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NO. 73369-9-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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BIRNEY DEMPCY and MARIE DEMPCY,

Petitioners/Appellants,

vs.

CHRIS AVENIUS and NELA AVENIUS, husband and wife, and their  
marital community; et. al,

Respondents.

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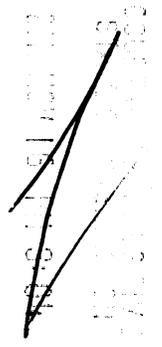
ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY  
The Honorable Theresa Doyle

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**APPELLANTS' OPENING BRIEF**

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ORIGINAL

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## A. INTRODUCTION

The Parties are neighbors in a unique cul-de-sac in Bellevue, Washington, referred to as “Pickle Point” (Pickle Point Neighborhood). Each of the neighbors owns one of the four Pickle Point homes and an undivided one fourth (1/4) interest as tenants in common in an adjoining common property (“Common Property”). The Common Property is subject to a covenant (1968 Covenant), requiring each of the owners to pay one fourth (1/4) of the costs of developing and maintaining the landscaping and tennis court on the Common Property. The Common Property is also subject to a separate set of declarations which contains a provision prohibiting division of any parcel into a smaller parcel, and multiple provisions addressing maintenance and repair obligations as well as usage rights of the Common Property (“Pickle Point Declaration” or “PPD” herein). Despite the maintenance covenants, the Common Property has fallen into a dangerous and dilapidated state of disrepair.

Birney Dempcy and Marie Dempcy (Dempcys), owners of one of the Pickle Point properties, sued the other co-tenants to enforce the covenants and compel the maintenance to the Common Property, and they also sued to enforce certain specific covenants of the PPD which the

Aveniuses were violating.<sup>1</sup> The Respondents counterclaimed and brought an action, *inter alia*, to partition the Common Property under Washington's partition statute RCW 7.52 *et. seq.*, and argued that actions concerning the Common Property required a vote of two or more neighbors approving. The trial court erroneously dismissed the Dempcys' causes of action and ordered partition of the Common Property on summary judgment.

The trial court erred because partition under RCW 7.52 *et. seq.* is inappropriate where there is: (i) an express and/or implied agreement preventing partition; (ii) equitable rights which would be minimized and defeated by partition; and/or (iii) a covenant or restriction which partition would violate. Further, under the 1968 Covenant, PPD and Washington's common law, any of the tenants in common has the pro rata obligation to maintain and repair the Common Property, and any tenant in common can enforce this obligation. Regardless of any obligation, any tenant in common has a right to maintain and repair the Common Property. The Trial Court also erred in awarding attorney's fees to the Respondents. This Court should reverse the Trial Court's Orders and Findings and direct entry of judgment against Respondents, and in favor of Appellants, the Dempcys.

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<sup>1</sup> The Trial Court found that the Aveniuses were violating the PPD in regards to a large hedge between the two properties blocking the Dempcys view to the north.

## B. ASSIGNMENTS OF ERROR

1. The Trial Court erred in Order #1 in its Certification of Judgment pursuant to CR 54(b). (CP 751-6).
2. The Trial Court erred in Order #2 in its Certification of Judgment pursuant to CR 54(b). (CP 751-6).
3. The Trial Court erred in Order #3 in its Certification of Judgment pursuant to CR 54(b). (CP 751-6).
4. The Trial Court erred in Order #4 in its Certification of Judgment pursuant to CR 54(b). (CP 751-6).
5. To the extent contained within in the Certification of Judgment and not stayed, pursuant to the Court's Order, dated April 7, 2015.
  - a. The Trial Court erred in entering its Order Granting Respondents' Motion for Partial Summary Judgment. (CP 719-723).
  - b. The Trial Court erred in entering its Order Denying Plaintiffs' Motion for Partial Summary Judgment. (CP 715-718).
  - c. The Trial Court erred in entering its Order Granting Respondents' Supplemental Findings in Support of Need for Partition. (CP 751-56).
6. The Trial Court erred in failing to award the Dempcys attorney's fees and costs.<sup>2</sup>

### Issues Pertaining to Assignments of Error

1. As a matter of law, did the Dempcys establish that there was (i) an express agreement and/or implied agreement preventing partition under RCW 7.52 *et. seq.* (ii) equitable rights which would be minimized and

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<sup>2</sup> Though not scheduled to be briefed at this time, to explicitly preserve all appeal rights, this error is explicitly designated and, also, as it specifically affects Assignment of Error 4--Order #4.

defeated by partition under RCW 7.52 *et. seq.* and/or (iii) a condition or restriction which partition under RCW 7.52 *et. seq.* would violate?

2. As a matter of law, do all Parties hereto have an obligation under the 1968 Covenants, the Pickle Point Declaration, and Washington's common law regarding tenancies in common to share pro rata in the obligation to maintain and repair the Common Property, and can any Party hereto enforce this obligation as to the other Parties?

3. Regardless of a right of contribution from the Dempcys' tenants in common, did the Appellant, as a tenant in common, have the basic right to maintain and repair the Common Property so long as such maintenance and repair did not interfere with the other tenants in common use and enjoyment of the Common Property?

4. Are the Respondents, or any of them individually, liable for the monetary damages arising from their interference with the Dempcy's contract to maintain and repair the Common Property?

5. Are the Dempcys entitled to an award of attorney fees?

### C. STATEMENT OF THE CASE

1. The Parties Share a Common Property as Tenants-in-Common.

Originally, the area comprising the Pickle Point neighborhood was owned as tenants in common by Anton Mueller and Susan Mueller and Chris Overly and Amanda Overly. (CP 313; 321-35; 549-74). The Muellers and Overlys then divided the area into five separate properties by means of recording a series of Statutory Warranty Deeds AFN 6409011, AFN 6409012, AFN 6369358 and Real Estate Contract / Statutory

Warranty Deed AFN 6583190<sup>3</sup> / 7206220461 (CP 313; 321-35; 549-74).

The result was the creation of four (4) residential properties and one “Common Property” owned by the four residents of the residential properties as tenants-in-common. (CP 313; 321-35). These four properties and the Common Property are, the Pickle Point neighborhood---an upscale Bellevue neighborhood and is unique for its open, expansive and park like atmosphere and stunning views. (CP 299-300; 313; 321-35).

The Dempcys moved into the neighborhood in 1973 and have loved and cherished their home and neighborhood for 40 years. (CP 299-300; 377-82). They wish to preserve its unique qualities—and, of course, their property’s value. However, the dilapidated and dangerous condition of the

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<sup>3</sup> Counsel for the Dempcys submitted a supplemental declaration, which the trial court considered, setting forth the precise chain of title. (CP 719-20; 575-604). Deed AFN 6409011 conveyed the current Dempcy Residence from the Muellers/Grantors to the Overlys/Grantees and subject to that transfer the Grantees (Overlys and their successors) were obligated to maintain landscaping and a tennis court on the Common Property. (CP 578-84). The Overlys then sold their property to the Dempcys by Deed AFN 7309120089. (CP 393-7; 424-8). Deed. AFN 6409012 conveyed the current Avenius Residence from the Overlys/Grantors to the Muellers/Grantees and subject to that transfer the Grantees (Muellers and their successors) were obligated to maintain the landscaping and tennis court on the Common Property. The various successors ultimately ended in a conveyance to the Aveniuses. (CP 575-6; 593-604) Deed AFN 6369358 conveyed the current Shannon Residence from the Mueller-Overly/Grantors to Flynn/Grantee and subject to that transfer the Grantees (Flynn and their successors) were obligated to maintain the landscaping and tennis court on the Common Property. The various successors ultimately ended in a conveyance to Shannon. Deed AFN 6583190 / 7206220461 conveyed the current Zemel Residence from the Mueller-Overly/Grantors to Jongejans/Grantees and subject to that transfer the Grantees (Jongejans and their successors). The various successors ultimately ended in a conveyance to Zemel. CP 575-604; 605-11.

Common Property today is out of character with the neighborhood that they love.

At this time the Pickle Point neighbors, from south to north are as follows: Dempcy 429 SE 94th, Bellevue, Washington (Dempcy Residence); Avenius 425 SE 94th Ave (Avenius Residence); Zemel 403 SE 94th Ave (Zemel Residence); and Shannon 407 94th Ave SE (Shannon Residence). (CP 104, 310). All the residences are upscale and of a unique style. (CP 312).<sup>4</sup>

Pickle Point includes a Common Property which is the subject of the Lawsuit and this appeal. (CP 312). The Common Property consists of an outdoor tennis court, lawn, landscaping, retaining wall, and access roads. (CP 312). It is uncontroverted that the southern portion of the Common Property (South Common Property) has become dangerous and dilapidated. (CP 105; 307). As revealed in the various surveys and expert declarations, the South Common Property disproportionately affects the Dempcys. (CP 307; 355-63; CP 270-72). In contrast, the northern portion of the Common Property (North Common Property), which admittedly affects the three Respondents almost exclusively, has been maintained and repaired, and no dilapidated or dangerous conditions exist. (CP 365-66).

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<sup>4</sup> The four (4) residences were all designed by a single architect, Anton Mueller. (CP 312). The architectural style is “Contemporary Northwest” using natural materials—for instance all houses are constructed with an exterior of shingles in a similar style. (CP 312).

2. The Common Property Is Subject to Two Relevant Recorded Instruments: The 1968 Covenants and the Pickle Point Declaration.

*(i) 1968 Covenants*

When the Muellers and Overlys divided the area known as Pickle Point by means of the instrument referenced above, they burdened the residences and the Common Property with covenants of access and maintenance. (CP 300 311; 549-574). Since 1968, the Common Property has been subject to a covenant (1968 Covenant) requiring each Pickle Point Owners to pay one fourth (1/4) the costs of developing and maintaining the landscaping and the tennis court on the Common Property.<sup>5</sup> (CP 300). The 1968 Covenant provides, in part:

AND SUBJECT TO: the assumption of and the agreement by Grantees to do the following:

A. Grantees agree to pay one-fourth (1/4) the cost of developing and maintaining the common area described above under Parcel B [Common Property] as follows

1. All landscaping in the common area; and

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<sup>5</sup> AFN 6583190 is the originating document Zemel's chain of title. This conveyance which occurred later than the rest and it did not contain the maintenance covenant which is contained in Statutory Warranty Deeds AFN 6409011, AFN 6409012, AFN 6369358. However, Zemel's predecessors always partook in the obligation for maintenance and upkeep—to wit they contributed their one fourth (1/4) share. Respondents presented evidence that the originating deed for the Zemel parcel (which occurred later) does not contain the maintenance covenant which is contained in the deeds creating the other three parcels. (CP 522-9). However it is unclear whether it was otherwise recorded in Respondent Zemel's chain of title. RP 11; CP 311, 312.

2. The construction of a tennis court to commence not sooner than January 1, 1970, and not later than January 1, 1973. The date of commencement of construction to be decided by majority vote of the owners of the four parcels of land served by said common area. In the event the vote is two for and two against, the results are to be considered a majority for commencement of construction.

1968 Covenant. (CP 549-50; 552-558).

All predecessors, including Mr. Zemel, consistently paid 25% of the cost of such maintenance as if such obligation existed for them as their other co-tenants.<sup>6</sup> (CP 300). Prior to the instant dispute, no issues were raised regarding the meaning of these 1968 Covenants. (CP 300; 312).

*(ii) Pickle Point Declaration*

In 1989, the Owners of the Pickle Point Residences had no material disputes. (CP 300; 312; 314). And, by 1989, Mr. Shannon had joined the Dempcys by moving into the Pickle Point Neighborhood. (CP 104; 314). At about this time the Pickle Point Owners decided that they wanted to preserve the nature of the neighborhood to prevent anybody from altering the unique aesthetic of the neighborhood which they treasured. (CP 314). Thus, they also decided to draft and record a declaration to protect and maintain the *entire* neighborhood's unique and beautiful feel. (CP 314). The result was the "Declaration of Protective Covenants, Restrictions, Easements, and Agreements for Pickle Point

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<sup>6</sup> With one minor exception involving a bankruptcy. (CP 300).

Association” (hereinafter “Pickle Point Declaration” or “PPD”), entered into by the Defendant Shannon, Defendant Dempcy and the predecessors of Defendant Avenius (Mikkelsen) and Defendant Zemel (Jongejan). (CP 314-5; 339-352). The PPD was executed by all the parcel owners on three different dates as evidenced by the notary signatures (CP 347-9).

3. The Pickle Point Declaration Prohibits the Division of Any Parcel into a Smaller Parcel

A number of clauses relating to the Common Property illustrate a desire among the Pickle Point owners to preserve and maintain the Common Property. Most importantly, it is clear, that when referring to the Common Property the PPD provides that, *as owners of Pickle Point homes*, each of them has the right to use and enjoy the Common Property and the provision sets a standard for maintenance. Indeed, PPD §5.1 explicitly states “Each owner shall have a *right to use and enjoy* the common property according to the nature of that property... .” (CP 345).

A sequential review of the PPD, for the purposes of this appeal and as relates to the Common Property, is as follows: Section 1.1 of the Declaration provides, in part: “Declarant hereby declares that the real property described in paragraph 1.2 below shall be held, transferred, sold, and conveyed subject to the conditions, restrictions, covenants,

reservations, easements, and charges (hereinafter collectively referred to as “Covenants”) set forth in this Declaration.” (CP 339). In turn, PPD §1.2 is clear that real property is the four Pickle Point residences and the Common Property. Thus, PPD §1.1. affects the Common Property regardless of its disposition, transfer or division because the Pickle Point Declaration as stated in PPD §1.3 was created for “the benefit of all the property subject to the PPD and for the benefit of each and every separate parcel of that property.” PPD §1.3. (CP 339).

To ensure this upscale aesthetic, the PPD’s Article 2 entitled “Restrictions on Use of Property by Occupants,” contains a host of restrictions on the way the Pickle Point Owners could actually use, build or reconfigure their individual property.<sup>7</sup> (CP 39-342). The PPD also gave the neighbors the authority to notify a neighbor of a failure to undertake necessary maintenance, and, upon a failure to address the issue, the Architectural Control Committee (discussed below) could undertake exterior maintenance on the neighborhood home and then assess that neighbor the cost incurred. PPD §2.14.<sup>8</sup> (CP 342). Finally, at PPD §2.15,

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<sup>7</sup> These restrictions cover issues, *inter alia*, ensuring that the four properties only have “one single detached single-family dwelling; and a private garage,” limiting the use of trailers, types of animals, fences, signs, length of construction, landscaping, open air clothes drying, and subdivision. (CP 339-40).

<sup>8</sup> PPD §2.14 states “Maintenance Notice/Assessment of Costs. When in the opinion of the Committee certain maintenance needs to be performed on a parcel or parcels, the Committee shall notify the Owner by certified mail specifying in said notice exactly what

there is an express *prohibition* against dividing any parcel, including the Common Property, into a smaller parcel: “Subdivision. No parcel shall be subdivided into smaller parcels without the written consent of all parcel owners.” PPD §2.15. (CP 342). Again, PPD §1.2 provides that all five parcels, including the Common Property are subject to the PPD. (CP 339).

As referenced above, the PPD also established an “Architectural Control Committee” (ACC) in Article 3. PPD §3.1. (CP 342). The ACC was composed of four people, one representative for each Pickle Point parcel owner. (CP 342). The ACC had specific criteria to consider when reviewing plans, *inter alia*, the “harmony” of the proposal in relation to the existing neighborhood as well as “the other effects of the proposal on surrounding property.”<sup>9 10</sup> (CP 339). Article 3 sets up basic procedures for the ACC. (CP 343-44).

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needs to be repaired or maintained. The Owner shall then have thirty (30) days from receipt of such notice to perform the necessary maintenance or to make written demand for a hearing before the Committee. If a hearing is demanded, the Committee shall set a date therefor and give the owner at least ten (10) days notice thereof. The hearing shall be informal and the rules of evidence shall not apply. The Committee shall render its decision in writing. The cost of such exterior maintenance actually performed shall be added to and become part of the assessment to which the parcel is subject.” (CP 342).

<sup>9</sup> PPD §3.4 states “Criteria. The Architectural Control Committee shall consider the following criteria in approving or rejecting the plans submitted to it: 3.4.1. The harmony of the external design, color, and appearance of the proposal in relation to the surrounding neighborhood, including the common exterior shingling which exist on the date hereof....3.4.3. The other effects of the proposal on surrounding property; including, but not limited to, potential view blockage. 3.4.4. The compliance of the proposal with the Covenants contained in this Declaration.” (CP 343-344).

