

COA Cause No. 35787-9-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

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DIVISION II
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**OAKBROOK, 7TH ADDITION HOMEOWNERS ASSOCIATION,
a Washington corporation,**

Appellant,

vs.

**MICHAEL E. NEWHOUSE and KAREN A. NEWHOUSE,
husband and wife, and the marital community of them composed,**

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Although an “Introduction” is not permitted under the Washington Rules of Court, Rules of Appellate Procedure 10.3(a), Appellant/Plaintiff has elected to offer such an “Introduction”. Respondents/Defendants are compelled to respond in the interest of clarity and accuracy.

Respondents/Defendants MICHAEL and KAREN NEWHOUSE (“NEWHOUSE”) have resided in a development known as Oakbrook since in or about 1997. The Oakbrook development contains a wide spectrum of houses, buildings, and structures in differing shapes and sizes. In addition, Oakbrook homeowners have constructed a wide range of outbuildings on their lots; i.e., tent garages, sheds, storage shelters, buildings containing permanent foundations, shops, and other stick-built structures.

Appellant/Plaintiff Oakbrook 7th Addition Homeowners Association (ASSOCIATION) brought on a complaint for injunctive relief in an effort to have NEWHOUSE tear down a structure that was virtually complete by the time the ASSOCIATION took any action.

One of the affirmative defenses raised by NEWHOUSE was equitable estoppel. Pursuant to substantial evidence, the Court found that the

ASSOCIATION had allowed numerous and substantial nonconformities to exist in the subject Oakbrook development, and that NEWHOUSE justifiably relied upon and acted pursuant to the substantial nonconformities existing in the subject OAKBROOK development. Likewise, in spite of obvious construction, the ASSOCIATION did not take any action until NEWHOUSE had made substantial progress. After a review of the testimony offered by ASSOCIATION representatives at the time of trial, it will become clear that the current suit (and subsequent appeal) by the ASSOCIATION is fairly characterized as an attempt to visit oppression on NEWHOUSE rather than an effort to prosecute a just claim.

The Court in the instant case balanced the equities and relied on substantial evidence concerning its decision. As it is entitled to do so according to the particular circumstances surrounding the case, the Court, acting in equity, determined that fairness in this matter required a showing of actual notice to defeat the doctrine of balancing the equities.

Although substantial case law supports the Court's ability to make such a determination, and the facts in this particular case leave no doubt as to the ASSOCIATION's admissions, statements, and acts wholly inconsistent

with their claim, the ASSOCIATION has nonetheless elected to bring on a frivolous appeal.

II. CURRENT ISSUES

1. WHETHER or not a homeowners association is entitled to rely on (unsupported) constructive notice to avoid the well-settled legal principal of balancing the equities;

2. WHETHER or not one who innocently, unintentionally and unknowingly violates a covenant is entitled to balancing of the equities, particularly when the homeowners association delays in bringing suit or notice of a perceived violation;

3. WHETHER or not a defendant is entitled to rely upon the defense of equitable estoppel when, as in the instant case, the homeowners association has made admissions, statements, or acts inconsistent with their claim against the defendant;

4. WHETHER or not fairness in this matter required a showing of actual notice to defeat the doctrine of balancing the equities;

5. WHETHER granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised according

to the circumstances of each case.

III. STATEMENT OF THE CASE

The statement of the case set out in Appellant's brief is both incomplete and inaccurate. Specifically, Appellant relies upon a fact pattern which is both disingenuous and not supported by the record. Further, Appellant has elected to provide superfluous and misleading information in an effort to advocate its tenuous position, all such fictitious information being irrelevant and otherwise inadmissible at the time of trial.

It should be noted that the Appellant elected not to designate approximately 80 exhibits entered at the time of trial, nor did the Appellant designate the majority of clerk's papers. Therefore, the Respondents provide the following set of facts (supported by the record), in an effort to provide the Court with a complete and accurate fact pattern.

HISTORICAL PERSPECTIVE/HAUN GARAGE/SHOP

The origin of this matter concerns the ASSOCIATION's attempt to arbitrarily and selectively enforce covenants through complaint. **CP 3-6**. In answer to the ASSOCIATION's complaint, NEWHOUSE pled numerous affirmative defenses, including, equitable estoppel. **CP 9**.

NEWHOUSE first purchased the NEWHOUSE property in the later part of 1997, and has resided continuously on the property since then. **RP, July 31, 2006, Page 298, Lines 6-10.** Bob Haun owned and occupied the property directly contiguous to the NEWHOUSE property at the time NEWHOUSE purchased and moved into the NEWHOUSE property. **RP, July 31, 2006, Page 298, Lines 11-16.** Although sporadic and not well-circulated, the ASSOCIATION claims to have a kind of newsletter. According to the ASSOCIATION's own testimony, Bob Haun was the editor of the claimed newsletter in 1998. **RP, July 31, 2006, Page 183, Lines 20-25.**

MICHAEL NEWHOUSE came in contact with Mr. Haun in or about 1998. **RP, July 31, 2006, Page 299, Line 24.** Likewise, Mr. Haun held himself out as some sort of committee president and maintained a decision-making role in the ASSOCIATION when NEWHOUSE met Mr. Haun. **RP, July 31, 2006, Page 299, Lines 5-8.**

Eric and Jean Vanderscheer reside on property directly contiguous to the Haun property. **RP, July 31, 2006, Page 184, Lines 3-5:** **RP, July 31, 2006, Page 298, Lines 17-22.** According to the

ASSOCIATION's own testimony, Jean Vanderscheer was the president of the ASSOCIATION board of directors in 1998. **RP, July 31, 2006, Page 183, Lines 14-19.**

A large, detached garage and wood shop subject to frequent and active use is located on the Haun property. **RP, July 27, 2006, Page 34, Lines 3-14: Trial Exhibits 13 and 13-B.** The Haun garage/shop is a stick-built, finished building of considerable size and dimension. **CP 17, 252, 253; Trial Exhibits 13 and 13-B.** The Haun garage/shop is constructed on a permanent foundation. **RP, July 31, 2006, Page 311, Lines 16-18.**

The large, detached garage/shop was present on the Haun property when NEWHOUSE purchased the NEWHOUSE property. **RP, July 31, 2006, Page 299, Lines 12-14. RP, August 1, 2006, Page 362, Lines 22-25, Page 363, Lines 1-7.** Mr. Haun would frequently invite MICHAEL NEWHOUSE over to the Haun property for the purpose of showing off and displaying the garage and shop. **RP, July 31, 2006, Page 299, Lines 15-17.** Mr. Haun was proud to give MICHAEL NEWHOUSE a tour of the garage and shop. **RP, July 31, 2006, Page 312, Lines 18-21.** Mr. Haun would regularly display new tools and pull cars into

the garage/shop for work. **RP, July 31, 2006, Page 183, Lines 14-19:**
RP, July 31, 2006, Page 299, Lines 20-23.

