

NO. 74057-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

STEVEN MARSHALL and DEANNA MARSHALL a.k.a DEANNA
NELSON, a married couple,

Appellants,

ROGER RESSMEYER,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Roger Ressmeyer (“Ressmeyer” or “Respondent”) and Steven Marshall and Deanna Marshall (collectively the “Marshalls” or “Appellants”) own adjoining lots on Mercer Island. Ressmeyer’s lot is directly uphill from the Marshalls’ lot. Covenants, Conditions, and Restrictions (the “CC&Rs”) govern both the Marshalls’ property and Ressmeyer’s property. Among other things, the CC&Rs limit the height of vegetation on the lots to the height of the nearest roof peak ridgeline. The Marshalls desire to grow the vegetation on their lot to a height equal to the height of Ressmeyer’s roof peak, completely blocking Ressmeyer’s view of Lake Washington and reducing the value of Ressmeyer’s property. After attempting to work out a neighborly resolution, Ressmeyer eventually filed this lawsuit to protect his rights and enforce the CC&Rs. At summary judgment, the Superior Court held that vegetation height was limited to the height of the roof peak on the same lot as the vegetation, regardless of whether a roof peak on another lot may be closer.

The Marshalls appealed, claiming that the Superior Court misapplied the rules of contract interpretation in finding that any other reading of the CC&Rs defies common sense.

II. ISSUES PRESENTED

The sole issue in this case is whether the CC&Rs require the Marshalls to trim their vegetation to the height of the roof peak ridgeline of the closest structure on their own property or whether the CC&R's are intended to allow a property owner to grow their vegetation to the roof peak ridgeline of their uphill neighbor's residence and completely block their neighbor's view.

III. ASSIGNMENT OF ERROR

Ressmeyer assigns no error to the Superior Court's order of June 23, 2015 granting Ressmeyer's motion for summary judgment in part and denying the Marshalls' motion for summary judgment.

IV. STATEMENT OF THE CASE

A. Substantive Facts

Ressmeyer owns a parcel of real property at 6930 96th Avenue SE, Mercer Island, Washington (the "Ressmeyer Property"). Clerk's Papers ("CP") 37 ¶ 2. The Marshalls own a parcel of real property at 6934 96th Avenue SE, Mercer Island, Washington (the "Marshall Property"). CP 37 ¶ 8. The Ressmeyer Property is immediately adjacent to and lies uphill from the Marshall Property. *Id.* Both properties have views of Lake Washington which greatly increase the value and desirability of the lots. *Id.*

Both the Ressmeyer Property and the Marshall Property were created through a subdivision recorded as Odegard Short Plat: MI-88-03-04(H-5) and Mitchell Trust Short Plat: MI-88-08-25(H-5) (the “Short Plat.”). Both the Ressmeyer Property and the Marshall Property are subject to and bound by the *Declaration of Covenants, Conditions and Restrictions of Mariner Cove*, King County Recording Number 8906140318, governing the Short Plat. CP 40-45.

Article III, Section 2 of the CC&Rs is titled *Maintenance of Landscaping and Trees* (the “Height Restriction”) and states:

“To protect the outlook from each lot, and to maintain the overall desirability of the subject properties, all owners are required to maintain visible landscaping in a neat and sightly condition. *Planted trees (not including the natural large trees on the plat), shrubs, and/or hedges must be maintained at a height equal to or lower than the nearest roof peak/ridge height, unless the owner has secured an instrument allowing a deviation from this restriction signed by all owners of Mariner Cove lots uphill of the lot/owner seeking the deviation.*” *emphasis added*. CP 43.

The Marshalls purchased the Marshall Property in 2001 and constructed the residence on the property (the “Marshall Residence”). CP 37 ¶ 8. The Marshall Residence is the only structure on the Marshall Property. *Id.* For several years following the purchase, the Marshalls abided

by the Height Restriction and maintained the vegetation on the Marshall Property to the height of the Marshall Residence's roof peak/ridge height (the "Maximum Height"). CP 38 ¶ 9. In 2011, however, the Marshalls refused to trim the vegetation on the Marshall Property, but allowed Ressmeyer to prune the vegetation at Ressmeyer's sole expense. *Id.* In the years since 2011, Marshall has repeatedly allowed the vegetation on the Marshall Property to grow higher than the Maximum Height, despite Ressmeyer's repeated requests to prune the vegetation. CP 38 ¶ 10.

