

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 41201-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II, AT TACOMA

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DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; AND RIVER PROPERTY LLC,

Respondents,

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JAMES W. BROWN; ROBERTA D. DAVIS; KAE HOWARD; TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CHRISTI D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG, husband and wife; VINCENT and SHELLY HUFFSTUTTER, husband and wife, THOMAS J. and GLORIA S. KINGZETT, husband and wife, LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E. MCCLASKEY, JR. and VERONICA A. MCCLASKEY, TRUSTEES OF THE MCCLASKEY FAMILY TRUST – FUND A; CRAIG STEIN, RICHARD AND CAROL TERRELL, husband and wife,

Appellants.

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BRIEF OF RESPONDENTS

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Steven B. Tubbs  
Attorney at Law  
7001 SE Evergreen Hwy.  
Vancouver, WA 98664  
(360) 993-0729  
Attorney for Respondents

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## STANDARD OF REVIEW

Summary judgment awarding declaratory relief is reviewed de novo. Hisle v. Todd Pacific Shipyards Corp., 151 Wash.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The Court of Appeals must consider all facts and reasonable inferences from them in the light most favorable to the nonmoving party. City of Lakewood v. Pierce County, 144 Wash.2d 118, 125, 30 P.3d 446 (2001). The trial court can grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. Wilson v. Steinbach, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

The interpretation of a restrictive covenant is a question of law that is reviewed de novo. Parry v. Hewitt, 68 Wash.App. 664, 668, 847 P.2d 483 (1992). Like the trial court, the primary task is to determine the intent of the drafters. Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999); Wimberly v. Caravello, 136 Wn.App. 327, 336, 149 P.3d 402 (2006)

## STATEMENT OF FACTS

The parties to this litigation each own an interest in property within Rivershore Subdivision, located in Clark County, Washington. CP 2.

When this subdivision was first developed, covenants were recorded to address development within the subdivision. CP 2; CP 16-20. Plaintiffs Dale E. and Leta L. Anderson, Trustees of the Dale E. Anderson and Leta L. Anderson Family Trust (hereinafter referred to as the 'Trust') purchased a lot within the Riverside Subdivision in 1990. CP 13.

Appellant Brown also acquired a lot within Riverside. CP 2; CP 8. He later submitted an application to the City of Vancouver for the purpose of dividing that lot in two. CP 8; CP 13. A number of neighbors objected, CP 21-23, including the Trust, CP 13, to no avail. CP 25-26. The City approved the application. CP 13. Defendant Brown, addressing the common interest in Tract A, divided the original lot's interest in half, assigning one-half interest in Tract A to each of the resulting lots. CP 27. No appeal or legal challenge to the final decision of the City was undertaken. CP 13.

Thereafter, River Property LLC (hereinafter the LLC) purchased one of Brown's lots. CP 13. At the time of purchase, and at all material times since, the LLC understood and believed that the lot which it purchased from Brown was a legal lot and could be used by said Plaintiff for all lawful purposes, subject only to whatever restrictions that zoning ordinances or the covenants might otherwise impose. CP 13-14.

Later, Lot 2 within the subdivision became available for sale. Plaintiffs Dale E. Anderson and Leta L. Anderson (hereinafter referred to as “Andersons”), having personal knowledge of the prior short plat approval received by Appellant Brown, purchased that Lot with the express intent and for the express purpose of short platting the same. CP 14. Upon completing their purchase, Andersons submitted preliminary plans to the City for evaluation and comment, pursuant to the City’s pre-application review process. *Id.* During the course of that initial review, the Defendants below, and Respondents herein, (hereinafter collectively referred to as the “Neighbors”) objected, claiming that the original covenants precluded further division of lots; and that they had effectively amended their covenants to bar any such development. CP 32-33. The Neighbors had recorded a document that purported to preclude any further platting or subdividing of existing lots. CP 42-44.

