

No. 37563-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FOXVIEW HOMEOWNERS ASSOCIATION,

Appellant

v.

CYNTHIA A. FENBERG,

Respondent

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DIVISION II
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STATE OF WASHINGTON
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DEPUTY

BRIEF OF APPELLANT

JAMES V. HANDMACHER, WSBA#8637
Morton McGoldrick, P.S.
820 "A" Street, Suite 600
Post Office Box 1533
Tacoma WA 98401
Attorneys for Appellant

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Assignments of Error

1. The trial court erred in failing to join the individual lot owners before determining respondent's counterclaim.
2. The trial court erred in entering the Order Granting Defendant's Motion for Partial Summary Judgment in Part on December 21, 2007.
3. The trial court erred in awarding attorney fees to respondent incurred on the counterclaim resolved by the Partial Summary Judgment, and offsetting those fees against fees awarded to appellant on the remaining issues in this case in the Judgment entered on March 6, 2008.

Issues Pertaining to Assignments of Error

1. Are owners of an interest in property necessary parties to an action determining their rights in that property, such that failure to join them as parties is reversible error?
2. Do the recorded plat and CCRRs give the appellant Association and its members the right to unfettered pedestrian access to the common areas and the beach over the roadway on Fenberg's Lot 8?
3. Is the Association the prevailing party on the counterclaim, and thus entitled to an award of its

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I. INTRODUCTION

This case first raises the issue whether the trial court can determine the property rights of individuals without joining them in the litigation. Appellant Foxview Homeowners Association (the Association) brought suit against one of its members, respondent Cynthia Fenberg, for violating several requirements in the recorded Covenants, Conditions, Restrictions and Reservations (CCRAs) for the plat of Foxview during the construction of her house. Fenberg filed a counterclaim to enjoin the Association and its members from using a road over her lot for pedestrian access to the beach. She failed to join the individual lot owners as counterclaim defendants, despite the Associations' affirmative defense that she had failed to join indispensable parties.

Rather than requiring the joinder of the individual lot owners or dismissing the counterclaim, the trial court granted summary judgment to Fenberg, determining that the CCRAs do not give the lot owners an easement to cross Fenberg's property for pedestrian access to the beach, and permanently enjoining them from that use.

The second issue in this case is whether the CCRAs give the Foxview lot owners the right to use the road over Fenberg's lot for pedestrian access to the beach. A section of the CCRAs states that this

roadway provides pedestrian access to the beach. The drafter of the CCRRs testified that he inserted this language to allow the lot owners to use the roadway for unfettered pedestrian access to the beach, knowing that such beach rights are a valuable asset. No contrary evidence was produced by Fenberg. Yet the trial court entered summary judgment determining that the CCRRs do not give the lot owners a right to cross Fenberg's property for access to the beach, and enjoining that use.

The third issue in this case is the entitlement of the parties to attorney fees. At trial, the court found that Fenberg had violated a number of the covenants, and directed her to cure those violations within specified times. The trial court awarded the Association its attorney fees incurred at trial, awarded Fenberg her attorney fees incurred on the counterclaim, and offset those awards with a net judgment in favor of the Association. If this Court reverses that summary judgment, then it should also reverse the attorney fees awarded to Fenberg and the offset of those fees against fees awarded to the Association. If this Court awards summary judgment to the Association on the merits, it should also award to the Association attorney fees incurred in the trial court. In either event, the Association should be awarded attorney fees incurred on this appeal.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to join the individual lot owners before determining respondent's counterclaim.
2. The trial court erred in entering the Order Granting Defendant's Motion for Partial Summary Judgment in Part on December 21, 2007.
3. The trial court erred in awarding attorney fees to respondent incurred on the counterclaim resolved by the Partial Summary Judgment, and offsetting those fees against fees awarded to appellant on the remaining issues in this case in the Judgment entered on March 6, 2008.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are owners of an interest in property necessary parties to an action determining their rights in that property, such that failure to join them as parties is reversible error? (Assignment of Error 1)
2. Do the recorded plat and CCRRs give the appellant Association and its members the right to unfettered pedestrian access to the beach over the roadway on Fenberg's Lot 8? (Assignment of Error 2)
3. Is the Association the prevailing party on the counterclaim, and thus entitled to an award of its attorney fees on that issue in the trial court and on appeal? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. Factual Background.

On January 28, 2002, Brentwood Homes LLC recorded the plat called Foxview. (CP 41, 46) The plat consists of nine lots, plus two common area tracts. *Id.* Tract A is the location of the storm water drainage ponds, and Tract B is the location of an on-site wetland. *Id.* The plat depicts a 15-foot access easement over Lot 8 leading from the cul-de-sac to Tract A (see Appendix A to this brief). (CP 41, 48-50)

On March 22, 2001, Brentwood Homes LLC recorded a Declaration of Covenants, Conditions, Restrictions and Reservations for Foxview (hereafter CRRs). (CP 41-42, 52) On January 25, 2002, Brentwood Homes LLC recorded the Second Amendment to the CRRs for Foxview. (CP 42, 88) The Second Amendment created a new section 3.6 to the CRRs (see Appendix B to this brief), which states:

There exists a 15 ft wide Access Easement encumbering Foxview Lot 8. This roadway is a Limited Common Element and provides limited access to the Storm Drainage Tract "A" and the on-site wetland Tract "B", together with possible and/or potential pedestrian access to the adjacent railroad right-of-way and the beaches and tidelands of Puget Sound, pursuant to long-standing easements and/or agreements of record. This access road is an expressed condition of plat approval by the City's Hearing Examiner. The maintenance and repairs of such access road shall be an obligation of the Association.

