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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 37536-2-II

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.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

A. The Gearys Continue To Rely On An Erroneous Strict Construction Rule, Rather Than The Modern Rule Protecting The Owners' Collective Interests.

In its opening brief, the Association set forth the correct modern legal standard for interpreting association covenants in a manner that furthers the collective interests of the homeowners. See Opening Brief, pp. 19-21, 26-29. Since the brief was filed, the Washington Court of Appeals has continued to follow this standard, giving due consideration to the legitimate homeowner expectations:

If more than one reasonable interpretation of the covenants is possible regarding an issue, we must favor that interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions.

See Mack v. Armstrong, ___ Wn. App. ___, 195 P.3d 1027 (Division III, November 18, 2008), *quoting Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn. App. 665, 683, 151 P.3d 1038 (2007), *review denied*, 163 Wn.2d 1003 (2008).

The Gearys continue to argue that a rule of strict construction must be applied against the collective interests of their homeowner neighbors. In the face of authority to the contrary, the Gearys ask this court to create an exception to the modern rule because Mrs. Hill “was involved” in supporting the Association’s enforcement action. See Respondents’ Brief, at p. 12, 14-15. Mrs. Hill may have established the Flying H community with her late husband. But she is not a party, she is not a controlling Declarant, and under Washington law her involvement does not destroy the Association’s right to enforce the covenants on behalf of the collective interests of all owners.

The Gearys try to support their strict construction theory by citing to *Viking Properties*, *Riss*, and *White*. None of these cases support the theory. In *Viking Properties* the Court applied the modern standard, relying on *Riss v. Angel* and *Mains Farm* for the proposition that the restrictive rules against the grantor in favor of free use of land do not apply to disputes among homeowners. *Viking Properties*, 155 Wn.2d at 120,

quoting Riss, 131 Wn.2d at 622-23. In the modern subdivision context, restrictive covenants tend to enhance efficient use of land; the restrictions are managed collectively by the benefitted owners. Therefore, the basis for the old rule of construing covenants against the grantor are no longer valid. *See Viking Properties*, 155 Wn.2d at 120, *quoting Mains Farm*, 121 Wn.2d at 816.

In *Riss*, the Court recognized the trend of authority rejecting the strict construction rule. The Court applied the modern rule, placing “special emphasis on arriving at an interpretation that protects the homeowners’ collective interests”. *Riss*, 131 Wn.2d at 623-24, *quoting Witrak*, 61 Wn. App. at 181. Like many other cases applying the modern rule, *Riss* involved a challenge to an owner-managed Association seeking enforcement of covenants applicable to their community.

Finally, the 1983 *White* decision predates the modern standard of covenant review under *Riss*, and actually involved a

suit by the developer, rather than the collective interests of the homeowners.

The Flying H Ranch Association is collectively managed by all owners, through an owner-elected Board of Directors. This suit is not between Mrs. Hill and the Gearys. *See Witrak*, 61 Wn. App. at 180-181 (noting that a strict construction rule “may have some validity” in conflicts between a homeowner and the Declarant). This conflict is between the Gearys and their Association, representing the collective interests of all owners. Mrs. Hill and her late husband relinquished their powers of management and covenant enforcement to the collective ownership long ago. Mrs. Hill no longer wields control over the properties, and her willingness to volunteer and testify regarding the covenant’s intent does not create an exception to the modern rule of covenant interpretation.

B. The Nondiscretionary Roofing Covenant Is Not Voided By The Discretionary Enforcement Covenants.

In *Riss*, the Court also established the principle that the procedures for discretionary approval do not trump specific nondiscretionary covenant restrictions. See Appellant's Brief, pp. 28-30. The Gearys attempt to sidestep this principle. They argue that in *Riss* the ACC tried to use a discretionary procedure to be more restrictive than the nondiscretionary covenant, whereas here the discretionary consent-to-construct covenants should justify approval of a result that is *less restrictive* than the nondiscretionary covenant. See Respondents' Brief, p. 30-33.

Under *Riss*, the discretionary general consent to construction covenants must not override a specific nondiscretionary covenant. Whether the covenant prohibits shingle roofing, or sets a maximum roof height, the result should be the same. Appellant's Brief, p. 28-29; *see also Mack*, 195 P.3d at 1031-32 ("if the covenants include both specific

restrictions of some aspect of design or construction and a general consent-to-construction provision, the specific covenant prevails ...”).

In *Riss*, the Association was prevented from using its discretion to impose a roof height restriction below the maximum roof height allowed under a specific nondiscretionary covenant. The same principle applies with equal force here, where the Gearys try to invoke a discretionary covenant procedure to override a specific and nondiscretionary prohibition on shingle roofing material. A volunteer Board of Director’s failure to act under a general discretionary approval procedure does not ratify an owner’s violation of a specific and nondiscretionary restriction. To read the covenants in this way would defeat the plain and obvious meaning of the nondiscretionary restriction, reward the willful wrongdoer, and violate the homeowners’ collective interests.

