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I. INTRODUCTION

Appellant Gloria Holcomb (Ms. Holcomb) is a woman of relatively limited means. Ms. Holcomb bought undeveloped property in the Taree Community in Kitsap County hoping to build a home there in which she could spend her retirement years. She had a set budget with which to build her retirement residence.

Lots in the Taree Community are restricted by recorded covenants (the Taree Covenants). The Taree Covenants in part require review of any proposed structure by an architectural control committee (ACC), and permit the ACC to bring an injunctive action to prevent development that it has not approved. To protect against inaction by the ACC, the Taree Covenants stated that the ACC would be deemed to have given its approval if it failed to act on “final plans” within thirty days.

Ms. Holcomb engaged an experienced architect, Peter Brachvogel, who prepared drawings for a residence that met every County and Taree Community requirement. In the process of developing these drawings, Ms. Holcomb and Mr. Brachvogel repeatedly sought input from the ACC concerning an ambiguous height limitation stated in the Taree Covenants, but the committee and its chair, Mr. Moser, declined to shed any light on how the committee would interpret the height limitation as applied to Ms. Holcomb’s proposed residence. Accordingly, Mr. Brachvogel designed

the structure such that it would meet the height limitation regardless of whether the height was measured from grade or from the base of the first floor.

Ms. Holcomb and Mr. Brachvogel met with the committee members onsite on May 11, 2006. At that time, Mr. Brachvogel presented a set of drawings that fully complied with the Taree Covenants. The ACC, including specifically Mr. Moser, approved the drawings and asked that Mr. Brachvogel confirm that approval in writing. Mr. Brachvogel did so, and began to work on expensive detailed drawings. Ms. Holcomb obtained her building permits from the County on July 10, 2006.

Thirty-five days later, on June 15, 2006, past the date on which the Taree Covenants required the ACC to act, Mr. Moser sent a letter on behalf of the ACC. The ACC insisted that Ms. Holcomb's design had not been approved and that the thirty-day "clock" had not begun to run because Ms. Holcomb had not submitted "final plans."

Months ensued while Ms. Holcomb attempted, without success, to have Mr. Moser and the ACC reaffirm their approval of her design. The ACC expressed no desire to resolve the matter until Ms. Holcomb filed this lawsuit in late October 2006. In a letter dated December 4, 2006, the ACC approved the same drawings it had approved on May 11 with only one insignificant, handwritten change, confirming what had already been

stated to the ACC – that the design met the height limitation imposed by the Taree Covenants. By that time, however, Ms. Holcomb had lost the opportunity to build, both due to weather and finances. Her only choice was to continue her lawsuit in the hope of recovering damages that would allow her to build.

Defendants consistently argued through trial that the ACC had not given its approval, and that Ms. Holcomb had not submitted “final plans” so as to commence the running of the thirty-day clock, until December 2006. Although defendants argued that Ms. Holcomb had failed to mitigate her damages, their argument was that Ms. Holcomb should have constructed her home after the December 2006 meeting. Ms. Holcomb testified without contradiction that by December 2006 she had lost the ability to construct because of the delay. At no time did the defendants argue that Ms. Holcomb should have begun construction anytime earlier than December 2006. Specifically, defendants never argued that Ms. Holcomb should have begun construction in defiance of the ACC’s June 2006 letter purporting to revoke its approval.

After a two-day trial, Judge Costello in substance ruled that the defendants had acted wrongfully. Specifically, he found that the ACC had either approved the plans on May 11 or had failed to act within the thirty-day window required by the Taree Covenants such that Ms. Holcomb had

her approval not later than June 12, 2006. Ms. Holcomb's financing was in limbo because she truthfully advised her lender of the June 15, 2006, letter from the ACC "revoking" its approval. Assuming that her lender in theory would have closed despite a lack of resolution of the issue (an unsafe assumption), defying the ACC would have put Ms. Holcomb at serious risk. It would have invited action by the ACC to obtain an injunction, leaving Ms. Holcomb exposed to increased costs, liability to her construction lender, and the like. Judge Costello nonetheless found that Ms. Holcomb had acted "voluntarily" in failing to begin construction in defiance of the ACC's position and that the Association and the ACC were not liable for Ms. Holcomb's ensuing damages.

The defendants had never advanced the argument on which Judge Costello based his decision. Therefore it was not a focus at trial. Thus Ms. Holcomb moved for reconsideration, and specifically offered the declaration of her banker, who testified that her bank would not close the loan it had committed to based upon the ACC's June 15 letter. Judge Costello denied the motion for reconsideration.

In this appeal, Ms. Holcomb asks that the Court of Appeals reverse with instructions to enter judgment in favor of Ms. Holcomb.

II. ASSIGNMENTS OF ERROR

Assignments of Error.

1. The trial court erred by entering judgment in favor of defendants.
2. The trial court erred when it entered Finding No. B(3), that after June 12, 2006, “[t]he Plaintiff then chose not to pursue building the building, from this court’s view.”
3. The trial court erred when it entered Finding No. B(4), that “[t]here is nothing in the record that any action after June 12, 2006 was a legally cognizable cause of the building not proceeding.”
4. The trial court erred when it entered Conclusion No. 1, that “[t]here are no compensable damages based upon the ACC’s actions in this matter.”
5. The trial court erred when it entered Conclusion No. 2, that “Taree Community Association and Mr. Moser are not responsible for any of the damages argued by the Plaintiff.”
6. The trial court erred by denying Ms. Holcomb’s motion for reconsideration.

Issues Pertaining to Assignments of Error.

1. Was the trial court’s entry of judgment in favor of defendants supported by substantial evidence? (Assignment of Error No. 1)

2. Did the trial court properly apply the law in entering judgment in favor of defendants? (Assignment of Error No. 1)

3. Was the trial court's Finding No. B(3), that after June 12, 2006, "[t]he Plaintiff then chose not to pursue building the building, from this court's view," supported by substantial evidence? (Assignment of Error No. 2)

4. Was the trial court's Finding No. B(4), that "[t]here is nothing in the record that any action after June 12, 2006 was a legally cognizable cause of the building not proceeding," insofar as it is a finding of fact, supported by substantial evidence? (Assignment of Error No. 3)

5. Was the trial court's Finding No. B(4), that "[t]here is nothing in the record that any action after June 12, 2006 was a legally cognizable cause of the building not proceeding," insofar as it is a conclusion of law, a proper application of the law? (Assignment of Error No. 3)

6. Was the trial court's Conclusion No. 1, that "[t]here are no compensable damages based upon the ACC's actions in this matter," insofar as it is a finding of fact, supported by substantial evidence? (Assignment of Error No. 4)

7. Was the trial court's Conclusion No. 1, that "[t]here are no compensable damages based upon the ACC's actions in this matter,"

insofar as it is a conclusion of law, a proper application of the law?

(Assignment of Error No. 4)

8. Was the trial court's Conclusion No. 2, that "Taree Community Association and Mr. Moser are not responsible for any of the damages argued by the Plaintiff," insofar as it is a finding of fact, supported by substantial evidence? (Assignment of Error No. 5)

9. Was the trial court's Conclusion No. 2, that "Taree Community Association and Mr. Moser are not responsible for any of the damages argued by the Plaintiff," insofar as it is a conclusion of law, a proper application of the law? (Assignment of Error No. 5)

10. Did the trial court abuse its discretion when it denied Ms. Holcomb's motion for reconsideration? (Assignment of Error No. 6)

III. STATEMENT OF THE CASE

A. The Property.

Ms. Holcomb owns an undeveloped lot in Kingston, Washington, located at 24665 Taree Drive NE (the "Property"). RP 21. She bought the Property in 2003. RP 21. The Property is situated on a variably sloping parcel of land, with a view to the north of Puget Sound. RP 22. The elevation of the land at the rear (south) of the Property is approximately ten feet higher than the land at the front (north) and either side of the Property, resulting in a "bowl like" topography. RP 22. Ms. Holcomb

intended to construct a home on the Property that would become her retirement home. RP 22.