(CP 42, 90) The following is the history of the “long-standing easements and/or agreements of record.” This history is not disputed by any evidence in the record.

In 1907, Ida E. Thompson, J.B. Thompson, and J.A. Hoshor were the owners of a large parcel of property which included what is now Foxview. (CP 42, 92-95) By deed dated September 30, 1907, they conveyed a strip of land along the westerly side of the property to the Port Townsend Southern Railroad Company. (CP 42, 97-101, 209-212) That deed reserved to the grantors the right to construct and maintain a crossing twenty feet in width over the strip conveyed to the railroad, at a location opposite the center of the Sunset Beach Hotel as then located. (CP 42) By agreement also dated September 30, 1907, Port Townsend Southern Railroad Company agreed to extend the crossing over the adjacent tidelands owned by the railroad. (CP 42, 103-104, 214) By deed dated December 27, 1907, the Port Townsend Southern Railroad Company conveyed that strip of land to the Northern Pacific Railway Company. (CP 42, 106-108) This railroad right-of-way is now depicted on the west side of the plat of Foxview. (CP 42) The deeds are referenced on the recorded plat of Foxview. (CP 42, 47)

By deed dated May 16, 1908, the Thompsons and Hoshier sold to Lewis Tallman a portion of their property that included the Sunset Beach Hotel (equivalent to the southwest portion of Foxview), and transferred to Tallman the right to use the south 10 feet of the railroad crossing described above. (CP 42-43, 110-112) The deed also included the right to use springs elsewhere on the Thompson/Hoshier property to supply the Sunset Beach Hotel. (CP 43)

By deed dated December 12, 1925, the Pierce County Treasurer sold Tallman's property (less a strip one foot wide on the west side) to C.L.L. Thompson on a tax foreclosure. (CP 43, 114-116) By deed dated December 14, 1932, the Pierce County Treasurer sold the remaining one foot of Tallman's property to C.O. Nelson on a tax foreclosure. (CP 43, 118-120) Homer Schwesinger acquired that one foot by deed from C.O. Nelson dated October 19, 1942. (CP 43, 122-124) Belle Schwesinger acquired the remainder of the property still owned by the Thompsons, of which Foxview is the westernmost portion, by deed from Mary Thompson dated May 11, 1945. (CP 43, 126-28) Belle Schwesinger then conveyed the property to Homer Schwesinger by deed dated July 18, 1945. (CP 43, 130-132)

Homer Schwesinger conveyed the property now known as Foxview to Narrows II Partnership by deed recorded on November 25, 1997. (CP 43, 134-136) As part of a name change, Narrows II Partnership conveyed the property to Brentwood Homes LLC by deed April 25, 2000. (CP 43, 138-139) As mentioned above, Brentwood Homes LLC then platted the property into Foxview.

The second amendment to the CRRs was recorded just prior to the plat. As noted above, it included a new section 3.6 to provide a 15-foot access easement over Lot 8 for access to maintain the storm drainage Tract A and wetland Tract B. The drafter of that second amendment added language to the new section 3.6 to allow the lot owners in Foxview to also use the 15-foot access easement over Lot 8 for unfettered pedestrian access to the beach. (CP 21-22) He was aware that historical deeds for the property within the plat of Foxview reserved an easement over the railroad tracks and beach to provide access to Puget Sound. *Id.* He believed that this beach access was a valuable right that would increase the marketability of the lots within Foxview. *Id.* He used the term “possible and/or potential” to describe that access because he did not want Brentwood Homes LLC to be warranting that easement, though he believed that the easement rights were valid. *Id.*

By deed recorded January 7, 2004, Columbia State Bank, the successor in interest to Brentwood Homes LLC, sold Lot 8 of Foxview to the respondent Cynthia A. Fenberg. (CP 43-44, 141) The deed expressly conveyed the property subject to the “covenants, conditions, restrictions and easements, if any, affecting title, which may appear in the public record, including those shown on any recorded plat or survey.” (CP 141) Exhibit A to the deed stated that the deed is subject to the CRRs and the amendments thereto. (CP 142-143) Fenberg proceeded to build a house on Lot 8 of Foxview. (CP 44) In that course of that construction, disputes arose with the Association over violations of the CRRs.

In a letter dated February 25, 2006, Fenberg asked the Association to approve a gate across the access easement. (CP 23) After an exchange of information regarding the proposed height, the Foxview Architectural Control Committee met and denied approval to construct the gate. (CP 23-24) Despite this denial, Fenberg proceeded to construct a gate across the access easement, and denied the Association and its members access over the road for any purpose other than maintenance of the storm water system. (CP24)

B. Procedural Background.

On August 15, 2006, the Association filed suit against Fenberg to enjoin violations of the CRRs committed by Fenberg in the course of constructing her house on Lot 8, including the construction of the gate over the access easement without permission. (CP 1) Fenberg filed her answer and a counterclaim seeking an injunction barring the Association and its members from using the access easement over Lot 8 for access to the beach. (CP 6) The Association's reply to the counterclaim included an affirmative defense that Fenberg had failed to join the individual members of the Association who are indispensable parties to a determination of their right to use the access easement over Lot 8 for access to the beach. (CP 10)

On June 28, 2007, the Association moved for summary judgment on Fenberg's counterclaim, asking for a determination that the Association and its members have an easement over Lot 8 for access to the beach, created in the recorded CRRs, and for an injunction requiring Fenberg to remove the gate which blocked the access road. (CP 12) At oral argument, the trial court asked the parties to submit additional briefing on the issue of whether an easement can be created by recorded CRRs. The parties submitted that briefing, with both concluding that an easement can

be so created. (CP 194, 201) However, the trial court denied the motion for summary judgment without explanation.

