

65577-9

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

NO. 65577-9

SEAWEST SERVICES ASSOCIATION,

Respondent/Plaintiff,

v.

JIM COPENHAVER AND SUZANNE COPENHAVER,

Appellants/Defendants.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The very first sentence of respondent Seawest's brief misstates the case to its core. Appellants Copenhavers' predecessor did not reserve "shares in [Seawest's] water system," Brief of Respondent (Resp. Br.) at 1, he reserved shares in "water." This leads to the error in Seawest's second sentence, that Copenhaver received water "as a limited member of Seawest." Copenhaver did not agree to membership, no covenant or other document recorded against the Copenhaver property provided for membership, and the claim is contrary to Seawest's statement when Copenhaver was purchasing the property that its owner was "not a member."

This compels Seawest to argue for a contract "implied in law" (an argument not made until Seawest's summary judgment reply) and that membership arises from a common scheme of development, a doctrine that never has been extended to apply to property outside the development. That doctrine requires a "common developer/grantor" and applies to the "developer's remaining land." Neither of these requisites is found here.

Seawest's claim to attorneys' fees fails independent of its membership claim. Recognizing the weakness of its contract fee

provision claim, Seawest relies on CR 11 to apply to prelitigation conduct and without having made a CR 11 motion below.

Seawest argues that its easement rights should be expanded so that it can comply with a state agency's "recommend[ed]" action and a state rule's general directive to prevent cross-contamination. It argues that there are no limits to its water system even though the easements carefully specified the components they authorized. Seawest elevates the word "and" in the title of the pollution control setback easement over the operative grant language to defeat the purpose of such an easement to prevent pollution in the setback area.

II. ARGUMENT

A. The Copenhavers Are Not "Members" of Seawest (Reply to Resp. Br. at 22-43)

1. The Copenhavers established the elements of equitable estoppel (Reply to Resp. Br. at 22-28)

Seawest asserts that there is "no evidence" to support equitable estoppel, Resp. Br. at 22, but is unable to discredit the clear unequivocal statement of its president which supports the application of estoppel here. Equitable estoppel requires a showing of inconsistency between a prior statement and a later claim. *Kramarevcky v. Dep't of Soc. & Health*

Servs., 122 Wn.2d 738, 743, 863 P.2d 535 (1993); Opening Brief of Appellants (App. Br.) at 19. None of Seawest's arguments explains away the inconsistency between Seawest president Ford's statement that the Copenhagen property is "not a member" of Seawest and the claim now made that Copenhagen is a "limited member." CP 848. Seawest's oft-repeated claim that "water shares" was used equivalently to "membership" is contrary to Ford's statements. Resp. Br. at 24. Ford mentioned that the Copenhagen property had "a water share," but also stated that its owner was "not a member of Seawest[.]" CP 848.

Seawest and the trial court assert that Ford's statement was literally true, but was irrelevant because there is no entity named "Seawest Home Assn." Resp. Br. at 24; RP 3/19/10 at 11. But neither of them can explain why Ford would have intentionally named a nonexistent entity. Acceptance of their interpretation means that Ford's statement was at best gratuitous, and at worst that he was deceiving the Copenhavers to avoid disclosing that they would become "limited" members of an entity with a different name, Seawest Services Association. The far better interpretation – and the one to which Copenhavers clearly are entitled as the nonmoving parties – is that Ford *unintentionally* misstated the

common words that are part of Seawest's name in responding to an inquiry that was specific and limited to water service. As well, Ford was responding to a letter addressed to him in his capacity as president of Sea West [sic] Services Association, everything else in Ford's response was specific to water, and he did not identify any "additional charges" beyond the minimal quarterly payments. CP 848.

Seawest writes that it "never argued that Copenhaver was a member of their, or any, 'home association.'" Resp. Br. at 24. This is gamesmanship with words. Seawest is a homeowners association. *See, e.g.*, CP 4117 (common areas and road maintenance provisions in Seawest bylaws); CP 3380 (architectural control and road maintenance provisions in Seawest articles). *See also* Resp. Br. at 6 ("one purpose" of Seawest is to provide water to property within the subdivision and other property); *id.* at 25 (Seawest is "for Copenhaver's purposes" an association that provides water service). Seawest indeed does argue that Copenhaver is its member. There is only one Seawest entity.