During the time Mr. Haun was president of an ASSOCIATION committee, he actually encouraged NEWHOUSE to build a garage on the NEWHOUSE property. **RP, July 27, 2006, Page 84, Lines 22-24.**
RP, July 27, 2006, Page 84, Lines 22-24. RP, July 27, 2006, Page 34, Lines 9-14. The ASSOCIATION has never attempted to enforce any covenants against the Haun garage and shop, or take any other action concerning the Haun garage. **RP, July 27, 2006, Page 163, Lines 11-23.**
RP, July 31, 2006, Page 311, Lines 22-24. The ASSOCIATION admitted that the Haun garage/shop was constructed in 1990. **RP, July 31, 2006, Page 200, Lines 16-20.**

At the same time, Eric Vanderscheer, who lives directly next to the Haun garage/shop, and whose wife was the president of the ASSOCIATION board of directors in 1998, frequently used the garage/shop to work on his own vehicles and his sons' vehicles. **RP, July 31, 2006, Page 183, Lines 14-19: RP, July 31, 2006, Page 299, Lines 20-22.** MICHAEL NEWHOUSE had conversations with Mr. Haun and Mr. Vanderscheer while all three

parties were standing in the Haun garage/shop. **RP, August 1, 2006, Page 360, Lines 3-7.**

Newsletters offered into evidence by the ASSOCIATION actually reflect that Eric Vanderscheer was a member of the ASSOCIATION committee. **RP, July 31, 2006, Page 188, Lines 9-12.** In fact, the ASSOCIATION actually offered “special thanks” to Bob Haun and Eric Vanderscheer for contributing “much to our community and viability of our board by their many years of service.” **RP, July 31, 2006, Page 195, Lines 1-11.**

NEWHOUSE first considered building a garage after Mr. Haun told him it would be a good idea. **RP, July 27, 2006, Page 43, Lines 4-15.** Eric Vanderscheer also expressed a desire to build a garage. **RP, July 27, 2006, Page 43, Lines 19-23.** Likewise, NEWHOUSE noticed numerous buildings throughout the Oakbrook neighborhood. **RP, July 27, 2006, Page 55, Lines 10-19.** Without question, the Haun building was obvious and in plain sight in 1998. **RP, August 1, 2006, Page 389, Lines 20-25; Page 390, Lines 1-10.** Any trees and shrubs in and about the area of the Haun building were very small in 1998. **RP, August 1, 2006, Page 390, Lines 4-10.**

Although conspicuous year round, the majority of the Haun garage/shop is visible from adjoining streets during the fall as trees drop their leaves. **RP, July 27, 2006, Page 38, Lines 17-21.**

ASSOCIATION representative, Jack Carmichael II, became the editor of the claimed newsletter in or about 2000. **RP, July 27, 2006, Page 129, Lines 17-21.** At one point in the trial, ASSOCIATION representative Jack Carmichael II, claimed that it would be “impossible” to see the Haun garage/shop from the street. **RP, July 27, 2006, Page 119, Lines 24-25: Page 120, Lines 1-9.** Yet, at another point in the trial, Mr. Carmichael denied that he said impossible, but claimed it would be “very, very difficult to see the Haun building from the street. **RP, July 31, 2006, Page 199, Lines 1-7.** Ironically, Jack Carmichael II claimed that the NEWHOUSE structure was in violation of covenants in his letter of January 14, 2005, *based on our visual inspection from the street. . . .*” **Trial Exhibit 10.**

Further (as set out in Appellant’s Brief), Jack Carmichael II claimed he did not know the Haun garage/shop was a garage. **Appellant’s Brief, Page 7.** However, after repeated questioning at the time of trial (and under sworn testimony), Jack Carmichael II actually admitted he was inside the

Haun garage after he became editor of the claimed newsletter.

RP, July 27, 2006, Page 163, Lines 11-14. RP, July 31, 2006, Page 203, Lines 5-8.

The following excerpts of sworn testimony offered by Jack Carmichael II are particularly revealing concerning the ASSOCIATION's intent to visit oppression on NEWHOUSE rather than an effort to prosecute a just claim:

Q: So, in all this time, you have never seen the Haun building until this lawsuit?

A: I saw – it's at the end of a separate cul-de-sac. I never travel that street. I have no reason to travel that street.

RP, July 31, 2006, Page 304, Lines 22-25.

After additional question, and in sharp contrast, Mr. Carmichael then admitted:

Q: So you had gone into the building, Mr. Carmichael?

A: Yes, I had gone into the building, yes.

Q: In 1998?

A: Correct.

RP, July 31, 2006, Page 203, Lines 22-25.

At the time of trial, ASSOCIATION representative Jack Carmichael II testified that no action would be taken concerning the Haun garage/shop unless a complaint was filed. **RP, July 27, 2006, Page 164, Lines 8-13.**

However, the ASSOCIATION admitted that it believes the Haun building is in violation of the ASSOCIATION covenants. **RP, July 31, 2006, Page 192, Line 25: Page 193, Lines 1-2.**

NEWHOUSE STRUCTURE

Work on the NEWHOUSE building commenced in 2004. **RP, July 31, 2006, Page 304, Lines 22-25.** Bulldozers were brought through the neighborhood and to the NEWHOUSE project in broad daylight. **RP, July 31, 2006, Page 305, Lines 1-7.** The transportation of the bulldozers resulted in considerable noise and the bulldozers passed by approximately 30 homes in Oakbrook on their way to the NEWHOUSE project. **RP, July 31, 2006, Page 305, Lines 1-7.** No one from any committee or the ASSOCIATION contacted NEWHOUSE when the bulldozers appeared at the NEWHOUSE project and started work. **RP, July 31, 2006, Page 305, Lines 13-15.** However, as the Appellant admits, a “representative” of the ASSOCIATION testified, under oath, that he lives “three houses down” from the NEWHOUSE property. **RP, July 31, 2006, Page 277, Lines 10-24.**

Thereafter, three to four loads of concrete were brought in for the

foundation. **RP, July 31, 2006, Page 305, Lines 16-23.** No one from any committee or the ASSOCIATION contacted NEWHOUSE when the concrete was brought in. **RP, July 31, 2006, Page 305, Lines 24-25: Page 306, Lines 1, 2.**

Next, the NEWHOUSE structure was framed. A large lumber package was delivered; fellow firemen from MICHAEL NEWHOUSE's place of employment lifted up the walls and pounded nails. The project was noisy. **RP, July 31, 2006, Page 306, Lines 8-15.** Eric Vanderscheer offered to help with the project. **RP, July 31, 2006, Page 306, Lines 16-18.** Again, no one from any alleged committee or the ASSOCIATION contacted NEWHOUSE concerning the project. **RP, July 31, 2006, Page 306, Lines 22-24.**

A gate, which is only sporadically locked and closed, was actually opened by neighbors of NEWHOUSE so that concrete and lumber trucks could come down an alley to the project. **RP, July 27, 2006, Page 101, Lines 2-6; page 104, Lines 5-20. RP, August 1, 2006, Page 372, Lines 12-15.**

Although a "representative" of the ASSOCIATION lived "*three*

houses down” from the NEWHOUSE property during the construction period, and after the NEWHOUSE structure was very near (structural) completion, NEWHOUSE finally received a letter from the ASSOCIATION on or about January 14, 2005. **RP, July 31, 2006, Page 329, Lines 9-14.**

The January 14, 2005 letter, authored by Jack Carmichael II, was the first time NEWHOUSE had ever heard anything about covenant violations. **RP, July 31, 2006, Page 300, Lines 14-18.** The ASSOCIATION never made any attempt to enforce any covenants against NEWHOUSE prior to that time. **RP, July 31, 2006, Page 300, Lines 19-22.** NEWHOUSE had invested roughly \$16,000.00 to \$17,000.00 in the structure by January of 2005. **RP, July 31, 2006, Page 306, Line 25: Page 307, Lines 1-2.**

