

62974-3

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No. 62974-3-1

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

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MARK BLOOME,

Appellant,

v.

JACKSON HAVERLY, M.D.,

Respondent.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

This case boils down to a simple question: Can a document that generally protects “views,” but then specifically discusses only vegetation, eliminate forever the right to build? Decades of case law mandating strict and narrow interpretation of restrictive covenants compel the conclusion that the restrictive covenant at issue in this lawsuit cannot restrict Mr. Bloome’s or his successors’<sup>1</sup> ability to build without so stating.

Dr. Haverly argues that the restrictive covenant at issue in this litigation should be construed broadly, in favor of him as the beneficiary. Dr. Haverly’s position is at odds with decades of Washington jurisprudence viewing restrictive covenants with skepticism. Contrary to Dr. Haverly’s arguments, Washington courts interpret restrictive covenants narrowly – in favor of the free use of land – and avoid interpretations that would restrict more than the clear language of the covenant would allow.

In response to Mr. Bloome’s opening brief, Dr. Haverly has made new factual arguments . If the Court considers these new arguments, made for the first time on appeal, it cannot affirm the trial court due to the genuine issues of material fact they create. If the Court does not consider

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<sup>1</sup> As it evaluates this controversy, the Court should be mindful of the fact that the View Covenant is not a mere contract between parties, it is a restrictive covenant running with the land that will bind these parties and their successors indefinitely.

these new arguments (and it should not), it cannot affirm the trial court due to the trial court's errors of law. Either way, this Court should reverse the grant of summary judgment to Dr. Haverly and either grant summary judgment to Mr. Bloome or remand for trial on the remaining questions of fact.

## **II. A SUMMARY OF THE UNDISPUTED—AND NEWLY DISPUTED—FACTS**

The following material facts are undisputed: As part of the purchase-and-sale of the home now owned by Dr. Haverly, the parties simultaneously signed two restrictive covenants running with the land, one entitled "Declaration of View Covenant to be Recorded against 4743 West Ruffner, in Favor of 4730 West Ruffner"<sup>2</sup> (the "View Covenant") and one entitled "Declaration of Covenants – Restrictions on Development" (the "Restriction on Development"). The View Covenant states "It is agreed that between buyer and seller the intent of both parties and the burden upon 4743 West Ruffner to the benefit of 4730 West Ruffner is to maintain the existing view corridor for 4730 West Ruffner as it exists on June 30, 1995." CP 24. The View Covenant then contains a series of specific restrictions regarding foliage on the Lot: "[B]oth parties acknowledge that to maintain the exact view is impossible, that due to tree

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<sup>2</sup> 4743 West Ruffner is the Lot owned by Bloome. Because it is unimproved, the address was necessarily an estimate.

**pruning and/or removal**, sometimes the view will be better than the view on June 30, 1995, and sometimes **due to tree growth**, it shall be worse.”; “[T]his corridor shall have trees in the line of sight, but that **the trees shall not substantially**, but may partially, block out portions of the view corridor.”; “[S]eller shall **remove nine trees** as shown in the attached Exhibit B.”; “[S]eller shall **replace those trees with trees . . .**.”; “It is further understood that **in the future, if trees** located on [the Lot] should block the view corridor . . . and therefore **require cutting or pruning**, such cutting and pruning will be at the expense of [buyer or successor]”; “No **trees or plants** shall be planted or allowed to grow in front of or directly behind the street level fence [on the Lot].”; “There exists a large conifer in front of the fence . . . this **tree** is excluded from this covenant.” CP 24-25 (emphasis added). And so on. Nowhere does the View Covenant mention buildings or other improvements to the Lot. The Lot was unimproved at the time they entered the View Covenant and it remains so today. The Restriction on Development contains a series of detailed restrictions and prohibitions defining what Dr. Haverly or his successor may build on his property. CP 147-60.

Until he read Dr. Haverly’s Response brief, Mr. Bloome believed that there was no dispute regarding whether the parties ever discussed the possibility that the View Covenant restricted more than vegetation. Mr.