In the face of the legal objections, City staff submitted the question to the City Attorney for an opinion. 45-48. The City Attorney’s office recommended that staff deny any application, and require that the applicant appeal the adverse determination. *Id.*

The subject litigation then ensued. Neither the Trust nor the LLC has any plans to divide or develop their respective properties at this time. However, neither of said Plaintiffs concurs with the position of the

Neighbors. CP 1-3. By contrast, the Andersons purchased Lot 2 solely for the purpose of dividing it in the same manner as invoked by Defendant Brown. CP 14.

After responsive pleadings were exchanged, the parties filed cross motions for summary judgment. CP 12-75; CP 77<sup>1</sup>. The Trial Court crafted its own language in preparing the final Order. CP 264-268. Critically for the Plaintiffs, the Court ruled that the Neighbors' attempt to modify the covenants was invalid and that the original covenants and plat did not restrict any short plat of an existing lot. *Id.*

The Plaintiffs had also argued that the prior failure to interpose a legal objection to Brown's short plat of a lot within the Riverside development precluded any right to challenge a proposed short plat on grounds that the original covenants or plat barred the same. CP 70-72. However, the Trial Court ruled that waiver was barred by the covenants, and that the issue of estoppel could not be resolved by summary judgment due to one or more unidentified issues of fact. CP 267. Plaintiffs did not seek a mandate compelling the City to approve any plat application, and the Court deferred to the City's authority to consider such an application on other grounds. CP 267.

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<sup>1</sup> The Appellants other than Appellant Brown included their motion for declaratory relief by summary judgment within their Memorandum filed with the Court.

Finally, the Trial Court ruled that the Plaintiffs, although the prevailing parties, were not entitled to an award of attorneys' fees and costs on the grounds that no legal basis existed for the same, as argued by the Neighbors. CP 301-303; CP 311; CP 314-318.

#### APPELLANTS' FIRST ASSIGNMENT OF ERROR

That the matter was not ripe for determination and the Order was an improper 'advisory' opinion.

As described above in Respondents' Statement of Facts, there are three separate Plaintiffs, each owning a different Lot within the Rivershore development. The Trust has an interest in the status of the covenants and conditions, as well as the manner in which those documents of record may be amended or modified. The Trust has no plans or intentions to short-plat its property. The LLC has an interest in confirming, indirectly, that the Lot that it acquired is a legal lot and may be used for all purposes which conform to the zoning and building requirements of the City of Vancouver, including the construction and occupation of a single family residence thereon. The Andersons were the last to buy a Lot. They did so with the express understanding that they could divide that Lot according to the same procedures invoked by Defendant Brown, and purchased that Lot for that express purpose.

Each of these Plaintiffs has an immediate and direct interest in the recorded covenants which affect the use of their property, and the use of their Neighbors' Lots that are situated within the Rivershore development.

RCW 7.24.020 expressly affords the remedy sought by Plaintiffs. It has been a long-standing practice for the Courts to issue declaratory relief in addressing the rights and obligations of parties that are subject to covenants. Plaintiffs are entitled to judicial determination of their property rights under the applicable covenants without the necessity of a short-plat filing. Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 185, 157 P.3d 847 (2007). The Declaratory Judgment Act is to be interpreted liberally in favor of a party seeking relief. *Id.*

The Neighbors rely upon the decision in Bloome v. Haverly, 154 Wn.App. 129, 225 P.3d 330 (2010) to argue that the decision of the Trial Court was premature and advisory. The circumstances in the instant case are not comparable or analogous to those in Bloome, *supra*. To the contrary, the instant facts stand in sharp contrast to the dilemma confronting the Court in Bloome. The concern in that case was with the nature and extent of a view easement and the grantor's intent in crafting the easement. In Bloome, *supra* the Court was asked to decide whether a view easement prevented construction of a home, and, if not, to what extent such construction was limited by the easement.