The letter of January 14, 2005 was a total surprise to NEWHOUSE as a result of all the other buildings and structures in Oakbrook. **RP, July 31, 2006, Page 307, Lines 6-10.** NEWHOUSE never believed that there would be any resistance concerning his project because of all the other existing buildings and structures in Oakbrook. **RP, July 31, 2006, Page 304, Lines 5-16.**

The January 14, 2005 letter authored by ASSOCIATION

representative Jack Carmichael II cited noncompliance with covenant Articles

1, §§ 4, and 7, to wit:

“§4 – No building shall be located on any lot nearer than 20 feet to the front line, nearer than 20 feet to any side street line, nearer than 7 feet to an interior lot line, or (as to a building located on an interior lot) nearer than 15 feet to the rear lot line. In addition, no building or structure shall be build closer than 25 feet to the property line abutting Onyx or Zircon Dr. S.W. For the purpose of this covenant, eaves and steps shall not be considered as a part of the building, but in no case shall a portion of a building lot encroach upon another lot.

§7 – No building, fence, wall or other structure (including any thing or device other than trees, shrubbery or landscaping) shall be commenced, erected or maintained upon any lot, nor shall any exterior addition to or change or alteration therein be made until the plans, specifications and plot plans showing the nature, kind, shape, height, materials and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by an architectural control committee. . . .”

Trial Exhibit 10.

At the time of trial, Jack Carmichael II testified that he later believed he was working from a copy of the covenants “which was not valid”.

RP, July 31, 2006, Page 204, Lines 4-22.

NEWHOUSE had no idea that any ASSOCIATION covenants existed at the time they purchased the NEWHOUSE property. **RP, July 27, 2006,**

Page 30, Lines 20-23. NEWHOUSE did not receive any copies of covenants at the time of closing the NEWHOUSE property. **RP, July 27, 2006, Page 31, Lines 23-25.** After receiving the letter from ASSOCIATION representative Jack Carmichael II, MICHAEL NEWHOUSE drove to an escrow or title company and asked for a copy of the covenants. **RP, July 31, 2006, Page 301, Lines 12-17.**

NEWHOUSE did not know the ASSOCIATION architectural control committee even existed until he received the January 14, 2005 letter from Jack Carmichael II. **RP, August 1, 2006, Page 390, Lines 18-19; Page 391, Lines 3-7.** NEWHOUSE was left with impression that no ASSOCIATION committee existed which dealt with structures. **RP, August 1, 2006, Page 365, Lines 17-25; Page 366, Lines 1-4.**

After receiving the January of 2005 letter from Jack Carmichael II, MICHAEL NEWHOUSE obtained a set of structure plans and visited Mr. Carmichael at the Carmichael residence. **RP, August 1, 2006, Page 353, Lines 21-24.** When NEWHOUSE handed the plans to ASSOCIATION representative Jack Carmichael II, Mr. Carmichael responded, "Thanks, but I don't really need these. We, on the committee, have pretty much decided we

are not going to allow this to exist.” **RP, August 1, 2006, Page 355, Lines 9-11.** Specifically, Mr. Carmichael told NEWHOUSE that the decision had already been made and that NEWHOUSE could tear the structure down or move it two feet.” **RP, August 1, 2006, Page 355, Lines 23-25: Page 356, Lines 1-7.**

Jack Carmichael’s letter was confusing to NEWHOUSE as a result of all the other structures and buildings in Oakbrook. After receiving the January 14, 2005 letter, NEWHOUSE did not deconstruct or advance the project. **RP, July 27, 2006, Page 84, Lines 1-9.** Again, NEWHOUSE had been encouraged by Bob Haun to build a garage/shop, and Eric Vanderscheer consistently used the Haun garage/shop. **RP, July 27, 2006, Page 84, Lines 18-25: Page 85, Lines 1-5.**

A February 9, 2005 letter authored by Jack Carmichael II stated, in part and without qualification:

“Access to the proposed detached garage would require a second driveway. . . . **Since there are no such secondary driveways within the Oakbrook 7th Addition,** this additional feature would conflict with the ‘harmony’ requirements in both uniqueness and appearance.” **Trial Exhibit 9.**

At the time of trial, Jack Carmichael II was asked about the two

separate driveways set out on Lot 340, and Mr. Carmichael admitted such lot had two separate driveways. **RP, August 1, 2006, Page 401, Lines 16-20; Trial Exhibit 27-A.** When asked about his statement to NEWHOUSE that “Since there are no such secondary driveways within the Oakbrook 7th Addition . . .”, Mr. Carmichael admitted he was “*mistaken in that remark.*” **RP, August 1, 2006, Page 401, Lines 21-24.** When asked, specifically, about the claimed separate driveway violation set out in his letter of February 9, 2005, Jack Carmichael II then testified that he himself actually found “three or four separate driveways.” **RP, August 1, 2006, Page 402, Lines 2-3.**

Clearly, Mr. Carmichael’s sworn testimony is wholly inconsistent with the statements set out in the January 9, 2005 letter. **CP 168, Trial Exhibit 10.** In truth, the Trial Exhibits proffered into evidence by NEWHOUSE are replete with examples of separate driveways. **See Trial Exhibit Numbers set out below.** Specific examples of separate driveways include, but are not limited to, **Trial Exhibits 45-B, 46, 52-A, 55-B, 57-A, 57-B, 57-B and 77-A.**

The NEWHOUSE garage was completed to rafter height before by the

end of 2004. **RP, July 27, 2006, Page 82, Lines 22-25; Page 83, 1-4.**

According to the ASSOCIATION, the NEWHOUSE building was “a good, 12 15 feet” above the companion fence line before the ASSOCIATION came in contact with the project. **RP, July 27, 2006, Page 150, Lines 22-25; Page 151, Line 1.** NEWHOUSE did not do anything for several weeks after receiving the January 14, 2005 letter. **RP, July 27, 2006, Page 84, Lines 10-12.** Even at the time of trial, the NEWHOUSE structure was without electricity. **RP, July 27, 2006, Page 91, Lines 18-25.** Thereafter, the ASSOCIATION did nothing and did not even file a complaint until July 27, 2005. **CP 3.**

The ASSOCIATION’s complaint attempts to prosecute claims based on three covenants: (1) conflict of harmony, (2) setback requirements, i.e., “no building shall be located . . . nearer than 7 feet to an interior lot line”, and (3) “No lot shall be used except for residential purposes. No structure or building of any kind shall be erected, altered, placed or permitted to remain on any lot other than one detached single family dwelling for single family occupancy only, not to exceed two stories in height.” **CP 4, 5.** The ASSOCIATION admitted that the last covenant specifically referenced

“structure or building”, but admitted it does not always enforce such a provision. **RP, July 27, 2006, Page 167, Lines 5-16.**

SELECTIVE ENFORCEMENT AND ASSOCIATION CONFLICT

The ASSOCIATION admitted that it arbitrarily enforced covenants according to its own random definition of “common sense.” **RP, July 27, 2006, Page 167, Lines 17-25: Page 168, Lines 1-6.** However, the ASSOCIATION also admitted that the covenants do not provide for such “common sense”, unilateral enforcement. **RP, July 27, 2006, Page 167, Lines 17-25: Page 166, Lines 22-25: Page 167, Lines 1-4.** At the same time, according to a subjective interpretation offered by Jack Carmichael II, a shed cannot be construed as a building, and is not subject to the covenants. **RP, July 31, 2006, Page 179, Lines 10-17.** The record reflects that such a determination is also arbitrary. **RP, July 31, 2006, Page 191, Lines 23-25: Page 191, lines 1-5.** When asked to provide any document that allows the ASSOCIATION to determine what is and is not a “building”, Jack Carmichael II only offered, “I have said that there has to be some type of interpretation of these things.” **RP, July 31, 2006, Page 207, Lines 22-25.** In truth, whether or not a shed violates a covenant is determined pursuant to

the arbitrary and subjective determination of Jack Carmichael II.
RP, July 27, 2006, Page 124, Lines 22-25: Page 125, Lines 1-3.