Seawest emphasizes the high standard of proof for estoppel, Resp. Br. at 23, 24, but the evidence supporting each element here is plain and direct. It is up to a jury, not the court, to decide whether Ford's statement

about membership made entirely in the context of the water right is clear, cogent, and convincing. Seawest emphasizes that Ford used few words, Resp. Br. at 23-24, but this supports application of estoppel because the representation of no membership was “clear.”

Seawest’s arguments about Copenhaver’s reliance on Ford’s statement similarly run afoul of the summary judgment standard. Resp. Br. at 25-26. Ford’s statements may have provided more information than was requested in the title company’s form, *id.* at 26, but the “not a member” statement was just part of a response describing minimal quarterly charges and no “additional charges.” CP 848. Seawest does not explain why a buyer would not reasonably rely on such direct and favorable statements explaining the water charges.¹

Seawest argues that there is no injury because Copenhavers were

¹ Seawest argues that Copenhaver testified that he would not have purchased property controlled by a “homeowner’s association,” relying (ironically) on similarly imprecise terminology used by its president Ford. Resp. Br. at 25. But Seawest *is* a homeowners association. As Seawest admits, it is a homeowners association that “for Copenhaver’s purposes” supplies water. *Id.* Seawest cites its own subsequent conduct and also Jim Copenhaver’s November 19, 2008 letter to Seawest president Fred Darvill where he refers to Seawest as “our association,” Resp. Br. at 26-27, but subsequent statements have no bearing on Copenhavers’ reliance at the time of the purchase. Copenhaver’s reference to Seawest as “our association” contained no language suggesting that Copenhaver thought he was a “member” of Seawest. The subject of Copenhaver’s letter was Seawest’s discharge of chemicals on his property. CP 750-51.

ordered to pay for services that they use. Resp. Br. at 27. But this case is not about the \$25 quarterly payments described by Ford. Seawest's argument glaringly fails to acknowledge the import of the trial court's order imposing liability for substantial assessments and attorneys' fees.

Seawest contends that it would be unfair and unlawful to treat the Copenhavers differently or "preferential[ly]." Resp. Br. at 27-28. There is no "unjust enrichment" here. The Copenhavers are the only property owners burdened with hosting the water system. Their predecessor's easement grants enabled Seawest's predecessor to provide water to his development using land outside the subdivision. There is no "unreasonable preference" in honoring Ford's statements that the owners of the Copenhaver property would be charged quarterly for water service and were not members. RCW 80.28.090.

2. No covenants or agreements establish membership
(Reply to Resp. Br. at 28-35)

There are no covenants, easements, contracts, or any recorded documents establishing the Copenhavers as members of Seawest. Copenhavers' predecessor reserved water, not "membership" or some other relationship with Seawest. The easements reserved "shares" of *water*, not shares of *Seawest*. Seawest asserts constructive notice of

membership, but cites no document recorded against the property subjecting the property to membership. *See, e.g.*, Resp. Br. at 12 (admitting that 1991 quitclaim by Seawest developer Grady to Seawest was not recorded against Copenhaver property).²

Seawest also argues for actual notice, relying primarily on “subject to” provisions in title reports and in previous deeds. Resp. Br. at 29-31. Seawest admits that provisions in two prior deeds were omitted from the deed to Copenhaver. *Id.* at 30-31. Seawest cites the title report provided to Copenhaver, *id.*, but neglects Seawest president Ford’s subsequent explanation of the quarterly charges and “not a member” statement.³

Seawest relied below upon its articles of incorporation arguing that the Copenhavers are “limited members” of Seawest. CP 1962-63, 72-73, 78. But there was no evidence of the agreement by any owner of the Copenhaver property to be governed by those articles. Seawest admits

² Seawest asserts that Grady “reserved” Gaudin’s six water shares in this quitclaim deed. *Id.* The shares were reserved by Gaudin a decade earlier. Accordingly, Grady did not have any interest in Gaudin’s water rights to “reserve.” The Copenhaver property owner was not a party to the 1991 transaction relied on by Seawest.

