

68249-1

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NO. 68249-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

VERNON L. MEYERS & VIRGINIA C. MEYERS, et al.,

Appellants,

v.

REGINALD PETER SAUNDERS & ELIZABETH SAUNDERS, et al.,

Respondents.

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COURT OF APPEALS
STATE OF WASHINGTON


APPELLANTS' REPLY BRIEF

William H. Williamson
WSBA #4304
WILLIAMSON LAW OFFICE
Attorney for Appellants Meyers

5500 Columbia Center
701 Fifth Avenue-Suite 5500
P.O. Box 99821
Seattle, WA 98139-0821
(206) 292-0411

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I. Murphy v. Seattle Requires Dismissal of Plaintiffs' Complaint With Prejudice.

O'Briens claim that "...the CRC did not make a decision on the Maple Tree based upon the species of the tree;" and, that "[n]owhere in the two CRC letters does the species of the Maple Tree come into play." The CRC's May 28, 2009 decision letter plainly shows that the very basis of the CRC's actions were linked to the tree not being a "Madrona or other evergreen" under the 2008 *View Guideline* (CP 64, App. 8):

The Declaration of Gerald Harkleroad gives us additional insight on the original intent of the covenants. To quote Mr. Harkleroad: "Though the covenant language restricting tree height may seem to except from its coverage 'trees in existence' at the time the covenants were recorded, the understanding of those involved at the time, including myself, was that this language was intended to cover the full grown Madrona and other evergreen trees in the subdivision. In addition, even though it was desirable to maintain some of those existing large trees, in certain cases, we negotiated thinning of those existing trees. Again, this was done in order to gain or protect the view from a resident's main living room." From this statement, it is the CRC opinion that the original intent of the covenants was not to protect the horizontal expansion of a maple tree, at the expense of another homeowner's view.

CRC Chair Gary Albert's declaration confirmed that the CRC applied the new 2008 *View Guideline* containing the 1989 Harkleroad tree species criteria in its decision letters. CP 822. The second April 27, 2010 CRC Decision letter incorporates its earlier May 28, 2009 decision letter. It again identifies the *View Guideline* as the basis of its Decision to then add height restrictions. CP 68-71. The *View Guideline* at Footnote 3 (CP 27; App. 6) in turn incorporates the 1989 Harkleroad Declaration of "original intent" that restricts existing trees to specific tree species, namely "full grown Madrona and other evergreen trees." CP 77; App. 12.

The undisputed basis for granting summary judgment against Appellants is the requirement that the Meyers “comply with the CRC’s “non-binding” decisions dated May 28, 2009 and Apr. 27, 2010.” CP 508; App. 10. Both CRC “Decision” letters state that they are based on the “...published *View Guideline for Somerset* and the *Declaration of Gerald Harkleroad*, which outlines the intent of the original covenants.” CP 63; CP 68;¹ App. 8. These two letters incorporate the 2008 *View Guideline*² referencing Harkleroad’s 12/11/89 Declaration, and add two additional criteria not appearing in CCR ¶10, or any other CCR: (1) “Madronas and other evergreen trees” species; and (2) “when the affected neighbors’ homes were built when they had a *view*, as defined in the *View Guideline for Somerset*, over your Maple tree.” CP 64, CP 68; (App. 8).

It is undisputed that the 2008 *View Guideline* and 1989 Harkleroad Declaration were not adopted or recorded as covenant amendments required under CCR ¶1 procedures, RCW 64.04.020, and RCW 65.08.030. O’Briens state that Harkleroad’s “thoughts were...used by the CRC to clarify ambiguities in the Covenants.” Response, Page 2. They were not,

¹ The April 27, 2010 letter states in part: “At the time we did not address their height of the tree because verifiable information was not availed [sic] to show that when the affected neighbors’ homes were built they had a *view*, as defined in the *View Guideline for Somerset*, over your Maple tree.” (*Italics supplied*; *Emphasis added*).

² CP 26-30, Note 3 referencing Mr. Harkleroad’s Dec. 11, 1989 Declaration.

and could not have been, presented to the Meyers in 1970 when they purchased Lot 117 built their home. CP 686-687; CP 1185-1190; App. 4.

The second CRC decision letter directed the Meyers to reduce the tree's height to a "protected view in the *View Guideline*" at "the time the affected neighbor's [Hodgsons] home was built in 1967." (Emphasis added). This second CRC letter substituted new criteria not appearing in CCR ¶10 and relied upon the Hodgsons' claim that their view of the Olympic Mountain Range was unobstructed in 1968. CP 68-71; App. 8. The Hodgsons confirmed, however, that the Meyers' could not have received notice of any specie specific limitation to the grandfathered Maple tree in 1970 when they purchased their property:

"We were advised by a neighbor that the offending tree might be grandfathered and it was not until we received the 11/12/08 version of the Somerset Association's View Guidelines that we were aware that even grandfathered trees are subject to restrictions on unnecessary intrusion of the views of another residence. We feel that the offending tree should be reduced in size to minimize the interference." CP 841; App.9; (Emphasis added).

The Ballases also confirmed that uphill Somerset owners considered the new 11/12/08 *View Guideline* as changing the tree's grandfathered status:

"When we moved here in 1995 were told the tree was grandfathered and was not subject to the covenants on height and width. We are now led to believe that the 11-12-08 version of the Somerset Assoc. View Guidelines indicates that grandfathered trees are subject to restrictions on intruding on views. It is our opinion that the tree obstructs our views and should be trimmed or removed." CP 835-836, CP 857-858; App. 15; (Emphasis added).

The Straders (CP 857-858; App. 15) and Bloomfields' CRC complaint below confirmed that they also filed their complaint only after receiving the CRC's new 11/12/08 *View Guideline*:

“...Since moving into our Somerset home in early 1981 the tree has increased in size by some 30 to 40 percent...The tree has been pruned three times, including after it had been damaged by a lighting strike.

As the tree became more intrusive we were advised by a neighbor that it was a grandfathered tree and therefore not subject to the covenant restrictions on height. Reviewing the 11/12/2008 version of the Somerset Association's View Guidelines indicates that grandfathered trees are subject to restrictions on intruding on views. It is therefore considered by us that the tree ‘unnecessarily interferes with the view of another residence,’ i.e., ours and should be reduced in size to minimize the interference.” CP 839-840; App. 15. (Emphasis added).

The court's analysis need go no further. The precipitating event leading to disrupt 50 years of continued grandfathered status for existing trees was the creation of 11/12/08 CRC *View Guideline*. It should reject this blatant attempt to retroactively amend CCR ¶10 under Murphy v. Seattle, 32 Wn.App. 386, 391-92, 647 P.2d 540 (1982); Natelson, *infra* at §4.4.4 citing Constellation Condo Assn. v. Harrington, 467 So.2d 378, 383 (Fla. Dist. Ct. App. 1985). The argument that the Meyers were somehow aware of such “new” 2008 restrictions in 1970 is pure fantasy. The trial court record, including statements of Mr. Harkleroad, who was reviewing

building plans for view interference caused by trees³ and the CRC records, show that the 11/12/08 *View Guideline* was not, and could not have been, provided to the Meyers in 1970 when they purchased Lot 117 and built their home.

As Murphy v. Seattle holds, the Appellant Meyers as a landowner who purchased property "...without notice of such restrictions on the use of land, takes free of such restrictions." Id at 391. See also Dickson v. Kates, 132 Wn.App. 724, 737,133 P.3d 498 (2006). O'Briens' arguments at Page 42 notwithstanding,⁴ the only record evidence, that was never rebutted by O'Briens, was provided by the Appellant Vernon L. Meyers:

"10. The May 28, 2009 email that I have read from CRC Chairman Gary Albert stating that the original intent of the covenants was limited to 'full grown Madrona and evergreen trees' is a complete surprise to myself and my wife. This statement was never presented to us in writing by anyone at any time, and certainly when we built our house in 1969 and 1970." CP 687; App. 4.

The Meyers' title report attached to O'Brien's complaint at CP 696-700 shows no recorded tree species restriction. CP 696-700; App. 16.

³ CP 77-78; CP 750, p. 24, ll. 3-17.

⁴ O'Briens argue that the Meyers "...chose to accept their lot knowing that the Maple Tree already was or might obstruct the views from another residence and they assumed that the Covenants would allow them to keep the Maple Tree in place and growing to an unlimited height." (Emphasis added). No evidence record exists proving these facts. The argumentative assertions of counsel, and attempts to now raise claims of unresolved factual issues, are not admissible for purposes of CR 56. White v. State, 131 Wn.2d 1, 9, 17, 929 P.2d 396 (1997).

Similarly, the recorded 2001 CCR amendments contain no retroactive specie provisions altering CCR ¶10 existing tree entitlements. CP 91-103; App. 5. As the Murphy court noted under these circumstances:

“Similarly, the record fails to reveal knowledge by Murphy of any facts sufficient to prompt an inquiry which would have disclosed the restriction. See Enterprise Timber, Inc. v. Washington Title Ins. Co., 76 Wn.2d 479, 457 P.2d 600 (1969).

Because Murphy did not have constructive notice as a matter of law, and because virtually no evidence was presented to the Board to support a finding that he had actual notice, we reverse the judgment of the Superior Court which affirmed the Board's decision.” Id; (Emphasis added).

Since the “Madronas and other evergreens” and new 11/12/08 *View Guideline* limitations to the CCR ¶10 entitlement used to restrict the Meyers’ tree height and width were not recorded before the Meyers bought Lot 117 and constructed site improvements and their home, they “had no constructive notice and took free of the restrictions.” Id at 392-93. Accordingly, no trial court record exists to support the trial court’s determination that the Meyers must comply with the CRC’s letters based upon the *View Guideline* and the 1989 Harkleroad Declaration. The trial court’s decision must be reversed, the *View Guideline* declared null and void, and O’Briens’ complaint dismissed with prejudice.

II. Harkleroad’s Statements of Subjective Intent Cannot Be Substituted as “Original Intent” to Create Retroactive Tree Specie Restrictions.

The Meyers' Motion to Strike excerpted portions of the Harkleroad declarations was filed and argued simultaneously with their Motion for Summary Judgment. CP 457-482. The orders appealed included "All pleadings filed in support of and in opposition to Defendant's Motion for Summary Judgment" that incorporated the Court's and were considered by the County during oral argument satisfying RAP 2.4(b). CP 504, CP 508; App. 10; Report of Proceedings, Page 1; App.14. Both motions were so entwined that the court should consider all pleadings filed by the parties leading to entry of the appealed orders. Right-Price v. Connells Prairie Cmty. Council, 105 Wn.App. 813, 819, 21 P.3d 1157 (2001).

