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SUPREME COURT  
STATE OF WASHINGTON  
Jan 03, 2012, 3:06 pm  
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No. \_\_\_\_\_  
(Chelan County Superior Court Cause No. 11-2-00678-1)

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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ROSS WILKINSON and CINDY WILKINSON; MONTE KARNES and  
KIMBERLY KARNES; DAVID BETHEL and JEANIE BETHEL;  
DARRELL MCLEAN; JIM PAULUS and KATHY PAULUS; JOE  
HARGIS and LINDA HARGIS; DANIEL MACINDOE and ISIARA  
MACINDOE; TED TREPANIER and RUBY AKINS-TREPANIER,

Respondents,

v.

CHIWAWA COMMUNITIES ASSOCIATION,  
a Washington Non-Profit corporation,

Appellant.

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STATEMENT OF GROUNDS  
FOR DIRECT REVIEW

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Yen B. Lam, WSBA #32989  
Galvin Realty Law Group PS  
6100 219<sup>th</sup> St. SW, Suite 560  
Mountlake Terrace, WA 98043  
(425) 248-2163

Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
(206) 574-6661

Attorneys for Appellant Chiwawa Communities Association

ORIGINAL

A. INTRODUCTION

This case involves restrictions on commercial activities in the covenants of a single family residential subdivision and the ability of a homeowners association, elected by its members, to preserve the single family residential character of the subdivision.

Despite this Court's approval of broad restrictions on commercial activities in covenants for single family residential subdivisions in *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 854 P.2d 1072 (1993), *Metzner v. Wojdyla*, 125 Wn.2d 445, 886 P.2d 154 (1994), and *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999), recent decisions of the Court of Appeals have permitted the plainly commercial activity of a short term rental business in subdivisions. This Court should grant direct review here to reaffirm its broad interpretation of covenant restrictions on commercial activities in a subdivision. RAP 4.2(a)(3).<sup>1</sup>

Review is also appropriate under RAP 4.2(a)(4) because the trial court's decision here reflects a fundamental antagonism toward the decisionmaking of the elected homeowners' association board designed to implement the policy of the covenants prohibiting commercial activity in a single family residential subdivision. RCW 64.38 reflects a legislative

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<sup>1</sup> Review is also appropriate under RAP 4.2(a)(2) because those Court of Appeals decisions cannot be squared with the broad interpretation of prohibited commercial activities in cases like *Hagemann v. Worth*, 56 Wn. App. 85, 782 P.2d 1072 (1989).

policy of "homeowner democracy" for homeowner association boards. Those boards are elected by their members and perform functions akin to traditional municipal corporations. Courts should defer to the exercise of discretion by such elected boards in implementing and enforcing subdivision covenants.

#### B. FACTUAL BACKGROUND

Chiwawa River Pines ("Chiwawa") is a residential community located in an area zoned as Rural Waterfront. Chiwawa consists of 367 lots whose owners belong to the Chiwawa Communities Association, a non-profit homeowner association ("Association"). The membership includes permanent residents and vacation home owners.

Chiwawa is comprised of six sections. The original developer, Pope & Talbot Development, Inc., built Chiwawa in phases. The Association's predecessors were two corporations created in the early 1960's. The two corporations merged and in 1969, the Association's members approved the articles of incorporation stating that its purpose was to "create or acquire or purchase or contract to purchase or lease, and to operate and maintain water well, wells, or other water supply and water distribution system in connection therewith, and otherwise to provide community services to or in connection with the platted areas of Chiwawa River Pines."

In 1988, Chiwawa's owners approved the consolidation of the covenants for the six Chiwawa sections that restricted land use in Chiwawa to single-family residences and prohibited nuisances, offensive and industrial/commercial uses; those covenants stated:

4. Land Use. Lots shall be utilized solely for single family residential use consisting of single residential dwelling and such out-buildings (garage, no more than one guest cottage, patio structure), as consistent with permanent or recreational residence

.....

5. Nuisances or Offensive Use. No nuisance or offensive use shall be conducted or suffered as to lots subject hereto, nor shall any lot be utilized for industrial or commercial use

.....

The 1988 covenants also expressly reserved the power of the majority of the property owners to adopt new restrictions. The covenants were further amended in 1991 to eliminate guest cottages.

The Association's board historically enforced the covenants against the operation of lodging and transient or nightly rentals. For example, that board informed the Donks that they could not operate a bed and breakfast. In 1987, the board learned that Larry Thormahlen intended to operate a nightly rental, and it promptly sent him written notification that an operation of a "day-by-day rental" was in violation of the covenants. Thormahlen advised the board that he had no intention of

renting cabins by the day. In 1991, Renate Brahm, an owner, had a sign advertising lodging in her driveway. The board asked Brahm to remove the sign and informed her that no businesses were allowed in the community pursuant to the covenants.

In recent years, transient rentals have increased dramatically, in part due to Internet advertising. Respondents (with the exception of Monte and Kimberly Karnes) advertise their rentals in a manner similar to motels and hotels, allowing customers to view photos of the lodging and a calendar of available dates.

Because Chiwawa owners were troubled by the increasing number of properties being used solely to generate high volume, short-term occupancy for what amounts to commercial businesses, and transients came to Chiwawa, causing attendant noise, litter, drinking-related problems, trespassing, and improper campfires, the board in November 2007 sent a survey to owners about the increase in nightly rentals and to assess any interest in amending the covenants. There were 116 responses. The responses were in favor of stopping the nightly rentals, but allowing low-impact, service-oriented businesses, such as trail grooming, as an exception to commercial use.

