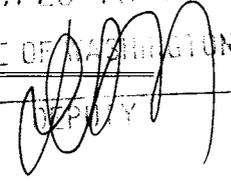


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DIVISION II

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STATE OF WASHINGTON

BY 

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

WOLLOCHET HARBOR CLUB, a Washington non-profit corporation,
Plaintiff/Appellant,

v.

DOREEN KNAPP, a single person; ANTONE MOSICH and BETTY
MOSICH, husband and wife; RAY JONES and CAROL JONES, husband
and wife; FRANK MARINKOVICH and LISA MARINKOVICH,
husband and wife; ESSIE WOLFRAM and/or the Estate of Essie
Wolfram; TIM POTTER and JORJA POTTER, husband and wife; JOHN
GINNIS and RUTH GINNIS, husband and wife; STEVE KELLER and
DEANNA KELLER, husband and wife; DEAN DENNIS and KATHY
DENNIS, husband and wife; KENT OLMSTEAD and KATHLEEN
OLMSTEAD, husband and wife; NICK STIMLER and SHELLEY
STIMLER, husband and wife; TERRY BOWINGTON and CINDY
BOWINGTON, husband and wife; CARL PETERSON and BEVERLY
PETERSON, husband and wife; JUANITA CARBAUGH, a single person;
and VERNON SCOTT and LISA SCOTT, husband and wife,

Defendants/Respondents.

DEAN DENNIS and KATHY DENNIS, husband and wife; DAN
WOLFROM, as Personal Representative of the Estate of Essey Wolfrom;
TIM POTTER and JORJA POTTER, husband and wife; and STEVE
KELLER and DEANNA KELLER, husband and wife,

Defendants/Third-Party Plaintiffs/Respondents,

v.

LISA SCOTT and VERNON SCOTT, husband and wife; GRANT
WILLIAMS and ADELE WILLIAMS, husband and wife; DAN
LOHOSKY, SR., and MICHELLE LOHOSKY, husband and wife;
WILLIAM SHAFFER and JUNE SHAFFER, husband and wife; KEVIN
JACOBSON, a single man; JAMES HANSEN and ANITA HANSEN,

ORIGINAL

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husband and wife; BETTY GOSSAR, a single woman; and HERMAN
KOSIR and DOROTHY KOSIR, husband and wife,

Third-Party Defendants/Appellants.

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I. INTRODUCTION

Between 1952 and 1964, DeWitt C. Rowland created the Wollochet Harbor Club. He constructed the community in four phases, naming each addition First, Second, Third, and Fourth. In 1957, he incorporated the Wollochet Harbor Club, a non-profit corporation (“WHC”), to govern the four additions. WHC developed adjacent to Wollochet Bay. The Second Addition lies along the shores of the Wollochet Bay with the majority of its homes on the shoreline. Its other homes, and many of the homes in other additions, enjoy views of Wollochet Bay. From its inception, its Articles of Incorporation and By Laws have identified the views of Wollochet Bay as critical to the character of the community. The community has been operating for over 50 years under this general scheme and plan.

Washington recognizes that when a declarant creates a community with a general scheme and plan, courts will give effect to that intention. Courts look not only at the covenants, but at any correlating documents, such as Articles of Incorporation and By Laws, as well as the surrounding facts, when determining whether a general scheme or plan exists that must be recognized.

Where a general scheme or plan exists, a majority of community members cannot impose unexpected and detrimental changes to property rights on others in the community. *See Meresse v. Stelma*, 100 Wn. App.

857, 866, 999 P.2d 1267 (2000) (quoting *Boyles v. Hausman*, 517 N.W.2d 610, 617 (Neb. 1994)) (“The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants.”); accord *Riss v. Angel*, 131 Wn.2d 612, 623-24, 934 P.2d 669 (1997) (holding that when interpreting restrictive covenants “[t]he court will place special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.” (citation omitted)). Yet, in October 2006, members of WHC’s Second Addition did exactly that – without notice to anyone else in the subdivision, they purported to eliminate certain view and building restrictions from their addition’s covenants – protections on which community members relied when purchasing their homes and which add value to the entire community. In so doing, the Second Addition lot owners created new property rights for themselves and destroyed the general scheme and plan of WHC. *Meresse*, 100 Wn. App. at 866-67 (holding that covenant permitting road maintenance did not enable majority to relocate road to detriment of minority); *Shafer v. Bd. of Trustees of Sandy Hook Estates, Inc.*, 76 Wn. App. 267, 273-74, 883 P.2d 1387 (1994) (holding that “an express reservation of power to change restrictions in a subdivision by less than 100 percent of all lot owners must be exercised in a reasonable manner consistent with the general plan of the development.”).

When WHC's Board challenged these actions, the trial court erroneously held that the Board lacked standing to bring the lawsuit. Reading the governing documents strictly and narrowly, the trial court held that WHC's governing documents did not give the Board the right to challenge actions taken by the various additions – even if those actions destroyed the general scheme and plan of the community.

In coming to this decision, the trial court bifurcated the issue of the existence of WHC's general scheme and plan and refused to consider whether such a plan existed before construing WHC's governing documents. The trial court got it backwards. The existence of a general scheme or plan must first be resolved before the court can determine if the Board has standing to enforce that general scheme or plan, which includes challenges to actions taken by members that destroy the community. The trial court's refusal to reach the issue of whether a general scheme and plan exists for WHC before it reached the issue of standing constitutes reversible error.

The trial court also held that Article (q) of the Articles of Incorporation requires a two-thirds vote of the association to approve assessments and/or expenditures for legal fees and costs. Because WHC's Board did not obtain a two-thirds membership vote first, the trial court

ruled that the Board's actions of retaining counsel and filing this suit were *ultra vires*.¹

Article (q) authorizes WHC to assess its members for water, sewage, mutual use areas and "other corporate purposes." Article (q) further provides that two-thirds of the membership must vote to approve assessments except for assessments related to the water system, roads and sewage.

The trial court broadly construed the phrase "other corporate purposes" in Article (q) to mean *all* "other corporate purposes," as opposed to *associated* "other corporate purposes" related to the capital improvements addressed by Article (q). The trial court erred as a matter of law by failing to read the general phrase "other corporate purposes" in the context of its more specific terms such as water system, roads and sewage. Also, when read in context with the Articles of Incorporation and the By Laws, the trial court's broad reading of "other corporate purposes" is inconsistent with the authority granted to WHC to protect and implement the view protections that are critical to its general scheme and plan.

¹ Significantly, the membership approved these actions in a vote taken on May 21, 2008.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it bifurcated the issue of the existence of a general scheme and plan of the community from the issue of standing for purposes of ruling on Certain Defendants'² motion for summary judgment.

2. The trial court erred by granting Certain Defendants' motion for summary judgment and ruling as a matter of law that WHC had no standing to seek declaratory and injunctive relief to protect and enforce the general scheme and development plan of WHC for the benefit of all lot owners in all four additions of WHC.

3. The trial court erred in ruling that Article (q) of the Articles of Incorporation of WHC required a two-thirds vote of the membership both to assess and to use assessments for litigation to enforce view protections.

