

FILED
COURT OF APPEALS
DIVISION II

08 AUG 18 PM 12:08

No. 37536-2-II

STATE OF WASHINGTON
BY Cm

DEPUTY

COURT OF APPEALS FOR DIVISION II

STATE OF WASHINGTON

FLYING H. RANCH HOMEOWNERS ASSOCIATION, a Washington
non-profit corporation,

Appellant,

v.

JAMES L. GEARY and JANICE GEARY, husband and wife; and U.S.
BANK NATIONAL ASSOCIATION N.D.,

Respondents.

BRIEF OF APPELLANT

Talis M. Abolins, WSB No. 21222

Campbell Dille Barnett
Smith & Wiley, PLLC
317 S. Meridian
Puyallup, WA 98371
(253) 848-3513

ORIGINAL

TABLE OF CONTENTS

<u>Description</u>	<u>Page No.</u>
I. ERRORS AND ISSUES	1
A. ASSIGNMENTS OF ERROR	1
B. ISSUES	2
II. STATEMENT OF THE CASE	4
1. Facts	4
2. Procedural History	15
III. STANDARD OF REVIEW	19
IV. SUMMARY OF ARGUMENT	21
V. ARGUMENT	23
A. The Covenants Unambiguously Grant The Association A “Right to Enforce” The Prohibition Against Composition Roofing	23
B. The Gearys’ Clear Violation of Article VII(3) Is Not Excused By The Discretionary Approval Procedures Of Article V, Section 2	26
1. Under <i>Riss v. Angel</i> , covenants must be interpreted to further, not defeat, the homeowners’ collective interests	26
2. The ACC’s discretionary approval procedures do not apply to the specific objective prohibition of composition roofing	28

3.	The Gearys never submitted plans and specifications for discretionary approval	30
4.	The Gearys interpretation would lead to absurd results	31
C.	The Trial Court Should Consider the Remedy Of Injunctive Relief	34
D.	The Covenants Do Not Authorize An Award Of Attorney's Fees Against The Association	35
VI.	CONCLUSION	38

TABLE OF AUTHORITIES

CASES

<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	20
<i>Green v. Normandy Park</i> , 137 Wn.App. 655, 151 P.3d 1038 (2007), <i>rev. denied</i> , 163 Wn.2d 1003 (2008).	20, 23, 24 28, 29, 35
<i>Hearst Commc'ns, Inc. v. Seattle Times</i> , 154 Wash.2d 493, 504, 115 P.3d 262 (2005).	20
<i>Hollis v. Garwall, Inc.</i> , 137 Wash.2d 683, 695, 974 P.2d 836 (1999).	19, 20, 34 35
<i>Lakes at Mercer Island Homeowners Ass'n v. Witrak</i> , 61 Wn.App. 177, 810 P.2d 27 (1991), <i>rev. denied</i> , 117 Wn.2d 1013, 816 P.2d 1224 (1991).	20, 27
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998).	35
<i>Olivine v. United Capitol Insurance</i> , 105 Wn.App. 194, 202, 19 P.3d 1089 (2001)	35
<i>Riss v. Angel</i> , 131 Wn.2d 612, 934 P.2d 669 (1997).	20, 22, 23 26, 27, 28 29, 30
<i>Viking Properties, Inc. v. Holm</i> , 155 Wn.2d 112, 118 P.3d 322 (2005).	19, 20, 27

<i>White v. Wilhelm</i> , 34 Wash.App. 763, 771, 665 P.2d 407, <i>review denied</i> 100 Wash.2d 1025 (1983).....	21
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).....	19
<i>Wimberly v. Caravello</i> , 136 Wn.App. 327, 149 P.3d 402 (2006).....	19, 20

STATUTES, RULES AND REGULATIONS

Civil Rule 56(c).....	19
RCW 64.38.....	38
RCW 64.38.020(4).....	25

I. ERRORS AND ISSUES

A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the Homeowner Association's summary judgment motion for the injunctive relief and other remedies available for violations of the Association Covenants.
2. The trial court erred by interpreting the covenants "most strongly against" the Homeowners Association, rather than in a manner that furthers the homeowners' collective interests.
3. The trial court erred by granting the Gearys' summary judgment motion, and concluding that the prohibited composition shingle roofing was deemed "approved" even though the Gearys were repeatedly told that composition shingles were prohibited.
4. The trial court erred by concluding that the specific and non-discretionary prohibitions in Covenant

Article VII can be deemed “approved” under Covenant Article V, which only governs discretionary approvals of paint schemes, and plans and specifications for structures.

5. The trial court erred by failing to address the Geary’s Covenant violation under the standards for injunctive relief.
6. The trial court erred by granting attorney’s fees to the Gearys for time spent on the unsuccessful claim that their composition shingle roofing was not “composition roofing” under Covenant Article VII(3).

B. ISSUES

1. May a Homeowner’s Association enforce its Covenants against a homeowner who defiantly installs prohibited composition shingle roofing despite notice of the prohibition and directives to stop the work?

2. Should the Association's covenants be interpreted in a manner that furthers the homeowners' collective interests, rather than "most strongly against" the Association?

3. Do the nondiscretionary prohibited uses of Covenant Article VII(3) apply to homeowners without regard to the discretionary consent to construct procedures applicable under Covenant Articles VII(4) and II?

4. Is Article II's default approval provision properly limited to the Architectural Control Committee's discretionary review of: (1) those structural projects requiring submission of plans of specifications for discretionary approval; and (2) those projects where the owners actually submit plans and specifications for discretionary approval?

5. Should the trial court have applied the standards for injunctive relief to the Gearys' use of prohibited roofing materials?

6. Should the trial court have denied the motion for attorney's fees where the Gearys' arguments were without merit, and where there is no basis for the award in the Covenant?

II. STATEMENT OF THE CASE

1. Facts

The Flying H. Ranch Homeowners Association is a non-profit corporation that manages the properties of the Flying H Ranch. The Ranch properties were originally owned by Roy and Gloria Hill. In 1974, the Hills recorded a Declaration of Covenants, Conditions and Restrictions (Covenants) to govern the Flying H Ranch properties. See Appendix: CP 276-296; CP 37-38 (1989 Amendment to Covenants); CP 125-127. The Covenants establish a unique private residential

community of 24 custom built homes. Each home has an aircraft hanger and taxiway easement to the Ranch's private airport. Covenant Article VII(36), (42) and (44); CP 291, 294. The Covenants are "for the purpose of protecting the value and desirability of ... the real property" within the Flying H. Ranch Estates. CP 276 (recital).

Permitted and Prohibited Uses. The Covenants detail a set of "Permitted and Prohibited Uses" binding on all homeowners. Article VII(1) through (53); CP 284-296 and 37-38 (amending Article VII(2), (3), (32) and (53)). Many of the permitted and prohibited uses are specific, objective, and nondiscretionary. For example, the roofing covenant expressly prohibits composition roofs, and expressly permits tile and shake roofs. Covenant Article VII(3). Several provisions govern aircraft operations. See, e.g., Covenant Articles VII(3) (4) (taxi way clear zones), (6) (hangars and tie down

space), (17) (underground fuel tanks), (29) (no structures taller than 30 feet), (31) through (41) (additional aircraft related use restrictions); CP 284-296; CP 37 (as amended). For instance, “flagpoles, radio or television antennas or other structures are not to exceed 30 feet above ground level”. Above ground fuel tanks, and walls restricting clearance for taxing and low flying aircraft are also prohibited. Article VII(4), (12), (17), and (29); CP 286-288, 290.

In addition to specifically permitted and prohibited uses, Article VII identifies some uses subject to discretionary approval by an Architectural Control Committee (ACC). The Covenants contain several discretionary standards for a value enhancing uniform regulation of all homes. See Covenant, Articles VII(53) and V, Section 2(b); CP 38, 283. For example, while tile and shake roofs are specifically permitted, the roofing

covenant allows the ACC to approve “other” roofing materials (such as metal roofing):

No composition roofs shall be allowed and roofing material shall be either shake or tile or other material as may [be] approved by the Committee.