The ASSOCIATION admitted that the majority of alleged covenant violations it attempts to enforce concern recreational vehicle and recreational vehicle parking. **RP, July 27, 2006, Page 152, Lines 21-25: Page 153, Lines 1-3.**

ASSOCIATION representative Skip Ettinger testified that ASSOCIATION covenants do not provide for any distinction between a “shed” and a “building”. **RP, July 31, 2006, Page 227, Lines 3-13.** In complete contrast to the testimony of Jack Carmichael II, ASSOCIATION representative Clarence Latshaw testified that setback requirements are enforced against *any building or shed* that the ASSOCIATION knows about. **RP, July 31, 2006, Page 287, Lines 8-20.** ASSOCIATION representative Clarence Latshaw also agreed that a building could be defined as a structure enclosing a space within its walls and usually covered with a roof. **RP, July 31, 2006, Page 282, Lines 14-17.** Mr. Latshaw testified that nothing has been done about the Haun garage/shop. **RP, July 31, 2006, Page 289, Lines 1-7.** Yet, Clarence Latshaw is the ASSOCIATION

representative who lives “*three houses down*” from the NEWHOUSE property. **RP, July 31, 2006, Page 277, Lines 12-24.**

Adding to the inconsistency, and in direct conflict with the testimony of Skip Ettinger and Clarence Latshaw, Jack Carmichael II testified that *he* has “drawn the line that, if it’s 10 by 12 or smaller and placed away in the back, behind a fence line or in the back where it’s not in general view, it’s in harmony with the neighborhood. . . .” **RP, July 27, 2006, Page 126, Lines 8-13.** Jack Carmichael II further testified that covenant violations are enforced “based on my interpretation of what this really means”. **RP, July 27, 2006, Page 157, Lines 16-22.** Notably, Jack Carmichael believes enforcement should be based upon “*what I think* the covenants actually say.” **RP, July 27, 2006, Page 159, Lines 23-24.**

When asked that, with the number of violations present in Oakbrook, isn’t it reasonable to believe the residents do not have to ask for any consent from the ASSOCIATION, Jack Carmichael II replied, “I believe a lot of people seem to think that can do things without having to ask, yes.” **RP, July 27, 2006, Page 111, Lines 6-10.**

At the time of trial, the ASSOCIATION was unable to offer any

coherent definition of “harmony”. **RP, July 27, 2006, Page 119, Lines 7-15.**

According to, Jack Carmichael II, consistency and harmony are subjectively defined as “if you have something that becomes a sore thumb, it’s a sore thumb.” **RP, July 27, 2006, Page 119, Lines 16-18.** Notably, Jack Carmichael II, on behalf of the ASSOCIATION, has filed a substantive pleading in Pierce County Superior Court under his own signature. **CP 116, 117.**

On the other hand, NEWHOUSE never heard anything about neighborhood “harmony” prior to the current lawsuit. **RP, July 27, 2006, Page 55, Lines 10-12.** NEWHOUSE had no idea what “harmony” could be as a result of the numerous buildings, “everything from tool sheds to garages . . . big units, foundations. . . .” **RP, July 27, 2006, Page 55, Lines 15-19.**

Witness Denise Copeland resides “straight across the street and just to the right in the cul-de-sac” from the NEWHOUSE residence. **RP, July 27, 2006, Page 57, Line 25; Page 58, Lines 1-4.** She has resided in her current residence for nine years. **RP, July 27, 2006, Page 58, Lines 5-6.** The ASSOCIATION references the testimony of Denise Copeland, but fails to mention that she testified that, in her experience, there are a lot of

structures and buildings, apart from single-family residences in Oakbrook. **RP, July 27, 2006, Page 58, Lines 21-24.** Ms. Copeland also testified that she has a building on her property that is less than seven feet from her property line. **RP, July 27, 2006, Page 61, Lines 18-22.** She further believes that “everyone in the neighborhood has one. . . .” **RP, July 27, 2006, Page 62, Lines 4-5.** Ms. Copeland also testified that there is another building “right up” to her fence; i.e., a “permanent storage shed.” **RP, July 27, 2006, Page 64, Lines 16-22.** Ms. Copeland also noted that she could see the NEWHOUSE structure from the “road as I’m coming home or going. . . .” **RP, July 27, 2006, Page 62, Lines 18-22.**

The ASSOCIATION could not produce any evidence concerning dissemination of any newsletter from 1997 through 2000. **RP, July 27, 2006, Page 130, Lines 19-24.** In spite of claims set out in Appellant’s Brief, NEWHOUSE wrote one safety article on one occasion for the claimed ASSOCIATION newsletter. **RP, July 27, 2006, Page 45, Lines 22-24: Page 46, Lines 1-13.** In truth, Bob Haun authored several articles in the newsletter under the NEWHOUSE name. **RP, July 27, 2006, Page 48, Lines 10-13.**

Further, admissible evidence provides that MICHAEL NEWHOUSE was invited to one meeting at Eric Vanderscheer's residence after Mr. Vanderscheer found out that NEWHOUSE was a firefighter/paramedic. **RP, July 31, 2006, Page 301, Lines 18-24.** Notably, Jean Vanderscheer and Bob Haun attended the meeting. **RP, July 31, 2006, Page 302, Lines 15-18.** NEWHOUSE's presence at Mr. Vanderscheer's residence was related to a possible safety committee, although NEWHOUSE virtually did nothing. **RP, July 31, 2006, Page 304, Lines 1-4.** NEWHOUSE did not attend another meeting until after the ASSOCIATION brought suit. **RP, July 31, 2006, Page 302, Lines 3-11.**

Before the ASSOCIATION brought suit, KAREN NEWHOUSE did not read any of the ASSOCIATION newsletters that actually reached the NEWHOUSE residence. **RP, July 31, 2006, Page 235, Lines 15-22.** Mr. Haun left KAREN NEWHOUSE with the impression that he was the ASSOCIATION president. **RP, July 31, 2006, Page 236, Line 25; Page 237, Lines 1-5.**

"REAL LIFE" TESTIMONY

The ASSOCIATION attempts to bootstrap the fractured testimony of

Johanna Henry to the concept that, somehow, the NEWHOUSE structure was not in “harmony”, and that “crowded lots reduce the desirability of property in Oakbrook.” **Appellant’s Brief, Page 8.** First, Ms. Henry did not perform any market analysis that was, in any way, relevant in this case. **RP, July 31, 2006, Page 251, Lines 10-14.** Ms. Henry was unable to offer any data related to a market analysis concerning the NEWHOUSE property. **RP, July 31, 2006, Page 252, Lines 8-14, Lines 20-25.** Ms. Henry admitted she is not qualified to appraise a property. **RP, July 31, 2006, Page 256, Lines 19-21.** Ms. Henry also admitted that she has a separate driveway to the back of her property, and that she has visible garbage cans and a trailer in the separate driveway. **RP, July 31, 2006, Page 263, Lines 17-19: Trial Exhibit 88.**