Bloome has unequivocally stated that the parties discussed neither the possibility that Mr. Bloome would build on his Lot nor the possibility that the View Covenant applied to anything other than vegetative encroachments into the “view corridor:”

Defendant Haverly never requested, and Sharon and I never agreed, that the View Covenant would restrict Sharon’s and my right to build on [the Lot], and we never discussed this issue with Defendant Haverly before, during or after the time we negotiated the [Restriction on Development] and the View Covenant.

*See* CP 68, Bloome Declaration ¶ 12. Dr. Haverly now appears to assert – for the first time on appeal – that he informed Mr. Bloome prior to signing the View Covenant that he wanted to protect the view from more than just trees and bushes. Brief of Respondent at 20-21, 26, 29. As discussed below, the Court cannot now consider this new argument, but even if it does, the assertion only creates a genuine issue of material fact precluding summary judgment.

### **III. LEGAL AUTHORITY AND ARGUMENT**

Because of the topography of Mr. Bloome’s burdened Lot, the trial court’s all-encompassing order on summary judgment prevents him from building anything at all. Unless this Court reverses the grant of summary judgment to Dr. Haverly, Mr. Bloome will be left with a vacant, in-city, waterfront lot of almost no monetary value pursuant to a covenant that

does not mention restrictions on building, and pursuant to negotiations in which restrictions on building (on this lot) were not even discussed.

The trial court committed several errors of law when it granted summary judgment to Dr. Haverly. Dr. Haverly's responsive arguments do not change this fact, and Mr. Bloome requests that this Court reverse the trial court's grant of summary judgment and either grant summary judgment to Mr. Bloome or remand for trial on the remaining issues of fact.

**A. Dr. Haverly's Cited Caselaw Addresses Restrictive Covenants in Residential Subdivisions and has no Bearing on this Case.**

The law of restrictive covenants is well defined. If a restrictive covenant does not clearly and expressly ban some legal use of property, that use is permitted, regardless of what the signing parties hoped to achieve. Washington courts regard restrictive covenants such as the View Covenant narrowly and refuse to extend their prohibitions beyond their clear effect. Decades of case law guides this Court in its interpretation of the View Covenant. *See, e.g., Parry v. Hewitt*, 68 Wn. App. 664, 668, 847 P.2d 483 (Div. 1 1992) ("A covenant is strictly construed against one who claims the benefit of the restriction.") (holding that a mobile home was not a "trailer" for purposes of the restrictive covenant); *see also Weld v. Bjork*, 75 Wn.2d 410, 411, 451 P.2d 675 (1969); *Burton v. Douglas County*, 65

Wn.2d 619, 622, 399 P.2d 68 (1965) (“Restrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed.”); *Gwinn v. Cleaver*, 56 Wn.2d 612, 615, 354 P.2d 913 (1960) (“Public policy favors the free use of one's own land. Imposed restrictions will not be aided or extended by judicial construction, and doubts will be resolved in favor of the unrestricted use of property.”); *Granger v. Boulls*, 21 Wn.2d 597, 599, 152 P.2d 325 (1944).

As Mr. Bloome stated in his Appellant’s Brief at 28 n.5, where a dispute arises between homeowners in a residential subdivision, the Washington State Supreme Court has relaxed the traditional rule of strict interpretation of restrictive covenants. *Riss v. Angel*, 131 Wn.2d 612, 623, 934 P.2d 669 (1997) (“[W]here construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable.”). This new line of authority continues to develop to protect the collective, quasi-public interests of homeowners in residential subdivisions.

Dr. Haverly relies on two cases in the *Riss* line of authority, *Bauman v. Turpen*, 139 Wn. App. 78, 160 P.3d 1050 (Div. 1 2007) and

*Wimberly v. Caravello*, 136 Wn. App. 327, 405, 149 P.3d 402 (Div. 3 2006), to establish the proposition that courts interpret restrictive covenants broadly where their intent is view preservation. Both of these cases involved disputes between homeowners in residential subdivisions. *See Bauman*, 139 Wn. App. at 83 (describing the twelve-lot subdivision subject to a restrictive covenant signed in 1949); *Wimberly*, 136 Wn. App. at 331 (“The Martin Creek community is governed by a set of bylaws with restrictive covenants.”).