On November 9, 2007, Fenberg noted her own motion for summary judgment on the counterclaim, asking for a determination that the Association and its members have no right to use the access easement over Lot 8 for access to the beach. (CP 206) She also asked for a determination that she could maintain the access gate. Fenberg submitted no new affidavits or briefing in support of her motion. The Association submitted a supplemental declaration with more legible copies of certain documents of title. (CP 209) At hearing on December 7, 2007, the trial court orally granted Fenberg's motion for summary judgment determining that the Association and its members have no right to use the road for access to the beach, but reserved for trial the issue regarding the gate.

On December 12, 2007, Fenberg noted a hearing for presentation of the order granting summary judgment. On December 13, 2007, the Association moved for reconsideration of the trial court's oral ruling, to be heard the same date. (CP 215) On December 21, 2007, the trial court denied the motion for reconsideration. (CP 227) The Association opposed entry of the order granting summary judgment as to the members of the Association who had not been joined as parties to the counterclaim.

(RP 10-14) The trial court rejected that argument and entered the summary judgment which is the subject of this appeal. (CP 228)

The covenant violations which formed the basis of the Association's complaint against Fenberg went to trial beginning January 7, 2008. (CP 132) The trial court found that Fenberg had violated several covenants in the CRRs. (CP 231-242) The trial court's judgment required Fenberg to cure those covenant violations within specified timeframes. (CP 243-246) The judgment included a requirement that Fenberg provide the Association with the code for access through the gate across the road on Lot 8.

The trial court awarded attorney fees to the Association on the issues litigated at trial, and awarded attorney fees to Fenberg for the issue resolved on summary judgment. (CP 241) After offsetting those fees, the trial court awarded a net judgment to the Association of \$39,700.87. (CP 246)

The Association appealed the summary judgment in favor of Fenberg on the counterclaim, and the award of attorney fees to Fenberg on that counterclaim. (CP 247) Fenberg did not cross-appeal from any of the issues resolved at trial, or the judgment rendered at the conclusion of that trial.

IV. ARGUMENT

A. Individual lot owners are necessary parties to the counterclaim to take away their access rights over respondent's property, and failure to join them as parties was reversible error.

Respondent Fenberg filed a counterclaim seeking to enjoin the Association and its members from using the road over her property for access to the beach. The issue, discussed further in Section B below, was whether the recorded CCRRs for the plat of Foxview gave the lots owners the right to use a road over Fenberg's property for pedestrian access to the beach. Fenberg did not join the individual lot owners as parties.

A person who has an interest in the subject of the action which may be impaired by the disposition of that action must be made a party to the action. CR 19(a)(2).¹ The trial court violated that rule by issuing a summary judgment determining that the individual lot owners have no right to access the beach over Fenberg's property, and permanently enjoining them from that use, without joining them as parties.

¹ CR 19(a): A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. ...

CR 19 is patterned after the virtually identical federal rule. The procedure to be followed under CR 19 is described in 7 Wright & Miller, Federal Practice & Procedure, Civ.3d § 1611:

Upon a motion by defendant to dismiss because of nonjoinder, or upon its own motion, the court will first undertake to determine whether the absentee is a person needed for a just adjudication of the action under the standard set out in Rule 19(a). If that proves to be the case, the court then will ascertain whether the person is subject to service of process and whether joinder of the person will deprive the court of subject-matter jurisdiction. Just as the nonjoinder of someone deemed only “necessary” under the prior rule was not fatal, the nonjoinder of someone described in Rule 19(a) does not result in a dismissal if that person can be made a party to the action. If joinder is feasible, the court must order it; the court has no discretion at this point because of the mandatory language of the rule.

Whether Fenberg’s counterclaim is considered a declaratory judgment action or an action to quiet title, the affected lot owners are necessary parties. RCW 7.24.110 states in relevant part:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. ...

In *Treyz v. Pierce County*, 118 Wn. App. 458, 462, 76 P.3d 292 (Div. 2, 2003), *review denied*, 151 Wn.2d 1022 (2004), this Court cited that statute and then stated that the trial court lacks jurisdiction if the necessary parties are not joined.

If this counterclaim is considered a quiet title action the same result occurs. The rule is succinctly stated in 65 Am.Jur.2d, Quieting Title §68:

All parties with any claims to the property, or material interests that might be affected, are considered necessary and indispensable to an action to quiet title. A failure to join a necessary and indispensable party to such a proceeding requires dismissal and renders any order quieting title in that proceeding void ab initio.

Washington follows the same rule. In *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 79 Wn. App. 221, 228, 901 P.2d 1060 (Div. 2 1995), *affirmed*, 130 Wn. 2d 862, 929 P.2d 379 (1996), this Court stated:

All owners of an interest in property are presumably indispensable parties to an action involving that property. Failure to join an indispensable party requires the dismissal of an action to quiet title.

