

No. 36544-8-II

(Skamania County Superior Court No. 03-2-00082-7)

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IN THE COURT OF APPEALS, DIVISION TWO  
FOR THE STATE OF WASHINGTON

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DENNIS LANE and ELIZABETH LANE,  
husband and wife,

Appellants,

v.

LAWRENCE L'HOMMEDIU and JANE DOE L'HOMMEDIU,  
husband and wife,

Respondents.

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**RESPONDENTS' BRIEF**

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## INTRODUCTION

This case concerns a 60 year old deed restriction requiring that septic tanks not discharge within 50 feet of the Washougal River (“River”), or any tributary thereof. Appellants Dennis and Elizabeth Lane (“Lanes”) feign concern that Respondent L’Hommedieu’s septic systems “might be too close” to a manmade ditch.<sup>1</sup> Appellants’ Br. at 7. All parties agree that the purpose of the 50-foot setback is to prevent pollution to nearby watercourses. Clerk’s Papers (“CP”) 676, Finding 3. Yet, the Lanes do not even challenge the trial court’s finding of fact that “[t]he **overwhelming evidence** in this case is that there is very little, if any, possibility that L’Hommedieu’s septic systems would pollute the [ditch].” Finding 19 (emphasis added).

This appeal is **not** about keeping the River clean. Rather, it is the latest episode in the Lanes’ 5-year legal quest to prevent the construction and occupation of a residence near their vacation home. The deed restriction is merely a legal hook to try to accomplish that objective. As the Honorable Judge E. Thompson Reynolds stated:

I don’t think it could seriously be argued that the Lanes were objecting just to the septic systems... [T]heir theory was that by preventing the septic

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<sup>1</sup> The trial court ruled that the ditch is considered a “tributary” of the Washougal River for purposes of the deed restriction. Finding 9.

systems you're preventing the house. But really what they wanted to do was prevent the house.

Report of Proceedings ("RP") 735-36.

In the Lanes' prior appeal of this matter following the entry of partial summary judgment in favor of L'Hommedieu, this Court remanded for trial after concluding that the equitable defenses asserted by L'Hommedieu were factual inquiries reserved for trial. *See Lane v. Skamania County, et al.*, noted at 128 Wn. App. 1063, 2005 WL 1847180, at \*7-8 ("*Lane I*"). On remand, after a 3-day bench trial involving 8 lay and 6 expert witnesses, those facts were determined.

On this appeal, the Lanes now make every attempt to ignore those factual findings. Appellants' Br. at 25 ("The Lanes do not challenge the factual findings made by the trial court..."). The Lanes try to ignore those findings because Judge Reynolds, sitting as the trier of fact, carefully considered the credibility of the witnesses, weighed the evidence, and concluded that the deed restriction did not apply to L'Hommedieu. Judge Reynolds concluded that (1) "the deed restriction has been outmoded and lost its usefulness as to modern septic systems," Finding 17, and (2) "[a]lternatively the balancing of the equities also weighs against enforcement of the deed restriction," Finding 27.

Inasmuch as the Lanes' request for injunctive relief and L'Hommedieu's defenses were both equitable in nature and principally questions of fact, the trial court was uniquely positioned to adjudicate the respective parties' contentions. L'Hommedieu respectfully requests that this Court affirm the decision below.

## I. STATEMENT OF THE CASE

### A. The Deed Restriction

On August 5, 1944, the following deed restriction was recorded on 460 acres of unimproved, rural property along the Washougal River ("River") in Skamania County, Washington, Finding 1:

During the period of twenty-five (25) years from and after the first day of June, 1944, the aforesaid property or any buildings or structures erected thereon, **shall not be used for any purpose which will cause pollution [sic.] to the waters** of the Washougal River or any tributary thereof, and all sewage disposal shall be by means of a **septic tank of standard design**, and no septic tank or drainage shall discharge within **fifty feet** of the Washougal River or any tributary thereof.

Exhibit ("Ex.") 1 (emphasis added); Finding 2. In 1944, the "standard design" of a septic system consisted of nothing more than a crude open bottom tank, usually without an accompanying gravity drainfield. Finding 15; RP 547. Moreover, at that time there was no government regulation or permitting requirements for septic systems. RP 548. Septic systems would

not be subject to government regulation for another three decades, until approximately 1970. *Id.*

In those subsequent decades, the acreage subject to the aforementioned deed restriction was conveyed in increasingly smaller parcels by various successors in interest. For example, on August 12, 1966, a portion of the acreage was approved as the plat for the River Glen Subdivision, consisting of 25 small, urban-sized lots, averaging approximately a third of an acre each. Finding 6; Ex. 33. Of these lots, 20 contain River frontage. Ex. 33. Skamania County recognizes each lot as a separate, legal residential building lot. Findings 6, 27; RP 473.

**B. L’Hommedieu Property**

In 1973, David and Gretchen L’Hommedieu purchased Lot 8 of the River Glen Subdivision. Finding 7; RP 249. Like many of the lots in the subdivision at that time, Lot 8 was used solely for family recreation, especially camping. RP 249, 371. Lot 8 ultimately formed many childhood memories for David and Gretchen’s son, Lawrence “Matt” L’Hommedieu. RP 263, 370. Over the following decades, the River Glen Subdivision transitioned to its current state of being used exclusively for residential purposes. RP 372.

David and Gretchen L'Hommedieu eventually purchased an adjacent parcel, Lot 9. Finding 7; RP 262. Lots 8 and 9 each have 75 feet of River frontage and relatively flat topography. Ex. 33, 399. Running generally along and near the common boundary line between Lots 8 and 9 was a man-made drainage ditch that flows into the River. Finding 8. The ditch is approximately 2 feet wide and typically contains no more than a few inches of water. CP 155.

Prior to the purchase of Lots 8 and 9 by David and Gretchen L'Hommedieu, their predecessors in interest made several notable improvements. Specifically, sometime shortly after plat approval for the River Glen Subdivision in 1966, the owner of Lot 8 authorized the County to construct the aforementioned ditch. Finding 8; RP 292. The ditch was constructed to improve drainage in the general area and facilitate nearby road construction. RP 292. The trial court recognized that the owner likely did not believe that such a drainage ditch would be considered a "tributary" of the River for purposes of the deed restriction. Findings 8, 9, 18. This is because the mere construction of the new "tributary," combined with the established lot dimensions and strict application of the 50-foot setback in the deed restriction, would have rendered the lot useless for its intended residential purpose. Findings 18, 27.

Additionally, in 1974, the owner of Lot 9 installed a septic system. Finding 20; Ex. 39. Notwithstanding the deed restriction, this septic system discharged approximately 25 feet from the ditch. Finding 6; RP 380. Years later, L'Hommedieu would actually unearth this septic system when excavating for the construction of his new residence. RP 317, 380.