<sup>10</sup> In addition to construction of structures, the PPD limits the rights of the Pickle Point Owners to build fences, hedges or cut trees or alter the vegetation on their property. PPD

4. The Pickle Point Declaration Sets Forth the Right of Each Parcel Owner to Use And Enjoy the Common Area and the Standard for Maintaining the Common Area.

In addition to the foregoing provisions, Article 5 of the PPD contains specific provisions which apply to the use and maintenance of the Common Property. In addition to PPD §5.1, which creates the standard for the maintenance provisions of Article 5,<sup>11</sup> the subsequent three provisions provide a means by which the ACC would also serve as an “Assessment Committee” which had the power and was required to issue assessments on the Pickle Point Owners and lien their property if the Pickle Point Owners did not pay according to the assessments the Assessment Committee issued for maintenance. PPD §§5.2, 5.3 & 5.4.<sup>12</sup> (CP 345).

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§§4.1-4.4. All of this was done to preserve the unique, open, and park like atmosphere of the neighborhood. (CP 315).

<sup>11</sup> PPD §5.1 Common Ownership. Each owner of a parcel within the property subject to this Declaration shall also own a common undivided interest in Parcel 5. This parcel shall be referred to herein as the common property. Each owner of a parcel shall have a right to use and enjoy the common property according to the nature of that property and subject to the restrictions contained in this Declaration. (CP 345).

<sup>12</sup> PPD §5.2 Creation of Lien and Personal Obligation. Each Owner of a parcel agrees to pay any and all assessments provided for in this section. These assessments, together with any interest or cost of collection shall be a continuing line upon the property which is the subject of such assessment. Each owner of a parcel shall also be personally obligated to pay the amount of any assessment levied against his property during the time that he is the owner thereof, together with any interest or costs of collection on that assessment. This personal obligation shall not be released by any transfer of the property to the effective date of the assessment. §5.3 Assessment Committee. The ACC shall be the Assessment Committee. This Committee shall establish rules and procedures for the fulfillment of its obligation. It shall hold meetings and establish regular and special assessments as provided for herein. §5.4 Purpose of Assessments. The assessments levied by the Committee shall be used exclusively to maintain the common property. (CP 345).

Sections 5.5 and 5.6 of the PPD give the ACC the power to make non judicial assessment liens to pay for “ordinary” and “extraordinary” maintenance.<sup>13</sup> (CP 345-6). An assessment for “ordinary” maintenance is required without more. (CP 345). However, “extraordinary” maintenance assessments require two votes of the Assessment Committee. (CP 346).

PPD §5.5 addresses the procedure by which the Assessment Committee is required to utilize its powers of assessment, levy and lien property to enforce its maintenance obligations. (CP 345-6). PPD §5.5 established that the Assessment Committee would issue regular assessments necessary for the “ordinary maintenance” of the Common Property.<sup>14</sup> PPD §5.5. (CP 345). The Assessment Committee could also levy special assessments if necessary. PPD §5.6.<sup>15</sup> (CP 346). PPD §5.6

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<sup>13</sup> Neither “extraordinary” nor “ordinary” are defined in the PPD.

<sup>14</sup>PPD §5.5 Regular Assessments. Once a year the Committee shall determine the amount of money necessary for the ordinary maintenance of the common property and the operation of the Committee. This amount will be equally divided among the parcels subject to this Declaration other than the common parcel, and notice of such assessment shall be given to each property owner in the manner prescribed by the Committee. The Committee. The Committee shall establish procedures for the payment of such assessments. (CP 345).

<sup>15</sup>PPD §5.6 Special Assessments. If the Committee determines that a special assessment is necessary for the extraordinary maintenance of or capital improvements to the common property, the Committee shall send a notice of special assessment to the owners of all parcels. This notice shall include a statement of the reasons such an assessment is necessary, the amount to be assessed, the method of payment proposed by the Committee, and the date and place for a meeting to discuss such a special assessment. This meeting shall be held no sooner than thirty (30) days from the date of notice of special assessment. The meeting will be conducted according to the rules adopted by the Committee, and the owner of each parcel shall be entitled to one vote for each parcel. Approval of a special assessment shall require consent of 50% of the Parcels excluding Parcel 5. (CP 346).

does not determine *what* maintenance is “ordinary,” but *only* the procedure the Assessment Committee must follow to utilize a nonjudicial assessment tool at their discretion and disposal. (CP 346).

PPD §5.7 further details the powers once the assessment and levy occurs. It grants authority to the Assessment Committee to not only lien the property, if necessary, but also to foreclose on a recalcitrant Pickle Point Owner who ignores their assessment. PPD §5.7.<sup>16</sup> (CP 346).

There is nothing in the PPD, nor was there any expressed intention to the contrary, that the Assessment Committee served any purpose other than to levy and enforce assessments for the maintenance of the Common Property.

5. The Southern Common Property has Not Been Maintained in Good Repair.

There is no disagreement between the Parties that the Common Property adjacent to the Dempcy Residence, the South Common Property, has not been maintained and is in dilapidated condition and repair.

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<sup>16</sup>§5.7 Enforcement. If any assessment is not paid according to the procedures established by the Committee, the amount of the assessment shall bear interest at the maximum legal rate and the Committee shall file a lien on the property subject to the unpaid assessment for the amount of the assessment plus interest. The Committee may bring an action at law to enforce payment of a delinquent assessment against the owner of record of the property subject to the unpaid assessment in order to recover the amount of the assessment, and the Committee may also take whatever measures are provided for by law to foreclose or collect on the lien filed on the property subject to the assessment. In the event of legal action to enforce or collect any assessment, the prevailing party shall be entitled to recover court costs, actual attorney’s fees, and the other expenses of litigation. (CP 346).

Respondent Avenius prepared a detailed report on the same, and concluded that the South Common Property required the installation of a new retaining wall to replace the collapsed retaining wall, installation of stairs to replace the rotted out ones, repair of the footings of the fence on the northwest corner of the tennis court, resurfacing and repainting of the tennis court, landscaping to remove blackberry bushes and other weeds and bring it up to the standard of the rest of the Pickle Point neighborhood. (CP 305; 355-65). Respondent Avenius has stated that the Tennis Court is a “safety risk to anyone entering the area” and that the Tennis Court “lowered the value of our properties.” (CP 357). The other Respondents acknowledge that the tennis court’s deteriorated condition represents a safety risk. (CP 367-8). In Respondent Avenius’ deposition he admitted that he planted a row of trees so that he could not see the tennis court from his house. (CP 406).

The Dempcys bear the burden of the disrepair to the Southern Common Property. Rick Franz, an experienced real estate agent and Dempcys’ expert witness attested via declaration:

“...I also believe that the Dempcys bear the vast brunt of the burden of this ugly eyesore. The Dempcy Property is the *only* property that abuts the Tennis Court and runs along its perimeter. Also, their driveway encircles it. The Dempcys have to look at this dilapidated eye sore every time they walk out of their house and every time they come home. Every one of their guests has to look at it as well. Unless a passerby knew about the Common

Property, the obvious assumption is that the Tennis Court is part of the Dempcy Residence. As such, the Tennis Court detracts and impacts from the value of the Dempcy Residence. In contrast, the other Pickle Point Neighbors are less impacted because they can simply drive by it, without much concern, as it is perched on a small hill and does not appear to be part of their residences.”

Franz Declaration, ¶7 (CP 270-72)

The effect on the Dempcys’ property value—indeed on the very enjoyment of their home—is at stake. (CP 270-72; 621-22). Repair of the South Common Property would enhance the South Common Properties’ value, and the value of the other Pickle Point residences. (CP 270-72).

6. The Respondents, through the ACC, have Maintained the North Common Property in Good Repair while Letting the South Common Property fall into Disrepair.

For years, the access road to the Respondents’ properties, which the Dempcys do not use, was dilapidated and remained in a poor condition. (CP 305). For instance, the access road was sloughing off to one side, a bank was collapsing, and there were several potholes. (CP 305). These poor conditions are all clustered north of the Dempcy Property. (CP 305).

In July 2013, Respondents, through the ACC, voted to and resurfaced their access road, installed a new retaining wall to support their access road, and planted new landscaping along this portion of the Common Property (North Common Property). (CP 305; 367). The

Dempcys have been assessed to help pay for these improvements. (CP 305-6).

The three Respondents, as members of the Assessment Committee, voted against levying an assessment to maintain the South Common Property in the same fashion as the North Common Property. (CP 306, 367-8). The Dempcys' access road was not resurfaced, the retaining wall which supports the hill next to Dempcys' access road was allowed to remain in a collapsed condition, the fence which is collapsing was not repaired and the surface of the tennis court stayed in a dilapidated and dangerous condition.<sup>17</sup> (CP 306). The Respondents did approve sweeping, pressure washing and trimming of the South Common Property. (CP 367). The record below contains no justification by the Respondents for maintaining the Northern Common Property commensurate with the Pickle Point Neighborhood and PPD §5.1 while allowing the South Common Property to remain in a dilapidated state. Mr. Shannon also agrees that the provisions for maintaining the tennis court have not been adhered to. (CP 105; CP 552).<sup>18</sup>

7. Respondent Shannon Prevented Appellants from Independent Efforts to Repair the Common Property.

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<sup>17</sup> Mr. Shannon agrees that the tennis court is "badly deteriorated." CP 105.

<sup>18</sup> "Q. The provisions for maintaining the common area, have they been followed or adhered to as far as the tennis court goes? A. No." Shannon Deposition. (CP 552).

On June 18, 2013, the Dempcys entered into a contract with Northshore Paving, Inc., an independent contractor, to resurface the tennis court. (CP 307, 319). On September 20, 2013, Respondent Shannon identifying himself as “Chair, Pickle Point Association,” sent a letter to Northshore stating that Northshore should not proceed with the resurfacing because the Association had not approved such work. (CP 368).<sup>19</sup> As a result of this letter, Northshore refused to honor its contract. (CP 307, 319).

8. The Dempcys Filed Suit to Remedy the Disrepair to the Southern Common Property.

The Dempcys filed a lawsuit to enforce the provisions of the PPD, invoking Section 6.1 of the PPD. (CP 1-16). Pertinent to this appeal, the Dempcys sought the following relief: (1) A declaratory judgment to enforce the covenants (First Cause of Action); (2) damages for breach of covenant (Third Cause of Action); (3) damages for tortious interference with a contract (Fourth Cause of Action). (CP 1-16). In response, the Respondents counterclaimed and brought an action, *inter alia*, to partition the Common Property under Washington’s partition statute RCW 7.52 *et. seq.* (CP 17-31).

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<sup>19</sup> The letter Mr. Shannon reads in part “I believe you continue to get request to pave or resurface the tennis court as part of the paving program on 94<sup>th</sup> Ave SE....The Association has elected not to make any improvements to the tennis court until a long range plan has been developed and approved.” Shannon Letter. (CP 368).

After discovery, both Dempcys and the Respondents filed cross motions for summary judgment which were heard on January 30, 2015. (CP 69-88; 225-250). The Trial Court judge denied the Dempcys' motion for summary judgment. (CP 715-718). The Trial Court judge then granted Respondents' partial motion for summary judgment, resulting in: (i) an order of partition pursuant to Washington's Partition statute RCW 7.52 *et. seq.*; (ii) an Order dismissing with prejudice the First, Third and Fourth Causes of Action; (iii) an Order of attorneys fees for the Respondents. (CP 719-723). The Trial Court requested supplemental facts from the Respondents, and entered them on February 18, 2015. (CP 721; 724-25).

The Trial Court's rulings on summary judgment did not resolve the dispute regarding the Dempcy's claim of PPD §2.6 violations against the Aveniuses. (CP 719-23). These issues were not considered by the Trial Court at summary judgment, but were reserved for trial. (CP 719-23).

The Dempcys filed a timely appeal pursuant to a CR 54(b) finding of no just reason for delay for immediate appeal and RAP 2.2(d), and the trial court stayed all other matters regarding the Common Property until final appellate review. (CP 726-34; 751-56; 757-62). The Trial Court's CR 54(b) findings set forth four legal orders/findings of which the

Appellants assign error and this brief addresses. (CP 751-6).<sup>20</sup> Although all issues regarding the Common Property were stayed pursuant to the concurrent order entered by the trial court, the issues between Plaintiff and Defendant Avenius were assigned for trial before the Hon. Chad Allred on the week of May 18, 2015.<sup>21</sup> Here, Judge Allred ruled that fences and hedges maintained by Respondent Avenius violated Section 2.6 of the PPD, but that other smaller obstacles did not.<sup>22</sup> The Dempcys believed that they should have been deemed the prevailing party and entitled to their attorney fees pursuant to PPD §6.1. (FN 44). However, the trial court disagreed and held that since *all* of the plantings, fences and other

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<sup>20</sup> Pursuant to the Partial Final Judgment Certified Pursuant to CR 54(b) For Appeal” The first order in error reads as follows: “1. Defendants’ Motion for Partial Summary Judgment is granted, dismissing with prejudice the First, Third and Fourth Causes of Action in the Plaintiffs Amended Complaint and dismissing with prejudice any claims by the Plaintiffs for damages arising from these causes of action.” The second order in error reads as follows: “2. The Common Property shall be partitioned. A referee shall be appointed to determine the manner of partition, by sale, physical division and/or the amount of compensation to be paid to any Party to assure equitable treatment. To the extent that the physical division of the Common Property may create inequities of value between the tenants-in-common, the referee to be appointed can determine “compensation to be made by one party to another on account of the inequality of partition” under RCW 7.52.440.” The third order in error reads as follows: “3. A declaratory judgment is entered determining that at least two owners of the ACC must make any decision regarding any special assessments for the extraordinary maintenance costs of repairing the Common Property and tennis court, as sought by Plaintiffs in this action.” The fourth order in error reads as follows: “4. Pursuant to Section 6.1 of the CC&R’s, the Plaintiffs shall pay the Defendants’ reasonable attorney fees, court costs and other expenses of the litigation relating to the CC&Rs, the amount of which shall be determined at the time of final appellate adjudication or unless good cause is shown.” (CP 751-2).

<sup>21</sup> Trial on these issues took place after Clerks Papers Ordered. Appellants will reorder and supplement the Clerk’s Papers, to provide the Post-trial Memorandum Order issued by Judge Allred.

<sup>22</sup> See, note 21.

obstacles alleged by the Dempcys did not violate Section 2.6, there was actually no prevailing party under Section 6.1 of the PPD. The Dempcys have appealed Judge Allred's ruling only with respect to attorneys fees.<sup>23</sup>

#### D. SUMMARY OF ARGUMENT

The Trial Court's order requiring partition of the Common Property is erroneous for any one of the following three reasons: (a) Respondents are subject to an agreement which prevents, explicitly and implicitly, partition. Thus, they are estopped and/or have waived that right; (b) Respondents are subject to an agreement which prohibits partition of the Common Property; and (c) Partition in this case would violate Appellants' equitable rights.

The Parties are subject to recorded agreements which require that the Common Property be maintained in a condition so that it can be used and enjoyed according to its nature by those benefitting from that agreement. The Common Property has not been maintained in this condition and there is no provision in any recorded agreement which allows a majority to decide not to maintain the Common Property in such condition.

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<sup>23</sup> As of the filing of this brief, Appellants are awaiting notice from this Court regarding its appeal of J. Allred's Order.

Respondents are required to reimburse Appellants for their costs of maintaining the common property pursuant to agreements between them, or if it is found that such improvements were necessary or increased the value of the Common Property. Any tenant in common has the right to maintain a common property if such maintenance does not interfere with the use of such common property by the other tenants. Such interference has not been claimed. Respondents' interference with Appellants' efforts to maintain the Common Property has damaged Appellants in an amount to be proved at trial.

Finally, Appellants should be awarded their fees and costs as the prevailing party under agreements between the Parties after full adjudication of prevailing party attorney fees for the entire lawsuit.

#### E. ARGUMENT

1. ORDERS FOR PARTIAL SUMMARY JUDGMENT ARE SUBJECT TO DE NOVO REVIEW AND BASIC RULES OF CONTRACT INTERPRETATION APPLY TO THE COURT'S REVIEW OF RESTRICTIVE COVENANTS.

When reviewing a grant or denial of summary judgment, the appellate court engages in the same standard as the trial court and conducts a de novo review. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530–31, 70 P.3d 126 (2003). A motion for summary judgment is granted when there is no genuine issue as to any material fact, and the movant is

entitled to judgment as a matter of law. CR 56(c). Facts and reasonable inferences are construed in the light most favorable to the nonmoving party. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993). Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan County Deputy Sheriffs Ass'n v. Chelan County*, 109 Wn.2d 282, 745 P.2d 1 (1987).