On the other hand, NEWHOUSE called Pierce County Deputy Sheriff Dennis Banach to testify at the time of trial. **RP, July 31, 2006, Page 293, Lines 15-20.** Originally, this entire matter began with a spurious complaint from Ruebena Grant; Mr. Banach is the current owner of the former Grant residence. **RP, July 31, 2006, Page 293, Lines 21-25: Page 294, Line 1.** The NEWHOUSE structure was visible to Mr. Banach when he purchased his

current residence. **RP, July 31, 2006, Page 294, Lines 7-9: Page 296, Lines 1-5.** The existence of the NEWHOUSE structure did not have any influence on Mr. Banach to purchase the residence and real property. **RP, July 31, 2006, Page 294, Lines 7-11.** In fact, Mr. Banach offered more than the asking price for the Grant property. **RP, July 31, 2006, Page 294, Lines 12-14.** Mr. Banach did not receive any covenants at the time of closing. **RP, July 31, 2006, Page 294, Lines 15-18.** Mr. Banach also noted the existence of “buildings . . . sheds, garages” throughout the neighborhood. **RP, July 31, 2006, Page 295, Lines 16-21.**

SITE VISIT BY THE COURT AND FINDINGS

As it has the authority to do, the Court invoked (1) balancing of equities and (2) equitable estoppel in this case. Specifically, the Trial Court conducted a comprehensive site visit of the Oakbrook development on the afternoon of Friday, July 28, 2006. **CP 39.** Notably, the Court did not limit its site visit to the NEWHOUSE neighborhood. Rather, the Court conducted an extensive tour of Oakbrook 7th Edition. **RP, July 31, 2006, Page 308, Lines 9-17: Trial Exhibit 89.**

The Court found that the NEWHOUSE structure was very high

quality and very much in harmony with his residence. **RP, August 2, 2006, Page 469, Lines 22-23.** The Court further determined that the whole area of the Oakbrook development is of “mixed quality, style, and level of maintenance”, and that it was not shown to any appreciable degree that the NEWHOUSE structure blocks air, light, or view to any other properties. **RP, August 2, 2006, Page 469, Lines 24-25: Page 470, Lines 1-3.** The Court also noted that Mr. Banach was a “real-life impeacher” concerning Ms. Henry’s opinion in that Mr. Banach paid full price and even more for his property, the same which is right next to the NEWHOUSE property. **RP, August 2, 2006, Page 471, Lines 20-24.**

NEWHOUSE tendered over 80 different photograph exhibits into the record at the time of trial which reflected covenant violations: **CP 340, 341, 342, 344; Trial Exhibits 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 86, 87, 88, 89, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, and 113.** Most of the NEWHOUSE exhibits concern photographs of

violations that have been taken directly from street view.

RP, August 1, 2006, Page 386, Lines 22-25; Page 387, Lines 1-11.

Likewise, the Trial Court acknowledged that NEWHOUSE clearly identified 80 or more covenant violations. **CP 86.** Pursuant to a site visit and NEWHOUSE exhibits, the Trial Court determined and recognized examples of substantial violations, to wit: Oakbrook lots 51, 385, 9, 24, 25, 42, 61, 371, 340, 96, 111, 160, 164, 204, 299, 297, 293, 324, 250, 281, 260, 278, and 379 (Haun lot). **CP 86.** Specifically, the Court noted that the violations were permanent and substantial. **CP 86.** The ASSOCIATION was unable to provide any evidence that it did or did not approve of the substantial and permanent violations. **CP 86.** As the Trial Court noted, the “*telling factor*” in this case concerned the extensive, substantial and permanent covenant violations in Oakbrook. **CP 87.**

The Court further noted that a number of structures tended not to promote open space, to wit: Lots 97, 76, 80, 385, and 284. **RP, August 2, 2006, Page 472, Lines 14-18: CP 89.** Specifically the Court noted that the Vanderscheer lot was not particularly attractive. **CP 89.**

In addressing equitable estoppel, the evidence supported the Court’s

finding, to wit: “[T]he Architectural Control Committee has allowed numerous and substantial nonconformities to exist, and the Committee did not act until the defendant was substantially into his project, despite the fact that there was obvious construction going on.” **RP, August 2, 2006, Page 474, Lines 18-22.** The Court further determined, pursuant to the evidence presented at the time of trial, that there was no dispute that NEWHOUSE acted on the nonconformities. **RP, August 2, 2006, Page 474, Line 25.** The Court also recognized that NEWHOUSE was not acting in bad faith. **RP, August 2, 2006, Page 463, Lines 4-6.**

Applicable case law and substantial evidence submitted at the time of trial leaves no doubt that the Trial Court’s decision to deny the ASSOCIATION’s request for an injunction was (and is) correct. The Appellate Court is invited to review the Trial Court’s well-grounded and well-reasoned ruling in its entirety, and the same is incorporated herein by referenced, to wit: **RP, August 2, 2006, Page 463 through Page 476.**

IV. ARGUMENT

A. THE TRIAL COURT IS VESTED WITH SOUND DISCRETION TO GRANT OR WITHHOLD AN INJUNCTION.

First, in Washington, it is well-settled that the granting or withholding of an injunction is addressed to the sound discretion of the Trial Court to be exercised *according to the circumstances of the particular case*. **Holmes Harbor Water Co., Inc. v. Page**, 8 Wn.App. 600, 508 P.2d 628 (1973); **Lenhoff v. Birch Bay Real Estate, Inc.**, 22 Wn.App. 70, 587 P.2d 1087 (1978); **Washington Federation of State Employees, Council 28, AFL-CIO v. State**, 99 Wn.2d 878, 665 P.2d 1337 (1983).

When the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion. **MacKay v. MacKay**, 55 Wn.2d 344, 347 P.2d 1062 (1959).

According to the ASSOCIATION, the trial Court applied a defense that contravenes “common sense”. Although Jack Carmichael II would have the matter addressed according to his subjective, “common sense” interpretation, Washington law clearly provides that the decision to grant or withhold an injunction is left in the sound discretion of the Trial Court, the same to be exercised according to the circumstances of the particular case.

The ASSOCIATION mistakenly believes that it has a “legal and equitable right” to injunctive relief in any case, but ignores the Trial Court’s

application of balancing the equities. **See below.** In support of their proposition, the ASSOCIATION relies on *Kock v. Swanson*, 4 Wn.App. 456, 481 P.2d 915 (1971).

Reliance on *Kock* is good example of the ASSOCIATION's attempt and desire to supplant its "common sense" interpretation in place of well-established legal principles. The *Kock* case concerned a tract description in a mortgage. The tract was erroneously described as a portion of Tract 125, when the only property owned by the mortgagors in the plat at the time of their mortgage was in Tract 124, (the property intended to be covered by the mortgage). The Court determined that subsequent grantees were not put on notice by the auditor's index of the recorded mortgage containing the erroneous description, and therefore had no duty to go further than a search of the record as to Tract No. 124. Simply put, the *Kock* case has nothing to do with covenants or related enforcement.