In 1982, nearly a decade after David and Gretchen L'Hommedieu purchased Lot 8, Dennis and Elizabeth Lane purchased Lots 6 and 7, which now contain their vacation home. RP 85. Lots 6 and 7 are upriver from lots 8 and 9. *Id.* Unlike Lots 8 and 9, however, Lots 6 and 7 are not traversed by a ditch. RP 84. To this date, lots 6 and 7 are served by a simple gravity septic system that was originally installed in 1977. Ex. 41; RP 566.

L'Hommedieu always hoped to someday acquire his parents' property and settle down there with a family of his own. RP 370. Unfortunately, this conflicted with the Lanes' desire to purchase those lots and to make the River Glen Subdivision a private enclave for themselves and other family members. The Lanes and/or their family members currently own over one third of the lots in the River Glen subdivision. RP 92-93. The Lanes have made numerous and repeated attempts to purchase Lot 8 from David and Gretchen L'Hommedieu. RP 271.

Much to the disappointment of the Lanes, in July of 1995, Matt L'Hommedieu's dream materialized when he acquired both Lots 8 and 9 from his parents. Finding 10; RP 263, 400. Nonetheless, the Lanes continued to make attempts to purchase Lot 8 from Matt L'Hommedieu. Ex. 30; RP 71-72, 88, 95, 400.

**C. The Septic Systems**

In 1998, L'Hommedieu obtained a building permit and constructed a modest home on Lot 8 consisting of approximately 900 square feet of living space. Finding 10; RP 401-02. The drainfield for the existing septic system was located on Lot 9. Finding 10. L'Hommedieu and his young family, including his wife and two children, quickly outgrew the 900 square foot residence located on Lot 8. RP 402. Accordingly, L'Hommedieu made plans to construct a new, larger home on Lot 9. *Id.* The existing home on Lot 8 and the new home on Lot 9 were to be served by separate septic systems. Finding 10.

L'Hommedieu hired an engineer to design two new state-of-the-art septic systems. Ex. 58. These systems are comprised of modern components that have been expressly approved by the Washington State Department of Health to treat effluent at the State's most stringent standard, Treatment Standard 1. Ex. 121. L'Hommedieu voluntarily agreed to meet

Treatment Standard 1, even though the systems could have been lawfully approved at a lower standard, Treatment Standard 2. RP 534-35, 551.

When the deed restriction was executed in 1944, a “standard design” for septic consisted of nothing more than a crude open bottom tank, usually without an accompanying gravity drainfield. Finding 15; RP 547. Most significantly, the technology did **not** pre-treat the effluent before discharge into the soil. *Id.* In other words, these systems relied entirely upon the natural bacteria in the soil to remove the pathogens from the effluent, including fecal coliform.

Conventional gravity systems (such as the Lanes’) eventually began to replace these crude septic systems in the ‘60s and ‘70s. RP 540.

Conventional gravity systems consist of three components: a tank, distribution lines or laterals, and soil. Finding 12. The tank separates the solid and liquid wastes, but does not appreciably reduce fecal coliforms. *Id.* The effluent then moves by gravity flow from the tank out to perforated drain lines and into the soil. *Id.* These systems fall far short of treating effluent to either Treatment Standard 1 or 2. RP 526. Like their crude predecessors, these systems rely entirely upon the soil to remove pathogens from the effluent, including fecal coliform. Finding 12; RP 528.

As is typical in riparian areas, the soil in the River Glen Subdivision is extremely porous. RP 147, 152, 538. In such rapidly permeable soils, effluent moves quickly downward and can reach the water table before the soil bacteria can adequately remove the pathogens in the effluent. RP 543. Because the flow of groundwater in a riparian basin is toward the river, any untreated effluent can directly pollute the Washougal River. RP 161-62. With our increased modern understanding of this threat, commencing in June of 2007, new statewide regulations will prohibit Skamania County from approving conventional gravity systems anywhere in the River Glen Subdivision. RP 543-44. In other words, the Lanes' conventional system that was installed in 1977 would **not** be permitted today. Rather, all new systems must pre-treat the effluent to at least meet Treatment Standard 2. RP 543-44.

Unlike the Lanes' conventional gravity system that does not pre-treat effluent before discharge into the soil, L'Hommedieu's septic systems are designed to achieve the State's highest effluent quality standard, Treatment Standard 1. Finding 13. Specifically, the systems are comprised of a two-compartment septic tank, an aerobic treatment unit ("ATU"), an ultraviolet disinfectant light ("UV light"), and pressure distribution laterals. *Id.* Effluent enters the septic tank which separates solid and liquid wastes. Then, the

ATU creates an oxygen rich environment for organisms that facilitate the rapid biodegradation and decomposition of the effluent. *Id.* The effluent is further treated by a UV light, which inactivates fecal coliform via electromagnetic radiation. *Id.* Finally, the system utilizes pressurized distribution laterals, rather than conventional gravity flow, to ensure an even distribution of the effluent throughout the drainfield soil. *Id.* Unlike conventional gravity systems, this system **pretreats effluent** before discharge into the soil. *Id.*

A review of the three parameters that the State measures to determine the strength of effluent amply demonstrates that these recent advances in septic technology are not mere incremental improvements.

	<b>Raw Sewage</b>	<b>Conventional Gravity System</b>	<b>Treatment Standard 2</b>	<b>Treatment Standard 1</b>
<b>Total Suspended Solids<sup>2</sup> (mg/l)</b>	200-290	47-62	< 10	< 10
<b>BOD<sub>5</sub><sup>3</sup> (mg/l)</b>	200-290	130-174	< 10	< 10
<b>Fecal Coliform<sup>4</sup> (per 100 ml.)</b>	10 <sup>7</sup> – 10 <sup>9</sup>	10 <sup>5</sup>	< 800	< 200

<sup>2</sup> Total Suspended Solids is a measurement of the opacity of the effluent. RP 522.

<sup>3</sup> 5-Day Biochemical Oxygen Demand is a measure of the oxygen intake in the effluent. *Id.*

<sup>4</sup> Fecal coliforms are pathogens in raw sewage. *Id.*

Exs. 31, 121.

The most important parameter to sanitarians is fecal coliforms. RP 522. As indicated in the chart, raw sewage typically contains from  $10^7$  to  $10^9$  (*i.e.* 100 million to 10 billion) colonies of fecal coliform per 100 ml. of effluent. Ex. 31. Conventional gravity systems (such as the Lanes') only reduce fecal coliforms to  $10^5$  (*i.e.* 1 million) colonies per 100 ml. of effluent before discharge into the soil. *Id.* **In contrast**, systems designed to meet Treatment Standard 1 (such as L'Hommedieu's), reduce fecal coliforms to an astonishing 200 colonies per 100 ml. of effluent. Ex. 121.

At this extremely low level, the discharge from L'Hommedieu's system constitutes "clean water." Ex. 58, at 1. Indeed, this level of fecal coliforms is actually **lower** than the background level of fecal coliform naturally occurring in the nearby ditch or River. RP 523-24. Accordingly, before the effluent is even discharged into the soil, **it is already pre-treated to a level cleaner than the water in the ditch or River.**

On December 5, 2002, the County understandably approved the designs for L'Hommedieu's systems. Ex. 16. The septic permit approvals were not appealed by the Lanes.