The interpretation of a restrictive covenant is also a question of law, subject to de novo review. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). Basic rules of contract interpretation apply. *Id.* Reviewing courts must generally give words in a covenant their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). A court will not read ambiguity into a contract “where it can reasonably be avoided.” *Id.* (citing *McGary v. Westlake Investors*, 99 Wn.2d 280, 285 (1983)); *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995) (A provision is not ambiguous merely because the parties suggest opposing meanings). Also, the “primary goal in interpreting covenants that run with the land is to determine the drafter's intent and the purpose of the covenant at the time it was drafted.” *Bauman v. Turpen*, 139 Wn. App. 78,

86, 160 P.3d 1050 (2007). Where homeowners disagree as to the interpretation of restrictive covenants, “courts should place special emphasis on arriving at an interpretation that protects homeowners’ collective interest.” *Ross v. Bennett*, 148 Wn. App. 40, 50, 203 P.3d 383 (2008), *as amended* (Jan. 27, 2009).

The trial court decided as a matter of law that (i) partition was authorized under RCW 7.52 *et. seq.*, without comment to the defenses against partition both contractual and equitable;<sup>24</sup> (ii) the Respondents had no obligation to repair and maintain the South Common Property;<sup>25</sup> (iii) Mr. Dempcy had no right to repair and maintain the South Common Property—irrespective of a right of contribution from his co-tenants;<sup>26</sup> and (iv) the Respondents were not subject to liability for interfering in Mr. Dempcy’s rights to repair and maintain the South Common Property.<sup>27</sup>

The Dempcys believe that the foregoing should have been decided in their favor under a summary judgment standard. It is clear from reading the 1968 deed Covenants and the PPD that the primary goal of the originating parties in preparing these documents was to maintain the parcels in excellent condition and repair, and to prevent the parcels from being divided.

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<sup>24</sup> CP 724-25.

<sup>25</sup> CP 721-23; 724-25; 721.

<sup>26</sup> CP 721-22.

<sup>27</sup> CP 721-22.

To the extent that the Court also determined that there were issues outside the 1968 Covenant and the PPD that could be resolved on summary judgment, it was required to apply the standard that “reasonable persons could reach only one conclusion.” *Bennett*, 148 Wash. App. at 49 (2008)(citing, *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26 (2005)). However, reasonable minds could not only reach the conclusion of the Trial Court as a matter of law. Indeed, the Dempcys, contend that reasonable minds should reach a different conclusion—theirs.<sup>28</sup>

2. THE DEMPCYS ESTABLISHED THAT *CARTER’S* EXCEPTIONS TO THE RIGHT OF PARTITION UNDER RCW 7.52 APPLY.

Tenants in common have a right to partition as set forth in RCW 7.52.010.<sup>29</sup> However, the law recognizes exceptions to the right to partition. *Carter v. Weowna Beach Community Corp.*, 71 Wn.2d 498, 502, 429 P.2d 201 (1967). There are three distinct limitations to the right of partition set forth in RCW 7.52.010, which are reviewed below in (a) and (b).

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<sup>28</sup> Or, at very least, that genuine issues of material fact remain.

<sup>29</sup> RCW 7.52.010. “When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be maintained by one or more of such persons, for a partition thereof, according to the respective rights of the persons interest therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.”

a. Appellants Established that the Respondents Waived their Right to Partition by Agreement and that Partition would Violate at Least One Restrictive Covenant.

Tenants in common can be estopped from exercising their right to partition if they have an agreement preventing the same. *Carter v.*

*Weowna Beach Community*, 71 Wash.2d 498, 502 (1967).

[W]he[n] a cotenant, by his own acts, is estopped or has waived his right by express or implied agreement; or where his cotenant's equitable rights will be minimized or defeated; or in violation of a condition or restriction imposed upon the estate by one through whom he claims.

*Carter*, 71 Wash.2d at 502 (1967).

The rule applies whether the covenant is in a deed or by agreement between the tenants in common. *Reilly v. Sageser*, 2 Wn. App 6, 10-11, 467 P.2d 358 (1970); *Washington Pulp & Paper Corp. v. Robinson*, 166 Wash. 210, 216, 6 P.2d 632 (1932); *Ortmann v. Kraemer*, 190 Kan. 716, 717, 378 P.2d 26, 28 (Kan. 1963). If the purpose for which the property was acquired would be defeated by partition, the Court may imply an agreement not to partition. *Huston v. Swanstrom*, 168 Wash. 627, 632, 13 P.2d 17 (1932).

In *Carter*, the proscriptive language preventing partition was contained within a deed from the original grantor: "To the joint and common use, pleasure and benefit of said private community park by the several owners... ." *Carter*, 71 Wash.2d at 502 (1967). After the *Carter*

plaintiffs purchased their properties, they sought to partition the undeveloped track and use it free and clear of any restriction upon the use of the tract as a private park. *Id.* at 498. The trial court dismissed the plaintiffs' action with prejudice, and the Washington State Supreme Court affirmed. *Id.* The Court reasoned that the plaintiffs would not invoke partition, "in violation of their own agreement and the restrictions imposed on the estate by the original grantor through who they claim." *Id.*

Applying the contract and restrictive covenant exceptions to the current dispute, the Respondents are estopped from invoking partition. Respondents are parties to the PPD, which prohibits partition contractually and by restrictive covenant. The PPD is similar in language and scope to the covenant in *Carter* which provided the right of the tenants in common to avoid partition. Section 5.1 of the PPD provides: "Each owner [of a Pickle Point parcel] shall have a right to use and enjoy the common property according to the nature of that property." PPD §5.1. Since the parties have entered into an agreement that each parcel owner has the right to use and enjoy the whole of the common area, they are estopped from partitioning the property which would have the effect of depriving a parcel owner of such use and enjoyment. It is critical to understand that this right is a result of being a neighbor of Pickle Point and owning one of the four residences, not solely by virtue of co-owning the Common Property.

Additionally, the parties waived their right to partition by agreeing that all parcel owners must consent to the division of any parcel into smaller parcels. Section 2.15, labeled “Subdivision” provides that “[n]o parcel shall be subdivided into smaller parcels without the written consent of all parcel owners.”<sup>30</sup>). There is no way to partition the Common Property because the PPD forbids the same.

Further, any sale, division or other transfer of the Common Property in a partition action would frustrate the intent and effect of the 1968 Covenant and the PPD which arise not from owning the Common Property as a tenant in common, but actually arise from ownership of a residence. More importantly, the partition the Respondents seek would be purely hollow and accomplish nothing because the Common Property would still be subject to the 1968 Covenants and PPD and the rights of the four (4) Pickle Point neighbors no matter what its disposition. Section 1.1 of the Declaration provides, in part: “Declarant hereby declares that the real property described in paragraph 1.2 below shall be held, transferred, sold, and conveyed subject to the conditions, restrictions, covenants,

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<sup>30</sup> Respondents may argue that since the caption stated “Subdivision,” §2.15 should be interpreted not in a generic sense, but as a exactly technical term to apply to the Bellevue Ordinance on platting property and therefore the section was irrelevant to a partition action under RCW 7.52. As Appellants raised below, Section 6.4 of the Declaration provides that captions cannot be used when interpreting the intent of the parties to the Declaration. Therefore, the word “Subdivision” could not be used to limit the meaning of the section.

reservations, easements, and charges (hereinafter collectively referred to as “Covenants”) set forth in this Declaration.” Section 1.3 provides in part: “The Covenants shall inure to the benefit of, shall burden, and shall pass with the property and each and every parcel thereof, and shall apply to and bind the owners of the property subject to these Covenants, their legal representatives, heirs, successors, and assigns in perpetuity.” PPD §5.1 provides “Each owner shall have a *right to use and enjoy* the common property according to the nature of that property... .” All these would continue to exist after a partition action—regardless if the Common Property was sold or divided amongst the neighbors.

Thus, the 1968 Covenant and PPD §§1.1, 1.3 and 5.1 provide the right of *each neighbor* to use the whole of the Common Property—which they obtained by being a neighbor of Pickle Point. These rights, secured by contract and covenant, would not disappear upon partition. By implication, even if the Common Property was subdivided, any subdivided property or any purchaser at an ordered partition sale would also be subject to rights/obligations of the four Pickle Point Neighbors set forth in 1968 Covenant and the PPD.<sup>31, 32</sup> There is no grounds to extinguish these

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<sup>31</sup> For example, the Pickle Point Neighbors would still have a “right to use and enjoy the common property” by dint of being an “owner of a parcel” per the PPD § 5.1. They would also have an obligation to construct and maintain a tennis court per the 1968 Covenant as a successor to the Grantees who undertook this obligation.

wholly separate rights/obligation as an *owner* of a home in the Pickle Point Neighborhood to use the entire Common Property (including the tennis court) and partake in its upkeep.

*b. Partition would Minimize or Defeat Appellants' Equitable Rights.*

Partition is improper if it would compromise a cotenant's equitable rights. *Carter v. Weowna Beach Community Corp.*, 71 Wn.2d 498, 500, 429 P.2d 201 (1967)(citing *Leinweber v. Leinweber*, 63 Wn.2d 54 (1963) and 40 Am. Jur. Partition § 83, p. 72).

In *Carter*, the original grantor of a large piece of land partitioned his property into two tracts—Tract 1 and Tract 2. *Id.* at 499. Tract 1 “was made up of 81 residential lots and bounded on the east by [Lake Sammamish] and [bordered] on the west by Tract 2.” *Id.* Tract 2 “was not divided into lots but rather [the Grantor] deeded to each [of the 81 residential lot owners] a one-eighty-first part and share of tract 2.” *Id.* The purpose was to have Tract 2 serve as a “private community park” by the owners of the eighty one (81) residential lots in Tract 1 *Id.* The owners of Tract 1 kept Tract 2 “in its native state and is used for hiking, picnicking

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<sup>32</sup> These deeds provide that the obligation to maintain the Common Property arises from the residence ownership, not from the common Property ownership. Not only would the Common Property be subject to the rights of the Pickle Point Neighbors, but, the Pickle Point Neighbors, by nature of owing a Pickle Point residence, would be obligated to maintain the landscaping of the common area and the obligation to contribute 25% each to the cost of maintaining the tennis court on the Common Property.

and other forms of recreation.” *Id.* Some of the eighty one (81) owners brought an action for partition under RCW 7.52 *et. seq.* and called for a sale “free and clear of deed restrictions.” *Id.* The trial court denied the action, holding that:

[S]ale of tract 2 free and clear of deed restrictions would be inconsistent with the intention of the original grantor, and would be contrary to the deeded interests of the purchasers to use the entire tract subject only to the rights of the 80 others to use it similarly.

*Carter* at 501.

The Washington State Supreme Court affirmed this ruling. First, *Carter* stated that the original deeds setting forth the nature of the Common Property memorialized the “grantor’s intention.” *Id.* *Carter* then simply stated that the owners took the property with the knowledge of what was on the chain of title.<sup>33</sup> *Carter* is not unique. In other jurisdictions, courts have declined to impose partition if it would violate the rights and privileges of a tenant in common to use and enjoy a common area. *See e.g., Weiner v. Pierce*, 203 So.2d 598, 603 (Miss. 1967) (ruling that partition was unavailable, because both the deed and the contract show a purpose to retain the service areas for the common use and benefit of the owners of the lots.); *Pine v. Tiedt*, 232 Cal.Ap. 2d 733,

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<sup>33</sup> *Carter* at 502 (“The plaintiffs in the instant case purchased their property with full knowledge of the rights and privileges of the other purchasers. They may not now claim the absolute right to sell the property in a manner destructive of these rights and in violation of their own agreement and the restrictions imposed on the estate by the original grantor through whom they claim.”).

43 Cal. Rptr. 184 (1965) (agreement to postpone partition implied when partition would frustrate the purpose for acquiring property); *Rosenberg v. Rosenberg*, 413 Ill. 343, 108 N.E.2d 766 (1952) (agreement not to partition implied in order to fulfill agreement of parties); *Hunt v. Meeker County Abstract & Loan Co.*, 128 Minn. 207, 150 N.W. 798 (1915) (right to partition suspended to extent necessary to avoid defeating purpose of the contract); *Kavann Properties, Inc. v. Cox*, 268 N.C. 14, 149 S.E.2d 553 (1966) (agreement not to partition implied where partition would defeat purpose of the agreement); *Prude v. Lewis*, N.M. 256, 430 P.2d 753 (1967) (partition denied when it would violate agreement between parties on joint use of land); *Raisch v. Schuster*, 47 Ohio App.2d 98, 352 N.E.2d 657 (1975) (covenant not to partition will be implied where partition would nullify an underlying agreement); *Braaten v. Braaten*, 278 N.W.2d 448 (S.D. 1979) (agreement to waive partition implied in prior agreement concerning use of property).

Applying the court's reasoning in *Carter* to the instant case, partition of the Common Property would be inequitable and inconsistent with the intent of the Grantors. The Grantors (Mueller/Overly) created the Common Property. This was the Grantors' discretionary choice to create a community park. The Common Property's *very creation* evidences the Grantors' intent and justifies its importance and continued existence. The

Common Property was created for the very purpose of having an open recreational Common Property. The Grantors created a Common Property with an unambiguous purpose to have a neighborhood tennis court, open space with landscaping, and have all four neighbors partake in its upkeep.

Further, like the park in *Carter*, the Common Property does not just exist in a vacuum, but its existence and proper upkeep is also a separate benefit of each of the home owners in the Pickle Point Neighborhood which was reaffirmed some 20 years later in PPD § 5.1. The Dempcys have presented substantial evidence that their equitable rights—as a Pickle Point neighbor—would be extinguished by partition. At minimum, material issues of fact remain as to whether partition would destroy the Dempcy’s equitable rights as a Pickle Point neighbor to use and enjoy this fundamental feature of the neighborhood.

3. AS A MATTER OF LAW, ALL PARTIES HAVE A CONTRACTUAL PRO RATA SHARE OF THE OBLIGATION TO MAINTAIN AND REPAIR THE COMMON PROPERTY AND THIS OBLIGATION IS ENFORCEABLE BY ANY OTHER PARCEL OWNER.

The Trial Court determined, erroneously, that maintenance of the Common Pract including the tennis court require a vote of at least two owners of the Property “under Section 5.6 of the CC+Rs.” Two aspects of the trial court’s findings regarding Section 5.6 are not supported by the

law or the facts: (1) that Section 5.6 applies; and (2) that Section 5.6 requires two votes from the four tenants before maintenance is required.

First, the record does not support a finding that repair of the South Common Property would constitute “extraordinary maintenance” or “capital improvements” so as to implicate Section 5.6 of the PPDs, and to support the Declaratory Judgment entered by the Trial Court. (*See*, CP 721-22). Respondents conceded in oral argument that material issues of fact remained regarding the characterization of the requisite maintenance, necessitating an evidentiary hearing. RP 21:4-23:19. The materiality of unresolved fact questions concerning the nature and character of the necessary repairs is evident, because Section 5.5 requires the ACC to assess, without regard to votes, for all “ordinary” maintenance. Appellants maintain that the PPD itself indicates what is “ordinary” and that is such maintenance as is required to meet the standard set forth in Section 5.1. This would be such maintenance as is required to allow the use and enjoyment of the common area by keeping existing improvements in good condition and repair. However, if the meaning of “ordinary” cannot be gleaned from the document, then testimony should be required at trial to determine from experts what maintenance is “ordinary” with respect to a tennis court. “It is axiomatic that on a motion for summary judgment the trial court has no authority to weigh evidence or testimonial credibility[.]”

*No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.*, 71 Wn. App. 844, 854 n.11, 863 P.2d 79 (1993).

