

No. 40947-0-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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RANDY S. JENSEN,

Appellant

v.

LAKE JANE ESTATES,

Respondent

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**BRIEF OF APPELLANT**

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DIVISION II  
STATE OF WASHINGTON

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## INTRODUCTION

Restriction 6 on the plat of Debra Jane Lake prohibits subdivision of lots without the approval of the original developer, Lake Tapps Development Company. However, for 26 years from 1974 through 2000, thirteen lots were subdivided in the plat without seeking approval from anyone. In 2003, the original developer dissolved and no longer exists.

Beginning in 2000, the self-appointed Board of respondent Lake Jane Estates (LJE), a homeowners association whose members are the lot owners in the plat, began asserting the right to approve or deny subdivisions. From 2001-2005 the Board approved three and denied three, with one subdivision occurring without any request for approval.

In late 2005, appellant Randy Jensen requested approval to subdivide his two lots into six lots the same size and across the street from a four-lot subdivision just approved by the Board. He provided all information requested by the Board regarding certain issues of concern to the Board. The Board solicited input from neighboring property owners, and two-thirds of the neighbors supported the proposal.

The Board met in secret and decided to deny Mr. Jensen's request. They discussed concerns about storm water, but sought no independent expert advice and gave Mr. Jensen no opportunity to respond to those

concerns. They discounted the strong support of his neighbors, despite their announcements before and after this time that their primary consideration is the opinion of the surrounding neighbors. They admit that they discounted this support in retaliation against Mr. Jensen for opposing the Board's attempt to change the bylaws to increase the Board's power.

At a subsequent public meeting, the Board voted 7-0 to deny Mr. Jensen's request. They refused to give him a reason. After this suit was commenced, they claimed they did not want to open the floodgates to additional subdivisions of smaller lots. However, less than a year after denying Mr. Jensen's request, they approved another subdivision creating three lots of the same size.

Restriction 6 gives only the original developer the authority to approve or deny subdivisions. The original developer no longer exists, and LJE offered no evidence that it can approve subdivisions as the successor to the original developer other than its bald assertion of that right. Since there is no longer any entity authorized to grant consent, Restriction 6 is unenforceable.

Even if LJE had the power to approve or deny subdivisions, the Board acted unreasonably and in bad faith in denying Mr. Jensen's request. They did not deny his request because of the neighborhood

opposition (2/3 supported it), or because of storm water concerns (no evidence of problem), or because of lot sizes (approved same size lots before and after), or because they just did not want any more subdivisions (approved one 6 months before and another less than a year later). They denied his request as payback for his earlier opposition to their attempt to change the bylaws to increase their power.

The trial court erred in determining that LJE had the authority to approve or deny subdivisions under Restriction 6, and that the Board of LJE acted reasonably and in good faith in denying that Mr. Jensen's request. The trial court also erred in admitting and considering an amateur and biased survey of members in 2000, and in preventing Mr. Jensen from laying the foundation for his opinion of the value of his lots. This Court should reverse and remand for a determination of damages.

#### **ASSIGNMENTS OF ERROR<sup>1</sup>**

1. The trial court erred in entering Finding of Fact 12 that said a 2000 boundary line adjustment that divided lot 8 into two lots was not a subdivision.
2. The trial court erred in entering Finding of Fact 14 referencing an inadmissible survey of the members of LJE in 2000.

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<sup>1</sup> The Findings of Fact and Conclusions of Law are attached as Appendix A.

3. The trial court erred in entering Finding of Fact 30 that LJE investigated and considered the relevant circumstances before denying Mr. Jensen's request to subdivide his lots.

4. The trial court erred in entering Finding of Fact 32 that the evidence supports LJE's concern about the possible floodgate effect of allowing too many subdivisions.

5. The trial court erred in entering Finding of Fact 33 that there is no evidence that LJE acted in bad faith when it rejected Mr. Jensen's request.

6. The trial court erred in entering Finding of Fact 34 that the Board exercised ordinary care when they denied Mr. Jensen's request.

7. The trial court erred in concluding that LJE had direct authority under the terms of the covenants and Articles of Incorporation to require lot owners to obtain LJE's approval before subdividing any lot.  
(Conclusion of Law 4)

8. The trial court erred in concluding that LJE is the de facto successor to the original developer so as to require lot owners to obtain LJE's approval before subdividing any lot. (Conclusion of Law 5)

9. The trial court erred in concluding that LJE did not act in bad faith in denying Mr. Jensen's request for approval to subdivide his lots.  
(Conclusion of Law 9)

10. The trial court erred in concluding that LJE did not act unreasonably in denying Mr. Jensen's request for approval to subdivide his lots. (Conclusion of Law 10 and 11)

11. The trial court erred in refusing to allow Mr. Jensen to lay the foundation for his opinion of damages.

12. The trial court erred in admitting and relying upon evidence of a survey in 2000 conducted by a member of LJE.

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is there any language in the restrictions or the Articles of Incorporation giving LJE the power to grant approval for subdivisions? (Assignment of Error 7)

2. Can LJE become the successor to the original developer for purposes of approving or denying subdivisions of lots merely by asserting that authority? (Assignments of Error 10, 11)

3. If there is no successor to the original developer authorized to consent to the subdivision of lots with the plat, is restriction number 6 unenforceable? (Assignments of Error 10, 11)

4. Did LJE's Board act unreasonably in denying Mr. Jensen's request for consent to subdivide his lots by refusing to tell him what their

objections were or giving him a chance to respond to those objections?

(Assignments of Error 3, 4, 6, 10)

5. Did LJE's Board act unreasonably in denying Mr. Jensen's request for consent to subdivide his lots by refusing to consider the overwhelming support for his request by his neighbors, despite their announced policy of giving great weight to the neighbor's opinion? (Assignments of Error 3, 4, 6, 10)

6. Did LJE's Board act unreasonably in denying Mr. Jensen's request for consent to subdivide his lots when his request would have created lots virtually identical in size, location and topography to lots across the street approved just a few months earlier? (Assignments of Error 3, 4, 6, 10)

7. Did LJE's Board act unreasonably in denying Mr. Jensen's request for consent to subdivide his lots because they were establishing a policy not to allow further subdivisions in the plat, and then approving a similar subdivision less than a year later without any support from the neighbors? (Assignments of Error 3, 4, 6, 10)

8. Did LJE's Board act in bad faith in refusing to consider the strong neighborhood support for Mr. Jensen's proposal in retaliation for his previous opposition to an unrelated bylaw amendment supported by the Board? (Assignments of Error 5, 9)

9. Should Mr. Jensen have been allowed to testify as to basis for his opinion of the difference in value of the lots that would be created by his proposed subdivision? (Assignment of Error 11)

10. Was it error for the trial court to admit and rely upon evidence of a survey of lot owners when it was conducted by a person with no survey experience, the survey question was biased, and the respondents self-selected whether to respond? (Assignments of Error 2, 12)

#### **STATEMENT OF THE CASE**

Appellant Randy Jensen owns Lots 4 and 23 in Block 2, Division 1 of the plat of Debra Jane Lake. RP 64-65. He bought Lot 23, also known as 18708 Bonney Lake Boulevard, as his residence in 1997. RP 65. The lot is approximately one acre in size. RP 67. He bought Lot 4, also known as 7012 Locust, in 2005. RP 65-66. That lot was adjacent to the north end of Lot 23. He completely remodeled the house on Lot 4 and used it as a rental house. RP 66-67. The locations of the two lots are depicted in yellow on Exhibit 54.

In February, 2004, Mr. Jensen applied to the City of Bonney Lake to subdivide Lot 23 into two lots. RP 67; Ex. 23. The zoning at that time required minimum lot sizes of 20,000 square feet. RP 67-68. He discontinued that application in 2005, when the zoning changed to allow

smaller lot sizes. RP 68-69.

In 2005, Mr. Jensen applied to the City of Bonney Lake for a boundary line adjustment transferring some of the area in Lot 23 to Lot 4, and two short plats to subdivide each lot into 3 smaller lots. RP 69-70. The proposed site plan is Exhibit 25. The City told Mr. Jensen that he would have to get subdivision approval from respondent Lake Jane Estates (LJE). RP 71. LJE's denial of that request is the basis for this lawsuit.

A. History of subdivision approvals.

The plat of Debra Jane Lake was recorded in 1959. Ex. 1. On the face of the plat, under the heading "RESTRICTIONS" is the following language:

The following restrictions are hereby declared to be covenants running with the land and binding upon future owners, their heirs, successors or assigns on the following described real property and said restrictions are as follows:

...

4. Before construction of any structure is commenced all plans must be approved by the Architectural Committee appointed by the T & J Maintenance Co. All construction must be in conformity with the plans as approved.

...

6. No lot in this plat shall be subdivided without the written consent of the LAKE TAPPS DEVELOPMENT CO.

...

14. The breach of any of the foregoing conditions shall constitute a cause of action against the persons committing the breach by the T & J Maintenance Co. or the Lake Tapps Development Co., Inc.

15. If any of the foregoing restrictions are declared to be legally unenforcible [sic] with respect to all or any portions of said property, the applicability and enforcement of the remaining restrictions shall not otherwise be affected.

Lake Tapps Development Co., Inc. was a Washington corporation incorporated on April 15, 1954. CP 2, 4. It filed articles of dissolution on March 31, 2003, and is no longer in existence. Ex. 22.

Respondent Lake Jane Estates (LJE) is a Washington non-profit corporation incorporated August 3, 1959 under the name "T & J Maintenance Co." CP 1, 4. T & J Maintenance Co. changed its name to Lake Jane Estates in 1970. *Id.* LJE is a homeowners association as defined in Chapter 64.38, RCW. *Id.* Because LJE cannot get a quorum at its annual meetings, at least since 2003 none of LJE's Board members have been elected by the membership, but instead have been appointed by other Board members. RP 316-317.

The first subdivision of a platted lot within Debra Jane Lake occurred in 1965, when Lot 8 in Division 3 was subdivided into two lots by the developer, Lake Tapps Development Co., Inc., which presumably gave itself permission. Ex. 5, 6. Over the subsequent 35 years, through calendar year 2000, 14 platted lots were subdivided within the plat of Debra Jane Lake. One of those subdivisions was approved by LJE in

1973.<sup>2</sup> Ex. 46. The other 13 lots were subdivided in 1972, 1975, 1977, 1979, 1982, 1984, 1985, 1990, 1992, 1999, and 2000 without requesting or receiving approval from LJE or anyone else.<sup>3</sup> Exs. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20.

In July 2000, LJE asserted the right to approve subdivisions of lots by filing suit against the owners of two lots who were attempting to short plat their properties without consent. From 2001 to 2005, the owners of 6 platted lots sought approval from LJE to subdivide their lots. Ex. 45, 80, 81, 82, 83, 84. Three were approved and three were denied. *Id.* In 2003, one lot was subdivided without requesting approval from anyone. Ex. 21.

B. The Vanunu subdivision application.

Immediately prior to the Jensen subdivision application at issue in this case, LJE approved the subdivision application by Mr. Vanunu. Mr. Vanunu owned two platted lots that had been combined in a previous boundary line adjustment. Ex. 20. An old fire station was located on those two lots. Mr. Vanunu proposed to demolish the fire station and subdivide those two former lots into four lots averaging just under one-

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<sup>2</sup> Another was approved by LJE the same year, but was not subdivided. Ex. 47.

<sup>3</sup> LJE claimed and the trial court found in Finding of Fact 12 that a boundary line adjustment in 2000 was not a subdivision. There is no substantial evidence to support that finding. That boundary line adjustment, contained in Ex. 20, resulted in the subdivision of Lot 8, Block 3 of Debra Jane Lake into two smaller lots, new parcels B and C. By any definition of the word, this is a subdivision.

quarter acre in size. RP 269-270; Ex. 43. The Board of LJE solicited comments from 24 neighbors as to whether they approved or disapproved of the request. Only fifteen responded, and they supported the request by a margin of 9-6 (60%). RP 237; Ex. 44. On October 20, 2005, the Board voted to approve the Vanunu subdivision request. Ex. 45.

C. Randy Jensen's subdivision application.

In August, 2005, Randy Jensen submitted a request to LJE for consent to the subdivision of his two lots into a total of six lots, through a boundary line adjustment and two short plats. Ex. 24, 25. He held off proceeding with that request until he saw the decision on the Vanunu proposal, since it was nearly identical in size and character. RP 77. The Jensen lots are across the street from the Vanunu property. RP 108. The six lots to be created by the Jensen subdivision were the same size as the lots to be created by the Vanunu subdivision. RP 108. The Jensen lots would be accessed from Locust and Bonney Lake Boulevard, the same as the Vanunu lots. RP 108-109. Both the Jensen lot 4 and the Vanunu lots drained into the drainage ditches along Locust. RP 109.

Mr. Jensen presented his proposal to the Board of LJE at its meeting on November 18, 2005, just a few weeks after LJE approved the Vanunu proposal. RP 75-76, 317; Ex. 102. In December, 2005, Jeff Brain

and Keith Arionus came to Mr. Jensen's house to inspect the property. RP 83-85. Mr. Brain was the vice president of LJE. RP 84, 301. Mr. Arionus was not on the Board, but he was a strong opponent of subdivisions. RP 318. Mr. Brain and Mr. Arionus were members of LJE's Architectural Committee, which has no function in approving subdivisions. RP 317-318. According to Mr. Brain, "We just, as neighbors, decided to ask Mr. Jensen if we could have a look at the property." RP 319.

On December 17, 2005, Duane Shabo, the president of LJE, sent a letter to Mr. Jensen summarizing concerns that Mr. Brain and Mr. Arionus brought to the Board's attention after that visit. Ex. 26. Those concerns included a garage or shed located on the association's bridle trail easement, a possible drainage problem on the back side of the properties, and encroachment of the proposed access driveway on the bridle trail easement.<sup>4</sup> *Id.* The letter stated that "the Board is unable to proceed with your request on short platting until you address these issues." *Id.*

As to the issues involving the bridle trail easement, Randy Jensen's brother Dan Jensen notified the Board at their meeting on January 19 that Mr. Jensen planned to remove the garage as part of the project, that he was entitled to use the easement as long as he did not impede its use as a bridle

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<sup>4</sup> None of the bridle trail easements in the plat of Debra Jane Lake have ever been developed as a bridle trail. RP 89.

trail, and that his clearing of the easement area for a driveway would actually assist in future use of the bridle trail easement. RP 87-90, 94-95, 204-205; Ex. 27. This resolved the Board's concerns (RP 326-327), and no one ever expressed any further concerns about the impact of the project on the bridle trail easement (RP 205).

