

Court Of Appeals Number: 36572-3-II

COURT OF APPEAL, DIVISION II  
STATE OF WASHINGTON

FAWN LAKE MAINTENANCE COMMISSION, RESPONDENT

v.

ALDONS ABERS and INESE ABERS, APPELLANTS

REPLY BRIEF OF APPELLANTS

FILED  
COURT OF APPEALS  
DIVISION II  
09 JUL - 1 AM 11:26  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEP. \_\_\_\_\_

John Frawley  
Attorney for Appellants

5800 236<sup>th</sup> St. SW  
Mountlake Terrace, WA 98043  
(425)778-1300  
WSBA #11819

P. M. 6-30-2008

ORIGINAL :

TABLE OF CONTENTS

I. Introduction ..... Page 1

II. Issues Addressed By Reply Brief ..... Page 1

III. Discussion Of Issues Addressed In Reply Brief

    A. The Respondent has mischaracterized the central issue and misstated the authority of the Board of Directors which governs the Respondent Homeowner's Association. .... Page 3

    B. Appellants Were Not Required To Go Through The Subdivision Process To Create One Residential Lot ..... Page 7

    C. The record contains no evidence of detrimental reliance and the argument is not appropriate. .... Page 9

    D. The Respondent's argument of "proportionality" actually favors the Appellants position. .... Page 10

IV. Conclusion ..... Page 13

## TABLE OF AUTHORITIES

### Table of Cases

<u>Parry v Hewitt</u> .....	Page 5
68 Wn.App. 664, 847 P.2d 483 (1992);	
<u>Wimberly vs. Caravello</u> .....	Page 5
136 Wn.App. 327, 149 P.3rd 402 (2006)	
<u>Lane vs. Wahle</u> .....	Page 5
101 Wn.App. 878, 6 P.3d 621 (2000)	
<u>Diamond "B" Constructors, Inc. vs. Granite Falls</u> <u>School District</u> .....	Page 5
117 Wn.App. 157, 165, 70 P.3d 966 (2003)	

### Statutes

RAP10.3(c) .....	Page 1
RCW 58.17.040(6) .....	Page 8

## **I. INTRODUCTION**

Appellants present this Brief in reply to the materials submitted in the "Corrected Respondents' Brief." (sic) Pursuant to RAP10.3(c), this Reply Brief will be limited to providing a response to issues in the Corrected Respondents' Brief which need to be addressed by the Appellants.

## **II. ISSUES ADDRESSED IN REPLY BRIEF**

1. Has the Respondent provided a fair or correct analysis of the contract provisions in question?

A. Where, as here, a party (the Respondent) misquotes the relevant contract provision and attempts to write out descriptive language in the contract, should the Court acquiesce and treat the contract language as superfluous?

B. Has the Respondent correctly analyzed the standard to which the Respondent's Board of Directors should be held in this matter?

2. Is the single residential lot owned by the Appellants appropriately classified as one residential lot for purposes of the issues now before the Court?

3. When the Respondent has presented no factual evidence of the understanding or intentions of any other homeowner in the Fawn Lake subdivision, is it appropriate to consider arguments which are based (apparently) on supposition about what other homeowners might have been thinking?

A. Is the Respondent required to present some factual evidence to support its legal analysis?

4. The Respondent's central argument and theme in this case is that allowing the Appellants to be assessed for a single residential lot would create a disproportionate assessment as compared to other owners within the subdivision. Where, as here, the owner of a single residential lot receives one set of services (including water hookups, access keys and data, voting rights, etc.), is it appropriate that the owner of that single residential lot be assessed for one residential lot?

A. Would assessing the owner of a single residential lot result in disproportionate charges being assessed to that single residential lot owner?

B. Is there any evidence in the record that assessing the owner of a single residential lot one set of dues and assessments would be disproportionate or unfair to the remaining property owners

in the subdivision?

**III. DISCUSSION OF ISSUES ADDRESSED IN REPLY BRIEF**

**A. The Respondent has mischaracterized the central issue and misstated the authority of the Board of Directors which governs the Respondent Homeowner's Association.**

First on this issue, the Respondent has intentionally omitted from its discussion a key descriptive contract term and key portions of the covenants of the Fawn Lake subdivisions. Specifically, at page six of the Corrected Respondents' Brief, the Respondent purports to quote Article I, Section 3 of the covenants. In total, the Corrected Respondents' Brief quotes that section as follows:

“Charges and assessments by the Commission shall be levied in equal proportions against each and every lot...”

In fact, the relevant portions of that section read as follows:

“Charges and assessments by the Commission shall be levied in equal proportions against each and every residential lot, or in accordance with the service rendered directly to each such residential lot...” CP270.

For the Court's convenience, the Appellant has underlined those

portions of Article 1, Section 3 which were omitted by the Respondent in its Brief. Significantly, the Respondent omitted the word “residential” as used in the covenants to further define the term “lot.” Further, the Respondent omitted the entire portion of Article 1, Section 3 which states that the charges are to be proportionate and in accordance with the service rendered directly to the residential lots. These omissions are telling.