In 2008, Chiwawa owners approved an amendment to the covenants prohibiting rentals for a period of six months or less. In

*Wilkinson et al. v. Chiwawa Communities Association* (Chelan County Superior Court Cause No. 09-2-00896-0), the trial court amended the scope of the ban, determining that rentals for a duration of less than one month violated the single-family residential use restriction and the prohibition against commercial use, nuisance, and offensive use in the covenants. The trial court prohibited rentals of less than one month.

The respondents appealed the trial court's ruling to Court of Appeals, Division III (Cause No. 289117). That court determined that the only issue on appeal was whether the trial court erred in rewriting the 2008 amendment to prohibit rentals for periods of less than one month. It struck the rental restrictions in the 2008 amendment but kept the remaining provisions of the 2008 amendment.

The board held a special meeting on July 9, 2011 in which the owners voted on whether rentals for less than one month or 30 continuous days should be allowed in Chiwawa. Prior to the vote, the board posted statements in favor and against the transient rentals on its blog. Respondents participated in the vote by sending mailings in support of allowing transient rentals to the owners directly, and also designated a representative, Gitty Stafford, to serve on the Voting Committee. The Voting Committee consisted of seven non-board Chiwawa owners who counted the votes:

A majority of the owners voted to amend the covenants to explicitly prohibit transient rentals. That amendment stated:

Rentals for less than one month or 30 continuous days if the rental period does not begin on the first day of the month ("transient use") shall be prohibited. The transient use of any lot for purposes such as vacation rentals, bed & breakfast, inn, motel, hotel, resort, or other transient lodging purposes, is inconsistent with the single-family residential purposes required by these Protective Covenants, is considered commercial use, and is thus specifically prohibited. Rentals for a duration of more than one month shall be permitted, shall be in writing, subject to compliance with local zoning and permitting regulations, and subject to the Protective Covenants and By-laws.

The respondents then filed the present action in the Chelan County Superior Court to challenge the 2011 amendment to the covenants. The parties each filed motions for summary judgment. On December 15, 2011, the trial court, the Honorable John E. Bridges, granted the respondents' motion, and denied the Association's.

C. ARGUMENT WHY DIRECT REVIEW IS APPROPRIATE

In interpreting a covenant, this Court effectuates the grantor's intent with a special emphasis on arriving at an interpretation that protects the homeowners' collective interest. *Riss v. Angel*, 131 Wn.2d 612, 623-24, 934 P.2d 669 (1997). *See also, Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 72 Wn. App. 139, 146, 864 P.2d 392 (1993). The original covenants at issue here evidence an intent on the grantor's part to create a

quiet, single family residential community. The 2011 covenant amendment effectively carries out that purpose.

(1) Respondents' Short Term Rental Businesses Violate the Commercial Use Ban in the Original Covenants and Are Inconsistent with a Single Family Residential Community

The respondents' businesses of short term rentals in Chiwawa are inconsistent with the original covenants forbidding commercial uses and requiring a single family residential community. That the respondents are conducting a business is clear. Many of the respondents are real estate professionals. They advertise homes in Chiwawa on the Internet as part of a short term rental business under names like Comfy Cabins or as Lake Wenatchee Hideaways. They have tax numbers with the Department of Revenue and have paid business and occupation taxes on income of as much as \$35,000 in a single year.

Moreover, the respondents' short term rentals are inconsistent with the single family character of Chiwawa intended by the original grantor.<sup>2</sup>

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<sup>2</sup> The applicable 1964 Chelan County Zoning Code defined a single family residence as follows:

Dwelling unit. A building or portion thereof designed for occupancy by one family and having only one cooking facility.

Family. An individual, or two or more persons related by blood, marriage, adoption, or legal guardianship, living together in a dwelling unit in which meals or lodging may also be provided for not more than two additional persons excluding servants; or a group of not more than three unrelated persons living together in a dwelling unit.

The nightly rentals have changed the character of the community by increasing traffic in the neighborhood, increasing garbage that attracts wildlife, and causing gunfire, fireworks, and speeding snowmobiles from transient occupants. Owners no longer feel comfortable in their own homes because they do not know who will show up next door. They also feel it is unsafe for their children to play in the neighborhood.

None of the respondents restrict their nightly rentals to single families. Respondents *admit* that they rent to unrelated persons who do not share a residence outside of Chiwawa. These are not "families." These groups of people come to Chiwawa for vacation purposes, not to establish a residency or even a vacation home. For example, Patty Blouin rented property to celebrate a girl's birthday weekend with three of her friends. Michelle Simpson rented property with a group of seven unrelated friends. Blouin and Simpson *admitted* that they did not consider their group a family unit. Respondents' commercial use of their properties as transient rentals is not like the use of properties by other single-family owners in Chiwawa.

Respondents' Internet advertisements are designed to attract a large group of people looking for vacation lodging. These properties are advertised as accommodating 8-14 occupants. Clearly, the definition of "single family" does not extend to a group of friends renting a property for

a night or weekend. These transient occupants are paying customers with a license to use the property, not tenants under a lease.