At that same meeting on January 19, 2006, the Board of LJE expressed continued concerns about water runoff. Ex. 27. They also expressed concerns about whether a larger turn-around area would be needed for emergency services. Ex. 27. On behalf of his brother, Dan Jensen assured the Board that he would confer with the City of Bonney Lake and provide further information to the Board. Ex. 27. In his letter the following day, LJE's president Mr. Shabo said that "Once the Board receives your response, plans will go forward to notify the Association members of your plans." Ex. 27.

As to the drainage issue, Mr. Jensen hired an expert from a company called "Drainage Works" to prepare a report. RP 91. That company prepared a report in February, 2006, which was provided to the Board at its meeting on February 16, 2006, along with a revised site plan showing drainage ponds. RP 91-93, 324-5. Regarding the turn around for emergency services, Mr. Jensen submitted to the Board at its February 16

meeting two letters from the Bonney Lake fire marshal and city planner stating that the City would require an approved fire apparatus turn around as part of their permitting for the project. Ex. 28, 29; RP 93-94, 95-96.

After Mr. Jensen submitted the drainage report and letters from the City of Bonney Lake at LJE's Board meeting on February 16, 2006, the Board was sufficiently satisfied with the information provided by Mr. Jensen to send his proposal out to the immediate neighbors for their approval or disapproval. RP 227, 328-329. No one representing LJE indicated that they had any unresolved concerns. RP 102, 206, 348-349.

LJE had a policy to provide notice of any subdivision application to all lots owners within 600 feet. RP 329. On June 15, 2004, LJE's attorney stated in a brief filed on another matter that, "The primary consideration of the Board [in deciding whether to approve subdivisions] was whether there was any objection by the immediate neighbors..." Ex. 40, footnote 5. In the August 20, 2008 minutes of the meeting of LJE's Board, Jeff Brain, the Board's vice president and presiding officer, told the members that "One of the biggest things we consider is the input of the immediate neighbors – those within a 600 foot radius." Ex. 41.

For the Jensen proposal, Melissa Gubbe, LJE's executive treasurer, mailed 85 notices to lot owners in the vicinity of the Jensen lots. RP 218,

220, 224, 228. The notification form asked each lot owner to sign and return indicating if they approve or disapprove, and if they disapprove, to explain why. Ex. 30, 31; RP 97. The mailing included a copy of the site plan and a return envelope. RP 99. LJE also sent each lot owner a letter from LJE president Duane Shabo listing a number of reasons why lot owners may not want to approve the Jensen proposal. Ex. 30; RP 97.

Randy Jensen went to the home of each of his neighbors that had received a notification from LJE. RP 105. He explained what he was proposing, and asked if they had any questions or needed any additional information. RP105. Most of the neighbors that he talked to were in favor of the proposed subdivision, and asked him to turn in their ballots for them. RP 106. Some said they would turn in their ballots themselves, particularly those who were opposed to the project. RP 106. Mr. Jensen collected 26 signed notification forms, and turned them in to Melissa Gubbe on March 20, 2006. RP 104, 106-107.

Melissa Gubbe was directed by the LJE Board to contact each of the persons whose notification letter was received through Mr. Jensen, but not those whose vote came by mail. RP 229. Ms. Gubbe called all 26 people. RP 229. After talking with all of them, three persons allegedly told her to change their vote from “yes” to “no.” RP 233. The others

reaffirmed their vote in favor of Mr. Jensen's proposal.

Ms. Gubbe tallied the votes that came in either by mail or from Mr. Jensen, and recorded that tally on Ex. 34. RP 227-228. Twenty-seven were returned by mail, including two for Mr. Jensen's lots which she did not count. RP 228. Twenty-six were delivered by Mr. Jensen. RP 229. Ms. Gubbe erroneously excluded one "yes" vote as a duplicate and one as out of the survey area. RP 232-233. After correcting for those errors, a total of 34 "yes" votes were returned. RP 233. After changing three votes delivered by Mr. Jensen from "yes" to "no", and eliminating two "no" votes that were received too late to consider, a total of 17 "no" votes were received. RP 235.

The number of responses received on the Jensen proposal, and the percentage in favor of the Jensen proposal, was the highest ever received by the Board. At the bottom of Ex. 34, Ms. Gubbe reported to the Board the results from four previous neighbor notifications. RP 235-236. Those were 1-9 against, 1-6 against, 2-9 against, and 9-6 in favor. The highest previous response was 15 votes for the Vanunu proposal, with 60% voting in favor. Mr. Jensen's proposal had 51 responses, with 67% voting in favor. Ms. Gubbe gave Ex. 34 and the neighbor notification letters to the Board prior to their vote on the Jensen proposal. RP 245.

Prior to the public vote, the Board met privately to discuss the Jensen proposal. RP 339. Two Board members in attendance, Gordon Bowman and Evelyn Raymond, lived near the Jensen lots and lobbied strongly against the Jensen proposal. RP 339-340. Mr. Bowman expressed concerns about storm water from the Jensen project, though he has no expertise in storm water issues. The Board had the report of Mr. Jensen's expert, and did not seek any independent expert advice on storm water. RP 340.

As noted previously, the neighboring property owners voted 34-17 (67%) in favor of Mr. Jensen's request. However, the Board discounted all of the "yes" votes submitted by Mr. Jensen, even though they knew that those votes had been personally confirmed by a LJE Treasurer Melissa Gubbe. RP 342-343. Jeff Brain testified that he discounted the votes because Mr. Jensen had talked to those people in support of his project. RP 343. Yet he did not discount the "no" votes submitted by people that Gordon Bowman had talked to in opposition to the project. RP 345.

Mr. Brain also testified that one of the reasons the Board did not give weight to the votes submitted by Mr. Jensen was his previous opposition to the Board's efforts to change the bylaws. RP 351. The Board called a special meeting for November 13, 2005, to seek member

approval of three bylaw changes. Ex. 94. They sought to change the date of the annual meeting, provide for recovery of attorney fees in the event of litigation, and allow the Board to change the bylaws without a vote of the members. Ex. 94. Mr. Jensen circulated two flyers opposing those bylaw changes, and urged the members to appear in person to vote rather than giving a proxy to the Board. Ex. 95, 96; RP 80-82. Not enough people attended the special meeting to constitute a quorum, so all three bylaw amendments failed. RP 83. Mr. Brain testified that he was “frustrated” by Mr. Jensen’s opposition to the Board’s bylaw proposal. RP 352.

At their subsequent Board meeting on May 18, 2006, the Board of LJE voted 7-0 to deny Mr. Jensen’s request to subdivide his lots. Ex. 37. There was no discussion and no reason for the decision was given. RP 113, 337-338; Ex. 37. Mr. Jensen asked for a reason for declining his request, and he was told that a letter with an explanation would be sent by LJE’s attorney. *Id.* LJE’s attorney sent Mr. Jensen a letter dated May 23, 2006, but again there was no explanation for the decision. RP 114, 338; Ex. 39. Mr. Brain testified that according to the Board, there was nothing Mr. Jensen could have done to get approval to subdivide his property. RP 356. Prior to the filing of this lawsuit, Mr. Jensen was given no explanation why his request was denied, or the outcome of the votes by his

neighbors. RP 114. Mr. Jensen filed this case on July 28, 2006.

On February 2, 2007, Judge Vicki Hogan granted Mr. Jensen's motion on the pleadings, and entered a declaratory judgment that the restrictive covenant requiring consent was no longer enforceable because the Lake Tapps Development Company no longer existed. In an unpublished decision, the Court of Appeals reversed that decision, stating that there are material issues of fact as to whether LJE is the successor to Lake Tapps Development Company, and remanding this case for trial. That trial commenced on April 13, 2010. CP 132.

By the time of trial, nearly four years had now passed from the time the Board unreasonably denied Mr. Jensen's request for approval to subdivide his lot. During that interim, the real estate market collapsed, and still has not recovered. As a result, the lots to be created from the subdivision diminished significantly in value. Mr. Jensen estimated the lost value of the lots at approximately \$400,000. RP 139, 149, 152, 156.

## **ARGUMENT**

**A. Restriction 6 is unenforceable because there is no entity authorized to approve subdivision requests.**

**1. LJE has no authority under Restriction 6 to approve or disapprove the subdivision of lots.**

In Conclusion of Law 4, the trial court held that LJE had direct

authority under the terms of the covenants to require lot owners to obtain LJE's approval before subdividing any lot. This conclusion is clearly wrong.

Interpretation of language contained in a restrictive covenant is a question of law which this Court will review de novo. *Mack v. Armstrong*, 147 Wn. App. 522, 529, 195 P.3d 1027 (2008). A court's first objective in interpreting a restrictive covenant is ascertaining the intent of the original parties. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005). In ascertaining this intent, a court must 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.* Clear and unambiguous language in a restrictive covenant will be enforced according to its terms. *Mariners Cove Beach Club, Inc. v. Kairez*, 93 Wn. App. 886, 890, 970 P.2d 825 (1999).

The restrictions on the face of the plat draw clear distinctions in the powers granted. Restriction 6 states that, "No lot in this plat shall be subdivided without the written consent of the LAKE TAPPS DEVELOPMENT CO." Restriction 4 gives LJE (formerly known as T & J Maintenance Co.) authority to approve all building plans. Restriction 14 gives both LJE (T & J) and the original developer (Lake Tapps

Development Co.) authority to enforce any breach of the covenants. Thus, the restrictions recognize and give certain powers to LJE, but do not name it as a party authorized to approve the subdivision of lots in Restriction 6.

Common sense would indicate that this distinction was intentional. The drafters referenced both entities in the Restrictions, but gave only one the power to approve or reject subdivisions of lots.

This common sense interpretation is supported by common maxims governing interpretation of contracts. Basic rules of contract interpretation are applied to the interpretation of restrictive covenants. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). As stated in 5-24 Corbin on Contracts § 24.28:

The maxim *expressio unius est exclusio alterius* means literally "the expression of the one is the exclusion of the other." If the parties in their contract have specifically named one item or if they have specifically enumerated several items of a larger class, a reasonable inference is that they did not intend to include other, similar items not listed.

Since, in ascertaining the intent of a restrictive covenant, a court must give a covenant's language its ordinary and common use, the trial court was clearly wrong in stating that LJE has direct authority under Restriction 6 to approve subdivisions. Restriction 6 gives authority to approve subdivisions to only the original developer.

In Conclusion of Law 4, the trial court also held that LJE had direct authority under the terms of the Articles of Incorporation to require lot owners to obtain LJE's approval before subdividing any lot. This conclusion is also clearly wrong.

The trial court never explained how the Articles of Incorporation of LJE can grant it authority to approve subdivisions when that authority is not stated in Restriction 6. The trial court's oral decision shows the error in its analysis.

The trial court first stated that LJE was set up by the original developers, who intended that the association would have some power. RP 596. No one disputes that statement. The trial court then stated that the powers granted to LJE in its Articles of Incorporation:

include the power to keep records of approval or disapproval as provided in the restrictions, conditions, and covenants. That kind of implies they are set up with some approval or disapproval authority.

This was a reference to the language in paragraph 8 in Article II. Ex. 58.

The trial court then noted that language in paragraph 14 in Article II gave LJE "authority to approve or disapprove as provided on their restrictions, covenants, and conditions." RP 596-597.

What the trial court failed to mention in its oral decision is the subsequent language in that same paragraph 14 which delineates what LJE

has the power to approve or disapprove. Paragraph 14 says that LJE has the power to approve or disapprove plans and specifications for structures to be erected on lots, including the kind, shape, height, materials, location, and grading. This is consistent with the authority stated in Restriction 4 on the face of the plat:

4. Before construction of any structure is commenced all plans must be approved by the Architectural Committee appointed by the T & J Maintenance Co. All construction must be in conformity with the plans as approved.

This is the power to approve or disapprove for which they must keep records. Nothing in paragraph 14 indicates that LJE has the power to approve subdivisions.

The trial court also noted that Articles give LJE the power to enforce restrictions, referring to the language in paragraph 11 of Article II. RP 596. Again, this power to enforce the restrictions was expressly granted to LJE in Restriction 14 on the face of the plat. That simply means that LJE has the right to bring an enforcement action against a lot owner that attempts to subdivide without the consent of the original developer, not that LJE has the authority to grant that consent itself.

There is nothing in the Articles of Incorporation purporting to give LJE the power to approve the subdivision of lots reserved to the original developer in Restriction 6. Nor is there any legal basis to amend the

restrictive covenants through corporate formation documents. Washington courts have recognized that restrictive covenants can be created by recording a declaration of covenants, or in a deed transferring an interest in the property, or set forth on the face of the subdivision plat. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691, 974 P.2d 836 (1999). No court has ever suggested that restrictive covenants can be created or modified by Articles of Incorporation.

The Articles of Incorporation for LJE are consistent with the language of the restrictions on the face of the plat. LJE has authority to approve structures and to enforce violations of the restrictions. It has no authority to approve subdivisions under Restriction 6.

**2. LJE is not the successor to the original developer with authority to approve or disapprove subdivision of lots.**

The language of Restriction 6 is clear and unambiguous in stating that only Lake Tapps Development Co., the original developer, has the right to approve or deny the subdivision of lots. Since that entity no longer exists, Judge Hogan held that Restriction 6 is unenforceable, and granted Mr. Jensen judgment on the pleadings. This Court reversed, holding that Restriction 6 is still valid and enforceable despite the dissolution of the developer if LJE is the successor in interest to the developer. This Court

held that there was an issue of fact whether LJE is the successor in interest to the developer, stating:

Here, LJE's admission that the developer dissolved does not affect its right to prove that, having exercised the authority to review and approve proposed subdivision requests with the developer's consent, LJE was the legitimate de facto successor. Because LJE presented evidence of a disputed issue of material fact under which it could be granted relief, judgment on the pleadings was improper. But by ruling that judgment on the pleadings is inappropriate in this case, we do not intend to suggest that LJE is, in fact, the de facto successor to the developer. We hold only that because LJE presented evidence that it is the de facto successor, there is an issue of fact requiring a trial sufficient to defeat a motion for judgment on the pleadings. It will be for the finder of fact to decide whether LJE is the developer's successor.