These modern cases addressing restrictive covenants in the context of residential subdivisions do not bear on the case at bar. Dr. Haverly and Mr. Bloome are not innocent successors-in-interest relying on a set of common subdivision restrictions, they personally drafted and signed the View Covenant and the companion Restriction on Development. **This Court cannot rule in Dr. Haverly’s favor under the authority of *Bauman* and *Wimberly* without drastically expanding the scope of *Riss* and undoing the well-established law that governs this case.** This decades-old line of authority, which is still good law outside of the subdivision context, directs this Court to strictly interpret the View Covenant in favor of Mr. Bloome’s free use of the Lot. *Cf., e.g., Burton v. Douglas County*, 65 Wn.2d 619, 399 P.2d 68 (1965); *Gwinn v. Cleaver*, 56 Wn.2d 612, 354 P.2d 913 (1960).

Dr. Haverly's Response Brief highlights the crucial difference between *Burton* and *Riss*. He asserts that Mr. Bloome's argument resembles those rejected in *Wimberly* and *Bauman*, which is true. Even a cursory review of those cases in light of the pre-*Riss* authority demonstrates that, but for the fact that the disputes arose between owners (and successors-in-interest) in residential subdivisions, the arguments rejected there would have succeeded. When deciding this dispute between original signatories outside of a residential subdivision, the Court must strictly construe the View Covenant in favor of the free use of land as Mr. Bloome argues, not broadly in favor of the beneficiary and the drastic restriction on the use of land that Dr. Haverly urges.

**B. The Court Cannot Consider Dr. Haverly's Recasting of His Previous Factual Assertions.**

For the first time, Dr. Haverly now asserts that he informed Mr. Bloome in 1995 that Dr. Haverly wanted a view covenant that would prohibit construction of buildings on the Lot. *See* Respondent's Brief at 20. Dr. Haverly's new assertion is not properly made before this Court, but in any event, it does nothing more than raise an issue of fact precluding summary judgment.

Dr. Haverly's Declaration in the trial court included the following statement: "When I asked for a view covenant, I told Mr. Bloome I

wanted to preserve the view – not just preserve the view from trees and bushes.” CP 20. This unfortunately punctuated sentence can reasonably be interpreted in one of two ways:

- (a) Dr. Haverly intended to explain what he meant when he told Mr. Bloome that he wanted to preserve the view, as in “I told Mr. Bloome I wanted to preserve the ‘view’ – not just preserve the view from trees and bushes.”; or
- (b) Dr. Haverly attempted to summarize an alleged statement he made in 1995, as in “I told Mr. Bloome ‘I want[] to preserve the view – not just preserve the view from trees and bushes.’”

As summarized below, Dr. Haverly has consistently made arguments that are consistent with (a): that his sentence was an after-the-fact explanation of what he meant when he told Mr. Bloome that we wanted to preserve the view, which is consistent with Mr. Bloome’s recollection and testimony that the parties never discussed buildings on the Lot or restricting buildings on the Lot. Dr. Haverly now argues, for the first time, that the correct interpretation is (b): that this was something he told Mr. Bloome.

Prior to filing his Respondent’s Brief, Dr. Haverly has consistently offered this sentence as meaning (a). Indeed, the punctuation in (a) comes from Dr. Haverly’s response to Mr. Bloome’s motion to strike this

sentence: “wanted to preserve the ‘view’ not just the view from trees.” CP 116. Mr. Bloome met Dr. Haverly’s argument head-on in his Reply in Support of the Motion to Strike. CP 130-31. At several other points in the proceedings before the trial court, Dr. Haverly made arguments consistent with (a). In his Motion for Summary Judgment, Dr. Haverly stated: “Dr. Haverly agrees that the possibility of Bloome building a structure in the ‘view corridor’ was never discussed; there was no need to.” CP 53. In his Reply, he stated “Bloome neglects to point out that there was no reason to address construction of a building in the view corridor: there was no building interfering with Dr. Haverly’s view nor did the steep slope topography invite the possibility that such development would ever be contemplated.” CP 111. Dr. Haverly even adopted this view earlier in his Respondent’s Brief before this Court when he stated: “Mark Bloome admits that the parties never discussed prior to closing the possibility of a structure or building being placed on Bloome’s property that would intrude into the ‘view corridor.’” Respondent’s Brief at 12; *see also id.* at 18 (“The evidence implies that no discussion of buildings took place . . .”).