Vegetation on the Marshall Property that exceeds the Maximum Height obstructs the view of Lake Washington from the Ressmeyer Property, greatly reducing Ressmeyer's enjoyment of his property and the desirability and value of the Ressmeyer Property. CP 38 ¶ 13.

The Marshalls' opinion that they should be able to grow their vegetation to the height of their uphill neighbor's nearest roof peak runs directly counter to the intent of the drafter of the CC&Rs. The CC&Rs were drafted by Odegard Development Corporation ("ODC") and recorded in King County in 1989. CP 328 ¶ 4. David Odegard was the Vice President of ODC when the CC&Rs were drafted and recorded. CP 328 ¶ 2. ODC developed and sold properties for the highest value. CP 329 ¶ 10. In doing so, ODC considered the marketability of each lot in a subdivision when drafting CC&Rs. CP 329 ¶ 8. In order to protect the marketability of each

lot, including the uphill lots, the intent of the CC&Rs was to reasonably preserve each lot's outlook toward Lake Washington. CP 329 ¶ 8-9. The word "outlook" is an industry term used to describe a view. CP 328 ¶ 6. ODC's intent, as the drafter of the CC&Rs, was to protect the view of Lake Washington from each lot in the Mariner Cove subdivision and to maintain the maximum value of each property based on the lake views. *Id.*

To protect the outlook from each lot, while still allowing the purchaser of a lot to build a home, ODC drafted the Height Restriction into the CC&Rs. CP 328 ¶ 7. The intent of the CC&Rs was to limit vegetation to the height of the residence on the lot. *Id.* Because houses often have varying roof peak/ridges, the CC&Rs limit the vegetation height to the nearest roof peak/ridge of the residence located on the same lot as the vegetation. *Id.* This would allow vegetation height to remain consistent with the height of the residence. *Id.* The drafter's intent was *never* to tie the vegetation height to the roof peak/ridge of a residence on a *different* lot. *Id.* ODC never even considered the privacy of the lots when drafting the outlook or Height Restriction provisions of the CC&Rs. CP 329 ¶ 9.

The Marshalls and Ressmeyer have communicated often regarding the Marshalls' vegetation in relation to the Height Restriction. Early on, when Ressmeyer was forced to remind the Marshalls to trim their vegetation pursuant to the Height Restriction, the Marshalls begrudgingly obliged,

generally a few months to one year after the request. The Marshalls would trim some, but not all, of the offending vegetation to the required Height Restriction, but never *below* the Height Restriction. The moment growing resumed, all the trimmed vegetation again violated the Height Restriction.

While the Marshalls have argued that trimming the vegetation to comply with the Height Restriction was a neighborly gesture, Stephen Marshall's communications with Ressmeyer suggest otherwise. On May 11, 2005, Ressmeyer's wife Karen Ressmeyer, sent the Marshalls an email expressing concern regarding the Marshalls' recently planted row of trees (the Hedge) and specifically addressing the Height Restriction in the CC&Rs:

..., we are somewhat alarmed by the line of trees you planted along our wooden fence. These plantings appear to be contrary to your stated intention of not adversely affecting our view. We remind you that the Covenants, Conditions and Restriction of Mariner Cove prohibit trees, shrubs and hedges to be maintained at a height equal to or lower than your roof height." CP 371.

On May 18, 2005 the Marshalls responded, writing it was their "intention is 'not' allow the trees to get higher the roof/chimney." CP 370. Notably, the Marshalls did *not* express any disagreement, or even surprise, over the Height Restriction referenced in Ms. Ressmeyer's email.

Marshalls continued to partially abide by the CC&Rs, writing in an email, "We just cut the [vegetation] this summer...We will have [the

vegetation] cut again in the spring and will cut [the vegetation] every year.” CP 373. Despite Steven Marshall’s reassurance to timely prune his vegetation, he only pruned it every other year and only upon Ressmeyer’s request, which Ressmeyer typically made when Marshall’s rapid-growing hedge was five to seven feet above the Height Restriction, (i.e., Marshall’s nearest roof peak/ridge line) and blocking Ressmeyer’s lake view.