The Court of Appeals declined to rule, noting that “the record does not contain facts necessary for a court to resolve the apparent underlying dispute between the parties: to what extent does the covenant limit development of the downhill parcel? The answer to this question depends on facts not contained in the record.” Bloome, *supra*, at 141. The Court observed that it was a matter of conjecture whether a home could be constructed without adversely affecting the view, and therefore declined to render judgment. “A justiciable controversy must exist between the parties”, the Court observed, citing Osborne v. Grant County, 130 Wn.2d 615, 631, 926 P.2d 911 (1996).

Unlike Bloome, *supra* the facts in this case are not those of “conjecture”, but immediate and stark reality. These circumstances meet the “justiciable controversy” test affirmed in Bloome *supra*:

(a) “an actual, present and existing dispute, or the mature seeds of one, as opposed to a possible, dormant, hypothetical, speculative or moot disagreement.”

The dispute whether short plats are barred in this instance is ‘actual, present and existing’. It is neither hypothetical nor speculative.

(b) “between persons having genuine and opposing interests.”

This case clearly involves the same.

(c)“which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic.”

The Plaintiffs interests in this case are both direct and substantial. Considerable value and use issues as well as the rights of lot owners are immediately and directly at stake. The status of Plaintiff LLC’s lot; the ability of Plaintiffs Anderson to fulfill their intentions to short plat; the rights of Plaintiff Trustees to determinations regarding their rights and obligations under the covenants along with the corresponding rights and obligations of its Neighbors are all ‘direct and substantial’ under this test.

(d)“a judicial determination of which will be final and conclusive.”

Certainly this is the remedy sought by Plaintiffs, and one which is within the Court’s authority to render. There are no legal restrictions precluding the same.

Whether Plaintiffs are precluded from short platting their properties based upon the language within the original covenants governing property within Riverside subdivision; whether Plaintiff River Property LLC in effect purchased an illegal lot; and whether the covenants were ineffectively amended, are precisely the subjects that the UDJA was intended to address.

The trial Court did not err in entering declaratory relief.

APPELLANTS' SECOND ASSIGNMENT OF ERROR

Under RCW 58.17.215, unanimous consent of all owners within River is required to short plat in light of the original covenants and "the face of the Plat".

The relevant language within RCW 58.17.215 reads as follows:

When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW 58.17.040(6), that person shall submit an application to request the alteration to the legislative authority of the city ... where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

The language upon which the Neighbors rely has been emphasized.

It is conditional. The first condition, whether the property is subject to covenants, is readily answered in the affirmative. The second condition requires a determination that "the application for alteration would result in

violation” of a covenant. The Court’s duty of inquiry concerns this question.

Interpretation of language contained in a restrictive covenant is a question of law. Green v. Normandy Park Riviera Section Cmty. Club, Inc., 137 Wn.App. 665, 681, 151 P.3d 1038 (2007). The objective is to determine the dedicator’s intent. Hollis v. Garwall, Inc., *supra*. The Court must give effect to and enforce that intent. It is not a function of ‘the majority rules’. Meresse v. Stelma, 100 Wn.App. 857, 866, 999 P.2d 1267 (2000).

The first citation to the record by the Neighbors refers to a notation on the face of the plat of Rivershore. Brief of Appellants, p. 15. The plat notation does not contain any cross-reference to recorded covenants, nor does it preclude division of lots in such a manner as to preserve the integrity of any plan regarding benefits or burdens associated with title to Tract A.

The Appellants further rely upon three covenants in support of their position:

(a) CP 16, provision No. 1.: One residence per lot. There is no express prohibition against division of one lot into two, in the manner undertaken by Appellant Brown expressly or impliedly contained within the language of this covenant. Unfortunately, if Appellants are correct,

then Respondent River Property LLC has either acquired an illegal lot, or may be precluded from constructing any residence thereon. Such an interpretation yields an absurd result, and was properly rejected by the Trial Court. See, e.g., MacLean Townhomes, L.L.C. v. America 1st Roofing & Builders Inc., 133 Wn.App. 828, 138 P.3d 155 (2006).