Article VII(3); CP 37. Thus, a homeowner would be allowed to seek ACC approval of metal roofs, for example.

Discretionary Approval of Structures. The ACC has a special role for discretionary approval of plans and specifications for structures. Under Section (4) of Article VII, homeowners are prohibited from erecting or altering structures on any lot

until the construction, plans, and specifications of the plan showing the location with respect to topography and finished creation have been approved by the Architectural Control Committee.

Article VII(4); CP 286. The ACC’s role in approving structural plans and specifications is further defined in

Article V. CP 282-284. The ACC was created to act as “Administrators of the provisions of this Article [V].” Covenants, Article V, Section 1(a); CP 282. Article V reiterates a homeowner’s responsibility to seek ACC approval of plans and specifications for buildings or other structures. CP 282, Article V, Section 2 (“Approval of Plans by Architectural Control Committee”). The approval process begins when the owner submits plans and specifications showing:

- (1) the size and dimensions of the improvement;
- (2) the exterior design;
- (3) the exterior color scheme;
- (4) the exact location of the improvement on the lot;
- (5) the location of driveways, parking areas and fences;
- (6) the scheme for drainage and grading; and
- (7) proposed landscaping and fencing.

Covenants, Article V, Section 2(a); CP 282. The ACC has the discretion to withhold approval “of said plans and specifications” if the structural improvement will be “detrimental to the community” because of:

grading and drainage plan, location and quality of the structure on the building site, color scheme, finish design, proportions, shape, height, style, appropriateness, material used thereon, or landscaping plan.

Article V, Section 2(b); CP 283. Under Article V, an owner must also seek the ACC's discretionary approval of "[c]hanges in exterior color schemes of all structures ...” Article V, Section 2(c); CP 283.

Under the Article V process, the ACC must exercise its discretion and issue a written approval or disapproval “within thirty (30) days after plans and specifications have been submitted ...” Article V, Section (2)(e). If the ACC fails to make a timely decision, or fails to file a lawsuit to enjoin the construction, approval is not required and the project is deemed compliant with the Covenants. Article V, Section 2(d), (e) and (f); CP 283-84.

Roofing Standards at Flying H. Until recently, the Flying H Ranch enjoyed uniform compliance with its roof covenants. On at least three occasions, homeowners considered the use of composition shingles, such as those manufactured by GAF Materials Corporation. See CP 56-57; CP 199-200. In each case, the owners (one of them a member of the Board of Directors) were advised that the GAF composition shingles were prohibited. CP 57; see also CP 112, 116; CP 197-200. In each case, the owners complied with the Covenants and installed roofing materials permitted by Article VII(3). CP 198, lines 1-5; CP 200, lines 1-3; CP 297-300.

Tom Groce was one of the owners who asked to re-roof with composition shingles. Mr. Groce made his request after learning that the “Fire Free” roofing tiles on his roof were defective, and the subject of a 1999 class action lawsuit. CP 39-43, 173-174 (settlement notices); CP 195-196. After being informed that composition

shingles were prohibited, Mr. Groce successfully replaced his “Fire Free” roofing tiles with roofing permitted under Covenant Article VII(3). See CP 196.

The Gearys. In 2003, the Gearys bought their house from Jim Lang after “reading and understanding” the Covenants, and after reviewing a roof inspection report. CP 129, 88.

In the summer of 2005, the Gearys learned that they needed to replace their roof. CP 20, Par 4. Mr. Lang had sold the Gearys a home with the “Fire Free” roofing tiles. CP 195-196. Although the Gearys had reviewed a roof inspection report, they apparently did not realize that the roof had “Fire Free” tiles. CP 88; CP 195-196. The Gearys began researching their “best” option. See CP 73. The Gearys’ roofing contractor estimated \$55,000 for a tile roof. When the Gearys explained that their house could not support traditional tile, the contractor steered the Gearys away from lighter

tile roof products. CP 73. The Gearys did not like the warranty for lightweight tile, and also found shake undesirable because it was flammable and would require vents. See CP 73, 144. Of all the available products considered, the Gearys determined that “Grand Sequoia Shingles” was the “best product” for their home. CP 144, 145, 204.

The Grand Sequoia spec sheet confirms that the material is a “composition” roofing “shingle”. CP 158-161; CP 128. The Gearys’ roofing consultant also confirmed that Grand Sequoia is composition roofing of inferior quality to tile roofing. CP 121-122.

On February 28, 2006, the Gearys asked the ACC to approve GAF composition roofing shingles. The ACC promptly informed the Gearys that the GAF product could not be approved because it was prohibited by the Covenants. CP21, par.s 5 and 6.

On April 15, 2006, the Gearys threatened to sue the Association. CP 25-26. On April 25, the Gearys issued a letter to the Board indicating they would proceed without Board approval or a change in the covenants. CP 144. The Gearys began stocking their airplane hanger with the composition roofing material. CP 22, par. 9.

The Association sent a letter to the Gearys stating that they were in violation, and if the violation were not corrected within 60 days, they would be subject to penalties pursuant to the Covenants. CP 23, par. 11. The Gearys were visited by Board members and specifically told to stop roofing with the prohibited materials. CP 22, par. 8; CP 84.

During the discussion, Mr. Geary understood that the Board would be reviewing the situation. He also believed that the issue would turn on a judge's interpretation of "composition" under the covenants. CP 84; see Article VII(3). He stopped his work. He later

sent a letter to the Board asking that the Covenants be amended to allow his composition roof. CP 28.

The day after his meeting with the Board members, Mr. Geary called Home Depot to cancel his order for the composition roofing work. CP 84, lines 16-17. Home Depot informed Mr. Geary there would be a cancellation fee and that he should move forward to avoid the risk of bad weather. See CP 84. At that point Mr. Geary decided to resume his composition roofing project. CP 84, lines 22-23. Geary completed the project by May 4, 2006. CP 257.

Covenant Amendments. In December of 2006, the Flying H Ranch held its annual meeting and the membership failed to approve the Gearys' request for a Covenant change. See CP 24. In August of 2007, the Board cooperated in another owner's request for a vote on a proposed amendment to Article VII(3) that would eliminate the prohibition of composition roofing. CP

114, 117-120. The owners of the Flying H Ranch again failed to pass the proposed amendment to their Covenants. CP 71, 114, 117-120.

2. Procedural History

After the Gearys' proposed Covenant amendment failed, the Flying H. Ranch Homeowners Association commenced this action. In its Complaint, the Association sought a court order directing the Gearys to bring their property into compliance with Covenant Article VII, Section 3. CP 3-6. The Gearys answered the Complaint, and alleged affirmative defenses and a counterclaim. CP 7-12. The Association replied to the counterclaim, and moved for summary judgment. CP 13-18; CP 19-28. The Gearys were granted a continuance of the summary judgment hearing, and the parties stipulated to the Gearys' filing of an amended Answer. CP 60-61; CP 246-251.

On November 16, 2007, the trial court granted summary judgment in favor of the Association. CP 252-254. The court ruled as a matter of law that:

defendant Geary is hereby in violation of the Covenants, Conditions, and Restrictions as relate to the Flying H. Ranch subdivision, to wit, Article VII, Section 3, by using composition roofing material on the improvements located on defendants' property.

CP 253. The court dismissed the Geary's counterclaims and affirmative defenses with prejudice, and reserved for motion or trial the questions of remedies for the violation (such as injunctive relief ordering the Gearys to remove composition roofing), and attorney's fees. CP 254.