B. The Taree Covenants.

The Property is subject to protective covenants recorded for the Taree Plat (Taree Covenants). RP 23; Ex. 1. The Taree Covenants establish an architectural control committee (ACC) and require submission to and approval by the ACC of improvements within the Taree Plat:

4. No building shall be erected, placed or altered on any lot *until construction plans and specifications and plan showing location of structure* have been approved by the architect control committee as to quality of workmanship and materials, harmony of external design with existing structures and as to location with respect to topography and finish grade elevation.

....

12. No dwelling or other structure will be built on any lot of this plat with the highest point more than *17 feet above the ground level at the base of said dwelling or structure*. No T.V. antennae shall be more than 10 feet higher than the roof line of the dwelling on its respective lot.

Ex. 1. The Taree Covenants protect individual homeowners like Ms.

Holcomb by requiring prompt action:

21. The committee's approval or disapproval as required in the covenants shall be in writing. In the event the committee or its designated representatives fails to approve or disapprove *within 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 related covenants shall be deemed to have been fully complied with.

Ex. 1 (emphasis added).

Although paragraph 21 anticipates that the ACC may bring an injunctive action to enforce the terms of the Taree Covenants, paragraph 23 makes it clear that *any* Taree resident could bring such an action:

23. If the parties hereto, or any of them or their heirs, or assigns, shall violate or attempt to violate the covenants herein, it shall be lawful for any other person or persons owning real property situated in this plat to prosecute any proceedings at law or in equity against person or persons violating or attempting to violate any such covenants and to prevent him or them from so doing or to recover damages or other dues for such violation.

Ex. 1.

C. Ms. Holcomb Designs Her Retirement Home; the ACC Refuses Reasonable Requests for Guidance.

In February 2006, Ms. Holcomb retained architect Peter W. Brachvogel to prepare construction plans for a single-family home to be built on the Property. RP 26. Mr. Brachvogel is a licensed professional architect with considerable experience in residential design. RP 126-27. Ms. Holcomb gave Mr. Brachvogel a copy of the Taree Covenants so that he could incorporate their restrictions into his design. RP 27.

Paragraph 12 of the Taree Covenants limits the height of a structure to seventeen feet, with the height measured from “ground level at the base of said dwelling or structure,” but does not identify precisely which

part of the structure is its “base.” Ex. 1. Accordingly, both Ms. Holcomb and Mr. Brachvogel sought clarification from the ACC and its Chairman, Mr. Moser. RP 28-33; 134. Specifically, they asked Mr. Moser repeatedly to clarify whether the base of the proposed structure was the sub-floor, the garage floor elevation, the top of the foundation, or some other point at the base of the structure. *Id.* Mr. Moser replied on each occasion that the ACC could not, and would not, give a definite interpretation, acknowledging that the covenant condition was “ambiguous.” RP 32-33.

Lacking definitive guidance on the height issue, Mr. Brachvogel prepared a set of preliminary design plans for ACC review. RP 28-29. These preliminary plans were submitted to the ACC and Mr. Moser around April 6 or 7, 2006. RP 29. Ms. Holcomb, Mr. Brachvogel, and Mr. Brachvogel’s assistant architect, Csilla Elliott, continued to attempt to get a definitive answer from Mr. Moser on the height issue, but Mr. Moser demurred. RP 31-33. Finally, Mr. Brachvogel revised the building plans to depict the base of the structure at the first floor to match the existing grade. RP 37-38; 145-46. As a result, the seventeen-foot height requirement was met whether it was measured from the “base of the structure” or from the pre-existing, rough grade of the land. RP 37-38; 135.

D. The ACC Approves the Design with Requested Written Confirmation from Mr. Brachvogel.

On May 11, 2006, Mr. Brachvogel met on the Property with Mr. Moser and Mr. Middlehoven, another member of the ACC, to present the final plans with the revised height depiction. RP 145-48. As Mr. Brachvogel testified (the only architect to testify), the information provided on the plans on May 11 clearly indicated that the proposed structure met the seventeen-foot height limitation because the residence would preserve the existing grade. RP 142-46. Mr. Brachvogel also orally explained this to Mr. Moser at the May 11 meeting. RP 146.

At the meeting, both Mr. Moser and Mr. Middlehoven told Mr. Brachvogel that the revised plans were “approved.” RP 148. Ms. Holcomb arrived on the Property shortly thereafter, and both Mr. Moser and Mr. Middlehoven told Ms. Holcomb that the plans had been approved.¹ RP 40. Another committee member, Mr. Dennis Wodtke, arrived on the property shortly after Ms. Holcomb, and, after the details were disclosed to him, also stated his approval to Ms. Holcomb. RP 40.

Mr. Moser’s personal notes confirm the ACC’s approval. RP 234; Ex. 46. In those notes, Mr. Moser acknowledged that the height require-

¹ At that meeting, Mr. Moser told Ms. Holcomb that he had sent her a letter the day before, but that “with the submittal of the new plans” the letter was moot and should be disregarded. Accordingly, Ms. Holcomb did not open the letter until mid-July. RP 35. That letter addressed the earlier April plans.

ment was met: “[Mr. Brachvogel] presented updated progress prints dated 5 May 2006 to us showing Taree 25’ setback, *17’ height requirements were met.*” Ex. 46 (emphasis added). The Moser notes continue: “He signed and dated two sets of [drawings] & committed to send us a letter regarding any official changes to these drawings.” Ex. 46. The notes do not mention any “concerns.”

On May 12, 2006, Mr. Brachvogel sent a letter to the ACC confirming that the plans had been approved. RP 148; Ex. 3. He told the ACC that he would begin to prepare formal construction drawings. Ex. 3. Consistent with the understanding reached on the Property on May 11, he reiterated his commitment to seek approval from the ACC for any changes. Ex. 3. Mr. Moser received the letter. RP 232. He understood that detailed (and expensive) engineering drawings were being prepared based upon the approval granted on May 11. RP 232. Although Mr. Moser testified that he disputed Mr. Brachvogel’s statement that the plans had been “approved,” he did not respond to this letter or dispute its veracity at anytime before June 15, 2006. RP 232-33.

E. The ACC Purports To Deny Approval of the Approved Plans 35 Days After the May 11 Meeting.

On June 15, 2006, 35 days after the ACC had approved the revised drawings at the May 11 meeting onsite, Mr. Moser and the ACC by letter

purported to “deny” approval of the drawings. RP 42; Ex. 4. In this letter, Mr. Moser took the position that the structure’s height was to be measured from the roof peak to “existing grade” and not “rough grade,” and therefore the drawings reviewed and approved on May 11 were “meaningless.” Ex. 4. As Mr. Brachvogel testified, in this case “rough grade” and “existing grade” were in fact the same in the drawings submitted, a fact the drawings clearly disclosed. RP 162. Despite the approvals given on May 11, and the understanding (memorialized in Mr. Moser’s notes) that any *changes* would require ACC approval, Ex. 3, Mr. Moser on June 15, 2006, argued that Ms. Holcomb was required to submit “final plans” for ACC and that the drawings approved on May 11 were somehow not “final.” Ex. 4. This was the first time anyone had told Ms. Holcomb that there were any issues with her plan approval. RP 43.