(b) CP 19, provision No. 15: Common ownership of Tract A.

This provision, while labeled as a ‘covenant or restriction’, is simply a mandate to the developer to provide for common ownership of the tract among owners of property within the project. Again, there is no express or implied prohibition against division of one lot into two, such as in the manner undertaken by Appellant Brown.

(c) CP 19, provision No. 16.: Ban on public easements.

Contrary to the Neighbors’ claims, the language in question does not preclude future division of any lot. The division of an existing lot into two or more parcels does not render access to Tract A “public” in the common sense use of that term.

The Neighbors urge the Court to speculate as to the grantor’s intent, where no such intent is evident from the language upon which they rely. They further urge the Court to speculate as to the nature of Andersons’ plat application, and the treatment of Tract A. Their arguments rest upon surmise, and not upon an express statement limiting

the future use and development of a lot. The absence of an expression of intent contained within the covenants establishes that the Court's determination that RCW 58.7.215 did not apply was correct, and the Court did not err in so ruling. This determination also finds support in the historical treatment of the covenants by the Appellants and the City. Defendant Brown's short plat received final approval without legal challenge.

Alternative grounds. If it is determined by the Court of Appeals that the trial Court erred in this regard, then the ultimate result nonetheless remains the same. A decision of the Trial Court may be upheld on any legitimate ground, even if not so articulated by the Court. State v. Carroll, 81 Wn.2d 95, 101, 500 P.2d 115 (1972); Boundary Dam Constructors v. Lawco Contractors, Inc., 9 Wn.App. 21, 31, 510 P.2d 1176 (1973). In that respect, the Trial Court erred in ruling that there was challenged evidence of estoppel. See Respondents first assignment of error and discussion thereunder, *infra*. Even if the original covenants and plat precluded short platting of a lot within the River development, Respondent Brown's successful short plat bars the Respondents from urging the position that the original covenants preclude the same.

#### APPELLANTS' THIRD ASSIGNMENT OF ERROR

The 2008 Amendment to Covenants was valid.

The Neighbors have cited no authority to advance their argument, and the argument should therefore be disregarded. “We do not consider assignments which are unsupported by argument or authority. State v. Wood, 89 Wash.2d 97, 569 P.2d 1148 (1977). Here the position is supported by argument which we do not find persuasive especially in view of the lack of any authority.” Yeats v. Yeats' Estate, 90 Wn.2d 201, 209, 580 P.2d 617 (Wash. 1978). *See also*, Tippie v. Delisle, 55 Wn.App. 417, 420, 777 P.2d 1080 (1989).

In addition, their contention lacks merit. “In order for an amendment to be valid, it must be adopted according to the procedures set up in the covenants...”. Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc., 76 Wash.App. 267, 273-274, 883 P.2d 1387 (1994), *review denied*, 127 Wash.2d 1003, 898 P.2d 308 (1995). The relevant provision regarding amendment is set forth in the first Declaration, whereby “modification” may be accomplished “by affirmative vote of 80% of the then owners of lots within the subdivision”, and subject to further conditions not relevant for this appeal. CP 16.

Defendants failed to muster the requisite number of votes necessary to amend. Voting rights extend to all “owners of lots” within the subdivision. *Id.* Respondents attempt to diminish the voting rights of Appellant Brown and the LLC by contending that each owner owns only

½ of a “lot” for voting purposes. There is nothing in the covenants or the plat establishing or even implying such a condition for the purposes of voting and determining what constitutes a “lot”. The interpretation urged must conform to the understanding that may reasonably be gleaned from the language of the covenants themselves. “The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants.” Meresse v. Stelma, *supra*.

The Trial Court properly determined that the Grantor unambiguously provided for a ‘one lot-one vote’ rule in determining whether the covenants could be modified. The trial Court ruled properly, and did not err.