B. Issues Pertaining to Assignments of Error

1. Whether the existence of a general scheme or plan of the community affects whether a homeowner's association has standing to challenge changes to covenants that negatively impact the entire

² Dean and Kathy Dennis, Dan Wolfrom, Tim and Jorga Potter and Steve and Deanna Keller are the members of the Second Addition who brought a counterclaim against the WHC and its Board in response to the WHC's complaint challenging the Second Addition's amendment of its protective covenants and restrictions. They shall be referred to as "Certain Defendants" throughout this brief.

community but benefit a chosen few when the association's governing documents charge the board with controlling and managing all business of the corporation, including the enforcement of restrictive covenants in any of the additions in which members' lots may lie. (Assignment of Error #1).

2. Whether a homeowners' association has standing to bring a lawsuit for declaratory judgment to enforce the general scheme or plan of the community when the association's governing documents charge the board with controlling and managing all business of the corporation, including the enforcement of restrictive covenants in any of the additions in which members' lots may lie. (Assignments of Error #1 and #2).

3. Whether RCW 24.03.035(2) provides WHC with the authority to institute litigation to enforce the general scheme or plan of the community.³ (Assignment of Error #2).

4. Whether WHC's Articles of Incorporation and the By Laws authorize the Board to use member assessments to commence and fund litigation regarding view enforcement without obtaining a vote approving the assessments and expenditures by two-thirds of the WHC membership. (Assignment of Error #3).

³ Additional authority also exists under RCW 64.38.020(4) because WHC is a homeowner's association.

III. STATEMENT OF THE CASE

A. Factual Summary

1. The Creation of the WHC Community

a. *The First Addition: 1951*

Between the years 1951 and 1964, DeWitt C. Rowland, the declarant, developed WHC. In 1951, he platted what is now known as the First Addition. CP 385-88; *see also* CP 65-75. At the same time, Mr. Rowland recorded restrictive covenants, including building restrictions limiting development to single family dwellings subject to design approval by an architectural design committee, protected access to Wollochet Bay, and established views. *Id.* (See ¶¶ 4, 17, 21, 22). The covenants also provide that they shall run with the land and be binding until 1972 “at which time said covenants shall be automatically extended for successive periods of 10 years unless by vote of a majority of the then owners of the lots it is agreed to change said covenants in whole or in part.” CP 386 (¶1).

b. *The Second Addition: 1953*

In 1953, Mr. Rowland platted the Second Addition to WHC. CP 389-91. The covenants for the Second Addition – the same addition whose current activities are the center of this lawsuit – also provided building restrictions limiting development to single family dwellings subject to design approval and certain height restrictions; protected access

to Wollochet Bay by establishing a mutual use area on Lot 10 in the Addition ("Lot 10"); and established view covenants. *Id.* (See ¶¶ 4, 17, 23, 25, 26). Like the First Addition, these covenants also provided that they run with the land, be binding until 1972 and be renewed at 10-year intervals "unless by vote of a majority of the then owners of the lots it is agreed to change said covenants in whole or in part." CP 390 (¶1).

A few months after recording the initial covenants, Mr. Rowland amended them, replacing the view covenant (paragraph 26) with the following:

It is essential that the view from any lot of this Addition, *or from houses which may hereafter be built on land westerly of this Addition*, be maintained and safeguarded so far as it is possible so to do without restricting the use of other lots as allowed by the provisions herein. Therefore, no hedge shall be permitted over seven (7) feet in height unless it be certain that such hedge in no way interferes with the view from any other lots *or the land westerly of this Addition*; and no trees will be permitted of such height or character that they restrict the view of any part of Wollochet Bay from houses built or to be built on other lots of this Addition, *or on land westerly thereof*. Trees now standing shall be permitted to remain on the lots if the owner of lots upon which they are located desire, but such trees will be required to be trimmed at the expense of the owner of the lot on which they are located when requested by the owner or purchaser of any house whose view is restricted by them so that such trees shall not restrict the view to any greater degree than they do as of the date of the signing of this instrument.

CP 393. (*Emphasis added*).

c. *The Second Addition's Standard
Supplemental Agreement: 1956*

In 1956, Mr. Rowland also had lot owners in the Second Addition sign a "Standard Supplemental Agreement". CP 154-68. The supplemental agreement contemplated the future addition of other lots and other additions as well as the creation of a non-profit corporation to govern WHC. *Id.* While the supplemental agreement generally addresses water and road issues as well as beach access to Lot 10, it also provided that if a non-profit corporation were formed, it would incorporate the covenants of each addition into the corporate governing structure:

If said corporation so organized shall then contract with the sellers [DeWitt C. Rowland and Anne S. Rowland] to be bound by the provisions herein required of it, *thereupon subject to the terms of this agreement and those of the plat of this addition and the covenants and restrictions thereof*, upon a majority vote of the owners and purchasers ... of the lots of said addition and those of other land or additions at that date designated to share with them in the use of Lot 10, said corporation shall (without further expense to it) own said Lot 10 and Lot A and said water system and have the right to operate, maintain, develop and/or improve said Lot 10, and said water system, and govern, maintain and/or improve the roads.

CP 161-62. (*Emphasis added*).

The creation of the non-profit corporation contemplated in the supplemental agreement was to come shortly.

d. The Third Addition: April 1957

By 1957, Mr. Rowland was ready to plat another addition. On April 18, 1957, he recorded the plat and restrictive covenants for the Third Addition. CP 394-96. The restrictive covenants for the Third Addition contain similar restrictions as the First and Second: Only one single-family dwelling could be built on each lot subject to control by an architectural design committee and certain height restrictions; lot owners were granted access to Lot 10, the mutual use beachfront area; and views were protected. *Id.* (See ¶¶ 4, 17, 23, 25, 26). These covenants also run with the land, were binding until 1976 and renewed in 10-year intervals unless a majority of lot owners voted to change them. CP 395 (¶1).

In addition to containing identical restrictions to those imposed on the Second Addition, the view covenant for the Third Addition specifically references the future non-profit corporation that would govern WHC:

... In addition to the rights of the owners and purchasers of lots in this addition, to protect the view from their respective lots and/or houses by any lawful means, *the non-profit corporation herein referred to shall provide additional means of enforcing their provision by corporate action and by providing penalties for violations or by assessing any lot owner, who, after notice,*

shall neglect or fail to remove the offending tree, obstruction or structure.

CP 396 (¶26). (*Emphasis added*).

e. Incorporation of WHC: December 1957

Finally in December 1957, Mr. Rowland formed the non-profit corporation referred to in the Second and Third Addition plats and covenants and the supplemental agreement signed by Second Addition lot owners. CP 91-100. The Articles of Incorporation specifically authorized the association to enforce the covenants and restrictions in any of the Additions, “including any covenant or restriction respecting the maintenance of the view of Wollochet Bay from houses on any lots.” CP 95. The Articles of Incorporation have never been amended. At least as far back as 1980, Article XVII of the By Laws incorporated the covenants and restrictions of each of the Additions. CP 132. Although the By Laws have been amended several times over the years, Article XVII remains unchanged. *See* CP 101-132.

f. The Fourth Addition: 1964

The Fourth Addition did not get platted until June 1964. CP 397-99. Like the First, Second and Third Additions, only one single-family dwelling is permitted per lot subject to design approval. CP 398-99 (*See* ¶¶ 4, 13). Moreover, each lot was granted access to Lot 10 and made a member of the non-profit corporation Mr. Rowland incorporated in 1957. CP 399 (*See* Special Provision (2)). The restrictive covenants did not

include any view restrictions; however, none of the lots in the Fourth Addition have significant views. *See* CP 397 (plat map); CP 225 (map of WHC showing view lots). The covenants, like those of the First through Third Additions, run with the land for 25 years, are renewed every 10 years, and may be changed by majority vote of the lot owners. CP 399 (§1).