Second, in applying Section 5.6, the Trial Court mistakenly conflated a *right to assess* with the *obligation to maintain*. By their ordinary meaning, Sections 5.6 of the PPD gives the tenants in common through an Architectural Control Committee (ACC) the power to *assess* the tenants for capital and other maintenance that is not otherwise required by the PPDs. Section 5.6 provides a procedure which the Architectural Control Committee must follow to make assessments for capital and other maintenance that is not otherwise required under the PPD. To exercise this additional assessment power, notice has to be given so that tenants can discuss the need for such an assessment. The provision does not permit the Respondents to reduce their obligations. Even if they elect not to assess themselves to maintain the Common Property, the obligations in their agreements remain and can be enforced under Section 6.1. Indeed, once the parties are in court of law to determine their rights, the need to assess and create a nonjudicial lien by the Assessment Committee is obviated. The fact that Respondents are unwilling to utilize the tool of a nonjudicial assessment, does not mean that they may avoid the obligation to maintain

the common area in good condition and repair under the various agreements to which they are subject.<sup>34</sup>

The obligation to maintain the Common Property cannot be altered at the Respondents' whim. The maintenance which "the Plaintiffs sought"<sup>35</sup> was the maintenance required by the 1968 Covenants and the PPD in order to comply with 1968 Covenant and Section 5.1 thereof (so that each tenant could "use and enjoy the common property according to its nature"). An examination of the Covenant and the PPDs shows that this basic obligation is not subject to majority vote or interpretation to the contrary. Indeed, there is no provision in the PPD that says that the agreements set forth in Section 5.1 don't apply unless two of the tenants agree that they should apply. There is no provision for the ACC to construe and interpret which would permit one portion of the Common Property to remain deteriorated. See *Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190 (2003)(Interpretations" of covenants are limited to the text.). The law limits the ability of a majority of landowners to

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<sup>34</sup> *To wit*, (i) The 1968 Covenants which require the contributions from each of the Pickle Point Neighbors to maintain the landscaping and tennis court on the Common Property; (ii) PPD 5.1 which sets the standard requiring that *each* Pickle Point Neighbor, by dint of owning a home in the Pickle Point Neighborhood, has the right to "use and enjoy" the common area "according to its nature"; (iii) Washington' tenancy in common law which allows a tenant in common to make repairs or improvements to the Common Property and receive reimbursement if the repairs and improvements are necessary or enhance the value of the Common Property.

<sup>35</sup> CP 722.

implement covenants on a minority, *even where* those covenants expressly permit the landowners to make amendments by majority. *Meresse v. Stelma*, 100 Wn.App. 857, 999 P.2d 1267 (2000). In *Meresse*, subdivision covenants allowed a majority of the lot owners to change or alter the covenants. *Meresse*, 100 Wn. App. at 859. The majority of lot owners voted to override the minority owner, Meresse, and relocate the access road onto his property by characterizing the action as “maintenance, repairs” or “additional construction on the road,” which did not require unanimous approval. *Id.* at 867. The court held that language of the covenants did not place Meresse on notice that he might be burdened, without consent, by road relocation “at the majority’s whim.” *Id.* at 866-67. The court held that the amendment was invalid and the homeowners did not act in a “reasonable manner consistent with the general plan of development.” *Id.* at 865.

Where, as in this case, the crux of the dispute concerned the implementation of covenants affecting the common property of a tenancy in common, the majority cannot “rewrite” covenants against the wishes of even one person benefitting from a covenant. *See Messett v. Cowell*, 194 Wn. 646, 659 (1938), *partially superseded on other grounds by* RCW

36.35.290.<sup>36</sup> Indeed, *Messett* even went so far as to rule that so long as one cotenant is bound/benefited by a covenant affecting the land, all cotenants are bound by the same covenant if the covenant affects the entire property or would disturb that co-tenant's rights. That is because each cotenant in a tenancy in common owns his share as a separate estate.

Finally, material questions of fact remain as to whether the ACC actually ever interpreted the PPD §5.6. The original minutes for the pertinent meeting did not contain any evidence of interpretation. (CP 306; 367-8). The Dempcys only learned about minutes with an interpretation provision during depositions in November 2014. (CP 306; 316-17; 367-8; 391-92). If the minutes were amended at a later meeting, the Dempcys were not given the required notice of such a meeting and therefore the amendment would not be valid.

4. AS TENANTS IN COMMON, APPELLANTS HAVE THE RIGHT TO MAINTAIN THE COMMON PROPERTY AND SEEK A RIGHT OF CONTRIBUTION FROM THE RESPONDENTS.

a. *As a Matter of Law, Appellants Have the Right to Maintain the South Common Property.*

The law in Washington is that each tenant in common has the right to maintain a common property if such maintenance does not interfere with use by the other tenants, and no agreement exists which prohibits such maintenance. *In re Foreclosure of Liens*, 130 Wn.2d 142, 148, 922

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<sup>36</sup> The portion of *Messett* that was superseded by statute, RCW 36.35.290, involves the elimination of easements by tax foreclosure.

P.2d 73 (1996), *Butler v. Craft Eng Const. Co.*, 67 Wn. App. 684, 695, 843 P.2d 1071 (1992). In accordance with this rule, the trial court should not have interfered with the Dempcys' rights as tenants in common to maintain the Southern Common Property even if the Assessment Committee did not assess the parcel owners to do so. There is no dispute that (i) the Dempcys are Tenants In Common with the Respondents (ii) the South Common Property has dilapidated to the point where it is a possible safety hazard and it is in need of maintenance and (iii) the 1968 Covenant requires that the Tenants In Common "maintain the common area" with the tennis court. The Respondents presented no evidence that maintenance of the Southern Common Property would interfere with their use.<sup>37</sup> There is no agreement between the tenants which would prohibit such maintenance. Indeed, such maintenance is required to meet the maintenance standards set forth in Section 5.1 and to "protect the homeowners' collective interest." *See, Ross*, 148 Wash. App. at 50 (2008).

b. *As a Matter of Law, Appellants Have the Right to Seek Pro Rata Contribution from the Respondents for Maintaining the South Common Property, Irrespective of the PPDs.*

The law in Washington is that a co-tenant in a tenancy in common who makes repairs to common property which are necessary or increased the value of the property is entitled to pro rata reimbursement. *In re Foster Estate*, 139 Wash. 224, 227, 246 P. 290 (1926); *Cummings v. Anderson*, 94 Wn.2d 135, 144, 61 P.2d 1283 (1980); *Yakavonis v. Tilton*, 93 Wn. App 304, 313, 968 P.2d 908 (1998); *Womach v. Sandygren*, 107

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<sup>37</sup> Respondents asserted below only that they were not interested in playing on the tennis court, and considered replacing it with a greenbelt. (CP 81-82).

Wash. 80, 84, 180 P. 922 (1919). This right stems from the principle that, regardless of the size of its undivided fractional share, a co-tenant has a co-equal right to the possession, use, and enjoyment of the whole of the property, the only limitation being that it must exercise its right so as not to interfere with the co-equal rights of the other cotenants. *Butler*, 67 Wn. App. at 695 (1992); *Messett v. Cowell*, 194 Wn. 646 (1938). If one co-tenant pays more than his share of certain items necessary to preserve the land for all, the others are liable to reimburse him for their pro rata shares of the excess amounts he has paid. 17 Wash. Prac., Real Estate § 1.31 (2d ed.); *McKnight v. Basilides*, 19 Wn.2d 391, 143 P.2d 307 (1943); *In re Foster's Estate*, 139 Wash. 224 (1926); *Stone v. Marshall*, 52 Wash. 375, 100 P. 858 (1909).

The right to pro rata contribution is available provided that the improvements were necessary or increased the value of the property. *In re Foster's Estate*, 139 Wash. at 227 (1926). In *Foster's*, one cotenant in common (Paying TIC) brought an action against her cotenant in Common (Nonpaying TIC) for one-half the amount the Paying TIC paid for improvements on the property that they owned as cotenants in common. *Id.* The *Foster's* Court explained “the rule is well established that improvements placed upon property by one cotenant may not be charged against the other cotenant, unless it appears that the improvements were

either necessary or were an actual enhancement of the value of the property.” *Id.*; *Cummings*, 94 Wn.2d at 144 (1980). The Court can review the types of improvements which were deemed to give right to an action for contribution. *Fritch v. Fritch*, 53 Wn. 2d 496, 501, 335 P.2d 43 (1959).

In regards to repairs, Washington has explicitly held “a co-owner, is responsible for his share of the necessary property maintenance expenses throughout his tenure of ownership.” *Yakavonis v. Tilton*, 93 Wn. App. at 313 (1998). *Womach* also implies that “expenses and repairs that enhanced the value of the property” are compensable, pro-rata, by the tenants in common. *Womach v. Sandygren*, 107 Wash. at 84 (1919). Indeed, multiple states have held that repairs should be deemed “necessary” when they are consistent with the use and enjoyment of the property according to the nature of that property. For instance, In *Gillmor*, a rancher was deemed to have a compensable claim for “installing a range fence and a ditch” which was consistent with sheep grazing and a “necessary cost of grazing the livestock” which is what the property was intended for. *Gillmor v. Gillmor*, 694 P.2d 1037, 1041 (Utah 1984). In *Litzelswope*, a “reasonable repair” to a co-owned easement was deemed to related to “the enjoyment of the easement and the injurious effect on other co-owners” and deemed repairs installing steps and installing a culvert and retaining wall (to avoid erosion) to be “reasonably necessary for their

enjoyment of the easement.” *Litzelswope v. Mitchell*, 451 N.E.2d 366, 370 (Ind. Ct. App. 1983). In *Reynolds* two co-tenants disputed whether a land should be restored after a fire so as to continue livestock auctions after a fire. *Reynolds v. Haynes*, 425 S.W.2d 29, 33 (Tex. Civ. App. 1967). One cotenant refused to participate in cleaning up after a fire. The Court sided with the cotenant who wanted to restore the property and agreed that “clearing the premises at the location where the fire occurred” was “necessary for the property preservation of the property.” *Id.*

Here, there was no dispute that repairs and maintenance to the South Common Property are “necessary” and would “enhance the value of the [Common] property.” (CP 270-72; 357). Appellant’s presented substantial evidence that the South Common Property including the tennis court has dilapidated to the point where the Pickle Point Neighbors now wish to “lock it up” because of safety concerns. (CP 367-8). Repair is also necessary to comply with the 1968 Covenants, and the tennis court cannot be used or enjoyed without the improvements. *See* PPD §5.1. Appellants also presented substantial evidence that maintenance and repairs would enhance the value of the Common Property. (CP 270-72). Indeed, the evidence shows that the condition of the South Common Property is reducing adjacent property values. (CP 270-72).

As a matter of law, the Dempcys have a right to make improvements and the neighbors are obligated to contribute. This matter should be remanded for trial to determine the amount that is necessary to restore the common area to good condition and repair and the contribution that each party is required to pay therefor.

5. RESPONDENTS ARE NOT IMMUNE FROM LIABILITY FOR ANY DAMAGES ARISING FROM THEIR INTERFERENCE WITH THE DEMPCYS' CONTRACT TO MAINTAIN AND REPAIR THE COMMON PROPERTY.

The PPDs provide that the neighbors are only immune from “personal liability” in the context of “any action by or decision of the Committee.” PPD §3.6.<sup>38</sup> The Appellants presented a claim of tortious interference with a contract based on substantial evidence that Respondent Mr. Shannon interfered with a private contract to repair the tennis court. (CP 8-16). There is no dispute that Mr. Shannon’s letter was written without (i) a convening of the ACC (ii) any semblance of being done under the auspices of the ACC or (iii) any notice to Dempcy. As such, this was not “action by or decision of the [ACC].” By the plain terms of the PPD, one cannot act on behalf of the ACC without giving notice to the

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<sup>38</sup> PPD §3.6 states: “No Liability. The members of the Architectural Control Committee shall have no personal liability for any action by or decision of the Committee. The owner of that property agrees and covenants not to maintain any action against any member of the Architectural Control Committee which seeks to hold that member personally or individually liable for damages relating to or caused by any action or decision by the Committee.” (CP 343-44).

ACC members of an intended decision or action. Since this act unfolded outside of the ACC, the protective provisions of PPD § 3.6 do not apply. Since the Dempcys presented substantial evidence that Respondents interfered with Dempcys' efforts to repair the common area, and since, as a matter of law, PPD § 3.6 does not inoculate the Respondents, Summary Judgment should be reversed, and this matter should be remanded for the Trial Court to weigh the evidence and assess damages for the contract interference.

6. THE RESPONDENTS ARE LIABLE TO THE APPELLANTS FOR THEIR ATTORNEY FEES.

The Trial Court's award of attorney's fees to Respondents "[p]ursuant to Section 6.1 of the CC&Rs," was erroneous; the Dempcys should be designated as the "prevailing party" under Sections 5.1, 6.1, and 2.15 of the Declaration.

Appellants maintain that they should be the substantially prevailing party after appellate adjudication. Second, the Dempcys' claims enforce their rights under the 1968 Covenant and tenant in common law. The PPD has an "attorney fees" provision, but "enforcing" the PPD was not necessary.<sup>39</sup> The 1968 Covenant does not have an attorney's fee

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<sup>39</sup> PPD 6.1 states "Enforcement. Any owner of property within the property subject to this Declaration shall have the right to enforce the Covenants contained in this Declaration through an action at law or in equity. The Architectural Control Committee shall also have the right to bring such action in its name. The prevailing party in any

provision, nor does Washington tenant in common law provide for attorney's fees in this dispute.<sup>40</sup> There is no basis for granting attorney fees for any issue related to the 1968 Covenant or common law. Third, under RCW 7.52.480 there are two mentions of attorney fees—neither of which are applicable here.<sup>41</sup> Fourth, regardless of all else, the Dempcys prevailed on their claims related to the enforcement of Section 2.6 of the PPD against Avenius. The Trial Court should not have ruled on attorney fees until all issues regarding the PPD were resolved. Thus, Order #4 was premature. To that end, the Dempcys maintain that they were the prevailing party at trial in relation to the PPD and that Judge Allred applied an incorrect standard as to who was the prevailing party considering the substantial rulings in the Dempcys' favor.

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action brought to enforce the Covenants contained in this Declaration shall have the right to collect attorney's fees, court costs, and other expenses of litigation, in addition to any damages which may be awarded."

<sup>40</sup> Neither does the Easement under King County Recorders Number 6409013 which is also subject to this lawsuit.

<sup>41</sup> "RCW 7.52.480 The cost of partition, including fees of referees and other disbursements including reasonable attorney fees to be fixed by the court and in case the land is ordered sold, costs of an abstract of title, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the decree. In that case there shall be a lien on the several shares, and the decree may be enforced by execution against the parties separately. When, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them." The first mention of attorney fees refers to the transactional costs inherent in a partition and that such attorney fees are to be divided amongst the parties like the fees of the referees. The second mention refers to litigation but it does not apply to the circumstances here.

In sum, the Dempcys first believe they are the prevailing party. However, even if they are not designated the prevailing party, there should be no award of attorney fees until their appeal on of Judge Allred's order denying attorneys' fees is resolved. The Dempcys appealed the Trial Court's order that they were not the prevailing party when they enforced the PPD §2.6 against the Aveniuses and received equitable relief from the Trial Court.

F. CONCLUSION

This Court should reverse the Trial Court's Orders #1-4 in the CR 54(b) certification, and the underlying grants Summary Judgment for the Respondents and denial of the Dempcys' motion for Summary Judgment to the extent incorporated and not stayed. Finally, the Trial Court erred in awarding attorney's fees to the Respondents.

DATED this 16 day of November 2015

Respectfully Submitted,

BAROKAS MARTIN & TOMLINSON



By: Aric S. Bomsztyk, WSBA #38020  
Attorneys for Appellants

**APPENDIX (AMENDED)**

**1968 Covenants**

- |   |  |
|---|--|
| 1. <i>Dempsy</i> -Statutory Warranty Deed<br>Clerk's Designation:                         | AFN 6409011<br>Sub No. 80/CP 579-584   |
| 2. <i>Avenius</i> -Statutory Warranty Deed<br>Clerk's Designation:                        | AFN 6409012<br>Sub No.62 /CP 163-168   |
| 3. <i>Shannon</i> -Statutory Warranty Deed<br>Clerk's Designation:                        | AFN 6369358<br>Sub No.62 /CP 157-161   |
| 4. <i>Zemel</i> -Real Estate Contract/<br>Statutory Warranty Deed<br>Clerk's Designation: | AFN 6583190/<br>7206220461<br>Sub No.75 /CP 524-529<br>& Sub No.81 /CP 608-611 |

**Pickle Pont Declaration/PPD**

- |   |   |
|---|---|
| 5. Declaration of Protective Covenants, Restrictions<br>Easements, And Agreements For<br>Pickle Point Association<br>Clerk's Designation: | AFN 9006081851<br>Sub No. 62/CP 579-584 |
|---|---|



640001

STATUTORY WARRANTY DEED

THE GRANTORS, GILBERT A. MUELLER and SUSAN MUELLER, his wife,  
for the purpose of partitioning property in which they are tenants  
in common, do hereby convey and warrant unto the Grantees,  
CHRISTOPHER W. OVERLY and AMANDA C. OVERLY, his wife,  
the following described real property, situate in King County,  
Washington:

PARCEL A:

That portion of the plat of Moorland, as recorded in  
Volume 4 of plats, page 103, records of King County, Wash-  
ington, and of portions of vacated streets and alleys within  
said plat, described as follows:

Beginning at the intersection point of the centerline of  
94th Avenue S.E., said centerline now being the West margin  
of said 94th Avenue S.E., with the North boundary of said  
plat of Moorland; Thence due South along said centerline  
and West margin a distance of 349.24 feet to the Easterly  
extension of the South line of Lot 28, Block 9, of said plat  
of Moorland; Thence S 89°53'49" W along said easterly ex-  
tension and South line a distance of 60.00 feet to the True  
Point of Beginning; Thence continuing S 89°53'49" W along  
the South lines of Lots 28 and 9 of said block 9 and the  
Westerly extension of the South line of said Lot 9 a dis-  
tance of 236.00 feet; Thence S 88°46'29" W a distance of  
148.72 feet to a line which is 8.69 feet West of and  
parallel to, when measured at right angles, from the  
Westerly margin of Block 8 of said plat of Moorland; Thence  
due North along said parallel line a distance of 112.91 feet;  
Thence N 89°53'49" E, a distance of 384.69 feet; Thence  
due South a distance of 110.00 feet to the True Point of  
Beginning.