On December 7, 2007, the Gearys moved for summary judgment. CP 255-265. In their motion, the Gearys relied on Washington state authority standing for the proposition that restrictive covenants are in derogation of the policy favoring free use of land, and any doubts should be resolved in favor of the free use of land. See,

e.g., CP 258, lines 10-14; 262, lines 14-15. The Gearys argued that their composition shingles were not subject to enforcement because they completed the installation before the Association started its lawsuit. The Association responded with its own Motion for Summary Judgment, asking for an order directing the Gearys to replace the prohibited composition roofing material, and for other relief as allowed under the Covenants. See CP 269-275. After reviewing the briefing and arguments of counsel, the court granted the Gearys' Motion for Summary Judgment. CP 328-329. The court recognized inconsistencies in the Covenants, but concluded that any ambiguities or inconsistencies must be construed "most strongly against the drafter, which would be the homeowners association." See Verbatim Report of Proceedings (VRP), pp. 3-4.

Under this standard the trial court ruled that the Gearys:

are in compliance with the Declaration of Covenants and Conditions and Restrictions (CC&Rs) of the Flying H. Ranch Homeowners Association since the board did not enjoin the Gearys' roof installation before its completion, as provided in the Article V, Section 2(e) of the CC&Rs.

CP 329. The court further ordered that the Association's action be dismissed, reserving the request for fees and costs by the Gearys. CP 329. The Association moved for reconsideration of the court's ruling, and opposed the Gearys' request for attorney's fees and costs. CP 330-358, 370-379. The court denied reconsideration and awarded \$26,395.00 in attorney's fees and \$419.00 in costs to the Gearys. CP 395-403.

The Association timely filed this appeal of the order denying its Motion for Summary Judgment, the order denying the Motion for Reconsideration and second Motion for Summary Judgment, and the award of attorney's fees and costs. CP 404-416.

III. STANDARD OF REVIEW

A trial court's summary judgment rulings are subject to de novo review. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005). In reviewing the evidence, the trial court must consider the evidence in reasonable inferences therefrom in a light most favorable to the non-moving party. *Id.* Summary judgment is appropriate when, after reviewing all facts and reasonable inferences in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *see also Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The interpretation of a restrictive covenant is a question of law that the courts generally review de novo. *Wimberly v. Caravello*, 136 Wash.App. 327, 336, 149 P.3d 402 (2006). The court's primary task is to determine the intent of the covenant's drafters. *Wimberly*, 136 Wash.App. at 336, (citing *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 695, 974 P.2d 836 (1999)).

Basic rules of contract interpretation apply to the review of restrictive covenants. *Wimberly*, 136 Wash.App. at 336; *see Hollis*, 137 Wash.2d at 695-96, *citing Berg v. Hudesman*, 115 Wash.2d 657, 666-67, 801 P.2d 222 (1990). Courts must generally give words in a covenant their ordinary, usual, and popular meaning. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wash.2d 493, 504, 115 P.3d 262 (2005).

If the covenants are ambiguous, the courts will adopt the interpretation that favors the collective interests of the owners, and preserves their reasonable expectations. *See Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005), *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997), *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn.App. 177, 810 P.2d 27 (1991), *rev. denied*, 117 Wn.2d 1013, 816 P.2d 1224 (1991), and *Green v. Normandy Park*, 137 Wn.App. 655, 151 P.3d 1038 (2007), *rev. denied*, 163 Wn.2d 1003 (2008) Ambiguity exists where the meaning of a covenant is uncertain, or two or more reasonable and fair interpretations are possible.

See *White v. Wilhelm*, 34 Wash.App. 763, 771, 665 P.2d 407, *review denied*, 100 Wash.2d 1025 (1983).

IV. SUMMARY OF ARGUMENT

With the increasing pressures of urbanization, Washington Courts have recognized the importance of interpreting homeowner association covenants in a manner that will help preserve the collective interest of the owners in uniformity and architectural control. In this case, the trial court applied the incorrect legal standard and construed the Covenants “most strongly against” the homeowners association.

The Association respectfully asks that this Court reverse the trial court, and recognize the Association’s unambiguous right to enforce the Covenants. Composition roofs are clearly prohibited, and are not subject to the ACC’s discretionary approval procedures. The Gearys made a calculated and defiant decision to proceed with shingles, and cannot frustrate the purposes of the Covenant merely because the Association

waited until after the proposed amendment failed to bring legal action.

Under *Riss v. Angel*, the provisions that govern a discretionary consent to construct provision cannot operate to defeat the non-discretionary and specific prohibitions that serve to protect the reasonable expectations of other homeowners.

Preventing the Association from enforcing the Covenants would lead to absurd and unjust results, and would encourage opportunistic homeowners to willfully attempt to complete projects that are clearly prohibited. This case should be remanded for appropriate application of the standards for injunctive relief, with an appropriate consideration of the extent to which the Gearys are innocent parties, as opposed to individuals who made a calculated decision to proceed with a project that was clearly prohibited. The award of attorney's fees should also be reversed.

VI. ARGUMENT

A. **The Covenants Unambiguously Grant The Association A “Right To Enforce” The Prohibition Against Composition Roofing.**

The Association is entitled to enforce its Covenants against the Gearys, who defiantly installed a prohibited roofing material despite repeated warnings not to. As a matter of law, this Court can confirm the Association’s legal right to seek the injunctive and other relief allowed under the covenants.

When interpreting restrictive covenants, Washington courts place a “special emphasis” on arriving at an interpretation that protects the owners’ “collective interests” and “reasonable expectations.” *Green*, 137 Wash.App. at 683, 151 P.3d 1038 (quoting *Riss*, 131 Wash.2d at 624, 934 P.2d 669).

In this case, the Flying H Ranch homeowners reasonably expect and enjoy a community of tile and shake roofs, in which “composition roofs” are prohibited.

Covenant Article VII(3). This roofing covenant was clearly intended to preserve uniformity within the small, unique community of the Flying H Ranch. The Covenants protect all owners' collectively, ensuring a pleasing appearance throughout the neighborhoods, and adding value to the homeowners' land. *See Green*, 137 Wash.App. at 684.

There is no meaningful dispute that the Gearys violated this covenant. The Gearys defiantly used composition shingles, despite repeated warnings not to. The trial court agreed and properly granted summary judgment on the Gearys' violation of the roofing covenant. CP 253; VRP 7, lines 1-4.

The Covenants unambiguously grant the Association "the right to enforce" the Covenant violation by bringing suit against the Gearys for injunctive and other relief. See Covenant Articles VII(48) (right to enforce covenants by any proceeding at law or equity;

failure to enforce not a waiver), VII(51) (owners who fail to correct a violation subject to penalties and liens of \$10 per day); see RCW 64.38.020(4) (association power to institute suit).

The Association has pursued enforcement of the Covenants in good faith. First, the Association presented the Gearys' proposed Covenant amendment to a vote by the membership. CP 24, par. 12. The Association's willingness to allow a vote on the Gearys' request for a Covenant change was not a waiver of the right to enforce.

Failure of the Association to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

Covenant Article VII(48); CP 295. When the proposal failed, the lawsuit was commenced. Although the Gearys threatened legal action to clarify their rights under the Covenants, they ultimately made the calculated decision to proceed with a prohibited roofing material, after

requesting a change to their binding Covenants. The Court should reverse the trial court and hold that the Association may pursue with its unambiguous right to enforce the Covenants on behalf of the owners.

B. The Gearys' Clear Violation Of Article VII(3) Is Not Excused By The Discretionary Approval Procedures Of Article V, Section 2.

The Gearys mistakenly argue that their use of the prohibited materials is excused under Covenant Article V, Section (2)(e). They claim the Association should have sued to stop them from installing the prohibited shingles. This argument is flawed for several reasons.