Oddly, during the 35 days from the May 11 approval to the June 15 “denial,” Mr. Moser chose not to contact Mr. Brachvogel or Ms. Holcomb to tell them that the drawings were not approved. RP 232. Instead, with full knowledge that Mr. Brachvogel was proceeding in reliance on the May 11 approval, Mr. Moser was silent.

Assuming for the sake of argument that the ACC did not approve Ms. Holcomb’s drawings on May 11, ACC approval was not necessary because the ACC did not respond within 30 days. Under paragraph 21 of

the Taree Covenants, plans are deemed approved if the ACC does not respond within 30 days of submission. Ex. 1.

However, the HOA then and at trial contended that the ACC did not need to respond within 30 days because the drawings submitted on May 11 were “draft plans” and “not final.” Exs. 4, 6. The Taree Covenants do not require “final plans.” In practice, the ACC had not required “final plans.” RP 212-28; Ex. 45. Records introduced at trial showed that the ACC had approved designs based upon handwritten sketches that were not to scale (2004 Baker Application; 2003 Page Application); plans clearly marked “Draft – Not for Construction” (2003 Middlehoven Application); and plans stamped “Not for Building Permit” (1993 Sliger Application). Ex. 45. Indeed, the “Middlehoven Application” was submitted by the very same Paul Middlehoven who, as a member of the ACC, claimed that nothing less than a building permit set would satisfy the ACC. RP 213-15.

F. Ms. Holcomb’s Attempts To Reach Agreement Allowing Her To Build Are Rebuffed.

On or about July 10, 2006, Kitsap County issued Ms. Holcomb’s building permits. RP 34. However, as of June 15, 2006, the HOA and ACC unambiguously took the position that Ms. Holcomb did not have “approval,” and that the thirty-day “clock” provided in the Taree

Covenants had not begun to run because the plans submitted on May 11 were allegedly “not final,” despite the ACC’s prior approvals based upon equally “not final” plans. Exs. 4, 6. Mr. Moser insisted that only plans submitted to the County for permit approval could be considered “final plans,” despite the fact that an ACC denial would then force a resident to change already-submitted plans. RP 211. Indeed, the HOA steadfastly argued that Ms. Holcomb did not have approval and was not excused from obtaining actual approval until December 2006. CP 496 (trial brief); RP 13 (opening statement); Exs. 4 (June 15, 2006 letter from Mr. Moser), 6 (July 12, 2006 letter from Mr. Moser); RP 212, 232, 276, 285-86 (Moser testimony that no approval was given until December 2006); RP 301-05 (Wodtke testimony that no approval was given until December 2006); RP 315, 318 (Middlehoven testimony that no approval was given until December 2006); RP 50 (Holcomb testimony that “They were standing on the position that they were denying my plans.”).

As noted above, the Taree Covenants allow any member of Taree to sue to enforce their terms. Ms. Holcomb had a loan commitment, a workable budget, and a design approved by the County that complied with the Taree Covenants. As she put it, “I should have been able to begin construction.” RP 112. However, Ms. Holcomb reasonably felt that she could not proceed with construction in defiance of the ACC’s position and

instead attempted to persuade the ACC that her residence complied with the height limitation, and that the ACC should re-approve her design. RP 112 (“I didn’t think I could proceed without problems.”). Moreover, her lender refused to close her construction loan because of the ACC’s objection.² CP 650-52. At no time did the defendants argue or even suggest that Ms. Holcomb could or should have ignored the ACC’s objection and simply gone ahead with construction and no evidence was introduced at trial that Ms. Holcomb could have done so.

On June 28, 2006, Ms. Holcomb sent a letter to Mr. Moser stating that the ACC had already approved her plans on May 11, 2006; that she had proceeded with her permit application based upon this approval; but offering to respond to “any reasonable and sensible questions regarding the drawings.” Ex. 5. Mr. Moser responded by letter on July 12, 2006, by reference to an unadopted “procedure”³ repeating what he had said in the June 15 denial – that Ms. Holcomb did not have approval, and that the 30-day clock had not begun to run because “final plans” had not been

² The Declaration of Larry Elfendahl was submitted in support of Ms. Holcomb’s motion for new trial or reconsideration. Mr. Elfendahl’s testimony was not introduced at trial because the ACC never argued that Ms. Holcomb could or should commence construction without first obtaining ACC approval, which defendants argued did not occur until December 4, 2006. Ms. Holcomb’s motion is addressed below. That the defendants did not argue that Ms. Holcomb should have defied the ACC is not particularly surprising; in discovery, Ms. Holcomb demonstrated that her lender would not close while the dispute remained unresolved.

³ The “procedure” was never formally adopted. RP 36; RP 208 (covenants never amended to adopt procedure; never adopted by Association).

submitted:

As stated in step 1 of the Taree ACC Submittal Procedure . . . , *you are required to submit a set of final drawings identical to what you submitted to Kitsap County*. For obvious reasons, the ACC established this *requirement* as a matter of policy many years ago and it applies to all Taree lot owners. This is a *requirement* The ACC awaits the submittal of your final drawings.

Ex. 6.

Ms. Holcomb then consulted legal counsel. On at least three occasions, Ms. Holcomb's attorney tried to resolve the impasse, but the ACC did not respond. RP 52, 54. In early August 2006, Ms. Holcomb approached Dan Maloney, the president of the Association, with plans in hand, and offered to pay for another architect to review them to prove that she had already provided all information the ACC needed to evaluate whether the structure, as proposed, met the seventeen-foot height limitation. RP 53. Mr. Maloney rebuffed her and told her that it was "in the hands of the lawyers." RP 54. In light of this refusal to respond, Ms. Holcomb had no choice but to file this action on October 27, 2006, seeking declaratory relief and damages. RP 54.

G. The ACC Finally Agrees, But Ms. Holcomb Loses the Opportunity to Build Because of the Delay.

The filing of the complaint resulted in a meeting on December 1, 2006, involving the ACC, Ms. Holcomb, and Mr. Brachvogel. RP 55. Mr. Brachvogel again explained that the May 11 plans demonstrated that

the height limitation was met. RP 151-54. At the ACC's insistence, he wrote on the Holcomb plans "rough grade equals existing grade" – a fact that was already apparent on the May 11 plans. RP 151-54. The ACC then approved Ms. Holcomb's building plans – the plans dated May 5, 2006, and approved on May 11, 2006, seven months earlier. Although these were not the "permit set" reviewed and approved by Kitsap County, they were identical in all material respects. RP 155-60. The only difference was the addition of Mr. Brachvogel's handwritten notation – which Mr. Brachvogel testified was unnecessary given what was already reflected in the drawings.

The actions of the ACC on December 4, 2006, left Ms. Holcomb with a re-approved set of plans, but no ability to build. First, the delay caused by the ACC's actions pushed her outside of the building season. RP 56-57. This fact was uncontested at trial. Her septic permit allowed her to construct only during the summer construction season. RP 58. This fact was also uncontested. Further, the weather and site conditions – her lot is particularly wet in winter – precluded bringing heavy equipment onsite. RP 58. In fact, when her neighbor, ACC member Peter Middlehoven, brought heavy equipment onto his site to build a driveway in similar conditions, the heavy equipment was stuck for several days. RP 58. The defendants presented no testimony that Ms. Holcomb could have

proceeded with construction in December 2006.