This is not a case where the covenants allowed the Gearys to seek a discretionary approval of plans and

specifications for a shingle roof, or where shingle roofs were prohibited under an internal ACC rule. *Compare Mariners Cove Beach Club, Inc. v. Kairez*, 93 Wn. App. 886, 970 P.2d 825 (1999) (owner was required to seek discretionary ACC approval of dock, but ACC used internal unrecorded policy to reject dock). This is a case where shingle roofs are categorically prohibited without any exception at all.¹

C. The Gearys Admit That Their Interpretation Of The Enforcement Provisions Leads To A Direct Conflict.

In their brief, the Gearys put forth an analysis in which they state that the covenant enforcement procedures “are in **direct conflict** with each other”. See Respondents’ Brief, pp. 15-17. Despite this concession, they take the internally inconsistent position that the covenants “are not ambiguous”.

¹ The Gearys erroneously claim that another owner, Mr. Lang, was allowed to keep a prohibited roof in violation of the covenants. See Respondents’ Brief, p. 4. Mr. Lang’s roof was a tile roof, expressly allowed. CP 195 (Lang installed a tile roof, and that his “house plans” were approved by the ACC). Even if Mr. Lang had a shingle roof, this would not support a finding of abandonment. See *Green*, 137 Wn. App. 698 (abandonment is a question of fact involving proof of habitual and substantial covenant violations).

As explained in the opening brief, the discretionary consent to construct provisions logically and reasonably apply to the discretionary covenants. Where an owner has a right to discretionary review of plans and specifications for a structure, the failure to reject an otherwise permitted construction will fairly and logically be deemed an approval. See Appellant's Brief, pp. 5-9, 29-34. This result does not apply to the nondiscretionary categorical prohibition of shingle roofs.

The only conflict raised by the 60-day notice of violation procedure under Article VII(51) is the conflict created under the Gearys' unreasonable interpretation that *all* covenant violations are automatically "approved" if the Association fails to sue the homeowner before the violation is complete. This is absurd. The Association has the right to enforce intentional covenant violations by giving notices of violation, and then pursuing fines, liens and other remedies. See Article VII(48).

The Association has put forth a reasonable interpretation that furthers the collective interests of the homeowners,

preserves the important purposes of homeowner membership, and avoids the inconsistencies and absurd results of the Gearys' interpretation.

D. The Association Did Not Victimize The Gearys By Allowing Them To Seek A Covenant Amendment.

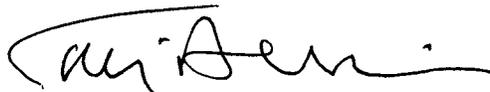
The Gearys admit they successfully started and finished their shingle roof in a ten day period, and then they blame the Association for waiting nine months to sue them. See Respondents' Brief, pp. 18-20. The Gearys are not innocent purchasers harmed by their Association's failure to give a discretionary approval. The Gearys knowingly purchased their home subject to the Covenants, including the nondiscretionary prohibition of shingle roofs under Article VII(3). When they realized they purchased a defective tile roof, the Gearys took months to research a variety of options, looking for the "best" one. Rather than go with available alternatives, the Gearys stubbornly pursued the installation of a prohibited shingle roof. See Appellants' Brief, pp. 11-12 (with CP references). When

they were confronted with the violation, they asked the Association to consider a covenant amendment, and then hastily finished their project. CP 28.

The Gearys are correct in pointing out that their volunteer Board of Directors did not rush to litigation. Instead, the Board bent over backwards to give the Gearys their requested opportunity to advocate in support of a retroactive covenant amendment to forgive their violation. Ultimately, the owners did not pass the requested amendment. The Gearys assumed the risk by proceeding with a known violation of the nondiscretionary rules they originally agreed to live by.

RESPECTFULLY SUBMITTED this 9th day of
January, 2009.

**CAMPBELL DILLE BARNETT
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Attorney for Appellant

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

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

Respondent,

and

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

Appellant.

No. 37536-2-II

**AFFIDAVIT OF
MAILING/SERVICE**

MELINDA L. LEACH, being first duly sworn on oath, deposes and says:

That on the 9th day of January, 2009, she cause to be mailed, by first class mail, a true copy of the Reply Brief of Appellant and Affidavit of Mailing/Service on file in the above-entitled matter, to the Court of Appeals, Division II and to the attorney for Respondent as follows:

Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402

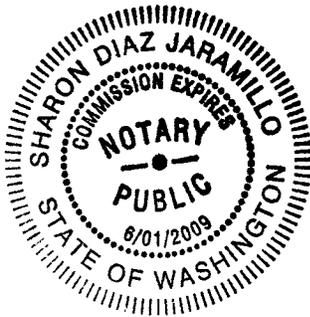
Klaus Snyder
Snyder Law Firm LLC
920 Alder Ave., Ste 201
Sumner, WA 98390

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That she placed and affixed proper postage to the said envelope, sealed the same, and placed it in a receptacle maintained by the United States Post Office for the deposit of letters for mailing in the City of Puyallup, County of Pierce, State of Washington.


MELINDA L. LEACH

SUBSCRIBED AND SWORN to before me this 9th day of January, 2009.




Printed Name: Sharon Diaz Jaramillo
NOTARY PUBLIC in and for the State of
Washington residing at Puyallup
My commission expires: 6-1-09

Affidavit of Mailing

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