*Jensen v. Lake Jane Estates*, 2008 WL 2026096, p. 3 (2008).

The trial court held in Conclusion of Law 5 that LJE was the *de facto* successor to the developer for the purpose of enforcing the terms of the restrictive covenants, and thus has the authority to require lot owners to obtain LJE's approval before subdividing any lot. This conclusion of law confuses several different issues. LJE does not need to be the successor to the original developer to enforce the covenants. Restriction 14 explicitly gives LJE the authority to enforce the terms of the restrictive covenants. The fact that LJE has that authority to enforce violations of the covenants, and thus has the authority to require lot owners to obtain consent before subdividing, does not thereby confer authority on LJE to

give that consent in place of the original developer.

Rather, as previously stated by this Court, LJE must carry its burden of proving that it is the legitimate de facto successor to the original developer. LJE presented no evidence to the trial court to carry its burden of proving that it is the successor in interest to the original developer.

In *Green v. Normandy Park Riviera Community Club, Inc.*, 137 Wn. App. 665, 684, 151 P.3d 1038 (2007), *review denied*, 163 Wn.2d 1003 (2008), the Court discussed in footnote 15 some of the factors to consider in determining succession to developer rights and obligations:

Neither the *Restatement* nor any Washington cases set out general or default rules for determining succession to developer rights and obligations in the context of subdivisions such as the one here. The *Restatement* explains that the question of whether a party succeeds to a developer's rights must be determined on a case-by-case basis based on an interpretation of the document creating those rights and the facts of the particular case. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 5.1 cmt. c (2000). Employing this approach, cases from other jurisdictions have found succession to a developer's rights or obligations in the absence of an explicit provision, as we do here. *See, e.g., Lake Forest Prop. Owners' Ass'n v. Smith*, 571 So.2d 1047, 1050 (Ala.1990) (parent corporation with which developer corporation merged successor to developer's voting rights); *Sherwood Estates Homes Ass'n v. Schmidt*, 592 S.W.2d 244, 247-48 (Mo.Ct.App.1979) (developer's assignment to homeowners association of right to enforce restrictions carried with it the right to grant or deny approval of plans for structures despite covenant language requiring approval

by the developer, because assignment was consistent with the purpose of the development).

In every case where another entity was found to be the successor to the developer's rights under restrictive covenants, there has either been a transfer of rights to the other entity, or a relationship between the two entities, or both. In *Lake Forest Property Owners' Association v. Smith, supra.*, there was a merger between the developer and the successor entity. In *Sherwood Estates Homes Association v. Schmidt, supra.*, there was an assignment of the right to enforce all building restrictions from the developer to the homeowners association. In *Green*, there was an initial assignment of rights from the developer to the homeowners association, and then continuity of control from the time of the dissolution of that homeowners association until the reincorporation of the homeowners association under the same name. Similarly, in *Battery Homeowners Association v. Lincoln Financial Resources, Inc.*, 309 S.C. 247, 422 S.E.2d 93 (1992), cited with approval in *Green*, the homeowners association was administratively dissolved and shortly thereafter an unincorporated association was formed by the same homeowners.

LJE relied heavily upon *Green* in support of its claim to be the successor in interest to the Lake Tapps Development Co., Inc. In *Green*, the recorded covenants required building plans to be approved by the

developer. The developer's estate was sold to Seattle Trust, and then to Normandy Park Company. Normandy Park Company then recorded a conveyance of all of its rights in the covenants to the homeowners association, Normandy Park, Riviera Section, Community Club, Inc. (NPRSCC), and its successors and assigns. Thirty years later, NPRSCC was administratively dissolved. However, its officers continued to enforce the covenants, and nine years later incorporated the defendant Community Club<sup>5</sup> which continued to enforce the covenants. The Court held that the benefit of the developer's right to approve building plans was validly transferred by express assignments to the homeowners association, NPRSCC. The Court held that the dissolution of NPRSCC did not terminate that authority, because the transfer to NPRSCC expressly included its successors and assigns. The Court held that the Community Club was the successor to NPRSCC because the officers of that association continued to function as the association until reincorporating it under the same name.

There are two important distinctions between *Green* and the case at bar. First, in *Green* there was an express transfer of rights from the developer to the homeowners association, NPRSCC, and its successors

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<sup>5</sup> The new homeowners association was incorporated under the same name, so the Court denominated the first entity as NPRSCC and the second as the Community Club.

and assigns. Second, there was a clear basis for a successor relationship between NPRSCC and the subsequent Community Club. The officers of NPRSCC continued to operate as the homeowners association after its dissolution, and then became the officers of the new incorporated homeowners association, the Community Club, providing obvious continuity between the two entities.

In the case at bar, there is no suggestion of any transfer of the developer's rights to the homeowners association, LJE. The covenants created a clear division of powers between the developer and the homeowners association. The homeowners association was given the right to approve building plans, the developer was given the right to approve subdivisions, and both entities were given the power to enforce any breach of the covenants. Unlike in *Green*, there is no evidence that the developer did anything to transfer its power to approve subdivisions to the homeowners association.

There is also no suggestion of any relationship between the developer and the homeowners association. Those companies were separately formed, and remained separate corporate entities until the developer's voluntary dissolution in 2003. There is no suggestion of

common management or control evidencing continuity between the entities as in *Green*.

LJE also relies on *Sherwood Estates Homeowners Association v. Schmidt, supra*. In that case, the developer transferred to the homeowners association the power to enforce “any or all building restrictions.” *Id.*, at 247. Noting that this assignment was a transfer of all of the developer’s powers and duties under the restrictions, without reservation of any rights (*Id.*, at 247-248), the Court held that this broad assignment includes the power to approve building plans. Again, what clearly distinguishes that case from the case at bar is the express transfer of all authority from the developer to the homeowners association. In the case at bar, there is an express division of authority between the developer and the homeowners association, retaining the power to approve subdivisions in the developer, and no subsequent transfer of that authority from one to the other.

In support of its argument that it is the successor to the developer, LJE can show nothing more than that it has exercised subdivision approval authority on a few occasions in the past. The mere exercise of authority cannot confer authority. Actual authority must flow from the language of the restrictive covenant, not from the bare assertion of authority by LJE. If a person holds himself out as authorized to solemnize marriages,

convinces other persons that he is so authorized, and even conducts weddings, he does not thereby obtain such power in the absence of statutory authority. LJE has cited no case that has held that an entity becomes a successor solely by attempting to exercise authority granted to another.

In the absence of any expression of intent to convey the rights of the developer to another entity, or even any relationship with the developer, it is apparent that LJE has simply authorized itself to act in the developer's place. This does not protect the common interests of the property owners, it violates them. From its inception, purchasers of lots in Debra Jane Lake Plat had the reasonable expectation that any lot subdivisions would be subject to approval of Lake Tapps Development Co. The authority to approve could have been, but was expressly not, given to LJE.

**3. Since there is no entity authorized by Restriction 6 to exercise approval authority, the restriction is unenforceable.**

If LJE is not the successor to the developer which had the right to approve subdivisions, then no entity exists to make those determinations, and the Restriction is not enforceable. That was the conclusion reached by those courts that have addressed similar situations. In *White v. Wilhelm*, 34 Wn. App. 763, 665 P.2d 407 (1983), developers of a subdivision

recorded restrictive covenants, which among other things required building plans to be approved by the Architectural Control Committee (the “ACC”). When the Wilhelms began construction of a swimming pool enclosure, the Whites filed suit to enjoin that construction, alleging violation of several restrictive covenants, including the requirement to obtain approval by the ACC prior to construction. The Court of Appeals affirmed the trial court’s factual determination that there had been no ACC for several years, and its legal conclusion that:

The fact that the defendants did not try to submit their plans to a non-existent ... Committee provides no legal cause of action to the plaintiffs.

*Id.*, at 770-771.

*Barbato v. Shundry*, 1991 WL 115949 (Ohio App. 5 Dist., 1991), presented the exact factual pattern present in the case at bar.<sup>6</sup> In *Barbato*, the recorded covenants required plans for all buildings to be approved in writing by the grantor. When the defendants attempted to construct a garage, plaintiffs sued for an injunction. The trial court found that the

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<sup>6</sup> A copy of the opinion is attached in Appendix B. Until its amendment in 2002, Rule 2(G) of the Ohio Supreme Court Rules for the Reporting of Opinions stated that unpublished opinions of the court of appeals may be cited by any court or person as persuasive though not controlling authority. In 2002, that language was deleted, and Rule 4 of the Ohio Supreme Court Rules for the Reporting of Opinions was adopted stating that distinctions between controlling and persuasive opinions based on whether they have been published are abolished, and that all court of appeals opinions issued after the effective date of the rules may be cited as legal authority and weighted as deemed appropriate by the courts.

grantor mentioned in the restrictive covenants was a corporation which was no longer in existence. It also found that there is no evidence of a successor corporation having been created for the purpose of exercising its approval authority, or any evidence of a written transfer of such approval authority. The trial court concluded that those covenants requiring the written approval of the grantor are not enforceable due to the abandonment of the approval authority by the grantor. The Ohio Court of Appeals affirmed, stating:

However, as the trial court properly found, the restrictions are not enforceable because the rejection procedure no longer exists. A property owner cannot unilaterally and arbitrarily assume that authority, however capable he is of enforcing a clear cut restriction that requires no aesthetic or other judgment.

Fifteen years later, a different Ohio Court of Appeals reached the same conclusion. In *Garvin v. Cull*, 2006 WL 2796258 (Ohio App. 11 Dist, 2006),<sup>7</sup> the restrictive covenants stated that no fence can be erected until approved by the Board of Trustees of the homeowner's association or an architectural committee appointed by the Board. The Culls built a fence without such approval, because the association had been "cancelled" by the State of Ohio and thus there was no entity that could grant that

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<sup>7</sup> A copy of the opinion is attached in Appendix C. Rule 4 of the Ohio Supreme Court Rules for the Reporting of Opinions state that all court of appeals opinions issued after 2002 may be cited as legal authority and weighted as deemed appropriate by the courts.

approval. The Court rejected the plaintiff's argument that the fence is prohibited as a matter of law in the absence of an approval entity. It said that the restrictive covenant does not prohibit fences, but only requires prior approval. The Court concluded:

Here, we conclude that the general plan regarding fence regulation that was arguably once in effect has collapsed because there is no entity available to reasonably exercise the authority to disapprove of the proposed fence.

*Id.*, at 3. The Court also rejected the plaintiff's assertion that they have standing to enforce the deed restriction, stating at page 4:

We agree that if the deed restrictions are enforceable, then property owners such as the Garvins could enforce the restrictions. [citations omitted] However, as the Fifth District reasoned in *Barbato*, at 4-5, "the restrictions are not enforceable because the rejection procedure no longer exists. A property owner cannot unilaterally and arbitrarily assume that authority, however capable he is of enforcing a clear cut restriction that requires no aesthetic or other judgment." [citations omitted] Nothing in the deed restrictions gives the Garvins authority to act as the board, or architectural committee, or as a successor committee to the grantors, Birchfield, to review plans for approval and consent to the erection of fences in the Subdivision.

Similarly, in *Hanchett v. East Sunnyside Civic League*, 696 S.W.2d 613, 615-616 (Tex.App. 14 Dist., 1985), a lot owner built a house without the approval of the architectural control committee as required by the restrictive covenants. One member of the committee was dead, one was presumed dead, and the other could not be located. The Court stated:

In light of the fact that no language in the deed or original restrictions provided a method of succession of membership to the architectural control committee, failure by appellant to satisfy this restriction does not in itself justify forcing appellant to remove his house from the subdivision.

The circumstances in the case at bar are indistinguishable.

Restrictive covenant number 6 requires written approval from an entity that no longer exists. LJE cannot unilaterally assume the approval authority set forth in restrictive covenant number 6. The restrictive covenant is thus unenforceable.

**B. If LJE had approval authority, its denial of Mr. Jensen's subdivision request was unreasonable and in bad faith.**

Restrictive covenants requiring consent before actions are taken are upheld so long as the authority to consent is exercised reasonably and in good faith. *Riss v. Angel*, 131 Wn.2d 612, 625, 934 P.2d 669 (1997). In determining whether the association acted reasonably, a court may examine the fact-finding and other procedures undertaken by the association officials. *Id.*, at 630. A decision made without a thorough investigation and upon inaccurate information is unreasonable. *Id.* Misleading campaigns against the proposal by board members may also support a determination that the decision was unreasonable. *Id.*

The evidence in this case clearly demonstrated that the Board of LJE acted unreasonably and in bad faith in denying Mr. Jensen's request to

approve the subdivision of his lots. Procedurally, the Board acted unreasonably in failing to tell Mr. Jensen about the Board members' concerns and to give him any opportunity to address those concerns. Instead, they met in secret, made their decision, and announced that decision without any explanation of the basis for the decision.

LJE sent two letters to Mr. Jensen expressing concerns about the impact of the project on the bridle trail easement, storm water runoff from the project, and provision of a turnaround for emergency vehicles. Mr. Jensen responded to those concerns by explaining that his project would remove the existing structure on the bridle trail easement, and that use of the easement for the access drive would not prohibit future use for a bridle trail, and was allowed by law. LJE admits that this resolved the Board's concerns (RP 326-327), and no one ever expressed any further concerns about the impact of the project on the bridle trail easement (RP 205). Mr. Jensen responded to the storm water concern by providing a report from a geotechnical expert regarding the suitability of the property for infiltrating storm water, and that the city would require compliance with all of their storm water code. He likewise responded to the turnaround issue by submitting a letter from the city saying the project would be required to provide a turnaround for emergency vehicles.

Mr. Jensen was told that the matter would not be submitted to the neighbors to solicit their opinion until all of the issues raised by the Board were addressed. After Mr. Jensen submitted the information on the issues raised by the Board, LJE submitted the matter to the neighbors. Mr. Jensen reasonably believed that he had satisfied all concerns of the Board, and the LJE witnesses at trial admitted as much. No Board member indicated to Mr. Jensen that he or she had any continuing concerns about his project.

Instead, the Board met in secret and discussed their concerns. One Board member opposed to the project argued that there were storm water concerns. No Board member had any expertise in storm water issues, and the Board made no effort to get any independent expert advice. Though they had information from Mr. Jensen's expert that storm water can be infiltrated onsite, and assurances that the City would apply its storm water regulations to development on this property, even at trial LJE still tried to justify its decision in part on storm water concerns. RP 381-382.

