of these claims is the conduct of the Association, not of the homeowners who later landscaped. *Id.*⁷ As argued in the Association’s Brief at pp. 44–46, this Court should hold that the claims are time-barred

⁶ Permission to all homeowners to landscape the common area adjacent to their homes was given in October 2002. (Tr. Ex. 16)

⁷ This is consistent with what the trial court found in the only pertinent finding of fact—FF 29: “The Association had allowed other members to usurp portions of the common area to the south, east and north, and showed favoritism to influential members—particularly to the Alfreds and the Francisces in approving projects in the common areas under Section III of the CCRs and on individual lots under Section VI of the CCRs.” It is also the basis of the only two conclusions of law on the claims—CL 13-14. There is no dispute that this occurred in 2002 and that the Naumans knew about—and voted in favor of—the adoption of this policy. (Tr. Ex. 16)

under RCW 4.16.080(2) RCW 4.16.080(4), and RCW 4.16.130, finding that the claims accrued when the Association acted to adopt the policy.

This Court should hold that the breach of fiduciary duty claims are time barred because the Naumans have raised no authority to challenge the cases cited in the Association's Brief at pp. 43–45. *See, e.g., LaHue*, 6 Wn. App. at 784; *Viewcrest Coop. Asso. v. Deer*, 70 Wn.2d 290, 295, 422 P.2d 832 (1967). Because the Naumans discovered that the Association had given permission to homeowners to landscape the common area adjacent to their homes in 2002, the breach of fiduciary duty claim accrued then. While the Naumans seek to employ the “continuing tort rule,” there is no basis to do so. The continuing tort rule is contrary to the discovery rule and not a single Washington case has applied the continuing tort rule in a breach of fiduciary duty case.

The breach of restrictive covenants claims is also time barred.⁸ Breach of covenants is a claim to enforce property rights that run with the land, not to enforce a bargained-for promise. Consequently, the statute of limitations for this counterclaim is three years as governed by RCW 4.16.080(2). This Court should reject the Naumans' argument for the six-

⁸ The legal and factual issues addressed in the Association's appeal and the Naumans' cross-appeal (Naumans' Assignment of Error #1) are intertwined with respect to the statute of limitations applicable to the Naumans' breach of covenants counterclaim. The Association's briefing on this issue, therefore, in both its briefs opposes the Naumans' first conditional cross-appeal.

year statute.

Washington's RCW 4.16.040 states that "an action upon a contract in writing, or liability express or implied arising out of a written agreement" shall be commenced within six years. RCW 4.16.040 (1). A real property restrictive covenant is not the same as a contract within the meaning of the statute of limitations. *See* BLACK'S LAW DICTIONARY 393 (8th ed. 2004), *quoting* Roger Bernhardt, REAL PROPERTY IN A NUTSHELL 212 (3d ed. 1993) ("The important consequence of a covenant running with the land is that its burden or benefit will thereby be imposed or conferred upon a subsequent owner of the property who never actually agreed to it. Running covenants thereby achieve the transfer of duties and rights in a way not permitted by traditional contract law"); *see also* 1515–1519 Lakeview Blvd. Condo. Ass'n v. Apt. Sales Corp., 146 Wn.2d 194, 43 P.3d 1233 (2002) (acknowledging the differences between real property covenants and contracts. *Id.* at 203–04).

While the Naumans cite two out-of-state cases, these cases rely upon the statutes in their respective states. The language of Washington's Statute of Limitations (RCW 4.16.040) is not analogous to those in Montana (§ 27-2-202 MCA) and California (Cal. Code Civ. Proc. § 337). The Court should have granted the Association's Motion for Partial Summary Judgment and dismissed the claims of the Naumans for breach of covenants.

III. CONCLUSION

The *Covenants* confer a broad scope of the authority on the Association and its Architectural Reviewer. The Naumans ask this Court to diminish this authority by affirming. This Court should reverse. The trial court failed to properly interpret the *Covenants*. The Naumans' arguments rest on a weak foundation. Their garage application, which even the trial court found did not conform to the *Architectural Guidelines* and which the trial court itself denied as proposed, conflicted with the *Covenants*, was incomplete and was properly denied. Similarly, the denial of a second access point across the GAD is supported by the *Covenants* and the facts. This Court should reverse the judgment on the Naumans' counterclaims, reverse the trial court's injunctive relief and reinstate the denial.

The Court also should reject the Naumans' conditional cross-appeals by applying the three-year statute of limitations to the breach of restrictive covenants claim and affirming the Naumans' liability on the trespass claim, the "cross appeal" for which the Naumans offered no substantive argument.

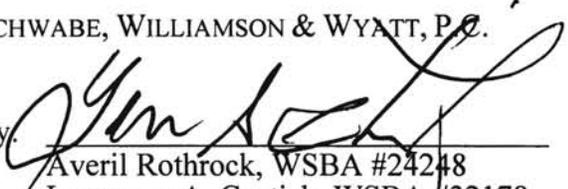
Finally, the Naumans were not entitled to all the attorney fees and costs they received for the three counterclaims on which they prevailed. The trial court committed legal error when it declined to eliminate even

one entry from the amount requested. The record amply supports reversal and remand for segregation.

Dated: July 16, 2012

SCHWABE, WILLIAMSON & WYATT, P.C.

By:


Averil Rothrock, WSBA #24248
Lawrence A. Costich, WSBA #32178
Jamila A. Johnson, WSBA #39349

*Attorneys for Appellant,
Pointe II on Semiahmoo Owners
Association d/b/a Sunset Pointe
Owners' Association*

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 2012, I caused to be served the foregoing *Appellant/Cross-Respondent Pointe II of Semiahmoo Owners Association's Reply/Response Brief* on the following parties at the following addresses:

Peter R Dworkin
Belcher Swanson Law Firm PLLC
900 Dupont Street
Bellingham, WA 98225-3105
Telephone: (360) 734-6390
Facsimile: (360) 671-0753
E-Mail: prd@belcherswanson.com

Kenneth Lee Karlberg
Karlberg & Associates PLLC
851 Coho Way Ste 308
Bellingham, WA 98225-2006
E-Mail: ken@karlberglaw.com

Jill Smith
Roy Simmons & Parsons, P.S.
1223 Commercial Street
Bellingham, WA 98225-4306
Telephone: (360) 752-2000
Facsimile: (360) 752-2771
E-Mail: jill@royandsimmons.com

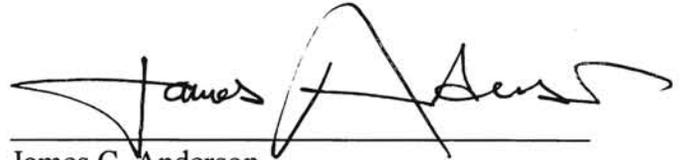
Mark J. Lee
Attorney
Brownlie Evans Wolf & Lee, LLP
230 E. Champion St.
Bellingham, WA 98225
Telephone: (360) 676-0306
Facsimile: (360) 676-8058
E-Mail: mark@brownlieevans.com

Howard M. Goodfriend
SMITH GOODFRIEND, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101-2988
Email: howard@washingtonappeals.com

BY MESSENGER

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JUL 16 PM 4:44

by delivering to each a true and correct copy thereof, certified by me as such, by way of U.S. Postal Service-ordinary first class mail.

A handwritten signature in black ink, appearing to read "James C. Anderson", written over a horizontal line.

James C. Anderson
Legal Secretary