1. Under *Riss v. Angel*, covenants must be interpreted to further, not defeat, the homeowners' collective interests.

First, the trial court erroneously granted summary judgment based on a strict construction argument that has been rejected by Washington courts. See CP 258, 262 (Geary's Motion); VRP 4 (oral ruling). Washington courts have moved away from the strict construction rule

historically adhered to when interpreting restrictive covenants. *Viking Props.*, 155 Wash.2d at 120. This is due in large part to a shift in perception regarding restrictive covenants. *See Viking Props.*, 155 Wash.2d at 120. Instead of viewing such covenants as restraints on the free use of land, Washington courts acknowledge that restrictive covenants “tend to enhance, not inhibit, the efficient use of land.” *Viking Props.*, 155 Wash.2d at 120 (quoting *Riss v. Angel*, 131 Wash.2d at 622). Accordingly, Washington courts strive to interpret restrictive covenants in a way that protects the homeowners' collective interests and achieves the drafter's intended purpose of creating and maintaining a planned community with a particular character. *See Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wash.App. 177, 181, 810 P.2d 27, *review denied*, 117 Wash.2d 1013, 816 P.2d 1224 (1991). If more than one reasonable interpretation of covenants is possible, the

court favors the interpretation that avoids frustrating the reasonable expectations of those affected by the covenant's provisions. *Green*, 137 Wash.App. at 683, 151 P.3d 1038.

In this case the Gearys and the trial court applied the incorrect legal standard, and denied the Association the right to enforce the nondiscretionary and specific prohibition against composition roofing. This ruling is contrary to Washington law, and directly defeats the homeowners' reasonable expectations and collective interests in maintaining uniformity among the 24 homes of the Flying H Ranch.

2. The ACC's discretionary approval procedures do not apply to the specific objective prohibition of composition roofing.

The ACC's discretionary approval procedures do not *and legally cannot* alter the specific objective prohibition of composition roofing. In *Riss v. Angel*, the Supreme Court held that discretionary ACC approval

procedures cannot alter the enforceability of specific objective covenants.

If covenants include specific restrictions as to some aspect of design or construction, the document manifests the parties' intent that the specific restriction apply rather [than] an inconsistent standard under a general consent to construction covenant.

Riss, 131 Wn.2d at 625-26; see also *See Riss*, 131 Wn.2d at 628-29; *Green*, 137 Wn.App. at 693-694. Thus, a general consent to construction covenant governing discretionary review of structural plans and specifications cannot be relied upon to defeat the specific objective prohibitions that protects the homeowners without regard to discretionary action by the ACC.

In this case, the discretionary approval procedures of Article V, Section (2)(e) are expressly focused on: (1) structural projects that require the submission of a detailed set of plans and specifications under (2)(a); and (2) changes in the exterior color schemes of structures.

See also Covenant Article VII(4). The Geary's did not propose a new paint scheme, or a structural alteration under Articles V and VII(4). The Gearys did not seek approval of a metal roof, which would also be subject to ACC discretion. Instead, the Geary's unilaterally announced that they would be violating the specific prohibition of Article VII(3) by installing a composition roof. The Gearys' offending roof did not require a structural change, or ACC approval of structural plans and specifications. Under *Riss*, the ACC had no authority to approve composition roofing – by default or otherwise.

3. The Gearys never submitted plans and specifications for discretionary approval.

As discussed above, the ACC approval procedures of Article V simply do not apply to composition roofing projects. However, even if they did apply, the Gearys are unable to invoke the default approval procedure because

they failed to properly invoke the approval process.

The default approval provisions of Covenant Article V, Section (2)(e) only apply when an owner has submitted the detailed plans and specifications required under Section (2)(a). Only then does the clock for discretionary ACC approval begin to run, and only then can a homeowner claim an approval by default under Section 2(e). In this case, the Gearys never submitted plans and specifications as provided for in Article V, Section 2(a) and Article VII(4). Having failed to invoke the Article V process, they cannot invoke the Article V default remedies.

4. The Gearys' interpretation would lead to absurd results.

The Gearys' interpretation would also lead to absurd results. The Gearys' entire argument is based on the premise that owners can get away with a specifically prohibited use, so long as they complete their project

before a lawsuit is filed. This defiant rewriting of the Covenants would lead to absurd results.

Under the Gearys' theory, a homeowner could interfere with (if not destroy) safe use of the Flying H airport simply by erecting a pole or other structure exceeding the 30 foot height limitation, or by locating an above ground fuel tank in close proximity to the runway. See Covenant Article VII(17) and (29). A rebellious owner could easily complete such a project before the Association would have an opportunity to stop it.

The Gearys' theory unreasonably rewards the owner who intentionally violates the covenants. Here, the Geary's theory is especially offensive -- multiple owners wanted to use composition shingles, but voluntarily complied with the Covenants when told that the material was prohibited. CP 57 par. 5.

Under the Gearys' absurd regime of property management, opportunistic owners have every incentive

to start illegal projects, knowing that a Board of busy volunteer homeowners might not notice, or might require additional time before meeting and reaching a decision on expediting costly litigation.

In cases like this, involving the proposed violation of a specific and nondiscretionary covenant, the party to commence clarifying litigation should be the would-be violator, and not the Association. The Covenants may require a different result where ACC discretion is involved. See Covenant, Article V, Section 2. But this is not a case where the ACC delayed or abused discretion under the consent to construct provision – this is a case where the Gearys made a calculated and defiant decision to proceed with prohibited composition roofing despite repeated warnings not to do so.

This Court should reject the Gearys' argument that composition roofing is permitted for owners who manage to install a shingle roof before the Association brings a

lawsuit. This argument frustrates the intent of the Covenants, and the modern legal standards for interpreting covenants in a manner that furthers, rather than defeats, the collective interests of those who choose to reside in privately managed neighborhood communities.

C. The Trial Court Should Consider The Remedy Of Injunctive Relief.

Having determined that the Gearys' composition shingle roofing violated the Covenants as a matter of law, the trial court should have next considered the Gearys' violation under the standards applicable to injunctive relief. Restrictive covenants are enforceable by injunctive relief, and the court generally considers and weighs equitable factors. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 699-700, 974 P.2d 836 (1999) (citation omitted).

The Association's right to injunctive relief depends on the extent to which the Gearys can support the claim that they are "innocent defendants". *Hollis*, 137 Wash.2d

at 699-700; *Green*, 137 Wn.App. at 698-699. The Gearys are not innocent defendants, but are instead homeowners who took a knowing and calculated risk by installing composition shingles in a community where such material is prohibited. The Association is entitled to an order directing the removal of the prohibited material. *Hollis*, 137 Wash.2d at 699-700.

D. The Covenants Do Not Authorize An Award Of Attorney's Fees Against The Association.

An award of attorney's fees is reviewed for an abuse of discretion. *Olivine v. United Capitol Insurance*, 105 Wn.App. 194, 202, 19 P.3d 1089 (2001). Findings of fact and conclusions of law are required to make an adequate record. *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998).

As stated above, the trial court erred in granting relief to the Gearys. This error extends to the ruling that the Gearys are prevailing parties entitled to attorney's fees and costs.

The award of attorney's fees and costs is also subject to reversal because the Covenants do not authorize an award of attorney's fees and costs to homeowners under these circumstances. While homeowner association covenants frequently provide for an award of attorney's fees to owners who prevail in litigation with the association, the Covenants here present an exception to this general rule. Nowhere in the Covenants is a provision that would authorize an award of attorney's fees and costs to the Gearys. Although the Association is entitled to an award of attorney's fees and costs if it prevails in pursuing assessments and liens, the members of the Flying H Ranch Association have not adopted language granting attorney's fees to individual homeowners. See Covenants, Article IV, Section 1, CP 279. For this reason, the trial court's conclusion that the Covenants contain "provisions for the award of attorney fees to the defendants herein" should be reversed. See

CP 398, par. 3. The only mention of attorney's fees in the Covenants provides for the recovery of attorney's fees and costs associated with the Association's collection of assessments.