#### APPELLANTS’ FOURTH ASSIGNMENT OF ERROR

##### Plaintiffs failed to exhaust their administrative remedies.

The Neighbors claim that the Plaintiffs have failed to exhaust their administrative remedies. This contention is premised upon the underlying and unwarranted assumption that all Plaintiffs wish to short plat all of their lots at this time; that all have a concrete design for doing so; and that state law allocates exclusive jurisdiction to the City in making any such determinations. However, the City is not equipped to address equitable arguments of Plaintiffs Anderson, as conceded by City Attorney (CP 47),

has no cited mechanism for addressing concerns of River regarding its status as a 'lot'; and no mechanism for addressing concerns of Trustees, River and Andersons regarding the manner of modification of covenants that affect their use and enjoyment of their lots. The trial court was solely equipped to address all of the parties' concerns in a single forum, at one time, and did not err in rendering declaratory relief on the issues before it.

Certainly the City is vested with authority to determine whether plat application should be approved. See RCW 58.17.030. The City, in acting upon the pre-application submission regarding Lot 4, candidly observed that it would give facial validity to the position of the Defendants regarding the validity of the covenants as originally enacted. CP 45. This conclusion is premised in part upon an unwarranted assumption regarding the implication of Tract A. To reiterate, there is no requirement that Tract A be involved, or that such involvement would necessarily violate the covenants. See, *e.g.*, CP 27. Furthermore, the City expressly declined to undertake legal considerations such as waiver or estoppel. CP 47. The City has expressly and understandably declined to wade into the troubled waters of equity, deferring to the inherent equitable powers of the Court. See, *e.g.*, Hoggatt v. Flores, 152 Wn.App. 862, 218 P.3d 244 (2009). In so acting, the Court does not tread upon the power of the City to render an

appropriate decision at the appropriate time under the rules that it has adopted. *Id.*

### **RESPONDENTS' CROSS APPEAL**

#### **RESPONDENTS' ASSIGNMENTS OF ERROR**

##### **RESPONDENTS' FIRST ASSIGNMENT OF ERROR**

The Trial Court erred in ruling that waiver and estoppel were not established under the facts before the Court as an alternative to its declaratory ruling, and denying Plaintiffs' Motion for Clarification or Reconsideration.

##### **RESPONDENTS' SECOND ASSIGNMENT OF ERROR**

The Trial Court erred in ruling upon the scope of the City of Vancouver's authority, and implying that said authority included the ability to disregard the ruling of the Trial Court, denying Plaintiffs' Motion for Clarification or Reconsideration.

##### **RESPONDENTS' THIRD ASSIGNMENT OF ERROR**

The Trial Court erred in denying Plaintiffs an award of reasonable attorneys' fees.

#### **ISSUES PERTAINING TO RESPONDENTS'**

##### **FIRST ASSIGNMENT OF ERROR**

Were the Plaintiffs entitled to declaratory relief on the grounds that the Neighbors were estopped from their claims?

ISSUES PERTAINING TO RESPONDENTS'

SECOND ASSIGNMENT OF ERROR

Did the Trial Court properly rule on the authority of the City in its Judgment?

ISSUES PERTAINING TO RESPONDENTS'

THIRD ASSIGNMENT OF ERROR

Are the Plaintiffs the prevailing party under the covenants, entitling them to an award of fees?

ARGUMENT

1. Were the Plaintiffs entitled to declaratory relief on the grounds that the Neighbors were estopped from their claims?

Trial Court's Judgment should be affirmed on alternate grounds if it is held that the original covenants precluded future lot divisions. If such error occurred, the Judgment may be sustained on alternate grounds. State v. Carroll, supra; Boundary Dam Constructors v. Lawco Contractors, Inc., supra.

Assuming that Rivershore's covenants as originally recorded or as subsequently amended effectively barred short platting of lots within the subdivision, the Court erred in ruling that estoppel was not established by evidence.

Equity precludes enforcement.