As finally established, portions of the First, Second and Third Additions are located along Wollochet Bay. The Second Addition enjoys the largest portion of shoreline in WHC. Many of the homes of the Second and Third Additions that are not directly on the shore enjoy views of Wollochet Bay. The Fourth Addition, formed last and located the farthest from Wollochet Bay, does not have any significant view. As a whole, all the properties contain single story, single-family homes that nestle among the trees, highlighting the community's scenic access to Wollochet Bay.

2. The Articles of Incorporation and By Laws Govern All Additions Equally

The Article of Incorporation and the By Laws serve to bring all four additions together as one subdivision. The Second Addition supplemental agreement and the covenants of all but the First Addition contemplate the creation of a larger subdivision composed of all four additions and governed by one non-profit corporation. The Articles

reiterate the purposes of the corporation in relationship to the subdivision as a whole, as do the By Laws.

As stated above, the Articles of Incorporation filed by Mr. Rowland in 1957 have not been amended over the years. The Articles provide an extensive list of "Objects and Purposes" of WHC. The relevant "Objects and Purposes" of WHC pertaining to this appeal appear in Articles (j), (k), (n), (o), (p), (q), (r) and (s). *See* CP 91-100.

a. Article (j): Board Enforcement of Covenants

Article (j) provides that an "object and purpose" of WHC is to "enforce the restrictions in any of the Additions" by "such other and proper regulation as may be necessary to so enforce such covenants and restrictions, including any covenant or restriction *respecting the maintenance of the view of Wollochet Bay from houses on any lots.*" CP 95. (*Emphasis added*). Article (j) enables the Board to enforce paragraph 26 of the Second Addition's covenants as amended in 1956 as it provides that views shall be protected not just in the Second Addition, but also for lots to the west of the addition. CP 161-62. The Second Addition's elimination of paragraph 26 is at issue here.

b. Article (k): Costs of Doing Business

Article (k) enables the Board to pass-on the costs of services rendered by the corporation to all of the membership. As the specific language sets forth, the association is authorized to pass along to its

members “necessary operating costs,” “funds for contingencies,” funds for the “reimbursement of members who advance or convey money or property to the corporation,” and other expenses.⁴ CP 96.

c. *Article (n): Incurring Debt on Behalf of WHC*

Article (n) permits the Board to “contract indebtedness, borrow money, execute promissory notes ... whenever necessary.” It also enables the Board to make *any and all contracts of every kind and nature whatsoever concerning the purposes or property of this corporation ...*” CP 96. (*Emphasis added*). Like Article (k), Article (n) sets forth a broad set of powers necessary and consistent with WHC’s objects and purposes as provided in other articles.

d. *Article (o): One Vote Per Lot*

Article (o) instructs the Board of Trustees to “provide a method of voting on all matters of this corporation and for all trustees thereof, provided that the voting shall be by lots.” CP 96-97. Voting on issues within WHC has always been one vote per lot. CP 103 (Art. I, Sec.1). Changes to the By Laws may be made by three-fifths of lot owners in

⁴ “[A]ll necessary operating costs and charges, and depreciation, obsolescence and replacement costs and such reserve fund or funds for contingencies or for reimbursement of members who advances or convey money or property to the corporation, as the Board of Trustees of this corporation shall deem wise or necessary ...” CP 96.

attendance at a meeting regardless of which addition in which they live.

CP 112 (Art. XVI).

e. Article (p): The Power to Enforce Covenants

Article (p) provides that the Board has the power to “enforce any or all protective covenants and restriction in the plats of Wollochet Yacht Harbor, 2nd Addition, and Wollochet Yacht Harbor, 3rd Addition, and in any other Additions platted or to be platted . . .”

f. Article (q): The Power to Spend and Assess for Capital Improvements

Article (q) provides that the Board has the power:

To assess the members of this corporation for the maintenance and operation of the water system and development and improvement thereof necessary to provide water to all homes of members, and for the maintenance, repair and operation of the above referred to septic tank effluent system, in the manner and to the degree as shall be set forth in the by laws, and to assess the members for improvements in the mutual use areas, and for other corporate purposes, provided however, that no member shall be assessed for items other than for the water system, roads and sewage (or septic tank effluent system) unless two-thirds of the members of the corporation ... shall approve such assessment.

CP 97.

Much debate surrounds the meaning of Article (q), which provides that the Board may assess for certain items of capital improvements and

“other corporate purposes” if approved by a two-thirds vote of all lot owners. Certain Defendants ignore the fact that Article (q) addresses spending on capital improvements and argue that “other corporate purposes” means any and all corporate spending. However, such an expansive interpretation would prevent the Board from conducting all but limited business and conflicts with other articles of the Articles of Incorporation. For example, the Board’s ability to purchase a ream of paper, the cost for printing an agenda for the annual meeting and for mailing that agenda to all lot owners would first need be approved by a two-thirds vote if “other corporate purposes” were intended to mean any and all corporate spending.

Also, Certain Defendants’ interpretation of Article (q) would make portions of Article (q) itself unnecessary and superfluous. The first portion of Article (q) sets forth a list of items for which the association may assess its members: water system, sewer system, mutual use areas, and “other corporate purposes.” The second portion of Article (q) limits that authority by requiring a two-thirds vote for assessments “for items other than for the water system, roads and sewage.” If “other corporate purposes” means any and all corporate purposes as Certain Defendants argue, then the first part of Article (q) is unnecessary given the restrictions in the later part of Article (q).

g. *Article (r): The Corporation is to Serve All Additions Equally*

Article (r) provides that “[t]his corporation is formed for the use and benefit of those certain Additions in Pierce County, State of Washington, known as Wollochet Yacht Harbor, 2nd Addition, and Wollochet Yacht Harbor, 3rd Addition, and for lots or tracts in Addition known as Wollochet Yacht Harbor, and in Government Lot 1 ...” CP 97-98.

h. *Article (s): The Corporation Shall Enjoy All Powers Granted to it Under Law*

Article (s) provides that:

This corporation is formed under and by virtue of, and pursuant to the terms and provisions of Chapter 134 of the 1907 Laws of the State of Washington, and amendments thereto, and this corporation shall have and enjoy all of the powers and privileges as in that Act (including Amendments) provided.

...

CP 98. Hence, WHC may exercise not only those powers granted to it under its Articles and By Laws, but all other laws of Washington, including those granted in RCW 24.03 (granting powers to non-profit corporations). *See also* RCW 64.38.020 (granting certain powers to homeowner associations).

3. The By Laws of WHC

The By Laws grant the Board and all lot owners the right to “enforce, by any proceedings at law or in equity, all restrictions,

conditions, covenants, reservations, liens, charges, and rules and regulations now and hereafter imposed by the covenants and restrictions of Wollochet Yacht Harbor.” CP 113 (Article XVIII). Article IV of the By Laws (Protection of View for Back Lots) originally provided that the Board of Trustees had the responsibility to protect the view covenants of each of the additions:

Section 1: The Board of Trustees shall supervise the protection of view of Wollochet Bay from all back lots or from dwellings built or which may be hereafter built, upon them, and shall strictly enforce the protective covenants and restrictions in the plats of the Second and Third Additions, but this provision shall not deprive any lot owner or purchaser of any other legal means of enforcing such covenants and restrictions.