Each such assessment, together with interest, costs, and reasonable attorney's fees, shall also be personal obligation of the person who was the Owner of such property at the time when the assessment fell due.

Covenant, Article IV, Section 1, CP 279. This provision does not authorize an award of attorney's fees and costs to the Gearys. Therefore, in addition to reversing the trial court on the merits, the ruling on attorney's fees is also subject to reversal on the independent ground that there is no provision in the Covenants or state statute authorizing an award of attorney's fees for the Gearys. The trial court abused its discretion in concluding that the Covenants authorized an award of attorney's fees.

The Gearys also argued that they were entitled to fees under RCW 64.38.050, based on their own claim

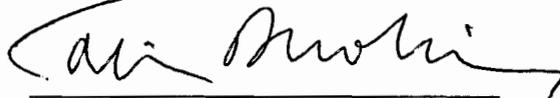
that the Association had violated Chapter 64.38 RCW. CP 389-390. Under RCW 64.38.050, a violation of Chapter 64.38 RCW (regarding homeowner associations) allows the aggrieved party to pursue remedies in court. In such cases, the court “may award reasonable attorney’s fees to the prevailing party.” RCW 64.34.050. However, in this case the Gearys failed to cite to a specific provision of Chapter 64.38 RCW that was violated, and the trial court failed to make any finding of such a violation. The only party entitled to attorney’s fees on this theory is the Association, which has been forced to defend itself against the Gearys’ unsupported opposition under Chapter 64.38 RCW. The Association respectfully asks for an award of its fees in this litigation, including this appeal. All of these fees arise and relate to the Geary’s erroneous position that the Association exceeded its authority under Chapter 64.38 RCW.

VII. CONCLUSION

Based upon the foregoing reasons, the Court should reverse the trial court and remand for a ruling on the remedies available under the Covenants.

RESPECTFULLY SUBMITTED this 15th day of August, 2008.

**CAMPBELL DILLE BARNETT
SMITH & WILEY, PLLC**



Talis Abolins, WSB No. 21222
Attorney for Appellant

APPENDIX

**FLYING H. RANCH HOMEOWNERS ASSOCIATION
V.
GEARY**

COURT OF APPEALS No. 37536-2-II

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS; and
AMENDMENT TO DECLARATION OF COVENANTS, CONDITIONS AND
RESTRICTIONS**

RE-RECORD 8707310544

VOL 0488 PAGE 0430
VOL 487 PAGE 1578

RE-RECORD TO CORRECT LEGAL DESCRIPTION.
8805310005

C.F. Wild
JULY 31 1988
MAY 31 1988
A-53245

87 JUL 31 P 1: 30

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

THIS DECLARATION, made on the date hereinafter set forth by ROY A.C. HILL and GLORIA M. HILL, hereinafter referred to as the "Declarant".

W I T N E S S E T H:

WHEREAS, Declarant is the owner of certain property in the County of Pierce, State of Washington, which is more particularly described as:

Pierce County Large Lot No. 1156, as recorded under Auditor's Fee No. 8510140451.

RECORD TO CORRECT LEGAL DESCRIPTION

NOW, THEREFORE, Declarant hereby declares that all of the properties described above shall be held, sold and conveyed subject to the following easements, restrictions, covenants, and conditions, which are for the purpose of protecting the value and desirability of, and which shall run with, the real property and be binding on all parties having any right, title or interest in the described properties or any part thereof, their heirs, successors and assigns, and shall inure to the benefit of each owner thereof.

ARTICLE I

DEFINITIONS

Section 1. "Association" shall mean and refer to FLYING H RANCH ESTATES, INC., its successors and assigns.

Declaration of Covenants
Page 1

88 MAY 31 AM 8:30

25-
25.-

EXHIBIT A

8805310005

EX-26 Holm

Section 2. "Owner" shall mean and refer to the record owner, whether one or more persons or entities, of a fee simple title to any Lot which is a part of the Properties, including contract sellers, but excluding those having such interest merely as security for the performance of an obligation.

Section 3. "Properties" shall mean and refer to that certain real property hereinbefore described, and such additions thereto as may hereafter be brought within the jurisdiction of the Association.

Section 4. "Common Area" shall mean all real property owned by the Association for the common use and enjoyment of the owners. The Common Area to be owned by the Association at the time of the conveyance of the first lot is described as follows:

Tract 18, Large Lot No. ~~8510140451~~
8510140451.

Section 5. "Lot" shall mean and refer to any plot of land shown upon any recorded subdivision map of the Properties with the exception of the Common Area.

Section 6. "Member" shall mean and refer to every person or entity who holds membership in the Association.

Section 7. "Declarant" shall mean and refer to ROY A.C. HILL and GLORIA M. HILL, their successors or assigns.

ARTICLE II

PROPERTY RIGHTS

Section 1. Owners' Easements of Enjoyment. Every owner shall have a right and easement of enjoyment in and to the Common area which shall be appurtenant to and shall pass with the title to every Lot, subject to the following provisions:

Declaration of Covenants

Page 2

8805310005

(a) The right of the Association to suspend the voting rights and right to use of the facilities by an owner for any period during which any assessment against his Lot remains unpaid; and for a period not to exceed 60 days for any infraction of its published rules and regulations;

(b) the right of the association to dedicate or transfer all or any part of the Common Area to any public agency, authority, or utility for such purposes and subject to such conditions as may be agreed to by the members. No such dedication or transfer shall be effective unless an instrument signed by two-thirds (2/3) of each class of members agreeing to such dedication or transfer has been recorded.

Section 2. Delegation of Use. Any owner may delegate, in accordance with the By-Laws, his right of enjoyment to the Common area and facilities to the members of his family, his tenants, or contract purchasers who reside on the property.

ARTICLE III

MEMBERSHIP AND VOTING RIGHTS

Section 1. Every owner of a lot which is subject to assessment shall be a member of the Association. Membership shall be appurtenant to and may not be separated from ownership of any Lot which is subject to assessment.

Section 2. The Association shall have two classes of voting membership:

Class A. Class A members shall be all Owners with the exception of the Declarant and shall be entitled to one vote for each Lot owned. When more than one person holds an interest in any Lot, all such persons shall be members. The vote for such Lot shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any Lot.

Declaration of Covenants

Page 3

8805310005

Class B. The Class B member(s) shall be the Declarant who shall have the majority vote (one more vote than the total Class A members). The Class B membership shall cease when the Declarant no longer owns property within the properties as defined in Article 1, Section 3 of this document.

ARTICLE IV

COVENANT FOR MAINTENANCE ASSESSMENTS

Section 1. Creation of the Lien and Personal Obligation of Assessments. The Declarant, for each Lot owned within the Properties, hereby covenants, and each Owner of any Lot by acceptance of a deed therefor, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay to the Association: (1) annual assessments or charges, and (2) special assessments for capital improvements, such assessments to be established and collected as hereinafter provided. The annual and special assessments, together with interest, costs, and reasonable attorney's fees, shall be a charge on the land and shall be a continuing lien upon the property against which each such assessment is made. Each such assessment, together with interest, costs, and reasonable attorney's fees, shall also be the personal obligation of the person who was the Owner of such property at the time when the assessment fell due. The personal obligation for delinquent assessments shall not pass to his successors in title unless expressly assumed by them.

Section 2. Purpose of Assessments. The assessments levied by the Association shall be used exclusively to promote the recreation, health, safety, and welfare of the residents in the Properties and for the improvement and maintenance of the Common Area, and pay taxes and other expenses relating thereto.

Declaration of Covenants

Page 4

8805310005

Section 3. Special Assessments For Capital Improvements.

In addition to the annual assessments authorized above, the Association may levy, in any assessment year, a special assessment applicable to that year only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon the Common Area, including fixtures and personal property related thereto, provided that any such assessment shall have the assent of the majority of the votes of each class of members who are voting in person or by proxy at a meeting duly called for this purpose.