[citations omitted]

The same result would apply if the trial court was merely interpreting the rights of the parties under the provisions of the recorded CRRs. A covenant is an agreement or promise relating to real property created in a conveyance or other instrument. *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 690, 974 P.2d 836 (1999). It is a fundamental principle that “a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract.” *Matheson v. Gregoire*, 139 Wn. App. 624, 635, 161 P.3d 486 (Div. 2, 2007), *review*

denied, 163 Wn.2d 1020 (2008). Since Dr. Fenberg's counterclaim sought to eliminate the lot owners' beach rights arising under the CRRs, they were necessary parties to that counterclaim.

The individual lot owners are subject to service of process and their joinder would not deprive the court of jurisdiction. Since these lot owners are necessary to a just adjudication of the counterclaim, joinder of those individual lot owners is mandated by CR 19(a). The rule's use of the word "shall" leaves no room for the exercise of discretion. *Sorenson v. Dahlen*, 136 Wn. App. 844, 855, 149 P.3d 394 (Div. 2, 2006)("As a general rule, the use of the word "shall" in a statute or court rule is mandatory and operates to create a duty.")

The Association raised the joinder issue in its reply to Fenberg's counterclaim, where it stated the affirmative defense that "defendant has failed to join the members of the Association who are necessary parties to resolve issues raised by defendant's counterclaim." (CP 11) The Association again raised the issue before entry of the summary judgment. (RP 10-15) An objection grounded on failure to join a necessary party is timely if made in a motion for reconsideration. *Henry v. Town of Oakville*, 30 Wn. App. 240, 243, 633 P.2d 892 (1981), *review denied*, 96 Wn.2d 1027 (1982). The issue can even be raised for the first time on appeal.

Id.; *Treyz v. Pierce County, supra*, at 458.

Despite bringing this issue to the attention of Fenberg, she did nothing to join the other lot owners. After the Association brought the issue to the attention of the trial court, the trial court failed to order the joinder of the other lot owners, or dismiss the counterclaim. Instead, the trial court granted summary judgment on Fenberg's counterclaim.

The trial court's failure to order the joinder of the individual lot owners is reversible error. If the trial court had granted summary judgment to the Association, determining that the Association and its members had the right to cross Fenberg's property for access to the beach, the failure to join the individual lot owners would have been harmless. They would not have been prejudiced by the court's decision because their rights would not have been lost. Similarly, if the trial court had merely rendered a declaratory judgment as to the rights of the lot owners, it would not have been reversible error because that judgment would not have bound the lot owners under principles of res judicata or collateral estoppel. However, by including a permanent injunction against the lot owners, barring them from using the road over Fenberg's property for access to the beach, the trial court sought to deprive them of their property rights without joining them in the case. This is clear reversible error.

B. The Association is entitled to summary judgment determining that the Association and its members have the right to use the road over Fenberg's property for pedestrian access to the beach.

1. Standard of Review.

When reviewing an order for summary judgment, the appellate court engages in the same inquiry as the trial court. *Mountain Park Homeowners Association, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383, 1385 (1994); *Kitsap County v. Smith*, ____ Wn. App. ____, 180 P.3d 834 (Div. 2, 2008). The appellate court will affirm summary judgment if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* All facts and reasonable inferences are considered in the light most favorable to the non-moving party, and all questions of law are reviewed de novo. *Id.*

Although the reversal of an order granting summary judgment to one party does not necessarily mean that the other party's motion for summary judgment must be granted, that can be an appropriate remedy in a case where the two motions take diametrically opposite positions on the dispositive legal issue, and the material facts are not in dispute. *Weden v. San Juan County*, 135 Wn.2d 678, 710, 958 P.2d 273, 289 (1998); *Spahi v. Hughes-Northwest, Inc.*, 107 Wash. App. 763, 776-777, 27 P.3d 1233, 1239 (2001).

2. The recorded CRRs gave each lot owner in Foxview the right to use the access road over Lot 8 for access to the beach.

As discussed in the factual background above, the owners of a tract of land including the area now known as Foxview conveyed a strip of land just west of Foxview to the railroad in 1907, reserving a 20-foot crossing over that strip and adjacent tidelands. This created an easement appurtenant to the grantor's remaining property. *Cowan v. Gladder*, 120 Wash. 144, 145, 206 P. 923 (1922). This easement right passed to the lot owners in Foxview, for the reasons stated by this Court in *Green v. Lupo*, 32 Wn. App. 318, 323, 647 P.2d 51 (Div. 2, 1982):

Easements appurtenant become part of the realty which they benefit. Unless limited by the terms of creation or transfer, appurtenant easements follow possession of the dominant estate through successive transfers. The rule applies even when the dominant estate is subdivided into parcels, with each parcel continuing to enjoy the use of the servient tenement.

An easement appurtenant passes to successors-in-interest by the conveyance of the property to which it is appurtenant regardless of whether it is specifically mentioned in the instrument of transfer. *Kirk v. Tomulty*, 66 Wn. App. 231, 239, 831 P.2d 792 (1992), *review denied*, 120 Wn.2d 1009 (1992); *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 655, 145 P.3d 411 (2006), *review denied*, 161 Wn.2d 1012 (2007). Thus, all of

the owners of lots within Foxview have an easement to cross the railroad right-of-way and tidelands to Puget Sound.

The Second Amendment to the CCRRs recognized this access right and provided a means to exercise that right by giving the lot owners the right to use the road crossing Lot 8 for pedestrian access to the railroad right-of-way and beach. Section 3.6 states in relevant part:

There exists a 15 ft wide Access Easement encumbering Foxview Lot 8. This roadway . . . provides . . . possible and/or potential pedestrian access to the adjacent railroad right-of-way and the beaches and tidelands of Puget Sound, pursuant to long-standing easements and/or agreements of record.