Ross v. Bennett, 148 Wn.App. 40, 46, 203 P.3d 383 (2008) cited by O'Briens restates the exceptions to the extrinsic evidence rule in Hollis v. Garwall, 137 Wn.2d 683, 696, 974 P.2d 836 (1999).⁵ Ross, citing Bauman v. Turpin, 138 Wn.App. 78, 87-89, 160 P.3d 1050 (2007) holds that the drafter's intent is a question of fact and is reviewed for substantial evidence. Where reasonable minds can reach but one conclusion, questions of fact may be determined as a matter of law. Id at 49. Conceding at Page 17 that Harkleroad could not testify to the original drafter's intent under Wimberly v. Caravello, 136

⁵ "Only in the case of ambiguity will the court look beyond the document to ascertain intent from surrounding circumstances." Mountain Park Homeowners Ass'n, Inc. v. Tydings, 125 Wash.2d 337, 344, 883 P.2d 1383 (1994). However, admissible extrinsic evidence does not include: 1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; 2) evidence that would show an intention independent of the instrument; or 3) evidence that would vary, contradict or modify the written word." (Emphasis added).

Wn.App. 327, 336, 149 P.3d 402 (2006), O'Briens assert that he nevertheless "had knowledge of their intent" that could "help clarify any ambiguities." Even if admissible for background "circumstances," there is no record evidence showing that Harkleroad or the Building Committee ever applied this "standard" in reviewing any specific building plans after 1962.

Harkleroad's Nov. 14, 2011 Declaration refers to April 25, 2006 CRC Meeting Minutes singling out Maple trees for eradication. CP 74; App. 12. When given repeated opportunities to produce records, Mr. Harkleroad testified that he had met with the CRC to "give a general discussion of [his] methods of administering the covenants;" but could not recall "what exact documents he had given to the Committee [CRC]," and that Evergreen's records were lost, destroyed, or otherwise unavailable. CP 746-747, CP 751; App.13.

Similarly, declarations of CRC chair, Gary Albert, at CP 21-31 and CP 819-869, contain no building plan records showing that the Building Committee or CRC ever applied such a standard to a Somerset Lot. The only historical and expert evidence, which was not rebutted by O'Briens, was provided by the Meyers who declared that the tree was a valuable landscape amenity that they incorporated into their building plans approved by the Building Committee. CP 686, ¶¶4-5, 10; CP 1185-1186, ¶¶3-5; color photo at CP 707; App. 4.

Given the refusal of the CRC to meet with the Meyers experts to discuss their professional opinions, and the absence of physical evidence showing how

the new “Madronas and other evergreen trees” standard was ever applied, the trial court was left with Mr. Harkleroad’s inadmissible conclusory subjective statements of original intent. App. 12. These statements that the CRC applied in its decision letters unlawfully function as a device to retroactively alter CCR ¶10 entitlements to evade the recording requirements of RCW 64.04.020 and RCW 65.08.030. See Robert G. Natelson, Law of Property Owners Assn. at §4.4.4.

Black v. Evergreen Land Developers, 75 Wn.2d 241, 245, 450 P.2d 470 (1969) cited by O’Briens confirms the finality of the Building Committee’s review process “to insure that the Blacks’ view was not unduly infringed upon.” This identical Somerset review process was available to all uphill Division 4 owners. The O’Briens’ predecessor, Saunders, and Hodgsons were fully aware of the mature Maple tree’s presence in their view corridors. Yet, they admit they did not object to the Building Committee during the Meyers’ home construction process. CP 814-816, CP 2; CP 51-56; CP 841-842, App. 9.

Adding new 11/12/08 specie specific restrictions alters, if not defeats, the plain meaning of “trees of any type.” Fairwood Greens HOA. v. Young, 26 Wn.App. 758, 762, 614 P.2d 219 (1980). Rules adopted under RCW 64.38.020 adding “Madrona and other evergreens” restrictions and “view at the time a house was built” cannot supersede the CCR ¶1 amendment requirements. They cannot

“offend” the recorded CCR’s⁶ by limiting “trees of any type” or act to revoke earlier Building Committee decisions. Natelson, *supra* at §4.2, at 124 (1989).⁷

O’Briens claim that Meyers would allow “even a small tree...to grow to an unlimited height just because it was planted and growing in 1962 at the time the Covenants were recorded.” This argument conflicts with CRC and Harkleroad statements that “small trees” in existence in 1962 were to be treated differently than “original large trees.” CP 333, App. 18; CP 77-78, App. 12. They claim at Page 26 that the “Maple tree was not determined to be in violation of the Covenants just because it was a maple tree.” (Emphasis supplied).

These arguments openly conflict with Mr. Harkleroad’s Nov. 14, 2011 Declaration where he states that: “[e]xisting and new growth maples...were routinely required to be removed.” CP 74; App. 12. They fail to overcome undisputed historical photographs showing existing mature trees remaining in Somerset Div. 4 on the Meyers’ property. CP 329-373; App. 3. They fail to answer why the mature Maple tree was left on Lot 117 later purchased by the Meyers, and why the O’Briens’ predecessors, and other uphill owners, built their

⁶ *View Guideline* at CP 26, App. 6.

⁷ “The means employed by the rule must not offend any provision in the declaration or other documents of superior force.” *Id.* “In order for an association regulation to be valid, it must be consistent with the documents superior to it...In most reported cases in which this hierarchy has been disregarded, association decisions were made in violation of the terms of the declaration.” *Id.* at §4.5. (Emphasis added).

homes with the mature Maple tree obstructing their views without any complaints being made to the CRC.

King County Assessor's photos at CP 814-816 (App. 2), and certified Aero-Metric aerial photographs presented to the CRC by the Meyers' experts show a mature 70.00 foot tree in 1962. CP 350-353; App.3. These photos were publicly available to O'Briens before filing suit. If any "Madrona and other evergreen" specie specific "standard" ever in fact existed, Harkleroad and/or Evergreen, his employer, waived this standard as permitted under CCR ¶5.⁸

The record shows that the Meyers confronted the CRC on April 8, 2009 about the 1989 Harkleroad Declaration. CP 329; CP 380; App.3. The Meyers' detailed Report asked that the CRC investigate why Mr. Harkleroad did not have the tree thinned or removed from the Meyers' unsold lot in 1970. CP 381. When asked to meet to discuss the result of the Meyers' expert reports on May 4, 2009, the CRC refused. CP 210; App. 17. The CRC's refusal to counter the Meyers' expert evidence and produce actual records of where the Building Committee applied the Harkleroad tree species standard, explains why O'Briens conspired

⁸ "5. Waiver of Restrictions and Limitations. Evergreen Land Developers, Inc., reserves the right to enter into any agreement with the grantee of any lot or lots (without the consent of the grantees of other lots or adjoining or adjacent property) to deviate from the conditions, restrictions, limitations, and agreements contained in this Declaration which shall be manifested in an agreement in writing, shall not constitute a waiver of any such conditions, restrictions, limitation or agreement as to the remaining Lots in the subdivision, and the same shall remain fully enforceable as to all other lots located in the subdivision." CP 804, App. 1; (Emphasis added).

with the CRC to substitute Harkleroad's conclusory declarations upon which the trial court's orders are based. Because no trial court evidence shows how this purported "standard" was ever applied to any Somerset lot, O'Briens cannot meet its burden or satisfy the substantial evidence test for determining drafter's intent under Ross supra at 49-50. Riss v. Angel, 131 Wn.2d 612, 627-30, 934 P.2d 669 (1997) holds that absent actual evidence, reliance upon such conclusory statements is deemed to be unreasonable and arbitrary. Natelson, supra at §4.4.4.

III. Attempts to Revoke Building Committee Actions and Impose an Enhanced "Collective" Treeless View Covenant Should be Rejected.

O'Briens cite Mack v. Armstrong, 147 Wn.App. 522, 527, 195 P.3d 1027 (2008) as authority for this court to interpret CCR ¶10 provisions broadly as a "collective" view entitlement without regard to existing trees. They argue at Page 33 that the Building Committee's prior decisions were not binding; and that it had "no authority to consider existing trees when it approved house plans under CCR ¶3 and ¶4."

The covenants were the result of preliminary and final plat approvals after grading was complete and plat improvements installed. RCW Chapter 58.17;⁹ See CP 810-811 final plat map (App. 1) and Harkleroad deposition testimony at CP 744-754 (App. 13). Applying the

⁹ See Benchmark v. Battleground, 94 Wn.App. 537, 972 P.2d 944 (1999); and Washington State platting procedures and requirements at RCW 58.17.033 through RCW 58.17.190.

ordinary and common meaning rule in construing all of the provisions in CCR ¶10 together¹⁰ with the CCR ¶1, ¶4, ¶6, and ¶7, a more plausible interpretation of “original intent” is that the drafters were attempting to simultaneously balance view interference with the preservation of existing large trees throughout the entirety of the plat. Otherwise, there would have been no reason for even providing the exception language of “no trees of any type, other than those existing at the time these restrictive covenants...” “are filed.” The developer could simply have denuded all platted lots, and restricted the planting of new trees with specific size and specie restrictions in recorded CCR’s, which Evergreen choose not to do. See Day v. Santorsola, 118 Wn.App. 746, 756, 76 P.3d 1190 (2003).

Asserting now that the Committee “had no authority to consider existing trees,” in 1970, O’Briens reject their own trial court argument that CCR ¶4 directed the Building Committee to approve “all house building plans” for the “site” in order to preserve views. CP 172-173. These criteria include: “harmony thereof with the surroundings” and the effect upon “the outlook of the adjacent neighboring property;” and “any and all factors which in the Building Committee’s opinion shall affect the desirability or suitability of such proposed structure improvements or alterations.”

¹⁰ Riss v. Angel supra at 621.

CCR ¶5 authorizes Building Committee review and approval of “front yards” and “landscaping.” Reading forward, CCR ¶10 provisions when read together with CCR ¶4, ¶5, ¶6, and ¶7 show that existing trees were part of a single consent-to-construction process that also included the review of “fences, hedges or boundary walls” in ¶10. In this textual sequence, the existing tree entitlement provision is inserted and followed with exclusive authority (“sole judge”) given to the Building Committee to determine and then “enforce” unnecessary view interference. The 2001 CCR Amendments (CP 93-94) did not allow the CRC to revoke Building Committee decisions or developer agreements with individual lot owners.