³ Seawest quotes language in the easements that they were granted for the purpose of providing water service to “all of the real properties described herein,” Resp. Br. at 29-30, neglecting to disclose that the Copenhaver property was not one of those tracts (1A, 1B, etc.). Nothing in the easements supports Seawest’s assertion that those parties equated “membership” with “water rights.”

that the articles of incorporation were not recorded. Resp. Br. at 7. The articles are the *only* document that provides for the “limited member” category contended for by Seawest. There is no evidence of Copenhavers’ actual or constructive notice of the articles.

Absent any covenant or agreement that says anything about membership, Seawest is left only with its argument that the terms “water hook ups” or “water shares” used in the easements are inherently and universally synonymous with “membership.” Resp. Br. at 29-30, 32-33. Nothing is self-evident in this claim. To the contrary, the reserved “water hook up” or “water share” is a property right, virtually the opposite of a “membership” obligation in an association. A “water share” is not a “share in Seawest.”

Seawest relies exclusively on a declaration from Clive Defty, the owner of King Water Company, to support Seawest’s proposition that reservation of a water right or share is synonymous with membership. Resp. Br. at 30, 32, *citing* CP 1925. Defty’s lay legal opinions are based entirely on his experience with unrelated entities. Seawest cites only Defty’s declaration for the proposition that property owners cannot obtain water from a nonprofit without being a member. Resp. Br. at 32 (no law

or authority cited). Defty's assertion that "memberships," "water hookups or shares," "water shares," and/or "water hookup rights" are "synonymous" because they "refer" to water service is a bare, unsupported conclusory allegation of law. CP 1925. It may be that the quoted terms (except for "memberships") "refer to" water service, but it hardly follows that they are common synonyms such that an ordinary purchaser reading "water rights" would be put on notice that these "rights" meant and required "membership."

Indeed, Seawest misstates Defty's testimony for its claim that it is "commonly recognized" that these terms are synonymous. Resp. Br. at 32 (citing and quoting CP 1925). Defty did not assert this. Moreover, Defty did not include the term "water right" in his list of what in his experience are synonymous terms. CP 1925 (listing "water share" and "water hookup rights").⁴ Read carefully, Defty's declaration does not support Seawest's actual notice argument that common words with very different common meanings are terms of art universally understood as identical, contrary to their common usage.

⁴ Even if Defty professed to know what is "commonly recognized" (Resp. Br. at 32), his knowledge as a water system owner is different from an ordinary layperson's expected understandings and such a statement would be pure and unattributed hearsay.

Seawest looks for support from a statement by Gaudin that Seawest could collect “unpaid assessments.”⁵ Resp. Br. at 30, *citing* CP 3411-12. But the parties/successors on both sides consistently referred to the nominal quarterly water charges as “assessments,” and these quarterly charges are not at issue. *See* CP 848; CP 1957 (Seawest’s motion for partial summary judgment referring to water and share of costs collectively as “assessments”); CP 3413 (deed from Shelley to Gaines stating “assessments or charges”); CP 3553 (title insurance policy from Gaines to Smith stating “assessments or dues”).

In the sale deed from original grantor Gaudin to Shelley, Gaudin stated that Seawest was “*solely* responsible for the construction, maintenance, financing and repair of the water system.” CP 3412 (emphasis added). Seawest points out that Gaudin also said about those obligations, “the seller herein is not [responsible].” Resp. Br. at 30-31. But if Gaudin believed that the owner of the property was responsible for any of those obligations, he would not have said that Seawest is “solely

⁵ Seawest’s reliance upon *Rodruck v. Sand Point Etc. Comm.*, 48 Wn.2d 565, 295 P.2d 714 (1956), Response at 30, is mistaken. There is no correlation between whether an assessment touches and concerns land, as in *Rodruck* and the claim by Seawest that water hook ups or shares are synonymous with the term memberships.

responsible.”