(see Appendix B)

3. An easement for access over Fenberg's lot can be created by recorded CCRRs.

As noted above, the trial court asked both parties for additional briefing on the issue whether an easement could be created in recorded covenants. Both parties agreed that it could.

In *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 253, 84 P.3d 295 (Div. 2, 2004), this Court adopted the terminology of the *Restatement (Third) of Property: Servitudes* (hereafter *Restatement*). A servitude is a legal device that creates a right or obligation that runs with the land. *Id.* A servitude can be, among other

things, an easement, profit, or covenant. *Id.* Under section 2.1(1)(b) of the Restatement, a servitude is created if a lot is conveyed “in a general plan development or common-interest community subject to a recorded declaration of servitudes for the development or community.” According to comment *c* to that section, the function of CCRs includes the creation of easements to enjoy common areas. Using the terminology of the Restatement, an easement can be created in recorded CRRs.

Washington cases have recognized that easements can be created by covenants. In the early case of *Kalinowski v. Jacobowski*, 52 Wash. 359, 100 P. 852 (1909), the Supreme Court affirmed an injunction barring defendant from interfering with plaintiff’s use of an access easement created in an unrecorded contract. The Court rejected appellant’s argument that the contract was not an easement, stating, “The grant of a right of way does not have to be in any particular form of words.” *Id.*, at 362. The Court also quoted the following language:

It is settled law that easements may be created by agreements or covenants that one shall have a right or privilege in the estate of another, as well as by express grants. Such agreements are grants in effect.

Id., at 367.

In *Beebe v. Swerda*, 58 Wn. App. 375, 793 P.2d 442 (1990), *review denied*, 115 Wn.2d 1025 (1990), the Court stated:

No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, providing the language is sufficiently definite and certain in its terms. 28 C.J.S. *Easements* § 24 (1941); 25 Am.Jur.2d *Easements & Licenses* § 20 (1966); 2 G. Thompson, *Real Property* § 320, at 47 (1980 repl.).

A covenant or agreement may operate as a grant of an easement if, to carry out the intention of the parties thereto, it is necessary to give it that effect.

2 G. Thompson, *Real Property* § 320, at 53 (1980 repl.).

From these authorities, it is apparent that no particular words are necessary to create an easement, and an easement can be created either in covenants or by a separate deed, as long as the intent to create the easement is apparent.

4. The CCRRs clearly intended to create an easement over Fenberg's lot.

The court's goal is to ascertain and give effect to those purposes intended by the covenants. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005). In ascertaining this intent, the courts give a covenant's language its ordinary and common use and will not read a covenant so as to defeat its plain and obvious meaning. *Id.* The court will place special emphasis on arriving at an interpretation that protects the homeowners' collective interests. *Id.* If more than one reasonable

interpretation of the covenants is possible regarding an issue, the courts must favor that interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions. *Green v. Normandy Park Riviera Section Community Club, Inc.*, 137 Wn. App. 665, 683, 151 P.3d 1038 (2007), *review denied*, 163 Wn.2d 1003 (2008).

Basic rules of contract interpretation apply to the interpretation of restrictive covenants. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). It has long been the law of this state that an interpretation of a writing which gives effect to all of its provisions is to be favored over one which renders some of the language meaningless or ineffective. *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953); *Lake v. State Farm Mutual Automobile Insurance Co.*, 127 Wn. App. 114, 117, 110 P.3d 806 (Div. 2, 2005).

Application of these rules of interpretation compels a conclusion that section 3.6 of the CCRRs creates a right for the lot owners to use the road over lot 8 for pedestrian access to the beach. That is what it says, and denying the lot owners that pedestrian access would render the quoted language in section 3.6 meaningless.

The court may consider extrinsic evidence to discern the intent of the covenants, where the evidence gives meaning to words used in the

covenants. *Hollis v. Garwall, Inc.*, *supra*, at 695-696. The relevant intent is that of those establishing the covenants. *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997).

The declaration of Rob Tillotson clearly demonstrates the intent of the covenant language. (CP 21) Mr. Tillotson drafted that language. He was aware of the easement reserved for access to the beach, and wanted to provide that beach access as an amenity to the lot owners within Foxview. He specifically provided that the 15-foot access easement over Lot 8 included the right of pedestrian access to the reserved easement for beach access. He used the term “possible and/or potential” to describe that access because he did not want Brentwood Homes LLC to be warranting that easement, but he believed that the easement rights were valid.

Tillotson’s testimony was uncontradicted by Fenberg. When a pleading or affidavit is properly made and is uncontradicted, it may be taken as true for purposes of passing upon the motion for summary judgment. *Leland v. Frogge*, 71 Wn.2d 197, 200, 427 P.2d 724 (1967). If the trial court believed that his testimony was unclear, the trial court should have construed it most favorably to the Association, the non-moving party, denied the motion, and heard that testimony at trial.

The effect of the trial court's summary judgment denying use of the road for pedestrian access to the beach clearly frustrates the reasonable expectations of the lot owners in Foxview. On its face, section 3.6 indicates to those lot owners that they were buying lots with beach access. The law requires the court to place special emphasis on arriving at an interpretation that protects the homeowners' collective interests. Those collective interests are to have access to the beach, a very valuable property right.

Fenberg was not entitled to summary judgment. Summary judgment should have been granted to the Association, determining that the Association and its members have the right under the recorded CCRRs to use the access road over Lot 8 for pedestrian access to the beach. Since the material facts are not in dispute, this Court should reverse the trial court and direct entry of summary judgment in favor of the Association.