Second, Ms. Holcomb's budget for this project was constrained by her financial condition. She could have constructed but for the ACC's rescission of its approval. RP 55. However, by the next construction season (summer of 2007), construction costs had gone "extremely high" – rising anywhere from eight to fourteen percent. RP 56. This added anywhere from \$26,000 to \$45,500 to the cost of construction, budgeted at \$325,000. She had also incurred additional, unbudgeted costs, including \$8,000 in architects fees and attorneys fees of \$14,000. RP 56. She had also incurred significant unbudgeted expense in the form of additional rent of \$900 to \$1,150 per month. RP 62. At trial, Ms. Holcomb testified that she would no longer qualify for a construction loan because the ACC's actions had caused her to incur costs that depleted her cash reserves. RP 71-72. She could no longer afford to build the structure initially approved on May 11 and re-approved on December 4. None of these facts were disputed at trial.

The loss of Ms. Holcomb's ability to construct has damaged her in other ways. She spent \$37,000 in architectural fees for a design she can no longer construct. RP 59. The septic design she paid \$3,000 for is not useable. RP 59. Permit fees paid to Kitsap County in the amount of \$4,600 are now lost. RP 60. Although she should have been in her Taree

residence by Christmas 2006, Ms. Holcomb has had to rent elsewhere, incurring nonrecoverable and non-tax-deductible rental obligations of \$12,000 up to trial she would have otherwise avoided. RP 64. She bought fixtures she was unable to use, and unable to store; she sold them at a loss of \$1,800. RP 65. She has had to rent storage because she could not move into her Taree residence at \$45 per month. RP 66. These facts were uncontested.

Denied the ability to develop at Taree, Ms. Holcomb testified that she would have to sell, incurring \$25,000 to sell her Taree lot and to purchase another. RP 67. She incurred additional holding costs in the form of real estate taxes at \$1,000 per year. RP 67. Even if she had been in a position financially to build, she would have had to pay at least \$18,000 more in interest because of higher rates because she had lost her loan. RP 71-72, 74. Finally, she lost the opportunity to improve and sell her lot at a profit. RP 70. Again, these facts were uncontested.

H. Judge Costello's Decision.

This matter was tried before Judge Costello on May 13 and 14, 2008. On June 13, 2008, Judge Costello rendered his oral opinion and entered findings, conclusions, and judgment on July 18, 2008. CP 629-32.

In his findings and conclusions, Judge Costello first found that Ms. Holcomb had in fact obtained approval of her residence long before the

ACC's grudging action on December 4, 2006, either because the ACC approved them in fact or failed to take action within the time required by the Taree Covenants:

1. The Plaintiff's plans were submitted and considered by the ACC, and either were agreed to by the ACC or there was no decision made in writing, within 30 days, which was required by the protective covenants of the Plat of Taree.
2. The Plaintiff had the approval of the ACC by June 12, 2006.

CP 631. In other words, Judge Costello rejected the entire thrust of defendants' argument preceding and at trial – that no “final plans” were submitted until December 1, and no “approval” was given until December 4. Given that Ms. Holcomb “had the approval of the ACC by June 12, 2006,” the ACC's subsequent denial and demands for “final plans” before approving Ms. Holcomb's residence were wrongful and unreasonable.

Inexplicably, Judge Costello then found that Ms. Holcomb suffered no cognizable damages as a result:

3. The Plaintiff then chose not to pursue building the building, from this court's view.
4. There is nothing in the record that any action after June 12, 2006 was a legally cognizable cause of the building not proceeding.

CP 631. At no time did defendants argue that Ms. Holcomb could or should have ignored the ACC's pronouncements and simply proceeded with construction, and no facts were presented at trial supporting these

findings. To the contrary, the defendants consistently argued that ACC approval was necessary and that Ms. Holcomb did not receive that approval until December 4, 2008. Although the defendants argued that Ms. Holcomb had failed to mitigate her damages, they argued that she had failed to mitigate her damages by failing to construct after she had obtained approval in December 2006. CP 506.

I. Ms. Holcomb's Motion for New Trial/Reconsideration.

Ms. Holcomb timely filed a motion for new trial or reconsideration. CP 641-49. In that motion, she argued that Judge Costello should reconsider or grant a new trial on any of the following grounds: (a) surprise; (b) there was no evidence or reasonable inference from the evidence to justify the verdict or the decision; and (c) that substantial justice had not been done. Judge Costello denied the motion without requesting a response from defendants on August 19, 2008. CP 653-54. The merits of that decision are discussed below.

J. Notice of Appeal.

Appellant timely appealed by Notice of Appeal filed and served on August 19, 2008. CP 655-70.

IV. SUMMARY OF ARGUMENT

Under Washington law, the authority of an architectural review committee is limited. Here, the ACC was required to act reasonably and

within the time limits imposed by the Taree Covenants.

Judge Costello's finding that the ACC approved Ms. Holcomb's plans not later than June 12, 2006, either because approval was in fact given or because the ACC failed to act within thirty days of May 11, 2008, is proper and supported by substantial evidence. Given that approval, the ACC's and Mr. Moser's actions in revoking and refusing to reaffirm approval until December 4, 2008, were manifestly unreasonable.

When an architectural review committee acts unreasonably, money damages are recoverable. The good or bad faith of the committee members and of the Association is irrelevant. Delay damages of the kind sought by Ms. Holcomb here were in fact awarded in *Riss v. Angel*, 131 Wn.2d 612, 627, 934 P.2d 669 (1997). The Association is liable for the actions of its officers and agents within the scope of their authority, as here. Mr. Moser is individually liable as well given that he actively participated in the actions that caused Ms. Holcomb harm.

With respect to damages, Judge Costello ruled on a case not tried by the parties. The defendants never argued that Ms. Holcomb was obligated to begin construction in defiance of the ACC; they steadfastly maintained that Ms. Holcomb had no right to proceed until the ACC granted approval on December 4, 2006. In ruling that Ms. Holcomb "chose" not to construct and thereby caused her own harm, Judge Costello

committed error. The findings are not supported by substantial evidence. In fact, the only evidence before Judge Costello was that Ms. Holcomb could not proceed until the dispute with the ACC was resolved. The doctrine of avoidable consequences did not require Ms. Holcomb to defy the ACC.

The damages sought by Ms. Holcomb are of the sort recoverable in an action for breach of a restrictive covenant, and there is no substantial evidence supporting Judge Costello's finding that they were self-inflicted.

Finally, the trial court erred in not granting a new trial or reconsideration.

V. ARGUMENT

A. Standard of Review.

A trial court's findings of fact are reviewed to determine if they are supported by "substantial evidence." "Substantial evidence" exists "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1983). A finding of fact that is not supported by any evidence must be rejected. *See, e.g., Pardee v. Jolly*, 163 Wn.2d 558, 572, 182 P.3d 967 (2008); *Netversant Wireless Servs. v. Dept. of Labor & Indus.*, 133 Wn. App. 813, 827, 138 P.3d 161 (2006).

A trial court's conclusions of law are subject to de novo review. *Mack v. Armstrong*, 147 Wn. App. 522, 529, 195 P.3d 1027 (2008) (“We review conclusions of law de novo, whether or not the trial court styles them conclusions of law.”).

The denial of a motion for new trial or reconsideration is reviewed for abuse of discretion. *August v. U.S. Bancorp*, 146 Wn. App. 328, 339, 190 P.3d 86 (2008) (reversing denial of motion for reconsideration).

B. An Architectural Control Committee's Authority Is Limited (Issues Nos. 1, 2, 4-9).

The current state of the law governing an architectural control committee's exercise of its design review authority is succinctly stated:

Except to the extent provided by statute or authorized by the declaration [in this case the Taree Covenants], a common-interest community may not impose restrictions on the structures or landscaping that may be placed upon individually owned property, or on the design, materials, colors, or plants that may be used.