**D. Procedural History**

On March 14, 2003, Skamania County granted L’Hommedieu a variance to construct his new residence 50 feet from the River. CP 132. Although this is further back from the River than the Lanes’ own vacation home, the Lanes appealed the variance to the Board of Adjustment (“Board”). *Id.* The Board upheld the variance. *Id.*

The Lanes then sought judicial review by filing a petition under the Land Use Petition Act (“LUPA”). CP 131-42. The LUPA petition stated that the Board’s decision was erroneous because “instead of having one home located next to their property, they will instead have two houses.” CP 132. At this time, the petition made no mention of the 1944 deed restriction.

On June 9, 2003, the Lanes filed a motion to amend their Petition with a cause of action raising the 1944 deed restriction. Simultaneously, the Lanes secured an *ex parte* Temporary Restraining Order (“TRO”) from Commissioner Wyninger, prohibiting L’Hommedieu from commencing construction of any improvements, including the residence. Finding 6; CP 105-07. The TRO was converted to a preliminary injunction on June 26, 2003. Finding 23; CP 147-49.

On August 29, 2003, the Court granted summary judgment in favor of L’Hommedieu on the merits of Lanes’ allegations regarding the septic

system location. CP 379-81. In granting summary judgment, the Court quashed the preliminary injunction. CP 380.

On appeal, this Court reversed, finding that the case presented primarily factual issues best reserved for trial. First, the Court determined that the respective parties' dispute regarding whether the ditch constituted a "tributary" for purposes of deed restriction was a question of fact. *See Lane I*, 2005 WL 1847180, at \*7. Similarly, the Court concluded that application of the equitable defense of the doctrine of changed circumstances was also question of fact. *Id.*

On remand, the Lanes withdrew their previous request for a jury in favor of a bench trial before the Honorable E. Thompson Reynolds. CP<sup>5</sup>. Because L'Hommedieu's septic systems are more than 50 feet away from the River, the Lanes' sole allegation was that the systems violate the deed restriction with respect to distance from the ditch. Thus, the evidence considered at trial focused on whether the septic systems could pollute the ditch and whether the ditch was a tributary.

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<sup>5</sup> The Lanes' jury demand and its subsequent withdrawal have been designated simultaneously with the filing of the brief as supplemental clerk's papers pursuant to RAP 9.6(a). Accordingly, these documents have yet to be assigned numbers for identification purposes.

The 3-day bench trial, from February 26 through 28, 2007, involved 8 lay and 6 expert witnesses. At trial, L'Hommedieu provided overwhelming evidence that the ditch on L'Hommedieu's property was manmade. Although the trial court agreed, Judge Reynolds determined that the ditch was nevertheless a "tributary" of the River for the pollution prevention purposes of the deed restriction. Findings 8 and 9.

L'Hommedieu also provided overwhelming evidence regarding advances in septic system technology that rendered the covenant outmoded. This evidence is provided in more detail herein. Needless to say, Judge Reynolds did not hesitate to enter findings stating that (1) "[t]he overwhelming evidence in this case is that there is very little, if any, possibility that L'Hommedieu's septic systems would pollute the [ditch]," Finding 19, (2) "L'Hommedieu's septic system, although located within 50 feet of the stream, is actually less likely to pollute the stream than a conventional gravity system 50 feet away from the stream," Finding 16, and (3) "[t]he deed restriction has been outmoded and lost its usefulness as to modern septic systems," Finding 17.

At trial, L'Hommedieu also proved the deed restriction had not been enforced in prior years. Finding 20. For example, the evidence showed that the septic system originally installed in 1974 on Lot 9, was

within 25 feet of the ditch. *Id.*; RP 380. Similarly, a septic system currently used by a neighboring owner discharges within 30 feet of the same ditch that crosses L'Hommedieu's property. RP 293. Finally, an outhouse owned by the Lanes' cousins was located literally on the banks of the River. Finding 20; RP 261, 273.

The Lanes admitted at trial that they could not articulate any harm that they were suffering as a result of L'Hommedieu's alleged violation of the covenant. RP 85-86, 119. It was also proven at trial that septic systems such as the Lanes' conventional gravity system are "putting the region at risk." RP 566.

Finally, L'Hommedieu provided evidence that he incurred over \$120,000 in damages as a result of being wrongfully enjoined. Ex. 124. Specifically, the TRO caused him to lose a construction loan approved when interest rates were at historic lows. When the injunction was quashed the interest rates had increased, the cost of building materials increased, the project lost an entire building season, and attorneys' fees were incurred. *Id.* The trial court awarded L'Hommedieu \$12,513, representing damages incurred as attorneys fees to quash the preliminary injunction. Finding 23; Conclusion 3. Although significantly damaged by

the delay, L'Hommedieu does not appeal the trial court's ruling on damages.

The Lanes now appeal the court's ruling on the deed restriction.

## II. ARGUMENT

### A. The Lanes Misstate the Standard of Review

In *Lane I*, this Court remanded for trial. The reason for the trial was that the equitable defenses asserted by L'Hommedieu were **factual inquiries** reserved for a trier of fact. *Lane I*, 2005 WL 1847180, at \*7 (“the availability of [the defense of changed circumstances] is generally a **question of fact.**”)(emphasis added)(citing *St. Luke's Evangelical Lutheran Church v. Hales*, 13 Wn. App. 483, 486, 534 P.2d. 1379 (1975)). Similarly, the balancing of the equities or relative hardship is primarily a fact driven inquiry. See *Peterson v. Koester*, 122 Wn. App. 351, 359, 92 P.3d 780 (2004). Very appropriately, this Court stated:

The fact finder should decide whether the septic systems' technological sophistication renders the covenant unnecessary.

*Lane I*, 2005 WL 1847180, at \*8.

The trial court followed this Court's instruction and took testimony concerning the technological sophistication of the systems. Judge Reynolds concluded that the “overwhelming” evidence was that the

systems render the 50-foot setback outmoded. Findings 17, 19. Indeed, the purpose of preventing pollution is actually more at risk by the Lanes' system even though it meets the deed restriction setback. Finding 16.

While the trial court followed this Court's instruction, the Lanes want to ignore the fact-finding purpose of the remand. In an attempt to evade the facts as determined by the trial court, the Lanes glibly maintain that the standard of review is *de novo*. Appellants' Br. at 26. They do so by arguing that the "technological changes relied upon do not render the covenant obsolete." *Id.* at 1.

However, in *Lane I*, this court stated that "the fact finder should decide whether the septic systems' sophistication renders the covenant unnecessary." *Lane I*, 2005 WL 1847180, at \*8. Questions of fact are reviewed for substantial evidence. *See, e.g., State v. Klein*, 156 Wn.2d 103, 115, 124 P.3d 644 (2007). For the Lanes to argue that these technological advances are not sufficient to render the covenant obsolete, the Lanes are necessarily challenging the trial court's factual findings. That presents a significant problem because the Lanes have conceded that the trial court findings are supported by substantial evidence. *See* Appellants' Br. at 25 ("The Lanes do not challenge the factual findings made by the trial court...").