When the Board later voted unanimously to deny consent to subdivide, it refused to give Mr. Jensen any explanation for this decision, despite its own policy requiring the Board to provide a reason for denial. They told Mr. Jensen that he would get a letter from LJE's attorney

explaining the decision. Ms. Gubbe acknowledged that the letter to Mr. Jensen from the Board's attorney violated LJE's guideline requiring that an explanation be given. RP 285.

Substantively, the Board acted unreasonably in failing to follow its own announced policy to give great weight to the opinions of neighboring property owners. Prior to the decision on the Jensen proposal, LJE's attorney stated in a brief filed on another matter that, "The primary consideration of the Board [in deciding whether to approve subdivisions] was whether there was any objection by the immediate neighbors..." Ex. 40, footnote 5. After the Jensen decision, Jeff Brain, the Board's vice president and presiding officer, told the members at a meeting that "One of the biggest things we consider is the input of the immediate neighbors – those within a 600 foot radius." Ex. 41.

The Board sent 85 letters to neighbors within 600 feet of the Jensen lots. The response was the largest the Board had ever received, and an overwhelming two-thirds of those responding supported Mr. Jensen's request. However, the vocal opposition of two members of the Board was allowed to outweigh the opinion of the supermajority of their neighbors. The Board ignored the strong support of the project by the neighbors in denying consent to Mr. Jensen.

The Board also acted unreasonably and arbitrarily by denying Mr. Jensen's request when it had just approved a very similar request from a lot owner across the street. The Vanunu short plat proposed similar sized lots, in the same area, with similar topography, traffic and drainage issues. Far fewer votes were received from the neighbors, and though positive the percentage in favor was less than for the Jensen proposal. Yet the Vanunu proposal was approved and the Jensen proposal was denied, without explanation.

LJE's witnesses at trial tried to distinguish the Vanunu proposal by asserting that they approved Vanunu's request because they wanted to get rid of the eyesore and safety issue caused by the old fire station on the Vanunu's lots. However, Melissa Gubbe acknowledged that the city was already in the process of requiring removal or rehabilitation of the fire station, whether or not LJE allowed it to be subdivided. RP 281. As it turned out, after the subdivision was approved the property owner rehabilitated the fire station and turned it into a group home, so LJE's approval was not necessary to resolve the problem. RP 281-282.

At trial, LJE tried to justify its decision in the Jensen proposal by saying that they were concerned "about opening the floodgates for more subdivisions with three houses on one lot, whereas there was only one

house on a lot.” RP 381. The trial court accepted this assertion by entering Finding of Fact 32. There is no substantial evidence to support this finding. Less than one year after denying the Jensen proposal, the Board approved the Hellers’ request to divide one lot into three lots similar in size to the Jensen proposal, without any support from the neighbors. Ex. 86.

Jeff Brain, the Board’s presiding officer, testified that he takes into account “the types of people an increased density of housing might be likely to attract.” RP 309. He concluded that the quarter-acre lots to be created by Mr. Jensen’s subdivision would attract less desirable people than larger lots, though he conceded that the house on Mr. Jensen’s current one-acre lot was smaller than the houses that would be built on the quarter-acre lots to be created. RP 309-311. He acknowledged that the Jensen lots were the same size as the Vanunu lots that he had just voted to approve. RP 311. They were also the same size as the Heller lots that he voted to approve less than a year later. Ex. 86.

Not only was the Board of LJE required to act reasonably, they were also required to act in good faith. “Good faith” is generally defined as an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. *Breuer v. Douglas D.*

*Presta, D.P.M.*, 148 Wn. App. 470, 475, 200 P.3d 724 (2009).

The trial court found in Finding 33 there was no evidence that the Board acted in bad faith. This finding ignore the testimony of Jeff Brain, the presiding officer of the Board at the time the decision was made, who essentially admitted that the Board did not act in good faith. Mr. Brain testified that one of the reasons the Board did not give weight to the votes submitted by Mr. Jensen was his previous opposition to the Board's efforts to change the bylaws. RP 352. Mr. Brain testified that he was "frustrated" by Mr. Jensen's opposition to the Board's bylaw proposal. RP 352. His testimony leaves little doubt that the Board retaliated against Mr. Jensen by denying his subdivision request. Mr. Brain candidly admitted that, from the Board's perspective, there was nothing Mr. Jensen could have done to get subdivision approval from LJE. RP 356.

**C. The trial court erred in refusing to allow Mr. Jensen to testify regarding the basis for his opinion of damages.**

In *Riss*, after finding that the Board failed to act reasonably and in good faith in denying consent, the Supreme Court affirmed an award of delay damages against the Association and its members who participated in the unreasonable decision. In the case at bar, Mr. Jensen asserted a damage claim only against LJE. He sought damages arising from the delay in subdividing his lots as a result of LJE's failure to act reasonably

and in good faith. He based his damage claim on the difference in the value of the lots that would have been created and sold in 2006 when he requested approval, compared to the value of those lots today.

Proof of damages was offered through the testimony of Mr. Jensen. He is the property owner, which alone qualifies him to testify as to its value. As explained in *State v. Wilson*, 6 Wn. App. 443, 451, 493 P.2d 1252 (1972):

The owner of real property has a right to testify as to the value of his property. The rationale behind this right is that one who has owned property is presumed to be sufficiently acquainted with its value and the value of surrounding lands to give an intelligent estimate of the value of his property. Because of this rationale no inquiry into knowledge is required to qualify the owner, although knowledge will affect the weight to be accorded his opinion. [citations omitted] In giving his opinion the owner is entitled to explain his valuation by relevant and competent methods of ascertaining value.

In addition, Mr. Jensen is qualified as an expert under ER 702 based on his knowledge and experience. As stated in 5B Washington Practice, Evidence, § 702.11:

Expert opinion is admissible to show the value of land or buildings and improvements upon land. Although the matter of qualification is largely within the discretion of the trial court, the cases on appeal give some indication of the general criteria.

The witness should know the value of land in the area. The witness should be familiar with the property to be valued

and must have had some minimum experience to qualify him or her to value the particular property.

Mr. Jensen testified regarding his experience in buying and selling houses and lots for many years. He built his first house when he was nineteen years old and has built close to twenty. RP 64. He has been subdividing property since his late teens or early twenties. RP 64. He bought five houses from 2005 to 2007, and sold a house in mid-2007, all within a half mile of the lots at issue. RP 119, 132-138. He was allowed to testify as to the difference in value of the existing houses on the lots to be created by his subdivision between 2006 and 2010. RP 139, 150-152.

As to the lots without houses that would have been created by the requested subdivision, Mr. Jensen testified about a comparable lot he purchased in December, 2006. RP 140. However, the trial court erroneously refused to allow him to testify about an offer he received for comparable lots at that time. RP 141-145.

In *Donaldson v. Greenwood*, 40 Wn.2d 238, 252, 242 P.2d 1038 (1952), the Court stated that many factors may enter into the proof and determination of value of real property, including a bona fide offer to purchase. Furthermore, regardless of its admissibility as substantive evidence, such evidence is admissible if reasonably relied upon by experts, for the limited purpose of explaining the basis for the expert's opinion.

*Allen v. Asbestos Corp.*, 138 Wn. App. 564, 579, 157 P.3d 406 (2007).

The trial court also refused to allow Mr. Jensen to testify about the prices that are currently being paid by builders for comparable lots, stating that testimony was hearsay. RP 156. Pursuant to ER 703, an expert may rely upon “facts or data ... perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” By allowing the expert to rely upon facts “made known” and which “need not be admissible in evidence,” the rule clearly contemplates that an expert may rely upon hearsay information to support his opinion.

This clearly applies to real estate valuations. Appraisers routinely rely upon the reported sale prices of property to determine the fair market value of comparable property. Though the trial court allowed Mr. Jensen to testify about his opinions of value, its ruling refusing to allow him to testify about the basis for those opinions clearly undermined the weight to be given to those opinions.

**D. The trial court erred in admitting and relying upon opinions expressed in a poll of the members that was not reliable, objective, and professionally conducted.**

LJE treasurer Melissa Gubbe was allowed to testify over objection

about the results of a 2000 survey of the lot owners in Debra Jane Lake asking whether they were opposed to subdivisions in the plat. RP 257. The poll was conducted and presented to the Board by Keith Arionus, who has opposed many subdivisions in the plat. RP 318. Mr. Arionus was also allowed to testify over objection as to the results of his poll. RP 409-410. The trial court also admitted in evidence the survey forms allegedly received by Mr. Arionus. Ex. 89; RP 437-438. The trial court included a summary of those survey findings in Finding of Fact 14.

Mr. Arionus testified that he sent a letter to all members of LJE, which stated in part:

The Board of Directors for Lake Jane Estates is asking for opinions from property owners and to reject short platting to preserve the beauty and property value within the association's boundaries.

Ex. 89; RP 410. It then asked the recipient to vote "yes" or "no" to "Short platting within Lake Jane Estates." *Id.* Mr. Jensen never received one, though he lived there at the time. RP 499.

Out of approximately 440 lots in LJE, 117 letters were allegedly returned (though only 92 were offered in Ex. 89). RP 435. No one made an effort to contact the 300+ members who did not respond. RP 435. Mr. Arionus had no training in polling techniques, and did not know that he needed to obtain a cross-section of the target audience to get a statistically

valid result. RP 435-436. He said that about 85% of those who returned the letters were opposed to short platting in Lake Jane Estates. RP 411.

The survey results were clearly hearsay, constituting out-of-court statements offered to prove that the residents in the plat of Debra Jane Lake opposed subdivision of lots. ER 801(c). Many of the letters are unsigned, and some do not even indicate from whom they were allegedly received. Ex. 89.

One Washington court has allowed the results of a survey that was professionally prepared by a reputable source without any apparent reason to falsify. In *Simon v. Riblet Tramway Co.*, 8 Wn. App. 289, 294, 505 P.2d 1291 (1973), the court stated:

Defendant also contends the court erred in admitting into evidence an income and salary survey of professional engineers prepared by the National Society of Professional Engineers. We disagree. The survey of engineers' salaries was undoubtedly hearsay. However, the survey was relevant to the issues raised. The data presented therein, being a broad gathering of engineers' salaries, would have been difficult to present by individual testimony. Furthermore, the survey appears trustworthy and reliable, published by a reputable society, and without any apparent reason to falsify it. It has relevancy to one of plaintiff's contentions. Consequently, the survey was admissible.

Under Federal Rule of Evidence 807 (previously FRE 803(24)), there is a residual exception to the hearsay rule that allows statements “having equivalent circumstantial guarantees of trustworthiness” under

certain circumstances. Washington does not have an equivalent rule. However, even under the federal “residual exception,” survey results as offered by LJE in this case would not be admissible.

In *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 517 (C.A.3 (Pa.), 1998), the Court summarized the federal rule for admission of a survey:

Survey results offered as proof of the matter asserted are hearsay, and thus the results of a survey, and any testimony based on those results, cannot be admitted into evidence unless the survey falls into a recognized class exception to the hearsay rule or into the residual exception contained in Fed.R.Evid. 803(24). *See Pittsburgh Press Club v. United States*, 579 F.2d 751, 755-58 (3d Cir.1978). In this case none of the class exceptions are present, so we examine whether the survey contains the “circumstantial guarantees of trustworthiness” required for admissibility under Rule 803(24).

In *Pittsburgh Press*, we stated that “the circumstantial guarantees of trustworthiness are for the most part satisfied if the poll is conducted in accordance with generally accepted survey principles.” *Id.* at 758. We then discussed several factors which must be examined in determining whether a poll meets generally accepted survey principles:

A proper universe must be examined and a representative sample must be chosen; the persons conducting the survey must be experts; the data must be properly gathered and accurately reported. It is essential that the sample design, the questionnaires and the manner of interviewing meet the standards of objective surveying and statistical techniques.

*Id.*

The proponent of the evidence has the burden of establishing these elements of admissibility.

Applying these standards, the LJE survey is clearly inadmissible.

The person conducting the poll had no expertise in polling, no representative sample was obtained, there were no safeguards to ensure that the forms were actually submitted by association members, and the manner of soliciting the information was clearly slanted to seek votes in opposition. The letter did not objectively ask for the members' opinion, it asked for their support in rejecting short plats. There was no effort by LJE to establish any statistical validity to the survey results.

In *Engers v. AT&T*, 2005 WL 6460846, 2 (D.N.J., 2005), the Court excluded the results of an internet survey as hearsay.<sup>8</sup> The Court stated that polls must be conducted in accordance with generally accepted survey principles, citing the standards in *Brokerage Concepts*. The Court held:

Here, the survey so clearly fails all tests of trustworthiness that the Court will only address a couple of the reasons why. First, and most obvious, plaintiffs do not even argue that Ms. Anderson or Jane Banfield, the class member who purportedly set up the survey, is an expert. ...

---

<sup>8</sup> A copy of the opinion is attached in Appendix D. Citation to this unpublished opinion is permitted in the Third Circuit. See 3<sup>rd</sup> Circuit Local Appellate Rule 28.3 (a), a copy of which is attached in Appendix C. See also, *City of Newark, N.J. v. U.S. Dept. of Labor*, 2 F.3d 31, 33 (C.A.3, 1993) (unpublished opinion lacks precedential authority, but court may nonetheless consider persuasive its evaluation of a factual scenario virtually identical to the one before it).

Second, the poll respondents are self-selected, rendering the sample necessarily unrepresentative and the responses' objectivity dubious.

Similarly, LJE's poll was not performed by anyone who was an expert, and the poll respondents were self-selected. The only results came from those who bothered to return a ballot. Ms. Gubbe admitted that, if asked whether they oppose subdivisions in Lake Jane Estates, most of the people who are going to respond are the ones who are opposed, because people who do not care will not bother to fill out the form. RP 290-291.

LJE bore the burden of establishing the foundation that the survey was performed in accordance with generally accepted standards, and clearly failed to meet this burden. The trial court erred in admitting the survey forms and testimony regarding the opinions expressed therein.

The error was not harmless. The trial court stated in its oral decision that it read through all of the comments in the 2000 survey, and used those comments in part to reach its conclusion that the Board's decision on the Jensen subdivision request was not arbitrary. RP 609.