Next, the ASSOCIATION misconstrues the facts in *Piepkorn v. Adams*, 102 Wn.App. 673, 10 P.3d 428 (2000). In *Piepkorn*, Adams initially submitted construction plans to an Architectural Control Committee, seeking approval to build a six-foot cedar fence that would run along the lot lines of

the Adams's property. The Committee disapproved Adams' request. Adams responded to the Committee by submitting revised construction plans. Adams attached a letter addressed to the Committee to the revised plans stating, "I will proceed with construction. Please contact me immediately if you do not agree with the contents of this letter." None of the members of the Committee received this letter until Adams produced it during discovery. Of course, the Committee did not respond to the letter, and Adams he began constructing the fence.

In *Piepkorn*, it is clear Adams knew the Committee existed before starting construction. In the instant case, all of the evidence provides just the opposite: NEWHOUSE did not know the ASSOCIATION architectural control committee even existed until he received the January 14, 2005 letter from Jack Carmichael II. **RP, August 1 , 2006, Page 390, Lines 18-19; Page 391, Lines 3-7.** NEWHOUSE was left with impression that no ASSOCIATION committee existed which dealt with structures. **RP, August 1 , 2006, Page 365, Lines 17-25; Page 366, Lines 1-4.**

As noted in *Lenhoff*, supra:

State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775, 784 (1971), teaches as follows:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Lenhoff, 22 Wn.App. at 74-75.

There is no doubt that the comparative weight in support of the Trial Court's decision in this case is substantial. On the other hand, the ASSOCIATION has categorically failed to provide any evidence which suggests that the Trial Court's decision was at all "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."

Again, the Trial Court in this case was careful to conduct a comprehensive site visit the Oakbrook development. The "telling factor" in this case concerning the multitude of violations, which allowed the Court to prevent the ASSOCIATION from selectively enforcing covenants against NEWHOUSE. As set out in Thisius v. Sealander, 26 Wn.2d 810, 175 P.2d 619 (1946):

There is no question but that equity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.

Thisius, 26 Wn.2d at 818.

B. BALANCING OF THE EQUITIES IS APPROPRIATE IN THE INSTANT CASE, WITH SUCH A BALANCE BEING IN NEWHOUSE'S FAVOR.

As the Trial Court in this matter noted, injunctive relief provides that two elements are required, but that the Court is entitled to balance the equities contingent *upon the circumstances in the particular case*. As the

Piepkorn Court noted:

"Restrictive covenants ... are enforceable by injunctive relief." *Hollis*, 137 Wash.2d at 699, 974 P.2d 836. "To establish the right to an injunction, the party seeking relief must show (1) that he or she has a clear legal or equitable right, and (2) that he or she has a well-grounded fear of immediate invasion of that right." *Id.* Nonetheless, a court must balance the equities before it grants an injunction against an "innocent defendant who proceeds without knowledge or warning that his [or her] activity encroaches upon another's property rights." *Id.* at 700, 974 P.2d 836.

Piepkorn v. Adams, 102 Wn.App. at 6865.

When considering whether to grant or deny an injunction a trial court may recognize circumstances and weigh as equitable factors *any of the following*: (a) the character of the interest to be protected, (b) the relative

adequacy to the plaintiff of injunction in comparison with other remedies, (c) the delay, if any, in bringing suit, (d) the misconduct of the plaintiff if any, (e) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, (f) the interest of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment. ***Steele v. Queen City Broadcasting Co.***, 54 Wn.2d 402, 341 P.2d 499 (1959).

In balancing the equities, the Trial Court found four primary themes and/or factors to be addressed. The first theme addressed by the Court was fairness. The second theme and/or factor concerned whether the NEWHOUSE structure affects the value, desirability and attractiveness of real property. The third theme and/or factor concerned the possible loss or problems created for Defendants NEWHOUSE in the event of an unfavorable ruling. Finally the fourth theme and/or factor to be addressed by the Court concerned the possible loss or problems created for the ASSOCIATION in the event of an unfavorable ruling.

In the instant case, ***Holmes Harbor Water Co., Inc. v. Page***, 8 Wn.App. 600, 508 P.2d 628 (1973) is helpful, instructive and controlling. In

Holmes Harbor Water Co., an action was brought by lot owners and a corporation to enforce a restrictive covenant regulating the height of structures built on lots within a certain plat. The Plaintiffs sought an injunction requiring neighboring lot owners to remove or lower a roof that violated the height restriction. The Trial Court determined that the height restriction had been breached, but *denied* the mandatory injunction requested.

The Appellate Court affirmed by first recognizing that the Trial Court acted within its discretion in denying the mandatory injunction. The Trial Court also confirmed the Defendants' violation was unintentional. The Court noted that the Plaintiffs also delayed in bringing suit until the construction of defendants' house was complete. Further, as in the instant case, the Plaintiffs in *Holmes Harbor Water Co.*, failed to prove any injury, and that the cost of removing the violation was exorbitant when compared with the violation of the covenant.

The ASSOCIATION cites several cases (with differing fact patterns) in an effort to convince the Appellate Court that NEWHOUSE somehow intentionally or negligently violated the claimed covenants. Much as it selectively enforces claimed covenants, the ASSOCIATION further chooses

to ignore the multitude of violations throughout Oakbrook. Key facts in the instant prove that NEWHOUSE was clearly an innocent party who proceeded without any knowledge or warning: (1) Bob Haun owned and occupied the property directly contiguous to the NEWHOUSE property at the time NEWHOUSE purchased and moved into the NEWHOUSE property. **RP, July 31, 2006, Page 298, Lines 11-16.** (2) Mr. Haun held himself out as some sort of a committee president and maintained a decision-making role in the ASSOCIATION when NEWHOUSE met Mr. Haun. **RP, July 31, 2006, Page 299, Lines 5-8.** (3) Eric and Jean Vanderscheer reside on property directly contiguous to the Haun property. **RP, July 31, 2006, Page 184, Lines 3-5: RP, July 31, 2006, Page 298, Lines 17-22.** (5) According to the ASSOCIATION's own testimony, Jean Vanderscheer was the president of the ASSOCIATION board of directors in 1998. **RP, July 31, 2006, Page 183, Lines 14-19.** (6) A large, detached garage and wood shop subject to frequent and active use is located on the Haun property. **RP, July 27, 2006, Page 34, Lines 3-14: Trial Exhibits 13 and 13-B.** (7) The large, detached garage/shop was present on the Haun property when NEWHOUSE purchased the NEWHOUSE property. **RP, July 31, 2006,**

Page 299, Lines 12-14. RP, August 1, 2006, Page 362, Lines 22-25, Page 363, Lines 1-7. (8) Mr. Haun would frequently invite MICHAEL NEWHOUSE over to the Haun property for the purpose of showing off and displaying the garage and shop. **RP, July 31, 2006, Page 299, Lines 15-17.**

(9) Mr. Haun actually encouraged NEWHOUSE to build a garage on the NEWHOUSE property. **RP, July 27, 2006, Page 84, Lines 22-24. RP, July 27, 2006, Page 84, Lines 22-24. RP, July 27, 2006, Page 34, Lines 9-14.** (10) The ASSOCIATION has never attempted to enforce any covenants against the Haun garage and shop, or take any other action concerning the Haun garage. **RP, July 27, 2006, Page 163, Lines 11-23. RP, July 31, 2006, Page 311, Lines 22-24.** (11) NEWHOUSE first considered building a garage after Mr. Haun told him it would be a good idea. **RP, July 27, 2006, Page 43, Lines 4-15.** (12) Eric Vanderscheer also expressed a desire to build a garage. **RP, July 27, 2006, Page 43, Lines 19-23.** (13) NEWHOUSE noticed numerous buildings throughout the Oakbrook neighborhood. **RP, July 27, 2006, Page 55, Lines 10-19.** (14) Although a “representative” of the ASSOCIATION lived “*three houses down*” from the NEWHOUSE property during the construction period, the ASSOCIATION

did not do anything until the NEWHOUSE structure was very near (structural) completion. **RP, July 31, 2006, Page 329, Lines 9-14.** These key facts feed directly into the Trial Court's first theme.