The “reasonable expectations of those affected by the covenants’ provisions” of the homeowners, as explained in Mack v. Armstrong supra at 527-28, is a key consideration in a reasonable interpretation of the CCR’s. Mr. Harkleroad’s actions described by the O’Briens at Page 17 disprove any notion that the Building Committee was not involved in examining and resolving view interference issues with trees in the 1960’s and 70’s in implementing CCR ¶10. Harkleroad was both the developer’s agent and Building Committee responsible for reviewing the site, landscaping, and building plans. In his 1989 Declaration, and deposition

testimony,¹¹ he testified that he made “hundreds” of final decisions on view interference involving “the covenant restricting the height of trees.” His actions track the plan review process identified in CCR ¶4, ¶6, ¶7, and ¶10 that determined the reasonable expectations of the parties during the 1960’s and 1970’s when homes were being constructed:

3. During the course of my employment with Evergreen, my duties included review of house and site plans for the homes being constructed at Somerset No. 8. Over the course of years between 1967 and 1974, during which period homes were being constructed and sold, Evergreen administered the activities of the homeowners' association inasmuch as Evergreen still owned the majority of the lots. As Evergreen's project manager, I acted as a mediator to resolve disputes relating to the subdivision's written covenants, including the covenant restricting the height of trees.

6. I was involved in at least 300 instances of house plans and siting review in which view obstruction was at issue. Most of these instances were resolved amicably between the involved homeowners.

Mrs. Meyers described the Maple tree as “a landscape feature that enhanced the value of our property that we could incorporate into our patio and lawn area.” CP 686 (¶4), CP 1185-1186 (¶¶3-5); App. 4. Webster’s New World Dictionary, 1351 (4th college edition 1985) defines “landscaping” as: “...adding lawns, trees, bushes, etc.” Given the covenants’ clear concern with the height of “fences, hedges or boundary

¹¹Mr. Harkleroad also explained this process for Somerset Div. 4 parcels in his deposition testimony at CP 750, Page 24, ll. 1-17, App. 13; CP 72-78, App. 2

walls” and unnecessary view interference concern in CCR ¶10, and landscaping review/approval in CCR ¶7, “...it would be a strange reading indeed” that the Evergreen/Building Committee after years of uphill lot sales and building plan approvals would not have allowed the Maple tree to remain unaltered as a grandfathered tree. The Lakes at Mercer Island v. Witrak, 61 Wn.App. 177, 183, 810 P.2d 27 (1991). In reviewing this evidence, Alliegro v. Home Owners of Edgewood Hills, Inc., 35 Del.Ch. 543, 122 A.2d 910 (1956) cited in Riss supra at 624 also this point in time (the 1960’s and 70’s) for the Building Committee’s review to have ascertained the “general benefit of the entire development:”

“...a provision empowering a committee to pass on plans and specifications for the purpose of determining whether or not a proposed building conforms with a general plan of development and with applicable restrictive covenants, when clear and reasonable and for the general benefit of the entire development will be upheld, Hollingsworth v. Szczesiak, 32 Del.Ch. 274, 84 A.2d 816. (Emphasis added).

The decisions made by the developer Evergreen and the Building Committee through Mr. Harkleroad reflected the application of site, landscaping, and building review standards in CCR ¶¶ 2, 3, 4, 6, 7, and 10 that he was viewing for view interference then in the 1960’s and 70’s for the benefit of the entire Somerset development. As Evergreen’s agent he was also authorized under CCR ¶5 to waive/deviate from the CCR’s in any agreement with a grantee without the consent of adjoining lot owners

that would be binding on neighboring lot owners. His description of this process during home construction eliminates any attempt to construe CCR ¶10 isolation as a collective treeless view covenant where view interference can be re-examined and decided anew 40-50 years later.

Mr. Harkleroad/Building Committee finally decided any neighborhood view interference issues when: (1) in 1962 it left the mature Maple tree on a platted lot on recording of the CCR's; (2) in 1963 when O'Brien's predecessor's building plans on Lot 130 were approved without removing the mature tree on then vacant Lot 117 that obstructed their westerly views (CP 814-816; App. 2 and photo); (3) in 1968 when the Hodgsons' building plans were approved without requiring the removal or alteration of the Meyers' Maple tree (CP 841; App. 9); (4) in 1970 when Lot 117 was sold and the Meyers' site, landscaping, and building plans were approved without removal or alteration of the Maple tree (CP 707; App. 4); and (5) again in 1973 when the Saunders' purchased their lot and when building plans were approved without requiring the removal or alteration of the Meyers' Maple tree (CP 55; App. 9). Query in this context under Mack v. Armstrong supra¹² whether it was "reasonable for the Meyers' to expect" that their tree was grandfathered where Saunders

¹² The Meyers' expectations were explained in their Report to the CRC at CP 380-381.

later admitted that a mature Maple tree existed on the Meyers' property when they built their home in 1973, and that the Meyers actually reduced its height that "improved our sky view." CP 55; App. 9. If Meyers improved the Saunders' "sky view" by reducing the tree's height, why not the Hodgsons' views (and other uphill owners') whose photos served as the basis for the second CRC decision letter further reducing the height of the Meyers' tree? CP 841-843, App. 9; CP 68-71, App. 8.

O'Briens are seeking far more than an interpretation that "protects homeowners' collective interest" at Page 13 citing Ross, supra at 49-50. They seek an interpretation to enhance the value of lots and homes constructed in the 1960's and 70's with partial view obstructions "[a]s part of the collective, even those owners who may not have views are benefitted by the increase in property values of those persons with views." (Emphasis added). If this wide-sweeping reading of CCR ¶10 and "original intent" of the drafters were intended, the CRC rejected such a reading in its First decision letter at CP 63 stating that:

"The view the covenants are trying to preserve is the view in existence at the time the covenants were recorded; i.e., early 1960's." App. 8; (Emphasis added).

O'Briens in effect are asking this court to replat Somerset Div. 4 and renegotiate lots sales by removing or altering existing trees to open

views that the CRC even admitted they were not entitled.¹³ Imposing a wide-sweeping “collective” view corridor “even at the expense of trees” causes harm and is discriminatory. Natelson, *supra* at §4.4.4. It renders meaningless¹⁴ final decisions under CCR ¶4, ¶7, and ¶10 review criteria made 40-50 years ago. The time to seek an “increase in property values” for “those owners who may not have views” was at time of purchase as bargained for consideration. Uphill owner complaints of limited views lie with the developer Evergreen who was not joined as a party.

O’Briens cite Black *supra* to support an expansive “priceless view” concept. Black does not deal with any Somerset covenant interpretation. The Blacks were induced to purchase their Somerset lot by the oral guarantees and a promotional brochure warranting a “priceless view will (would) never be impaired.” *Id* at 243-44. Black *supra* at 245, however, confirms that final view interference decisions and enforcement actions were being made in the 1960’s 70’s by the Building Committee. Unlike O’Briens, Black objected in writing to the Somerset Building Committee on July 12, 1964 stating he was not consenting to the obstruction of their

¹³ See First Decision Letter of May 28, 2009, Page 1 stating: “The view the covenants are trying to preserve is the view in existence at the time the covenants were recorded; i.e. early 1960’s.” CP 63; App. 8; (Emphasis added).

¹⁴ Courts will not construe instruments that result in meaningless acts. Greer v. Northwestern Nat. Ins. Co., 36 Wn.App. 330, 337, 674 P.2d 1257 (1984) citing Continental Cas. Co. v. Darch, 27 Wn.App. 726, 731, 620 P.2d 1005 (1980).

views of Lake Washington. Id. When framing of the downhill lot owner's house "disclosed their view would be impaired," the Blacks immediately [not 40 years later] sued the developer Evergreen and realtor. Id at 246.

The Hodgsons described the Meyers' Maple tree as a "small wispy tree." The CRC used the Hodgsons' photos to significantly lower the tree's already reduced height. CP 841-843, App.9; CP 68-71, App. 8. The Meyers' experts and County Assessor disproved these facts, showing the Maple tree to be fully grown ± 70.00 feet tall in 1964. CP 814-816; App.2; CP 348-372; App.3. The second decision letter also conflicted with first decision letter where the CRC noted that the tree was no taller than it was in 1964. CP 64. The Meyers themselves reduced its height¹⁵ improving "sky views" as Saunders noted in their CRC complaint. CP 55; App.9. Like the Saunders (CP 55), and O'Briens' predecessors (CP 814-816), the Hodgsons filed no complaints with the Building Committee during the Meyers' construction review in 1970. Both owners had the same opportunity to object to the Maple tree on Lot 117 when they purchased and constructed their residences in 1963 and 1968, but failed to

¹⁵ See CP 1186-1187 at ¶7 where Mrs. Meyers states: "Anyone familiar with the neighborhood could easily see from the photos that when we bought and built our house in 1970, the tree was full grown. Over time, we actually shortened the height and width of the tree. A portion of the tree was destroyed in a wind storm in the mid-1980's that reduced its overall width. App. 4; (Emphasis added).

do so. CP 814-816; App. 2; CP 841-843, App. 9. They waited 40+ years until they "...received the 11/12/08 version of the ...*View Guideline*..." advising them that grandfathered trees were "subject to restrictions." CP 841. The "collective" priceless view construction of CCR ¶10 sought by the O'Briens was accordingly rejected by the Building Committee when it preserved existing large trees while balancing surrounding neighborhood harmony under CCR ¶4 and ¶10 review criteria. O'Briens' knowing silence/acquiescence is an admission ratifying the Building Committee's earlier approval of the Meyers' development plans that estops O'Briens' from raising new view interference claims. Huff v. N. Pac. Ry. Co., 38 Wn.2d 103, 114, 228 P.2d 121 (1951).

O'Briens argue at Page 35 "...[t]here is no proof that the Building Committee in 1970 considered the Maple Tree under Section 10..." and that there is "mere speculation from Mrs. Meyers as to what the Building Committee would have done or could have done." O'Briens are the plaintiffs who filed this lawsuit and CR 56 Motion. They filed multiple declarations, including CRC officers, to support the enforcement of the *View Guideline* and Harkleroad Declaration. CP 21-31; CP 235-240. Despite repeated opportunities to do so, they failed to produce any platting, Building Committee, and CRC records of tree interference decisions related to any Somerset lot or building plan applying this new

view interference test. Returning this case to the trial court under such circumstances would be a futile exercise.

IV. The CRC's Actions Are Non-Binding Mediation Recommendations that Could Not Serve as the Basis of Enforcement Decisions and the Trial Court's Summary Judgment Orders.