On July 8, 2009, Marshall explicitly acknowledged that his own legal counsel had informed him that his roof was the appropriate governing height for the vegetation on the Marshall Property, writing, “our land use attorney feels that the highest point of *our* roof would be used to determine the highest point of our landscaping... We have maintained our landscaping to this height for the full 5 years that we have lived in the home and will continue to-do going forward.” (emphasis added). CP 375.

B. Procedural History

Following the breakdown in communications between the parties, and the Marshalls refusal to trim the vegetation on their property to the height required by the CC&Rs, Ressmeyer filed the complaint in this matter on August 21, 2014. Ressmeyer’s complaint contained two claims: (1) Breach of the CC&Rs; and (2) Violation of RCW 7.40.030, Washington’s spite structure statute. CP 1-12.

The Marshalls' served their Answer and Counterclaims on September 19, 2014. The Marshalls denied both of Ressmeyer's claims, and alleged four counterclaims: (1) Declaratory Judgment stating that the CC&Rs allowed the Marshalls to grow the vegetation on their lot to the height of Ressmeyer's roof peak ridgeline; (2) Injunctive Relief; (3) Breach of the CC&Rs; and (4) Violation of RCW 7.40.030. CP 13-22.

Ressmeyer filed his Answer denying the Marshalls' counterclaims on October 24, 2014. CP 23-26.

Following further failed negotiations, the parties each filed motions for summary judgment on May 15, 2015. Ressmeyer sought summary judgment stating that the Height Restriction in the CC&Rs limited the height of the vegetation on the Marshalls' property to the height of the roof peak of the nearest structure on the Marshalls' property, and that the Marshalls' planned tower structure was a spite structure in violation of RCW 7.40.030. The Marshalls sought summary judgment stating that the vegetation on the Marshalls' property should be allowed to grow to the height of Ressmeyer's roof peak ridgeline, thereby blocking Ressmeyer's outlook from his property, or, in the alternative, to the height of a hypothetical structure which *could* have been built on Marshall's property but never was. The Marshalls also sought summary judgment stating that a hypothetical garage was not a spite structure as a matter of law.

At the summary judgment hearing, the court granted Ressmeyer's summary judgment motion regarding the Marshalls' vegetation height, giving the Marshalls twenty days from the Summary Judgment Order to comply. The court denied the Marshalls' summary judgment motions. The court reserved the question of whether a structure the Marshalls threatened to build on their property was a spite structure until such time as a new structure exists on the Marshall Property. The court issued its summary judgment order on June 23, 2015. CP 505-508.

The Marshalls filed a Motion to Reconsider on July 1, 2015, asking the Superior Court to waive the 20 day deadline, or to declare its ruling final so the Marshalls could appeal. Ressmeyer responded on July 8, 2015. On July 10, 2015, the court ruled that the 20 day deadline was lifted pending appeal, but otherwise did not change its ruling. CP 476-499.

Following the Motion for Reconsideration, and after negotiation, the parties filed a Stipulation and Order of Dismissal for all the remaining claims and counterclaims not decided at summary judgment. CP 510-515. Following the Stipulation, the sole remaining issue for possible appeal was the court's ruling regarding the Height Restriction.

The Marshalls filed their Notice of Appeal on October 9, 2015.

V. ARGUMENT

A. Standard of Review

Ressmeyer does not dispute the Marshalls' statement that the standard of review for appeals of summary judgment is *de novo*. Ressmeyer also agrees with the Marshalls that there are no disputed facts and the CC&Rs govern both the Marshall Property and the Ressmeyer Property.

B. The CC&Rs Limit the Maximum Height of Vegetation to the Nearest Roof Peak/Ridge Height of the Residence on the Same Property as the Vegetation.

The Marshalls claim this matter can be resolved through simple contract interpretation using the plain language of the CC&Rs, but they promptly resort to repeated misstatements of the drafter's intent, misstatement of Ressmeyer's desire for an expansive view easement, misstatements regarding contract interpretation principles, and reliance on irrelevant information to conclude that the lower court was wrong. The Superior Court was correct, and its Summary Judgment Order should be upheld.