Section 4. Notice and Quorum for Any Action Authorized Under Section 3. Written notice of any meeting called for the purpose of taking any action authorized under Section 3 or 4 shall be sent to all members not less than 30 days nor more than 60 days in advance of the meeting. At the first such meeting called, the presence of members in attendance shall constitute a quorum.

Section 5. Uniform Rate of Assessment. Both annual and special assessments must be fixed at a uniform rate for all Lots and may be collected on a monthly, annual, or semi-annual basis as determined by the Directors of the Association.

Section 6. Date of Commencement of Annual Assessments:
Due Dates. The annual assessments provided for herein shall commence as to all Lots on the first day of the month following the conveyance of the Common Area. The first annual assessment shall be adjusted according to the number of months remaining in the calendar year. The Board of Directors shall fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each annual assessment period. Written notice of the annual assessment shall be sent to every Owner subject thereto. The due dates shall be established by the Board of Directors.

Declaration of Covenants

Page 5

8805310005

Section 7. Effect of Nonpayment of Assessment:

Remedies of the Association. Any assessment not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of 8 percent per annum. The Association may bring an action at law against the Owner personally obligated to pay the same, or foreclose the lien against the property. No owner may waive or otherwise escape liability for the assessments provided for herein by non-use of the Common Area or abandonment of his Lot. A member's right to vote shall be suspended so long as any assessments are unpaid.

Section 8. Subordination of the Lien to Mortgages.

The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage. Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to mortgage foreclosure or any proceeding in lieu thereof, shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Lot from liability for any assessments thereafter becoming due or from the lien thereof.

Section 9. Exempt Property. The following property subject to the Declaration shall be exempt from the assessments created herein (a) all properties dedicated to and accepted by a local public authority; (b) the Common Area; (c) all properties owned by a charitable or nonprofit organization exempt from taxation by the laws of the State of Washington; and (d) all properties owned by Class B members until the Class B membership ceases. However, no land or improvements devoted to dwelling use shall be exempt from said assessments.

Declaration of Covenants

Page 6

8805310005

(b) Approval of said plans and specifications may be withheld if the proposed improvement is at variance with these covenants. Approval may also be withheld if, in the opinion of the Architectural Control Committee, the proposed improvement will be detrimental to the community because of: grading and drainage plan, location and quality of the structure on the building site, color scheme, finish design, proportions, shape, height, style, appropriateness, material used thereon, or landscaping plan.

(c) Changes in exterior color schemes of all structures shall be submitted to the Architectural Control Committee for approval.

(d) Landowners may appeal any decision made by the Architectural Control Committee to the Board of Directors of the FLYING R RANCH ESTATES, INC., whose decision shall be final.

(e) The Architectural Control Committee's approval or disapproval as required in these covenants shall be in writing. In the event that the Committee, or its designated representative fails to approve or disapprove within thirty (30) days after plans and specifications have been submitted to it, or in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with.

(f) It shall be the responsibility of the Architectural Control Committee to determine that improvements have been completed in accordance with the plans as submitted and approved. Such determination must be made within 60 days of the completion of the improvement and receipt of Notice thereof from the owner. In the event the Architectural Control Committee

Declaration of Covenants

Page 8

8805310005

shall determine that the improvement does not comply with the plans and specifications as approved, it shall notify the land owner within said 60-day period, whereupon the owner, within such time as the Architectural Control Committee shall specify, but not less than 30 days, shall either remove or alter the improvement or take such action as the Architectural Control Committee shall designate. If no action by the Architectural Control Committee is taken within 60 days of the date of completion of the improvement and notification thereof to the Architectural Control Committee by the Owner, the improvement shall conclusively be deemed to be satisfactory to the Architectural Control Committee.

ARTICLE VI

COMMON AREAS

The Declarant shall deed to the Association the Common Areas as described in Article I, Section 4 of this Declaration, and the Association shall grant easements for useage to the property owners of said Common Areas.

ARTICLE VII

PERMITTED AND PROHIBITED USES

(1) The work of construction of all building and structures shall be pursued diligently and continuously from commencement of construction until the structures are fully completed and painted. All structures shall be completed as to external appearance, including finish painting, within 12 months from date of commencement of the construction until the structures are fully completed and painted unless prevented by cause beyond the owner's control.

Declaration of Covenants

Page 9

8805310005

(2) It is the intantion and purpose of these covenants to assure that all dwellings, hangars/garages, and all other buildings be of high quality and workmanship substantially the same or better than that which could be produced on the date these covenants are recorded.

(3) All dwellings, garages and/or hangars, shall be of a high quality of workmanship and materials. The ground floor living area of the main residential structure exclusive of open porches and garages shall not be less than 1,600 square feet for a one story non-basement type home; not less than 1,400 square feet for a one story dwelling with basement and not less than 1,800 square feet for dwellings of more than one story. The main residential structure, both interior and exterior, shall be completed within one year from commencement of construction. No composition roofs shall be allowed and roofing materials shall either be shake or tile. Only onsite custom built homes will be allowed and therefore no prefabricated, modular or manufactured homes that are erected in sections are allowed. Certain manufactured kit type houses however that are of high quality may be allowed subject to the approval of the Architectural Control Committee as hereinafter created. No temporary structures including mobile homes will be permitted on premisses during the construction period, or otherwise.

(4) Structures of a temporary nature, such as mobile home, trailers, basements, tents, shacks, garages, barns or any other out building shall not be used nor permitted on any lot as a residence, either temporarily or permanently. No structure shall be erected, placed or altered on any lot until the construction, plans, and specifications of the

Declaration of Covenants
Page 10

8805310005

0000000000

plan showing the location with respect to typography and finished creation have been approved by the Architectural Control Committee. No fence, wall, or landscaping shall be placed in any lot near to the taxi ways and clear ways that would restrict adequate clearance for taxing and low flying aircraft.

(5) Dwellings and buildings constructed on Lots 13, 14, and 16 should be of quality that will be complementary to and not detract from those located on Lot 15. As to Lot 17, the Architectural Control Committee, shall have the right to waive these covenants as to use of said lot and number of animals.

(6) Only one hangar shall be allowed on each lot with a maximum area of 4,000 square feet per hangar and a maximum height of 30 feet. Hangar and tie-down space shall be used only by the lot owner or residents, their families and guests. No hangars shall be the primary use of any lot. Hangars shall therefore be allowed only when accessory to residential homes.

(7) Minimum Set Backs for all structures shall be 30 feet from all lot lines and 60 feet between structures in accordance with Pierce County Ordinance No. 820121.

(8) Except with the approval of the Architectural Control Committee, no persons shall reside upon the premises of any lot until such time as the improvements to be erected thereon in accordance with the plans and specifications approved by the Architectural Control Committee have been completed.

(9) No building or structure shall be moved onto any land embraced in said subdivision from any land outside of said subdivision. No trailers shall be maintained on

Declaration of Covenants

Page 11

8805310005

.....15

any building site as a residence. No building of any kind shall be erected or maintained on a building site prior to the erection of a dwelling house thereon, except that a garage or other small building of permanent construction may be erected for the storing of tools and other articles, but shall not be used for residence purposes.

(10) Where it is architecturally possible, all garages shall be incorporated in or made a part of the dwelling house. On-site parking provisions shall be provided in addition to garage automobile storage and no parking permitted on taxi road.

(11) All buildings shall be constructed in accordance with the then applicable uniform building codes and other laws and regulations that then apply to building on the intended lot.

(12) All utilities including electrical, telephone, gas and cable television shall be underground.

(13) No structure, fences, walls or landscaping shall be placed on any lot in such a way as to restrict the movement of aircraft on the runway and/or taxiways.

(14) Except with the approval of the Architectural Control Committee, the natural drainage of any lot shall not be changed. Driveway culverts for each lot shall be provided.