The court's role as noted by Professor Natelson, *supra* at §§4.2, 4.5, and 5.2, is to review the substantive validity of the *View Guideline* and Harkleroad Declaration that alters existing tree entitlements; and to prevent abusive unreasonable and arbitrary decision-making materially affecting recorded entitlements. O'Briens pass off the CRC's year-long "reconsideration" as "...the result of the complainants finally being able to respond to the secret evidence submitted to the CRC by the Appellants..." and that "...there is no formal CRC procedure on how it conducts its investigation." CP 1504-05; (Emphasis added). These arguments admit that O'Briens and the CRC (who would not meet with the Meyers' experts) acted without authority to convert a non-binding mediation process into an *ad-hoc* and *de facto* enforcement action. CP 210.

No authority is cited for the CRC's refusal to provide the Meyers any notice and hearing in a reopened investigation materially affecting their property rights. No reasons are cited for its refusal to meet with the Meyers' experts and instead use lay photos. It had over 11 months to ask

Harkleroad (with whom they were meeting)¹⁶ why he, as Evergreen's agent, left a mature Maple tree on Lot 117. CP 381; App. 3. Absent any authority, the CRC's decision letters, including the 2008 *View Guideline*, are null and void. See *Riss* supra at 630, citing Natelson at §4.2 and §5.2.

V. O'Briens Cannot Serve as the CRC's Enforcement Proxy.

O'Briens claim they can file a lawsuit on behalf of the CRC to support the CRC's enforcement actions. The process followed by the CRC belies this argument. On April 2, 2009, The CRC identified five (5) available processes that the parties could follow (CP 1544; App. 19):

1. CRC Dispute Resolution (decision tree)
2. Amendment One provided Mediation with outside mediator or CRC acting as mediator
3. City of Bellevue Mediation
4. Declaratory Judgment issued by a Judge declaring if one party's covenant interpretation is the correct one
5. Lawsuit filed in Superior Court with a court decision on the correct covenant interpretation

The CRC told the Meyers that their "neighbors started this process at one and you responded by asking to go to two." The CRC concluded that the process followed would be an "Amendment One Mediation Process:"

Steve, if you as the Respondent, chose to continue with the mediation process provided by Amendment One as clarified above, we will set up the meeting time and place. We will also provide mediator(s) if you and the complainants cannot agree on an outside mediator. If you chose not to continue with the mediation process provided by Amendment One, then the CRC will continue with the CRC Dispute Resolution Process (see attached decision tree) initiated by several of the Meyers neighbors. It should be noted that in any event, the CRC will issue a decision whether it be through CRC Dispute Resolution Process (initiated by Meyers neighbors) or the Amendment One Mediation Process (initiated by you as a response).

¹⁶ CP 747, pps. 11-12; App. 13.

"Q And did you appear in front of the CRC Committee and advise them as a group?

A Yes, I think I did. Yeah. There was one group, one meeting was held in somebody's home, and they asked me to appear and kind of give a general discussion of my methods of administering the covenants, trying to give them some insight on how the first few years were done."

The CRC told both parties that: “As you know, any CRC decision and recommendations are non-binding.” (Emphasis added). The attached “decision tree” concludes with a “Happy ending” terminating the dispute/or “Refer to Bellevue Mediation Prog[sic]” if “No.” CP 1547; App. 19. See also CP 91-103; CP 162-182; CP 711-723.

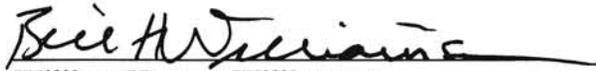
These procedures show that the parties participated in an “Amendment One Mediation Process (initiated by you as a response).” CP 1545; App. 19. The Saunders’ complaint requested that the CRC “recommend” an “amount of trimming.” Saunders, O’Briens, and Hodgsons all checked the box “Yes” to participate in the “Bellevue Mediation Program to resolve the situation.” CP 51, 56, 842; App. 9. Nothing possibly suggests that the Meyers willingly submitted to an enforcement action authorizing the CRC to “order” them to “comply” with a “non-binding” recommendation. CP 508; App. 10. Attempting to now shift blame to the Meyers, the undisputed record shows that Saunders and O’Briens violated ER 408 by first disclosing the results of the mediation before Judge Scott. CP 86, CP 128; App. 20. The Meyers motion to strike evidence of the mediation (CP 457-482) was denied. CP 255-264; CP 484-485. Mr. Smolinske’s statements that O’Briens impermissibly disclosed privileged mediation were not rebutted or challenged by O’Briens. CP 1493-1500; App. 20.

O'Briens openly concede that "they took on the role of the CRC and filed suit to enforce the CRC's decisions." (Emphasis added). Specific covenant "enforcement powers" provisions of CCR ¶10, however, allow no delegation to individual landowners. The "sole judge" and enforcer of unnecessary view interference decisions is the Building Committee. O'Briens rely on the CCR ¶1 general enforcement covenant. However, in the event of any conflict between specific and general provisions, the specific ¶10 provisions control. See Mack v. Armstrong supra at 531.

O'Briens' complaint was neither verified nor pleaded as a derivative action required by CR 23.1. CP 580-587. It fails to allege with particularity efforts to obtain the desired actions and reasons for the CRC's failure to act. CRC Chair Gary Albert states that the CRC in fact did just the opposite. It "enforced" its new 2008 *View Guideline* under the ruse of mediation. CP 819-869 and CP 1009-1014. It is the CRC who is not joined in this action who bears the burden of proof when it attempts to regulate the use of an individually owned parcel. Natelson, supra at §4.4.4, note 14 citing Seabreak v. Gresser, 517 A.2d 263 (1986). It follows that O'Briens cannot act as the CRC or seek fees on its' behalf under RCW 64.38.050. The CRC was a necessary party under CR 17 and CR 19 for any enforcement of CRC decisions required to confer subject matter jurisdiction. RAP 2.5(a).

RESPECTFULLY SUBMITTED this 8th day of August, 2012.

WILLIAMSON LAW OFFICE

A handwritten signature in black ink, appearing to read "Bill H. Williamson", with a long horizontal flourish extending to the right.

William Henson Williamson

WA State Bar No. 4304

5500 Columbia Center - 701 5th Avenue

P.O. Box 99821

Seattle, WA 98139-0821

(206) 292-0411

Attorneys for Appellant Meyers

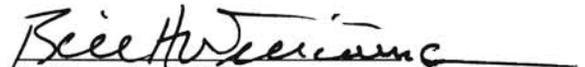
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 8th, 2012 I emailed to Allen Sakai (asakai@jgslaw.com) and deposited in the mails of the United States of America, postage prepaid, an envelope containing a true and correct copy of Appellants' Opening Brief addressed to:

Allen R. Sakai
Jeppesen Gray Sakai, PS
10655 NE 4th Street
Bellevue, WA 98004

DATED this 8th day of August 2012, at Seattle, Washington.


William H. Williamson

APPENDIX 15

COVENANT REVIEW COMMITTEE (CRC) Neighbor Complaint Form

Complete this form (Items 1 thru 10) and return to:

Somerset Community Association
ATTN: CRC
PO Box 5733
Bellevue, WA 98006

1. Name(s) of person(s) filing this complaint

JACK & MARJORIE BALLAS

2. Phone numbers: Day 425-603-0842
Evening " " "

3. Your address

14004 SE 45th CT

4. Name(s) of neighbor(s) you are complaining about

VERN & GINNY MEYERS

5. Their address(es)

13911 SE 45th Rd

6. Please describe in detail the basis of your complaint (attach additional information if needed)

A LARGE MAPLE TREE AT THE ABOVE RESIDENCE IS BLOCKING OUR FRONT LAWN VIEW OF THE OLYMPIC MTS. AND MERCER ISLAND. SINCE MOVING IN OUR HOME IN 1995 IT HAS INCREASED TREMENDOUSLY IN WIDTH. THE TREE HAS BEEN PRUNED BEFORE YEARS AGO. WHEN WE MOVED HERE IN 1995 WE WERE TOLD THE TREE WAS GRAND FATHERED IN AND WAS NOT SUBJECT TO THE COVENANTS ON HEIGHT AND WIDTH. WE ARE NOW LED TO BELIEVE THAT THE 11-12-8 VERSION OF THE SOMERSET ASS VIEW GUIDELINES INDICATES THAT GRAND FATHERED TREES ARE SUBJECT TO RESTRICTIONS ON INTRUDING ON VIEWS. IT IS OUR OPINION THAT THE TREE OBSTRUCTS OUR VIEWS AND SHOULD BE TRIMMED OR REMOVED.

EXHIBIT F-1

Two Pages (plus attachments)

Neighbor Complaint Form

7. Have you communicated with the neighbor(s) in question about these specific concerns?

Yes No

8. If so, when did the communications occur (month/year) and what was the response?
(attach additional information if needed)

4

9. What do you want the CRC to do regarding your concerns?

(Please refer to the limitations of the authority of the CRC in your covenants)

THE CRC IS ASKED TO EVALUATE IF THE INTRUDING
TREE IS IN FACT A GRAND FATHERED TREE.
WE WOULD LIKE THE CRC TO CONTACT US ON
THIS MATTER AND COME TO OUR HOME
AND SEE FOR YOURSELVES THE EXTENT OF
THE VIEW OBSTRUCTION, AND STATE TO WHAT
EXTENT THE TREE MUST TRIMMED ETC.

10. Would you be willing to go to Bellevue Mediation Program to resolve this situation?

Yes No

COVENANT REVIEW COMMITTEE (CRC) Neighbor Complaint Form

Complete this form (items 1 thru 10) and return to:

Somerset Community Association
ATTN: CRC
PO Box 5733
Bellevue, WA 98006

1. Name(s) of person(s) filing this complaint

James & Edith Bloomfield

2. Phone numbers: Day 425-643-7519 (jimbloom@comcast.net)

Evening 425-643-7519

3. Your address

14000 SE 45th Court

4. Name(s) of neighbor(s) you are complaining about

Vern & Ginny Meyers

5. Their address(es)

13911 SE 45th Place

6. Please describe in detail the basis of your complaint (attach additional information if needed)

A tree some 50 to 60 feet in height above the roof line of the home that owns the tree intrudes on our view of Mercer Island, the East Channel of Lake Washington, Seattle, and the Olympic Mountains. Since moving into our Somerset home in early 1981 the tree has increased in size by some 30 to 40 percent.

The tree has been pruned three times, including after it had been damaged by a lightning strike.

As the tree became more intrusive we were advised by a neighbor that it was a grandfathered tree and therefore not subject to covenant restrictions on height. Reviewing the 11/12/2008 version of the Somerset Association's View Guidelines indicates that grandfathered trees are subject to restrictions on intruding on views. It is therefore considered by us that the tree "unnecessarily interferes with the view of another residence", i.e. ours and should be reduced in size to minimize the interference.

EXHIBIT F-3

W
Q
U
V

7. Have you communicated with the neighbor(s) in question about these specific concerns?

Yes No

8. If so, when did the communications occur (month/year) and what was the response?
(attach additional information if needed)

Neighbors have contacted the Meyers offering to pay for the cost of removing the tree and were rebuffed.