1. Legal Authority

The court uses principles of contract interpretation when interpreting provisions in CC&Rs and other governing documents related to real estate developments. *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn.App. 263, 273-75, 279 P.3d 943 (2012). Contract interpretation is

a question of law. *Dave Johnson Ins. Inc. v. Wright*, 167 Wn.App. 758, 769, 275 P.3d 339, *review denied*, 175 Wn.2d 1008 (2012). Contract interpretation determines the intent of the parties. *Roats*, 169 Wn.App at 274. To determine intent, the court may use the “context rule” adopted in *Berg v. Hudesman*, 115 Wn.2d 657, 666-69, 801 P.2d 222 (1990). The context rule applies even when the provision at issue is unambiguous. *Roats*, 169 Wn.App. at 274. The context rule ““allows a court, while viewing the contract as a whole, to consider extrinsic evidence, such as the circumstances leading to the execution of the contract, the subsequent conduct of the parties, and the reasonableness of the parties’ respective interpretations.”” *Roats*, 169 Wn.App. at 274 (quoting *Shafer v. Bd. Of Trs. Of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn.App. 267, 275, 883 P.2d 1387 (1994)).

Contractual language must generally be given its ordinary, usual and popular meaning. *Jensen v. Lake Jane Estates*, 165 Wn.App. 100, 105, 267 P.3d 435 (2011). “An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective.” *Snohomish County Pub. Transp. Benefit Area Corp. v. First Grp. Am., Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850 (2012). And “[w]here one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter more

rational construction must prevail.” *Better Fin. Solutions, Inc. v. Transtech Elec, Inc.*, 112 Wn.App. 697, 712 n.40, 51 P.3d 108 (2002) (quoting *Byrne v. Ackerlund*, 108 Wn.2d 445, 453-54, 739 P.2d 1138 (1987)).

2. The Intent of the CC&Rs Was to Limit the Height of Vegetation to the Height of the Residence on the Same Lot as the Vegetation.

According to the context rule, the Court may use extrinsic evidence to determine the intent of the parties. There is no better statement of the parties’ intent than the Declaration of David Odegard. Mr. Odegard was the vice president of ODC and was specifically involved in the development of Mariner Cove, including drafting the CC&Rs¹. He speaks firsthand about ODC’s intent when drafting the CC&Rs. Mr. Odegard unambiguously states that the intent of the CC&Rs was to maximize the value of the lots in the Mariner Cove Short Plat. According to Mr. Odegard, limiting the height of vegetation and preserving views of Lake Washington was key to preserving the value of the Mariner Cove properties. In direct contradiction to the Marshalls’ interpretation, Mr. Odegard states the term “outlook” has nothing to do with a lot’s ‘privacy’ nor the general

¹ The Marshalls may argue that Mr. Odegard did not draft the CC&Rs because he did not sign the document. This argument ignores the fact that ODC was the entity that owned the real property and prepared the CC&Rs. The document was signed by Mr. Odegard’s father, the president of ODC. Mr. Odegard’s declaration makes clear that he was vice president of ODC, worked extensively on the Mariner Cove development, and was familiar with the terms of the CC&Rs. As vice president, Mr. Odegard is an agent of ODC, and his declaration, which the Marshalls have not challenged, provides sufficient background to validate his statements as to the intent of the CC&Rs.

appearance of the properties, but rather the view of Lake Washington from each property. In that light, the intent of Article III, Section 2 of the CC&Rs is the protection of lake views and has nothing to do with either the general appearance of the properties or privacy concerns of the residents.

3. The Plain Language of the CC&Rs Does Not Allow the Marshalls to Grow Vegetation Higher than Their Own Nearest Roof Ridge/Peak.

Even without Mr. Odegard's declaration, a plain reading of the CC&Rs still supports Ressmeyer's interpretation of the Height Restriction.

The full text of Article III, Section 2 of the CC&Rs is:

To protect the outlook from each lot, and to maintain the overall desirability of the subject properties, all owners are required to maintain visible landscaping in a neat and sightly condition. Planted trees (not including the natural large trees on the plat), shrubs, and/or hedges must be maintained at a height equal to or lower than the nearest roof peak/ridge height, unless the owner has secured an instrument allowing a deviation from this restriction signed by all owners of Mariner Cove lots uphill of the lot/owner seeking the deviation. CP 43.