Nowhere else in the record does Dr. Haverly assert that the proper interpretation is (b). Arguments raised for the first time on appeal are disregarded. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d

125 (2007) (“The general rule is that appellate courts will not consider issues raised for the first time on appeal.”). Nowhere in his response to Mr. Bloome’s Motion to Strike, not to mention his Motion for Summary Judgment, Reply in Support of his Motion for Summary Judgment, or at oral argument, did Dr. Haverly assert that he told Mr. Bloome in 1995 that he believed that the View Covenant restricted more than trees and bushes. This Court should not permit him to do so now.

Having so altered the meaning of his earlier declaration, Dr. Haverly then sprinkles the new interpretation of his earlier testimony liberally through the rest of his Respondent’s Brief, creating new arguments before this Court. For example, he now argues that Mr. Bloome’s silence subsequent to signing the View Covenant is telling, given that “Bloome had been told in 1995 what Dr. Haverly’s interpretation of their discussions [sic] had been and what Dr. Haverly believed would be the meaning of the language put down on paper.” Respondent’s Brief at 21; *see also id.* at 26, 29. But as averred by Mr. Bloome and confirmed by Dr. Haverly’s other arguments in this case, Dr. Haverly never made those statements. This is simply a case of Dr. Haverly’s counsel belatedly adopting a new interpretation of a colloquially written phrase.

Furthermore, insofar as Dr. Haverly asserts (b), he offers his own hearsay testimony. The rules of evidence define “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Option (b) involves the retelling of Dr. Haverly’s alleged 1995 statement, offered to prove that the word “view” is broader than just vegetation, and is indeed broad enough to include buildings. The Court cannot admit such testimony.

Regardless, on summary judgment the Court must presume that factual disputes will be resolved in favor of the non-moving party. Mr. Bloome has consistently asserted that the parties did not discuss buildings before or after signing the View Covenant, and the Court must assume the truth of this assertion.

**C. The Exclusion of a Tree is Consistent with Restrictions on Vegetation.**

The whole View Covenant applies only to vegetation and not to buildings. It is perfectly reasonable to exclude a single tree from a covenant that otherwise mandates the removal and/or topping of all vegetation. Dr. Haverly argues that the View Covenant’s exclusion of the “large conifer” from its purview shows that the parties knew how to

exempt,<sup>3</sup> so if they had intended to “exempt” buildings from the View Covenant, they would have. But there is no reason to “exempt” buildings from a prohibition on vegetation.

Dr. Haverly’s *expressio unius est alterius es* argument does not stand up in light of the View Covenant’s strictly vegetative scope. It is unreasonable to extrapolate from that exclusion that everything not expressly excluded from the View Covenant’s general ban must be prohibited. May Mr. Bloome park his car on the Lot? For how long? Could he park a recreational vehicle? Dr. Haverly’s logic compels the conclusion that he could not.

Contrary to Dr. Haverly’s belief, in the absence of express language, a restrictive covenant cannot bar a particular activity or improvement. Dr. Haverly asserts that everything is banned unless it is expressly permitted. This is exactly the reverse of the law of restrictive covenants: everything not expressly banned is permitted.

**D. The Court Should Exclude the Challenged Evidence.**

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<sup>3</sup> The specific tree is a very large conifer that is spreading into the view easement and progressively blocking the view. Bloome Dec. ¶ 3 CP 98; Bloome Dec. ¶ 11 CP 68. Mr. Bloome sold the property at a loss to his then renter, Dr. Haverly, and did not mind giving a vegetative view easement because he thought that Haverly would be a quiet neighbor. Bloome Dec. in Support of Motion for Reconsideration ¶ 6 CP 180. Dr. Haverly was aware that the conifer would intrude into the “view corridor” because he knew it grows laterally two-to-three feet per year. *Id.* ¶ 4 CP 179.