9. What do you want the CRC to do regarding your concerns?

(Please refer to the limitations of the authority of the CRC in your covenants)

The CRC is asked to evaluate whether the intruding tree is in fact a "grandfathered tree". Depending on the result of that inquiry the CRC is then asked to come to our home and judge whether the tree in question is an intruding tree and to what extent it must be reduced in size and height.

10. Would you be willing to go to Bellevue Mediation Program to resolve this situation?

Yes No

COVENANT REVIEW COMMITTEE (CRC) Neighbor Complaint Form

Complete this form (items 1 thru 10) and return to:

Somerset Community Association
ATTN: CRC
PO Box 5733
Bellevue, WA 98006

1. Name(s) of person(s) filing this complaint

Amy & Stephen Strader

2. Phone numbers: Day 425-746-8530

Evening 425-746-8524

3. Your address

14007 SE 45th Court, Bellevue, WA 98006

4. Name(s) of neighbor(s) you are complaining about

Vern & Ginny Meyers

5. Their address(es)

13911 SE 45th Place, Bellevue, WA 98006

6. Please describe in detail the basis of your complaint (*attach additional information if needed*)

Our view of Seattle, Puget Sound, and the Olympic Mountains is significantly affected by this tree, especially when it has leaves. We were informed when we moved into our house that this tree was grandfathered from height restrictions. Every Spring, when the tree gets its foliage, we're strikingly reminded that the tree is there and the impact on our view.

I've recently reviewed the "View Guideline for Somerset" revised 11/1/2008. The goal of these restrictions is to "preserve is the View that was observable above the View Line from the Observation Zone at the time the relevant Main Floor Living Space was Built." From our main floor, there is view blockage of the Olympic mountains, which I don't image was there 40 years ago.

We have two balconies that would not be included according to the definition of "Main Floor Living Space." From these balconies the view blockage is pretty amazing. While these balconies are not included by definition, I have become aware that my property assessment considers the balconies and the view from these locations. In these assessments, I will not receive any discount because of a large tree blocking the complete view of Seattle in Summer. Therefore, I respectfully request that this circumstance be considered as well.

Further, in the guidelines, I found the following statement "the twenty(20) foot height restriction does not apply to Grandgathered Trees, provided they do not unnecessarily interfere with the view of another residence." This tree, whether grandfathered or not interferes significantly with the view of our residence. Additionally, when visiting other houses in the neighborhood, I've found their views even more affected. Also according to these guidelines, when any tree, grandfathered or not, interferes with the view of another residence the following action is required "It must be trimmed to a lower height so the resulting view restoration is sufficient to prevent the tree from 'unnecessarily interfering with the view of another residence.'"

7. Have you communicated with the neighbor(s) in question about these specific concerns?

Yes No

8. If so, when did the communications occur (month/year) and what was the response?
(attach additional information if needed)

I've been told that many people have discussed the issue with the owners without success.

9. What do you want the CRC to do regarding your concerns?

(Please refer to the limitations of the authority of the CRC in your covenants)

I've heard recently discussion that the tree may not be grandfathered. The status of this tree must be determined. But more importantly, the guidelines must be enforced by whatever means is available to the CBC. I am concerned that merely trimming this tree to an acceptable level would result in a really tall stump, so a tree replacement is probably the most proper action.

10. Would you be willing to go to Bellevue Mediation Program to resolve this situation?

Yes No

APPENDIX 16



12711 25 45 PL
20 10 1969

POLICY OF TITLE INSURANCE

ISSUED BY

Pioneer National Title Insurance Company

a California corporation, herein called the Company, for a valuable consideration, and subject to the conditions and stipulations of this policy, does hereby insure the person or persons named in item 1 of Schedule A, together with the persons and corporations included in the definition of "the insured" as set forth in the conditions and stipulations, against loss or damage sustained by reason of:

1. Title to the estate, lien or interest defined in items 3 and 4 of Schedule A being vested, at the date hereof, otherwise than as stated in items 2 of Schedule A; or
2. Any defect in, or lien or encumbrance on, said title existing at the date hereof, not shown in Schedule B; or
3. Any defect in the execution of any instrument shown in item 3 of Schedule A, or priority, at the date hereof, over any such instrument, of any lien or encumbrance not shown in Schedule B;

provided, however, the Company shall not be liable for any loss, damage or expense resulting from the refusal of any person to enter into, or perform, any contract respecting the estate, lien or interest insured.

The total liability is limited to the amount shown in Schedule A, exclusive of costs incurred by the Company as an incident to defense or settlement of claims hereunder.

This policy shall not be valid or binding until countersigned below by a validating officer of the Company.

In Witness Whereof, Pioneer National Title Insurance Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers as of the date shown in Schedule A, the effective date of this policy.

Pioneer National Title Insurance Company

by *George B. Garber*
PRESIDENT

Attest: *Richard W. Bonlett*
SECRETARY

Countersigned:

By *Darwin S. Thompson*
Validating Signatory

EXHIBIT 1

WLTA

NUMBER : B-909515-A
DATE : APRIL 29, 1970 AT 8:00 A.M.
AMOUNT : \$40,000.00
PREMIUM: \$199.00

SCHEDULE A

1. INSURED

VERNON L. MEYERS AND VIRGINIA C. MEYERS, HIS WIFE

2. TITLE TO THE ESTATE, LIEN OR INTEREST INSURED BY THIS POLICY IS VESTED IN

THE NAMED INSURED

3. ESTATE, LIEN OR INTEREST INSURED

FEE SIMPLE ESTATE

4. DESCRIPTION OF THE REAL ESTATE WITH RESPECT TO WHICH THIS POLICY IS ISSUED

LOT 117, SOMERSET NO. 4, ACCORDING TO THE PLAT RECORDED IN VOLUME 68, OF PLATS, PAGE 29 THROUGH 30, IN KING COUNTY, WASHINGTON

SCHEDULE B

DEFECTS, LIENS, ENCUMBRANCES AND OTHER MATTERS AGAINST WHICH THE COMPANY DOES NOT INSURE:

GENERAL EXCEPTIONS

ALL MATTERS SET FORTH IN PARAGRAPHS NUMBERED 1 TO 4 INCLUSIVE ON THE COVER SHEET OF THIS POLICY UNDER THE HEADING SCHEDULE B GENERAL EXCEPTIONS

SPECIAL EXCEPTIONS

1. DEED OF TRUST TO SECURE AN INDEBTEDNESS OF THE AMOUNT HEREIN STATED AND ANY OTHER AMOUNTS PAYABLE UNDER THE TERMS THEREOF, RECORDED IN KING COUNTY, WASHINGTON.

AMOUNT : \$31,000.00
DATED : APRIL 8, 1970
RECORDED : APRIL 27, 1970
VOLUME/PAGE : 343/611
AUDITOR'S NO. : 6643851
GRANTOR : VERNON L. MEYERS AND VIRGINIA C. MEYERS, HIS WIFE
TRUSTEE : TRANSAMERICA TITLE INSURANCE COMPANY
BENEFICIARY : EQUITABLE SAVINGS AND LOAN ASSOCIATION, AN OREGON CORPORATION

2. AN EASEMENT AFFECTING THE PORTION OF SAID PREMISES AND FOR THE PURPOSE STATED HEREIN, AND INCIDENTAL PURPOSES, DELINEATED ON THE FACE OF, OR DEDICATED BY, SAID PLAT.

FOR : PACIFIC TELEPHONE & TELEGRAPH COMPANY RIGHT OF WAY

3. AN EASEMENT AFFECTING THE PORTION OF SAID PREMISES AND FOR THE PURPOSE STATED HEREIN, AND INCIDENTAL PURPOSES, DELINEATED ON THE FACE OF, OR DEDICATED BY, SAID PLAT.

FOR : PUBLIC UTILITIES
AFFECTS: 5 FEET ON EACH SIDE OF ALL 40 FOOT STREETS

4. AGREEMENT EXECUTED BY AND BETWEEN THE PARTIES HEREIN NAMED UPON THE CONDITIONS THEREIN PROVIDED.

BETWEEN : PUGET SOUND POWER & LIGHT COMPANY, A CORPORATION
AND EVERGREEN LAND DEVELOPERS, INC., A CORPORATION
DATED : NOVEMBER 20, 1961
RECORDED : DECEMBER 29, 1961
AUDITOR'S NO. : 5369635
PROVIDING : FOR THE INSTALLATION OF AN UNDERGROUND PRIMARY ELECTRIC DISTRIBUTION SYSTEM

5. COVENANTS, CONDITIONS AND RESTRICTIONS CONTAINED IN SAID PLAT AND IN DECLARATION OF PROTECTIVE RESTRICTIONS, AS HERETO ATTACHED.
DECLARATION DATED: FEBRUARY 16, 1962
RECORDED : FEBRUARY 19, 1962
AUDITOR'S NO. : 5389232
EXECUTED BY : EVERGREEN LAND DEVELOPERS, INC., A WASHINGTON CORPORATION, ET AL

6. RIGHT OF THE PUBLIC TO MAKE NECESSARY SLOPES FOR CUTS OR FILLS UPON SAID PREMISES IN THE REASONABLE ORIGINAL GRADING OF STREETS, AVENUES, ALLEYS AND ROADS, AS DEDICATED IN THE PLAT.

...END OF SCHEDULE B...

APPENDIX 17

From: Gary Albert [albert.gary@gmail.com]
Sent: Monday, May 04, 2009 8:39 PM
To: Steve Smolinske
Cc: Dan Conlin; Susan Edison; Randall Hammond; Jeff Richter
Subject: Re: View Guidelines

EXHIBIT A

Steve,
Thank you for your prompt response. Our next CRC meeting is May 26th and we anticipate providing a decision on the Meyers' tree at that time.

Regards, Gary

On Mon, May 4, 2009 at 8:05 PM, Steve Smolinske <SSmolinske@rainierrubber.com> wrote:
CONFIDENTIAL EMAIL

Gary,

Yes I am guarding the information you're absolutely correct and please don't interpret my vigorous defending of my In-Laws as being confrontational to the committee. The bottom line is that I am sure that no matter what the decision the neighbors are going to sue the Meyers. If you rule in favor of the Meyers they will sue hoping to force a favorable settlement, if you rule in favor of the neighbors that won't change the Meyers' stance and they will sue again in the hope of forcing a favorable settlement. The document that I have provided you is a work product ready to go to trial that is why it must be protected. The burden of proof rests with the neighbors and frankly what they have provided does not prove anything and would be laughed out of court. I am sure the attorney on the committee has talked to this point. There is no way that the neighbors can overcome the fact that the tree was 70 feet tall when the covenants were recorded and according to emails from both you and Dan could continue to grow.