PARCEL B

TOGETHER WITH

An undivided one-fourth (1/4) interest in that portion of  
the plat of Moorland described as follows:

Beginning at the intersection point of the centerline of  
94th Avenue S.E., said centerline now being the West Margin  
of said 94th Avenue S.E., with the North boundary of said  
plat of Moorland; Thence due South along said centerline and  
West Margin, a distance of 121.74 feet to the True Point of

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Beginning; Thence continuing due South along said centerline and Westerly Margin a distance of 227.50 feet to the Easterly extension of the South line of Lot 28, Block 9, of said plat of Moorland; Thence S 89°53'49" W along said Easterly extension and South line a distance of 60.00 feet; Thence due North a distance of 212.50 feet; Thence S 89°53'49" W, a distance of 110.00 feet; Thence due North a distance of 15.00 feet; Thence N 89°53'49" E, a distance of 170.00 feet to the True Point of Beginning.

SUBJECT TO: an easement for sanitary sewer, to Bellevue Sewer District, as recorded under King County Auditor's File No.

6409011

AND SUBJECT TO: the Grantees hereby assuming and agreeing to pay their pro-rata one-fourth share of the unpaid balance of the contract between the Bellevue Sewer District and Lawrence Calvert and Elizabeth S. Calvert, his wife, in the principal amount of \$6,260.61 and recorded under Auditor's File No.

6135074. The Grantees, as a part of the consideration for this Statutory Warranty Deed and by their acceptance of said deed, do hereby assume and agree to pay one-fourth of the indebtedness evidenced by said installment contract in accordance with the terms of said installment contract and further covenant and agree to perform and observe each and every covenant, agreement, term and condition of said installment contract and further covenant and agree to indemnify and save Grantors, or any one of them, harmless from any loss, liability, cost or expense under or in connection with their obligation to pay one-fourth of said installment contract;

AND SUBJECT TO: the following conditions and restrictions which are hereby impressed upon said real property as conditions and restrictions running therewith and are to have the effect of covenants running with the land, and the Grantees, their heirs, successors and assigns, by the acceptance of this Statutory Warranty Deed, each severally binds himself, his successors and assigns, to perform, fulfill, abide by and carry out each

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and every one of the following said conditions and restrictions, and hereby further severally agree for themselves, their successors and assigns, that the following conditions and restrictions, including this requirement, will be included verbatim in every instrument of conveyance affecting said real property; and these conditions and restrictions shall inure to the benefit of and be enforceable by the owner of any parcel of said real property, his legal representatives, heirs, successors and assigns, as well as by the owner of any neighboring real property which might be affected in any way by the failure of any person to perform, fulfill, abide by or carry out any one or more of the following said conditions and restrictions, and the failure by any owner, however long continued, to object to any violation or breach of or to seek in court the enforcement of any one or more of the following said conditions and restrictions, shall in no event be deemed a waiver of the right of any other owner hereby entitled to object and sue to abate, prevent, remove or restrain any breach or the same breach or as to any breach occurring prior or subsequent thereto:

1. The area of the tract described that lies Westerly of a line parallel to and 275.00 feet West of the existing Westerly margin of said 94th Avenue S.E., said area being a steep slope, is hereby restricted as follows:

No buildings shall be erected thereon, nor any structure, except such structures that may become necessary to protect or stabilize the tract. Neither shall it be excavated, terraced or filled, nor shall soil, trash, or other waste products or debris be dumped or placed upon it. That area shall be left undisturbed except for necessary clean-up of brush and debris and for the maintenance of surface and subsurface drains or for construction of additional drains that might be found necessary to maintain stability

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of the slope. These restrictions shall not be construed to prevent the topping of trees or brush on the slope for the purpose of improving views for the benefit of the portion lying easterly of said parallel line, provided no tree shall be topped or cut off closer to the ground than six feet. Any dead tree or trees in danger of being blown over may be cut off promptly to avoid the tearing of roots from the supporting soil.

7. The area of the tract lying Easterly of the parallel line referred to in Section 1 above, together with that area described in said Section 1, and except for the portion thereof which now slopes to the Northeast, is hereby restricted as follows:

(a) After any work is done in preparation for the development of any building site or sites, surface water originating upon or passing over any such site shall not be permitted to flow upon the west slope, west of the top of the slope.

(b) Surface runoff from paved streets, roofs, driveways, patios, and parking areas, and from any other surfaced or gravelled areas, shall be prevented from flowing upon the west slope, west of the top slope.

(c) No underground sprinkler system shall be installed, nor shall ponds, swimming pools, or similar structures be erected on the westerly fifty (50) feet of the above-described easterly area.

(d) All surface runoff as described in subparagraphs (a) and (b) of paragraph 2 shall be discharged into underground tight jointed pipe conduits that discharge off the tract, and all water from subdrains shall be similarly discharged.

AND SUBJECT TO: the assumption of and the agreement by Grantees to do the following:

A. Grantees agree to pay one-fourth (1/4) of the cost of developing and maintaining the common area described above under Parcel B as follows:

1. All landscaping in the common area; and

2. The construction of a tennis court to commence not sooner than January 1, 1970, and not later than January 1, 1973. The date of commencement of construction to be decided by majority vote of the owners of the four parcels of land served by said common area. In event the vote is two for and two against, the results are to be considered a majority for commencement of construction.

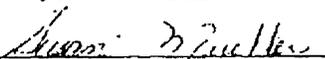
3. Grantees agree to pay their one-fourth (1/4) share in the cost of developing and maintaining roads and parking areas which benefit the property conveyed herein as well as the other property owned by the Grantors. AND SUBJECT TO: Grantees, upon commencement of the construction of any residence by Grantees, sharing in the cost of maintenance of existing roads, driveways and parking areas as follows:

1. A one-sixth (1/6) share for that portion of the entry road crossing Water District property from entrance to Ellis driveway.
2. A one-fifth (1/5) share for that portion of the entry road between the Ellis driveway and the north line of the Denny property.
3. A one-fourth share of the remaining portion of the entry road and cul-de-sac.
4. A pro-rata share in all other roads, driveways, and parking areas, from which Grantees' property benefits.

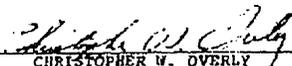
The foregoing conditions and agreements shall be binding upon the Grantors, the Grantees and their respective heirs, successors and assigns.

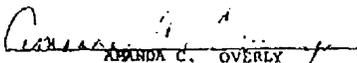
IN WITNESS WHEREOF the parties hereto have set their hands this 17<sup>th</sup> day of September, 1968.

  
\_\_\_\_\_  
GIBSON R. MUELLER

  
\_\_\_\_\_  
SUSAN MUELLER

Grantors

  
\_\_\_\_\_  
CHRISTOPHER W. OVERLY

  
\_\_\_\_\_  
AMANDA C. OVERLY

Grantees

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF KING )

On this day personally appeared before me GILBERT A. M...  
and SUSAN MOELLER, his wife, and CHRISTOPHER W. OVERLY and  
AMANDA C. OVERLY, his wife, to me known to be the individuals  
described in and who executed the within and foregoing instrument,  
and acknowledged that they signed the same as their free and  
voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 17<sup>th</sup> day of  
September, 1968.

Donald A. Schmechel  
Notary Public in and for the State  
of Washington, residing at Seattle



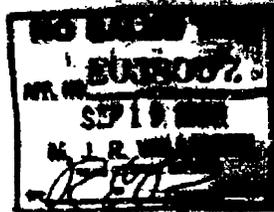
and for Secretary of State  
Signed of Donald A. Schmechel  
DONALD A. SCHMECHEL, County Auditor



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STATUTORY WARRANTY DEED

THE GRANTORS, CHRISTOPHER W. OVERLY and AMANDA C. OVERLY,  
his wife, for the purpose of partitioning property in which they are  
tenants in common, do hereby convey and warrant unto the Grantees,  
GILBERT A. MUELLER and SUSAN MUELLER, his wife, the following  
described real property, situate in King County, Washington:

PARCEL A:

That portion of the plat of Moorland, as recorded in  
Volume 4 of Plats, page 103, records of King County, Wash-  
ington, and of portions of vacated streets and alleys  
within said plat, described as follows:

Beginning at the intersection point of the centerline of  
94th Avenue S.E., said centerline now being the West margin  
of said 94th Avenue S.E., with the North boundary of said  
plat of Moorland; Thence due South along said centerline  
and West margin a distance of 121.74 feet; Thence  
S 89°53'49" W, a distance of 170.00 feet; Thence due South  
a distance of 7.50 feet to the True Point of Beginning;  
Thence continuing due South a distance of 7.50 feet; Thence  
N 89°53'49" E, a distance of 110.00 feet; Thence due South  
a distance of 102.50 feet; Thence S 89°53'49" W, a distance  
of 384.69 feet to a line which is 8.69 feet West of and  
parallel to, when measured at right angles from the Westerly  
margin of Block 8 of said plat of Moorland; Thence due  
North along said parallel line a distance of 110.00 feet;  
Thence N 89°53'49" E, a distance of 274.67 feet to the True  
Point of Beginning.

PARCEL B

TOGETHER WITH

An undivided one-fourth (1/4) interest in that portion of  
the plat of Moorland described as follows:

Beginning at the intersection point of the centerline of  
94th Avenue S.E., said centerline now being the West Margin  
of said 94th Avenue S.E., with the North boundary of said  
plat of Moorland; Thence due South along said centerline and  
West Margin, a distance of 121.74 feet to the True Point of

Beginning; Thence continuing due South along said centerline and Westerly Margin a distance of 227.50 feet to the Easterly extension of the South line of Lot 28, Block 9, of said plat of Moorland; Thence S 89°53'49" W along said Easterly extension and South line a distance of 60.00 feet; Thence due North a distance of 212.50 feet; Thence S 99°53'49" W, a distance of 110.00 feet; Thence due North a distance of 15.00 feet; Thence N 89°53'49" E, a distance of 170.00 feet to the True Point of Beginning.

SUBJECT TO: an easement for sanitary sewer, to Bellevue Sewer District, as recorded under King County Auditor's File No.

AND SUBJECT TO: the Grantees hereby assuming and agreeing to pay their pro-rata one-fourth share of the unpaid balance of the contract between the Bellevue Sewer District and Lawrence Calvert and Elizabeth S. Calvert, his wife, in the principal amount of \$6,260.61 and recorded under Auditor's File No.

6135074. The Grantees, as a part of the consideration for this Statutory Warranty Deed and by their acceptance of said deed, do hereby assume and agree to pay one-fourth of the indebtedness evidenced by said installment contract in accordance with the terms of said installment contract and further covenant and agree to perform and observe each and every covenant, agreement, term and condition of said installment contract and further covenant and agree to indemnify and save Grantors, or any one of them, harmless from any loss, liability, cost or expense under or in connection with their obligation to pay one-fourth of said installment contract;

AND SUBJECT TO: the following conditions and restrictions which are hereby impressed upon said real property as conditions and restrictions running therewith and are to have the effect of covenants running with the land, and the Grantees, their heirs, successors and assigns, by the acceptance of this Statutory Warranty Deed, each severally binds himself, his successors and assigns, to perform, fulfill, abide by and carry out each

and every one of the following said conditions and restrictions, and hereby further severally agree for themselves, their successors and assigns, that the following conditions and restrictions, including this requirement, will be included verbatim in every instrument of conveyance affecting said real property; and these conditions and restrictions shall inure to the benefit of and be enforceable by the owner of any parcel of said real property, his legal representatives, heirs, successors and assigns, as well as by the owner of any neighboring real property which might be affected in any way by the failure of any person to perform, fulfill, abide by or carry out any one or more of the following said conditions and restrictions, and the failure by any owner, however long continued, to object to any violation or breach of or to seek in court the enforcement of any one or more of the following said conditions and restrictions, shall in no event be deemed a waiver of the right of any other owner hereby entitled to object and sue to abate, prevent, remove or restrain any breach or the same breach or as to any breach occurring prior or subsequent thereto:

1. The area of the tract described that lies Westerly of a line parallel to and 275.00 feet West of the existing Westerly margin of said 94th Avenue S.E., said area being a steep slope, is hereby restricted as follows:

No buildings shall be erected thereon, nor any structure, except such structures that may become necessary to protect or stabilize the tract. Neither shall it be excavated, terraced or filled, nor shall soil, trash, or other waste products or debris be dumped or placed upon it. That area shall be left undisturbed except for necessary clean-up of brush and debris and for the maintenance of surface and subsurface drains or for construction of additional drains that might be found necessary to maintain stability

of the slope. These restrictions shall not be construed to prevent the topping of trees or brush on the slope for the purpose of improving views for the benefit of the portion lying Easterly of said parallel line, provided no tree shall be topped or cut off closer to the ground than six feet. Any dead tree or trees in danger of being blown over may be cut off promptly to avoid the tearing of roots from the supporting soil.

2. The area of the tract lying Easterly of the parallel line referred to in Section 1 above, together with that area described in said Section 1, and except for the portion thereof which now slopes to the Northeast, is hereby restricted as follows:

(a) After any work is done in preparation for the development of any building site or sites, surface water originating upon or passing over any such site shall not be permitted to flow upon the west slope, west of the top of the slope.

(b) Surface runoff from paved streets, roofs, driveways, patios, and parking areas, and from any other surfaced or gravelled areas, shall be prevented from flowing upon the west slope, west of the top slope.

(c) No underground sprinkler system shall be installed, nor shall ponds, swimming pools, or similar structures be erected on the westerly fifty (50) feet of the above-described easterly area.

(d) All surface runoff as described in subparagraphs (a) and (b) of paragraph 2 shall be discharged into underground tight jointed pipe conduits that discharge off the tract, and all water from subdrains shall be similarly discharged.

AND SUBJECT TO: the assumption of and the agreement by Grantees to do the following:

A. Grantees agree to pay one-fourth (1/4) of the cost of developing and maintaining the common area described above under Parcel B as follows:

1. All landscaping in the common area; and
2. The construction of a tennis court to commence not sooner than January 1, 1970, and not later than January 1, 1973. The date of commencement of construction to be decided by majority vote of the owners of the four parcels of land served by said common area. In event the vote is two for and two against, the results are to be considered a majority for commencement of construction.

B. Grantees agree to pay their one-fourth (1/4) share in the cost of developing and maintaining roads and parking areas which benefit the property conveyed herein as well as the other property owned by the Grantors. AND SUBJECT TO: Grantees, upon commencement of the construction of any residence by Grantees, sharing in the cost of maintenance of existing roads, driveways and parking areas as follows:

1. A one-sixth (1/6) share for that portion of the entry road crossing Water District property from entrance to Ellis driveway.
2. A one-fifth (1/5) share for that portion of the entry road between the Ellis driveway and the north line of the Denny property.
3. A one-fourth share of the remaining portion of the entry road and cul-de-sac.
4. A pro-rata share in all other roads, driveways, and parking areas, from which Grantees' property benefits.

The foregoing conditions and agreements shall be binding upon the Grantors, the Grantees and their respective heirs, successors and assigns.

IN WITNESS WHEREOF the parties hereto have set their hands this 17<sup>th</sup> day of September, 1968.