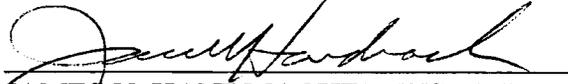
### **CONCLUSION**

In the absence of any evidence that there was a transfer of rights from the developer to Lake Jane Estates, or any merger or other relationship between the developer and Lake Jane Estates, there is no legal

basis to conclude that Lake Jane Estates is the successor to the developer. Since the developer no longer exists, and there is no successor, Restriction 6 is no longer enforceable. This Court should reverse the trial court and direct entry of a judgment declaring that Restriction 6 unenforceable and that Mr. Jensen has the right to subdivide without the consent of LJE.

In the alternative, if Restriction 6 is enforceable, and LJE had the right to grant or deny consent, it failed to act reasonably and in good faith. This Court should reverse the trial court, direct entry of judgment for Mr. Jensen declaring that he has the right to subdivide without the consent of LJE, and remand for a determination of the damages to be awarded to Mr. Jensen arising from the delay occasioned by LJE's wrongful conduct.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of December, 2010.

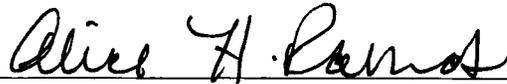
  
\_\_\_\_\_  
JAMES V. HANDMACHER, WSBA #8637  
Morton McGoldrick, P.S.  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on December 2, 2010, I did serve via ABC Legal Messengers (or other method indicated below), true and correct copies of the foregoing by addressing and directing fro delivery to the following:

**VIA ABC LEGAL MESSENGER**

Dianne K. Conway  
Gordon Thomas Honeywell  
1201 Pacific Avenue, Suite 2100  
Tacoma, WA 98402



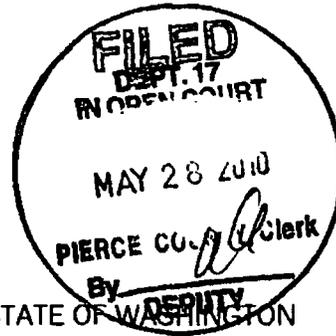
Alice H. Ramos  
Legal Assistant to James V. Handmacher

10 DEC 2 2010  
BY  DEPUTY  
STATE OF WASHINGTON  
COUNTY OF PIERCE

## APPENDIX A



06-2-09944-9 34396840 FNFL 06-01-10



SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

RANDY S. JENSEN, a single man,

Plaintiff,

v.

LAKE JANE ESTATES, a Washington non-profit corporation,

Defendant.

NO. 06-2-09944-9

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ASSIGNED TO THE HONORABLE RONALD E. CULPEPPER

This case, which was tried to the Court on April 13, 14, and 19, 2010, involves a challenge by an owner of a lot within the Debra Jane Lake Plat in Bonney Lake to the authority of the resident homeowners association, Defendant Lake Jane Estates ("LJE"), to enforce a restrictive covenant that requires approval before any lot within the Plat is subdivided. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Lake Jane Estates, a Washington nonprofit corporation, is the homeowners' association for a subdivision of approximately 440 residential lots within the City of Bonney Lake. The subdivision was created in 1959 through the Debra Jane Lake Plat

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1 and consists of relatively large lots. The subdivision is situated around a lake, and it  
2 provides several public amenities, such as parks, lake access, a pool, and a tennis court.

3           2.       When the Debra Jane Lake Plat was recorded with the Pierce County  
4 Auditor in 1959, the developer, the Lake Tapps Development Company ("the developer"),  
5 set forth restrictive covenants on the face of the plat. The notation on the Plat includes  
6 the express provision that the "covenants [are] running with the land and binding upon  
7 future owners, their heirs, successors or assigns." The plat restrictions are recorded with  
8 the Pierce County Auditor, and anyone who purchases a lot in the subdivision is on notice  
9 of the restrictions.  
10

11           3.       The restrictive covenants include a restriction requiring that a lot owner  
12 obtain approval before subdividing a lot ("Restriction No. 6") that states "No lot in this  
13 plat shall be subdivided without the written consent of the LAKE TAPPS DEVELOPMENT  
14 CO., INC."

15           4.       Enforcement of Restriction No. 6, as well as the other restrictions on the  
16 Plat, was provided for in paragraph 14 of the plat restrictions, which states: "The breach  
17 of any of the foregoing conditions shall constitute a cause of action against the person  
18 committing the breach by T&J Maintenance Company [now known as Defendant Lake  
19 Jane Estates] or the Lake Tapps Development Company."  
20

21           5.       The developer of the Debra Jane Lake Plat also filed Articles of  
22 Incorporation and Bylaws for the T&J Maintenance Company; the name of T&J  
23 Maintenance Company was changed to LJE (the defendant in this matter) through an  
24 amendment to the Articles of Incorporation in 1970. The purpose of LJE was to take care  
25 of the development's amenities, including the lake and park, so that the lots were more  
26

1 valuable. The Articles also give the Association, through its Board of Trustees, authority  
2 to enforce the restrictive covenants. The developer had an interest in establishing LJE to  
3 provide some regulation to preserve the feel of the development.

4           6.       The developer subdivided a lot within the Debra Jane Lake Plat in 1965  
5 and sold it as two lots. The deeds issued by the developer as part of this subdivision note  
6 that the new lots are subject to the charges and assessments of LJE and LJE had certain  
7 powers rights and duties regarding Debra Jane Lake.  
8

9           7.       In 1973 LJE received and approved two requests from lot owners to  
10 subdivide lots within the Debra Jane Lake Plat. One of the lots in question was not  
11 subdivided until 1982; there is no evidence that in 1982 the Board considered or  
12 approved that later subdivision.

13           8.       There is some evidence that two property owners wishing to subdivide their  
14 properties in 1990 may have been referred to LJE by the City of Bonney Lake.

15           9.       Between 2001 and October 2005 LJE reviewed six applications from lot  
16 owners in the Debra Lake Jane Plat who wished to subdivide their property and  
17 subsequently approved or denied those requests.  
18

19           10.      LJE filed two lawsuits filed in 2000 seeking to uphold its right to enforce  
20 the restrictive covenant on subdivision. Those lawsuits were later consolidated and tried  
21 in mid 2004.

22           11.      Plaintiff maintains that 14 lots were subdivided between 1972 and 2005  
23 for which no approval was obtained from LJE. Seven of these lots were "super-sized" lots  
24 within Division 3 of the Debra Jane Lake Plat, and another was a large lot on Debra Jane  
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1 Lake itself. The lots resulting from these seven subdivisions are similar in size or larger  
2 than the majority of lots within the Debra Jane Lake Plat.

3 12. A 2000 subdivision that Plaintiff claims was not approved by LJE was  
4 treated as a boundary line adjustment, not a subdivision. Two 1990 subdivisions that  
5 Plaintiff claims was not approved by LJE are the subdivisions referenced in paragraph 8  
6 of these findings.

7  
8 13. It is unknown whether the developer approved any of the subdivisions that  
9 Plaintiff claims were not approved by LJE.

10 14. LJE conducted a survey of its members in 2000 asking for their opinion  
11 regarding whether to allow the subdivision of lots within the Debra Jane Lake Plat. LJE  
12 received 117 responses, of which 85% were opposed to allowing the subdivision of lots.

13 15. Members of LJE have expressed opposition to subdivisions during annual  
14 meetings and in response to specific subdivision requests.

15 16. In 2003 the developer filed articles of dissolution with the Secretary of  
16 State.

17  
18 17. When determining whether or not to approve or disapprove a request to  
19 subdivide a lot within the Debra Jane Lake Plat, the LJE Board of Trustees considers  
20 various factors. These include but are not limited to overall community sentiment,  
21 aesthetics, potential effects on Association property and assets, potential effects on other  
22 members' properties, the site plan of the proposed project, the opinions of the lot owners  
23 who live closest to the lot(s) that are the subject of the subdivision proposal, and the  
24 effect granting the proposal might have on the ability of LJE to deny future subdivision  
25 requests.  
26

1           18.    In October 2005 LJE approved the request to subdivide a lot owned by  
2 Nisim Vanunu located at 7035 Locust Avenue East. This request proposed to subdivide a  
3 single large lot that was formerly two lots into four lots. The lots created by Mr. Vanunu's  
4 proposed subdivision were similar in size to the lots that would be created by Plaintiff's  
5 subdivision proposal.

6           19.    LJE sent a survey to approximately 24 lot owners seeking their opinion  
7 regarding Vanunu's proposed subdivision. LJE received by mail nine responses in favor  
8 of the subdivision and six responses opposed to the subdivision.

9           20.    A key consideration of the LJE Board of Trustees when approving the  
10 Vanunu subdivision proposal was the fact that an abandoned, derelict former fire station  
11 building that created a serious nuisance would be torn down if the subdivision occurred.

12           21.    Plaintiff owns two partially adjacent lots containing single family homes  
13 within the Debra Jane Lake Plat at 18708 Bonney Lake Blvd. and 7012 Locust Ave. East.  
14 In November 2005 Plaintiff submitted an application to LJE seeking approval to short  
15 subdivide these two lots into six lots.

16           22.    Plaintiff and/ or his brother and business partner, Dan Jensen, met with  
17 the Board of Trustees or Board members in November and December 2005 and January  
18 and February 2006 to discuss Plaintiff's proposal. In a letter to Plaintiff dated January  
19 20, 2006, the President of LJE informed Plaintiff that LJE would notify Association  
20 members of his proposal once he provided answers to questions regarding his proposal  
21 asked by the Board of Trustees.

22           23.    The Board sent a survey to approximately 85 lot owners seeking their  
23 opinion regarding Plaintiff's proposed subdivision. LJE received by mail 14 responses  
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1 opposed to the subdivision and 11 responses supporting to the subdivision. Because  
2 this survey was sent, it was reasonable for Plaintiff to assume that he had addressed all  
3 of the Board's concerns about his proposal to the Board's satisfaction.

4 24. After speaking to the owners of 85 neighbor properties, Plaintiff personally  
5 submitted 26 surveys from lot owners in support of his proposal. He did not submit any  
6 surveys from lot owners who told him they were opposed to his proposal. At the direction  
7 of LJE's Board of Trustees, Melissa Gubbe contacted each of the persons whose survey  
8 was returned by Plaintiffs. After discussing the proposal with Ms. Gubbe, 23 of the 26  
9 affirmed that they approved Plaintiff's proposed subdivision. When making its decision  
10 regarding Plaintiff's proposal, LJE's Board of Trustees discounted the legitimacy of the  
11 surveys personally submitted by Plaintiff. Including the surveys turned in by Plaintiff  
12 personally, 34 supported the proposal and 17 were opposed.

14 25. The LJE Board of Trustees voted unanimously to reject Plaintiff's  
15 subdivision request on May 18, 2006. The Plaintiff requested an explanation for the  
16 Board of Trustees' decision, and the Board members declined to give him one.

18 26. Plaintiff filed the present lawsuit on July 28, 2006. On January 25, 2007,  
19 he filed a motion for judgment on the pleadings, claiming that Restriction No. 6 gave only  
20 the developer the authority to approve or deny shortplat requests and, since the  
21 developer was dissolved in 2003, there was no longer any entity with the authority to  
22 approve or deny shortplat requests. The Court granted the Plaintiff's motion on February  
23 2, 2007. LJE filed a motion for reconsideration based on new authority, and the motion  
24 was denied. LJE timely appealed. On May 13, 2008, Division II of the Court of Appeals  
25  
26

1 reversed the grant of judgment to Plaintiff and remanded this matter back to the trial  
2 court.

3 27. Restriction No. 6 has not been substantially and habitually violated.

4 28. There is no evidence that LJE ever intended to abandon Restriction No. 6.

5 29. Prior subdivisions of lots within the Debra Jane Lake Plat that Plaintiff  
6 claims were not approved by LJE have not eroded the general plan of the Debra Jane  
7 Lake Plat such that the enforcement of Restriction No. 6 is useless and inequitable.

8 30. LJE investigated and considered the relevant circumstances before denying  
9 Plaintiff's request to subdivide his lots.

10 31. Plaintiff took the various concerns expressed by LJE about his proposed  
11 subdivision seriously and responded to them in a timely manner.

12 32. The evidence supports LJE's concern about the possible floodgate effect of  
13 allowing too many subdivisions.

14 33. There is no evidence that LJE acted with fraud, dishonesty, incompetence,  
15 or otherwise in bad faith when it rejected Plaintiff's proposal to subdivide his two lots into  
16 six lots.

17 34. The members of the LJE Board of Trustees exercised ordinary care and  
18 acted in a manner they reasonably believed to be in the best interests of LJE when  
19 making the decision to deny Plaintiff's request to subdivide his lots.

#### 20 CONCLUSIONS OF LAW

21 1, The Court has jurisdiction over the parties and the subject matter pursuant  
22 to RCW 2.08.010. Venue is proper because the property that is the subject of this action  
23 is located in Pierce County.  
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FINDINGS OF FACT AND CONCLUSIONS OF LAW - 7 of 9  
(06-2-09944-9)  
[1464928 v3.doc]

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1           2.     Washington courts have moved away from the position of strict  
2 construction historically adhered to when interpreting restrictive covenants. Instead of  
3 viewing restrictive covenants as restraints on the free use of land, Washington courts now  
4 acknowledge that restrictive covenants tend to enhance, not inhibit, the efficient use of  
5 land.

6           3.     If more than one reasonable interpretation of Restriction No. 6 is possible,  
7 the Court must favor that interpretation that avoids frustrating the reasonable  
8 expectations of the lot owners within the Debra Jane Lake Plat. The Court's goal is to  
9 ascertain and give effect to those purposes intended by Restriction No. 6.

10          4.     LJE has direct authority under the terms of the covenants and Articles of  
11 Incorporation to require that lot owners within the Debra Jane Lake Plat obtain LJE's  
12 approval before subdividing any lot.

13          5.     Alternatively, LJE is the *de facto* successor to the developer for the purpose  
14 of enforcing the terms of the restrictive covenants, including Restriction No. 6, and  
15 therefore has the authority to require that lot owners within the Debra Jane Lake Plat  
16 obtain LJE's approval before subdividing any lot.

17          6.     Restriction No. 6 has not been abandoned.

18          7.     The Court will not substitute its judgment for that of the LJE Board of  
19 Trustees provided the Board exercises its judgment reasonably and in good faith..