→ Tina Cohen and Ward Carson are two very competent and credentialed experts in their fields. If you and the committee would like to talk with them for your education, we are willing to pay for their time to discuss their findings with you. Send me an email with the request, then I will authorize it and you are free to set up a conference call or meeting which ever suits your schedule.

Tina's report does not deal with the width of the tree because the covenants do not mention width, they mention height, we contracted her to speak to her expertise pertaining to the tree and the covenants to the letter. She also does not speak of width because she instead speaks about the necessity of the canopy that is there today. The covenants say trees could not unnecessarily interfere, the tree does not unnecessarily interfere what is there is necessary for the tree which has been pruned down to its current height to exist.

Ward Carson has all the technical data (focal length, height from which the plane flew, sun angles etc.) for the photos he mentioned because the company that provides certified aerial photography has that information and they provided it to Ward that is how he was able to make his calculations and to document them. Without that information he could not have made his calculations. This is why he was unable to make a similar comment on the neighbors' photos. Again like Tina he was asked to do a specific task, calculate the height of the tree. Both these people have professional reputations to defend and uphold so anything they say they are able to defend in court. To answer your question why those photos are better than the neighbors' because the information about height, distance, sun etc. are known and certified and have been interpreted by somebody who is an expert, not by a group of neighbors weaving a story to match a photo.

Ward's comments about elevation are pertaining to the area of the shadow on the ground. If the ground sloped sharply away from the tree or the house then the shadow measurement would change. The ground in both locations is flat so he is able to calculate his conclusions based on level ground rather than having to calculate the effects of hills or valleys on the shadow. A 70 foot shadow cast on an upward slope is shorter than a 70 foot shadow going downhill.

I have been through a similar law suit myself and that is why I am handling this for my In-Laws as well as my Father In-Laws health. Obviously it's best to keep attorneys out for as long as possible and the cost down if possible. So being versed in how this might unfold I have put together the work product for you with all the facts that a judge will want to review. Part of the

reason not to proceed with a lawsuit is the expense that is incurred, by keeping the work product from the neighbors we are not giving them a heads up to how our Defense will proceed. They first have to file a complaint, spend lots of money on discovery and then build a case against ours. If we shared the work product with them now then that cuts out a lot of the expense they would have to incur and would take away a large portion of the detriment to filing a suit.

I hope this answers your questions, please let me know if you would like to talk with Tina and/or Ward. If you would like to share the documents with the neighbors in support of a favorable decision for the Meyers that is something that might be possible providing I talk with an attorney prior to their release and that they feel it is advisable. Thank you.

Steve

From: Gary Albert [mailto:albert.gary@gmail.com]
Sent: Mon 5/4/2009 4:10 PM
To: Steve Smolinske
Cc: Dan Conlin; Susan Edison; Randall Hammond; Jeff Richter
Subject: Re: View Guidelines

Steve,

I understand your bias in favor of the Meyers, but do not assume the CRC has a favored position or bias against any homeowner. We are charged with the duty to determine if there has been a covenant violation regarding view interference and do it as fairly as we can. The fact that we have allowed you to represent your in-laws should be testament to that fact. However, you are not helping the process.

The document you have provided includes technical information that is above the level of understanding for a normal layperson on the committee. We need to verify the accuracy and validity of the information in order to consider it but you prevent us from doing that by not allowing the information to be used outside of the committee. How can we or the Affected Neighbors investigate what you have presented as accurate without taking it to others knowledgeable in those fields of expertise? The CRC does not have a budget to parse out your report, that would fall on the Affected Neighbors and the reason for our request. You said it yourself, "Your duty as committee members is to investigate and then decide based on the information, not on the popularity of a decision..." We couldn't have said it better.

Some problems, Tina Cohen's report references a 1970 photo that was not included in her document. She notes photos are available on request, but you must authorize permission before we can contact any individual or firm. There were other photos included in the report, what happened to this one? Once again, you appear to be guarding all of the information. This report deals with the height of the tree as an important consideration in her analysis, the width of the tree is not without similar consideration.

Your email says, "According to the photographic analyst we hired, the neighbors photos can not be used to compare the trees size, because the focal length of the camera/s the distance from the object and the height above the ground are not known." I am assuming Ward Carlson is the photogrammetrist you are referencing in this statement. I looked carefully at photograph A1 in his report and was similarly wondering what the focal length of the camera was, the distance from the object and the height the photo was taken above the ground, the time of day and the declination of the sun but I could not find any mention of those listed. So my question is why should the Photo A1 that you base much of your position on be of any more value than the neighbors photos?

Also, Mr. Carlson's "tacit assumption in the above process is that the elevation differences across the landscape are not large enough to affect the fit process and erode the accuracy beyond that required by this project." I am not sure of which photos he is referring to but am assuming it was those involving the "11 well distributed points." Depending on what points were selected, there is about 400 feet of elevation difference between the Somerset Boulevard entrance and the Meyers home. Is that "large enough to affect the fit process and erode the accuracy" of the report or not? While your report is substantial in presenting your case, it is not without questions that need answering in order to be fairly considered.

I would ask you to reconsider your previous position or at least explain your reason for solely limiting your report to the CRC so we have context to your position.

Respectfully,
Gary Albert, Chairman
Covenant Review Committee

On Fri, May 1, 2009 at 11:13 AM, Steve Smolinske <SSmolinske@rainierrubber.com> wrote:
Dan

I don't believe that there is anything in the guidelines, or flow charts you provided that says only shared information is valid for the committees decision making process. I do not know how an impartial committee can decide to throw out information that is in direct opposition to the easy and popular decision after having viewed those facts. Obviously it would be much easier for the committee to side with the 11 rather than the Meyers and be done with the issue. However you can not ignore the factual evidence we presented to you regardless of if it is shared with the neighbors or not. Your duty as committee members is to investigate and then decide based on the information, not on the popularity of a decision or on what is shared and what is not. You can just as easily inform the neighbors that the confidential evidence provided by the Meyers professional experts, documented the history of the tree and that they never had a view to begin with. Or you could try to pen a decision against the tree and have to worry about the fallout from only one neighbor. At this point I don't see that you can not use the information we provided in your decision, the committees job is not to promote harmony amongst the largest number of neighbors but is to gather the facts, review them and then to impartially and without prejudice to either party offer a decision of the information gathered during the investigation.

I am sure that from the start when the neighbors spoke with "that lady on the SCA who had seen early photos of those lots" (Peter Saunders Email) everyone thought this would be an easy cut down that tree that is obstructing our view decision. I am sure nobody ever imagined that the tree was shorter and had been pruned to maintain its health and uphill views and had also been left alone by Gerald Hackleroad. Well, the facts have not turned out to support that view, so we all move on with the knowledge that the tree is protected and always has been.

If the committee should decide to make a decision against the Meyers when that decision comes out, please make note of that so that the Meyers can have something on file that states: "The Meyers confidential documents were excluded from our decision because they would not share that information with the neighbors" You can send that to us via email if you like. Again to emphasize the documents provided you are not to be shared with anyone outside of the committee.

According to the photographic analyst we hired, the neighbors photos can not be used to compare the trees size, because the focal length of the camera/s the distance from the object and the height above the ground are not known. I asked if there was anyway to use the photos to provide any size information relative to surrounding structures and he said NO not with out that information. It is not enough to intuitively look at photos taken from different zoom angles and for a layman to say look at this photo Mercer Island is seen above the tree, then look at this photo Mercer Island is gone and make an assumption that the tree has grown. To many variables to look at the neighbor photos that way. I already asked him that question. Did you compare the Smolinske Photos with the neighbors photos from 1970? Look at them and tell me the difference if you see any?

Steve

From: Dan Conlin [<mailto:dan@conlingroup.com>]
Sent: Friday, May 01, 2009 10:05 AM
To: Steve Smolinske
Cc: albert.gary@gmail.com; 'Susan Edison'; 'Randall Hammond'; 'Jeff Richter'
Subject: RE: View Guidelines

Steve,

The CRC met last Tuesday evening to discuss the Meyer's case. As you are aware, the view that our guidelines is intended to preserve is the view that was in existence at the time the home was built; i.e. mid 1960's. This is where the conflict exists: what was the view at this time? We closely reviewed the document that you had prepared. While you presented a case for the potential size of the Meyers Maple tree in 1964, we are uncomfortable with your decision not to share this document with the Affected Neighbors. The attorney on our committee reminded us that in legal cases, should this case go beyond the CRC, all evidence is shared by both sides anyway. This gives each side equal opportunity to present their own evidence and to refute the evidence provided by the other side. And this usually leads to the quickest and least costly solution.

For your information, the evidence currently under consideration is the Meyer's testimony that the tree is currently smaller than it was in 1964, photographs provided by the neighbors (you have copies), neighbor's testimony of the tree's growth over the years (again shared with you), the CRC View Guidelines (you have a copy), and the Declaration of Gerald Harkleroad, who was the Somerset Development project manager of Evergreen Land Developers from 1967 to 1974 (you have a copy) you would like us to consider your document in our ruling, the Affected Neighbors must also have the opportunity to review

Please let us know if you are willing to share it with the Affected Neighbors.

Thanks,

Dan Conlin
CRC Member

From: Steve Smolinske [mailto:SSmolinske@rainierrubber.com]

Sent: Thursday, April 30, 2009 10:42 AM

To: dan@conlingroup.com

Cc: albert.gary@gmail.com

Subject: RE: View Guidelines

Dan,

Just checking back when you feel a decision will be made by the committee?

Steve

APPENDIX 18

Steve Smolinske

From: Gary Albert [albert.gary@gmail.com]
Sent: Tuesday, March 24, 2009 1:32 PM
To: Steve Smolinske
Cc: Dan Conlin; Randy Hammond; Susan Edison; Jeff Richter
Subject: Re: CRC View Guidelines and the Meyers Tree
Attachments: Grandville vs Devaney.pdf

Thanks for stepping in and helping out with your in laws in this process. Sometimes it is very beneficial to have a third party involved who is not emotionally involved in the question. I am also looping in the other members of our Covenant Review Committee to keep them up to date.

To clarify the issue on trees existing at the time of the covenants (a.k.a. grandfathered):

1. Small existing trees that were not tall enough to impact a neighbor's view at the time of the covenants could grow to any height (not restricted to 20 ft.) as long as they do not unnecessarily interfere with a neighbors view. They could also be required to be kept to a lower height (even less than 20 ft.) if they interfered with a neighbors view. (This is essentially the same provision for new trees after the covenants, the exception is that new trees do have a maximum height of limit of 20 ft. and/or not to interfere)

2. Original large trees that were already tall enough so that a neighbor did not have a particular view at the time of the covenants could continue to grow higher. There would be no taking of a view since there was no pre-existing view to be taken.