Christopher W. Overly  
CHRISTOPHER W. OVERLY

Amanda C. Overly  
AMANDA C. OVERLY

Grantors  
Gilbert A. Mueller  
GILBERT A. MUELLER

Susan Mueller  
SUSAN MUELLER

Grantees







859128

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Beginning; Thence continuing due South along said centerline and Westerly Margin a distance of 227.50 feet to the Easterly extension of the South line of Lot 28, Block 9, of said plat of Moorland; Thence S 89°53'49" W along said Easterly extension and South line a distance of 60.00 feet; Thence due North a distance of 212.50 feet; Thence S 89°53'49" W, a distance of 110.00 feet; Thence due North a distance of 15.00 feet; Thence N 89°53'49" E, a distance of 170.00 feet to the True Point of Beginning.

SUBJECT TO: an easement for sanitary sewer, to Bellevue Sewer District, as recorded under King County Auditor's File No.

AND SUBJECT TO: the Grantees hereby assuming and agreeing to pay their pro-rata share of the unpaid balance of the contract between the Bellevue Sewer District and Lawrence Calvert and Elizabeth S. Calvert, his wife, in the principal amount of \$6,260.61 and recorded under Auditor's File No. 6135074. The Grantees, as a part of the consideration for this Statutory Warranty Deed and by their acceptance of said deed, do hereby assume and agree to pay the indebtedness evidenced by said installment contract in accordance with the terms of said installment contract and further covenant and agree to perform and observe each and every covenant, agreement, term and condition of said installment contract and further covenant and agree to indemnify and save Grantors, or any one of them, harmless from any loss, liability, cost or expense under or in connection with said installment contract.

AND SUBJECT TO: the following conditions and restrictions which are hereby impressed upon said real property as conditions and restrictions running therewith and are to have the effect of covenants running with the land, and the Grantees, their heirs, successors and assigns, by the acceptance of this Statutory Warranty Deed, each severally binds himself, his successors and assigns, to perform, fulfill, abide by and carry

JUN 23 1963 - 830 FILED BY PNTI

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out each and every one of the following said conditions and restrictions, and hereby further severally agree for themselves, their successors and assigns, that the following conditions and restrictions, including this requirement, will be included verbatim in every instrument of conveyance affecting said real property; and these conditions and restrictions shall inure to the benefit of and be enforceable by the owner of any parcel of said real property, his legal representatives, heirs, successors and assigns, as well as by the owner of any neighboring real property which might be affected in any way by the failure of any person to perform, fulfill, abide by or carry out any one or more of the following said conditions and restrictions, and the failure by any owner, however long continued, to object to any violation or breach of or to seek in court the enforcement of any one or more of the following said conditions and restrictions, shall in no event be deemed a waiver of the right of any other owner hereby entitled to object and sue to abate, prevent, remove or restrain any breach or the same breach or as to any breach occurring prior or subsequent thereto:

1. The area of the tract described that lies Westerly of a line parallel to and 275.00 feet West of the existing Westerly margin of said 94th Avenue S.E., said area being a steep slope, is hereby restricted as follows:

No buildings shall be erected thereon, nor any structure, except such structures that may become necessary to protect or stabilize the tract. Neither shall it be excavated, terraced or filled, nor shall soil, trash, or other waste products or debris be dumped or placed upon it. That area shall be left undisturbed except for necessary clean-up of brush and debris and for the maintenance of surface and subsurface drains or for construction of additional drains that might be found necessary to maintain stability

JUN 20 1968 - 830 FILED BY PHTI

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of the slope. These restrictions shall not be construed to prevent the topping of trees or brush on the slope for the purpose of improving views for the benefit of the portion lying Easterly of said parallel line, provided no tree shall be topped or cut off closer to the ground than six feet. Any dead tree or trees in danger of being blown over may be cut off promptly to avoid the tearing of roots from the supporting soil.

2. The area of the tract lying Easterly of the parallel line referred to in Section 1 above, together with that area described in said Section 1, and except for the portion thereof which now slopes to the Northeast, is hereby restricted as follows:

(a) After any work is done in preparation for the development of any building site or sites, surface water originating upon or passing over any such site shall not be permitted to flow upon the west slope, west of the top of the slope.

(b) Surface runoff from paved streets, roofs, driveways, patios, and parking areas, and from any other surfaced or gravelled areas, shall be prevented from flowing upon the west slope, west of the top slope.

(c) No underground sprinkler system shall be installed, nor shall ponds, swimming pools, or similar structures be erected on the westerly fifty (50) feet of the above-described easterly area.

(d) All surface runoff as described in subparagraphs (a) and (b) of paragraph 2 shall be discharged into underground tight jointed pipe conduits that discharge off the tract, and all water from subdrains shall be similarly discharged.

AND SUBJECT TO: the assumption of and the agreement by Grantees to do the following:

A. Grantees agree to pay one-fourth (1/4) of the cost of developing and maintaining the common area described above under paragraph B as follows:

1. All landscaping in the common area; and

2. The construction of a tennis court to commence not sooner than January 1, 1970, and not later than January 1, 1973. The date of commencement of construction to be decided by majority vote of the owners of the four parcels of land served by said common area. In event the vote is two for and two against, the results are to be considered a majority for commencement of construction.

JUN 20 1962 - 830 FILED BY PHTI

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B. Grantees agree to pay their one-fourth (1/4) share in the cost of developing and maintaining roads and parking areas which benefit the property conveyed herein as well as the other property owned by the Grantors.

AND SUBJECT TO: Grantees, upon commencement of the construction of any residence by Grantees, sharing in the cost of maintenance of existing roads, driveways and parking areas as follows:

1. A one-sixth (1/6) share for that portion of the entry road crossing Water District property from entrance to Ellis driveway
2. A one-fifth (1/5) share for that portion of the entry road between the Ellis driveway and the north line of the Denny property.
3. A one-fourth share of the remaining portion of the entry road and cul-de-sac.
4. A pro-rata share in all other roads, driveways, and parking areas, from which Grantees' property benefits.

The foregoing conditions and agreements shall be binding upon the Grantors, the Grantees and their respective heirs, successors and assigns.

IN WITNESS WHEREOF the parties hereto have set their hands this 11<sup>th</sup> day of June, 1968.

*[Signature]*

*Charles W. Cook*  
Grantors

*Judith M. Flynn*

Grantees

UN 20 1968 - 830 INDEXED BY PHM



Pioneer National Title Insurance Company  
WASHINGTON TITLE DIVISION

REAL ESTATE CONTRACT

6899214

THIS CONTRACT, made and entered into this 29<sup>th</sup> day of OCTOBER, 1909,

5503100

between Gilbert A. Mueller and Susan Mueller, his wife, and Christopher W. Overly and Amanda C. Overly, his wife,

hereinafter called the "seller," and Dirk Jongejan and Kay Jongejan, his wife

hereinafter called the "purchaser";

WITNESSETH: That the seller agrees to sell to the purchaser and the purchaser agrees to purchase from the seller the following described real-estate, with the appurtenances, in King County, State of Washington:

399274 U-21

The easterly 127 feet of that portion of the Plat of Moorland, as recorded in Volume 4 of Plats, page 103, records of King County, Washington, and of portions of vacated streets and alleys within said plat; described as follows: Beginning at the intersection point of the centerline of 94th Avenue S.E., said centerline now being the West margin of said 94th Avenue S.E., with the North boundary of said plat of Moorland; Thence due South along said centerline and West margin a distance of 121.74 feet; Thence S 89°53'49" W, a Distance of 170.00 feet; Thence due south a distance of 7.50 feet; Thence S 89°53'49" W, a distance of 274.67 feet to a line which is 8.69 feet west of and parallel to, when measured at right angles from the westerly margin of Block 8 of said plat of Moorland; Thence due North along said parallel line a distance of 129.24 feet to the North boundary of said plat of Moorland; Thence N 89°53'49" E along said North boundary, a distance of 444.69 feet to the point of beginning.

TOGETHER WITH an undivided interest in that portion described as follows:

Beginning at the intersection point of the centerline of 94th Avenue S.E., said centerline now being the West margin of said 94th Avenue S.E., with the North boundary of said plat of Moorland; Thence due South along said centerline and West margin a distance of 121.74 feet to the True Point of Beginning; Thence continuing due South along said centerline and West margin a distance of 227.50 feet to the Easterly extension of the South line of Lot 28, Block 9, of said plat of Moorland; Thence S 89°53'49" W along said Easterly extension and South line a distance of 60.00 feet; Thence due North a distance of 212.50 feet; Thence S 89°53'49" W, a distance of 110.00 feet; Thence due North a distance of 15.00 feet; Thence N 89°53'49" E, a distance of 170.00 feet to the True Point of Beginning.

SUBJECT TO an easement for sanitary sewer, to Bellevue Sewer District, as recorded under King County Auditor's File No.

EXHIBIT A

The terms of purchase of this contract are as follows: The purchase price is Twenty-Three Thousand (\$23,000.00) Dollars, of which Thirteen Thousand (\$13,000.00) Dollars have been paid, the receipt whereof is hereby acknowledged, and the balance of said purchase price shall be paid as follows:

6583190

In two installments of Five Thousand Dollars (\$5,000.00) each, the first installment due one year from the date of this contract, and the second installment due two years from the date of this contract, which installments shall be without interest if paid on or before their due dates, or which shall bear interest at the rate of twelve percent (12%) per annum in the event of late payment.

All payments to be made hereunder shall be made at or at such other place as the seller may direct in writing. As referred to in this contract, "date of closing" shall be OCTOBER 24, 1969

(1) The purchaser assumes and agrees to pay before delivery all taxes and assessments that may as between grantor and grantee hereafter become a lien on said real estate; and if by the terms of this contract the purchaser has assumed payment of any mortgage contract or other encumbrance, or has assumed payment of any taxes or assessments now a lien on said real estate, the purchaser agrees to pay the same before delivery.

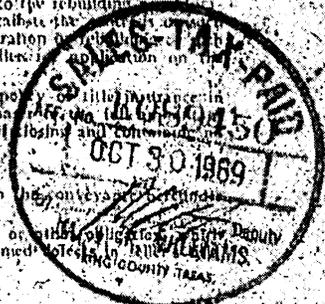
(2) The purchaser agrees, until the purchase price is fully paid, to keep the buildings now and hereafter placed on said real estate insured to the actual cash value thereof against loss or damage by both fire and windstorm in a company acceptable to the seller and for the seller's benefit, as his interest may appear, and to pay all premiums therefor and to deliver all policies and renewals thereof to the seller.

(3) The purchaser agrees that full inspection of said real estate has been made and that neither the seller nor his assigns shall be held to any covenant respecting the condition of any improvements thereon nor shall the purchaser or seller or the assigns of either be held to any covenant or agreement for alterations, improvements or repairs unless the covenant or agreement relied on is contained herein or in writing and attached to and made a part of this contract.

(4) The purchaser assumes all hazards of damage to or destruction of any improvements now on said real estate or hereafter placed thereon, and of the taking of said real estate or any part thereof for public use, and agrees that no such damage, destruction or taking shall constitute a failure of consideration. In case any part of said real estate is taken for public use, the portion of the condemnation award remaining after payment of reasonable expenses of procuring the same shall be paid to the seller and applied as payment on the purchase price hereon, unless the seller elects to allow the purchaser to apply all or a portion of such condemnation award to the rebuilding or reconstruction of any improvements damaged by such taking. In case of damage or destruction from a peril insured against by the insurance existing after payment of the reasonable expense of procuring the same shall be devoted to the restoration of the improvements within a reasonable time, unless purchaser elects that said proceeds shall be paid to the seller in satisfaction of the purchase price hereon.

(5) The seller has delivered, or agrees to deliver within 15 days of the date of closing, a purchaser's policy of title insurance in the full amount of a comparable one issued by POSTER NATIONAL TITLE INSURANCE COMPANY, insuring the purchaser against loss or damage by reason of defect in seller's title to said real estate as of the date of closing and containing no exceptions other than the following:

- a. Printed general exceptions appearing in said policy form.
- b. Liens or encumbrances which by the terms of this contract the purchaser is to assume, or as to which the purchaser has agreed to be made subject to.
- c. Any existing contract or contracts under which seller is purchasing said real estate, and any mortgage or other obligation secured by this contract agrees to pay none of which for the purpose of this paragraph (5) shall be deemed to be a defect in title.



(6) If seller's title to said real estate is subject to an existing contract or contracts under which seller is purchasing said real estate or any mortgage or other obligation, which seller is to pay, seller agrees to make such payments in accordance with the terms thereof, and upon default the purchaser shall have the right to make any payments necessary to remove the default, and any payments so made shall be applied to the payments due falling due the seller under this contract.

(7) The seller agrees, upon receiving full payment of the purchase price and interest in the manner above specified, to execute and deliver to purchaser a statutory warranty deed to said real estate, (excepting any part thereof heretofore taken for public use, free of encumbrances except any that may attach after date of closing through any person other than the seller, and subject to the following:

EXHIBIT A attached

(8) Unless a different date is provided for herein, the purchaser shall be entitled to possession of said real estate on date of closing and to retain possession so long as purchaser is not in default hereunder. The purchaser covenants to keep the buildings and other improvements on said real estate in good repair and not to permit waste and not to use or permit the use of the real estate for any illegal purpose. The purchaser covenants to pay all service, installation or construction charges for water, sewer, electricity, garbage or other utility services furnished to said real estate after the date purchaser is entitled to possession.

(9) In case the purchaser fails to make any payment herein provided or to maintain insurance, as herein required, the seller may make such payment or effect such insurance, and any amounts so paid by the seller, together with interest at the rate of 10% per annum thereon from date of payment until repaid, shall be repayable by purchaser on seller's demand, all without prejudice to any other right the seller might have by reason of such default.

(10) Time is of the essence of this contract, and it is agreed that in case the purchaser shall fail to comply with or perform any condition or agreement hereof or to make any payment required hereunder promptly at the time and in the manner herein required, the seller may elect to declare all the purchaser's rights hereunder terminated, and upon his doing so, all payments made by the purchaser hereunder and all improvements placed upon the real estate shall be forfeited to the seller as liquidated damages, and the seller shall have right to re-enter and take possession of the real estate and no waiver by the seller of any default on the part of the purchaser shall be construed as a waiver of any subsequent default.

Service upon purchaser of all demands, notices or other papers with respect to forfeiture and termination of purchaser's rights may be made by United States Mail, postage pre-paid, return receipt requested, directed to the purchaser at his address last known to the seller.

(11) Upon seller's election to bring suit to enforce any covenant of this contract, including suit to collect any payment required hereunder, the purchaser agrees to pay a reasonable sum as attorney's fees and all costs and expenses in connection with such suit, which sums shall be included in any judgment or decree entered in such suit.

If the seller shall bring suit to procure an adjudication of the termination of the purchaser's rights hereunder, and judgment is so entered, the purchaser agrees to pay a reasonable sum as attorney's fees and all costs and expenses in connection with such suit, and also the reasonable cost of searching records to determine the condition of the title at the date such suit is commenced, which sums shall be included in any judgment or decree entered in such suit.

IN WITNESS WHEREOF, the parties hereto have executed this instrument as first written above.