A number of equitable defenses are available to preclude enforcement of a covenant: merger, release, unclean hands, acquiescence, abandonment, laches, estoppel, and changed neighborhood conditions. St. Luke's Evangelical Lutheran Church v. Hales, 13 Wn.App. 483, 488, 534 P.2d 1379, *review denied*, 86 Wn.2d 1003 (1975); 5 R. Powell, Real Property, P. 679, (rev. ed., 1991); see Tindolph v. Schoenfeld Bros., 157 Wash. 605, 608, 611, 289 P. 530 (1930).

Mt. Park Homeowners v. Tydings, 125 Wn.2d 337, 341-342, 883 P.2d 1383 (1994).

Certainly, Appellant Brown had no right to object whatsoever.

"[O]ne who has violated a building restriction cannot enforce a building restriction against others." Reading v. Keller, 67 Wn.2d 86, 89, 406 P.2d 634 (1965). Having already short-platted his lot into two, and sold one of them for his own benefit, he cannot now assert that others may not do so as well.

Estoppel. The elements of estoppel are three fold: (1) an admission, statement, or act inconsistent with a claim afterward asserted, (2) an act by that party in reasonable reliance on the admission, statement, or act of another, and (3) injury to the relying party if the court allows the first party to contradict or repudiate the earlier admission, statement, or act. Board of Regents v. City of Seattle, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). It is unchallenged that the Andersons, acting in reliance upon the

prior acquiescence in development of the Brown lot, purchased an additional lot with the express purpose and intent to short plat the same. They incurred expense and costs of delay as a consequence of the inconsistent position now adopted by their Neighbors. The Appellants are estopped from preventing the proposed short plat.

Acquiescence: Washington has adopted the doctrine of acquiescence in equity to bar the complainants' objections.

In 3 Pomeroy, Equity Jurisprudence § 818 (5th ed. 1941), the general rule is stated: Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent. A most important application includes all cases where an owner of property, A, stands by and knowingly permits another person, B, to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection, as by expending money upon it, making improvements, erecting buildings, and the like.

Nugget Properties, Inc. v. Kittitas County, 71 Wash.2d 760, 767, 431 P.2d 580 (1967).

The Neighbors, having acquiesced to the short plat of Brown and the ensuing sale to LLC, are barred from asserting their claim

that the covenants preclude short platting. The Judgment of the Trial Court should be affirmed on these alternate grounds.

2. Did the Trial Court properly rule on the authority of the City within the Court's Judgment?

The Trial Court ruled *sua sponte* that the City was not bound, without the benefit of briefing or argument. The ruling of the Court regarding the effect of its ruling upon the City is ambiguous. CP 267. It appears that the Court is confirming the obvious: it cannot and is not ordering the City to approve any particular plat application which it may receive, and that such application must meet the requirements which the City standards otherwise impose upon the applicant. The Plaintiffs requested clarification and/ or modification to no avail. CP 277-281; CP 300. Assuming that the Court actually intended that the City was free to disregard the declaratory rulings of the Court regarding ability of Andersons to short plat their lot under the provisions of the original plat, covenants, and subsequent attempts at amendment, the Court erred.

Given the absence of the City as a party to the litigation, the rights of the City cannot be included within the Court's decision. No party sought to have those rights enumerated, although Defendant Brown insisted that the City was a necessary party. No appeal has been taken

from the Order denying that defense. The judgment of the Court found that no application was pending from any of the three plaintiffs<sup>2</sup>, and that the City was not ‘necessary’ to the adjudication of the rights of the parties regarding further short platting within the subject subdivision. The ruling cannot enumerate the rights of the City accordingly. The Plaintiffs did not seek mandamus relief. Certainly the Court did not mandate any proposed short plat, and it would not be within the Court’s authority to review the specific material advanced by the Defendants to determine whether the criteria for short plat approval have or have not been met. The declaration of rights contained within the final Judgment need not and should not reference the City’s role at all.

In addition, the parties did not brief nor argue ‘issue preclusion’, and that subject was not before the Court. It is an exhaustive subject. See, e.g., Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L.REV. 805 (1984); Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 96 P.3d 957 (2004). If the question was to be considered, then the Plaintiffs should have reasonable opportunity to brief and argue the same.