The second theme and/or factor considered by the Trial Court in the instant case concerned whether the NEWHOUSE structure affects the value, desirability and attractiveness of real property; i.e. the interest of third persons or the public. Here, any and all speculation is removed through the "real-life" testimony of Dennis Banach.

The NEWHOUSE structure was visible to Mr. Banach when he purchased his current residence. **RP, July 31, 2006, Page 294, Lines 7-9; Page 296, Lines 1-5.** Again, the existence of the NEWHOUSE structure did not have any influence on Mr. Banach to purchase the residence and real property. **RP, July 31, 2006, Page 294, Lines 7-11.** Mr. Banach actually offered more than the asking price for the property. **RP, July 31, 2006, Page 294, Lines 12-14.** Mr. Banach also noted the existence of "buildings . . . sheds, garages" throughout the neighborhood. **RP, July 31, 2006, Page 295, Lines 16-21.** Simply put, there is no evidence in this case that suggests the NEWHOUSE structure has a negative impact on

any third party or the public.

The Trial Court examined possible loss or problems created for both the ASSOCIATION and NEWHOUSE in the event of an unfavorable ruling. As the Court noted, an adverse ruling against NEWHOUSE would result in a major impact. **RP, August 2, 2006, Page 472, Lines 24-25.** Even the structure's value at the time the ASSOCIATION finally issued a letter in January of 2005 provides that there is a loss and equity in favor of NEWHOUSE. **RP, August 2, 2006, Page 472, Lines 1-7.** The Trial Court noted that the ASSOCIATION would have problems no matter how the litigation was decided. Particularly, the Trial Court observed that if the ASSOCIATION prevailed, it would have to decide whether to initiate enforcement against a “multitude of other violations.” **RP, August 2, 2006, Page 473, Lines 14-16.**

The ASSOCIATION attempts to advance unsupported legal principles (“the filing of covenants is sufficient itself to prevent any balancing of the equities”) in an effort to avoid balancing of the equities. The ASSOCIATION also claims that “NEWHOUSE received 30 newsletters “discussing covenants”, without offering any evidence of what NEWHOUSE

did or did not read (assuming, *arguendo*, he even received the newsletters.) The evidence in this case clearly provides that NEWHOUSE proceeded without warning or knowledge, especially in light of acts of Haun, Vanderscheer, and Latshaw (who lived “three houses down”) from NEWHOUSE.

C. THE ASSOCIATION IS EQUITABLY ESTOPPED FROM ENFORCING ALLEGED COVENANTS AGAINST NEWHOUSE.

The elements of equitable estoppel are: (1) admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. *McDaniels v. Carlson*, 108 Wn.2d, 738 P.2d 254 (1987). Further, estoppel can arise through silence, as well as statements, when one has a duty to speak. *McDaniels*, supra. The observation by the Court in *Huff v. Northern Pac. Ry. Co.*, 38 Wn.2d 103, 228 P.2d 121 (1951), is directly on point in the instant case:

Where a person with actual or constructive knowledge of facts induces another, by his words or conduct, to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from

repudiating the transaction to the other's prejudice.

Huff, 38 Wn.2d at 114.

As stated by the Court in Harms v. O'Connell Lumber Co., 181 Wash. 696, 44 P.2d 785 (1935): “If one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to have remained silent.” Harms, 181 Wash. at 700.

The undisputed evidence in the instant case provides, in part: (1) Over 80 violations existed in Oakbrook; (2) Mr. Haun and Mr. Vanderscheer, both who held themselves out as authority figures in the ASSOCIATION encouraged NEWHOUSE to build a structure; (3) Mr. Haun had already constructed a building that, according to the ASSOCIATION at the time of trial, was in violation, yet the ASSOCIATION did nothing about it; (4) An ASSOCIATION representative called to testify at the time of trial lives “*three houses down*” from NEWHOUSE, but did nothing through the entire construction phase of the NEWHOUSE structure.

NEWHOUSE acted on the very representations (and encouragement) of Haun and Vanderscheer. NEWHOUSE never had any idea that he would meet with any resistance concerning the construction and existence of the

NEWHOUSE structure. After construction was virtually complete, then Jack Carmichael II asserted a misguided, claimed authority which directly contradicted the acts and admissions of Haun and Vanderscheer.

In their brief, the ASSOCIATION fails to recognize that they have failed to do anything about of 80 violations in Oakbrook, yet, somehow, they expect NEWHOUSE to overlook such violations in the same manner as the ASSOCIATION has elected to do. As the Trial Court stated: “By inaction, the . . . Committee has allowed numerous and substantial nonconformities to exist, and the Committee did not act until the defendant was substantially into his project, despite the fact that there was obvious construction going on.” **RP, August 2, 2006, Page 474, Lines 18-22.** Clearly, NEWHOUSE was justified in relying upon the representations of Mr. Haun, Mr. Vanderscheer, and the numerous and substantial nonconformities. And, it was certain that NEWHOUSE would suffer substantial injury if the ASSOCIATION was allowed injunctive relief.

OAKBROOK places great reliance upon *Wilhelm v. Beyersdorf*, 100 Wn.App. 836 (2000), in support of the proposition that “constructive notice of covenants precludes reasonable reliance on another party’s conduct

asserting otherwise.” However, the ASSOCIATION ignores that, as reflected in the cases provided by the Appellant, balancing of the equities plays into cases concerning injunctive relief, and each one of the cases are subject to fact-specific application of the doctrine.

Wilhelm concerns a Division III case wherein the owners of a dominant estate brought suit seeking declaratory judgment, reformation of an easement to conform to a road's actual use, easement by prescription, and damages for interference with easement.

The facts in *Wilhelm* reflect that the Defendants were charged with actual and/or constructive knowledge that their property was encumbered by an easement because, apparently, “a title report provided to them before closing indicated that the land was subject to several easements” *and* “they visited the site”.

In contrast, the evidence in the instant case provides that NEWHOUSE never received any copies of covenants at the time of closing, nor did NEWHOUSE receive any notice that any covenants even existed until January of 2005. Any action analogous to a site visit would have revealed over 80 violations, much the same as the Trial Court noted as a result of its

site visit in the instant case.

The ASSOCIATION next asserts an unsupported legal proposition that NEWHOUSE cannot be innocent or free from fault because notice is “imputed”, and thereafter claims the NEWHOUSE “neighbors knew about the covenants.” The NEWHOUSE “neighbors” concern Mr. Haun and Mr. Vanderscheer (and their acts and representations as set out above). Another neighbor “*three houses down*” refused to do anything. Any theory based on constructive notice does not supplant the well-settled legal principle that the granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised *according to the circumstances of the particular case*.