If the Court disregards Dr. Haverly's new factual argument regarding his pre-1995 statements, it may similarly dispense with many of Dr. Haverly's other arguments against striking the challenged evidence, which depend on Dr. Haverly's new argument. *See, e.g.*, Respondent's Brief at 21, 26, 29. The evidence Mr. Bloome asks be stricken is indistinguishable from the evidence this Court struck in *Ross v. Bennet*, 148 Wn. App. 40, 203 P.3d 383 (2008), applying the standards the Supreme Court established in *Hollis v. Garwell*, 137 Wn.2d 683, 974 P.2d 836 (1999).

Dr. Haverly's statements of his belief regarding the meaning of contractual terms are not admissible. Dr. Haverly confuses admissible extrinsic evidence (facts) with his lawyer's arguments regarding the meaning of the View Covenant (question of law). Dr. Haverly may advance his interpretation in his legal arguments, as Mr. Bloome has advanced his. The Court will determine the correct interpretation, but the Court may not admit Dr. Haverly's subjective beliefs as relevant evidentiary facts.

As Mr. Bloome argued in his opening brief at 33 n.6, this Court should take no guidance on the question of admissibility of extrinsic evidence from the Division Three case of *Wimberly v. Caravello*, *supra*, because *Wimberly*'s cursory treatment of the admissibility of extrinsic

evidence directly contradicts the binding precedent of *Hollis*. *Wimberly* was wrongly decided and must be disregarded.

Instead, the Court should follow its own precedent and *Hollis*, as laid out in *Ross*. Mr. Bloome invites the Court to compare the challenged statements here to the legally indistinguishable statements the Court struck in *Ross*, listed at p. 19 of Mr. Bloome's Appellant's Brief.

**E. The Restriction on Development Demonstrates that the Parties Knew How to Restrict Buildings When they Wanted To.**

It is unreasonable to presume that the View Covenant contained a complete prohibition on buildings when neither party so much as mentioned the possibility of restricting buildings – despite completing hours of discussion about how to restrict future construction in the companion Restriction on Development. Dr. Haverly attempts to minimize the importance of the Restriction on Development by incorrectly asserting that View Covenant and the Restriction on Development are “separate instruments.” Respondent's Brief at 29. In fact, the record shows that they are two parts of a single Purchase and Sale Agreement, negotiated simultaneously with one another, and signed in one sitting. The negotiations leading to the Restriction on Development establish an indispensable part of the context in which the parties drafted and signed

the View Covenant.<sup>4</sup> The fact of the Restriction on Development establishes the implausibility of Dr. Haverly's interpretation of the View Covenant. Dr. Haverly would have this Court conclude that two highly educated individuals discussed at length two documents, one of which addressed buildings in great detail and one of which addressed vegetation in great detail, and did not once discuss the fact that they both intended the second one to prohibit buildings. On Dr. Haverly's motion for summary judgment, the Court cannot so conclude.

Dr. Haverly correctly asserts, Respondent's Brief at 30, that Mr. Bloome's argument takes the form of a syllogism, but Dr. Haverly misstates the major premise. It should read: "To control or prevent otherwise legal construction, a restrictive covenant must do so expressly and unequivocally." Nobody disputes that the Restriction on Development does so. The View Covenant, however, does not. Dr. Haverly argues that some "covenants that restrict development on property do so with general language, of say, 'There shall be no development of any kind on the property.'" Respondent's Brief at 30. If the View Covenant had used such language, then the Covenant would say what Dr. Haverly asserts it to say; but Dr. Haverly wants this Court to construe the

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<sup>4</sup> Dr. Haverly asserted in his Motion for Summary Judgment that Mr. Bloome drafted the documents. Mr. Bloome recalls a collaborative process. It is certainly not the case that Mr. Bloome simply drafted the documents and presented them to Dr. Haverly to sign.

View Covenant to have this same effect – no development – without the Covenant saying so.

Mr. Bloome does not imply that a proper prohibition on construction must specifically restrict every imaginable obstacle, as Dr. Haverly asserts. Respondent’s Brief at 30-31. Rather, the language must put future owners of the Lot on notice of the scope of the restriction. Some possible words that would do so include “construction”, “building”, or “improvement”, plus “prohibit”. The parties employed none of these words, and therefore, even if they had reached a meeting of the minds about prohibiting improvements or construction of buildings, the View Covenant is ineffective to do so.