Ultimately, the trial court here relied on the Court of Appeals decision in *Ross v. Bennett*, 148 Wn. App. 40, 203 P.3d 383, *review denied*, 166 Wn.2d 1012 (2009) (minimal short term rental of property was not a commercial activity) to sustain its view. That decision is distinguishable in the Association's view,<sup>3</sup> but if it is interpreted as the trial court did here, it is inconsistent with this Court's decisions. More critically, *the trial court did not address this Court's decisions in its oral ruling at all*. In *Mains Farm*, the Court enjoined an adult family home business in a plat that restricted lots for "single family residential purposes only." 121 Wn.2d at 854. This Court determined such factors as the fact that the members were strangers prior to arrival to the adult family home, not related to the defendant homeowner by birth, adoption, or marriage, and in need of 24-hour care, were not factors characteristic of a single family residence. *Id.* at 818.<sup>4</sup> "The reasonable expectations of the other

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<sup>3</sup> The homeowner in *Ross* rented his home four times in two years and did not advertise it over the Internet. The community in *Ross* also did not enact a covenant amendment explicitly restricting transient rentals.

<sup>4</sup> Like Chelan County's 1964 zoning code, most legal authorities define a single family as a housekeeping unit; a family is:

1. a group of persons connected by blood, by affinity, or by law, esp. within two or three generations.
2. A group consisting of parents and

lot owners who bought their family homes in reliance on the long recorded covenants would not include a State-licensed, 24-hour operating business.” *Id.* at 818-19. In addition, the residential use restriction was violated by the intensity of use. “The single-family residential nature of defendant’s use of her home is destroyed by the elements of commercialism and around-the-clock care that must be accorded to the unrelated persons who occupy her home.” *Id.* at 821.

In *Metzner*, this Court ruled that operation of a licensed child day care facility in a residential neighborhood violated a restrictive covenant limiting use of property to “residential purposes only.” *Id.* at 452-53. The *Metzner* Court confirmed the holdings in *Hagemann*<sup>5</sup> and *Mains Farm*, stating that the case law has established a *bright line rule* which prohibits any commercial or business use of property that is subject to a residential

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their children. 3. A group of persons who live together and have a shared commitment to a domestic relationship.

*Black’s Law Dictionary*, (7th ed. 1999), at 273. A “family” does not mean all those who live under one roof. *Matthews v. Penn-America Insurance Company*, 106 Wn. App. 745, 749, 25 P.3d 451 (2001), *review denied*, 145 Wn.2d 1019 (2002). The *Hagemann* court noted: “[O]ne could argue a number of unrelated persons residing together does not constitute a ‘family’ for the purpose of the declaration restriction to ‘single-family residences.’” *Id.* at 92 fn.4.

<sup>5</sup> In *Hagemann*, the Court of Appeals enjoined the operation of an elderly foster care home in a plat designed for residential and recreational use and which restricted buildings to “single-family residences” and prohibited “business, industry or commercial enterprise of any kind or nature . . . .” 56 Wn. App. at 86-87, 91. The enforcement of the covenant preserved the residential character of the neighborhood. *Id.* at 89. As the court tartly observed: “[T]o provide residence to *paying customers* is not synonymous with a residential purpose.” *Id.* at 91 (emphasis added).

use restriction. *Id.* at 451. Like the state licensed adult facilities in *Hagemann* and *Main Farm*, the child day care center accepted money in exchange for the care of persons not related to them.

Based on the existing case law, use is residential or commercial, not both. If it looks like a business, it is a business. The intensity of use also changes the character of use. Respondents' use of their properties is not for single family residential purpose when the principal use of the property is for conducting a rental business akin to a hotel or bed and breakfast, uses that would not be permitted under applicable County zoning codes. They serve paying customers. Those customers are not related to the owners, find their lodgings on the Internet, are not run through any credit or criminal background checks, rarely meet the owners, and receive cleaning services like a hotel or motel with their stay. The nightly rentals increase the amount of traffic in Chiwawa and increase the appearance of one-time visitors with no ties or vested interest in the community. Following the reasoning in *Mains Farm*, the reasonable expectations of other owners who bought into Chiwawa, a planned single family residential community where commercial uses were prohibited, does not include a constant turnover of transient renters of properties.

This Court should grant direct review under RAP 4.2(a)(3) to reaffirm its bright line rule regarding covenants prohibiting commercial activities in a single family residential subdivision.

(2) The Board Properly Enforced the Grantor's Intent

As set forth *supra*, the original grantor intended to create a peaceful community of single family residences that was free of commercial activity and nuisances. The covenants reflect that intent. The 2011 amendment duly adopted by the Association reflects that intent. A ban on short-term rentals prevents a plainly commercial business—nightly rentals. It ensures that single family residential use, as such a use is traditionally defined, prevails in Chiwawa rather than a party atmosphere among transient occupants of properties in the subdivision.

The ultimate impact of the trial court's decision here is to supersede the decision of the Association's board and its membership in ascertaining and applying the grantor's intent regarding the subdivision. In doing so, the court relied on *Meresse v. Stelma*, 100 Wn. App. 857, 999 P.3d 1267 (2000), a Division-I case that affords greater rights in covenant interpretation cases to the views of a dissident minority of homeowners than the elected board. The Association believes that *Meresse* is

distinguishable,<sup>6</sup> but if it is to be applied as expansively as the trial court did here,<sup>7</sup> it is fundamentally contrary to this Court's decisional law and contrary to the Legislature's intent in RCW 64.38.