RESTATEMENT (THIRD) OF SERVITUDES § 6.9 (year). In other words, the ACC was not free to impose limits on Ms. Holcomb's proposal that were not contained in the Taree Covenants.

On the merits, a decision under a consent to construction covenant must be “reasonable.” *Riss v. Angel*, 131 Wn.2d 612, 627, 934 P.2d 669 (1997). Among other things, Washington courts have held decisions to be unreasonable where there was no evidence in the record as to the design of

structures other than the applicant's residence and the record showed merely conclusory statements of the chairman of an architectural control committee. *Id.*, citing *Oakbrook Civic Ass'n, Inc. v. Sonnier*, 481 So.2d 1008 (La. 1986). Under *Riss*, whether actions are undertaken in good or bad faith is irrelevant. *Riss*, 131 Wn.2d at 627 ("The homeowners argue they acted in good faith and therefore cannot be held to have violated the covenants. The trial court did not enter findings or conclusions on the good or bad faith of the homeowners. Regardless of the good or bad faith of the homeowners, however, a decision under a consent to construction covenant must be reasonable.").

The ACC was obligated to act within the time limitations established by the covenants at issue. Where a design review covenant provides, as here, that a committee must act within a specific period of time following receipt of plans, a failure to act bars any subsequent objection. *Kairez v. Mariner's Cove Beach Club*, 93 Wn. App. 886, 970 P.2d 825 (1999). In *Kairez*, the Court of Appeals reversed summary judgment in favor of an association, holding that a covenant similar to that present here – requiring action within a certain time – barred an association's right to compel removal of a deck when it failed to act within the time required.

The granting then subsequent rescission of approval of Ms. Holcomb's plans and the failure of the ACC to respond to the submission

of May 11, 2006, were manifestly unreasonable.

C. Judge Costello Properly Found That the ACC Had Approved Ms. Holcomb's Plans in Fact (Issues Nos. 1, 2, 7-9).

Judge Costello found that the ACC had either approved Ms. Holcomb's plans in fact, or had failed to act upon the plans presented on May 11 within the thirty days required by the Taree Covenants. CP CP 631. That finding is supported by substantial evidence.

The evidence adduced at trial concerning ACC approval of Ms. Holcomb's plans is stated in detail above. That evidence will not be repeated here, except to note that the evidence included the testimony of Ms. Holcomb and Mr. Brachvogel, Mr. Moser's notes, Mr. Brachvogel's May 12 letter confirming the approval, and the ACC's failure to take issue with Mr. Brachvogel's letter for at least 35 days. It is necessary, however, to discuss two additional issues.

At trial, defendants argued that the Taree Covenants required that ACC approvals be "in writing." The Taree Covenants do not themselves state what form this "writing" must take. As Ms. Holcomb and Mr. Brachvogel testified, the ACC through its membership orally approved the plans reviewed on May 11, 2006. Mr. Moser asked Mr. Brachvogel to confirm this by letter, along with Mr. Brachvogel's commitment to submit any changes for ACC review. Under these circumstances, the "writing"

requirement was met. *See, e.g., Lewis v. City of Marceline*, 934 S.W.2d 280 (Mo. 1996) (statute required notice of claim to be in writing; where claimant gave oral statement to city clerk, who then prepared notice of claim form, held that claimant need not be person who actually reduces notice of claim to writing); *Talley v. Paul Allison Grain Co.*, 369 S.W.2d 439 (1963) (buyer's written confirmation of oral contract denied by seller constituted "contract in writing").

Furthermore, the ACC was estopped to rely upon the "writing" requirement under these facts. The doctrine of equitable estoppel prevents a party from making a later claim where (1) one party has made an admission, statement, or act inconsistent with the later claim, (2) another party reasonably relies on the admission, statement, or act, and (3) the relying party would be injured if the first party is allowed to contradict or repudiate the admission, statement, or act. *Brevick v. City of Seattle*, 139 Wn. App. 373, 160 P.3d 648 (2007). Here, the ACC orally approved the drawings reviewed on May 11, 2006, knowing that Ms. Holcomb and Mr. Brachvogel would be proceeding with the preparation of expensive construction drawings in reliance on that approval. The ACC asked Mr. Brachvogel to confirm the discussion in writing. He did so. Ms. Holcomb in fact relied upon this approval to her detriment.

D. Judge Costello Properly Found That the ACC Had Approved Ms. Holcomb's Plans by Failing to Act Within Thirty Days of Receipt of Ms. Holcomb's Plans (Issues Nos. 1, 2, 4-9).

In the alternative, Judge Costello found that the ACC by virtue of its failure to act within thirty days of May 11, 2006 – the date on which Mr. Brachvogel met with the ACC onsite and provided a copy of Ms. Holcomb's plans. That finding is supported by substantial evidence.

It was undisputed at trial that Ms. Holcomb and Mr. Brachvogel submitted plans to the ACC not later than May 11, 2006. Assuming for the sake of argument that the approval granted by the ACC on that date and memorialized in Mr. Brachvogel's letter a day later was in some manner ineffective, the ACC was barred from denying approval because it failed to act within the thirty days allowed by the Taree Covenants.

As noted above, the Taree Covenants required the ACC to act within thirty days. Paragraph 21 of the Taree Covenants states:

21. The committee's approval or disapproval as required in the covenants shall be in writing. In the event the committee or its designated representatives fails to approve or disapprove *within 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 related covenants shall be deemed to have been fully complied with.*

Ex. 1.

Kairez v. Mariner's Cove Beach Club, 93 Wn. App. 886, 970 P.2d 825 (1999), discussed above, is dispositive. The ACC did not act within the thirty days required by the Taree Covenants.

The Association argued that the plans the ACC approved on May 11 were not “final” plans, such that it was not required to approve or reject within thirty days of May 11. At trial, defendants argued that the ACC was required to act only upon plans submitted to Kitsap County for permit approval. RP 211, 229. However, the Taree Covenants do not require submission of “final” plans and, on the specific issue of height, do not require that height be measured from either “existing” or “preconstruction” grade. Furthermore, the ACC historically had acted upon plans that were not “final” in this sense. As noted above, the ACC had approved designs based upon handwritten sketches that were not to scale (2004 Baker Application; 2003 Page Application); plans clearly marked “Draft – Not for Construction” (2003 Middlehoven Application); and plans stamped “Not for Building Permit” (1993 Sliger Application). Ex. 45.

The actions of the ACC were relevant to the interpretation of the Taree Covenants as not requiring “permit” plans before review under the principles of *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) (interpreting a contract in light of subsequent performance), as are the statements of the ACC and Mr. Moser that Ms. Holcomb would have to

submit “changes” to the plans for further review. The defendants’ argument that the May 11 plans were not “final” is belied by the ACC’s request that Mr. Brachvogel submit any “changes” for approval. There was no reason to require submission of “changes” if the balance of the plans were not considered “final.”

In short, if the defendants are to be believed that the plans were not “approved” on May 11, the Association nonetheless waived any approval requirement by failing to act within the thirty days required by the Taree Covenants, and Judge Costello so found. There is substantial evidence to support that finding.

E. Defendants Are Liable for the ACC’s Unreasonable Actions (Issues Nos. 1, 2, 4-9).

Judge Costello’s findings of fact and conclusions of law are cryptic. The sense of those findings and conclusions, however, is that (a) Ms. Holcomb’s plans were approved no later than June 12, 2006; and (b) Ms. Holcomb’s subsequent failure to proceed immediately with construction is the legal cause of any damages she suffered. Judge Costello did not rule that the Association and ACC Chairman Mr. Moser could not be liable in theory or that, absent Ms. Holcomb’s alleged inaction, they would not be liable in fact. Had he so found, he clearly would have erred.