**F. The View Covenant’s Specific Requirements Regarding Vegetation Control and Define the General “View Preservation.”**

The View Covenant contains a general statement that the view is to be preserved, then contains several specific—and ongoing—restrictions defining exactly how the parties and their successors will protect the view. The general statement cannot prevent more use of the Lot than the specific restrictions do. *Cf. Mack v. Armstrong*, 147 Wn. App. 522, 531, 195 P.3d 1027 (2008).

Dr. Haverly attempts to distinguish this case from *Mack v. Armstrong* solely by making the bizarre assertion that the View Covenant

“was not intended to specifically restrict horticultural development on his property,” arguing that the View Covenant did not contain a restrictive covenant addressing vegetation on the Lot. Respondent’s Brief at 31-33. But even a cursory review of the View Covenant’s specific prohibitions and prescriptions demonstrates that this is simply false. For example, the View Covenant states:

it is further understood that **in the future**, if trees located on 4743 West Ruffner should block the view corridor of 4730 West Ruffner, and therefore require cutting or pruning, such cutting and pruning will be at the expense of the owner of 4730 West Ruffner, with the approval of the owner of 4743 West Ruffner. The tree cutting company shall be a mutually agreed upon tree company. **No trees or plants shall be planted or allowed to grow in front of or directly behind the street level fence** at 4743 West Ruffner either to such a height or such a density that they interfere with the view corridor of 4730 West Ruffner Street. There exists . . . [large conifer]. Should this large conifer die, or in some way be diminished in health and vigor and be removed, it is agreed that **a tree or several trees that will give shielding similar to that provided by the current tree can be planted in the same general vicinity**, and those trees will not interfere with the view corridor to any greater extent than the removed conifer.

CP 25 (View Covenant) (emphasis added). The emphasized portions of this quote are ongoing restrictions on the type and size of vegetation that Mr. Bloome or his successors can put on the Lot. The View Covenant is intended to do exactly what Dr. Haverly asserts it is not: “specifically restrict horticultural development” on the Lot.

Despite Dr. Haverly's misreading of the View Covenant's plain language, *Mack* is directly on point with regard to the principle that specific covenant restrictions control general ones.<sup>5</sup> In *Mack*, the restrictive covenant gave a neighborhood Architectural Committee the authority to protect views, and also specifically limited building heights to less than thirty feet. *See* 147 Wn. App. at 525-26. The court held that the Architectural Committee could not exercise its general authority to further limit building height to less than thirty feet. *Id.*, at 531. Here, the View Covenant contains a general statement regarding view preservation and several specific statements regarding the manner in which the parties wanted the view preserved. As the court did in *Mack*, this Court should conclude that the manner in which Dr. Haverly's view may be protected is restricted to the specific methods provided for in the View Covenant: by defining vegetation heights and densities.

Notably, Dr. Haverly did not address Mr. Bloome's arguments that the View Covenant's general statement of intent is a recital with little or no operative effect. Arguments left unrebutted are conceded. *Cf. State v.*

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<sup>5</sup> *Mack* dealt with a dispute between homeowners in a residential subdivision, making it one of the *Riss* line of cases discussed *supra*. *Mack* nonetheless concluded that the well-established rule that the specific controls the general applied even where the acknowledged result was to limit the view of the uphill lot. *Mack* is not on point for the question of how courts should interpret restrictive covenants in residential subdivisions, but *Mack* is directly on point to establish that the specific controls the general – even in the face of strong policies to the contrary.

*Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (Div. 1 2005) (“The State does not respond and thus, concedes this point.”).

As a side note, Dr. Haverly argues repeatedly that the reason the View Covenant does not mention buildings is that there were no buildings on the Lot in 1995. But if that was the parties’ logic, there was no need to address future plantings, either. Yet the parties did address planting trees and shrubs in the future. This supports the conclusion that the View Covenant only addressed vegetation to the exclusion of all else.