The ASSOCIATION turns to *Mountain Park Homeowners Association, Inc. v. Tydings*, 125 Wn.2d. 337, 883 P.2d 1383 (Wash. 1994), and attempts to use the Court’s recognition of a severability clause as a foundation for “the separate treatment of each covenant.” The *Mountain Park Homeowners Association, Inc.* case examined whether violations of other protective covenants in a subdivision were irrelevant to a covenant against antennas which had not been enforced in a uniform manner. The

ASSOCIATION's nonsensical argument should be dismissed in its entirety.

The ASSOCIATION further argues that the "common sense" of Jack Carmichael II should replace the authority of the Trial Court. The ASSOCIATION relies upon *Riss v. Angel*, 131 Wn.2d 612, 883 P.2d 1383 (1997) for such a proposition. The *Riss* Court addressed "conclusory statements" of the architectural control committee chairman which were advanced for the purpose of attempting to prove that a residence would not be in "harmony" with the existing neighborhood:

In examining whether rejection of a proposal is reasonable, courts have identified a number of factors which demonstrate unreasonable decisionmaking. Among other things, courts have found decisions unreasonable where . . . the record showed merely conclusory statements of the chairman of an architectural control committee that the proposed residence was not harmonious with surrounding structures.

Riss, 131 Wn.2d at 627.

Apart from "conclusory statements" offered by Jack Carmichael II, there is no evidence in the record which provides that the NEWHOUSE structure is not "harmonious". All of the evidence provides just the opposite.

D. THE REVIEWING COURT WILL NOT SUBSTITUTE ITS JUDGMENT REGARDING FACTUAL DETERMINATIONS.

The ASSOCIATION's objective on appeal is to have the Appellate Court substitute its own judgment in place of the Trial Court concerning factual determinations. However, there is a presumption in favor of the Trial Court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. Leppaluoto v. Eggleston, 57 Wn.2d 393, 357 P.2d 725 (1960).

Challenged findings are not disturbed if they are supported by substantial evidence as they are in the instant case. In re Marriage of Vander Veen, 62 Wn.App. 861, 815 P.2d 843 (1991). More specifically, Washington has determined that the Court in a bench trial is in a better position to evaluate the credibility of witnesses and that the reviewing Court will not substitute its judgment regarding factual determinations. Fisher Props., Inc v. Arden-Mayfair, Inc., 115 Wn.2d 364, 798 P.2d 799 (1990).

E. NEWHOUSE SHOULD BE AWARDED ATTORNEYS FEES.

The Washington Rules of Court, Rules of Appellate Procedure (RAP)

18.1(a) provides in part:

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial

court.

In turn, the Washington Rules of Court, Rules of Appellate Procedure (RAP) 18.9(a) provides in part:

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, . . . who . . . files a frivolous appeal, . . .to pay terms. . . .

Under RAP 18.9(a), an appeal is deemed frivolous if no debatable issues upon which reasonable minds might differ are presented and issues are so devoid of merit that no reasonable possibility of reversal exists. *Harrington v. Pailthorp*, 67 Wn.App. 901, 841 P.2d 1258 (1992), review denied, 121 Wn.2d 1018, 854 P.2d 41.

In light of the evidence submitted by NEWHOUSE at the time of trial; the ASSOCIATION's failure to provide any basis for their appeal beyond subject "common sense"; and the ASSOCIATION's failure to cite, identify or prove that the Trial Court's decision was manifestly unreasonable, or exercised on untenable grounds, NEWHOUSE should be awarded attorneys fees.

V. CONCLUSION

It is well-settled that the granting or withholding of an injunction is

addressed to the sound discretion of the Trial Court to be exercised according to the circumstances of the particular case. In the instant case, the Trial Court not only relied upon exhibits entered at the time of trial, but traveled to the Oakbrook development and conducted an in person, detailed and comprehensive site visit. The Court's findings and conclusions are consistent with the admissible and substantial evidence in this matter.

In Washington, there is a presumption in favor of the Trial Court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. The ASSOCIATION argues that the Trial Court allowed a defense that "contravenes common sense", but does not recognize that Washington law clearly provides that the decision to grant or withhold an injunction is left in the sound discretion of the Trial Court.

Challenged findings are not disturbed if they are supported by substantial evidence, as they are in the instant case. The undisputed and substantial evidence in the instant case provides that over 80 violations existed in Oakbrook; NEWHOUSE neighbors Haun and Vanderscheer held themselves out as authority figures in the ASSOCIATION and actually

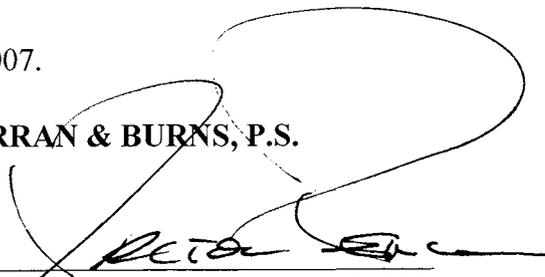
encouraged NEWHOUSE to build a structure; Mr. Haun had already constructed a building that, according to the ASSOCIATION, was in violation, yet the ASSOCIATION did nothing about it; and, the ASSOCIATION claims that it had another representative living “*three houses down*” from NEWHOUSE, but did nothing through the entire construction phase of the NEWHOUSE structure.

By filing a frivolous appeal, there is every indication that the ASSOCIATION has visited oppression on NEWHOUSE rather than make an attempt to prosecute a just claim.

Pursuant to all of the facts, admissible evidence and law provided above, (1) the ASSOCIATION’s appeal should be denied; (2) the decision of the Trial Court should be affirmed; and (3) NEWHOUSE should be awarded attorneys fees.

Dated this 12th day of June, 2007.

McFERRAN & BURNS, P.S.

By 
Dalton Lee Pence, WSBA No. 30339
Attorney for Respondents/
Defendants

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DIVISION II

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STATE OF WASHINGTON

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COA Cause No. 35787-9-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

**OAKBROOK, 7TH ADDITION HOMEOWNERS ASSOCIATION,
a Washington corporation,**

Appellant,

vs.

**MICHAEL E. NEWHOUSE and KAREN A. NEWHOUSE,
husband and wife, and the marital community of them composed,**

Respondents.

CERTIFICATE OF DELIVERY

Dalton Lee Pence, WSBA #30339
Attorney for Respondents
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3906 South 74th Street
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(253) 471-1200

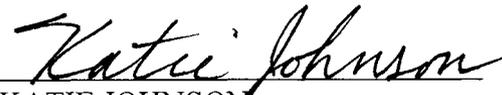
CERTIFICATE OF DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on June 13, 2007, at Tacoma, Washington, I caused true and correct copies of (1) Brief of Respondents and (2) Certificate of Delivery to be deposited with Puget Sound Courier Service to be delivered to:

Frederick L. Hetter III
Attorney at Law
913 Powell Street
Steilacoom, WA 98388

**I DECLARE UNDER PENALTY OF PERJURY UNDER
THE LAWS OF THE STATE OF WASHINGTON THAT
THE FOREGOING IS TRUE AND CORRECT.**

Dated this 13th day of June, 2007 at Tacoma, Washington.


KATIE JOHNSON