Seawest does not go so far as to argue that Gaudin intended to deceive his purchaser (indeed an act that could unnecessarily have created liability if as Seawest contends the owner is responsible for maintenance), but the summary judgment ruling does so impliedly, snubbing the face value of Gaudin’s statement and instead drawing an unlikely inference in Seawest’s favor. The court did the same thing with respect to Seawest president Ford, who used the term “water share” in the same response that said that Copenhaver was “not a member” of Seawest. CP 848. As with Gaudin, who would not have indicated Seawest is “solely responsible” if he understood that his purchaser would have some responsibilities for maintenance of the water system, Ford would not have said the property owner has a “water share” but is “not a member” if he thought the terms were synonymous. The court drew improper and indeed unlikely inferences in favor of the moving party from statements by individuals on both sides of the easement transaction.

In the alternative, Seawest argues that the Copenhavers were put on sufficient notice of possible membership to make a proper inquiry. Resp. Br. at 32-33. But the Copenhavers made a plain and direct inquiry

as to what future water charges would be made, and Seawest's president Ford identified only the quarterly payments for water. CP 848.

Seawest cites *Jones v. Harris*, 63 Wn.2d 559, 562, 388 P.2d 539 (1964) to argue that acquisition "of a water share gave [Copenhaver] membership in Seawest," Resp. Br. at 33, but *Jones* was asked to determine the meaning of the "book value" of a corporation, a commonly used term which was clearly defined in several previous court rulings. The court was able to resolve the issue authoritatively by citing the precedents recognizing the "generally accepted" meaning of the term. *Id.* at 562. In contrast, no case or other authority recognizes a generally accepted meaning of "water share" or "water right" that includes "membership." Here, of course, the court need not determine whether an ordinary purchaser with no knowledge of specialized terms should have asked further as to whether "water share" or "water right" meant the same thing as "member," because Seawest's president wrote that the owners of the Copenhaver property were "*not* members" of Seawest in a response that also used the term "water share." CP 848 (emphasis added).

Seawest argues that Copenhavers' \$4,000.00 payment to Seawest in April of 2007 was somehow a retroactive acknowledgment that their

property was subject to Seawest's articles of incorporation. Resp. Br. at 33-34. Seawest cites no case or other legal authority for this argument, *id.*, nor does it cite anything in the record linking the supposed "actual" notice (six years after the purchase) to the Copenhavers' one substantial payment several months later.

Seawest's final argument for actual notice is that Gaines, a prior owner of the Copenhaver property, separately was involved in helping to draft a conveyance of the water system from developer Grady to Seawest that asserted that any transferee of Gaudin's reserved water rights who elected to receive water from Seawest would be a "limited member." Resp. Br. at 34. Seawest neglects to mention that the Copenhaver property was not involved in this transaction and therefore was not recorded in the Copenhaver property chain of title, a point Seawest acknowledges in its statement of facts. Resp. Br. at 12 ("this 1991 Agreement was not recorded against the Copenhaver property"). Seawest's argument misses the point of the recording statutes that whatever Gaines knew or did independently of his ownership of the Copenhaver property, the mere fact of prior ownership does not provide notice to subsequent purchasers.

3. Seawest articulates no basis to imply a contract between the Copenhavers and Seawest⁶
(Reply to Resp. Br. at 35-36)

Seawest argues that a contract was implied “in law” because the Copenhavers benefited from the water system, essentially conceding that there was no contract “in fact.” Resp. Br. at 35. Seawest further claims that a contract must be implied to avoid unjust enrichment. *Id.* But the Copenhavers *have* paid for water service, in accordance with the terms stated by Seawest’s president. CP 3458-3527 (compilation of water payments since purchase in 2001). Moreover, Seawest neglects the very substantial burden on the Copenhaver property in having the well serving Seawest’s water system on the property, a burden not shared by any other Seawest customer. It easily could be concluded that the Seawest developer got the better of the deal in being able to develop his subdivision without using any of his own property for the well.

Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wn. App. 246, 84 P.3d 295 (2004), the only authority cited by Seawest (Resp. Br. at 35-36), supports the Copenhavers, not Seawest. *Lake Limerick*

⁶ Seawest did not answer appellants’ point that the implied contract argument was not raised by Seawest until its summary judgment reply brief. App. Br. at 28, n.9.

ruled that the appellant there – as with the Copenhavers here – did not have actual notice of the bylaws when the appellant took title to the property, so a court could not “imply” a contract in fact. 120 Wn. App. at 261. Because there was no evidence that the plaintiff had ever paid anything to the respondent for services received (or provided other consideration such as allowing a well on his property), application of unjust enrichment was appropriate to support an implied contract in law. Here, the owner of the Copenhaver property granted a valuable easement in addition to making regular water payments. Unjust enrichment has no application here.

4. The mere granting of the easements did not make the grantor part of a common scheme of development of different property
(Reply to Resp. Br. at 36-39)

A common scheme of development refers to restrictions established by a common grantor/developer on lots within the developer’s land. *Mt. Baker Park Club v. Colcock*, 45 Wn.2d 467, 275 P.2d 733 (1954); *Johnson v. Mt Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920). Seawest asks this Court to extend this rarely applied doctrine to the Copenhaver property which is “located *outside* of the Seawest subdivision.” CP 2605 (emphasis added). The “common plan”

in both *Mt. Baker Park Club* and *Johnson* concerned restrictions on lots *within* a single development, “Mt. Baker Park.” *Mt. Baker Park Club*, 45 Wn.2d at 468; *Johnson*, 113 Wash. at 459. Seawest cites no authority applying this rule to lots outside the subdivision. Seawest also fails to inform the court that it is asking for unprecedented expansion of the “common plan” rule. Resp. Br. at 37-38.

The record does not support Seawest’s premise that its articles of incorporation were part of the “same transaction” as the easements. Resp. Br. at 38. The articles were filed a year before the easements, they were not recorded, they were not part of any “transaction” with Gaudin, and there is no evidence that Gaudin even was aware of them. Nor did they relate to the “same subject matter.” Resp. Br. at 38, quoting *Turner v. Wexler*, 14 Wn. App. 143, 146, 538 P.2d 877 (1975). The easements allowed Seawest to develop a well on the Gaudin property, the articles established a homeowners association for the Seawest subdivision.⁷

Seawest’s argument defeats itself. It argues that the common plan

⁷ In contrast, the rule stated in *Turner* does apply to the two easements executed by Gaudin and Seawest’s predecessor. App. Br. at 40-41. The two easements were between the same parties, and both pertained to development of the well on Gaudin’s property.

rule applies where there are benefits and burdens “imposed by a common grantor/developer.” Resp. Br. at 37. But here there was no “common grantor/developer.” The grantor of the easement was Gaudin (owner of the Copenhaver property), and the developer was Grady (developer of the Seawest subdivision who transferred ownership of the water system to Seawest in conjunction with his development).

Even worse for Seawest is its reliance on Restatement (Third) of Property, which applies the common plan rule to “a conveyance by a developer” and applies only to “the developer’s remaining land.” *Id.* (quoting the Restatement). There was no “conveyance by a developer” here; the easement conveyance was by Gaudin *to* developer Grady. The Copenhaver property is not part of “the developer’s remaining land.” It was not owned by developer Grady (although it could easily have been incorporated into Grady’s adjacent development had there truly been a common plan of development). Moreover, the Restatement emphasizes that the rule should be applied if it is the “only” way to avoid injustice. Grady got a great deal in securing an off-site location for the water system for his development in exchange for a few reserved water rights. There is

no “injustice” crying out for correction by applying a rule that never has been extended this far.⁸

5. The fee provision in Seawest’s bylaws does not apply to owners of property outside the Seawest subdivision
(Reply to Resp. Br. at 39-43)

Seawest’s defense of the lower court’s fee award rests on a provision in its bylaws which allows Seawest to collect attorneys fees against an “owner of a tract within Seawest[.]” Resp. Br. at 40, citing CP 434. It is undisputed that the Copenhavers are not an “owner of a tract within Seawest.” Even if the Copenhavers were found to be “limited members” of Seawest, there is no provision in Seawest’s bylaws that authorizes collecting attorneys’ fees from limited members.