Throughout this case, both at the trial Court level and now at the appellate Court level, the Respondent has simply ignored the fact that these covenants refer to residential lots. The Respondent has argued that we should refer to “lots as originally configured” as the basis upon which charges and assessments by the commission should be calculated. In essence, the Respondent argues that in Article 1 Section 3 of the covenants, we should substitute the words “lots as originally configured” for the term “residential lot” used in that section. The Respondent has cited absolutely no authority for this proposition.

As outlined in the Appellants Brief in this matter, both logic and resort to dictionary definition support the position of the Appellants. Appellants should be charged and assessed based upon the number

of residential lots that they own within the Fawn Lake divisions. They own one residential lot. They should be assessed one set of dues.

Beyond simple reading of this section and logic, the Respondent's position violates rules of contractual construction. Interpretation of a restrictive covenant is a question of law. Parry v Hewitt, 68 Wn.App. 664, 847 P.2d 483 (1992); Wimberly vs. Caravello, 136 Wn.App. 327, 149 P.3d 402 (2006). Basic rules of contract interpretation are applied. Wimberly, supra and Lane vs. Wahle, 101 Wn.App. 878, 6 P.3d 621 (2000). In interpreting contracts, the Court must construe a contract such that meaning is given to every word and every term in the agreement. Diamond "B" Constructors, Inc. vs. Granite Falls School District, 117 Wn.App. 157, 165, 70 P.3d 966 (2003). Not only does the interpretation of the covenants offered by the Respondent violate these rules of construction, but they substitute new meaning for terms in the contract. Certainly, the Respondent provides no explanation as to why we should ignore any attempt to define the term "residential lot" nor why the Respondent insists on substituting "lots as originally configured" for this contractual term.

Also in violation of these same rules of construction, the

Respondent simply ignores the second half of the critical provision in the covenants. The second phrase in the covenants indicate that charges and assessments shall be levied “in accordance with the service rendered directly to each such residential lot...” Clearly, this language was intended to make certain that each residential lot is charged separately for its share of the services rendered. The Court will recall that the Appellants were provided only one water hookup, one key to the locked gate (and therefore only one means of access), one vote, and one set of services following the combination of their two lots into one residential lot. CP110. As the covenants require that they be charged “in accordance with the service rendered”, they should be assessed only one set of dues. Simple rules of contract construction, as outlined above, mandate this conclusion.

Apparently aware that the actions of the Board of Directors are not supported by the covenants, the Respondent goes on to argue that the directors “have authority to make determinations regarding all aspects relating to payment of dues and assessments, including the amount, manner, and method of payment...” Corrected Respondents’ Brief, page 8. Further, the Respondent argues that Fawn Lake can make any assessment that it wants as long as there is “a degree of

reasonableness.” Respondent even argues that the decision can be “unreasonable as long as it is not wholly arbitrary.” The cases cited by the Respondent are inapposite.

The cases cited by the Respondent involve determination of whether a building permit application is appropriate, whether rules prohibiting the use of alcohol or significant activities are appropriately made and enforced, and similar purely discretionary decisions. In the present case, we have a simple issue of contract interpretation. We are not faced with question of reasonableness, but simply a question of whether the term “residential lot” actually means “lot as originally configured.” If the Respondent is arguing that these two terms mean the same thing, then the interpretation is wholly arbitrary and unreasonable. However, the real issue is not one of reasonableness, but one of interpreting the relevant contract provisions. The Respondent has offered no help on this issue.

**B. Appellants Were Not Required To Go Through The Subdivision Process To Create One Residential Lot**

Next, Respondent argues in its Brief that the combination of the two lots formerly owned by the Appellants into one residential lot was not authorized by the subdivision statute and, therefore, that the

combination was not effective to create one residential lot. This argument fails as it is neither supported by the statute cited nor the factual history of this case.

RCW 58.17.040(6) exempts from the short plat or subdivision process a lot line adjustment which does not create any additional lot or tract. This section essentially exempts from the subdivision process all lot combinations. As was detailed in the materials presented to the trial Court, the Appellants met with the Mason County officials as part of this process, followed specifically the steps required within Mason County, and combined their lots. CP109. The County has since taxed the property as one lot and has indicated that only one building permit could be issued for the property. In every sense of the word, the County recognizes that these Appellants own one "residential lot." CP109.

In a somewhat convoluted and difficult to follow argument, the Respondent argues that although the Appellants completed the process required by Mason County and created one residential lot, the process was not effective because Mason County, at the time, treated this as an "informal" process. Noting that the informal process was not "codified" until 2003, the Respondent argues that the informal

**C. The record contains no evidence of detrimental  
reliance and the argument is not appropriate.**

Next, beginning at page 21 of the Corrected Respondents' Brief, the Respondent argues that other property owners in the subdivision purchased property in reliance on the governing documents and, apparently suggesting some sort of justifiable reliance, argues that the Appellants are therefore prohibited from the lot combination that they completed. This argument fails for several reasons.