The trial court's decision cannot be squared with this Court's decision that condominium owners associations may adopt provisions restricting the ability of owners to lease their property given the benefit of owner occupation of units. *Shorewood West Condominium Ass'n v. Sadri*, 140 Wn.2d 47, 992 P.2d 1008 (2000). Like single family residential owners in a homeowner association, condominium owners are also subject to restrictive covenants and subject to amendment by majority rule.<sup>8</sup>

Moreover, in enacting RCW 64.38, the Legislature recognized broad authority in elected homeowner association boards to exercise a variety of powers in RCW 64.38.020 that included "any other powers

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<sup>6</sup> Unlike the covenant amendment in *Meresse* that relocated an access road, the amendments here were properly enacted and were consistent with Chiwawa's status as a single family residential subdivision that prohibited commercial activity.

<sup>7</sup> The *Meresse* court claimed that the law will not subject a minority of landowners to restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants. 100 Wn. App. at 866. The assertion is entirely contrary to homeowner democracy principles.

<sup>8</sup> The trial court's decision also contradicts *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 273-74, 883 P.2d 1387 (1994), *review denied*, 127 Wn.2d 1003 (1995), where the majority owners in a large residential development approved new covenants to prohibit the storage of junk vehicles on individual properties for more than six months. *Id.* at 865 n. 9. The amendment was adopted for the common good. Similarly, the trial court's decision is contrary to *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006) where Division III prohibited a homeowner from constructing a garage that violated the terms of the applicable covenant.

necessary and proper for the governance and operation of the association.” RCW 64.38.020(14). Homeowner association boards act much like the elected bodies of municipal corporations. This Court has recognized that deference to such elected bodies with respect to land use decisions is appropriate. *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 830, 256 P.3d 1150 (2011) (court gives “considerable deference” to city’s construction of its land use ordinances).

This is an issue that will re-surface across Washington as other homeowners associations confront efforts by certain owners to disrupt non-commercial, single family residential subdivisions by allowing transient rentals advertised on the Internet. Direct review is appropriate under RAP 4.2(a)(4).

D. CONCLUSION

The trial court’s decision here is contrary to decisions of this Court and the Court of Appeals. RAP 4.2(a)(3). It presents a fundamental issue that this Court should decide. RAP 4.2(a)(4). This Court should grant direct review.

DATED this 3d day of January, 2012.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
(206) 574-6661

Yen B. Lam, WSBA #32989  
Galvin Realty Law Group PS  
6100 219<sup>th</sup> St. SW Ste. 560  
Mountlake Terrace, WA 98043  
(425) 248-2163  
Attorneys for Appellant Chiwawa  
Communities Association

# APPENDIX

Superior Court of the State of Washington  
For Chelan County

Lesley A. Allan, Judge  
Department 1  
T.W. Small, Judge  
Department 2



John E. Bridges, Judge  
Department 3  
Bart Vandegriff  
Court Commissioner

401 Washington Street  
P.O. Box 880  
Wenatchee, Washington 98807-0880  
Phone: (509) 667-6210 Fax (509) 667-6588

**March 24, 2010**

Yen B. Lam  
Galvin Realty Law Group, P.S.  
Attorneys at Law  
6100 - 219<sup>th</sup> St SW, Suite 560  
Mountlake Terrace, WA 98043

Dennis Jordan  
Dennis Jordan & Associates Inc. P.S.  
4218 Rucker Avenue  
Everett, WA 98203

**Re: *Wilkinson et. al. v. Chiwawa Communities Association*  
*Chelan County Superior Court Cause No. 09-2-00896-0***

Dear Counsel:

- The court has now had an opportunity to review the following:
- Order Granting In Part and Denying In Part Plaintiffs' (sic) and Defendant's Motion for Summary Judgment
  - Plaintiffs' Motion for Reconsideration of Order on Summary Judgment
  - Defendant's Response to Plaintiffs' Motion for Reconsideration of Order on Summary Judgment

The court's ruling on January 21, 2010 merely stated the undisputed facts considered by the court. These facts were "other evidence called to the attention of the trial court" properly set forth in the court's order pursuant to CR 56(h).

The court's rulings were on both parties' cross-motions for summary judgment. While Plaintiffs filed for declaratory judgment,

**March 24, 2010**

**• Page 2**

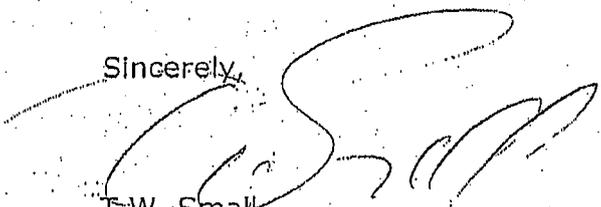
the Defendant counter-claimed for declaratory and injunctive relief. Resolution of the issue of short-term rentals involved more than consideration of a single covenant.

Given the undisputed facts, the severability provision in the covenants, the pertinent case law and the violations of the covenants by plaintiffs allowing the use of their property for periods of time of less than one month, the court reaffirms its ruling that the 2008 Amendment to the Protective Covenants is invalid and unenforceable for rentals of a period of more than one month. Conversely, the covenant is enforceable against daily "rentals" and "rentals" of less than one month.

Consequently, plaintiffs shall immediately cease and desist from advertising and using their properties for short-term rentals for a period of less than one month. Such partial enforcement may be done in this case without injury to the public and without injustice to the parties.

Therefore, plaintiffs' motion for reconsideration is denied. Enclosed is a conformed copy of the order entered contemporaneously with this letter decision.