(15) Exterior lighting of any sort which is visible from the street or from any other dwelling house in this subdivision shall not be installed without first obtaining the permission of the Architectural Control Committee.

(16) Use of each lot is restricted to residential use for one family unit per lot. A family unit consists of a man and/or woman and children of either or both, and may also include parents and hired help. Any structure or accommodations provided for guests, caretakers, or family members must be approved by the Architectural Control Committee and shall not, in any event, be used as rental units.

Declaration of Covenants

8805310005

Page 12

(17) No fuel tank shall be maintained above ground.

All underground fuel storage tanks shall receive approval from the Pierce County Building Department prior to the installation.

(18) During construction, owners will be responsible for the immediate repair of any damage to taxi road, easements, culverts, and utilities adjacent to their lots as a result of the construction activities. Association shall have the right to make said repairs and bill the owner therefore, and upon receipt of said billing, the Owner will pay the same.

(19) All animals shall be restricted to and confined to each lot owners property. There shall be no commercial activity in regard to animals such as dog kennels, boarding stables, etc. Noise creating animals and fowl, such as geese, peacocks, roosters and incessantly barking dogs, day or night, will not be permitted. Horses are to be ridden on Owner's property and not on undeveloped areas. Manure shall not be dumped on adjacent property and accumulations thereof shall be stored away from neighboring property and periodically removed. No poultry or swine shall be permitted. Animals will be permitted as follows: total of two dogs and two cats. Farm animals including horses, goats, llama, etc., total of 2 animals per 2 acres, 3 per 5 acres, and 4 for more than 5 acres. Horses are to remain on Owners property and shall not be permitted on any undeveloped area; while making egress to main road, horses shall be limited to the easement area adjacent to the taxi way/road and no pot holding nor littering by animals will be permitted. Clean up shall be the responsibility of the individual user.

Declaration of Covenants

Page 13

8805310005

(20) No garbage, refuse, rubbish or cuttings shall be deposited on or left on the lot premises unless placed in an attractive container suitably located and screened from public view. No building material of any kind shall be placed or stored upon any property in said subdivision until the Owner is ready to commence construction, and then such material shall be placed within the property line of the building site upon which structures are to be erected, and shall not be placed on the taxi/road way.

(21) No noxious or undesirable thing, or undesirable use of the property in said Addition, whatsoever, shall be permitted or maintained upon said building sites in said Addition. If the Architectural Control Committee shall determine what trade, business or use is undesirable or noxious, such determination shall be conclusive.

(22) No signs of any kind nor for any uses, except public notice by a political division of the State, or as required by law, shall be erected, posted, painted or displayed on any building site or portion of this subdivision whatsoever. Provided however, that any builder may erect and display signs during the period he is building and selling property in said subdivision, and that any owner wishing to sell his or her home may place one sign, not larger than 400 square inches, advertising the property for rent or sale.

(23) Oil drilling or oil development operations, refining, mining operations of any kind or the operation of quarries, gravel and sand pits, soil removing or top soil stripping shall not be permitted on any of the building sites of the subdivision described herein.

Declaration of Covenants

Page 14

8805310005

(24) Except with the permission of the Architectural Control Committee or except as may be necessary in connection with the construction of any improvement, no excavation shall be made nor shall nor dirt be removed from a Lot herein.

(25) No visible or audible trade, craft, business, profession, commercial, or similar activity of any kind shall be conducted on any Lot, nor shall any goods, equipment, vehicles, materials or supplies used in connection with any trade, service, or business be visible or audible from any lot. Some occupations as defined by the Pierce County Zoning Code, Section 9.03.340 that do not otherwise conflict with these covenants are allowed. No other commercial or business uses shall be allowed.

(26) Motorcycles, mopeds, all terrain vehicles and similar vehicles will not be permitted except on Owners property or on main ingress and egress roadways. No such vehicles shall be allowed on taxi ways, clear ways, or run ways at any time.

(27) Large construction equipment shall not be parked or stored on or transported to and from any lot except when necessary during periods of construction.

(28) No disabled vehicles or junk cars shall be maintained on any lot, however this does not include antiques or other collectibles which are suitably housed.

(29) Flagpoles, radio or television antennas or other structures are not to exceed 30 feet above ground level.

(30) No individual water supply system shall be permitted on any Lot unless such system is located, constructed and equipped in accordance with the requirements, standards and recommendations of the Pierce County Health Department.

Declaration of Covenants

Page 15

8805310005

Approval of such systems as installed shall be obtained from such authority. Lots 1 through 12 and Lot 14 of Pierce County Large Lot #851040451 shall be subject to that certain Agreement dated the 23rd day of February, 1987, by and between the Declarant and the City of Bonney Lake, which Agreement is attached to these Covenants and designated Exhibit "A" and incorporated herein by reference as though fully set forth.

(31) Aircraft shall have right of way over all moving traffic whether it be automobile, motorcycle, bicycle, horse or pedestrian.

(32) The taxiway is for the sole purpose of aircraft taxiing to and from the runway.

(33) The maximum speed for all vehicles within the development shall be 10 miles per hour with the exception of airplanes taking off and landing on the runway.

(34) The clear way area is an extension of parcel 18, the runway, to the Western line of Large Lot Subdivision Boundary. This area shall remain clear of building construction, overhead wires, or any objects hazardous to low flying arriving and departing aircraft.

(35) Following extended periods of rain or heavy frost, load restrictions may be imposed by the Association limiting use of taxi road to aircraft and automobiles.

(36) FLYING H RANCH ESTATES is listed in the Washington State Aeronautics Directory as a private airport restricted to the use of residential members and their guests. Normal traffic pattern procedures will be adhered to consistent with safety and prevailing wind conditions. Noise abatement procedures will be followed by arriving and departing aircraft consistent with safety limitations of aircraft and existing weather conditions.

Declaration of Covenants

Page 15

8805310005

(37) No commercial flight instructions will be permitted.

(38) There shall be no ultralight operations, glider operations, hot air balloon operations or sky diving activities without the prior approval of the Association.

(39) Tie-downs are restricted to homeowners privately based aircraft, however, tie-downs for transient guests of residents are permitted for a limited period of time, which shall be determined by the Association.

(40) Use of runway may be occasionally restricted by the Association for short periods following rapid freeze-thaw conditions or extended periods of heavy rainfall to prevent runway surface damage. Closures of short duration will be indicated by placement of cones on runway and taxiway.

(41) Aircraft/Flight Operations shall be subject to the following restrictions and covenants.

(a) FLYING H RANCH ESTATES is listed in the Washington State Aeronautics Directors as a private airport restricted to the use of residential members and guests.

(b) Normal traffic pattern procedures shall be adhered to consistent with safety and prevailing wind conditions.

(c) Noise abatement procedures shall be followed by arriving and departing aircraft consistent with safety limitations of aircraft and existing weather conditions.

(d) No commercial flight instructions are permitted.

(e) No ultra-light operations, glider operations, hot air balloon operations, or skydiving activities are permitted. Exceptions to any of the above for occasional use by guests of residents must have prior approval by the Association.

Declaration of Covenants

Page 17

6805310005

(f) Tie-downs are restricted to home owner's privately based aircraft. Tie-downs by transient guests of residents are permitted for limited period of time, which shall be determined by the Association.

(g) Use of runway may be occasionally restricted for short periods following snow rapid freeze-thaw conditions or extended periods of heavy rainfall to prevent runway surface damage. Closures of short duration will be indicated by placement of cones on runway and taxi way.

(h) No use of the property shall be made for commercial competitions including but not limited to ultra-light flying, skydiving, flight instruction, gliders, helicopters and stunt flying instruction.

(i) All takeoffs and landings shall be in an easternly and westernly direction. Arrival and departure patterns will be established accordingly.