First, again, there is not a single shred of factual support in the record for the detrimental reliance argument. There is no testimony from any current or former lot owner that they purchased a lot "in reliance on the governing documents" nor in reliance "upon the plat as originally configured." How can the Court possibly rule on a theory of detrimental reliance when there is no factual evidence of reliance?

Beyond that, and as will be discussed more fully below, the argument that is being made here is largely one of proportionality. That is, the Respondent is arguing that it would place a disproportionate burden on the other lot owners if the Appellants were allowed to build a single residence on their property. The Appellants

would encourage the Court to review the analysis in Section D, below as it relates to this issue.

**D. The Respondent's argument of "proportionality" actually favors the Appellants position.**

Throughout the Corrected Respondents' Brief, the Respondent argues that assessing Appellants one set of dues for their single residential lot would create a disproportionate increase in the assessments to be paid by the other lot owners. This is really the central theme of the Respondent. However, this argument fails for several reasons.

First, as quoted above, the covenants (the relevant contract in this case) require on their face that assessments be calculated based on the number of residential lots owned and that the assessments be proportionate to the services provided. Here, there is no debate but that Appellants own one residential lot. Further, there is no debate and it has not been denied that the Appellants were provided with only one water hookup following their lot combination, they were provided with only one key to access the property provided following their lot combination, they were provided with only one vote on all board issues following their lot combination, and, in general, the

service level that they demanded was that of one residential lot. If we are to assess the Appellants for two lots, then they would be paying two hundred percent of the dues as compared to every other owner of a single residential lot. How can this be proportionate?

The Court should also consider the converse of the current argument made by the Respondent. That is, suppose a lot owner in the subdivision successfully subdivided or short platted his or her building lot. Would the Respondent then be arguing that the Respondent could charge only one set of dues and assessments for the newly created multiple lots? Would the Respondent be arguing that they would be limited to charging on the basis of the "lots as originally configured?" Clearly, that would not be the case. The reason is simple: under these covenants, dues and assessments must be proportionate to the services consumed and to the number of residential lots owned. A lot owner who successfully subdivides his lots will be consuming additional services and will have additional residential lots. The new multiple residential lot owner must be charged multiple sets of dues.

Finally on the issue of proportionality, the Respondent argues that dues for all other lot owners will increase disproportionately if a

lot owner successfully combines two lots into one residential lot. This argument fails to account for the decrease in costs which will be recognized by the Respondent with lot combinations. Presumably, the Respondent is not making a profit on the dues that are assessed, but is seeking only to cover the cost incurred in managing this subdivision. Each time that a lot owner combines two lots into one residential lot, one water hookup and service is avoided, one set of access requirements (keys, gate keeping, etc.) is avoided, one set of mailings is eliminated, there is one less residential lot owner to use the roads thereby reducing the maintenance requirements, and, in general, one set of services provided by the Respondent disappears. It is a fallacious argument to suggest that this reduction in demand for services will not result in a reduction in the expense in providing those services. Nowhere in the record is there any evidence that the reduction in expenses will not be directly proportionate to the reduction in the number of residential lots and the number of services provided. The record is simply devoid of any evidence to support the analysis suggested by the Respondent.

#### IV. CONCLUSION

Once again, the Appellants are requesting that the Summary Judgment Orders entered on February 12, 2007 and June 4, 2007 be reversed. Appellants request that this Court remand the case to Mason County Superior Court with direction to enter Summary Judgment in favor of the Appellants, Mr. and Mrs. Abers. Further, Appellants are requesting that the Court be instructed to enter an award of attorney fees and costs to Mr. and Mrs. Abers, if justified by contract or statute. This should include recovery of attorney fees and costs on appeal.

Dated: June 29, 2008

Respectively submitted.



---

John Frawley, WSBA #11819  
Attorney for Appellants

FILED  
COURT OF APPEALS  
DIVISION II

08 JUL -1 AM 11:25

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

FAWN LAKE MAINTENANCE  
COMMISSION,

Respondent,

vs.

ALDONS ABERS and INESE ABERS,

Appellants.

No. 36572-3-II

DECLARATION OF MAILING

The undersigned declares that on June 30, 2008 I placed in the United States Postal Box with correct prepaid postage an original and copy of the Reply Brief Of Appellants, addressed to the following: Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402-4454 and a copy of the Reply Brief Of Appellants addressed to Stephen Whitehouse, P.O. Box 1273, Shelton, WA 98584-0952.

I declare pursuant to RCW 9A.72.085 and under penalty of perjury under the laws

**JOHN FRAWLEY**  
ATTORNEY AT LAW  
5800 236TH STREET SW  
MOUNTLAKE TERRACE, WA 98043  
TELEPHONE (425) 7781300  
FAX (425) 7759276

DECLARATION OF MAILING - 1

**ORIGINAL**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

of the State of Washington that the foregoing is true and correct.

Date: 6/30/08

  
\_\_\_\_\_  
Robin Jones

Mountlake Terrace, Washington  
Place of Signing

**JOHN FRAWLEY**  
ATTORNEY AT LAW  
5800 236TH STREET SW  
MOUNTLAKE TERRACE, WA 98043  
TELEPHONE (425) 7781300  
FAX (425) 7759276