20          8.     Limiting density is a valid exercise of power by a homeowner's association.  
21 It does not violate public policy to keep lots bigger than the minimum lot size allowed by  
22 the applicable zoning code.  
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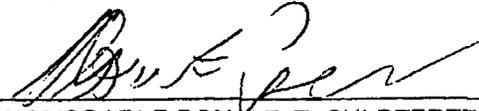
1 9. LJE did not act in bad faith when it denied Plaintiff's request to subdivide  
2 his two lots into six lots.

3 10. LJE did not act unreasonably when it denied Plaintiff's request to subdivide  
4 his two lots into six lots.

5 11. LJE exercised ordinary care when it refused to approve Plaintiff's request to  
6 subdivide his two lots into six lots.

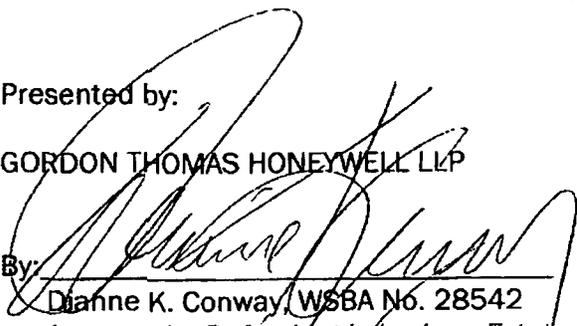
7 12. Plaintiff is not entitled to any damages.

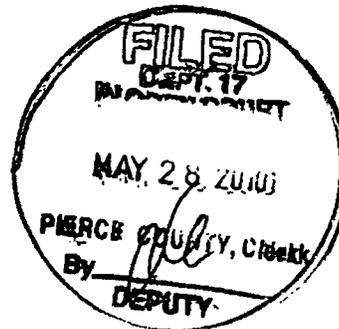
8  
9  
10 DONE IN OPEN COURT this 28 day of May 2010.

11  
12   
13 THE HONORABLE RONALD E. CULPEPPER

14 Presented by:

15 GORDON THOMAS HONEYWELL LLP

16  
17 By:   
18 Dianne K. Conway, WSBA No. 28542  
19 Attorney for Defendant Lake Jane Estates



20 *expressed in the form*  
21   
22 #8637

## APPENDIX B

Westlaw.

Page 1

Not Reported in N.E.2d, 1991 WL 115949 (Ohio App. 5 Dist.)  
**(Cite as: 1991 WL 115949 (Ohio App. 5 Dist.))**

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR  
 REPORTING OF OPINIONS AND WEIGHT OF  
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Stark  
 County.  
 Samuel BARBATO and Harriet Barbato, Plaintiffs-  
 Appellants,  
 v.  
 Gary SHUNDRY and Paula Shundry, Defendants-  
 Appellees.  
**No. CA-8451.**

June 10, 1991.

Civil Appeal from the Court of Common Pleas,  
 Case No. 90-1719-OC.  
 Rex W. Miller, Lesh, Casner & Miller, Canton, for  
 plaintiffs-appellants.

Terrence L. Seeberger, Ross A. Carter, Black, Mc-  
 Cuskey, Souers & Arbaugh, Canton, for defend-  
 ants-appellees.

Before GWIN, P.J., and SMART and WILLIAM B.  
 HOFFMAN, JJ.

*OPINION*

SMART Judge.

\*1 This is an appeal from a judgment of the Court  
 of Common Pleas of Stark County, Ohio, denying  
 the petition of plaintiffs-appellants Samuel and  
 Harriet Barbato (appellants) for temporary and per-  
 manent injunctive relief to prohibit defendants-ap-  
 pellees Gary and Paula Shundry (appellees) from  
 building a detached garage on their property.

After a bench trial, the trial court made extensive

findings of fact and conclusions of law, which we  
 have attached hereto and incorporate herein by ref-  
 erence, rather than paraphrasing those findings.

Appellants assign two errors to the trial court:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT'S JUDGMENT IS AGAINST  
 THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT JUDGMENT IS CON-  
 TRARY TO LAW.

I

In *C.E. Morris v. Foley Construction Co.* (1978),  
 54 Ohio St.2d 279, our Supreme Court held:

Judgments supported from some competent, cred-  
 ible evidence going to all the essential elements of  
 the case will not be reversed by a reviewing court  
 as being against the manifest weight of the evi-  
 dence.

Syllabus by the Court.

Appellants assert that the trial court's determina-  
 tion that the grantor refusal provisions of the restrictive  
 covenants have been abandoned is not supported by  
 the record.

We have examined the record before us, and we do  
 not agree. The record contains evidence which, if  
 believed by the trial court in its function as fact  
 finder, indicates that the corporation that developed  
 the allotment has been dissolved, and no new suc-  
 cessor corporation has asserted approval authority,  
 that the individual grantors have expressly refused  
 to assert the authority to reject the proposed garage,  
 that the grantors consider that they have no legal

Not Reported in N.E.2d, 1991 WL 115949 (Ohio App. 5 Dist.)  
(Cite as: 1991 WL 115949 (Ohio App. 5 Dist.))

authority to exercise and that no clear procedure for approval or rejection had been set up.

Appellants also maintain that the equities and public policies supporting enforcement of the restrictive covenant outweigh the right of appellees to use their property for the proposed garage.

In *Driscoll v. Austintown Assoc.* (1975), 42 Ohio St.2d 263, the Supreme Court opined that our legal system does not favor restrictions on the use of property, citing *Loblow, Inc. v. Warren Plaza, Inc.* (1955), 163 Ohio St. 581, that agreements restricting the use of real estate must be strictly construed against those limitations.

The trial court found that appellees would be substantially inconvenienced and would incur costs and possible property damage if they cannot build this garage. There was evidence before the court that indicated that the proposed garage would increase, not decrease, the property value of appellees' premises and nearby properties.

In short, we find sufficient, competent and credible evidence to support the trial court's judgment, and we conclude therefore that it is not against the manifest weight of the evidence.

The first assignment of error is overruled.

## II

Appellants next maintain that the trial court's conclusion of law no. 6, finding that the restriction that requires the approval of the grantor is not enforceable, is contrary to Ohio law. Appellants cite us to several cases from other appellate districts. We have reviewed these cases and find them distinguishable because in each case where the courts found a general plan that was reasonably exercised, they held them enforceable. Those that were not were struck down. Here, the general plan that was arguably once in effect has broken down and there is no entity available to reasonably exercise the authority to disapprove of the proposed garage. Keeping in

mind the dictates of *Driscoll, supra* I, the language in these covenants must be strictly construed against the limitations which they impose.

\*2 Appellants raise a number of issues under this assignment of error that interrelate. Basically, appellants assert that by virtue of the fact that they own property in the allotment, they have standing to enforce restrictive covenants even if the grantor has refused, arbitrarily or not, to enforce them. If the restrictive covenants are enforceable at all, then a property owner such as appellants may enforce the restrictions. However, as the trial court properly found, the restrictions are not enforceable because the rejection procedure no longer exists. A property owner cannot unilaterally and arbitrarily assume that authority, however capable he is of enforcing a clear cut restriction that requires no aesthetic or other judgment.

In short, we find that the trial court's judgment is in accord with Ohio law.

The second assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

GWIN, P.J., and WILLIAM B. HOFFMAN, J.,  
concur.

## ATTACHMENT

IN THE COURT OF COMMON PLEAS

STARK COUNTY, OHIO

SAMUEL BARBATO, Plaintiff

vs.

GARY SHUNDRY, Defendant

Not Reported in N.E.2d, 1991 WL 115949 (Ohio App. 5 Dist.)  
(Cite as: 1991 WL 115949 (Ohio App. 5 Dist.))

Case No. 90-1719-OC

Dec. 19, 1990.

*FINDINGS OF FACT AND CONCLUSIONS OF  
LAW AND JUDGMENT ENTRY*

*FINDINGS OF FACT*

1. The parties stipulated that the respective spouses of the plaintiff and defendant could be added as parties, and be bound by the decision in this case; and, in fact, each spouse, Paula Shundry and Harriet Barbato, was present and were made parties.

2. The parties further stipulated that the hearing of December 7, 1990 constituted the consolidated hearing on the merits of plaintiff's suit for preliminary and permanent injunctive relief.

3. Plaintiff is the owner of property located at 2533 57th Street N.E., North Canton, Ohio, and further known as Lot No. 18 in Meadow Glen Allotment No. 1 by virtue of a deed from Leroy H. Dieringer and Florence J. Dieringer dated November 24, 1958, recorded in Deed Volume 2609, page 693, Stark County Recorder's Office.

4. Defendant is the owner of certain property located at 2527-57th Street N.E., North Canton, Ohio, and further known as Lot No. 19 in Meadow Glen Allotment No. 1 by virtue of a deed from James R. Pugh and Dorothy J. Pugh dated June 10, 1978, recorded in Deed Volume 4086, page 127, which grantor acquired title to such property from Donald E. Joseph by deed dated April 25, 1977, recorded in Deed Volume 3959, page 187, and which grantor acquired title to such property from Leroy H. Dieringer and Florence J. Dieringer by deed dated September 7, 1960, recorded in Deed Volume 2721, page 681, Stark County Recorder's Office.

5. The title to lots in Meadow Glen Allotment No. 1, including the titles to both plaintiff and defend-

ant's properties identified above, are subject to uniform protective covenants and restrictions which provide in relevant part as follows:

"... said covenants and restrictions are adopted for the benefit and protection of all Meadow Glen Allotment No. 1 and that all the restrictions shall be construed together, ... and no violations of these restrictions shall act as a precedent in allowing others to violate the same or other restrictions, and it being further understood and agreed that the Grantors shall have the right to interpret these restrictions, which interpretation shall be binding as to all persons or property benefitted or bound by them."

\*3 "FIRST: No lot shall be used or occupied for other than private residence purposes ..."

"TWELFTH: No buildings or fence may be erected or maintained on the property herein sold until the plans, elevation, location, materials and grade thereof have been submitted to the Grantors and by them approved in writing and a copy of said plans which shall include all four elevations deposited with said Grantors nor shall any change or alteration be made in the design of any buildings or fences after the original construction thereof until approval thereof has been given in writing by the Grantors. The Grantors shall have the right to refuse any building, grading or location plans and the materials thereof which are not suitable or desirable in their opinion, for aesthetic or other reasons, and they shall have the right to take into consideration the suitability of the proposed building or other structure, and of the materials of which it is to be built, to the site upon which it is proposed to erect the same, the harmony thereof with the surroundings, and the effect of the building or other structure as planned on the outlook from the adjacent or neighboring property."

"THIRTEENTH: ... The garage, if not designed in with the dwelling, shall be located with the advice and consent of the Grantor so as not to be detrimental to adjoining lots or to conflict with the general plan of beautifying the rear portions of lots as

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garden sites. The Grantor may disapprove the location of any garage which does not comply herewith."

"EIGHTEENTH: Any covenant or restriction contained in this agreement may be enforced against any violation thereof by any present or future owner or owners of any lots located in said Meadow Glen Allotment No. 1 by any proper, legal or equitable proceedings, the same being for the benefit of all present and future owners of land in said Allotment."

6. Defendants obtained zoning approval from Plain Township for the construction of a detached garage to be located in the rear of their property.

7. The proposed garage would be 24 feet wide and 25 feet deep with a maximum peak of 15 feet and a 10 foot high garage door. Said garage was to be built with its outside walls 10 feet from the North lot boundary line, and 10 feet from the East lot boundary line. The exterior of the garage and defendants' home would be compatible in appearance. The driveway extension to the garage is designed so that it would come no closer to the East lot boundary line than does the presently existing concrete walkway at the side of defendants' home.

8. Defendants plan to landscape the garage, and were willing to do so in a way as to minimize the garage's visibility to plaintiff and to minimize any potential increase in noises.

9. The garage would be used to store a boat and a truck used by defendants in a part time cleaning business. No chemicals will be stored in the garage; nor would any commercial activities be conducted there.

10. The "grantors" referred to in the restrictive covenants for Meadow Glen Allotment No. 1 were Leroy H. Dieringer and Florence J. Dieringer. Testimony was elicited at trial that L.H. Dieringer, Inc. is the "grantor" for purposes of approving or disapproving plans for other Meadow Glen Allot-

ments, but there is no evidence of a written transfer of approval authority to that corporation for Meadow Glen Allotment No. 1. L.H. Dieringer, Inc. is a dissolved corporation.

\*4 11. Defendants attempted to obtain written approval for the proposed garage from Leroy H. Dieringer, who had been the principal of L.H. Dieringer, Inc. Mr. Dieringer did not review the proposal. Mr. Dieringer told the defendants that the restrictive covenant was invalid, and that they did not need his written approval. He did not approve or reject the plans for the proposed garage. Mr. Dieringer, while testifying that he did not approve or disapprove of the plans, further testified that his reasons for not agreeing to the proposal, without reviewing it, were complaints of neighbors and the fact that there was no two-car detached garage in the allotment.

12. Plaintiff Samuel Barbato objected to the proposed garage because it would be visible from his yard, which he has landscaped, and because vehicles driving down the driveway would pass by his bedroom window.

13. Three neighbors objected to the proposed garage for the reason that it would, among other things, diminish their property value, and would set a precedent which could lead to other detached garages in the allotment.

14. Three neighbors testified that they did not object to the proposed garage. One neighbor, Carolyn Valentine, testified that even if she lived in plaintiffs' home or next to the defendants' home, she would not object to the proposed garage.

15. John Boebinger, an experienced real estate broker, testified that based on his view of the plans, property and allotment, that the proposed garage would increase the value of defendants' property and the immediately surrounding properties. His opinion was based in large part on the garage replacing an old green outbuilding, and that defendants' truck, which is often parked in front of defendants'

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home, would be stored in the garage.

16. Defendants' cleaning truck needs to be kept in a heated garage during winter months to prevent damage to its equipment. It will not fit inside defendants' present attached garage. Defendants are currently renting a garage several miles away to house the truck at a rate of \$350.00 a month. Housing the truck several miles away constitutes a substantial inconvenience to defendants' part-time cleaning business.

17. Of the eighty-five (85) homes in Allotments 1, 2, 3 and 4, over thirty (30) have outbuildings, some as high as twelve (12) to fourteen (14) feet, and over thirty (30) have driveways that go to the side of, or to the rear of said homes. Several have attached garage additions. None of the outbuildings referred to herein have a foundation as is proposed in the present case.

18. The applicable zoning regulations and the restrictive covenant do not contain a prohibition against detached garages.