Given this concession, the Court could end its inquiry here. The fact finder has concluded that the deed restriction has been rendered unnecessary. That factual determination is supported by substantial evidence. Accordingly, the decision below should be affirmed.

**B. The Equitable Defense of Changed Conditions Is Fluid and Not Subject to Any Singular Formulation**

By its very nature as an equitable doctrine, the defense of changed conditions is fluid and not easily distilled into any singular formulation. Relevant jurisprudence and authority, however, clearly defines the ultimate purpose of the doctrine. It applies where changes have occurred that would **“render perpetuation of the restriction of no substantial benefit,”** *St. Luke’s*, 13 Wn. App. at 486 (emphasis added), or where the “restriction [has] become **outmoded** and to have **lost its usefulness**, so that its **benefits have already been substantially lost.**” William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861, 883 (1977) (emphasis added). In short, the doctrine applies where **“the covenantor would be greatly burdened, but there would not be a corresponding benefit to the covenantee because of the changes.”** See Gerald Korngold, *Private Land Use Arrangements: Easements, Real Covenants, and Equitable Servitudes* 454 (2004) (emphasis added).

The equitable nature of this defense is critically important. As with all equitable claims they “must be analyzed under the **specific facts** presented in each case.” *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107-08, 33 P.3d 735 (2001)(emphasis added). Thus, when the Lanes argue as a matter of policy that the doctrine of changed circumstances “should not be applied...to grant individual ‘variances’ from the covenant,” the Lanes demonstrate a wholesale misunderstanding of the nature of the claim itself. Appellants’ Br. at 32. Similarly, in arguing that the remedy of the trial court is strictly limited, Appellants’ Br. at 33, the Lanes overlook relevant case law that authorizes the court to “modify or remove...a covenant” as necessary. *St. Luke’s*, 13 Wn. App. at 488. In fact, “[i]n...matters of equity, a trial court has broad discretion to create an equitable remedy.” *Noble v. Safe Harbor Family Pres. Trust*, 141 Wn. App. 168, 173, 169 P.3d 45 (2007) (citing *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006)).

As a matter of doctrinal purity, however, it is important for this Court to recognize that the doctrine of changed conditions unquestionably encompasses at least two different legal theories and accompanying tests, each applicable in vastly divergent situations. The doctrine can be applied in the context of a “common plan” for development of a subdivision. An

entirely separate context occurs when advances in technology render a restriction obsolete.

**1. The Analysis for Changes in the Neighborhood Applies to Common or General Plans of Development (*i.e.* Subdivision Covenants)**

The overwhelming majority of cases in which the equitable defense of changed conditions is analyzed by our courts arise within the context of a common plan of development (*i.e.* a housing subdivision).

A defense that is recognized in Washington and elsewhere is the “change-of-neighborhood” doctrine. The fact pattern that gives rise to this defense is that the neighborhood covered by the covenant, which usually means a subdivision in which uniform covenants exist, has so changed since the covenant was made that to enforce it against one owner would be of no substantial benefit to the persons attempting to enforce it.

17 William B. Stoebuck, *Washington Practice: Real Estate: Property Law*

3.8 (1995). The Washington Real Property Deskbook further explains:

[U]nder this defense [of changed neighborhood conditions] the courts will consider not only violations of the restrictive scheme within the subdivision, but also changes in the character of the immediately surrounding neighborhood that frustrate the purpose of the “common plan.”... The typical case involves a residential subdivision which has become surrounded by commercial and business activity. The factors to be considered include zoning changes, noisy and busy streets, commercial uses in the vicinity, covenant violations, and property valuations.

William H. Clarke, Washington Real Property Deskbook, Running Covenants, Ch. 14, at 14-50 (3d ed. 1997).

Of course, this “common plan” context is **not applicable** to the present case. As this Court already determined in *Lane I*:

Although the parties live in a subdivision, the covenant does **not** derive from a common plan. Rather, the covenant originated in 1944, long before the development of the River Glen subdivision.

*Lane I*, 2005 WL 1847180, at \*1, n.1 (emphasis added).

**2. The Analysis for Changes in Technology Is Justifiably Separate and Distinct from Changes in Neighborhood Conditions**

While acknowledging the validity of the defense of changes in technology, the Lanes nevertheless boldly proclaim that “there is no case in Washington so holding.” Appellants’ Br. at 30. This is not true.

In *Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn. App. 70, 587 P.2d 1087 (1978), a restrictive covenant stated that “(N)o building or structures shall be moved in and set upon any of said property but that all construction in said addition must be of new construction.” *Id.* at 72. Notwithstanding the Defendant’s “actual knowledge” of the covenant, the Defendant placed a modern, modular home on the property. *Id.* The trial court granted an injunction ordering the removal of the structure. In

reversing, the Court of Appeals carefully distinguished between the doctrines of changes in the neighborhood and changes in technology:

Whether the changed conditions consist of changes in the neighborhood...or changes in technology, as here, such changes are germane to the exercise of discretion by the trial court in deciding proper relief.

*Id.* at 77.

Significantly, the Court did not require the Appellant to demonstrate any change in the neighborhood. After all, the “change” under consideration is one of technology, not of conditions in the subdivision. Instead, the Court in *Lenhoff* merely looked to determine whether the technology could have been foreseen by the parties that entered into the covenant:

**the failure of the trial court to consider the change in technology in home construction between the time the covenants were effectuated and now provides a weighty reason against upholding the trial court’s grant of equitable relief... In the instant case the development of house-building technology in a manner not contemplated by the drafters of the restrictive covenants weighs heavily against the injunction.**

*Id.* at 77 (emphasis added).

**C. Substantial Evidence Shows that Changes in Technology Have Rendered the Deed Restriction Obsolete**

The Lanes' brief can best be summarized as an attempt to convince this Court of the veracity of their version of the facts regarding the septic systems at issue. As previously indicated, however, the determination of whether new technology has rendered the deed restriction obsolete is a question of fact. *Lane I*, 2005 WL 1847180, at \*7. Moreover, the evidence in this regard was largely presented via expert witnesses, and "appellate courts generally do not substitute their judgment with that of the trier of fact regarding issues of conflicting expert testimony." *See, e.g., State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

L'Hommedieu's expert witnesses included Bruce Scherling, a registered sanitarian and the lead health official for Skamania County. Mr. Scherling personally visited L'Hommedieu's parcels and was intimately familiar with both the site constraints and his systems. RP 519. L'Hommedieu's expert hydrogeologist, Stephen Swope, also conducted a site visit and provided a detailed analysis regarding the improbability of any septic effluent reaching the ditch. Ex. 120. In sharp contrast, the Lanes' expert witness, Robert Sweeney, never even visited L'Hommedieu's site. RP 145-46.