1. Defendants May Be Liable for the ACC's Unreasonable Actions (Issues Nos. 1, 2, 4-9).

Without question, money damages may be awarded in a case such as this where restrictive covenants have been violated. Such damages were in fact awarded in *Riss v. Angel*, 131 Wn.2d 612, 627, 934 P.2d 669 (1997). In *Riss*, the trial court awarded unspecified “delay damages” when a homeowners association unreasonably denied approval to a homeowner’s proposed design. The Washington Supreme Court left the damages award intact, but because the case involved an unincorporated association, the Court remanded for further findings as to those homeowners who actually participated in the adverse action.

Here, the Taree Community Association is a corporation. Ex. 10; RP 272. The ACC is a committee of the Association; the Association’s president, board, and membership select the members who serve on the ACC. RP 249. At no time has the Association argued that the actions of the ACC and its individual members with respect to Ms. Holcomb’s residence were undertaken in anything other than their official capacity. Accordingly, the Association is liable for the actions of the ACC, and the issue that led to a remand in *Riss* is not present.

With regard to Mr. Moser’s individual liability, the *Riss* Court held individuals accountable jointly and severally. *Riss v. Angel*, 131 Wn.2d

612, 632, 934 P.2d 669 (1997). Under *respondeat superior* principles, the *Riss* Court found considerable authority for members of a non-business nonprofit unincorporated association being held liable on the contracts of the association when the member assented to or ratified the contract, and liable for torts if the member participated in or ratified the action resulting in liability. *Id.*, 131 Wn.2d at 634; *citing generally* 6 AM. JUR. 2D *Associations and Clubs* §§ 43-48 (1963). Drawing from those analogies, the *Riss* Court concluded that under a consent to construction covenant, as in the instant case, joint and several liability may be imposed on those members who violated the covenants by participating in or ratifying an unreasonable or arbitrary decision to reject a proposed residence. *Riss*, 131 Wn.2d at 636. For the same reasons, Mr. Moser is liable here.

Defendants argued at trial that Mr. Moser could not be held individually liable on four technical grounds. First, defendants argued that Mr. Moser's actions were protected by the business judgment rule. Second, defendants argued that RCW 4.24.264 shielded Mr. Moser from liability unless his actions constituted gross negligence. Third, defendants argued that Mr. Moser could claim RCW 4.24.670 as a defense as a volunteer of a nonprofit corporation. Fourth, defendants argued that RCW 24.03.127 shielded Mr. Moser from liability. Judge Costello made no findings or conclusions with respect to Mr. Moser's liability that

addressed any of these defenses. As noted above, the thrust of Judge Costello's ruling was that Ms. Holcomb's injury was self-inflicted, so no finding adverse to Ms. Holcomb on these issues should be inferred.

The defendants cited two cases for the proposition that Mr. Moser's actions were protected by the business judgment rule – *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 167 P.3d 610 (2007); and *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 64 P.3d 1 (2003). Neither of these cases has any application here. In each of those cases, controlling shareholders of for-profit corporations were accused of over-reaching. In any event, Judge Costello implicitly found that Mr. Moser's actions in retracting the ACC's May 11 approval (or in failing to respond within the 30 days required by the Taree Covenants) were unreasonable. Certainly Judge Costello did not enter any finding that Mr. Moser's actions were reasonable.

RCW 4.24.264 also does not shield Mr. Moser from liability.

Defendants cited only the first paragraph of the statute:

[A] member of the board of directors or an officer of any nonprofit corporation is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes gross negligence.

CP 504. However, defendants failed to cite the second paragraph of the statute:

Nothing in this section shall limit or modify in any manner the duties or liabilities of a director or officer of a corporation to the corporation or the corporation's members.

RCW 4.24.264(2). It is undisputed that as an owner of property in Taree she was a member of the Association. RP 205. Accordingly, the statute imposes no limitations on Mr. Moser's liability.

Defendants also claimed that RCW 4.24.670 immunized Mr. Moser as a volunteer of a nonprofit corporation. CP 505. However, as those portions of the statute left unquoted by defendants state, the immunity conferred does not apply unless:

(c) The harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; ... and

...

(e) The nonprofit organization carries public liability insurance covering the organization's liability for harm caused to others for which it is directly or vicariously liable.

Taking these clauses in reverse order, there was no evidence at trial that the Association was insured as required. Although defendants offered an insurance policy, Ex. 30, the insurer in fact denied coverage under a policy exclusion, Ex. 29. RCW 4.24.670 does not apply. Even if proper insurance had been obtained, however, Mr. Moser would still be liable for "gross negligence ... or a conscious, flagrant indifference to the rights ...

of the individual harmed.”

Finally, RCW 24.03.127 does not shield Mr. Moser. The statute defines the duties of a director of a Washington nonprofit corporation. It requires that such a director act in “good faith,” but the only potential limit on such a director’s liability is with respect to the director’s reliance on the information or advice offered by a small sphere of personnel:

In performing the duties of a director, *a director shall be entitled to rely on information, opinions, reports, or statements*, including financial statements and other financial data, in each case *prepared or presented by*:

(1) One or more *officers or employees of the corporation* whom the director believes to be reliable and competent in the matter presented;

(2) Counsel, public accountants, or other *persons as to matters which the director believes to be within such person's professional or expert competence*;
or

(3) *A committee of the board upon which the director does not serve,*

At no time has Mr. Moser or the Association argued that Mr. Moser was acting in reliance upon information or opinions from any such individuals or committees. There is certainly no evidence that he did so. The statute does not apply.

2. Defendants in Fact Acted Unreasonably And Are Liable (Issues Nos. 1, 2, 4-9).

Judge Costello did not find that the defendants acted “reasonably” and no such finding may be inferred. There was ample evidence at trial

that Mr. Moser, an officer and agent of the Association, failed to act reasonably and in good faith. Mr. Moser went out of his way to make plan approval *more* difficult and time consuming. For instance, he refused on many occasions to provide an interpretation of the height limitation stated in the Taree Covenants. He personally gave approval on behalf of the ACC to Ms. Holcomb and her architect, Mr. Brachvogel, and then signed a letter purporting to rescind that approval. As noted above, Judge Costello's finding that the ACC had approved Ms. Holcomb's plans is supported by substantial evidence. Given that approval, Mr. Moser's rescission was manifestly unreasonable and in bad faith.

He deliberately neglected the 30-day response requirement in the Taree Covenants. He also purported to base his denial upon not receiving a "final plan," when no such requirement is found in the Taree Covenants and all evidence showed that the ACC had approved proposals on far less.

Mr. Moser determined, without any authority, that the level at the base of the structure required a "pre-existing" rather than a "rough" grade designation, even though Ms. Holcomb's drawings clearly reflected there was no material difference between the two. Although a simple arbitrary, face-saving notation was ultimately sufficient to garner ACC approval, Mr. Moser refused to discuss that simple notation until after this litigation was filed, and nearly seven months after the plan that was ultimately

approved had been submitted to the ACC. Of only four design review applications he considered, Mr. Moser allowed three homes to proceed that greatly exceeded the Taree Covenants' height restriction. RP 207.

Under these circumstances, under *Riss*, both the Association and Mr. Moser are liable.