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<sup>2</sup> No evidence of a pending application was offered, although one of the Plaintiffs had undergone the ‘pre-application review process.’ The absence of a pending application at all material times during Court proceedings was undisputed.

Moreover, the issue is not ‘ripe’ for adjudication. If an application for subdivision approval is submitted to the City, and the City determines that the amendment was effective notwithstanding the Court’s ruling, for example, then that determination is subject to further review. It is inappropriate to issue a preliminary ruling on the issue.

To the extent that the Judgment bound the City, or enumerated its rights, that ruling was error.

3. Are the Plaintiffs the prevailing party under the covenants, entitling them to an award of fees?

The trial Court erred in denying Plaintiffs’ request for fees. CP 311-313; 314-318. The Respondents are entitled such an award, both in the proceedings before the Trial Court, and herein. See, *e.g.*, Day v. Santorsola, 118 Wn.App. 746, 76 P.3d 1190 (2003).

The Trial Court relied upon Meresse v. Stelma, *supra*, to deny Respondents’ fees. CP 311-313. Meresse v. Stelma, *supra*, is readily distinguished. The *sole* issue before the Court therein concerned the attempt to amend the governing documents. In this instance, the ‘issue’ concerns the lawfulness of a short-plat action, in the context of both the original covenants and the attempted amendment. As noted in the context of the parties’ briefing herein, it is immediately apparent that this case

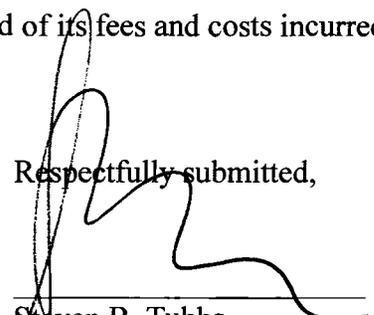
involves the covenants and their interpretation, and the successful party is entitled to an award of fees accordingly.

The Appellants concede the error of the Trial Court's ruling that denied Respondents' request for fees, by invoking the same language under the covenants<sup>3</sup> to request such an award on their own behalf. In so doing, the Appellants have waived any right to object to reversal, as they themselves have elected to invoke the jurisdiction of the Court in ruling upon fees in favor of the prevailing party. See Appellants' Brief at 24. Having made such an election, they may not be heard to complain when the Trial Court is reversed on this issue.

RESPONDENTS' REQUEST FOR FEES

Pursuant to the provisions of the covenants in question (CP 20) and RAP 18.1 (b), Respondents request an award of its fees and costs incurred herein.

Respectfully submitted,



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Steven B. Tubbs  
WSBA # 7239  
Attorney for Respondents

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<sup>3</sup> CP 20, Provision 19.

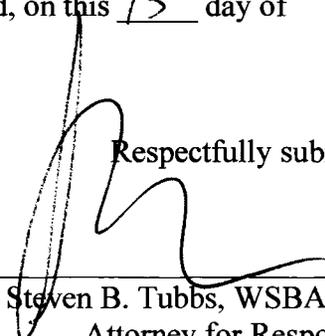
**CERTIFICATE OF SERVICE**

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I, Steven B. Tubbs, certify that I have mailed a copy of the attached Brief of Respondents to Mr. Stephen G. Leatham, of Heurlin, Potter, Jahn, Leatham & Holtmann, P.S., 211 E. McLoughlin Blvd., Vancouver, WA 98666-0611; and to Mr. Cary Cadonau of Brownstein, Rask, Sweeney LLP, 1200 SW Main St., Portland, OR. 97205; and the original and one copy of said Brief of Respondents to David C. Ponzoha, Clerk of the Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454, postage prepaid, on this 15 day of February, 2011.

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

Respectfully submitted,

  
\_\_\_\_\_  
Steven B. Tubbs, WSBA #7239  
Attorney for Respondents