Sincerely,



T.W. Small  
Superior Court Judge

Enclosure  
pc: Superior Court file

Honorable T.W. Small  
Thursday, January 21, 2010  
9:30 am

**FILED**

JAN 21 2010

SIRI A. WOODS  
CHELAN COUNTY CLERK

IN THE SUPERIOR COURT OF WASHINGTON  
FOR THE COUNTY OF CHELAN

ROSS WILKINSON and CINDY  
WILKINSON; MONTE KARNES and  
KIMBERLEY KARNES; DAVID BETHEL  
and JEANIE BETHEL; DARRELL MCLEAN;  
JIM PAULUS and KATHY PAULUS,  
JUSTIN HARGIS and TABATHA HARGIS;  
JOE HARGIS and LINDA HARGIS; DANIEL  
MACINDOE and ISIDRA MACINDOE; and  
DAVID SPICER and MARTHA SPICER,

Plaintiffs,

v.

CHIWAWA COMMUNITIES  
ASSOCIATION, a Washington Non-Profit  
Corporation,

Defendant.

No. 09-2-00896-0

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS' AND  
DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT

**ORIGINAL**

THIS MATTER came before this Court upon Defendant's Motion for Summary  
Judgment and Plaintiffs' Cross-Motion for Summary Judgment, with Plaintiffs, ROSS  
WILKINSON and CINDY WILKINSON; MONTE KARNES and KIMBERLEY KARNES;

ORDER GRANTING IN PART AND DENYING IN PART  
PLAINTIFFS' AND DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT - Page 1

Galvin Realty Law Group, P.S.  
Attorneys at Law  
6100 - 219<sup>th</sup> Street SW, Suite 560  
Mountlake Terrace, WA 98043  
Telephone: (425) 248-2163  
Facsimile: (425) 248-2168

1 DAVID BETHEL and JEANIE BETHEL; DARRELL MCLEAN; JIM PAULUS and  
2 KATHY PAULUS, JUSTIN HARGIS and TABATHA HARGIS; JOE HARGIS and LINDA  
3 HARGIS; DANIEL MACINDOE and ISIDRA MACINDOE; and DAVID SPICER and  
4 MARTHA SPICER, represented by their attorney of record, Dennis Jordan, and with  
5 Defendant CHIWAWA COMMUNITIES ASSOCIATION, a non-profit corporation,  
6 represented by its attorney of record, Yen Lam. A hearing was held on January 5, 2010. The  
7 Court considered the argument of counsel and the records and files contained herein,  
8 including the following:  
9

- 10 1. Defendant's Motion for Summary Judgment;
- 11 2. Declaration of Mike Stanford
- 12 3. Declaration of Joanne Stanford
- 13 4. Declaration of Gloria Fisk
- 14 5. Declaration of Emma Serino
- 15 6. Declaration of David Lowrie
- 16 7. Declaration of Yen Lam
- 17 8. Plaintiffs' Cross-Motion for Summary Judgment and Response to Defendant's  
18 Motion for Summary Judgment
- 19 9. Declaration of David Spicer In Support of Plaintiffs' Cross Motion and In  
20 Opposition to Defendant's Motion for Summary Judgment
- 21 10. Declaration of Jeanie Bethel In Support of Plaintiffs' Cross Motion and In  
22 Opposition to Defendant's Motion for Summary Judgment
- 23
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- 25

26 ORDER GRANTING IN PART AND DENYING IN PART  
27 PLAINTIFFS' AND DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT - Page 2

Galvin Realty Law Group, P.S.  
Attorneys at Law  
6100 - 219<sup>th</sup> Street SW, Suite 560  
Mountlake Terrace, WA 98043  
Telephone: (425) 248-2163  
Facsimile: (425) 248-2168

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- 11. Declaration of Denise Ericson In Support of Plaintiffs' Cross Motion and In Opposition to Defendant's Motion for Summary Judgment
- 12. Declaration of Cindy Wilkinson In Support of Plaintiffs' Cross Motion and In Opposition to Defendant's Motion for Summary Judgment
- 13. Declaration of Ted Trepanier In Support of Plaintiffs' Cross Motion and In Opposition to Defendant's Motion for Summary Judgment
- 14. Declaration of Dennis Jordan In Support of Plaintiffs' Cross Motion and In Opposition to Defendant's Motion for Summary Judgment
- 15. Defendant's Reply in Support of Defendant's Motion for Summary Judgment
- 16. Declaration of Lloyd Brodniak
- 17. Declaration of Joyce Pfluger
- 18. Declaration of David Johnston
- 19. Second Declaration of Mike Stanford
- 20. Amended Declaration of Yen Lam with Plaintiff's Discovery Responses
- 21. Second Declaration of Yen Lam in Support of Defendant's Motion for Summary Judgment
- 22. Defendant's Notice of Errata and Supplemental Reply
- 23. Plaintiff's Reply to Defendant's Response to Plaintiff's Cross Motion for Summary Judgment
- 24. Plaintiffs' Memorandum in Support of Proposed Order on Summary Judgment.