The Lanes essentially argue that L'Hommedieu must prove that buffers currently confer "no benefit" whatsoever. Appellants' Br. at 31 (requiring proof that technology "eliminated the need for [the deed restriction] altogether."). Although L'Hommedieu has met the Lanes' higher burden, the law only requires a demonstration that there is "no **substantial** benefit." *St. Luke's*, 13 Wn. App. at 485 (1975)(emphasis added).

After considering all of the evidence in this regard, the trial court made the following finding, which is unchallenged here on appeal:

The overwhelming evidence in this case is that there is very little, if any, possibility that L'Hommedieu's septic systems would pollute the stream.

Finding 19. Similarly, the trial court concluded:

There would be no substantial benefit to the public, to the plaintiffs, or to the environment by enforcing the 50-foot setback as it applies to L'Hommedieu. The deed restriction has been outmoded and lost its usefulness as to modern septic systems.

Finding 17. These findings are supported by substantial evidence.

The pretreatment of effluent before discharge into the soil represents a material and revolutionary change in septic system technology. As previously demonstrated, conventional gravity systems only reduce fecal

coliforms to  $10^5$  colonies per 100 ml. of effluent before discharge into the soil. Ex. 31. In contrast, L'Hommedieu's system, which is designed to meet Treatment Standard 1, reduces fecal coliforms to an astonishing 200 colonies per 100 ml. of effluent. Ex. 121. This is a difference in multiple orders of magnitude, and not a mere incremental improvement.

The covenant is outmoded because it is based upon a defunct premise. In the crude septic systems of the 1940's and the conventional gravity systems still commonplace today, buffers had an important role. This was because the primary mechanism for treating the effluent was the soil itself. Finding 15. In contrast, L'Hommedieu's systems do not use the soil bacteria to cleanse the discharge. Rather, the effluent is fully treated and rendered clean before it is ever discharged to the soil.

This change in technology is particularly important at the L'Hommedieu property because of the soil profile in that area. Both Mssrs. Sweeney and Scherling testified that the soils in the River Glen subdivision are very porous and do not effectively clean effluent.

Q. What is your belief as to the types of soils that exist on Mr. L'Hommedieu's property?

A. ...granular, and fairly **porous**.

...

Q. [W]ith what you refer to as these porous soils... is it more important to have some form of

pretreatment or is it better to rely on the soils to clean the effluent?

A. Primarily, you **would normally have pre-treatment...**

RP 147-50 (emphasis added). Mr. Scherling confirmed the same type of soil. *See, e.g.*, RP 538.

Accordingly, in an area like this, the primary concern nowadays from a public health and environmental standpoint is that the effluent receive pre-treatment before being discharged into porous soils. Unlike 1944 when such technologies did not exist, both experts would have required pre-treatment in the River Glen subdivision. In fact, Mr. Scherling stated that under the new WAC, effective July 1, 2007, he has already pre-identified the River Glen subdivision as one area in the County in which he cannot approve conventional gravity systems, such as the Lanes.

Q. Under the new [Washington] Administrative Code that will be effective July 1, 2007, do you believe that you could even approve a gravity system in the Riverglen subdivision?

A. Definitely not. That's one of the few areas in the County we've already pre-identified that gravity would never be an option now.

RP 543-44.

Unlike conventional gravity systems, L'Hommedieu's modern technologies pre-treat the effluent before discharge into the soil. Finding 13. L'Hommedieu's engineer designed a system that discharges "clean water" and complied with Treatment Standard 1. Ex. 58, at 1. Upon discharge, Mr. Scherling indicated that the effluent was essentially as clean as water in the River.

Q. [I]s Treatment Standard One the highest treatment standard that the state has?

A. ...[Y]es. To put it in perspective...its not that different, in some ways it's cleaner than what you'd find in actually -- discharged in streams....

...

Q. ...[S]o a septic system designed for Treatment Standard One, the discharge is essentially as clean as what's in the stream?

Q. That's a fair statement...

RP 523-24.

Mr. Scherling further testified that a conventional gravity septic system that complied with the deed restriction would be significantly less effective in keeping the River or ditch free from pollution than L'Hommedieu's systems. RP 565-66. The trial court entered a finding to this effect, which is uncontested here on appeal.

L'Hommedieu's septic system, although located within 50 feet of the stream, is actually less likely to

pollute the stream than a conventional gravity system 50 feet from the stream.

Finding 16. Thus, the Lanes appear to be arguing more about form than substance.

This unchallenged finding exposes the Lanes' true motivation. The Lanes are arguing for a system that would be contrary to the pollution prevention purposes of the deed restriction. The Lanes are not arguing about pollution; rather, they hope the deed restriction will shut down L'Hommedieu's residence altogether.

After conceding that L'Hommedieu's systems were superior to conventional gravity systems, the Lanes' expert, Mr. Sweeney, further conceded that he would have actually approved L'Hommedieu's septic system just as Mr. Scherling did.

Q. You really would have essentially done exactly what Mr. Scherling did?

A. This or other types of Treatment Standard 1 systems.

RP 166; *accord* RP 181-182.

Despite the testimony and the trial court finding, the Lanes argue that setbacks retain their relevance because the WACs require a 100-foot setback between septic systems and adjacent watercourses. Appellants' Br. at 23 (citing Ex. 17, WAC 246-272). The Lane's argument is highly

misleading. This provision applies to septic systems that do not meet enhanced Treatment Standards 1 or 2 (*i.e.* alternative or proprietary septic systems). L'Hommedieu's alternative systems were approved according to WAC 246-272-04001, which authorizes the State Department of Health to "maintain lists of approved methods, proprietary devices, guidelines, and alternative systems." Exhibit 121 is the State's approved list, which contains the systems utilized by L'Hommedieu. It further confirms that with respect to "conventional sewage systems...the rules presented in Chapter 246-272 WAC apply." Alternative sewer systems are not subject to WAC 246-272, including the 100 foot setbacks. As explained by Mr. Scherling, a system that meets Treatment Standard 1 or 2 may literally discharge 0 feet from a water source. RP 536 (using WAC 246-272, Table VI as an example of how meeting Treatment Standard 1, which is essentially clean water, literally requires no setback).

The evidence at trial also demonstrated that the change in technology since 1944 has been accompanied by regulatory advances. In 1944, there simply were no regulations in place regarding septic design, maintenance, and installation.

Q. Were there any septic system regulations in place in 1944?

A. None...in 1970, permitting was required at the state level.

Q. And, how would you describe the regulations that we have today?

A. Based on science and understanding of pathogen removal, based on the mechanisms of removing that bacteria. There's a lot of ways that can be done now. And, from a holistic view, we understand a lot better the importance of treating raw sewage completely as it's discharged because it's connected directly to our drinking water. So the potable water and sewage treatment can't be separated.

RP 548-49.