CP 107.

The By Laws also protected the residential character of WHC by limiting the provision of water by WHC to only one dwelling per lot. CP 105. Major improvements to the water and road systems required a vote of the general membership of *all* additions. CP 106 (Art. II, §8); CP 108 (Art. V, §2). And each addition’s restrictive covenants were incorporated into the By Laws by reference so as to clarify “the rights and obligations of the corporation and its members.” CP 112-13 (Art. XVII).

a. *Amendments to the By Laws: Mandate to Seek Legal Action*

In 2001 and 2002 WHC members amended Article IV. CP 117-19. Section 1 of Article IV now provides that “[t]he Board of Trustees shall enforce all of the protective covenants and restrictions in the plats of the four additions, but this provision shall not deprive any lot owner or purchaser of any other legal means of enforcing such covenants and restrictions.” CP 119. And since 1980, the By Laws have provided for a Committee for Covenant Enforcement to be elected each year “to help implement the enforcement of the protective covenants (including the protection of view).” The committee is made up of one member from each of the Second and Third Additions and one member from either the First or Fourth Addition. CP 117, 119. The creation of a Committee for Covenant Enforcement with members from the various additions implies that the additions were meant to be managed uniformly and for their mutual benefit.

The 2002 amendments deleted any specific reference to view protection in Article IV, not because view protection was no longer mandated, but because the association felt that all covenants and restrictions should be equally enforced. CP 964, 977. The provisions added in 2001, and unchanged by the 2002 amendments, included a procedure for the association to enforce covenants. The last step of the enforcement procedures requires that the Board refer unresolved violations

to legal counsel: “If the alleged violator does not agree to enter into binding arbitration and does not correct the violation within the specified time limit, the Board of Trustees *shall* turn the dispute over to legal council [sic] with instructions to proceed top [sic] the full extent of the law.” CP 119, By Laws, Art. IV, § 3 (g) (emphasis added).

4. Views Add Value to the Homes in the Community

Many of the homes in the Second and Third Additions have views of Wollochet Bay. CP 220-29. Homes with a view enjoy a premium selling price when placed on the market. CP 230-38; 239-40; 279-93. *See also* 10/15/08 Notice of Filing, Exh. C.⁵ One sales flyer for a home in the Third Addition provides that the property has a “marine and mountain view that will never be obstructed.” CP 214-19. Moreover, property owners in WHC are assessed property taxes based on the quality of their views. CP 239-40; 294-322. In addition to preserving the views of Wollochet Bay, the protective covenants and restrictions have enabled WHC to maintain a homogenous appearance, which is part of the community’s character.

In support of the Board’s summary judgment opposition, Juanita Carbaugh, a defendant and Second Addition resident, submitted a declaration from both herself and a real estate appraiser. *See* 10/15/08

⁵ Consistent with RAP 9.6, on October 16, 2006 WHC supplemented the designation of clerk’s papers to include documents that were part of the summary judgment record but not included in the docket. The trial court ordered on October 10, 2008, that these documents become part of the record on appeal pursuant to its authority under RAP 9.12.

Notice of Filing, Exhs. A-C. Her appraiser opined that the loss of view from her Second Addition home would result in a loss of \$100,000 to \$120,000 in value to her home. *Id.*, Exh. B at ¶ 6, Exh. C at ¶ 4 & Exh. A.

5. Unexpected Changes to Second Addition Covenants

On October 12, 2006, Dean Dennis, a property owner in the Second Addition, mailed to every other owner of property in the Second Addition a proposed ballot containing 20 proposed changes to the “Protective Covenants and Restrictions of Second Addition.” CP 182-85 (¶¶ 6-8 & 10-11); 189-99; 204-09. These amendments sought to eliminate all view protections within the Second Addition, which in turn affects homeowners in the Third Addition. CP 198 (Am. 19). The amendments also eliminate all design review requirements for future buildings on the property. CP 195-98 (Am. 12, 13, 14, 15, 16 & 20). Density limitations were eliminated as well as the prohibition on temporary structures. CP 191-92; 194; 197 (Am. 3, 4, 5, 10, 17). The Second Addition homeowners added a provision permitting home-based businesses, which had previously been prohibited. CP 192 (Am. 6). Finally, the Second Addition majority eliminated provisions permitting WHC or lot owners from other Additions to enforce the covenants. CP 190-91 (Am. 1&2).

The Second Addition majority admits that it sought these amendments because they dislike complying with the covenants, Articles of Incorporation and By Laws of WHC. Mr. Dennis states that he wanted

the amendments because “the uphill owners have become more and more rabid about forcing others to cut trees.” CP 183 (¶ 6). Mr. Keller states that he wanted the amendments because “the uphill owners have become more and more demanding about telling us to cut trees.” CP 174-76 (¶ 3). And Tim Potter states that “being frustrated with the demands for tree cutting, some of the owners in the Second Addition met and decided to try to amend the covenants.” CP 169-71 (¶ 5). The Amendments to the Second Addition’s protective covenants and restrictions radically alter the character of the Second Addition to the detriment of some Second Addition homeowner’s as well as owners of lots in additions to the west of the Second Addition. The Second Addition will no longer fit in with the historic character and plan of WHC. In short, these homeowners want to secede.

6. Amendments to the Second Addition PCRs

In support of their position, Certain Defendants argue that the Second Addition made amendments to its covenants in 1991 and 2001. CP 45-46. While it is true that the Second Addition amended its covenants in 1991 to eliminate view restrictions, amendments in 2001 restored those eliminated in 1991. CP 148-51. The Second Addition restored the covenants because:

The Wollochet Harbor Club homeowners of the 2nd addition feel it is time to correct the bylaws, Paragraph 26, as amended in April 1991. *We feel deleting this paragraph in its*

entirety was unlawful. We are looking to reinstate the bylaws of the original covenants so that all 4 additions, once again, are entitled to the same view protection.

CP 151. (*Emphasis added.*)

Among those signing the petition were Timothy Potter, Essey Wolfram and Ray and Carol Jones of the Second Addition. *Id.* Yet, Mr. Potter and Ms. Wolfram's Estate are now Third-Party Plaintiffs seeking to distance themselves from this admission. *See, e.g.*, CP 169-71 (Decl. of Tim Potter).

7. Protests from Property Owners

After receiving ballots for the proposed amendments, some property owners in the Second Addition notified property owners of the Third Addition about the proposed vote. These Second Addition property owners hired an attorney to represent their interests and challenged the right of the majority of Second Addition property owners to make amendments that detrimentally impacted the general scheme or plan of WHC. When resolution of these issues did not occur, the Board filed suit to settle these enforcement issues.

B. Procedural Background

1. The Complaint and Relief Sought

On December 1, 2006, WHC filed a complaint against the residents of the Second Addition seeking a declaration that the amendments to the covenants recorded by addition members in October

2006 were invalid and an injunction against implementation. CP 1-12. WHC filed the complaint because it has “the duty to protect and enforce the general scheme and development plan of WHC as provided in the Articles of Incorporation and the By Laws of WHC.” CP 10 (¶3.34).

Certain Defendants filed an answer, counterclaim and a third-party complaint on January 16, 2007. CP 13-28. Shortly thereafter, on February 16, 2007, the Certain Defendants filed a motion for summary judgment asserting that the Board lacked standing to bring this lawsuit. CP 29-49. The Board filed a cross-motion for summary judgment on March 2, 2007. CP 338-61.