ORDER GRANTING IN PART AND DENYING IN PART  
PLANTIFFS' AND DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT - Page 3

**Galvin Realty Law Group, P.S.**  
Attorneys at Law  
6100 - 219<sup>th</sup> Street SW, Suite 560  
Mountlake Terrace, WA 98043  
Telephone: (425) 248-2163  
Facsimile: (425) 248-2168

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25. Defendant's Memorandum Regarding Defendant's Proposed Order on Summary Judgment and Request for Clarification

Having considered the foregoing, the Court now makes the following

*HS rulings on undisputed facts*

1. Plaintiffs own real properties located in Chiwawa River Pines and are members of the Chiwawa Communities Association.
2. The 1988 and 1991 Amended Protective Covenants restrict land use to single family residential use, prohibit commercial use, nuisance, offensive use, and allow signs to be posted advertising property for sale or rent.
3. It is undisputed the Board of Trustees of Chiwawa Communities Association has taken enforcement action against short-term rentals.
  - a. On July 6, 1987, the Board of Trustees notified an owner, Larry Thormable, in writing, that his intention to rent his cabin on a day to day basis would violate the land use and nuisance and offensive use provisions of the Protective Covenants.
  - b. The Minutes of Special Meeting of the Board of Trustees of Chiwawa Communities Association dated December 8, 1991, state that Gloria Fisk, then President of the Board of Trustees, would ask Renate Brahm, an owner, to remove a sign advertising lodging in her driveway since no businesses were allowed in the community, pursuant to the Protective Covenants.

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4. Plaintiffs had actual or constructive knowledge that the Protective Covenants were subject to amendment by a majority of the owners.

5. At the special meeting held on September 27, 2008, the owners were asked to vote to whether to allow each of the following as an exception to industrial or commercial use: low-impact service-oriented businesses, long-term rentals (duration longer than six-months), and short-term rental (duration shorter than six-months). The results are listed in the table below.

<b>Proposal</b>	<b>Total Yes</b>	<b>Total No</b>
Allow long-term, low-impact service-oriented businesses?	226	15
Allow long-term residential rentals for a period of more than six (6) consecutive months?	183	51
Allow short-term rentals for a period of less than six (6) consecutive months?	78	160

6. The 2008 Amendment to the Protective Covenants, recorded on October 7, 2008, under Chelan Auditor's Number 2291058, was adopted pursuant to the procedures established in the Protective Covenants and By-laws and approved by a majority of owners.

7. Plaintiffs ROSS WILKINSON and CINDY WILKINSON; DAVID BETHEL and JEANIE BETHEL; DARRELL MCLEAN; JIM PAULUS and KATHY PAULUS, JUSTIN HARGIS and TABATHA HARGIS; JOE HARGIS and LINDA HARGIS; and DANIEL MACINDOE and ISIDRA MACINDOE are

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advertising and operating nightly rentals. Plaintiffs DAVID SPICER and MARTHA SPICER are advertising nightly rentals but stopped the operation of nightly rentals on July 1, 2009. Plaintiffs MONTE KARNES and KIMBERLEY KARNES would like to advertise and operate nightly rentals.

8. \_\_\_\_\_  
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Based on these *undisputed facts*, the Court *rules as follows:*

1. In conflicts between homeowners regarding the interpretation of restrictive covenants, the Court places a special emphasis on arriving at an interpretation that protects homeowners' collective interests. In construing restrictive covenants, the Court's primary task is to interpret the drafter's intent. Extrinsic evidence is admissible to determine the meaning of the specific words and terms used in the covenants. In the

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case of an ambiguity, the Court will look beyond the document to ascertain intent from the surrounding circumstances.

- 2. Under *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222, the Court can look at the actions of the parties to interpret ambiguous provisions. Based on past Board enforcement actions against nightly rentals and the language of the Protective Covenants, the developer intended to prohibit short-term rentals for a duration of less than one month.
- 3. Rentals for a duration of less than one month violate the single-family residential use restriction and prohibition against commercial use, nuisance, and offensive use in the 1988 and 1991 Amended Protective Covenants.

*is invalid and unenforceable for rentals*  
4. The 2008 Amendment to the Protective Covenants, of a period of more than one month,

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After considering the foregoing and finding no genuine issue of material fact and that Plaintiffs and Defendant are entitled to judgment as a matter of law;

NOW THEREFORE, it is hereby ordered that:

- A. Defendant Chiwawa Communities Association's Motion for Summary Judgment is GRANTED in part and DENIED in part.
- B. Plaintiffs' Cross-Motion for Summary Judgment is GRANTED in part and DENIED in part.
- C. Plaintiffs ROSS WILKINSON and CINDY WILKINSON; MONTE KARNES and KIMBERLEY KARNES; DAVID BETHEL and JEANIE BETHEL; DARRELL MCLEAN; JIM PAULUS and KATHY PAULUS, JUSTIN HARGIS and TABATHA HARGIS; JOE HARGIS and LINDA HARGIS; DANIEL MACINDOE and ISIDRA MACINDOE; and DAVID SPICER and MARTHA SPICER shall immediately cease and desist from advertising (in print and on the Internet) and using Plaintiffs' real properties, as described in Exhibit A, as short-term rentals for a period of less than

*to* one month.

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~~D. Internet Service Providers shall remove or take down websites advertising short-term rentals (for a period of less than one month) in Chiwawa River Pines upon receipt of written notice from Chiwawa Communities Association.~~

~~E. The 2008 Amendment to the Protective Covenant shall be revised and recorded against the real properties located in Chiwawa River Pines as follows:~~

- ~~a. The exception for low-impact, service-based businesses as a commercial use shall remain.~~
- ~~b. The prohibition against rentals with a duration of more than one month and less than six months shall be stricken.~~

~~F. The 2008 Amendment to the Protective Covenants shall be revised and recorded against the real properties within Chiwawa River Pines as shown in~~

~~Exhibit B.~~

D. Each party shall pay their own attorney fees.

E. Defendant Chiwawa Communities Association is entitled to an award of its costs.

to be determined at the time of presentation of the proposed judgment.