There is always a question about expanding grandfathered rights. In the case of your in laws Maple tree, as the tree ages and starts spreading out in the horizontal plane, is that permissible or is that an expansion of a grandfathered right? Grandfathered rights have a limited scope rather than being unlimited. For example, because you have a gravel pit that pre-existed before zoning laws does not mean you can expand the volume of extraction, even though you could with better equipment today.

According to our attorney, Terry Leahy, the value of the view trumps the value of the tree or a second story addition in a view community. Since Somerset is a view community that is what we protect in accordance with the covenants and View Guideline, but we will abide by any court decision that will provide a more definitive answer.

I hope this helps in working through the process with the neighbors and your in laws. I have attached supplemental information from a Somerset court case that also be of benefit.

Best regards,

Gary Albert, Chairman
Covenant Review Committee

On Tue, Mar 24, 2009 at 11:56 AM, Steve Smolinske <SSmolinske@rainierrubber.com> wrote:
Gary,

3/24/2009

APPENDIX 19

Steve Smolinske

From: Peter Saunders <r.peter.saunders@gmail.com>
Sent: Tuesday, March 31, 2009 1:02 PM
To: Steve Smolinske
Subject: Re: Meyers Reply

Hi Jim,

I prefer to write down my comments to make sure I don't miss any, and to make equally sure I get them clear and precise.

Steve, on behalf to the Meyers, is certainly playing hard ball, so collectively, we clearly have to do likewise. Obviously Ginny Meyers is talking the same old "do nothing" stance that she has adamantly taken since the mid-seventies, when the Meyers were first approached about their big tree problem.

Steve obviously has realized we mean business when he got a copy of Dan's response to your email. He decided to act quickly to avoid a slew of new covenant complaints. We did mention the other parties involved, beyond the principal players, at the meeting in Tukwila. We certainly must include at least all those neighbors whose complaints Dan has on file.

As proceedings are now likely to move at a brisk pace, I need to make an important point. The question of the grandfathered nature of that tree is very definitely going to be the chief point of contention. Therefore, we need to be on very solid ground, from both physical facts and legal interpretation.

My next point is the clause in the covenant interpretation document which made it abundantly clear that *any mutual agreement arrived at between neighbors, that exceeded the intent of the covenant and was approved by the CRC, would remain binding on the applicable property owners, and all future owners.*

This not only clearly warns us to be cautious of any substantial compromise in our current dispute with the Meyers, it also sets a precedent on *all future owners*. In legal terms then, those initial owners of those lots now having an obscured prime view, purchased those lots at a premium view price. Those initial owners had the reasonable expectation of retaining their view, beyond the building of single story roof lines and the maximum 20 foot high tree limits, and be able to pass that view potential on to all future owners, subject to the current covenant requirements..

We desperately need pictures of that tree at the time of initial lot purchases, around the mid sixties. I need that SCA ladies name, and contact-info, so I can delve deeper into her contention that she had seen really early photos of those lots. We need solid evidence to support the degree of grandfathering that the Meyers are entitled to.

Peter.

EXHIBIT 7

1/3

I believe process goes something like, the CRC is to setup a mediation conference within 10 days of notification of a complaint not to be scheduled later than 30 days from the complaint. Then the parties need to agree on a mediator and I have the mediation conference with all involved parties present with a chance to be heard. At this point the only parties that have complained to us in writing are the Kings, Hodgson, Saunders and Bloomfields, not some ambiguous group that Jim Bloomfield is representing. Any other parties that may wish to jump on at this point are out of luck. Please revise the calendar of events to represent the outline in the amendments to the covenants dated 2001. I look forward to hearing back from you.

Steve

From: Dan Conlin [mailto:dan@conlingroup.com]
Sent: Monday, March 30, 2009 10:37 PM
To: 'James Bloomfield'
Cc: 'Peter Saunders'; 'Gary Albert'; 'Randy Hammond'; Steve Smolinske
Subject: RE: Meyers Reply

Jim,

The process is as outlined on the "decision tree" that I previously sent you. Consider this email as an acknowledgment of receipt of your complaint and documented communication with Mr. and Mrs. Meyers. Randy Hammond, another member of the CRC, and I will review this case. Part of our review will include viewing this tree from various points, reviewing the covenants, as well as the guidelines provided by our legal counsel. It will also include visiting and receiving input from the Meyers and/or their son-in-law, Steve Smolinske. Also, Randy and I would like to visit and receive input from you, and any other members of the group that you are representing. I am out of town the rest of this week, but I will call or email you to arrange a time to meet next week.

After investigating the complaint a decision will be made with the concurrence of the CRC and sent to all parties. After our decision is presented, it is then up to the parties to find a solution with Bellevue mediation or in Superior Court. While the CRC decision is not binding, it is given a great deal of weight in both the Bellevue Mediation Program, as well as Superior Court, if taken that far.

I will be in touch...

Dan Conlin

From: James Bloomfield [mailto:jimbloom@comcast.net]
Sent: Monday, March 30, 2009 5:28 PM
To: Dan Conlin
Cc: Peter Saunders
Subject: Meyers Reply

Dan,

Please review the attached note from the Meyers' and let me know what the CRC will do now that we have contacted the Meyers and have not been able to reach a resolution of the impairment of our views.

2/3

Steve Smolinske

From: Dan Conlin <dan@conlingroup.com>
Sent: Thursday, April 02, 2009 11:33 PM
To: Steve Smolinske
Cc: 'James Bloomfield'; 'Peter Saunders'; 'Gary Albert'; 'Susan Edison'; 'Randy Hammond'; 'Jeff Richter'
Subject: RE: Meyers Reply
Attachments: Dispute Resolution Process.pdf; Covenant Amendment 246.doc

Steve,

I would like to clarify the role of the Covenant Review Committee (CRC) and our process in reviewing neighbor complaints. I am copying in both Mr. Bloomfield and Mr. Saunders, so there is no misunderstanding on either party's part. I am also copying in all other members of the CRC...there are five (5) members, including myself.

First, when neighbors have a conflict over a perceived covenant violation; e.g. potential view obstruction, there are several processes available to them to help resolve this conflict. They can be listed as follows:

1. CRC Dispute Resolution (decision tree)
2. Amendment One provided Mediation with outside mediator or CRC acting as mediator
3. City of Bellevue Mediation
4. Declaratory Judgment issued by a Judge declaring if one party's covenant interpretation is the correct one
5. Lawsuit filed in Superior Court with a court decision on the correct covenant interpretation

One does not have to follow the above; one, two, etc. in order; you can go directly to five. Steve, the Myers neighbors started this process at one and you responded by asking to go to two. That is your choice provided in the First Amendment to the covenants. I would like to address each of these processes in more detail.

Most neighbor complaints, especially regarding potential view obstruction, are resolved through number one above; i.e. The CRC Dispute Resolution Process or sometimes referred to as the decision tree. I have attached a copy of the CRC Dispute Resolution Process. As I mentioned, this is the process started by neighbors of the Myers. The CRC received ten (10) written complaint forms. The one thing that was missing on each form, as required on the attached process, was documented communication with the Myers. The CRC responded to each complainant by letter informing them that the CRC would only get involved after the complainant had documented communication with the Meyers. It is always our hope that disputes can be worked out between neighbors without CRC involvement. After meeting with a group of Myers neighbors, you responded to Mr. Bloomfield with a cc to the CRC. Mr. Bloomfield then emailed me (see email below) requesting what the next step would be. I responded, with a copy to you, as to the next step in the CRC Dispute Resolution Process (also see email below).

Your initial response back to me was as follows:

Dan,

I believe process goes something like, the CRC is to setup a mediation conference within 10 days of notification of a complaint not to be scheduled later than 30 days from the complaint. Then the parties need to agree on a mediator and to have the mediation conference with all involved parties present with a chance to be heard. At this point the only parties that have complained to us in writing are the Kings, Hodgson, Saunders and Bloomfields, not some ambiguous group that Jim Bloomfield is representing. Any other parties that may wish to jump on at this point are out of luck. Please revise the calendar of events to represent the outline in the amendments to the covenants dated 2001. I look forward to hearing back from you.

Steve

EXHIBIT 8

In essence, your response indicated you wanted to move to the second process listed above; i.e. Amendment One provided Mediation with outside mediator or CRC acting as mediator. That is your choice provided in the First Amendment to the covenants, which I have attached a copy of. The mediation process is described on page 4. However, your follow up response to me (shown below) prompts me to clarify this process. It is up to the two parties to agree to an outside mediator....If they can't agree then the mediator automatically comes from the CRC, not from the Somerset Association Board. Therefore your request for "research" on Board Members is really not applicable. There are five (5) members of the CRC. If the Complainant and the Respondent cannot agree on an outside mediator (and they very seldom do), then the CRC will appoint one or more members of the CRC to act as mediator(s). The Amendment further states that the Complainant and the Respondent, if they so choose, can each strike one member of the CRC from the list of prospective mediators. You have already exercised your right to strike me from the list of prospective mediators. Unless the Complainants exercise their right to strike another CRC member, the mediator(s) will be one or more of the remaining four CRC members. As stated in Amendment One, after hearing from both sides, the mediator(s) will issue in writing their findings and recommendations to both parties. This is an informal, non-binding mediation with CRC members who are not trained in mediation. However, it is hoped that this process will lead to an amicable solution between the parties.

If the parties want trained mediators they should seek the City of Bellevue Mediation service, which is the third process listed above. If both parties agree to binding mediation or binding arbitration they should seek professional help with expertise in the covenants field. Since the mediation process is essentially advisory, either party can follow with a legal decision in court.

Steve, if you as the Respondent, chose to continue with the mediation process provided by Amendment One as clarified above, we will set up the meeting time and place. We will also provide mediator(s) if you and the complainants cannot agree on an outside mediator. If you chose not to continue with the mediation process provided by Amendment One, the CRC will continue with the CRC Dispute Resolution Process (see attached decision tree) initiated by several of the Meyers neighbors. It should be noted that in any event, the CRC will issue a decision whether it be through CRC Dispute Resolution Process (initiated by Meyers neighbors) or the Amendment One Mediation Process (initiated by you as a response).