2. Bifurcation of the Summary Judgment Motions

After the Board filed their motion for summary judgment, Certain Defendants immediately sought to bifurcate the issue of the existence a general scheme and plan from the issue of standing. *See* RP 6-26 (3/29/07). The Board opposed the motion on the grounds that the existence of a general scheme and plan impacted the issue of standing. RP 11:17-13:22 (3/29/07). Ultimately the trial court ruled that it would hear Certain Defendants’ summary judgment motion separately from the Board’s cross-motion, but did not separate the issues at that time. RP 22:11-24:18 (3/29/07).

3. The Trial Court Erred When Ruling on Standing

On April 10, 2007, the trial court heard oral argument on Certain Defendants' summary judgment motion. *See* RP 1-40 (4/10/2007).

During argument, the trial court made it clear that it would refuse to consider any evidence or argument related to the impact of the general scheme or plan of WHC on standing:

May I stop you Ms. Reiten? I understand your argument, but your argument about the general scheme go (*sic*) to the merits of the claims, and I believe the issue before me today is much more narrow than that. It is strictly, does Wollochet Harbor Club, the homeowners association, have the ability based on the governing documents to bring this lawsuit on behalf of – I'm not sure who it is they're bringing it on behalf of, but does the Wollochet Harbor Club, the association itself, based on the governing documents have the authority to bring this type of lawsuit.

RP 30:10-20 (4/10/07).

The trial court granted Certain Defendants' motion and dismissed the Board's complaint. *See* RP 42:21-47:25 (4/10/07). In making its ruling, the trial court looked solely at the governing documents. The trial court narrowly construed the issues and the documents, holding that the Board could not "change, amend or challenge the protective covenants and restrictions of the four additions or the Second Addition in particular."

RP 45:16-24 (4/10/07).

4. The Trial Court Erred In Construing Article Q of the Articles of Incorporation

On May 4, 2007, Certain Defendants filed “Third Party Plaintiffs’ Motion For Partial Summary Judgment.” CP 427. In the motion, Certain Defendants requested, *inter alia*, that the trial court find that the Board, by assessing its members and spending assessments collected from members for this litigation without a two-thirds approval vote of WHC members was *ultra vires*. CP 428. Certain Defendants’ argued that Article (q) of the Articles of Incorporation did not permit the association to assess members and use such assessments without a two-thirds vote, except for costs associated with the water system, road and sewage system. CP 438. The Board argued that Article (q) addressed assessments regarding capital expenditures and the term “other corporate purposes” in Article (q) was similarly limited. CP 569-70.

Again, Article (q) states that the association has the power:

To assess the members of the corporation for the maintenance and operation of the water system and development and improvement thereof necessary to provide water to all homes of members, and for the maintenance, repair and operation of the above referred to septic tank effluent system, in the manner and to the degree as shall be set forth in the by-laws, and to assess the members for improvements in the mutual use areas, and for other corporate purposes, provided, however that no member shall be assessed for items other than for the water system, roads and sewage (or septic tank effluent system) unless two-

thirds of the members of this corporation . . .
shall approve such assessment.

CP 453.

Before ruling on the motion for partial summary judgment, the trial court requested further briefing regarding whether the membership had given implied consent to the use of assessments from the association's general fund for litigation purposes. RP 6:5-16 (6/1/07). Following further briefing, the trial court denied the motion. CP 1054. The Certain Defendants filed a motion for reconsideration. CP 1058. The trial court then ruled that Article (q) "required a two thirds vote of the membership to retain counsel in this case, but there [was] a question of fact as to whether there was implied consent." CP 1114.

Following trial, the trial court found that WHC failed to prove that two-thirds of the membership approved the expenditure of assessed funds on this litigation. CP 1118. (The Board does not appeal from the trial court's ruling that implied consent had not been proven.) The trial court also found that the association could not assess its members for "anything other than the maintenance and operation of the water, roads, sewage (or) septic systems, unless two thirds of the membership approved such an assessment." CP 1125. The Board appeals the trial court's ruling that Article (q) requires WHC to obtain two-thirds approval of the members of the association to fund this litigation.

IV. ARGUMENT

A. This Court Should Reverse the Trial Court’s Dismissal of WHC’s Complaint Because WHC Board Has Standing to Sue to Enforce WHC’s General Scheme and Development Plan

1. The Trial Court’s Order Dismissing WHC’s Complaint for Lack of Standing is a Question of Law Reviewed *De Novo*

The appellate court reviews summary judgment orders *de novo*, engaging in the same inquiry as the trial court. *Green v. Normandy Park*, 137 Wn. App. 665, 681, 151 P.3d 1038 (2007). The order will only be sustained if, when considering all the evidence in the light most favorable to the non-moving party, no genuine issue of material fact exists. *Id.*; see also CR 56(c).

2. The Trial Court Erred as a Matter of Law When it Held WHC Had No Standing to Bring Suit to Enforce the General Scheme and Development Plan

a. *WHC Has Standing to Bring Suit Pursuant to Its Governing Documents*

The trial court erred by narrowly defining the issue as the Board’s standing to sue defined only through a strict interpretation of WHC’s governing documents (which do contain the word “enforce” but do not contain the words “challenge” or “amend”) without considering the general scheme and plan of WHC. WHC’s governing documents mandate that the Board take responsibility for enforcing the general scheme and plan put in place by the declarant. See CP 95 (Article (j)); CP 97 (Article

(p)); CP 113 (By Laws, Article XVIII granting the Board the power to enforce all covenants, restrictions, regulations, etc. of WHC). Whether one calls such action enforcement of covenants or a challenge to amendments, the Board's mandate remains the same – protecting the community as a whole. *See Loch Haven Homeowners Ass'n v. Nelle*, 389 So. 2d 697, 698-99 (Fla. Dist. Ct. App. 1980) (“[R]estrictions which are part of a general scheme of development and improvement [] are enforceable in equity ... The essential ingredient of enforceability is the finding of the existence of a building scheme which depends on the intent of the grantor.” (citation omitted)); Shauna Cully Wagner, Annotation, *When is Tract Subject to “General Plan of Development” so as to Subject All Parcels in Tract to Restrictive Covenants?*, 119 A.L.R.5th 519 (2004) (“Establishment of a general plan of development in a subdivision is one method by which lot owners can *enforce* restrictive covenants against one another.” (*Emphasis added*)); *see also* Restatement (Third) of Property (Servitudes) §1.7 (2000) (“[A]ll property owners in a general plan development are implied beneficiaries of the servitudes with enforcement rights.”). In challenging the Board's power to bring this lawsuit, Certain Defendants necessarily, also, challenge the existence of a general scheme and plan.

The existence of a general scheme and plan constitutes a question of fact. *See* Restatement (Third) of Property (Servitudes) §1.7, §2.14 cmt.

f. (pointing out that the existence of a general scheme or plan of development is a question of fact to be established by the surrounding circumstances of its creation). Here, the amendments to the Second Addition's covenants in 1956 protected views not only in the Second Addition, but also in lots to the west of that addition. CP 392-93 (§26). The By Laws originally mandated that the Board supervise the view protection in all four additions. CP 107 (Art. IV). And the Articles of Incorporation also contain language to the effect that the Board shall protect views in each addition. CP 95 (Article (j)). Based on this documentation, a factual issue exists as to whether a general scheme and plan exists that incorporates the protection of views. If such a general scheme and plan exists, then the Second Addition's elimination of view protection for lots west of such a plan violates it because it eliminates an important property right shared, not just by Second Addition lot owners, but by lots west of that addition. *See Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 792-93, 150 P.3d 1163 (2007) ("In order for an amendment to be valid, it must be adopted according to procedures set up in the covenants *and it must be consistent with the general plan of development.*") (*Emphasis added*).