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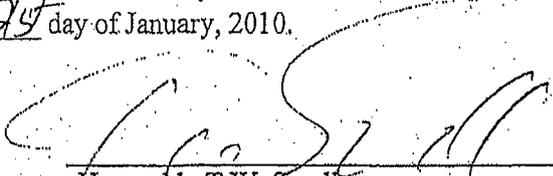
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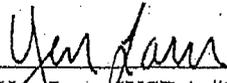
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DONE IN OPEN COURT this 7<sup>th</sup> day of January, 2010.

  
\_\_\_\_\_  
Honorable T.W. Small

Presented by:

GALVIN REALTY LAW GROUP, P.S.

  
\_\_\_\_\_  
Yen Lam, WSBA #32989  
Attorney for Defendant  
Chiwawa Communities Association

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Honorable T.W. Small  
February 10, 2010  
Without Oral Argument

**FILED**

**MAR 26 2010**

SIRI A. WOODS  
CHELAN COUNTY CLERK

IN THE SUPERIOR COURT OF WASHINGTON  
FOR THE COUNTY OF CHELAN

ROSS WILKINSON and CINDY  
WILKINSON; MONTE KARNES and  
KIMBERLEY KARNES; DAVID BETHEL  
and JEANIE BETHEL; DARRELL MCLEAN;  
JIM PAULUS and KATHY PAULUS,  
JUSTIN HARGIS and TABATHA HARGIS;  
JOE HARGIS and LINDA HARGIS; DANIEL  
MACINDOE and ISIDRA MACINDOE; and  
DAVID SPICER and MARTHA SPICER,

Plaintiffs,

v.

CHIWAWA COMMUNITIES  
ASSOCIATION, a Washington Non-Profit  
Corporation,

Defendant.

No. 09-2-00896-0

ORDER DENYING PLAINTIFFS' MOTION  
FOR RECONSIDERATION OF ORDER ON  
SUMMARY JUDGMENT

**ORIGINAL**

THIS MATTER came before this Court upon Plaintiffs' Motion for Reconsideration  
of Order on Summary Judgment, with Plaintiffs, ROSS WILKINSON and CINDY  
WILKINSON; MONTE KARNES and KIMBERLEY KARNES; DAVID BETHEL and

Galvin Realty Law Group, P.S.  
Attorneys at Law  
6100 - 219<sup>th</sup> Street SW, Suite 560  
Mountlake Terrace, WA 98043  
Telephone: (425) 248-2163  
Facsimile: (425) 248-2168

1 JEANIE BETHEL; DARRELL MCLEAN; JIM PAULUS and KATHY PAULUS, JUSTIN  
2 HARGIS and TABATHA HARGIS; JOE HARGIS and LINDA HARGIS; DANIEL  
3 MACINDOE and ISIDRA MACINDOE; and DAVID SPICER and MARTHA SPICER,  
4 represented by their attorney of record, Dennis Jordan, and with Defendant CHIWA  
5 WA COMMUNITIES ASSOCIATION, a non-profit corporation, represented by its attorney of  
6 record, Yen Lam. The Court considered the pleadings filed in this action as well as the  
7 following: Plaintiffs' Motion for Reconsideration of Order on Summary Judgment,  
8 Defendant's Response to Plaintiff's Motion for Reconsideration of Order on Summary  
9 Judgment. The Court having reviewed the papers and pleadings on file herein,  
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13 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion  
14 for Reconsideration of Order on Summary Judgment is DENIED.  
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17 DONE on March 23, 2010

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19 T.W. Small  
20 Judge T.W. Small  
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26 ORDER DENYING PLAINTIFFS' MOTION FOR  
27 RECONSIDERATION OF ORDER ON SUMMARY  
JUDGMENT - Page 2

Galvin Realty Law Group, P.S.  
Attorneys at Law  
6100 - 219<sup>th</sup> Street SW, Suite 560  
Mountlake Terrace, WA 98043  
Telephone: (425) 248-2163  
Facsimile: (425) 248-2168

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Presented by:

GALVIN REALTY LAW GROUP P.S.

*Yen Lam*

Yen Lam, WSBA # 32989  
Attorney for Defendant

ORDER DENYING PLAINTIFFS' MOTION FOR  
RECONSIDERATION OF ORDER ON SUMMARY  
JUDGMENT - Page 3

**Galvin Realty Law Group, P.S.**  
Attorneys at Law  
6100 - 219<sup>th</sup> Street SW, Suite 560  
Mountlake Terrace, WA 98043  
Telephone: (425) 248-2163  
Facsimile: (425) 248-2168

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SUPERIOR COURT OF WASHINGTON FOR CHELAN COUNTY

ROSS WILKINSON and CINDY WILKINSON;	) NO. 11-2-00678-1
MONTE KARNES and KIMBERLEY KARNES;	)
DAVID BETHEL and JEANIE BETHEL;	) ORDER ON PLAINTIFFS'
DARRELL McLEAN; JIM PAULUS and KATHY	) AND DEFENDANT'S
PAULUS; JOE HARGIS and LINDA HARGIS;	) MOTIONS FOR
DANIEL MacINDOE and ISIDRA MacINDOE;	) SUMMARY JUDGMENT
TED TREPANIER and RUBY AKINS-	)
TREPANIER,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
CHIWAWA COMMUNITIES ASSOCIATION,	)
a Washington Non-Profit corporation,	)
	)
Defendant.	)