C. The Association is entitled to an award of attorney fees on the counterclaim, both in the trial court and on appeal.

Section 15.13 of the CCRRs states:

In the event of legal action, the prevailing party shall be entitled to recover actual costs and reasonable attorney fees. For the purposes of this Declaration, "legal action" shall include arbitration, lawsuit, trial, appeals, and any action, negotiations, demands, counseling or otherwise where the prevailing party has hired an attorney. It is the intent of this provision to reimburse the prevailing party for all

reasonable attorney fees and actual costs incurred in defending or enforcing the provisions of this Declaration, or the Owner's right hereunder.

(CP 78) Under this provision, the Association was awarded its attorney fees incurred at trial, and Fenberg was awarded her attorney fees incurred on the counterclaim resolved on summary judgment. The trial court offset those fees, thereby reducing the fee award to the Association by \$23,163.20.

If the summary judgment is reversed, either to award summary judgment to the Association or to require joinder of the individual lot owners, then the trial court's award of attorney fees to Fenberg must also be reversed. This would eliminate the offset of those fees, increasing the judgment to the Association in the amount of \$23,163.20. If this Court awards summary judgment to the Association on the counterclaim, then it should also remand to the trial court to award the Association its attorney fees incurred in the trial court on the counterclaim.

Under the above-quoted section of the CCRRs, the Association is also entitled to attorney fees incurred on this appeal. Whether the summary judgment is reversed on the merits or to require joinder of the individual lot owners as parties, the Association would be the prevailing party on this appeal.

V. CONCLUSION

The trial court should have ordered the joinder of the individual lot owners before deciding Fenberg's counterclaim. If the counterclaim is considered on its merits, then summary judgment should be granted in favor of the Association. This Court should reverse the summary judgment in favor of Fenberg, and either remand to the trial court to join the individual lot owners, or enter summary judgment on the counterclaim in favor of the Association.

This Court should also reverse the award of attorney fees to Fenberg on the counterclaim, and the offset of those fees against attorney fees awarded to the Association for the issues decided at trial. This Court should award attorney fees to the Association on appeal, and remand to the trial court to award the Association its attorney fees incurred on the counterclaim in that court.

RESPECTFULLY SUBMITTED this 3rd day of July, 2008.


JAMES V. HANDMACHER, WSBA #8637
Morton McGoldrick, P.S.
Attorneys for Appellant

APPENDIX A

FOXVIEW

SHEET 5 OF 5

A REPLAT OF TRACT 'B' OF SCHWESINGER'S SUNSET BEACH-FOURTH ADDITION AND A PORTION OF GOVERNMENT LOT 2 IN THE SOUTHEAST QUARTER OF SECTION 17, TOWNSHIP 20 NORTH, RANGE 2 EAST, WILLAMETTE MERIDIAN CITY OF UNIVERSITY PLACE, PIERCE COUNTY, WASHINGTON

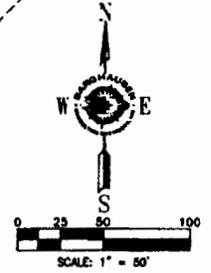
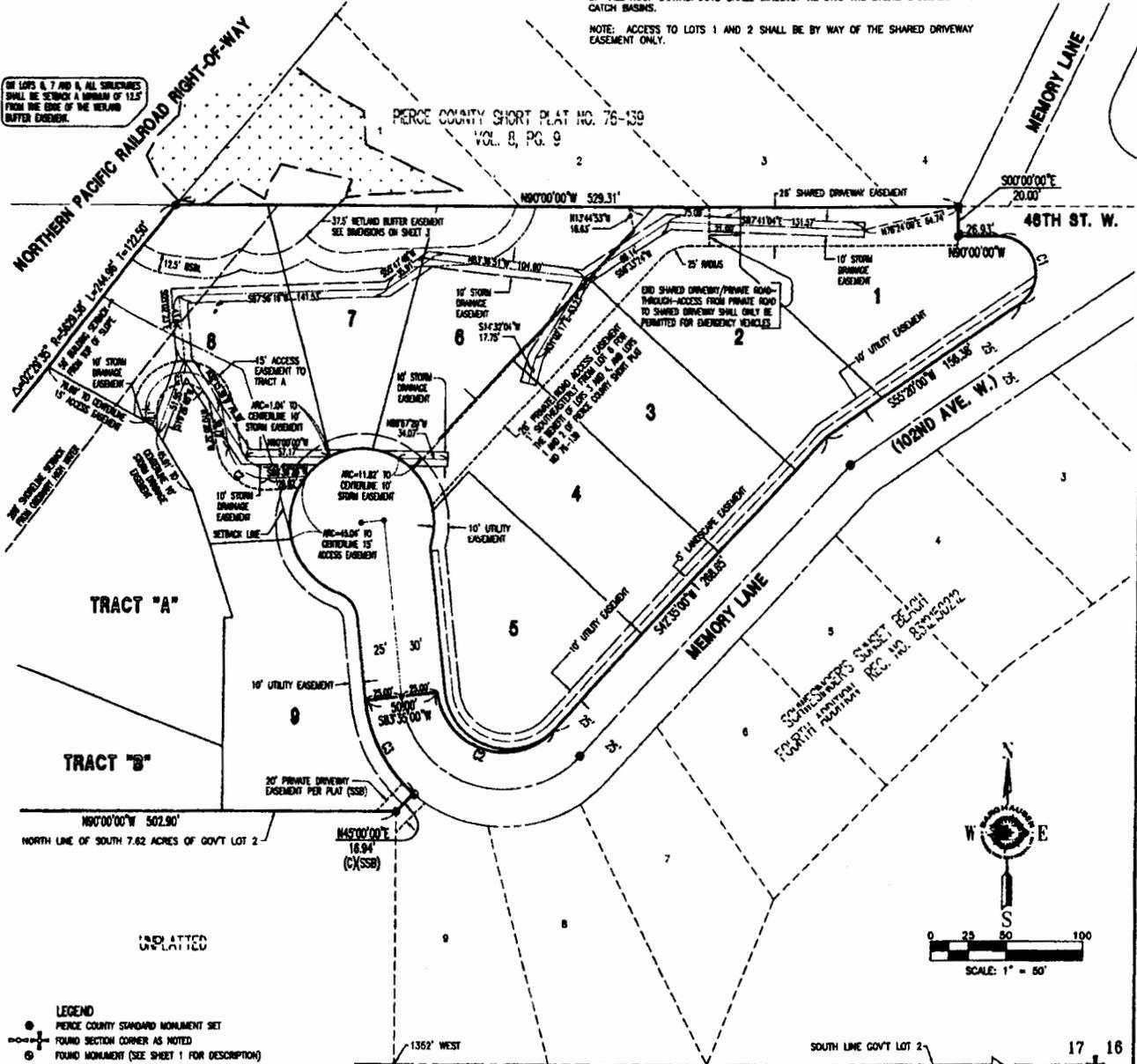
NOTES:

1. A PERPETUAL STORM DRAINAGE EASEMENT IS HEREBY GRANTED TO EACH LOT OWNER, THEIR SUCCESSORS AND ASSIGNS, AND TO THE CITY OF UNIVERSITY PLACE UNDER AND UPON THE STORM DRAINAGE EASEMENTS AND TRACT "A" SHOWN ON THIS PLAT.
2. ALL LOT OWNERS, THEIR SUCCESSORS AND ASSIGNS SHALL INDIVIDUALLY AND COLLECTIVELY BE RESPONSIBLE FOR MAINTAINING THE PLAT'S STORM DRAINAGE SYSTEM IN A FULLY FUNCTIONAL CONDITION. THE CITY OF UNIVERSITY PLACE SHALL BE RESPONSIBLE FOR MAINTAINING THE STORM DRAINAGE SYSTEM LOCATED IN THE CITY RIGHT-OF-WAY.
3. ALL ROOF DOWNSPOUTS SHALL DIRECTLY FEED INTO THE STORM DRAINAGE SYSTEM AT CATCH BASINS.

NOTE: ACCESS TO LOTS 1 AND 2 SHALL BE BY WAY OF THE SHARED DRIVEWAY EASEMENT ONLY.

ON LOTS 6, 7 AND 8, ALL STRUCTURES SHALL BE SETBACK A MINIMUM OF 12.5' FROM THE SIDE OF THE NEARAD BUFFER EASEMENT.

PIERCE COUNTY SHORT PLAT NO. 76-139
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- LEGEND**
- PIERCE COUNTY STANDARD MONUMENT SET
 - ⊕ FOUND SECTION CORNER AS NOTED
 - ⊙ FOUND MONUMENT (SEE SHEET 1 FOR DESCRIPTION)
 - ⊙ MONUMENT POSITION PER SCHWESINGER'S SUNSET BEACH-FOURTH ADDITION, REC. NO. 8312150212 (NOT FOUND)
 - PIERCE COUNTY STANDARD ROAD MONUMENT TO BE SET AS CONSTRUCTION IS COMPLETED
 - (M) DIMENSION MEASURED FOR THIS SURVEY
 - (C) DIMENSION CALCULATED FOR THIS SURVEY
 - (SSB) DIMENSION CITED ON SCHWESINGER'S SUNSET BEACH-FOURTH ADDITION, REC. NO. 8312150212

NOTE

VEGETATION WITH LANDSCAPING EASEMENTS TO BE MAINTAINED IN PERPETUITY. TREES WITH LANDSCAPING EASEMENTS MAY BE REMOVED IF CERTIFIED BY AN ARBORIST AS DISEASED OR DAMAGED. TREES MAY BE TRIMMED OR IN LIMITED NUMBERS REMOVED AS IS CONSISTENT WITH VEH PRESERVATION. ANY REMOVED TREES TO BE REPLACED ON A 2 TO 1 BASIS.

EASEMENT DETAILS AND DIMENSIONS

LINE TABLE			
LINE	BEARING	LENGTH	
L1	N00°00'00"W	7.90'	

CURVE TABLE				
CURVE	DELTA	LENGTH	RADIUS	TANGENT
C1	145°20'00"	63.41'	25.00'	80.10'
C2	131°00'00"	102.80'	45.00'	98.74'
C3	43°51'00"	72.71'	95.00'	38.24'

EASEMENTS AND RESERVATIONS

AN EASEMENT IS HEREBY RESERVED FOR AND GRANTED TO TACOMA PUBLIC UTILITIES, PIERCE COUNTY, PUGET SOUND ENERGY, ANY TELEPHONE COMPANY, ANY CABLE COMPANY, THE UNITED STATES POSTAL SERVICE AND THE CITY OF UNIVERSITY PLACE AND THEIR RESPECTIVE SUCCESSORS AND ASSIGNS, UNDER AND UPON THE EXTERIOR 10 FEET, PARALLEL WITH AND ADJOINING THE STREET FRONTAGE OF ALL LOTS AND TRACTS, IN WHICH TO INSTALL, CONSTRUCT, RENEW, OPERATE AND MAINTAIN UNDERGROUND CONDUITS, MAINS, CABLES AND WIRES WITH NECESSARY FACILITIES AND OTHER EQUIPMENT FOR THE PURPOSE OF SERVING THIS SUBDIVISION AND OTHER PROPERTY WITH ELECTRIC, TELEPHONE, TV, WATER, NATURAL GAS AND POSTAL SERVICE TOGETHER WITH THE RIGHT TO ENTER UPON THE LOTS AT ALL TIMES FOR THE PURPOSE HEREIN STATED.