Therefore, even though the Second Addition's covenants grant lot owners the ability to amend by majority vote, should a general scheme and plan exist for WHC, changes to the Second Addition covenants must not

unreasonably conflict with it. *Meresse v. Stelma*, 100 Wn. App. 857, 865-66, 999 P.2d 1267 (2000). Neither will amendments to protective covenants be enforced if they have no relationship to existing covenants. *Ebel*, 136 Wn. App. at 792-93; *see also Shafer v. Board of Trustees of Sandy Hook Yacht Club Estate*, 76 Wn. App. 267, 273-74, 883 P.2d 1387 (1994); *Wright v. Cypress Shores Dev. Co.*, 413 So. 2d 1115, 1124 (Ala. 1982) (holding that although declarant reserved unilateral right to abolish or modify covenants, it could not do so where lots had been purchased in reliance on those covenants). Covenants amended or adopted by less than one hundred percent of affected property owners that affect the use of all land within a community, must be done “in a reasonable manner [so] as not to destroy the general scheme or plan of development.” *Shafer*, 76 Wn. App. at 273; *see also Meresse*, 100 Wn. App. at 866; *Riss v. Angel*, 131 Wn.2d 612, 623, 934 P.2d 669 (1997) (“[T]he value of property often depends in large measure upon maintaining the character of the neighborhood in which it is situated.”(citation omitted)). Thus, whether a general scheme and plan exists for WHC is highly significant to this dispute. *See* Restatement (Third) of Property (Servitudes) §2.14 (“The determination whether the conveyance of land was pursuant to a general plan of development is critical to the implication of servitudes...”). If a general scheme and plan exists, then the Board has the power to protect and “enforce” that plan under WHC’s governing documents and

Washington law. The Second Addition cannot unilaterally and unexpectedly eliminate these view protections on which lot owners relied when purchasing their property. *See, e.g., Wright, supra*, 413 So. 2d at 1124.

The Second Addition also cannot eliminate density and residential requirements. These changes destroy the general scheme and plan for a residential, single family dwelling subdivision. Indeed, the By Laws provide that only one water connection may be given to each lot for the single home built upon it. CP 123 (By Laws, Art. I, Sec. 3). Like the court found in *Wimberley v. Caravello*, 136 Wn. App. 327, 338, 149 P.3d 402 (2006), “the only plausible reason to restrict the number and size of buildings here was to preserve the spectacular views” of Wollochet Bay.

The Board should be able to enforce the general scheme and plan of WHC just as it enforces the covenants under either its governing documents or Washington law. The trial court’s refusal to address the factual issue of whether a general scheme and plan exists and, if such a plan does exist, whether that existence confers standing on the Board to sue to protect it, constitutes reversible error.

(i) DeWitt Rowland Created WHC According to a General Scheme and Plan

To determine whether a general scheme and plan exists, rules of contract interpretation apply. *Shafer*, 76 Wn. App. at 274-75. Correlating documents must be ready in context. *Id.* at 276-77. The court views “the

contract as a whole, its subject matter and objective, the circumstances surrounding its making, the subsequent acts and conduct of the parties, and the reasonableness of the interpretations advocated by the parties.” *Wimberly*, 136 Wn. App. at 336. “Specifically, the court must decide what constitutes ‘reasonableness’ in a covenant in the context of the overall purpose of the covenants and the surrounding facts.” *Id.* at 337.

Here, the Declarant Rowland DeWitt had Articles of Incorporation, By Laws and restrictive covenants for each addition drafted and recorded. These “correlating documents” must be read together and in context. *See Shafer*, 76 Wn. App. at 276-77 (finding that Articles, By Laws and Covenants were “correlating documents” that should be read together in context when evaluating a common scheme or plan for a subdivision); *accord Loch Haven Homeowners Ass’n*, 389 So. 2d at 698-99 (“The more modern judicial attitude – and the one we adopt – is that the reservation of the right to amend restrictions is only one factor to be considered in determining whether the grantor intended to establish a uniform plan of development, and that all language of the restrictions should be considered in arriving at the grantor’s intention.”). Moreover, “[t]he fact that all the parcels in a development do not contain the same restrictions does not necessarily mean that a common scheme was not intended; such is only one element to be considered in the totality of the circumstances.” *Graham v. Beermunder*, 93 A.D.2d 254, 261, 462 N.Y.S.2d 231, 236

(N.Y. App. Div. 2d Dep't 1983). Reading WHC's governing documents in context demonstrates that a general scheme and plan does exist. *Id.*

With the amendment of the Second Addition's restrictive covenants in 1953, Mr. Rowland put all lot owners on notice that he intended to create a subdivision of single-family dwellings subject to view restrictions. His 1953 amendments granted view protections not only for the lot owners of the Second Addition, but also for "houses which may hereafter be built on land westerly of this Addition." CP 393. In 1956, he had Second Addition homeowners sign a supplemental agreement that they would become members of a non-profit corporation to govern WHC once incorporated. CP 154-68. The restrictive covenants for the Third Addition make specific reference to the non-profit corporation that Mr. Rowland would shortly incorporate in 1957. CP 396. And the Fourth Addition covenants explicitly grant membership in that corporation. CP 399.

The Articles of Incorporation and By Laws each speak to the protection of the community by the Board, and grant the Board explicit powers of enforcement. CP 91-100, 113-19. When read together these documents demonstrate an intent by the declarant to create a general scheme and plan for the entire subdivision and put in place a corporation to oversee it – he did not simply create independent additions.

(ii) The Second Addition's Amendments Make Unexpected and Inconsistent Changes That Destroy the General Scheme and Plan of WHC

Where, as here, the dispute over interpretation of a restrictive covenant is not between the original grantor and grantee, but is rather among homeowners of a community, rules of strict construction in favor of free use of the land are not applicable. *Riss*, 131 Wn.2d at 623.

Emphasis, rather, is placed on protecting the homeowners' collective interests. *Id.* at 623-24. Covenants "tend to enhance the efficient use of land and its value. The value of maintaining the character of the neighborhood in which the burdened land is located is a value shared by the owners of the other properties burdened by the same covenants." *Green*, 137 Wn. App. at 683; *see also Wright*, 413 So. 2d at 1122 ("[T]he equitable right to enforce such mutual covenants is rested on the fact that the building scheme forms an inducement to buy, and become part of the consideration.").