THIS MATTER having come before the Court on Defendant's Motion for Summary Judgment and on Plaintiffs' Motion for Summary Judgment and the Court having considered argument of counsel, the pleadings on file including the following:

1. Defendant's Motion for Summary Judgment;
2. Declaration of Yen Lam;
3. Declaration of Mike Stanford;

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ORDER ON PLAINTIFFS' AND  
DEFENDANT'S MOTIONS  
FOR SUMMARY JUDGMENT - 1

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- 4. Declaration of Joanne Stanford;
- 5. Declaration of Joanne Stanford;
- 6. Declaration of Gloria Fisk;
- 7. Declaration of Patty Blouin;
- 8. Plaintiffs' Motion for Summary Judgment;
- 9. Declaration of Dan and Isidra MacIndoe;
- 10. Joint Declaration of Plaintiffs;
- 11. Declaration of Dennis Jordan;
- 12. Plaintiff's Response to Defendant's Motion;
- 13. Declaration of Darlyn McCarty;
- 14. Declaration of Dennis Jordan;
- 15. Plaintiff's Motion to Strike;
- 16. Amended Declaration of Dennis Jordan;
- 17. Defendant's Response to Plaintiff's Motion to Strike;
- 18. Defendant's Response to Plaintiffs' Motion for Summary Judgment;
- 19. Second Declaration of Gloria Fisk
- 20. Second Declaration of Yen Lam;
- 21. Declaration of Judy Van Eyk;
- 22. Declaration of David Johnston;
- 23. Second Declaration of Mike Stanford;
- 24. Declaration of Michael Standley;
- 25. Declaration of Michelle Simpson;
- 26. Declaration of James Padden;
- 27. Plaintiffs' Reply to Defendant's Response to Motion for Summary Judgment;
- 28. Plaintiffs' Supplemental Motion to Strike Testimony
- 29. *Defendant's Response to Plaintiffs' Supplemental Motion*

The Court having considered the foregoing and the argument of counsel, NOW,

THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

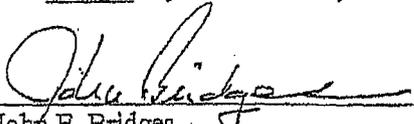
1. DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT IS DENIED  
IN ITS ENTIRETY.

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ORDER ON PLAINTIFFS' AND  
DEFENDANT'S MOTIONS  
FOR SUMMARY JUDGMENT - 2

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2. PLAINTIFFS' MOTION FOR  
SUMMARY IS GRANTED IN ITS  
ENTIRETY.

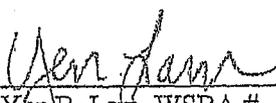
DONE IN OPEN COURT on this 15 day of December, 2011.

  
\_\_\_\_\_  
John E. Bridges  
Superior Court Judge

PRESENTED BY:

  
\_\_\_\_\_  
Dennis Jordan, WSBA #4904  
Attorney for Plaintiffs

COPY RECEIVED, APPROVED FOR  
ENTRY:

  
\_\_\_\_\_  
Yen B. Lam, WSBA #  
Attorney for Defendant

\\  
ORDER ON PLAINTIFFS' AND  
DEFENDANT'S MOTIONS  
FOR SUMMARY JUDGMENT - 3

DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Statement of Grounds in Supreme Court Cause No. \_\_\_\_\_ (Chelan County Superior Court Cause No. 11-2-00678-1) to the following parties:

Yen Lam  
Galvin Realty Law Group, P.S.  
6100 219<sup>th</sup> Street SW, Suite 560  
Mount Lake Terrace, WA 98043

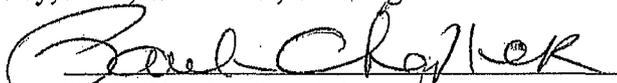
Dennis Jordan  
Dennis Jordan & Associates, Inc. P.S.  
4218 Rucker Avenue  
Everett, WA 98203

Original efiled with:

Washington Supreme Court  
415 12<sup>th</sup> Street W.  
Olympia, WA 98504

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 3<sup>rd</sup> day of January, 2011, at Tukwila, Washington.

  
Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick

## OFFICE RECEPTIONIST, CLERK

---

**To:** Paula Chapler  
**Subject:** RE: Ross Wilkinson, et al. v. Chiwawa Communities Association (Chelan County Superior Court Cause No. 11-2-00678-1)

Rec. 1-3-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

---

**From:** Paula Chapler [<mailto:paula@tal-fitzlaw.com>]  
**Sent:** Tuesday, January 03, 2012 3:02 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Ross Wilkinson, et al. v. Chiwawa Communities Association (Chelan County Superior Court Cause No. 11-2-00678-1)

Per Mr. Talmadge's request, please see the attached Statement of Grounds for Direct Review for filing in the following case:

Case Name: Ross Wilkinson, et al. v. Chiwawa Communities Association  
Chelan County Cause No. 11-2-00678-1  
Supreme Court Cause No. (Not assigned yet)  
Attorney: Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
(206) 574-6661

Sincerely,

Paula Chapler  
Legal Assistant  
Talmadge/Fitzpatrick  
(206) 574-6661