THESE EASEMENTS ENTERED UPON FOR THESE PURPOSES SHALL BE RESTORED AS NEAR AS POSSIBLE TO THEIR ORIGINAL CONDITION BY THE UTILITY. NO LINES OR WIRES FOR THE TRANSMISSION OF ELECTRIC CURRENT, TELEPHONE OR CABLE TV SHALL BE PLACED OR BE PERMITTED TO BE PLACED UPON ANY LOT UNLESS THE SAME SHALL BE UNDERGROUND OR IN CONDUIT ATTACHED TO A BUILDING.

FINAL PLAT OF: FOXVIEW JOB NO. 7580



Barghausen Consulting Engineers, Inc.
 Civil Engineering, Land Planning, Surveying, Environmental Services
 18215 72nd Avenue South Kent, WA 98032
 Telephone: (425) 251-8222 Fax: (425) 251-8782

GOVT LOT 2 IN THE SE1/4, SECTION 17, T20N-R2E, W.M.
SHEET 5 OF 5

20020128501

APPENDIX B

New Section 3.6: 15 ft Access Easement Road to Storm Drainage Facility

There exists a 15 ft wide Access Easement encumbering Foxview Lot 8. This roadway is a Limited Common Element and provides limited access to the Storm Drainage Tract "A" and the on-site wetland Tract "B", together with possible and/or potential pedestrian access to the adjacent railroad right-of-way and the beaches and tidelands of Puget Sound, pursuant to long-standing easements and/or agreements of record. This access road is an expressed condition of plat approval by the City's Hearing Examiner. The maintenance and repairs of such access road shall be an obligation of the Association.

New Section 3.7: Landscaped Limited Common Areas

There exists a 5 ft wide Landscape Easement encumbering Lots 1 through 5 inclusive, which easement begins at approximately the southwest corner of Lot 5 and runs southeasterly along Lot 5 and then northeasterly along the east side of Lots 5 through 1. Additionally, there is a generally triangular parcel of City of University Place right-of-way that is contiguous to and northeast of Lot 1, thus abutting and at the corner of the intersection of 46th Street West and Memory Lane. These areas are deemed to be Limited Common Areas of the plat of Foxview and as such the maintenance thereof shall be the responsibility of the Association as though both areas were within the confines of the plat.

New Section 3.8: Tract "A" and Tract "B"

There exists a Storm Water Drainage and Water Quality Facility, annotated as Tract "A", and an on-site wetland, annotated as Tract "B", both tracts as shown on the plat map. These tracts are dedicated to the Association as Common Areas. In addition to the normal storm drainage maintenance and potential repairs required of the Association pursuant to Article VII Maintenance, Section 7.3, Tract "A" has potential view-obstructing trees, a rockery retaining wall, a portion of the access road and other features requiring maintenance by the Association from time to time. Tract "B" is a wetland required to remain in its native state; provided, however, some level of periodic maintenance may be required of the Association

DEVELOPER/DECLARANT:

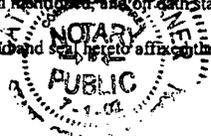
Brentwood Homes LLC

Patrick H Larkin
Patrick H Larkin, Manager

State of Washington)
County of Pierce)

On this 25th day of January 2002, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Patrick H Larkin, to me known to be a Manager of the Declarant/Developer, the entity that executed the foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of such entity for the uses and purposes therein mentioned, and of each stated that he was authorized to execute it.

Witness my hand and seal, hereto affixed, on the day and year above written.



Catherine McJannet
NOTARY PUBLIC in and for the State
of Washington, residing in Sumner
My commission expires 7-1-02

200201250112



STATE OF WASHINGTON, County of Pierce
ss: I, Pat McCarthy, Auditor, of the above
entitled county, do hereby certify that this
forgoing instrument is a true and correct copy
of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of Said County.

PAT MCCARTHY/Auditor
By: *[Signature]* Deputy
Date: JAN 14 2002

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IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION II

FOXVIEW HOMEOWNERS
ASSOCIATION, a Washington non-profit
corporation

Appellant,

v.

CYNTHIA A. FENBERG, a single
woman,

Respondent.

NO. 37563-0-II

CERTIFICATE OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
08 JUL -3 PM 1:40
STATE OF WASHINGTON
BY *cm*
IDENTITY

Elizabeth A. Moore, under penalty of perjury under the laws of the State of Washington
declares as follows:

I am an individual of at least 18 years of age, a resident of Pierce County, Washington,
and not a party to this action. On July 3, 2008 I did cause to be served by U.S. Mail a true and
correct copy of the Brief of Appellant on:

Kevin T. Steinacker
Dickson Steinacker
1401 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402

DATED this 3rd day of July 2008 at Tacoma, Washington



Elizabeth A. Moore