**F. When Faced With Multiple Readings of a Contract, Courts Do Not Select the One that Renders the Bargain Absurdly Imprudent.**

When faced with two reasonable interpretations of a contract, the Court must not select the one that renders the bargain absurdly imprudent. *See Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 373, 705 P.2d 1195 (1985). The value exchanged can provide evidence of the meaning of the bargain. Dr. Haverly misstates Mr. Bloome’s argument and thus attacks a straw man. Mr. Bloome does not offer the price he received for Dr. Haverly’s house as if to say, “See? I was robbed!” Mr. Bloome does not ask the Court to evaluate whether he made a good bargain or to rewrite the PSA. He simply requests that the Court take note of the supremely poor bargain Mr. Bloome would have to have made in order to enter into the covenant as

Dr. Haverly interprets it, compared to the reasonable exchange of value supported by Mr. Bloome's interpretation.

For example, imagine that Dr. Haverly owns a \$200,000 Ferrari with vintage wire wheels worth \$8000 each. Mr. Bloome admires the wheels and tells Dr. Haverly he would like to buy them. Dr. Haverly agrees, and the parties enter an agreement that reads: "The parties agree that their intent is to sell Dr. Haverly's wheels to Mr. Bloome." Mr. Bloome pays the \$32,000, then drives off in the Ferrari. When Dr. Haverly discovers Mr. Bloome's error and requests that Mr. Bloome return the car, Mr. Bloome insists that the language of the agreement is unambiguous because everybody knows "wheels" means "car."

Assuming that a court would agree that both interpretations were reasonable, the case law does not allow the court to conclude that Dr. Haverly agreed to sell his Ferrari at a \$168,000 loss. That would be an absurdly imprudent bargain. Faced with such a situation, Dr. Haverly would no doubt object to Mr. Bloome's presumption. But Dr. Haverly is now doing the exact same thing with Mr. Bloome.

Dr. Haverly now complains for the first time that no evidence other than Mr. Bloome's testimony establishes that the value of the Lot dropped substantially. Because Dr. Haverly did not object to Mr. Bloome's evidence below, he cannot do so now. But even if he could, a

property owner is competent to testify to the value of his own property. *See, e.g., Wicklund v. Allraum*, 122 Wash. 546, 547, 211 P. 760 (1922). Furthermore, there is every bit as much evidence that the value of the Lot would decrease if Mr. Bloome lost the ability to build as there is evidence that “[t]he value in [Dr. Haverly’s] property is in its view.” CP 18 (Declaration of Dr. Haverly). On Dr. Haverly’s Motion for Summary Judgment, the Court must adopt Mr. Bloome’s commonsense assessment that his Lot will drastically drop in value if it cannot be built upon.

Thus, Dr. Haverly asks this Court to adopt a reading of the View Covenant that implies that Mr. Bloome agreed to remove nearly all monetary value from the Lot in exchange for the modest Restrictions on Development. This the Court cannot do.

### III. CONCLUSION

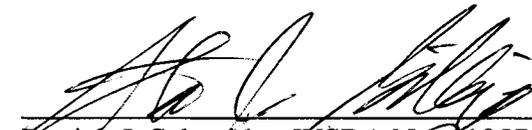
The law may only enforce clear and explicit restrictions on the free use of land. The parties had a meeting of the minds only about protecting Dr. Haverly’s view from encroachment by vegetation, and Dr. Haverly has received the benefit of that agreed-upon bargain.

If Dr. Haverly wanted to prevent Mr. Bloome or his successors-in-interest from improving the Lot, in perpetuity, he needed to clearly inform Mr. Bloome that this was his intent and then obtain Mr. Bloome’s clear consent to such a severe and perpetual restriction. He did not. Mr.

Bloome prays that this Court will return to him what is his: the right to use and improve his property in ways consistent with the restriction on vegetation that runs with his land.

RESPECTFULLY SUBMITTED this 17th day of July, 2009.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 17<sup>th</sup> day of July, 2009, I  
caused to be served a copy of this document on:

Mr. David Joseph Smith  
Law Office of David Joseph Smith, P.S.  
228 Market St.  
Kirkland, WA 98083-0616  
*By E-mail and Regular Mail*

I declare under penalty of perjury under the laws of the State of  
Washington this 17<sup>th</sup> day of July, 2009, at Seattle, Washington.



Helen M. Stubbert

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