F. Ms. Holcomb in Fact Suffered Legally-Cognizable Damages (Issues Nos. 1-9).

The crux of Judge Costello's ruling is that Ms. Holcomb "chose not to pursue building the building, from this court's view," and that "[t]here is nothing in the record that any action after June 12, 2006 was a legally cognizable cause of the building not proceeding." In so holding, Judge Costello committed reversible error. There is no evidence that Ms. Holcomb could or should have defied the ACC and begun construction shortly after June 12, 2006, and so no substantial evidence supporting Judge Costello's findings.

1. All Parties Tried This Case on the Basis That Any Failure to Mitigate Arose from Ms. Holcomb's Not Proceeding with Construction After Her December 4, 2006, Approval – Not Before (Issues Nos. 1-9).

The paradox is that although Judge Costello believed that approval was given not later than June 12, 2006, the defendants did not. The clearest evidence of this is Mr. Moser's letter of July 12, 2006, stating that

approval had not been given. At no time before December 4, 2006, did defendants concede that Ms. Holcomb at last had her approval. Ms. Holcomb testified without contradiction that she tried several avenues, including contacting the Association president and retaining counsel, to get the ACC to acknowledge its approval, but to no avail.

The Association defended this case on the basis that it had the right to deny approval to Ms. Holcomb's plans because Ms. Holcomb allegedly had never submitted "final" plans for review. Defendants at all times were adamant that Ms. Holcomb could not construct until approval was given and that no approval was given until December 4, 2006. With respect to mitigation of damages, defendants focused on Ms. Holcomb's post-December 2006 failure to construct:

Ms. Holcomb has made no attempt whatsoever to mitigate her damages in this matter. She received written approval to construct her residence in December 2006, and to date, has made no effort to do so.

CP 506.

In December of '06, plaintiff had approval from the county, had approval from ACC. It's 18 months since that date, and Your Honor, no construction has started yet.

RP 17. No witness testified that Ms. Holcomb could or should have begun construction in defiance of the ACC's insistence that it had not yet approved her plans. Ms. Holcomb was the only witness to testify on the issue, and she testified that she could not proceed with construction

because of the ACC's stance. RP 112. In support of her motion for new trial or reconsideration, she offered the declaration of her banker, who testified that the bank would not close its loan to Ms. Holcomb following Mr. Moser's June 15, 2006, letter until the dispute was resolved. There was no evidence that "choice" was involved.

2. Ms. Holcomb Was Not Required by the Doctrine of Avoidable Consequences to Test the Association's Resolve by Commencing Construction After June 12, 2006 (Issues Nos. 1-9).

It is true that the law does not permit a party to recover in a breach of contract action those damages which he could have avoided without undue risk, burden, or humiliation. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 142 P.3d 209 (2006); WPI 303.06; RESTATEMENT (SECOND) OF CONTRACTS § 350.

However, one who has been injured by another's wrongdoing is granted wide latitude to choose the means by which damages from such wrongdoing will be minimized. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 142 P.3d 209 (2006). The wronged party need not act if the cost of avoidance would involve unreasonable actions. *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 890 P.2d 480 (1995); CALAMARI & PERILLO, CONTRACTS § 14-15 at 585 (5th ed. 2003). He need not commit a wrong, as by breaching other contracts,

in order to minimize damages. CALAMARI & PERILLO, CONTRACTS § 14-15 at 585 (5th ed. 2003).

Of particular significance in this case, when confronted with the threat of an injunction for violation of a restrictive covenant, a property owner who chooses to proceed nonetheless faces substantial risk that his or her actions are ultimately found to be wrongful and that improvements constructed may be ordered torn down. In *Green v. Normandy Park*, 137 Wn. App. 665, 151 P.3d 1038 (2007), property owners built a house that did not comply with provisions of the neighborhood's restrictive covenants and without obtaining prior approval from the community club, which was charged with enforcing the covenants. The trial court entered judgment in favor of the community club and issued an injunction requiring complete demolition of the owners' house and garage.

Furthermore, there is no duty to mitigate if the wrongdoer's opportunity to correct a problem is at least equal to the wronged party. *Seabed Harvesting, Inc. v. Department of Natural Resources*, 114 Wn. App. 791, 60 P.3d 658 (2002). It was always within the power of the ACC to reaffirm its May 11 approval or to recognize that it had failed to act within the time required by the Taree Covenants. It was the ACC's stubborn refusal to do so that led to the delay.

Clearly, the ACC took affirmative steps – Mr. Moser's letters of

June 15 and July 12 – to prevent Ms. Holcomb from proceeding. This is uncontradicted. It was equally within the power of the Association/ACC to correct these “bad acts” by withdrawing these letters and approving Ms. Holcomb’s drawings, as Ms. Holcomb demanded. It was not incumbent on Ms. Holcomb to commit a wrong – telling her lender that she had approval when the ACC clearly took the position that she did not. The court can clearly take judicial notice of the risks Ms. Holcomb would have taken had she simply ignored the ACC and proceeded with construction, and of the costs she would have incurred (and did in fact incur) in bringing suit against the Association to compel approval.

The trial court found that Ms. Holcomb had obtained approval no later than June 12, 2006, as a result of the ACC’s failure to act on the drawings submitted by Mr. Brachvogel at the May 11 onsite meeting. Given that finding, Mr. Moser’s letters of June 15 and July 12 denying that the ACC had given its approval is a breach of the Taree covenants. Ms. Holcomb clearly testified that she could not proceed in light of those letters (as did the Taree witnesses); she was not merely acting as a “volunteer” but in response to the position taken by the ACC. Ms. Holcomb attempted through at least August 2006 to reason with the ACC and the Association, even offering to pay for another architect to review the drawings to demonstrate to the ACC that all necessary information had

been provided. These efforts were not required under the mitigation doctrine, but Ms. Holcomb made them nonetheless.

There is no factual or legal basis to conclude that Ms. Holcomb had to defy (or even could defy) the ACC and begin construction shortly after June 12, 2006, and it was error for Judge Costello to find and conclude that Ms. Holcomb's damages flowed from her own "choices" and were thus not recoverable by her.

3. Ms. Holcomb's Damages Are Recoverable in this Action (Issues Nos. 1-9).

Judge Costello concluded that "[t]here are no compensable damages based upon the ACC's actions in this matter" and that "Taree Community Association and Mr. Moser are not responsible for any of the damages argued by the Plaintiff." To the extent these conclusions are not addressed above, Ms. Holcomb's claimed damages were recoverable in this action from the Association and Mr. Moser.

A party may recover damages that "flow from the breach and which could reasonably have been anticipated by the parties." *Family Med. Bldg. v. Dep't of Soc. & Health Servs.*, 104 Wn.2d 105, 114, 702 P.2d 459 (1985). "The amount of damages should reflect what is required to place [a party] in the same financial position he would have enjoyed in the absence of the breach." *Id.* The rule "requires only reason to foresee,

not actual foresight. It does not require that the defendant should have had the resulting injury actually in contemplation ... but in general damages are awarded for a breach not because they were contemplated and promised to be paid, but to compensate the injured party for harm done that ought to have been foreseen whether it was or not.” *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 7, 390 P.2d 677 (1964) (quoting 5 CORBIN ON CONTRACTS § 1009) (internal quotations omitted).

The only evidence on damages was presented by Ms. Holcomb. The specifics of her testimony on damages are presented above. In sum, however, the facts to which she testified were that the ACC’s actions had caused her to lose a building season, that the cost of constructing the home designed for her rose to such an extent as to prevent her from building after December 2006, and to incur out-of-pocket expenses that exhausted her construction contingency. She sought damages that would restore her to the position she would have occupied had the ACC not abruptly withdrawn its approval.