19. The defendants' truck is a one ton truck, and therefore, does not violate a Plain Township zoning regulation which prohibits the parking of trucks with an axle weight exceeding 1 1/2 tons in a residential district. The restrictive covenants do not contain a provision prohibiting the parking or storage of a truck on an owner's property.

#### *CONCLUSIONS OF LAW*

\*5 1. The restrictive covenants for Meadow Glen Allotment No. 1 do not prohibit a detached garage. This is not a case where an adjoining property owner in an allotment is coming in to court seeking injunctive relief against an activity by a property owner which is prohibited pursuant to the restrictive covenants. The restrictive covenants in the present case allow for a detached garage, but set forth a procedure to be followed in obtaining approval of the plans and certain guidelines to be followed by the "grantor" in reviewing the plans.

2. The grantor mentioned in the restrictive covenants for other Meadow Glen Allotments required to review plans was L.H. Dieringer, Inc., a corporation. That entity is no longer in existence. There is no evidence of a successor corporation having been created for the purpose of exercising that approval authority, be it another corporation controlled by the original grantors, the grantor individually, or a homeowner's association.

3. The evidence before the Court is that L.H. Dieringer, individually, has not exercised approval authority for Meadow Glen Allotment No. 1 for some period of time, and that he himself is of the opinion that the covenants are not enforceable. There is no evidence of a written transfer of the approval authority to a third party entity. Mr. Dieringer, by his testimony, indicated a clear "hands off" approach to being involved in the approval process.

4. The Court finds that there are sufficient guidelines in the restrictions relative to the requirement of approval of plans for a detached garage to have made them enforceable when adopted. However, the Court finds in the present case that due to the passage of time, the position of not being involved articulated by Mr. Dieringer, and the dissolution of L.H. Dieringer, Inc., that there is no clear procedure in effect for the exercise of the approval authority.

5. Even assuming that Mr. Dieringer, individually, still had the right to exercise that authority, such right may not be exercised in an arbitrary manner. In the present case, there is no evidence that he even reviewed the plans. Since a detached garage is not prohibited in the allotment, disapproval of the plans on the basis that there is no other detached garage in the allotment at the present time, or that neighbors objected to the attached garage, would not be a sufficient basis or in keeping with the guidelines set forth in the deed restrictions.

6. Accordingly, this Court is of the opinion that while most of the restrictive covenants in the allotment may still be enforceable, those covenants re-

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quiring the approval of the grantor in the absence of an entity or are not enforceable due the abandonment of the approval authority by the grantor without a proper transfer to another entity.

7. This Court further holds that even assuming arguendo that "non approval" constituted action on his part, that the injunctive relief would still have been denied because his action was arbitrary and not based on the guidelines established by the restrictions.

\*6 /s/John G. Haas, Judge

Copies to:

Atty. Rex W. Miller

Atty. Terrence Seeberger

Atty. Ross Carter

Ohio App.,1991.

Barbato v. Shundry

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## APPENDIX C



Not Reported in N.E.2d, 2006 WL 2796258 (Ohio App. 11 Dist.), 2006 -Ohio- 5166  
 (Cite as: 2006 WL 2796258 (Ohio App. 11 Dist.))

CHECK OHIO SUPREME COURT RULES FOR  
 REPORTING OF OPINIONS AND WEIGHT OF  
 LEGAL AUTHORITY.

Court of Appeals of Ohio,  
 Eleventh District, Lake County.  
 Gary GARVIN, et al., Plaintiffs-Appellants,  
 v.  
 Geoffrey R. CULL, et al., Defendants-Appellees.  
 No. 2005-L-145.

Sept. 29, 2006.

Civil Appeal from the Court of Common Pleas,  
 Case No. 04 CV 001962.

Gerald J. Paronite, Gerald J. Paronite Co., LPA,  
 Willoughby Hills, OH, for Plaintiffs-Appellants.

Mark A. Zicarelli, Gibson, Brelo, Zicarelli &  
 Martello, Mentor, OH, for Defendants-Appellees.

COLLEEN MARY O'TOOLE, J.

\*1 ¶ 1 Appellants, Gary Garvin and Lou Ann  
 Garvin ("Garvins"), appeal from a judgment entry  
 by the Lake County Court of Common Pleas grant-  
 ing appellees' Geoffrey R. Cull and Vicki A. Cull  
 ("Culls"), motion for partial summary judgment.

¶ 2 The relevant facts are as follows. The Culls  
 and Garvins own neighboring property in Shiloh  
 Park Subdivision ("Subdivision"), located in Men-  
 tor, Ohio. On July 1, 2004, the Culls applied to the  
 City of Mentor Building Department for a permit to  
 build a privacy fence along the boundary between  
 their property and the Garvins'. The Culls proposed  
 constructing the fence at a height of six feet for a  
 distance of 87 feet from the rear property line and  
 then lowering the fence to a height of four feet for  
 another 68 feet from the front corner of the home to  
 the front yard sidewalk. The permit was granted on  
 July 6, 2004 and the fence installed.

¶ 3 On September 28, 2004, the Garvins filed a  
 Complaint against the Culls seeking, in relevant  
 part to this appeal, to enforce a deed restriction re-  
 lating to fences, imposed on all lots in the Subdivi-  
 sion.<sup>FN1</sup> It is undisputed between the parties that  
 the developers of the Subdivision, Birchfield  
 Homes, Inc. ("Birchfield") formulated deed restric-  
 tions for the entire subdivision and established a  
 Subdivision Homeowner's Association  
 ("Association").

FN1. The Complaint set forth two addi-  
 tional counts: violation of the City of  
 Mentor's ordinances as nuisance, and tres-  
 pass and nuisance, which are not the sub-  
 ject of this appeal.

¶ 4 The relevant provisions of the Declaration of  
 Restrictions for the Subdivision, recorded in 1984,  
 are as follows:

¶ 5 "Article V Architectural Control"

¶ 6 "[n]o building, fence, wall, or other structure  
 shall be commenced, erected or maintained \* \* \*  
 until the plans and specifications showing the  
 nature, kind, shape, height, materials, and location  
 \* \* \* shall have been submitted to and approved in  
 writing as to harmony \* \* \* by the Board of Trust-  
 ees of the Association, or by an architectural com-  
 mittee composed of three (3) or more representat-  
 ives appointed by the Board. In the event said  
 Board, or its designated committee, fails to approve  
 or disapprove such design and location within thirty  
 (30) days after said plans and specifications have  
 been submitted to it, approval will not be required  
 and this Article will be deemed to have been fully  
 complied with."

¶ 7 "Article VI General Provisions Enforcement"

¶ 8 "The Association, or any owner, shall have  
 the right to enforce \* \* \* all restrictions \* \* \* [.]"

¶ 9 Exhibit E of the deed restrictions contains the

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following relevant provisions:

{¶ 10} “ \* \* \* No portion of the premises nearer to the street \* \* \* than the building setback line shall be used for any purpose other than that of maintaining a lawn, \* \* \* and no fence shall be placed upon such portion of the premises without the consent of the Grantors [Birchfield] \* \* \* .”

{¶ 11} “After July 1, 2004, the rights, duties, and privileges of the Grantors [Birchfield] herein, if no longer owners of any subplot herein, shall be enjoyed by a committee of three members elected by a majority of the owners \* \* \* .”

\*2 {¶ 12} In their Complaint, the Garvins asserted standing as property owners to enforce the deed restrictions and alleged that the Culls did not obtain their permission or permission from the Association to construct the fence as required in the deed restrictions.

{¶ 13} On April 4, 2005, the Culls filed a motion, brief and supporting affidavits for partial summary judgment alleging no genuine issue of material fact existed on the issues of the enforceability of the deed restrictions, the Garvins' standing to enforce the Mentor Code of Ordinances, or that the Garvins were not entitled to injunctive relief for removal of the fence. The Garvins submitted a brief in opposition with supporting affidavits on April 18, 2005. On April 25, 2005, the Culls filed a reply brief. On May 5, 2005, the trial court granted the Culls' motion for partial summary judgment.

{¶ 14} In its judgment entry, the court stated: “ \* \* \* the court finds as a matter of law, that: (1) with respect to the [Culls'] fence, the deed restrictions that required prior approval of fences by the homeowners' association or its architectural committee are unenforceable against the [Culls]; (2) [the Culls] are not in violation of the Ordinances of the City of Mentor with respect to their fence because they obtained a permit from the City of Mentor for the construction of the fence; and (3) [the Garvins] are not entitled to injunctive relief with re-

spect to removal of the fence on [the Culls'] property.”<sup>FN2</sup> It is from this judgment that Garvins have filed a timely notice of appeal and assert the following sole assignment of error:

FN2. The Garvins and the Culls entered into a stipulated injunctive order and dismissal for the remaining counts based upon trespass and nuisance, in order to expedite this appeal as a final appealable order.

{¶ 15} “The trial court erred when it ruled that [the Culls] erecting a fence in front of the building setback line of [the Culls'] house did not violate the subdivision's private deed restriction.”<sup>FN3</sup>

FN3. The Garvins essentially appealed the trial court's decision granting partial summary judgment that the deed restrictions are unenforceable against the Culls as to the four foot high section of the fence, extending 68 feet into the front yard building setback.

{¶ 16} An appellate court reviews a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241, 1996-Ohio-336. In applying the de novo standard, we review the trial court's decision independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153. Summary judgment is proper when: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party who is entitled to have the evidence construed most strongly in her favor. Civ.R. 56(C); *Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 268, 617 N.E.2d 1068, 1993-Ohio-12. The moving party bears the burden of showing there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. See, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264, 1996-Ohio-107.

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{ ¶ 17} In their assignment of error, the Garvins raise a number of interrelated issues based upon uncontroverted evidence. It is undisputed that the parties' deeds of conveyance make reference to the subdivision's declaration of covenants, conditions, and restrictions and that the Association was duly created by Birchfield in 1984. It is further undisputed by the parties that the Association, and its status as a nonprofit corporation, was "cancelled" by the State of Ohio in September, 1986, and no statements of continued existence have been filed since that time. There is no longer any Association or board or committee otherwise operating in the Subdivision. Further, Birchfield was the original grantor of the deed restrictions and is no longer an owner and developer for the twenty-two year old subdivision and no successor committee to exercise their rights was created by the home owners. Thus, there was no Association, or any approval committee, in existence or otherwise operating, at the time the subject fence was erected in July 2004. It follows that there was no entity that the Culls could apply to for approval of the fence.

\*3 {¶ 18} The Garvins first assert that in the absence of any approval entity, the fence is prohibited as a matter of law. We disagree.

{¶ 19} It is well established in Ohio that restrictions on the use of property are generally not favored. *Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263, 276, 328 N.E.2d 395; *W.A.E. Corp. v. Fellerger*, 11th Dist. No. 2776, 1980 Ohio App. LEXIS 13334, at 3, 1980 WL 352125. While a court has the authority to interpret the language of a restrictive covenant to determine the intent of the drafters, it cannot rewrite a covenant to create new restrictions. *Driscoll* at 277, 328 N.E.2d 395. Pursuant to *Driscoll*, the language in these deed restrictions must be strictly construed against the limitations which they impose. See, also, *Barbato v. Shundry*, 5th Dist. No CA-8451, 1991 Ohio App. Lexis 2973, at 4, 1991 WL 115949. In *Barbato*, the property owner attempted to prohibit neighbors from building a detached garage on their property

pursuant to a restrictive covenant which required approval from a corporation which was then defunct. *Id.* at 13. The Fifth District held that a property owner could not unilaterally and arbitrarily assume that authority. *Id.* at 15.

{¶ 20} Initially, we note that this case is distinguishable from cases where an adjoining landowner in a subdivision seeks injunctive relief against an activity by a property owner which is prohibited pursuant to a deed restriction. Here, the deed restrictions set forth that: " \* \* \* no fence shall be placed [in front of the building line setback] without the consent of the [grantors [Birchfield]." The declaration of covenants, conditions, and restrictions of the Subdivision relating to the construction of all fences, states they require the "approval by the [board] or by an architectural review committee." The deed restrictions do not prohibit fences in front yard areas. Instead, the language of the deed restrictions permits fences, but sets forth a procedure for consent and approval of the plans by the board or other committee(s). Thus, the Garvins' argument is not well-taken.

{¶ 21} Next, the Garvins argue that the deed restrictions can be enforced as prohibiting fences, because evidence was produced that the Culls' property is part of a residential scheme of development and general plan to prohibit front yard fences. Restrictive covenants, like other efforts to restrict land use, are generally viewed with disfavor, but this disfavor can be overcome by evidence establishing the existence of a general plan or scheme. *Bailey Development Corp. v. MacKinnon-Parker, Inc.* (1977), 60 Ohio App.2d 307, 397 N.E.2d 405, paragraph one of the syllabus. Plans which are dedicated to maintaining the harmony and aesthetic quality of a community have been upheld when they are reasonably exercised. *Beckett Ridge Assn.-I, v. Agne* (1985), 26 Ohio App.3d 74, 76, 498 N.E.2d 223, citing *Prestwick Landowners' Assn. v. Underhill* (1980), 69 Ohio App.2d 45, 429 N.E.2d 1191.

{¶ 22} In the case at bar, the evidence is undisputed that, except for the Culls' lot, there are no fences in

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the front yards of any of the homes in the subdivision. Thus, the Garvins contend that the absence of front yard fences establishes that the deed restrictions relating to fences were part of a general plan or scheme to enhance the aesthetic character of the community. The Garvins cite to *Bailey* and *Prestwick*, supra, in support of this argument. Unlike the case at bar, in those cases, there was an operating Association or architectural committee in existence to which the property owners could or did apply for approval. Here, we conclude that the general plan regarding fence regulation that was arguably once in effect has collapsed because there is no entity available to reasonably exercise the authority to disapprove of the proposed fence.