Since 1944, sewage disposal has become highly regulated, with the State taking a justifiable interest in protecting public health. Today's regulatory scheme provides substantially greater protection of public health and the environment than the deed restriction. Mr. Scherling testified that as the public health official responsible for sewage disposal in the County, he could not approve a septic system that he believed was a health or environmental risk. RP 549. *See also* Finding 14 ("L'Hommedieu's sophisticated septic systems were approved by the County agency responsible for insuring that the streams and rivers of Skamania County are not polluted.").

In short, the deed restriction in 1944 appears to have been necessary because there was no regulation of septic systems at that time.

The covenant provided a regulation. Now, government regulations are far beyond the 1944 deed restriction. Indeed, rather than suing L'Hommedieu, the Lanes would better protect the River if they replaced their old system with a far superior system like L'Hommedieu's.

Because of the superiority of L'Hommedieu's system, opposing counsel repeats *ad nauseum* that the systems could fail. Yet, even that argument fails to come to grip with the facts.

First, L'Hommedieu's expert hydrogeologist, Stephen Swope confirmed that (1) the depth to groundwater (*i.e.* the water table), on L'Hommedieu's property is more than 17 feet below the surface, and (2) the laterals (*i.e.* discharge points) on L'Hommedieu's septic systems discharge at a depth in the ground **below** the invert or bottom of the ditch. Ex. 120, at 1.

Because the discharge of L'Hommedieu's septic laterals is at a depth greater than the bottom of the shallow ditch, the effluent would have to travel laterally well over 20 feet **and** upward to reach the ditch, which is simply impossible:

Q. ...And if Mr. L'Hommedieu's septic system were located 20 or more feet away, given these conditions, could any discharge from his septic system reach the ditch?

A. No.

Q. Does water flow uphill?

A. No...

Q. And the discharge from the laterals is below the lowest level of the invert of this stream?

A. Correct.

Q. And what would you expect the effluent would do from -- upon discharge on Mr. L'Hommedieu's property?

A. ...It would move directly downward to the water table.

Q. Based on your experience...would you have any concern whatsoever that the effluent from Mr. L'Hommedieu's septic system would reach the ditch?

A. No.

RP 499-50.

Of course, one would have to wonder why it would even matter if the effluent could reach the ditch anyway. After all, as previously indicated, said discharge is "clean water." Ex. 58, at 1.

Although Mr. Swope could have ended his expert analysis there, he calculated what condition would be necessary for the effluent to defy gravity, travel upwards, and mover laterally for over 25 feet to reach the ditch. He concluded that the only way that the effluent could ever

possibly reach the ditch is if the water table rose above the level of the ditch for a sustained period of time. However, inasmuch as the water table is at a depth of over 17 feet, it is extremely improbable that such an event could ever occur, because even in the wettest seasons, the water table will only rise a few feet. In short, Mr. Swope testified that it would take a flood of "Biblical proportions":

Q. ...[I]s there any condition that could occur in which effluent could reach that ditch?

A. If somehow the water table rose all the way up so that it rose above both the stream and the septic discharge.

Q. Now you have stated that the most you could ever see that water table rising was several feet.

A. That's right.

Q. And what is the probability that it would ever rise more than, say, five feet?

A. Extremely low, say like **a hundredth of a percent.**

Q. A hundredth of a percent. So, even if that were to rise, in that one one-hundredth of a percent, more than five, more than ten feet, would this still be a losing stream?

A. No. If it was to rise above the water, the level of that stream, it would become a gaining stream.

Q. But that would have to rise all the way to the invert?

A. That's right.

Q. What type of event would be necessary for the water table to rise that much?

A. It's hard to imagine. **It would have to be a flood of, let's say, biblical proportions, one that doesn't -- that I have not seen before.**

RP 500-01 (emphasis added).

Because the evidence was so overwhelming that effluent could not reach the ditch, arguments from counsel for the Lanes regarding such a possibility reached levels of absurdity that bear no relation to reality or any reasonable purpose for the deed restriction. For example, the Lanes' counsel demonstrated, based upon Mr. Swope's calculation, that if the septic system was only 7 feet away from the ditch it would still take 86 days of a sustained "100 yr. flood" for the effluent to reach the ditch. RP 514. Such arguments are so far beyond reason it is not surprising that Judge Reynolds was not persuaded.

Mr. Swope demonstrated, as the fact finder concluded, the 50 foot soil distance from the ditch was an outmoded and unnecessary restriction. Contrary to the arguments of Lane's counsel, Mr. Swope testified:

Q. Is there some point at which distance really doesn't matter?

A. Once you're outside of the distance at which you could reasonably expect ground water to flow under the flood condition, it doesn't really matter how far it is.

RP 515.

Perhaps pointing out even more evidence is using a nuclear bomb to kill a mouse. Nevertheless, this Court should also know that both the Lanes' expert sanitarian, Mr. Sweeney, and L'Hommedieu's expert sanitarian, Mr. Scherling, agreed that effluent simply cannot reach the ditch from L'Hommedieu's septic laterals. In this regard, Mr. Sweeney, the Lane's expert sanitarian conceded the following:

Q. ...If Mr. L'Hommedieu's septic laterals actually discharged at an elevation below the ground, lower than the invert or the bottom of this ditch, do you think there's much danger that this ditch could become contaminated?

A. Certainly less likely.

Q. Does water move upwards in the ground?

A. Well, not generally.

Q. In porous soils what is the general direction it would flow?

A. Down.

Q. Okay. And would water underground typically move 20 to 30 feet in a lateral direction without declining in elevation?

A. Not in porous soils...

RP 162-63.

Q ...[H]ow far can effluent travel in a horizontal direction?

A Typically not very far, depends on the soil type, of course.

...

Q. ...[D]o you agree that the horizontal movement of water would essentially be only a few feet?

A In most cases, yes.

Q And do you know how far Mr. L'Hommedieu's discharge points are from the creek?

A It appears to be roughly 25 feet.

Q Is that more than a few feet?

A Yes.

RP 174-76.

Finally, Mr. Scherling agreed that there is simply no concern that the effluent could reach the ditch.

Q. If the distance from Mr. L'Hommedieu's discharge to the ditch was greater than 20 feet, are you at all concerned that effluent would migrate from the lateral to that ditch?

A. ...It's too porous.

Q. And what does that effluent do in porous soils?

A. It will migrate downwards.

Q. In your experience, can effluent migrate 20 feet horizontally without dropping in elevation?

A. Is there a possible scenario? Yes, hypothetically. I've never seen it. You'd need a very restrictive layer up shallow, up close to the surface... Those constraints don't exist on this site, nor in that -- that area.

RP 564-65.

The sole reason that the covenant is being enforced is to allegedly protect the ditch. However, three experts, including a hydrogeologist and two sanitarians all concur based on their various disciplines that such an event is impossible. Clearly, Mr. L'Hommedieu's septic system will not pollute the ditch, even if there was a wholesale failure of the system. The Lanes have no evidence to the contrary.