Seawest relies on a bylaw provision that “owners” and “members” are synonymous. Resp. Br. at 40. But the bylaw fee provision does not apply to all “owners” (and therefore all “members”). Instead, it is limited explicitly to owners (or members) “of a tract within Seawest.” CP 434 (Bylaws, section 5.2). Seawest’s argument reads “of a tract within

⁸ Seawest concedes that the trial court's order to pay future assessments is not an injunction, characterizing it as a declaration of a present and future liability. Resp. Br. at 39.

Seawest” out of the provision. The court cannot change or ignore the provision. *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) (“Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it”). The Copenhavers are not “members of a tract within Seawest” any more than they are “owners” of such a tract.

Perhaps anticipating that its bylaw argument must fail, Seawest argues that the fee award was proper due to Copenhavers’ “intentional conduct” or under CR 11. Resp. Br. at 42-43. First, Seawest’s reliance on an “uncontested finding” as a “verity on appeal” is misplaced because the case was decided on summary judgment. Courts review summary judgment orders *de novo*. *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Second, there is no legal basis to award fees based on “intentional conduct.” That CR 11 is the only authority cited by Seawest lays bare the desperation of this argument. The rule does not apply to a party’s prelitigation conduct, Seawest did not make a CR 11 motion, it did not follow the strict procedures required by

that rule,⁹ and the court did not make the findings required by CR 11.

6. Copenhavers are entitled to fees pursuant to RCW 4.84.330
(Reply to Resp. Br. at 41-42)

Under RCW 4.84.330, the Copenhavers will be entitled to attorneys' fees if they prevail. *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984), cited with approval in *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003). Seawest attempts to distinguish this Division's decision in *Herzog*, citing the decision from Division Two in *Wallace v. Kuehner*, 111 Wn. App. 809, 46 P.3d 823 (2002). Resp. Br. at 41-42. But this is contrary to the *Mt. Hood* decision, which adopted *Herzog* while acknowledging *Wallace* in a footnote. 149 Wn.2d at 121-22 & n.14.¹⁰

⁹ CR 11 and the case law require notice and an opportunity to be heard before fees can be awarded under the rule. *Watson v. Maier*, 64 Wn. App. 889, 900, 827 P.2d 311 (1992) (it is "fundamental that due process requires notice and opportunity to be heard") (internal citations omitted). The court awarded fees without a hearing and did not cite CR 11.

¹⁰ *Wallace* held that RCW 4.84.330 did not apply because neither of the parties intended to contract with each other. 111 Wn. App. at 831. But there is no basis to read "intent" into the statute. This not only conflicts with *Herzog*, but *Wallace* is not applicable here anyway because Seawest alleges that the parties intended to contract.

This Division held in *Herzog* that RCW 4.84.330 “encompasses any action in which it is alleged that a person is liable on a contract.” 39 Wn. App. at 197 (emphasis added). *Mt. Hood* applied the reasoning of *Herzog* to a case involving an action on an invalid statute (rather than a contract). 149 Wn.2d at 121-22. The Supreme Court was persuaded by this court’s focus that, “had the other party prevailed in its suit on the contract, it would unquestionably be entitled to attorney fees and costs.” 149 Wn.2d at 121 (finding that point “significant”), *citing Herzog*, 39 Wn. App. at 191. The Supreme Court also emphasized the scope of the statutory language “[i]n any action on a contract,” again crediting *Herzog*. *Id.*, *citing Herzog*, 39 Wn. App. at 192. Since Seawest sought the benefit of attorneys’ fees pursuant to contract, if the Copenhavers prevail Seawest must also accept the burden. RCW 4.84.330.

B. The Easements Do Not Allow Seawest to Install Any Facility or Structure Seawest Desires
(Reply to Resp. Br. at 43-47)

The heart of Seawest’s argument is that purported requirements for nonprofit water systems erase the limitations of its easements. Even if a state agency’s “recommended” components or a rule’s general directive that systems have adequate backup really were requirements for a

generator, this would not broaden Seawest's easements in violation of the rule that the rights granted by an easement be construed strictly. App. Br. at 40. Seawest does not attempt to defend the trial court's rewriting of the easement to allow virtually unlimited uses and structures including fencing on Copenhavers' property.