Where covenants run with the land, as they do here, subsequent owners and governing homeowner associations may enforce them. *Id.* at 684-85; *see also Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 469, 194 P. 536 (1920) (holding that purchaser of lot without residential restriction but with full knowledge of residential character of

neighborhood could be prohibited from constructing a church on the lot); *Dickson v. Kates*, 132 Wn. App. 724, 734-35, 133 P.3d 498 (2006) (holding that if a party has actual notice of a restrictive covenant burdening their land they are bound by it under principles of equity – even if the restriction is not contained in their deed). For example, in *Johnson v. Mt. Baker Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920), the defendant sought to build a church in a residential neighborhood. Most of the lots in the neighborhood had deeds restrictions that prohibited anything other than a single family dwelling on the property. The lot sold to defendant did not have such a restriction. However, the defendant bought the lot with full knowledge of the residential character of the neighborhood and the restrictions on non-residential buildings. The development had been extensively advertised as a “high-class residential” section of Seattle and lots were sold for 15 to 20 percent above market price based on the residential restriction – similar to the manner in which many lots in WHC are sold based on their views. Despite this knowledge, defendant sought to build a church. The Washington Supreme Court enjoined this construction, stating:

Equity originally arose out of the fact that the law was unable to give relief in many instances where fair dealing and good conscience demanded that relief should be given, and so equity here will say to the appellant that, having bought its property with full knowledge of the rights and privileges of others, it may not now claim

the right to use the property in any way it may see fit.

Id. at 466.

Likewise, in *Dickson v. Kates*, 132 Wn. App. 724, 133 P.3d 498 (2006), the court held that notice of a restrictive covenant burdening one's land may be enforced – even if that covenant is not contained in the deed recorded on the property. Notice may be either actual or constructive. *Id.* at 734-35.

Further, in *Meresse v. Stelma*, 100 Wn. App. 857, 999 P.2d 1267 (2000), the covenants permitted amendment by a majority vote. The majority voted to move a road and impose a scenic easement on a dissenting lot owner. The court held that the amendment was not enforceable without 100 percent agreement. The court found that moving the road was not reasonable or consistent with the general scheme or plan of the neighborhood – it was an unexpected change in the use of the land. The court adopted the rule that:

[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants.

Id. at 866.

Here, the covenants for the Second Addition permit amendment by a majority vote. CP 390-91(¶1). And the majority – the Certain Defendants – clearly describe their motivation for making these changes:

they dislike having to comply with the covenants. *See* CP 170 (Decl. of Tim Potter, ¶4; CP 175 (Decl. of Steve Keller ¶3); CP 183 (Decl. of Dean Dennis ¶6). But the Second Addition covenants promise view protection not only to the Second Addition, but to lots to the west of the Second Addition. Hence, even though a majority of the owners in the Second Addition made these changes, because those changes destroy the general scheme and plan of WHC, the Board must act (i.e. has standing) to “enforce” that plan. *Meresse*, 100 Wn. App. at 866; *Wright*, 413 So. 2d at 1124. *See* CP 95 (Article (j) (enforcement of restrictions and covenants including the “maintenance of the view of Wollochet Bay from houses on any lots.”); CP 97 (Article (p) (enforcement of protective covenants and restrictions); CP 107-08, 126-27 (By Laws, Article IV – Procedures for Covenant Enforcement).

b. WHC Has Standing to Bring Suit Under RCW 24.03.035 (2)

WHC not only has standing to bring this action under its governing documents, but it also has standing under RCW 24.03.035 ,which provides in pertinent part:⁶

Each corporation shall have power:

⁶ Authority also exists under RCW 64.38.020, which provides in pertinent part: “Unless otherwise provided in the governing documents, an association may: . . . (4) Institute, defend, or intervene in litigation of administrative proceedings in its own name on behalf of itself or two or more owners on matters affecting the homeowners’ association, but not on behalf of owners involved in disputes that are not the responsibility of the association.”

...

(2) To sue and be sued, complain and defend, in its corporate name;

...

(20) To have and exercise all powers necessary or convenient to effect and or all of the purposes for which the corporation is organized.

As stated in the Articles, the governance and operation of the association specifically includes the enforcement of the view restrictions. *See* CP 95, 97 (Articles (j) & (p)). If the Board had no authority to bring a legal action against those who violate the Articles and By Laws, then enforcement of this particular object and purpose of the corporation would be severely and unreasonably restricted. Certain Defendants will argue that the governing documents only permit the Board to enforce covenants and restrictions that exist. That is, once an addition has changed a covenant, the Board cannot enforce it or challenge it – even if the covenant that was eliminated destroys the general plan and scheme of WHC. For example, since the Second Addition eliminated the view covenant protecting views in the Second Addition and lots west of it, the Board cannot challenge the elimination of that protection – even, at a minimum, for those lots west of the Second Addition. However, Defendants ignore that the Articles state that WHC is formed for the use and benefit of all the Additions, not just the Second. CP 97-98 (Article

(r)). Moreover, once lots west of the Second Addition were granted view protections, the Second Addition cannot unreasonably take such protection away. *Shafer*, 76 Wn. App. at 273; *see also Meresse*, 100 Wn. App. at 866; *Riss*, 131 Wn.2d at 623.

B. This Court Should Reverse the Trial Court's Ruling that WHC Is Required To Obtain a Two-thirds Vote of the Association To Approve Assessments to Pay For This Litigation

1. The Trial Court's Interpretation of Article (q) is Reviewed *De Novo*

Where there are only questions of law on review, the standard of review is *de novo*. *Shafer*, 76 Wn. App. at 273. This Court is asked to determine the meaning of the phrase "other corporate purposes" found in Article (q) in light of the provisions of Article (q) and read in the context of the Articles of Incorporation and By Laws. *See Green*, 137 Wn. App. at 681 (providing that the interpretation of language contained in restrictive covenant is a question of law); *Keystone Masonry, Inc. v. Garco Const., Inc.*, 135 Wn. App. 927, 932, 147 P.3d 610 (2006).

2. The Trial Court Erred as a Matter of Law by Finding that Article (q) Required the Board to Obtain a Two-Thirds Vote of the Association to Bring This Litigation

Certain Defendants, as Third-Party Plaintiffs, argued to the trial court that even if the Board had standing to bring suit, it could not finance the litigation without a two-thirds vote of WHC members under Article (q) of the Articles of Incorporation. Certain Defendants relied on the phrase

“other corporate purposes” within Article (q) and argued that the use of such a vague, all-encompassing phrase means that the Board cannot spend any money, whatsoever, on anything other than water, roads or sewer without a two-thirds vote.

Certain Defendants’ argument fails for three reasons. First, the phrase “other corporate purposes” is ambiguous. One must look to the surrounding phrases in Article (q) to provide context. These phrases relate to similar items of capital expenditures – not a blanket prohibition on all general spending. Second, if “other corporate purposes” meant “any and all” corporate purposes, certain provisions of Article (q) would be rendered meaningless. Finally, such an interpretation prevents the Board from conducting business and protecting the community through enforcement of the general scheme and plan, as authorized in the Articles of Incorporation and mandated in the By Laws.

a. The Phrase “Other Corporate Purposes” In Article (q) is Defined By the Context and The Specific Terms Surrounding the Phrase

Ambiguity in a writing presents a question of law for the court. An ambiguity will not be read into a contract where it can reasonably be avoided by reading the contract as a whole.” *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983) (citations omitted). Where contract interpretation does not depend on the credibility of extrinsic evidence or on a choice among reasonable inferences to be

drawn from extrinsic evidence, the court may determine the meaning of the contract as a matter of law. *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990) (adopting Restatement (Second) of Contracts § 212). However, there does not have to be an apparent ambiguity in a contract term for the court to engage in examination of the meaning of that term. *See Berg*, 115 Wn.2d at 666 (rejecting plain meaning rule and adopting context rule.)