Nonetheless, even if failure remains a concern, the evidence presented at trial regarding the likelihood of failure and accompanying environmental harm does not support the Lanes' tortured argument. Both Mssrs. Sweeney and Scherling testified that any system can fail. RP 166, 559. Similarly, Mr. Scherling testified in extreme detail how L'Hommedieu's system actually enhances the ability to detect failures and is user-friendly. RP 560-62. Similarly, the manual for L'Hommedieu's systems states that "[l]ittle maintenance is required." Ex. 14, at 13.

Ultimately, Mr. Scherling responded to all the hypothetical system failures imagined by the Lanes, such as a power outages, bad UV lights, etc., and concluded that they posed "no public health issue" whatsoever. RP 562.

For example, the primary component of concern for Mr. Sweeney was the UV light. RP 170-71. However, Mr. Scherling pointed out that L'Hommedieu's system emits an audible and visual alarm when the UV light ceases to function. RP 561. This is confirmed by the designer of the system. Ex. 58 at 3. Moreover, even if the UV light failed, L'Hommedieu's system would still meet Treatment Standard 2, which is all that is required for his site. RP 552-53.

Tellingly, in the end, both Mssrs. Sweeney and Scherling testified that even with any potential for failures, the benefits of L'Hommedieu's systems clearly outweigh the risk of failure.

Q. And the type of failures that you're talking about, in your mind are the failures of such a concern that you would recommend against using this new technology?

A. The risks are greater, but I wouldn't recommend against it

....

Q. And you would have approved this system, correct?

A. Yes.

RP 173-74. There is no question that L'Hommedieu's system, as designed and located, is preferred by the expert sanitarians that testified at trial over all of the other systems currently in use in the River Glen subdivision.

As previously indicated, the *Lenhoff* court determined how new technologies should be considered with respect to dated covenants:

**the failure of the trial court to consider the change in technology in home construction between the time the covenants were effectuated and now provides a weighty reason against upholding the trial court's grant of equitable relief.** Whether the changed conditions consist of changes in the neighborhood...or changes in technology, as here, such changes are germane to the exercise of discretion by the trial court in deciding proper relief. **In the instant case the development of house-building technology in a manner not contemplated by the drafters of the restrictive covenants weighs heavily against the injunction.**

*Lenhoff*, 22 Wn. App. at 77 (emphasis added).

Here, the drafters of the 1944 covenant likewise could not have envisioned the technological advances in septic systems that have transpired in the intervening 63 years. There can be no doubt that if the drafters of the 1944 covenant were here, and they learned about the soils and advantages of the L'Hommedieu system, they would much prefer L'Hommedieu's system over anything currently existing in the River Glen

subdivision, which according to the lead health official in the County, are “putting the region at risk.” RP 566.

**D. The Trial Court Was Not Precluded From Balancing the Equities**

The evidence at trial also demonstrated that L’Hommedieu was entitled to a balancing of the equities or relative hardships. Significantly, “[t]he Lanes do not contend that the trial court abused its discretion in the manner in which it balanced the equities.” Appellants’ Br. at 34. Rather, the Lanes argue that L’Hommedieu should not have been entitled to any balancing of the equities whatsoever.

**1. In Balancing the Equities, the Trial Court Did Not Consider L’Hommedieu’s Expenses in Installing or Decommissioning the Septic Systems**

The Lanes make every attempt to portray L’Hommedieu as a bad actor because he proceeded to build his home and install his septic systems with knowledge of the deed restriction. As a practical matter, once the injunction was lifted, L’Hommedieu had no option for his family other than to proceed with construction. The 900 square feet of living space available in the residence located on Lot 8 was insufficient for his young, growing family. RP 402. Apparently, **5 years** after the commencement of this litigation, the Lanes believe that L’Hommedieu’s life should still be held hostage to this litigation and the Lanes’ oppressive delay tactics, even

though there is no injunction prohibiting L'Hommedieu from constructing. Under the circumstances, L'Hommedieu quite reasonably determined that he would proceed with construction, once the injunction was lifted.

L'Hommedieu repeatedly pointed out that any balancing of the equities should not include the cost of installing or decommissioning the septic systems.

Here, there is no question that the benefit of enforcing the covenant to the Lanes is dwarfed by the harm that would occur to L'Hommedieu by enforcement. The harm that L'Hommedieu will suffer is NOT removal of his septic system(s) and/or a residence. Rather, the harm that will be suffered is the loss of a legally buildable lot.

CP 482. This was also repeated in the opening argument to trial and in L'Hommedieu's testimony. RP at 24-25, 431-32.

L'Hommedieu's closing argument was also consistent with this position.

The evidence at trial also demonstrated that L'Hommedieu is entitled to a balancing of the relative hardships. L'Hommedieu has expressly indicated on numerous occasions that the hardship he claims is not decommissioning of a septic system or the removal of a residence. *See* Trial Br. at 13 ("The harm that L'Hommedieu will suffer is NOT removal of his septic system(s) and/or a residence."). Rather, the hardship that is claimed by L'Hommedieu is loss of the benefits of the 1966 platting of the River Glen subdivision. Each of L'Hommedieu's lots were created by that plat and each lot is intended by the subdivision to be a separate, legal building site.

CP 605-606. The Court's decision to balance the equities without considering the harm in decommissioning the septic systems was confirmed at the entry of the findings, which make no mention of any harm to L'Hommedieu if ordered to decommission the septic systems.

[T]he balancing of the equities also weighs against enforcement of the deed restriction as demonstrated by the aforementioned findings, including, among others, (1) the lack of benefit to the Lanes, L'Hommedieu and the public if the deed restriction is enforced, (2) the resulting loss of a legally buildable lot if the deed restriction is enforced, (3) and the sophistication of L'Hommedieu's septic systems.

Finding 27. *See also* RP 730.

**2. The Case Law Cited By the Lanes is Inapposite**

Consistent with L'Hommedieu's explicit requests, the trial court did not consider the harm of decommissioning the septic systems for purposes of balancing the relative hardships. Unfortunately, the Lanes continue to perpetuate their argument here on appeal that the balancing of the hardships is "reserved for the innocent defendant who proceeds without knowledge" of the deed restriction. Appellants' Br. at 3 (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691, 974 P.2d 836 (1999)). This principle appears to be grounded in the common sense notion that "basic principles of equity require that a person should not be allowed to profit

from his or her own wrongdoing.” See, e.g., *State v. Tyler*, 138 Wn. App. 120, 129, 155 P.3d 1002 (2007). Thus, this principle would appear to apply only if the hardship being claimed by the defendant was removal of the septic system. As already stated, this is not the case here.

In each and every case cited by the Lanes, the individual claiming the benefit of the balancing of the equities was essentially trying to profit from their wrongdoing (*i.e.* asking the court to consider the removal and/or alteration of the offending structure as the harm that would be incurred if the disputed covenant was enforced.). In *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006), for example, the hardship claimed by the defendant was the “financial hardship resulting from [an] injunction” requiring removal of a three story garage in violation of a covenant. *Id.* at 410. The Lanes’ other citations fare no better.