\*4 {¶ 23} Finally, the Garvins assert that the fact that they own property in the subdivision, gives them standing to enforce the deed restrictions. We agree that if the deed restrictions are enforceable, then property owners such as the Garvins could enforce the restrictions. *Wallace v. The Clifton Land Co.* (1915), 92 Ohio St. 349, 110 N.E. 940, paragraph one of the; *Ormond v. Rollingbrook Estates Homeowners Assn.*, 8th Dist. No. 76482, 2000 Ohio App. LEXIS 5731, at 10, 2000 WL 1847558; *Catawba Orchard Beach Assn., Inc. v. Basinger* (1996), 115 Ohio App.3d 402, 407, 685 N.E.2d 584; *Devendorf v. Akbar Petroleum Corp.* (1989), 62 Ohio App.3d 842, 845, 577 N.E.2d 707 (an owner of a lot subject to deed restrictions may maintain an action to enforce the same restrictions imposed upon other lots by a common grantor.) However, as the Fifth District reasoned in *Barbato*, at 4-5, “the restrictions are not enforceable because the rejection procedure no longer exists. A property owner cannot unilaterally and arbitrarily assume that authority, however capable he is of enforcing a clear cut restriction that requires no aesthetic or other judgment.” See, also, *Chestnut Ridge Homeowners Assn. v. Lasker*, 1993 Conn.Super. LEXIS 2123, 1993 WL 327783; *Gonzalez v. Atascocita N. Community Improvement Assn.* (Tex.App.1995), 902 S.W.2d 591. Nothing in the deed restrictions gives the Garvins authority to act as the board, or archi-

tectural committee, or as a successor committee to the grantors, Birchfield, to review plans for approval and consent to the erection of fences in the Subdivision.

{¶ 24} Upon considering all of the evidence and construing it most strongly in appellant's favor, we conclude that no genuine issue of material fact exists as to whether the deed restrictions regarding fence construction were unenforceable. Accordingly, appellant's sole assignment of error is without merit.

{¶ 25} The judgment of the Lake County Court of Common Pleas is affirmed.

DONALD R. FORD, P.J., and CYNTHIA WEST-COTT RICE, concur.  
Ohio App. 11 Dist., 2006.  
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## APPENDIX D

Westlaw

Page 1

Slip Copy, 2005 WL 6460846 (D.N.J.)  
 (Cite as: 2005 WL 6460846 (D.N.J.))

Only the Westlaw citation is currently available.

### Discussion

**This decision was reviewed by West editorial staff and not assigned editorial enhancements.**

United States District Court,  
 D. New Jersey.  
 ENGERS, et al.  
 v.  
 AT & T, et al.  
**Civil Action No. 98-CV-3660 (JLL).**

Sept. 9, 2005.

Named Expert: Claude Poulin, FSA, M.A.A.A., EA  
 Neil H. Deutsch, Jonathan I. Nirenberg, Deutsch  
 Resnick, PA, Hackensack, NJ.

Christopher H. Mills, Fisher & Phillips, LLP, Cor-  
 porate Park III, Somerset, NJ.

### LETTER-OPINION & ORDER

JOSE L. LINARES, District Judge.

\*1 Dear Counsel:

#### Introduction

This matter is before the Court on defendants' motion to exclude certain evidence and to strike portions of plaintiffs' statement of facts filed pursuant to Local Civil Rule 56.1. More specifically, defendants have moved to exclude the supplemental declarations of Claude Poulin and Martha Anderson, and to strike portions of plaintiffs' L. Civ. R. 56.1 statement that are argumentative, baseless, founded upon inadmissible evidence, and the like. The Court has considered the submissions in support of and in opposition to the motion. There was no oral argument. *See* Fed.R.Civ.P. 78.

#### I. Motion to Exclude the Supplemental Declaration of Claude Poulin<sup>FN1</sup>

FN1. Preliminarily, contrary to plaintiffs' assertions, the Court sees nothing improper about filing a motion to strike certain evidence from summary judgment submissions in lieu of addressing such concerns in summary judgment briefs. (*See* Pls.' Br. at 5.) Plaintiffs seem to suggest that defendants are required by the rules to waste pages in their summary judgment filings addressing their adversaries' procedural transgressions instead of their adversaries' substantive arguments. If there were such a requirement, the most procedurally deficient litigants would enjoy a distinct advantage.

Rule 26(e) imposes a duty to supplement expert and other disclosures. Rule 37(c)(1) provides that failure to supplement under Rule 26(e), "unless such failure is harmless," mandates the barring of the subject evidence from trial, motions practice, and the like. *See also* Fed.R.Civ.P. 37(b)(2) (empowering district courts to bar evidence as a sanction for violating court order). In considering exclusion as a sanction, this Court considers (1) the prejudice or surprise of defendants, (2) defendants' ability to cure that prejudice, (3) disruption of the orderly and efficient progress of this litigation, and (4) bad faith or willfulness on plaintiffs' part. *Nicholas v. Penn. State Univ.*, 227 F.3d 133, 148 (3d Cir.2000).

Here, the Court deems the sanction of exclusion too extreme. *See DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1202 (3d Cir.1978) (sanction of exclusion is drastic and must survive strict four-prong test set forth above). While it is true that plaintiffs failed to supplement their expert disclosures under Rule 26(e), the opinions proffered in Mr.

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Poulin's four-page supplemental declaration merely expound upon-and only briefly-opinions included in his original report.<sup>FN2</sup> See *Solaia Tech. LLC v. ArvinMeritor, Inc.*, 361 F.Supp.2d 797, 807-10 (N.D.Ill.2005) (striking previously undisclosed expert opinions from a declaration in defense of a summary judgment motion and declining to strike opinions in same declaration previously disclosed in the expert report). Mr. Poulin's elaborations, moreover, are based at least in part on the Sales Agreement this Court ordered defendants to produce on May 3, 2004 (see Hedges, J., Letter-Opinion & Order of 5/3/04), which was unavailable to plaintiffs at the close of expert disclosures. Consequently, there is insufficient prejudice to warrant exclusion, and defendants could remedy that prejudice fairly easily. See *Nicholas*, 227 F.3d at 148. Defendants' motion is DENIED.

FN2. Insofar as any of Mr. Poulin's arguments are in fact "new," defendants do not explain how. (See Defs.' Br. at 7-8.) Indeed, defendants state that Mr. Poulin's arguments "further criticize" the former's methodology for setting cash account balances (*id.* at 7), which suggests to the Court that these arguments are duplicative rather than new, surprising, and prejudicial.

Plaintiffs are admonished, however, that similar tactics in the future will result in sanctions. Rule 16 provides that scheduling orders are binding on the litigants unless modified by subsequent order. Fed.R.Civ.P. 16(b), (e). Judge Hedges established a deadline for expert disclosures of January 31, 2004. (Hedges, J., Order of 12/1/03, ¶ 8.) Plaintiffs never requested leave of Court to supplement their disclosures, and the Court entered no order modifying Judge Hedges' Order of December 1, 2003. Notwithstanding these circumstances, plaintiffs filed the supplemental declaration of Mr. Poulin with its summary judgment filings on October 7, 2004. It is quite likely that, had plaintiffs requested leave to file a supplemental report on the basis of the newly

produced Sales Agreement, such relief would have been granted. See *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1228 (10th Cir.2003) (district court's failure to permit supplementation of expert disclosures may be abuse of discretion if that decision unreasonably limits available evidence). Nevertheless, plaintiffs were not *entitled* simply to ignore Judge Hedges' Order, as their opposition brief implicitly suggests.<sup>FN3</sup>

FN3. Plaintiffs' comparison of Mr. Poulin's supplemental declaration with the declarations of two of defendants' fact witnesses (see Pls.' Br. at 4) ignores both the distinct disclosure requirements applicable to expert testimony, see Fed.R.Civ.P. 26(a)(2)(B), and the substance of Judge Hedges' December 2003 Order.

## II. Motion to Strike the Declaration of Martha Anderson

\*2 Defendants' motion to strike the declaration of Martha Anderson is GRANTED. Plaintiffs have not disclosed Ms. Anderson as a witness under Rule 26. This Court is unaware of any law exempting "summary witnesses" from Rule 26's requirements, and plaintiffs have not identified any. This is not surprising, as Rule 37(c) precludes a party from using "any witness" not disclosed pursuant to Rule 26, absent "substantial justification" for that non-disclosure, and Rule 26(a)(1)(A) exempts only impeachment witnesses from its initial disclosure requirement. Plaintiffs do not assert any reason for their failure to disclose Ms. Anderson under the rules, and the Court cannot divine one. The declaration is therefore excluded on these grounds alone. See Fed.R.Civ.P. 37(c).

Further, the information on which Ms. Anderson's declaration is based, the results of an "ad hoc" internet survey, is inadmissible hearsay. Specifically, it is submitted only to demonstrate the truth of the matter asserted in the survey results, namely, that 221 people never received the Summary Plan De-

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scription in early 1998. Because plaintiffs can identify no exception to the hearsay rule under Federal Rules of Evidence 803 or 804 that would apply to these survey answers, the Court may not consider these. See Fed.R.Evid. 801(c), 802; see also *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 516 n. 14 (3d Cir.1998).

Plaintiffs' attempt to fit this survey into the "residual exception" to the hearsay rule under Federal Rule of Evidence 807 is unavailing.<sup>FN4</sup> Polls must be "conducted in accordance with generally accepted survey principles" "if they are to carry the "circumstantial guarantees of trustworthiness" required by Rule 807. *Brokerage Concepts*, 140 F.3d at 516 n. 14 (quoting *Pittsburgh Press Club v. United States*, 579 F.2d 751, 755-58 (3d Cir.1978)).

FN4. Rule 807 provides:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

A proper universe must be examined and a representative sample must be chosen; the persons

conducting the survey must be experts; the data must be properly gathered and accurately reported. It is essential that the sample design, the questionnaires and the manner of interviewing meet the standards of objective surveying and statistical techniques.

*Id.* (quoting *Pittsburgh Press Club*, 579 F.2d at 755-58) (quotes omitted).

Here, the survey so clearly fails all tests of trustworthiness that the Court will only address a couple of the reasons why. First, and most obvious, plaintiffs do not even argue that Ms. Anderson or Jane Banfield, the class member who purportedly set up the survey, is an expert. Instead, they submit that the survey's admittedly unscientific results are "anecdotal evidence." (Pls.' Br. at 8-9.) This argument ignores the trustworthiness requirements of *Pittsburgh Press Club*.

Second, the poll respondents are self-selected, rendering the sample necessarily unrepresentative and the responses' objectivity dubious. The survey is physically located on a website that is supportive of and apparently intended to advance the instant litigation. See <http://att.nac.net/main.htm>. The very link on the website that brings the would-be respondent to the survey itself states: "The results of the survey may be used as part of the class action lawsuit about the cash balance conversion, of which you are likely a participant." *Id.* Therefore, it can be fairly presumed that the poll's respondents do not actually represent a cross-section of the class, but instead a group of individuals, with internet access, whose members are aware of and unhappy with defendants' pension changes, and who took affirmative steps to fill out a survey knowing that certain answers would be helpful in a lawsuit in "which [they were] likely [ ] participant[s]." *Id.* This is not a representative sample, nor was the surveying even arguably objective. See *Brokerage Concepts*, 140 F.3d at 516 n. 14.

\*3 For all these reasons, Ms. Anderson's declaration, as well as the survey submitted therewith, are stricken.

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III. *Motion to Strike Portions of Plaintiffs' L. Civ. R. 56.1 Statement of Facts*

Defendants' motion to strike portions of plaintiffs' statement of facts is GRANTED to the extent that plaintiffs' statement asserts legal and other argument or relies on the Anderson declaration. *See Rodichok v. Limitorque Corp.*, 1997 U.S. Dist. LEXIS 9975, at \*2 n. 1 (D.N.J.1997). The Court notes that, as a practical matter, it would not consider bona fide arguments advanced in a statement of facts in any event, as the purpose of these statements is to narrow the issues before the Court, L. Civ. R. 56. 1, comment 2, and arguments inserted therein accomplish the opposite. The effect of the Court's ruling, therefore, will simply be that the Court will disregard argumentative statements in plaintiffs' statement of facts (as it would anyway) as well as any references to Ms. Anderson's internet survey.

***Conclusion***

For the reasons set forth above, defendants' motion [215] to exclude the supplemental declaration of Claude Poulin is DENIED, defendants' motion to exclude the declaration of Martha Anderson is GRANTED, and defendants' motion to strike portions of plaintiffs' L. Civ. R. 56.1 statement is GRANTED IN PART.

SO ORDERED.

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brief must also comply with rules 28.1(a)(1) and (a)(3). The brief of an appellee who has been permitted to file one brief in consolidated appeals must contain an appropriate cross reference index which clearly identifies and relates appellee's answering contentions to the specific contentions of the various appellants. The index must contain an appropriate reference by appellee to the question raised and the page in the brief of each appellant.

Source: 1988 Court Rule 21.1

Cross-references: FRAP 28-32; 3d Cir. L.A.R. 29-32

Committee Comments: The portions of prior Court Rule 21.1 that were repetitive of FRAP 28 were deleted in 1995. Otherwise no substantive change from prior Court Rule 21.1 is.

### **28.3 Citation Form; Certification**

(a) In the argument section of the brief required by FRAP 28(a)(9), citations to federal opinions that have been reported must be to the United States Reports, the Federal Reporter, the Federal Supplement or the Federal Rules Decisions, and must identify the judicial circuit or district, and year of decision. Citations to the United States Supreme Court opinions that have not yet appeared in the official reports may be to the Supreme Court Reporter, the Lawyer's Edition or United States Law Week in that order of preference. Citations to United States Law Week must include the month, day and year of the decision. Citations to federal decisions that have not been formally reported must identify the court, docket number and date, and refer to the electronically transmitted decision. Citations to services and topical reports, whether permanent or looseleaf, and to electronic citation systems, must not be used if the text of the case cited has been reported in the United States Reports, the Federal Reporter, the Federal Supplement, or the Federal Rules Decisions. Citations to state court decisions should include the West Reporter system whenever possible, with an identification of the state court. Hyperlinks to decisions may be used, but are not required, as provided in L.A.R. Misc. 113.13. If hyperlinks are used, citation to a reporter, looseleaf service, or other paper document must be included, if available. If a hyperlink to a paper document is not available, the internet address of the document cited must be included.

(b) For each legal proposition supported by citations in the argument, counsel must cite to any opposing authority if such authority is binding on this court, e.g., U.S. Supreme Court decisions, published decisions of this court, or, in diversity cases, decisions of the highest state court.

(c) All assertions of fact in briefs must be supported by a specific reference to the record. All references to portions of the record contained in the appendix must be supported by a citation to the appendix, followed by a parenthetical description of the document referred to, unless otherwise apparent from context. Hyperlinks to the electronic appendix may be added to the brief. If hyperlinks are used, the brief must also contain immediately preceding the hyperlink