BUYER'S  
*Dirk Jongejan*  
Dirk Jongejan  
*Kay Jongejan*  
Kay Jongejan  
STATE OF WASHINGTON

*Gilbert A. Mueller*  
Gilbert A. Mueller (SEAL)  
*Susan Mueller*  
Susan Mueller (SEAL)  
*Christopher W. Overly*  
Christopher W. Overly (SEAL)  
*Amanda C. Overly*  
Amanda C. Overly, his wife (SEAL)  
Sellers

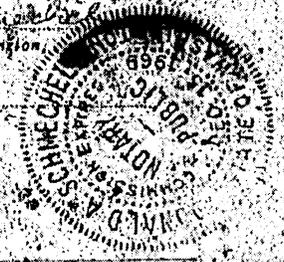
County of King  
On this 29th day personally appeared before me  
Gilbert A. Mueller, Susan Mueller, Christopher W. Overly and Amanda C. Overly, Dirk Jongejan and Kay Jongejan

to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 29th day of OCTOBER, 1969

*Donald A. Schirmer*  
Notary Public in and for the State of Washington

Residing at *Seattle*



## EXHIBIT "A"

5583190  
0618955

- (1) Subject to a balance due on installment contract between Lawrence Calvert, et al., and Bellevue Sewer District dated June 20, 1966, and recorded February 2, 1967, under Auditor's File No. 6135074, whereby it is agreed that a sewer connection charge in the amount of \$6,2601.61 is assessed against said premises and other lands, payable in yearly installments.
- (2) Covenants, conditions and restrictions contained in deed recorded March 21, 1967, Auditor's No. 6152050 and 6152051, executed by Starr H. Calvert, William Calvert, Elizabeth Calvert Henry, Jane Calvert Blethen, and the Pacific National Bank of Seattle, as Executor of the estate of Lawrence C. Calvert, deceased.
- (3) An easement affecting a portion of said premises for sewer pipe line and lines and all necessary connections and appurtenances, in favor of Bellevue Sewer District, recorded May 10, 1968 under Auditor's file No. 6346642.
- (4) Easement agreement dated September 17, 1968, between Gilbert A. Mueller and Susan Mueller, his wife, and Christopher W. Overly and Amanda C. Overly, his wife, recorded September 19, 1968, under Auditor's file No. 6409013, providing for ingress and egress and for utilities as may be reasonably necessary for the use of residential property southerly of said premises and in such form as will not unreasonably interfere with the use of residential property adjoining said premises of the south. Affects that portion of said premises described as an undivided one-fourth interest, and other lands.
- (5) Agreement executed by and between Bellevue Sewer District and Gilbert A. Mueller and Susan Mueller, and Christopher W. Overly and Amanda C. Overly, dated October 7, 1968 and recorded November 1, 1968 under Auditor's No. 6429039 in consideration of a connection charge of \$1,565.15 to connect premises to Bellevue Sewer District sewer system.
- (6) Purchaser understands and agrees that utility connections presently located on the property are for the benefit of adjacent property owners and that any additional connecting or assessment charges which may be levied for any utilities shall be payable by purchaser.

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Pioneer National Title Insurance Company  
WASHINGTON TITLE DIVISION  
Filed for Record at Request of

THIS SPACE RESERVED FOR RECORDER'S USE  
RECORDED  
OF  
REQUEST OF  
1972 JUN 22 AM 11 11  
DIRECTOR  
RECORDS & ELECTIONS  
KING COUNTY, WASH.

REVENUE STAMPS

TO  
Mr. Dirk Jongejan  
7201 S.E. 32nd  
Maple Island, WA 98148

FORM L58P

### Statutory Warranty Deed

THE GRANTORS GILBERT A. MUELLER and SUSAN MUELLER, his wife, and CHRISTOPHER W. OVERLY and AMANDA C. OVERLY, his wife,  
for and in consideration of Ten Dollars and other good and valuable consideration,  
in hand paid, convey and warrants to DIRK JONGEJAN and KAY JONGEJAN, his wife  
the following described real estate, situated in the County of KING, State of Washington:

as set forth in EXHIBIT "A" attached

SALES TAX PAID ON CONVEYANCE FILE NO. 089450  
M. J. [Signature] AND [Signature] TREASURER  
[Signature] DEPUTY

This deed is given in fulfillment of that certain real estate contract between the parties hereto, dated October 29, 1969, and conditioned for the conveyance of the above described property, and the covenants of warranty herein contained shall not apply to any title, interest or encumbrance arising by, through or under the purchaser in said contract, and shall not apply to any taxes, assessments or other charges levied, assessed or becoming due subsequent to the date of said contract.

Real Estate Excise Tax was paid on this sale or stamped exempt on October 30, 1969 Rec. No. E089450

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1971.  
Christopher W. Overly Susan C. Mueller  
Amanda C. Overly Gilbert A. Mueller

STATE OF WASHINGTON, }  
County of KING }  
Gilbert A. Mueller, Susan Mueller,  
Christopher W. Overly and Amanda C. Overly

Know all men by these presents that the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the purposes herein mentioned.

GIVEN under my hand and official seal this 8th day of February, 1972

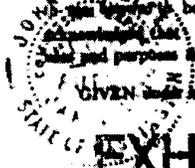


EXHIBIT B

[Signature]  
Notary Public in and for the State of Washington,  
residing at Seattle

7206220461

THE EASTERLY 127 FEET OF THE FOLLOWING DESCRIBED PLAT:

THAT PORTION OF THE PLAT OF MOORLAND, ACCORDING TO THE PLAT RECORDED IN VOLUME 6 OF PLATS, PAGE 104, IN KING COUNTY, WASHINGTON, AND OF PORTIONS OF VACATED STREETS AND ALLEYS WITHIN SAID PLAT, DESCRIBED AS FOLLOWS:

BEGINNING AT THE INTERSECTION POINT OF THE CENTERLINE OF 94TH AVENUE SOUTHEAST SAID CENTERLINE NOW BEING THE WEST MARGIN OF SAID 94TH AVENUE SOUTHEAST, WITH THE NORTH BOUNDARY OF SAID PLAT OF MOORLAND; THENCE DUE SOUTH ALONG SAID CENTERLINE AND WEST MARGIN A DISTANCE OF 121.74 FEET; THENCE SOUTH 89°53'49" WEST A DISTANCE OF 170.00 FEET; THENCE DUE SOUTH A DISTANCE OF 7.50 FEET; THENCE SOUTH 89°53'49" WEST A DISTANCE OF 274.67 FEET TO A LINE WHICH IS 0.69 FEET WEST OF AND PARALLEL TO WHEN MEASURED AT RIGHT ANGLES FROM THE WESTERLY MARGIN OF BLOCK 8 OF SAID PLAT OF MOORLAND; THENCE DUE NORTH ALONG SAID PARALLEL LINE A DISTANCE OF 129.24 FEET TO THE NORTH BOUNDARY OF SAID PLAT OF MOORLAND; THENCE NORTH 89°53'49" EAST ALONG SAID NORTH BOUNDARY, A DISTANCE OF 444.05 FEET TO THE POINT OF BEGINNING;

TOGETHER WITH AN UNDIVIDED ONE-FOURTH INTEREST IN THAT PORTION OF THE PLAT OF MOORLAND, DESCRIBED AS FOLLOWS:

BEGINNING AT THE INTERSECTION POINT OF THE CENTERLINE OF 94TH AVENUE SOUTHEAST SAID CENTERLINE NOW BEING THE WEST MARGIN OF SAID 94TH AVENUE SOUTHEAST, WITH THE NORTH BOUNDARY OF SAID PLAT OF MOORLAND; THENCE DUE SOUTH ALONG SAID CENTERLINE AND WEST MARGIN A DISTANCE OF 121.74 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING DUE SOUTH ALONG SAID CENTERLINE AND WESTERLY MARGIN A DISTANCE OF 227.50 FEET TO THE EASTERLY EXTENSION OF THE SOUTH LINE OF LOT 28, BLOCK 9, OF SAID PLAT OF MOORLAND; THENCE SOUTH 89°53'49" WEST ALONG SAID EASTERLY EXTENSION AND SOUTH LINE A DISTANCE OF 60.00 FEET; THENCE DUE NORTH A DISTANCE OF 212.50 FEET; THENCE SOUTH 89°53'49" WEST A DISTANCE OF 110.00 FEET; THENCE DUE NORTH A DISTANCE OF 15.00 FEET; THENCE NORTH 89°53'49" EAST A DISTANCE OF 170.00 FEET TO THE TRUE POINT OF BEGINNING.

SUBJECT TO THE FOLLOWING:

- (1) Subject to a balance due on installment contract between Lawrence Calvert, et al., and Bellevue Sewer District dated June 20, 1966, and recorded February 2, 1967, under Auditor's file No. 6125074, whereby it is agreed that a sewer connection charge in the amount of \$6,2601.61 is assessed against said premises and other lands, payable in yearly installments.
- (2) Covenants, conditions and restrictions contained in deed recorded March 21, 1967, Auditor's No. 6152050 and 6152051, executed by Starr H. Calvert, William Calvert, Elizabeth Calvert Henry, Jane Calvert Blethen, and the Pacific National Bank of Seattle, as Executor of the estate of Lawrence C. Calvert, deceased.
- (3) An easement affecting a portion of said premises for sewer pipe line and lines and all necessary connections and appurtenances, in favor of Bellevue Sewer District, recorded May 10, 1968 under Auditor's file No. 6346642.
- (4) Easement agreement dated September 17, 1966, between Gilbert A. Mueller and Susan Mueller, his wife, and Christopher W. Overly and Amanda C. Overly, his wife, recorded September 19, 1968, under Auditor's file No. 6409013, providing for ingress and egress and for utilities as may be reasonably necessary for the use of residential property southerly of said premises and in such form as will not unreasonably interfere with the use of residential property adjoining said premises of the south. Affects that portion of said premises described as an undivided one-fourth interest, and other lands.
- (5) Agreement executed by and between Bellevue Sewer District and Gilbert A. Mueller and Susan Mueller, and Christopher W. Overly and Amanda C. Overly, dated October 7, 1968 and recorded November 1, 1968 under Auditor's No. 6429049 in consideration of a connection charge of \$1,565.15 to connect premises to Bellevue Sewer District sewer system.
- (6) Purchaser understands and agrees that utility connections presently located on the property are for the benefit of adjacent property owners and that any additional connecting or assessment charges which may be levied for any utilities shall be payable by purchaser.



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REC FEE	2.00	
REC D F	19.00	
CASHSL	***21.00	

DECLARATION OF PROTECTIVE COVENANTS,  
 RESTRICTIONS, EASEMENTS, AND  
 AGREEMENTS FOR

PICKLE POINT ASSOCIATION

EXCISE TAX NOT REQUIRED  
 King Co. Records Division  
 By *Donna H. Lane*, Deputy

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1. PRELIMINARY MATTERS

1.1. Declarant. The undersigned (hereinafter "Declarant") are the owners of certain real property described in paragraph 1.2 below. Declarant hereby declares that the real property described in paragraph 1.2 below shall be held, transferred, sold, and conveyed subject to the conditions, restrictions, covenants, reservations, easements, and charges (hereinafter collectively referred to as "Covenants") set forth in this Declaration.

1.2. Property Subject to Covenants. All of the property described on Exhibit A is subject to the Covenants contained in this Declaration. Exhibit A consists of five parcels described in Exhibits A-1 through A-5, Parcel 5 being commonly owned property.

1.3. Intent and Term of the Covenants. The Covenants contained in this Declaration are for the benefit of all the property subject to the Covenants and for the benefit of each and every separate parcel of that property. The Covenants shall inure to the benefit of, shall burden, and shall pass with the property and each and every parcel thereof, and shall apply to and bind the owners of the property subject to these Covenants, their legal representatives, heirs, successors, and assigns in perpetuity.

2. RESTRICTIONS ON USE OF PROPERTY BY OCCUPANTS

2.1. Permitted Use. No parcel described on Exhibit A shall be used for any purpose other than the construction of a single-family dwelling. No building shall be erected, altered, placed, or permitted to remain on any parcel other than one detached single-family dwelling, and a private garage; provided

however, that all structures that exist on the date hereof shall be permitted structures.

2.2. No Temporary Dwellings. No trailer, mobile home, shack, garage, barn, or any other outbuilding, or any other structure of a temporary character shall be used on any parcel at any time as either a temporary or permanent residence.

2.3. Nuisance. No noxious or offensive activity shall be carried on upon any parcel, nor shall anything be done on any parcel which is or may become an annoyance or nuisance to the neighborhood. No boats, trailers, or recreational vehicles shall be stored or kept on any parcel for a period of more than 24 hours, unless said boat, trailer, or R.V. is enclosed or screened such that it is not visible from any street or any other parcel in the plat. The streets within the described real property shall not be used for overnight parking of any vehicles other than private automobiles. This covenant specifically restricts street parking of boats, trailers, or other R.V. vehicles.

2.4. Trash. No garbage, refuse, or rubbish shall be deposited or kept on any parcel or building unit except in suitable containers. All areas for the deposit, storage, or collection of garbage or trash shall be substantially screened from neighboring property, and from the common roads and paths. All equipment for the storage or disposal of trash, garbage, or other waste shall be kept in a clean and sanitary condition.

2.5. Animals. No animals, livestock, or poultry of any kind shall be raised, bred or kept on any parcel except as specifically provided for herein. Dogs, cats, and other household pets may be kept provided that they are not kept, bred, or maintained for commercial purposes, that no more than two dogs may be kept on any one parcel, and further provided that they are not kept in separate exterior kennels. (The intent of this covenant is to preclude both visual and audible annoyances to adjoining parcels.)

2.6. Fences. Except for those existing on the date hereof, no fences, wall, hedge, or mass planting other than a foundation shall be permitted between Parcel 1 and Parcel 2 unless

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approved by the owners of both parcels; provided, however, that nothing shall prevent the erection of a necessary retaining wall, the top of which does not extend more than two feet above the finished grade at the back of said retaining wall. With respect to all parcels, no fence, wall, hedge, or mass planting shall at any time extend higher than six feet above the ground. No wire fences shall be used for fencing any parcel unless approved by the Architectural Control Committee, except that the fence existing on parcel 5 on date hereof is approved and shall be the standard for any replacements thereof. The finished side of all fences shall face the exterior of the parcel.

2.7. Signs. No sign of any kind shall be displayed to the public view on any parcel.

2.8. Antennae. No radio or television antennae or transmitters shall extend above the roof ridge line of a dwelling, and no separate towers for such antennae or transmitters shall be permitted, unless approved by the ACC. Cable receiving dishes or any electronic receiving dishes are prohibited.

2.9. Utility Service. No outdoor overhead wire or service drop for the distribution of electric energy or for telecommunication purposes, nor any pole, tower, or other structure supporting said overhead wires shall be erected, placed, or maintained on the property subject to this Declaration.

2.10. Storm Drains. The owner or occupant of any building constructed on any parcel subject to this Declaration shall maintain in proper working order all roof drains and area storm drains on that parcel.

2.11. Construction Period. Any structure erected or placed on any parcel shall be completed as to external appearance, including finish painting and landscaping, within nine (9) months from date of start of construction.

2.12. Landscaping. Growth of alder, madrona, or other bush-type trees shall not be allowed to interrupt views. This restriction shall not apply to any growth on parcel 4.

2.13. Clothes Drying Area. No portion of any parcel shall be used as a drying or hanging area for laundry of any kind where it can be viewed from any street or adjacent house.

2.14. Maintenance Notice/Assessment of Costs. When in the opinion of the Committee certain maintenance needs to be performed on a parcel or parcels, the Committee shall notify the Owner by certified mail specifying in said notice exactly what needs to be repaired or maintained. The Owner shall then have thirty (30) days from receipt of such notice to perform the necessary maintenance or to make written demand for a hearing before the Committee. If a hearing is demanded, the Committee shall set a date therefor and give the owner at least ten (10) days notice thereof. The hearing shall be informal and rules of evidence shall not apply. The Committee shall render its decision in writing. The cost of such exterior maintenance actually performed shall be added to and become a part of the assessment to which the parcel is subject.

2.15. Subdivision. No parcel shall be subdivided into smaller parcels without the written consent of all parcel owners.

3. ARCHITECTURAL CONTROL COMMITTEE

3.1. Establishment. An Architectural Control Committee shall be established. The Committee shall have one member representing each parcel owner other than the common parcel. The initial members shall be appointed and may be removed by the Declarant. The members of the Committee shall designate one of their number to serve as chairman of the Committee and shall adopt such procedures and guidelines as they deem necessary for the orderly administration of their work. The initial address of the Architectural Control Committee shall be 429 94th S.E., Bellevue, WA 98004.

3.2. Structures and Exterior Renovation. No building, fence, hedge, wall, or other structure shall be erected, placed, altered, or exteriorly renovated on any parcel or building site subject to this Declaration until the building or renovation plans, specifications and plot plan are submitted by the owner

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or his representative to the Architectural Control Committee for approval.

3.3. Land Clearing. No native trees other than alder and madrona or significant ground cover shall be cut, removed, or destroyed without the approval of the Architectural Control Committee. Any person wishing to cut, remove, or destroy such trees or significant ground cover shall submit a plan showing the location of the trees or ground cover to be cut, removed, or destroyed, along with the location of the existing trees or ground cover to be retained. The applicant shall also submit a brief statement of the reasons supporting his request to cut, remove, or destroy such trees or ground cover; provided, however, that dead trees located on a parcel subject to this Declaration shall be removed by the parcel owner upon request by the Architectural Control Committee.

3.4. Criteria. The Architectural Control Committee shall consider the following criteria in approving or rejecting the plans submitted to it:

3.4.1. The harmony of the external design, color, and appearance of the proposal in relation to the surrounding neighborhood, including the common exterior shingling which exist on the date hereof. Shingles shall not include shakes.