Injunctive relief will be denied if the harm done to the defendant by granting the injunction will be disproportionate to the benefit secured by the plaintiff. See *Holmes Harbor Water Co., Inc.*, 8 Wn. App. 600, 603, 508 P.2d 628 (1973). Here, there is no question that the hardship asserted by L’Hommedieu, losing the benefit of the lots created by the 1966 plat of the River Glen Subdivision, far outweighs any speculative

benefit of enforcement to the Lanes. Indeed, the Lanes could **not** identify any harm to their interests from the septic systems as currently designed and located. RP 85-86, 119.

**F. The Trial Court Properly Awarded Damages to L’Hommedieu**

Under CR 65(c), a party may not obtain a “preliminary injunction...except upon the giving of security...for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained.” *See also* RCW 7.40.080 (identifying a bond as the required form of security). Inasmuch as L’Hommedieu was the prevailing party, the trial court correctly awarded \$12,513 in damages to L’Hommedieu for being “wrongfully enjoined.” Conclusions at 3.

**1. L’Hommedieu Was “Wrongfully Enjoined or Restrained”**

On June 9, 2003, in an apparent attempt to circumvent any opposition from L’Hommedieu’s counsel, the Lanes secured an *ex parte* Temporary Restraining Order (“TRO”) from Commissioner Wyninger. CP 106; Finding 6. Although the deed restriction only addresses the location of septic systems, the expansive TRO obtained and drafted by opposing counsel prohibited L’Hommedieu from “[e]xcavation on his property...for the purpose of installing a septic system or systems...[and]

**[c]ommencing construction on any other improvements.”<sup>6</sup>** The *ex parte* TRO was converted to a preliminary injunction on June 26, 2003. CP 147-49; Finding 6.

As a condition of the preliminary injunction, and as required by CR 65(c) and RCW 7.40.080, the Lanes posted a bond in the amount of \$150,000 to compensate L’Hommedieu for “all damages and costs which may accrue by reason of the injunction.” RCW 7.40.080; CP 143-46.

On August 29, 2003, the trial court granted partial summary judgment in favor of L’Hommedieu and quashed the preliminary injunction. Finding 6; CP 380. L’Hommedieu incurred \$12,513 as damages incurred in the form of attorneys fees to quash the preliminary injunction—a sum is not contested by the Lanes. Finding 23; CP 436-43.

The Lanes suggest that L’Hommedieu is not entitled to these damages because they were incurred in “obtaining the [partial] summary judgment which, it turns out, was not proper and was reversed by this

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<sup>6</sup> During opening arguments at trial, opposing counsel admitted that, if successful, the sole remedy available to the Lanes was decommissioning of the septic systems and not the removal of any improvements. RP at 18. This concession appears to be a tacit admission that the original TRO was overly broad.

Court.” Appellants’ Br. at 41. However, this Court’s adjudication of the propriety of *partial* summary judgment with an accompanying remand for trial simply could not, and did not, as a matter of law determine whether L’Hommedieu was “wrongfully enjoined or restrained.” CR 65(c). After all, such a determination can only be made when all of the claims in this matter are fully adjudicated.

It is ironic that the Lanes now complain about the prior appeal in which they successfully obtained a reversal of the partial summary judgment. Were it not for the original grant of summary judgment in favor of L’Hommedieu, the TRO would have remained in place much longer, thereby significantly increasing L’Hommedieu’s damages. Thus, instead of having been enjoined for one building season, Finding 24, L’Hommedieu would have been unlawfully restrained up and until the Court entered judgment on May 31, 2007.

**2. As the Prevailing Party, L’Hommedieu Is Entitled to Damages as a Matter of Law**

L’Hommedieu is entitled to recover attorneys’ fees as damages expended in seeking to resist the wrongful injunction:

As a general rule, attorney’s fees are damages recoverable by the party who successfully resists a wrongful injunction. *Berne v. Maxham*, 82 Wash. 235, 114 P. 23 (1914); *Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974). *See also* RCW 7.40.080;

CR 65 (c).

*Parsons Supply, Inc. v. Smith*, 22 Wn. App. 520, 524, 591 P.2d 821 (1979). See also *White v. Wilhelm*, 34 Wn. App. 763, 773-74, 665 P.2d 407 (1983), *Cecil v. Dominy*, 69 Wn.2d 289, 293-94, 418 P.2d 233 (1966). The fees incurred in resisting the wrongful injunction were previously set forth in the Declaration of John Groen Regarding Attorneys Fees, representing a total of \$12,513. CP 436-43.

Relevant case law does not require a showing that an injunction was obtained in “bad faith” in order for damages to be awarded.

[T]he test is not whether the injunction was erroneous on its face, but whether it is later determined that the restraint was erroneous in the sense that it would not have been ordered had the court been presented all the facts

*Knappett v. Locke*, 92 Wn.2d 643, 647, 600 P.2d 1257 (1979). Thus, the determination of whether an individual was “wrongfully enjoined,” may be determined objectively by reviewing the judgment: “The judgment in favor of the Lockes constitutes a finding that they were ‘wrongfully enjoined or restrained.’ CR 65(c).” *Id.*

**G. The Lanes’ Motives Are Irrelevant, As a Matter of Law, To Whether L’Hommedieu Was Wrongfully Enjoined**

The Lanes request this Court to reverse the award of damages, even if the remainder of the trial court’s judgment is upheld, because “the

Lanes should not be punished for seeking a TRO/preliminary injunction.” Appellants’ Br. at 41. As indicated above, however, this Court’s legal inquiry focuses on the effect of the injunction upon the party that is wrongfully enjoined, and not the party seeking the injunction.

By posting the \$150,000 bond, the Lanes were fully aware that if they were unsuccessful, they could be liable for damages. Moreover, the Lanes’ assertion that “[t]here was no finding by the trial court that the Lanes proceeded in an improper manner or in bad faith in obtaining provisional relief” is highly misleading. Appellants’ Br. at 42. Not only is there no requirement that such a finding be entered, but as a factual matter it simply isn’t true.

During the hearing on the entry of finding, counsel for the Lanes requested that Finding 26 to be amended as follows:

Paragraph 26...says, [1]the Lanes did not bring this suit in bad faith.[1] And my recollection was that what Your Honor actually said was that [1]the Lanes did not seek the TRO in bad faith[1], and that’s an important point -- an important distinction for purposes of an appeal...

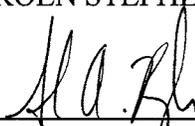
RP at 107. Citing the Lanes’ overly broad TRO, which was obtained *ex parte*, the Court then rejected counsel’s request to amend the findings, implying indeed that the TRO was obtained in bad faith. RP 735-36.

**CONCLUSION**

For the reasons enumerated herein, L'Hommedieu respectfully requests that the decision of the trial court be upheld.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of February, 2008.

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\_\_\_\_\_  
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