Seawest cannot answer Copenhavers' argument that the two easements carefully specified what could be constructed: a well, water line, pump, treatment facility, and storage tank. App. Br. at 40-42. A fence is a serious intrusion on a landowner's rights. There is no provision for a fence, and no Seawest argument that a fence is required by law. Seawest argues that Gaudin intended "a normal development" of the well site. Resp. Br. at 44-45, citing *Logan v. Brodrick*, 29 Wn. App. 796, 799-800, 631 P.2d 429 (1981). But Seawest cites no evidence establishing such intent. To the contrary, the easements were specific in identifying what was allowed, rather than providing vaguely for the undefined and unlimited "normal" expansion contended for by Seawest.

General "recommend[at]ions]" by the Department of Health (Resp. Br. at 46) do not give Seawest rights to Copenhavers' property that were not bargained for. Seawest quotes a state rule (adopted after the easement

grants) that in general terms requires measures to prevent “the risk of contamination by cross-connections,” Resp. Br. at 47, but makes no showing that this requires a noisy generator and propane tank.

Nor does Seawest overcome the trial court’s error in negating the locational restrictions in the easements. App. Br. at 38-40. The easements allowed the well and its listed appurtenances in the smaller keyhole shaped easement area, and prohibited anything that could create pollution in the larger pollution control setback area (such as a propane tank or generator, even if such were authorized at all). *Id.* Seawest emphasizes the “and” in the title of the setback easement, but does not address that the operative grant language creates only the pollution control setback. Resp. Br. at 45-46. The “purpose” clause mentioned components not listed in the well easement, but did not grant authority to put them anywhere. It is fair to read the two contemporaneous easements together (App. Br. at 40-41) to conclude that the components mentioned in the setback easement (storage tank, etc.) were intended as part of the well and water line in the well easement, but it misreads them to conclude that the setback easement intended to allow well components (including ones such as a

propane tank that could cause pollution that would defeat the purpose of the pollution control setback) to be located in the setback area.

C. Seawest May Not Pollute the Copenhavers' Land
(Reply to Resp. Br. at 47-49)

Seawest attempts to discredit its admission that its backwash effluent contains at least one chemical that discolors the water by arguing that the pollution has not yet created an “*acute* health concern.” Resp. Br. at 48 (emphasis added). But the *degree* of harm does not change the restrictive reading which necessarily attaches to a “pollution control setback.” If this Court looks beyond the plain meaning of “pollution control setback,” the regulations in effect at the time of conveyance strictly required that “*no* source of contamination will be constructed, stored, disposed of, or applied, in the control area without the written permission of the [health] department.” WAC 248-54-660(2)(b) (repealed 1983) (emphasis added). The setback was created to keep pollution at least 100 feet away from the well – not to allow Seawest to pump polluted backwash into the setback area.¹¹

¹¹ Seawest attempts to confuse the issue by discussing Copenhavers’ voluntary dismissal of a counterclaim that the backwash effluent was a nuisance. Resp. Br. at 48. Seawest’s argument that the issue of whether the easements allow discharge of

III. CONCLUSION

The trial court's summary judgment should be reversed. Reservation of water rights or shares did not create membership in Seawest. There is no authority to extend the rarely applied common scheme of development doctrine to property outside the development. Seawest's bylaws fee provision does not apply to property outside the subdivision. The trial court erred in rewriting the easements to allow fencing, generators, propane tanks, and contamination within the pollution control setback area. Copenhavers are entitled to attorneys' fees at trial and on appeal.

DATED this 31st day of May, 2011.

Respectfully submitted,

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contaminants within the pollution control setback is not before the court is refuted by Seawest's summary judgment motion and the trial court's order allowing the discharge within that area.

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12 DATED this 31st day of May, 2011, at Seattle, Washington.

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