Importantly, this section includes much more than a simple statement that the vegetation must be lower than the nearest roof peak/ridge height. In addition to the Height Restriction, this section of the CC&Rs also includes the reason for the restriction: "*to protect the outlook from each lot,*" which, as Mr. Odegard explained, would maintain the overall desirability of the subject properties. CP 329 ¶ 10. This section also includes a

provision by which its conditions could be changed – by securing “an instrument allowing a deviation from this restriction signed by all owners of the Mariner Cove lots uphill of the lot/owner seeking the deviation.”

It is impossible to read the Height Restriction as allowing a downhill neighbor to grow his vegetation to the height of an uphill neighbor’s roof peak ridge and also give meaning to the process for allowing a deviation from that Height Restriction. An interpretation giving meaning to all terms in a contract is preferred over an interpretation which makes certain terms ineffective. *Snohomish County Pub. Transp. Benefit Area Corp.*, 173 Wn.2d at 840. Such a deviation could *only* be to allow for taller vegetation because there is no minimum height restriction. However, if the downhill neighbor were allowed to grow their vegetation to the top of the uphill neighbor’s roof, that uphill neighbor would have no need to give the downhill neighbor permission for a deviation because the vegetation would already block the uphill neighbor’s view and the damage to the outlook and desirability of the uphill neighbor’s property would already be done. While the Marshalls attempt to provide other reasons an uphill property owner might still be interested in vegetation height, none of those reasons are contemplated in Article III, Section 2. Tying the Height Restriction to the roof peak of the nearest structure on the same lot as the vegetation makes the deviation language far more sensible. If the vegetation height is

restricted to the height of the nearest structure on the same lot, the permission of *all* of the uphill neighbors to deviate would allow the CC&Rs to eliminate precisely the dispute that gave rise to the instant litigation. The approval of all uphill neighbors is only reasonable if the vegetation height must match the roof height of the downhill property on which the vegetation sits. Any structure on a downhill property necessarily blocks a portion of the outlook from any uphill residence. The CC&Rs enable a lot owner to build a structure on the lot owner's property per the local zoning code and once constructed, the Height Restriction protects the outlook of the uphill properties by limiting the downhill neighbor's ability to grow vegetation above the height of the legal structures constructed on the downhill neighbor's property.

Article III, Section 2 also provides the intent of the section, stating that the restriction is to "protect the outlook" from each lot. As discussed *supra*, the drafter of the document provided the meaning of the word "outlook". As used in the CC&Rs, "outlook" is an industry term which means "view", in this case the view of Lake Washington. CP 328. The intent of the Height Restriction was to protect the outlook, or view, of Lake Washington from all the properties governed by the CC&Rs. Interpreting the Height Restriction to allow vegetation on one lot to grow to the height of a structure on another lot runs exactly counter to the intent of Article III,

Section 2 specifically and the CC&Rs generally. Such an interpretation is unreasonable. An interpretation of the CC&Rs that the Height Restriction limits the height of vegetation to the height of the roof peak of a structure on the same lot is consistent with the language and intent of Article III, Section 2. In such a case, the more rational construction must prevail. *Better Fin. Solutions, Inc.* 112 Wn.App. at 712 n.40.

Interpreting Article III, Section 2 to allow vegetation on a downhill lot to grow to the height of a structure on an uphill lot also contradicts the intent of the Section “to maintain the overall desirability of the subject *properties.*” (emphasis added). If each downhill lot owner may plant vegetation at the far uphill side of their lot and allow it to grow to the height of the uphill neighbor’s roof peak, then the only property which will have its overall desirability maintained is the farthest downhill lot (which just happens to belong to the Marshalls). However, Article III, Section 2 uses the plural “properties”, indicating that it is designed to protect all the properties, and not simply the lot closest to Lake Washington. Once again, the more rational construction must prevail.