To determine the meaning of an undefined term used in a contract, one looks at the words and phrases surrounding the term for guidance. *Wheeler v. Rocky Mountain Fire & Cas. Co.*, 124 Wn. App. 858, 872, 103 P.3d 240 (2004); *see* Restatement (Second) of Contracts §203(c) (1981) (providing that specific terms and exact terms are given greater weight than general language). The rules of construction of *ejusdem generis* and *noscitur a sociis* reflect this principle:

In the construction of laws, wills, and other instruments, the '*ejusdem generis* rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

Cockle v. Dep't of Labor and Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001) (quoting Black's Law Dictionary 517 (6th ed.1990)); *see also Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 590-91, 964 P.2d 1173

(1998) (applying concept of *ejusdem generis* to interpretation of insurance policy); *In re Weissenborn's Estate*, 1 Wn. App. 844, 847-48, 466 P.2d 536 (1970) (applying concept of *ejusdem generis* to interpretation of will). Similarly the doctrine of *noscitur a sociis* means that a word is known by the company it keeps. *Wright v. Jeckle*, 158 Wn.2d 375, 381, 144 P.3d 301 (2006) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115, S. Ct. 1061, 131 L.Ed.2d 1 (1995)).

Here, Article (q) identifies the following specific items for which the Board may spend money for development, operation, and maintenance: (1) the water system; (2) sewage or septic tank effluent system; (3) roads; and (4) mutual use areas – all items of capital expenditure. Following rules of contract interpretation, the inclusion of “other corporate purposes” in Article (q) must relate to these other, more specific items. These terms provide the context for finding that, as a matter of law, the phrase “other corporate purposes” refers to expenditures for other capital improvements that require development, operation and maintenance. It does not constitute a blanket prohibition on all expenses such as accounting, legal and general administration of the corporation.

differentiated water, sewage and roads, which do not require a two-thirds vote, from “improvements to mutual use areas” and “other corporate purposes,” which do. The declarant’s distinction between mutual use areas and roads further supports the interpretation that “other corporate purposes” relates to items of capital improvement. By setting forth that the association may assess its members for roads (a mutual use area) without a two-thirds vote and requiring a vote for improvements to other mutual use areas (such as Lot 10, the beach), the declarant distinguished between *types* of capital improvement projects. It makes no sense to distinguish between mutual use areas and roads, and require that WHC obtain a two-thirds vote for one and not the other, if Article (q) and the term “other corporate purposes” were not limited to capital expenditures.

c. The Board Has a Mandate to Enforce View Protections

WHC’s authority to commence litigation against the Second Addition and to fund the litigation with general assessments is found within WHC’s Articles of Incorporation and By Laws. Washington employs the context rule for contract interpretation with the goal of determining the intent of the parties. *Berg*, 115 Wn.2d at 663 (“The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties.” (internal cite omitted)).

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject

matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties.

Berg, 115 Wn.2d at 667.

In *Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 883 P.2d 1387 (1994), the Court of Appeals applied the context rule in interpreting a covenant provision of a subdivision. The Court of Appeals examined the articles and by laws of the subdivision because these correlating documents assisted in the interpretation of the covenant provision. *Shafer*, 76 Wn. App. at 275 (citing *Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 577, 295 P.2d 714 (1956)). Similarly, the By Laws and other Articles in the Articles of Incorporation assist in the interpretation of Article (q) and the meaning of "other corporate purposes."

Specifically, Articles (k), (n), (j) and (p), of the Articles of Incorporation direct the association to enforce the covenants and restrictions, to protect the views, and state that the association has the authority to contract to do so and pass along those costs to the association members. Article (k) enables the Board to pass on the costs of services rendered by the corporation to its members. CP 96. Such costs include the Board's creation of funds for the payment of "contingencies" and the payment of advances or conveyances of money or property to the

views from the back lots of WHC. CP 107. Even now, the By Laws *require* that the Board refer disputes to an attorney for resolution should certain steps for resolving matters fail. CP 119 (By Laws, Art. IV, Sec. 3 (g) (“[T]he Board of Trustees *shall* turn the dispute over to legal council [sic] with instructions to proceed top [sic] the full extent of the law.”).

The Articles of Incorporation and the By Laws emphasize the protection of views as a principle goal of WHC. Certain Defendants’ interpretation of “other corporate purposes” severely limits WHC’s ability to fulfill that mandate – or even conduct any business of the corporation such as mailing information to WHC members or renting a space to hold the annual meeting. The emphasis on view protection in the Articles, By Laws, and even the covenants of the Second Addition demonstrate that the declarant did not intend require a two-thirds vote before the Board could use general assessments for enforcement purposes.

The protection of views of Wollochet Bay is central to the identity of WHC. It is the only protection specifically set forth in the Articles of Incorporation. CP 453. It also received a specific article in the By Laws, Article IV. CP 107, 117, 964.

d. RCW 24.03.035 Also Supports the Board’s Position that a Two-Thirds Vote is Not Required

RCW 24.03.035 also supports the association’s ability to create policies and procedures regarding view protection. RCW 24.03.035 ,

provides that “[e]ach corporation shall have the power . . . [t]o have and exercise all powers necessary or convenient to effect any and all of the purposes for which the corporation is organized.” RCW 24.03.035(20).⁸ *See also State v. Lally*, 59 Wn. 2d 849, 855, 370 P.2d 971 (1962) (“A corporation has not only those powers that are expressly granted, but also those which are reasonably necessary to carry out its purposes.”). Article (q) must be read in conjunction with Articles (j), (k), (n), and (p) and Article IV of the By Laws. By reading these correlating documents together, the proposition that the Board must obtain a two-thirds vote to conduct regular business such as covenant enforcement makes no sense. Rather, Article (q)’s voting requirement should be limited to capital expenditures other than water, roads and sewage. Otherwise, the Board has no ability to carry on business or enforce WHC’s covenants and restrictions, especially those applicable to the protection of views.

V. CONCLUSION

For the foregoing reasons, the trial court’s dismissal of WHC’s complaint on standing grounds should be reversed as a matter of law. The trial court erred when it refused to consider whether WHC had in place a general scheme or plan (and it does) that the Board must protect as mandated by WHC’s governing documents for the benefit of all lot owners in all four additions of WHC. Bifurcating this issue from that of

⁸ As stated above, similar authority existed in RCW 64.38.020.

the Board's standing to litigate constitutes reversible error as the existence of a general scheme or plan must be decided first, before standing: that is, if a general scheme and plan exists, the Board has standing to protect it.

Moreover, the trial court's order that the Board needed approval by a two-thirds majority of WHC's members before filing suit should also be reversed as a matter of law. The trial court failed to consider the context in which Article (q) is written as well as the inconsistencies within the governing documents that such an order would create.

Plaintiff and Third-Party Defendants move the Court of Appeals to reverse the trial court and remand the case for further proceedings.

DATED this 20th day of October, 2008.

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I, Betty Lou Taylor, hereby certify that on the 20th day of October, 2008, I _____

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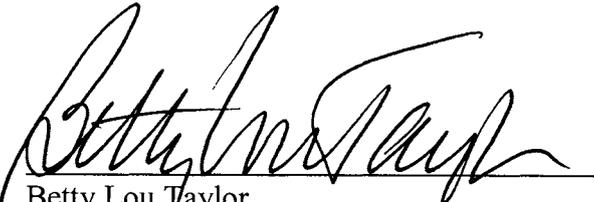
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EXECUTED this 20th day of October, 2008, at Seattle,
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