The defendants offered no evidence that the claimed damages did not result naturally from the delay caused by the ACC. They offered no evidence that the claimed damages were not foreseeable. In short, they offered nothing at all. In light of the fact that the evidence was entirely uncontested, Judge Costello’s ruling was error.

G. The Trial Court Erred by Not Granting Reconsideration (Issue No. 10).

Following entry of findings and conclusions, Ms. Holcomb moved for a new trial or reconsideration based upon (a) surprise; (b) there was no evidence or reasonable inference from the evidence to justify the verdict or the decision; and (c) that substantial justice had not been done. Judge Costello abused his discretion by denying that motion without giving any reasons for his decision.

The denial of a motion for new trial or reconsideration is reviewed for abuse of discretion. *Hornback v. Wentworth*, 132 Wn. App. 504, 132 P.3d 778 (2006), citing *Rivers v. Wash. State Conf. of Mason Contrs.*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Hornback*, 132 Wn. App. at ___, citing *Weems v. N. Franklin Sch. Dist.*, 109 Wn. App. 767, 777, 37 P.3d 354 (2002).

A motion for reconsideration may correct errors occurring at trial without an appeal. *Koboski v. Cobb*, 161 Wash. 574, 297 P. 771 (1931). In every case, the basis for reconsideration is the inherent power of the court to correct any errors in its proceedings that had any material effect on the outcome. *State v. Higgins*, 75 Wn.2d 110, 449 P.2d 393 (1969); *Brammer v. Lappenbusch*, 176 Wash. 625, 30 P.2d 947 (1934). In a

nonjury trial, however, the judge has broader discretion to simply reopen the case for more testimony, rather than granting a new trial. CR 59(g).

There were at least three grounds for reconsideration in this case: (a) surprise; (b) there is no evidence or reasonable inference from the evidence to justify the verdict or the decision; and (c) that substantial justice has not been done.

1. The Trial Court Should Have Granted Reconsideration Based Upon Surprise (Issue No. 10).

CR 59(a)(3) allows the court to reconsider its decision or order a new trial due to “surprise.” Although both parties are presumed to have come into court prepared to meet all of the issues and lines of evidence that are apparent from the pleadings and would support the allegations of the pleadings, surprise may be claimed when the court permits an amendment of the pleadings during trial and thereby presents a new issue which counsel is not prepared to meet with evidence. *Wright v. Northern Pac. Ry. Co.*, 38 Wash. 64, 80 P. 197 (1905).

For example, when defendant’s motion to make more definite and certain was denied, and at the trial evidence tolling the statute of limitations was introduced, which counsel was not prepared to meet, defendant was entitled to a new trial. *O’Neil v. Lindsey*, 41 Wash. 649, 84 P. 603 (1906). Further, admission of evidence of an unpleaded mutual agreement

to cancel a contract, without an amendment to the pleadings, was error; new trial granted with permission to amend the pleadings. *Holt Mfg. Co. v. Odenrider*, 61 Wash. 555, 112 P. 670 (1911).

Here, at no time prior to or during trial did the defendants contend that Ms. Holcomb should have proceeded to construct prior to December 2006. The defendants argued that Ms. Holcomb could not recover any damages *because of her failure to mitigate by constructing after the December 2006 special approval*. The trial court's decision amounts to an unsought amendment of the pleadings. Given that defendants argued Ms. Holcomb could not proceed despite obtaining her County permits, Ms. Holcomb had no reason to offer proof concerning why she did not flaunt the ACC's denial. She testified that she could not do so and with adequate notice would have presented additional testimony – *see* the Declaration of Larry Elfendahl, CP 650-52 – that her lender would not close on her loan while the dispute with the ACC was pending.

The trial court should have granted a new trial and/or reconsideration and its failure to do so was an abuse of discretion.

2. The Court Should Have Granted Reconsideration Because There Is No Evidence or Reasonable Inference from the Evidence That the ACC's Acts Were Not a Legal Cause of Ms. Holcomb's Damages (Issue No. 10).

Under CR 59(a)(7), reconsideration or a new trial may be granted

on the basis that “there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law.” When there is simply no conflict in the evidence, and all the relevant evidence favors the moving party, the trial court should not hesitate to authorize a new trial. *Sommer v. Dept. of Social and Health Servs.*, 104 Wn. App. 160, 15 P.3d 664 (2001).

There is no evidence in the record that Ms. Holcomb could have proceeded with construction in June 2006. By June 15, 2006, Mr. Moser had written his first letter declaring that no approval had been given. On July 12, 2006, he again wrote to say that no approval had been given. ACC witnesses at trial were consistent and adamant that no approval had been given and that Ms. Holcomb could not construct until she had such approval. Ms. Holcomb testified that she could not proceed and there was no testimony to contradict her statement. Any doubt is removed by Mr. Elfendahl’s declaration that Ms. Holcomb’s lender would not have closed on her construction loan in light of the dispute with the ACC.

For the reasons discussed above concerning mitigation of damages, it was not incumbent upon Ms. Holcomb to take the risk of defying the ACC. It was fully within the power of the ACC to recognize its mistake and to retract Mr. Moser’s letters of June 15 and July 12. It did not do so. Under these facts, there is simply no dispute that the ACC’s actions

caused Ms. Holcomb's claimed damages.

The court should have granted a new trial or reconsideration, and its failure to do so was an abuse of discretion.

3. The Court Should Have Granted Reconsideration Because Substantial Justice Has Not Been Done (Issue No. 10).

The last ground for reconsideration is also the last listed in Civil Rule 59 – that substantial justice has not been done. The cases are necessarily fact-specific, but reconsideration (or new trial) has been granted in at least the following relevant cases: *Berry v. Coleman Sys. Co.*, 23 Wn. App. 622, 596 P.2d 1365 (1979) (new trial granted when it was learned defendant lied in answers to interrogatories); *Barth v. Rock*, 36 Wn. App. 400, 674 P.2d 1265 (1984) (crucial medical testimony was expressly based on statements in medical text; however, when copy of book was found, it was discovered that testimony was inaccurate).

Here, the trial court's ruling ignored the undisputed facts. Mr. Moser on behalf of the ACC in fact wrote twice – on June 15 and again on July 12 – denying that Ms. Holcomb's plans were approved. Ms. Holcomb has testified without contradiction that she could not proceed while the ACC took this position. At no time, before, during, or after trial, have the defendants argued that Ms. Holcomb was free or duty-bound to start construction in June 2006.

Various Taree witnesses testified untruthfully that the ACC had consistently required “permit plans” for approval – the approval of the draft plans submitted by Mr. Middlehoven (a member of the ACC) being the primary example. *See Barth v. Rock*, 36 Wn. App. 400, 674 P.2d 1265 (1984) (crucial medical testimony was expressly based upon statements in a specified chapter of a medical textbook, but after both parties had rested and instructions were being considered, a copy of the book was obtained and it was discovered that the testimony was inaccurate; the appellate court held that a new trial was properly granted).

The court should have granted a new trial or reconsideration, and its failure to do so was an abuse of discretion.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the judgment entered in favor of defendants and direct the trial court to enter judgment in favor of Ms. Holcomb in an amount to be determined in further proceedings consistent with this Court’s order of remand.

RESPECTFULLY SUBMITTED this 4th day of March, 2009.

Davis Wright Tremaine LLP
Attorneys for Appellant

By 
Alan S. Middleton, WSBA No. 18118

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused the foregoing document to be served via U.S.

Mail on the following attorneys:

Charles K. Wiggins
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DATED this 4th day of March, 2009.



Alan S. Middleton

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