Finally, it makes little sense that the CC&Rs would require lot owners to spend time and effort determining whether a structure on one lot is closer to vegetation than a structure on another lot. In the instant case, for example, no evidence has been presented that Ressmeyer’s house is

closer to the vegetation along the lot line between the Ressmeyer and Marshall Properties. Further, it is indisputable that most of the vegetation on the Marshall Property is closer to the Marshall Residence than to any other structure. Interpreting the CC&Rs to provide a simple reference point for all the vegetation on a lot, and providing a uniform standard for that vegetation allows for reliable predictability while protecting each lot's outlook and maintaining the desirability of *all* the lots, and not just the lot closest to the lake.

The CC&Rs state the vegetation on the Marshalls' lot may grow no higher than the height of the roof peak of the nearest structure on the Marshalls' property. The drafter of the CC&Rs, Mr. Odegard, explicitly stated that was the intent of the document. A plain language interpretation, which examines *all* of the language in Article III, Section 2 must reach the same conclusion. The Superior Court was correct to grant Ressmeyer's Summary Judgment motion. After reviewing the evidence and the law, the only answer on appeal must be to affirm the lower court's ruling.

C. The Marshalls Repeatedly Rely On Incorrect Facts, Irrelevant Arguments, And Improper Interpretation in Asserting the Lower Court's Error.

The Marshalls correctly note that the sole issue before the Court is whether the lower court erred when it determined that the Marshalls must limit the height of the vegetation on their lot to the height of their roof ridge

peak. Based on *all* of Article III, Section 2, and Mr. Odegard's statement of the intent of the drafter of the CC&Rs, the Court should affirm the lower court's ruling. However, in attempting refute the lower court's rational and legally sound ruling, the Marshalls rely on misstatements of fact, irrelevant information, and bizarre hypotheticals to argue that the CC&Rs mean something other than what they do.

1. Elevation Has No Basis In The CC&Rs.

As a preliminary matter, Ressmeyer explicitly rejects the use of elevations to resolve this dispute. Using elevations to resolve this dispute has no basis in the CC&Rs because the CC&Rs do not mention elevations. Using elevation to determine vegetation height uncouples the vegetation height from the height of the roof peak of the nearest structure. While that may be what the Marshalls' wish the CC&Rs had done, that is not what the drafters of the CC&Rs did. Instead, as Mr. Odegard explained, the CC&Rs were drafted to tie the vegetation height to the residence on the same lot to minimize the impact on the uphill neighbors' view. CP 328-329 ¶¶ 7-8.

Also, using a structure, rather than elevation, as the reference point for the height restriction is easier for the lot owners to manage. If a dispute arises as to whether vegetation has grown too tall, it is a simple process to determine whether that is true merely by visually inspecting the vegetation height relative to height of the nearest roof peak of the structure on the same

lot as the vegetation. Using elevation as a reference would require the services of a surveyor each time the vegetation is trimmed to determine whether a lot's vegetation complied with the CC&Rs. Such an interpretation has no basis in the CC&Rs or common sense.

2. The CC&Rs Did Not Contemplate A Hypothetical Structure When Limiting Vegetation Height.

The Marshalls have argued that when they purchased their property, construction plans were provided to them which included a home built on a different portion of their lot. The Marshalls could not provide the plans, or even demonstrate the plans had been approved by the City of Mercer Island. The Marshalls argue that had those plans been followed, and if that home had been built, they would have been allowed to grow their vegetation to the height of the roof peak of that hypothetical structure. They reason, despite *not* using those plans or building that structure, they should still be allowed to grow their vegetation to the height of a fictitious structure— an elevation they calculate as 75 feet.

Even accepting the use of elevations used solely for this argument, the Marshalls' rationale is unsupportable. The prior plans, to the extent they existed as described by the Marshalls, are irrelevant. The Marshalls constructed their house using a different set of plans. There is no logical reason the CC&Rs would possibly be tied to unapproved plans that might

have been followed, but were not. What is logical is to tie the vegetation height on a lot to the height of the nearest roof peak/ridge of the constructed residence on said lot, precisely as the CC&Rs dictate.

The Marshalls apparently built their home in a different location than the alleged plans and in doing so rejected the developer's plans. This choice was not forced upon them by the developer, Ressmeyer, or anyone else, but was instead the result of the Marshalls' decision making process when they purchased the vacant lot, and in which they weighed the pros and cons of the design and location of the home the Marshalls ultimately constructed. The Marshalls should not be able to escape the consequences of their own decisions.