(j) Only lot owners, residents and their guests shall be allowed to use the airstrip except for emergency landings.

(k) The landing strip and taxiways shall be kept in good state of repair at all times. The surface of the landing strip shall be maintained in a manner so as to be dust free.

(l) There shall be no stunt flying in this general area whatsoever. All flights including aerobatics originating from this airstrip shall be conducted in accordance with FAA regulations.

(m) There shall be no open fly-ins to and from this property.

Declaration of Covenants

Page 18

8805310005

(n) The owner of the property or his successor in interest shall provide for notification of all parties flying in and out of this private airport of the concerns relating to the dairies in the area in the use of variable speed propellers or other high-pitched engines, and that noise abatement procedures be followed as herein provided.

(42) The properties herein are hereby restricted to allow a maximum of 24 lots on the 119 acres, and no lot shall be smaller in size than 2 acres.

(43) All lots shall be residential with accessory aircraft-related facilities allowed.

(44) All use of the aircraft facilities including taxiways and runways shall be conducted in accordance with FAA regulations.

(45) Lot owners assume full responsibility for and hold the Declarant, his heirs, successors and assigns, and the Association, harmless from any and all liability, claims, damages, and costs of any kind whatsoever for injury to or death of any person or persons, and for loss, damage or destruction of whatsoever kind or nature to any property owned by another member or any other person or persons occurring in connection with or in any way incident to or arising out of the operation of the member's or his guest's aircraft.

(46) It shall be the sole responsibility of each individual Owner to carry liability insurance for their protection relative to death or injury as a result of aircraft operation.

Declaration of Covenants

Page 19

8805310005

(47) Members of the Association shall make known to their guests and family members the provisions of the covenants and restrictions contained herein and shall be responsible and liable for their actions.

(48) The Association shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now and hereafter imposed by the provisions of this declaration. Failure of the Association to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

(49) Invalidation of any one of these covenants or restrictions by judgment or Court Order shall in no way affect any other provisions which shall remain in full force and effect.

(50) The Declarant or the Association shall not be held liable for closure or restrictions imposed by Pierce County on Land Use Permit UP9-83 as a result of non-compliance with conditions contained herein, as set forth in Article IX.

(51) Any violations of the provisions of these covenants which are not corrected within sixty (60) days after receipt of written notice of such violation from the Association shall incur a penalty for such violation at the rate of Ten Dollars (\$10.00) per day after the expiration of such sixty (60) day period, which penalty shall be a lien against the lot owned by the violator.

(52) This property is subject to the covenants and restrictions set forth on Pierce County Large Lot Number 1156, Pierce County Auditor's Fee No. 8510140451.

Declaration of Covenants

Page 20

8805310005

(53) The properties herein shall be maintained by the members in conformity with standards established from time to time by the architectural control committee. Said rules regulations and guidelines shall relate to maintenance of the premises, including easement areas.

ARTICLE VIII

AMENDMENTS

Declarants shall have the right to amend this Declaration of Covenants, Conditions, and Restrictions, including any of the Covenants, during the first two years after the date of the recording of these Covenants. Thereafter, this Declaration may be amended by an affirmative vote of a majority of all Class A and all Class B. members.

Class B members.

DATED this 29th day of July, 1987.

Roy A.C. Hill
ROY A.C. HILL.

Gloria M. Hill
GLORIA M. HILL

STATE OF WASHINGTON)
County of Pierce) ss.

On this day personally appeared before me, ROY A.C. HILL and GLORIA M. HILL, to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 29th day of July, 1987.

[Signature]
NOTARY PUBLIC in and for the State of Washington, residing at Sumner.

Declaration of Covenants
Page 21



8805310005

AMENDMENT TO DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS
RECORDED UNDER AUDITOR'S FEE NO. 8707310544

ARTICLE IV.

Section 7 shall read as follows: A late fee of \$25.00 will be charged for any assessment not paid by due date, and any assessment not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of 10 percent per annum. The Association may bring an action at law against the Owner personally obligated to pay the same, or foreclose the lien against the property. No owner may waive or otherwise escape liability for the assessments provided for herein by non-use of the Common Area or abandonment of his Lot. A member's right to vote shall be suspended so long as any assessments are unpaid.

ARTICLE VII.

(2) to read as follows: It is the intention and purpose of these covenants to assure that all dwellings, hangars/garages, and all other buildings be of a high quality and workmanship as determined by the Committee so as not to depreciate the value of surrounding properties.

(3) amend as follows: ...The ground floor living area of the main residential structure exclusive of open porches and garages shall be not less than 2,000 square feet for one-story rambler type homes and not less than 1,800 square feet for a daylight-basement home. Dwellings of more than one story shall total not less than 2600 square feet,...

amend further as follows: ...No composition roofs shall be allowed and roofing materials shall be either shake or tile or other material as may approved by the Committee.

(32) to read as follows: The taxiway and taxiway easement is for the sole purpose of aircraft taxiing to and from the runway. No other vehicles or animals will be permitted at any time.

....
Declaration of Covenants
Page 23

89 JUL 14 PM 2:13
RECORDED

EXHIBIT "A"

(53) To read as follows: The properties herein shall be maintained by the members in conformity with standards established from time to time by the Architectural Control Committee. Said rules, regulations and guidelines shall relate to maintenance of the premises, including ornament areas. This covenant included but is not limited to the general appearance and overall maintenance of each lot owned as related to grassy areas, etc.

DATED this 14 day of July, 1989.

STATE OF WASHINGTON)
County of Pierce)

[Signature]
[Signature]

On this day personally appeared before me, ROY A. L. HILL and GLORIA M. HILL, to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 14 day of July, 1989.

[Signature]
NOTARY PUBLIC in and for the State of Washington, residing at Wash.

....
Declaration of Covenants
Page 23



....
Declaration of Covenants
Page 24

8907140501

FILED
COURT OF APPEALS
DIVISION II

08 AUG 25 AM 9:19

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

OF THE STATE OF WASHINGTON

BY Ca
DEPUTY

FLYING H. RANCH HOMEOWNERS
ASSOCIATION, a Washington non-profit
corporation,

Appellant.

and

JAMES L. GEARY and JANICE GEARY,
husband and wife; and U.S. BANK
NATIONAL ASSOCIATION N.D.,
Respondent,

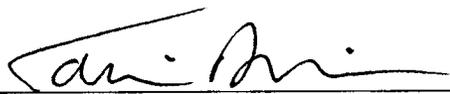
No. 37536-2-II

**AFFIDAVIT OF
SERVICE**

TALIS M. ABOLINS, being first duly sworn on oath, deposes and
says:

That on the 15th day of August, 2008, he caused to be hand
delivered true copies of the Brief of Appellant and Motion to Extend Time
for Filing Appellant's Brief on file in the above-entitled matter, in an
envelope addressed to below stated as follows:

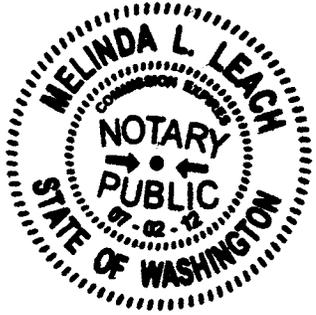
Klaus Snyder
Snyder Law Firm LLC
920 Alder Ave., Ste 201
Sumner, WA 98390


TALIS M. ABOLINS

Affidavit of Service

G:\DATA\DTMA\0 Appeals\Flying H Ranch HOA 31008.001\Affidavit of Service.wpd

SUBSCRIBED AND SWORN to before me this 15th day of August, 2008.



Melinda L. Leach
Printed Name: Melinda L. Leach
NOTARY PUBLIC in and for the State of
Washington residing at Tacoma
My commission expires: 7-2-12

Affidavit of Service

G:\DATA\DTMA\0 Appeals\Flying H Ranch HOA 31008.001\Affidavit of Service.wpd