3.4.2. The location of the proposal on the parcel in regard to slopes, soil conditions, existing trees and vegetation, roads and services, and existing building.

3.4.3. The other effects of the proposal on surrounding property; including, but not limited to, potential view blockage.

3.4.4. The compliance of the proposal with the Covenants contained in this Declaration.

3.5. Procedure. The Architectural Control Committee shall approve or reject the plans submitted to it within thirty (30) days from the date of the submission of the plans to the chairman of the Committee unless the person submitting the plans consents to an extension of the time for a decision. If the

Committee does not issue a decision within thirty (30) days from the date of the submission of the plans for the proposal, the plans shall be deemed to be approved. The Committee shall have the right to reject, for any reason whatsoever, any proposal which it decides is not suitable or desirable. The Committee's decision shall be in writing and if a proposal is not approved, the decision shall include a brief statement of the reasons for the Committee's action.

3.6. No Liability. The members of the Architectural Control Committee shall have no personal liability for any action by or decision of the Committee. The owner of that property agrees and covenants not to maintain any action against any member of the Architectural Control Committee which seeks to hold that member personally or individually liable for damages relating to or caused by ~~any action of or decision by the~~ Committee.

4. NATIVE GROWTH PROTECTION EASEMENT

4.1. Restrictions. Within the boundaries of the property subject to this Declaration, no trees other than alders or madronas or significant ground cover shall be cut, removed, or destroyed except as specifically provided herein.

4.2. Hand Pruning. Hand pruning of trees for view maintenance shall be permitted as long as it will not endanger slope stability; and will not adversely affect the tree or trees to be pruned. Such pruning shall be done in a competent and workman-like manner.

4.3. Safety. Trees and significant ground cover may be cut, destroyed, or removed when such an action is necessary to remove a present danger to life or property. Dead, dying, or diseased trees and ground cover, or trees and ground cover which present a fire hazard, shall be removed by the parcel owner.

4.4. No Dumping. No trash, debris, rubbish, or other material which is not biodegradable shall be dumped or disposed of within the the area subject to this Declaration.

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5. JOINT USE AND MAINTENANCE OF THE COMMON PROPERTY

5.1. Common Ownership. Each owner of a parcel within the property subject to this Declaration shall also own a common, undivided interest in Parcel 5. This parcel shall be referred to herein as the common property. Each owner of a parcel shall have a right to use and to enjoy the common property according to the nature of that property and subject to the restrictions contained in this Declaration.

5.2. Creation of Lien and Personal Obligation. Each owner of a parcel agrees to pay any and all assessments provided for in this section. These assessments, together with any interest or cost of collection, shall be a continuing lien upon the property which is the subject of such assessment. Each owner of a parcel shall also be personally obligated to pay the amount of any assessment levied against his property during the time that he is the owner thereof, together with any interest or costs of collection on that assessment. This personal obligation shall not be released by any transfer of the property subsequent to the effective date of the assessment.

5.3. Assessment Committee. The ACC shall be the Assessment Committee. This Committee shall establish rules and procedures for the fulfillment of its obligation. It shall hold meetings and establish regular and special assessments as provided for herein.

5.4. Purpose of Assessments. The assessments levied by the Committee shall be used exclusively to maintain the common property.

5.5. Regular Assessments. Once a year the Committee shall determine the amount of money necessary for the ordinary maintenance of the common property and the operation of the Committee. This amount will be equally divided among the parcels subject to this Declaration other than the common parcel, and notice of such assessment shall be given to each property owner in the manner prescribed by the Committee. The Committee shall establish procedures for the payment of such assessments.

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5.6. Special Assessments. If the Committee determines that a special assessment is necessary for the extraordinary maintenance of or capital improvements to the common property, the Committee shall send a notice of special assessment to the owners of all parcels. This notice shall include a statement of the reasons such an assessment is necessary, the amount to be assessed, the method of payment proposed by the Committee, and the date and place for a meeting to discuss such a special assessment. This meeting shall be held no sooner than thirty (30) days from the date of the notice of special assessment. The meeting will be conducted according to the rules adopted by the Committee, and the owner of each parcel shall be entitled to one vote for each parcel. Approval of a special assessment shall require consent of 50% of the Parcels excluding Parcel 5.

5.7. Enforcement. If any assessment is not paid according to the procedures established by the Committee, the amount of the assessment shall bear interest at the maximum legal rate and the Committee shall file a lien on the property subject to the unpaid assessment for the amount of the assessment plus interest. The Committee may bring an action at law to enforce payment of a delinquent assessment against the owner of record of the property subject to the unpaid assessment in order to recover the amount of the assessment, and the Committee may also take whatever measures are provided for by law to foreclose or collect on the lien filed on the property subject to the assessment. In the event of legal action to enforce or collect any assessment, the prevailing party shall be entitled to recover court costs, actual attorney's fees, and the other expenses of litigation.

6. MISCELLANEOUS

6.1. Enforcement. Any owner of property within the property subject to this Declaration shall have the right to enforce the Covenants contained in this Declaration through an action at law or in equity. The Architectural Control Committee shall also have the right to bring such action in its name. The prevailing party in any action brought to enforce the Covenants contained in this Declaration shall have the right to collect attorney's fees, court costs, and other expenses of litigation, in addition to any damages which may be awarded.

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6.2. Waiver. The failure to enforce any covenant contained in this declaration shall not be deemed a waiver of the right to enforce such a covenant.

6.3. Severability. If any covenant contained in this Declaration is held invalid, the remainder of the Declaration shall not be affected and shall continue in full force and effect.

6.4. Captions. The captions in this Declaration are inserted only as a matter of convenience and for reference, and in no way describe, define, or limit the intent of this Declaration. The captions are not to be used in interpreting this Declaration.

6.5. Municipal Ordinances. These Covenants shall in no way restrict the effect of any ordinance adopted by a municipal corporation having jurisdiction over any portion of the property subject to this Declaration. References to ordinances made in this Declaration shall be construed as references to the ordinances as they exist as of the date of the recordation of this Declaration or as they may thereafter be amended.

6.6. Interpretation. The Architectural Control Committee shall have the right to determine all questions arising in connection with this Declaration and to construe and interpret the provisions of this Declaration. Its good faith determination, construction, or interpretation of this Declaration shall be final and binding.

IN WITNESS WHEREOF, the undersigned have executed this Declaration this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

PICKLE POINT ASSOCIATION

By Bonney D. Rappley

By Birney N Dempsey  
 By Marie H. Dempsey  
 By John J. Goggin  
 By James T. Goggin  
 By J. Shannon  
 By Bonnie S. Mikkelson  
 By J. Mikkelson

STATE OF WASHINGTON )  
 ) ss.  
 COUNTY OF King )

On this 7<sup>th</sup> day of November, 1989, before me personally appeared Birney N Dempsey, and Marie H Dempsey to me known to be the persons who executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said persons, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

Valma J. Lachay  
 Notary Public in and for the State  
 of Washington, residing at Belleme  
 My appointment expires 4-21-90

STATE OF WASHINGTON )  
 ) ss.  
 COUNTY OF King )

On this 7<sup>th</sup> day of November, 1989, before me personally appeared Ray Goggin, and Dula Goggin to me known to be the persons who executed the

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instrument to be the free and voluntary act and deed of said persons, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

Valma J. Leckey

Notary Public in and for the State  
of Washington, residing at Belleme

My appointment expires 4-21-90

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That portion of Moorland, as per plat recorded in Volume 4 of Plats, on page 103, records of King County, and of portions of vacated streets and alleys within said plat, described as follows:

Beginning at a point, which is the intersection of the North line of Lot 10 in Block 9 of said subdivision, extended Westerly, with the center line of vacated 93rd Avenue Southeast;

thence South  $88^{\circ}46'29''$  West 148.72 feet;

thence North to the North boundary of the said plat of Moorland;

thence North  $89^{\circ}53'49''$  East, along said boundary, to its intersection with the center line of 94th Avenue Southeast, said point of intersection being marked by a stone monument;

thence South, along said center line, which is the existing West margin of said 94th Avenue Southeast, 349.24 feet to an existing iron pipe;

thence South  $89^{\circ}53'49''$  West 40.00 feet to the Southeast corner of Lot 28 of said Block 9;

thence South  $89^{\circ}53'49''$  West, along the South line of said Lot 28 and the extension thereof, and along the North line of said Lot 10 in Block 9, and the extension thereof to the point of beginning;

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Exhibit A

THAT PORTION OF THE PLAT OF MOORLAND, ACCORDING TO THE PLAT RECORDED IN VOLUME 4 OF PLATS, PAGE 103, IN KING COUNTY, WASHINGTON AND OF PORTION OF VACATED STREETS AND ALLEYS WITHIN SAID PLAT, DESCRIBED AS FOLLOWS:

BEGINNING AT THE INTERSECTION POINT OF THE CENTERLINE OF 94TH AVENUE SOUTHEAST, SAID CENTERLINE NOW BEING THE WEST MARGIN OF SAID 94TH AVENUE SOUTHEAST WITH THE NORTH BOUNDARY OF THE SAID PLAT OF MOORLAND; THENCE DUE SOUTH ALONG SAID CENTERLINE AND WEST MARGIN, A DISTANCE OF 349.24 FEET TO THE EASTERLY EXTENSION OF THE SOUTH LINE OF LOT 28, BLOCK 9 OF SAID PLAT OF MOORLAND; THENCE SOUTH  $89^{\circ}53'49''$  WEST ALONG SAID EASTERLY EXTENSION AND SOUTH LINE A DISTANCE OF 60 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING SOUTH  $89^{\circ}53'49''$  WEST ALONG THE SOUTH LINE OF LOTS 28 AND 9, OF SAID BLOCK 9 AND THE WESTERLY EXTENSION OF THE SOUTH LINE OF SAID LOT 9, A DISTANCE OF 236.00 FEET; THENCE SOUTH  $88^{\circ}46'29''$  WEST, A DISTANCE OF 148.72 FEET TO A LINE WHICH IS 8.69 FEET WEST OF AND PARALLEL TO WHEN MEASURED AT RIGHT ANGLES FROM THE WESTERLY MARGIN OF BLOCK 8 OF SAID PLAT OF MOORLAND; THENCE DUE NORTH ALONG SAID PARALLEL LINE A DISTANCE OF 112.91 FEET; THENCE NORTH  $89^{\circ}53'49''$  EAST, A DISTANCE OF 384.69 FEET; THENCE DUE SOUTH A DISTANCE OF 110 FEET TO THE TRUE POINT OF BEGINNING;

Exhibit A-1 (429 94th S.E.)

Damp

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That portion of the Plat of Moorland, as recorded in Volume 4 of Plats, page 103, records of King County, Washington, and portions of vacated streets and alleys within said plat, described as follows:

Commencing at the intersection of the centerline of 94th Avenue S.E., said centerline now being the West margin of said 94th Avenue S.E., with the North boundary of said Plat of Moorland; thence due South along said centerline and West margin a distance of 121.74 feet; thence  $S89^{\circ}53'49''W$  170.00 feet; thence due North 2.50 feet to the POINT OF BEGINNING; thence due South 17.50 feet; thence  $N89^{\circ}53'49''E$  110.00 feet; thence due South 102.50 feet; thence  $S89^{\circ}53'49''W$  384.69 feet to a line which is 8.69 feet West of and parallel with the Westeryly margin of Block 8 of said Plat of Moorland; thence due North along said parallel line a distance of 120.00 feet; thence  $N89^{\circ}53'49''E$  274.67 feet to the POINT OF BEGINNING.

Exhibit A-2 (425 94th S.E.)

Arrows

LOT 1 OF CITY OF BELLEVUE SHORT PLAT NUMBER 79-29, RECORDED UNDER RECORDING NUMBER 7905290618, SAID SHORT PLAT BEING A SUBDIVISION OF THAT PORTION OF THE PLAT OF MOORLAND, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 4 OF PLATS, PAGE 103, IN KING COUNTY, WASHINGTON, AND PORTIONS OF VACATED STREETS AND ALLEYS WITHIN SAID PLAT.

Exhibit A-3 (407 94<sup>th</sup> S.E.)

The easterly 127 feet of that portion of the Plat of Moorland, as recorded in Volume 4 of Plats, page 103, records of King County, Washington, and of portions of vacated streets and alleys within said plat, described as follows: Beginning at the intersection point of the centerline of 94th Avenue S.E., said centerline now being the West margin of said 94th Avenue S.E., with the North boundary of said plat of Moorland; Thence due South along said centerline and West margin a distance of 121.74 feet; Thence S 89°53'49" W, a Distance of 170.00 feet; Thence due south a distance of 7.50 feet; Thence S 89°53'49" W, a distance of 274.67 feet to a line which is 8.69 feet West of and parallel to, when measured at right angles from the Westerly margin of Block 8 of said plat of Moorland; Thence due North along said parallel line a distance of 129.24 feet to the North boundary of said plat of Moorland; Thence N 89°53'49" E along said North boundary, a distance of 444.69 feet to to the point of beginning.

Exhibit A-4 (403 94<sup>th</sup> SE)

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BEGINNING AT THE INTERSECTION OF THE CENTERLINE OF 94TH AVENUE SOUTHEAST, SAID CENTERLINE NOW BEING THE WEST MARGIN OF SAID 94TH AVENUE SOUTHEAST WITH THE NORTH BOUNDARY OF SAID PLAT OF MOORLAND; THENCE DUE SOUTH ALONG SAID CENTERLINE AND WEST MARGIN, A DISTANCE OF 121.74 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING DUE SOUTH ALONG SAID CENTERLINE AND WESTERLY MARGIN, A DISTANCE OF 227.50 FEET TO THE EASTERLY EXTENSION OF THE SOUTH LINE OF LOT 28, BLOCK 9, OF SAID PLAT OF MOORLAND; THENCE SOUTH 89°53'49" WEST ALONG SAID EASTERLY EXTENSION AND SOUTH LINE A DISTANCE OF 60 FEET; THENCE NORTH A DISTANCE OF 212.50 FEET; THENCE SOUTH 89°53'49" WEST, A DISTANCE OF 110 FEET; THENCE DUE NORTH A DISTANCE OF 15.00 FEET; THENCE NORTH 89°53'49" EAST A DISTANCE OF 170 FEET TO THE TRUE POINT OF BEGINNING.

Common Property

Exhibit A-5

**PROOF OF SERVICE**

On November 16, 2015, I caused the foregoing Appellants' Opening Brief to be served on the parties to this action, by email and legal messenger to:

**Counsel for Redek Zemel**

**Christina Mehling  
Mehling Law Firm, PLLC  
10900 NE 4<sup>th</sup> Street, Suite 2300  
Bellevue, WA 98004**

**Email: cm@mehlinglawfirm.com  
& Legal Messenger**

**Counsel for Chris and Nela Avenius**

**Allen R. Sakai  
Jeppesen Gray Sakai, P.S.  
10655 NE 4<sup>th</sup> Street, Suite 801  
Bellevue, WA 98004**

**Email: asakai@jgslaw.com  
& Legal Messenger**

**Counsel for Defendant, Jack Shannon**

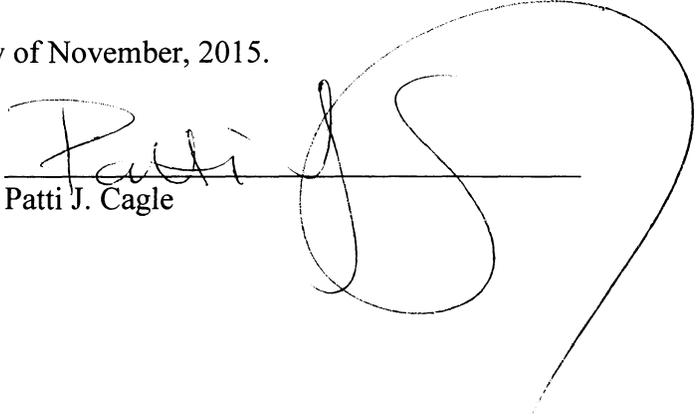
**J.Richard Aramburu  
Aramburu & Eustis, LLP  
720 3<sup>rd</sup> Avenue, Suite 2000  
Seattle, WA 98104**

**Email: rick@aramburu-eustis.com  
& Legal Messenger**

2015 NOV 16 PM 3:04  
STATE OF WASHINGTON  
COUNTY OF KING

I declare that the statements above are true to the best of my information, knowledge and belief.

DATED this 16 day of November, 2015.

  
Patti J. Cagle