The CC&Rs provide a Height Restriction that must be determined using information that is available to the parties and the Court. The Marshalls do not like that information, so they attempt to create other information out of whole cloth. Doing so renders the language of the CC&Rs meaningless.

3. Ressmeyer Has Never Sought An "Expansive View Easement."

The Marshalls argue again and again that Ressmeyer seeks an "expansive view easement" and wants to re-write the CC&Rs to provide one. The Marshalls' appellate brief mentions "view easement" at least nine

times. However, Ressmeyer has made no such claim, and the Marshalls have provided no evidence to support their allegations. Throughout this entire process, Ressmeyer has wanted nothing more than for the Marshalls to abide by the CC&Rs. He has never claimed a view easement, and has always maintained that the Marshalls may build whatever structure they like on their property if it complies with all statutes, codes, and regulations. Ressmeyer has merely continued to assert that the CC&Rs limit the growth of vegetation to the height of Marshall's nearest roof peak/ridge as provided in the CC&Rs. Demanding that the Marshalls abide by the rules they agreed to when they purchased their property does not constitute a demand for an "expansive", "grandiose", or "comprehensive" view easement.

4. The Height Restriction is not at Odds with Protecting the Outlook of the Subject Properties.

The Marshalls argue that the specific language of Article III, Section 2 of the CCRs limiting vegetation growth to the nearest roof ridge/peak trumps the general language protecting the "outlook". This argument fails according to its own terms. Specific terms will only trump general terms when the terms are in conflict. The Marshalls argue that the CC&Rs set forth a specific way to protect the outlook from each lot – by limiting the height of vegetation to the nearest roof peak/ridge. That statement is undeniably true. However, the Marshalls then argue that the Height

Restriction is somehow at odds with the intent to protect the outlook from each lot. The Marshalls' interpretation makes no logical sense. There is no friction between the desire to protect the outlook from each lot and the Height Restriction. The Marshalls are attempting to inject conflict of terms where no such conflict exists. Instead, a reasonable reading of the language cited allows for protecting the outlook *specifically by* limiting vegetation height. This reasonable interpretation only fails if one starts, as the Marshalls do, with the assumption that the Height Restriction is essentially meaningless. Read logically, the Height Restriction language provides an intent – to protect the outlook and desirability of the properties; and a method for achieving that intent – maintaining the height of the vegetation to the nearest roof ridge/peak. There is no conflict, and so there is no need for the specific to trump the general terms.

5. The Marshalls Rely On Irrelevant Information In Making Their Arguments.

The remainder of the Marshalls arguments rely on irrelevant assumptions to support their desire to avoid compliance with the CC&Rs. For example, the Marshalls point out that Ressmeyer has acknowledged investigating how tall a structure on their property *could* have been built. Based on that investigation, the Marshalls argue that he should not attempt to prevent them from growing vegetation to at least that height. This

argument fails for the same reasons as the Marshalls' hypothetical structure argument. Had the Marshalls constructed a structure as high as possible on their property, perhaps their argument would make sense. The problem for the Marshalls is that they did not do so. Instead, they built a different structure, with a different height. So, while Ressmeyer might have initially anticipated that a structure could be higher, he was no doubt pleasantly surprised to learn that the Marshalls had gone a different route. What the Marshalls might have done is irrelevant to the interpretation of the CC&Rs.

Similarly, the Marshalls argue that many other properties on Mercer Island have trees that grow taller than the height of the Marshalls' roof peak. However, those properties are not governed by the subject CC&Rs. The fact that trees elsewhere on Mercer Island may grow taller than the Marshalls vegetation plays no role in interpreting the CC&Rs.

In the same vein, the Marshalls argue that they desire taller trees along the lot line to give them privacy and a sound barrier. Leaving aside the curious claim that a hedgerow provides significant sound protection, a desire for privacy has no relevance to the interpretation of the CC&Rs. Article III, Section 2 of the CC&Rs explicitly spells out the intention for the Height Restriction. Privacy is not a consideration for limiting the height of the vegetation (nor was sound protection a consideration). Mr. Odegard was explicit on the subject, stating, "We were not contemplating 'privacy'

for any given lot when drafting the outlook and height restriction language in Article III, Section 2 of the CC&Rs. The language was solely intended to protect each lot's desired and valuable outlook toward Lake Washington." CP 329 ¶ 9. The Marshalls' desire for privacy is of no consequence when interpreting the CC&Rs. The Marshalls may attempt to improve the privacy of their lot by growing their vegetation higher than the Height Restriction, however they should use the process spelled out in the CC&Rs to do so (i.e. obtain the approval of all uphill neighbors).

The Marshalls insist that an interpretation that allows vegetation to grow only a few feet above Ressmeyer's driveway would provide an absurd result. The problem for the Marshalls is that Ressmeyer's driveway is irrelevant when determining whether the height of the Marshalls' vegetation violates the Height Restriction. The Marshalls' choice to use Ressmeyer's driveway as a reference point is an arbitrary decision which seeks to paint Ressmeyer's desire for the Marshalls to abide by the CC&Rs as absurd. However, they could just as easily use their own driveway, which the vegetation towers over.

Finally, the Marshalls state that requiring them to trim their vegetation in compliance with the CC&Rs would produce an absurd result because the vegetation would be "truncated" and "unsightly". This argument fails to account for the fact that the Marshalls chose to plant the

vegetation along their upper lot line. When they planted the vegetation (a row of Leyland cypress trees), they knew or should have known about the Height Restriction, yet the Marshalls made their choice anyway (just as they did with the structure they built as opposed to the structure they *could* have built). Now that the vegetation has grown sufficiently to require trimming, the Marshalls want to be protected from their own decisions.

VI. CONCLUSION

The Court should affirm the Superior Court's decision. When read as a whole, the plain language of Article III, Section 2, supports that the CC&Rs limit the height of vegetation on a lot to the height of the roof peak of the nearest structure on that lot. Even in unambiguous situations, the context rule allows the Court to consider extrinsic evidence when interpreting terms of the CC&Rs. When interpreting CC&Rs, the Court should determine the intent of the drafter. Here, the intent of the drafter is clearly explained by the drafter himself, Mr. Odegard. Article III, Section 2 was drafted to protect the "outlook" or view from the subject properties toward Lake Washington. The Height Restriction was put in place to allow lot owners to build the structure they desired on the properties (subject to all relevant statutes, codes, and regulations), but tied the vegetation height to the height of that structure to maintain the overall desirability of *all* the lots, not just the downhill properties.

The Marshalls made several choices they now regret. They chose to buy a property governed by the CC&Rs. They chose property that was too small to provide the separation from neighbors they so desperately seek. They built a house lower on the lot than the alleged original plans may have suggested. They chose to plant vegetation along the lot line that would quickly grow above the Height Restriction. They chose vegetation for their hedgerow that could look “truncated” or “unsightly” if trimmed to an appropriate height. The Marshalls now ask the Court to rewrite the CC&Rs to protect them from their own choices. They do so at the expense of the uphill property owners. In doing so, the Marshalls rely on faulty logic, strange hypotheticals, and irrelevant information in an attempt to create new CC&Rs out of whole cloth.

The law is clear – the lower court was correct. But, stepping back, as the lower court pointed out, even common sense dictates that Ressmeyer’s interpretation is correct. “Interpreting the language in the CC&Rs to allow vegetation to grow to the height of the roof peak/ridge of an uphill neighbor is unreasonable and makes no common sense.” CP 507 ¶4. The plain language, the intent of the drafter, and common sense all support that the CC&Rs do not allow the Marshalls to block Ressmeyer’s view by growing their vegetation to the height of the top of Ressmeyer’s roof.

RESPECTFULLY SUBMITTED this 22nd day of January, 2016.

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By



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NO. 74057-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

STEVEN MARSHALL and DEANNA MARSHALL a.k.a DEANNA
NELSON, a married couple,

Appellants,

ROGER RESSMEYER,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States. I am a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused a copy of the corrected Cover Page to the Respondent's Brief, to which this certificate is attached, to be served on the following counsel of record by the method shown:

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

DATED at Mercer Island, Washington this 26th day of January, 2016.



Anne C. Burgess

NO. 74057-1-I

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BRIEF OF RESPONDENT

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