As you know, any CRC decision and recommendations are non-binding. However, they are frequently used and referred to in both the City of Bellevue Mediation service and in lawsuits filed in Superior Court. While no one can predict what a Superior Court Judge's ruling will be, their intent is to insure the covenants are upheld. By design, the Covenant Review Committee (CRC) was created in the Covenants for the same purpose. While a judge is not bound to agree with the CRC, our intents are the same. Our guide is what is contained in the Somerset Covenants: "No trees of any type, other than those existing at the time these restrictive covenants of Somerset, Division No. 2, Somerset, Division No. 4 and Somerset, Division No. 6 are filed, shall be allowed to grow more than twenty (20) feet in height, provided they do not unnecessarily interfere with the view of another residence. The Building Committee [CRC] shall be the sole judge in deciding whether there has been such an interference."

Please let me know if you have any questions, and if you want to pursue the Amendment One Mediation Process.

Dan Conlin
CRC Member

From: Steve Smollnske [mailto:SSmollnske@rainferrubber.com]
Sent: Wednesday, April 01, 2009 12:05 AM
To: Dan Conlin
Subject: RE: Meyers Reply

Dan,

With the selection of board members coming up and the need to start the selection process of a committee member to hear both sides. I understand that there are several attorneys on the board, will you please research if any of them have ever represented a similar case that may bias their opinion in this matter. I think that they may also have to excuse themselves if they know or have represented any of the complaining owners or the Meyers, they would have a better feel for this than me. Also for these, the remaining members and Somerset's legal counsel please forward the names of any

members who have had ex parte prehearing communications with any of the parties involved in this issue. Please forward when, who and what was discussed. If there were materials (photos, old declarations, complaint letters, etc) presented to any Committee Member or vice versa, we need to know these circumstances. Also, can you provide me with the procedural rules followed by the Board during these hearings? I assume that they are exclusive to the parties or are these party proceedings where the complaining owners show up with a lawyer, and we are expected to do the same? It has been my experience in matters like these that it is in everyone's best interest if all procedures are followed the letter, clearly laid out and defined. My schedule is wide open for a meeting next week, after that it begins to fill up rather quickly.

Thank you.

Steve

From: Dan Conlin [mailto:dan@conlingroup.com]
Sent: Mon 3/30/2009 10:36 PM
To: 'James Bloomfield'
Cc: 'Peter Saunders'; 'Gary Albert'; 'Randy Hammond'; Steve Smolinske
Subject: RE: Meyers Reply

Jim,

The process is as outlined on the "decision tree" that I previously sent you. Consider this email as an acknowledgment receipt of your complaint and documented communication with Mr. and Mrs. Meyers. Randy Hammond, another member of the CRC, and I will review this case. Part of our review will include viewing this tree from various points, reviewing the covenants, as well as the guidelines provided by our legal counsel. It will also include visiting and receiving input from the Meyers and/or their son-in-law, Steve Smolinske. Also, Randy and I would like to visit and receive input from you, and any other members of the group that you are representing. I am out of town the rest of this week, but I will call or email you to arrange a time to meet next week.

After investigating the complaint a decision will be made with the concurrence of the CRC and sent to all parties. After a decision is presented, it is then up to the parties to find a solution with Bellevue mediation or in Superior Court. While the CRC decision is not binding, it is given a great deal of weight in both the Bellevue Mediation Program, as well as Superior Court, if taken that far.

I will be in touch...

Dan Conlin

From: James Bloomfield [mailto:jimbloom@comcast.net]
Sent: Monday, March 30, 2009 5:28 PM
To: Dan Conlin
Cc: Peter Saunders
Subject: Meyers Reply

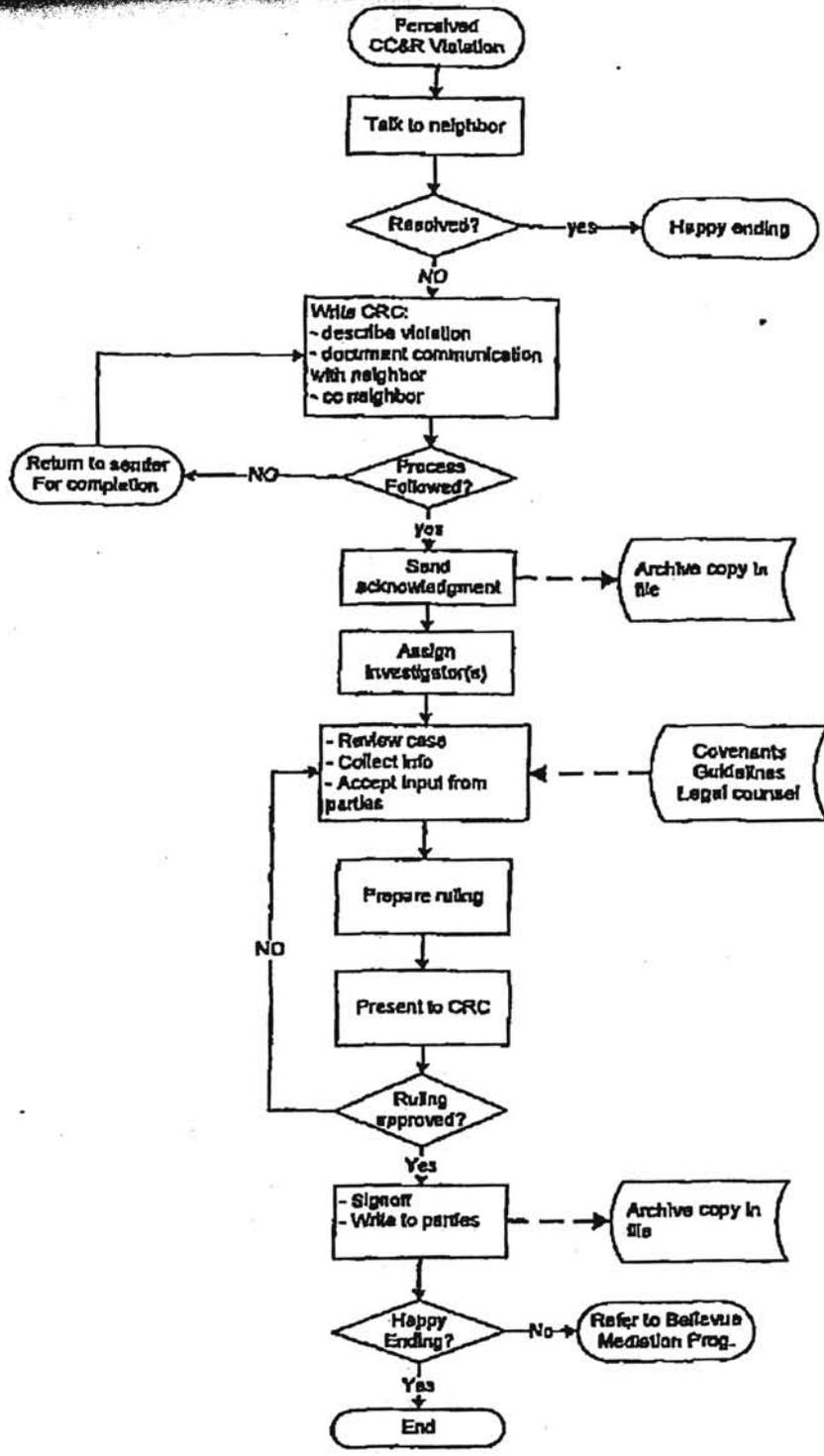
Dan,

Please review the attached note from the Meyers' and let me know what the CRC will do now that we have contacted the Meyers and have not been able to reach a resolution of the impairment of our views.

Thanks,

Jim Bloomfield
425-643-7519

3/4



Somerset CRC Dispute Resolution Process

Rev. 2/8/08

APPENDIX 20

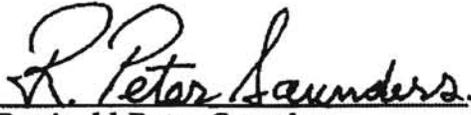
1 copy of the CRC's April 27, 2010 decision. The Defendants took no action to
2 comply with the CRC's second ruling.

3 → 14. On November 12, 2010, all parties and counsel participated in a formal
4 mediation with former Judge Steve Scott at JDR. The mediation was, unfortunately,
5 unsuccessful.
6

7 15. The Meyers' Maple Tree continues to exist and continues to obstruct
8 our views of Seattle, Lake Washington, Mercer Island and the Olympic Mountains.

9 I certify (or declare) under penalty of perjury under the laws of the state of
10 Washington that the foregoing is true and correct.

11 DATED this 17th day of November, 2011, at Bellevue, Washington.
12

13 
14 Reginald Peter Saunders
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25
DECLARATION OF REGINALD
PETER SAUNDERS - 7

PL16175.ars

Page 86

JEPPESEN GRAY SAKAI P.S.
Attorneys at Law
10655 NE 4th Street, Suite 801
Bellevue, Washington 98004
(425) 454-2344

1 9. The Plaintiffs have complained to the Meyers about the Maple Tree
2 interfering with the Plaintiffs' views from their respective properties. Despite
3 demand from the Plaintiffs, the Defendants have refused to trim or remove the
4 Maple Tree to comply with the Covenants.
5

6 10. The Somerset Community Covenant Review Committee (the "CRC")
7 reviewed the Plaintiffs' complaints both on site and in committee and they concluded
8 that the Maple Tree was interfering with the Plaintiffs' views and the views from
9 houses on several other properties. On or about May 28, 2009, the CRC sent a
10 letter to the Meyers stating that the CRC had determined that the Maple Tree was
11 interfering with the Plaintiffs' views, and therefore the Maple Tree needed to have
12 its canopy width trimmed to 30 feet. Attached hereto as Exhibit D is a true and
13 correct copy of the CRC's May 28, 2009 decision. The Defendants took no action
14 to comply with the CRC's decision.
15

16 11. On or about April 27, 2010, the CRC issued a second letter ruling
17 regarding the Maple Tree. In it the CRC ordered that the height of the Maple Tree
18 also be reduced significantly. Attached hereto as Exhibit E is a true and correct
19 copy of the CRC's April 27, 2010 decision. The Defendants took no action to
20 comply with the CRC's second ruling.
21

22 12. On November 12, 2010, all parties and counsel participated in a formal
23 mediation with former Judge Steve Scott at JDR. The mediation was, unfortunately,
24 unsuccessful.
25

DECLARATION OF MICHAEL A.
O'BRIEN - 5

PL16229 .ar#

6
7
8 **SUPERIOR COURT OF WASHINGTON**
9 **FOR KING COUNTY**

10 REGINALD PETER SAUNDERS and
11 ELIZABETH SAUNDERS, et al.,

12 Plaintiffs,

13 v.

14 VERNON L. MEYERS and VIRGINIA
15 C. MEYERS, et al.,

16 Defendants.

NO. 11-2-1407-4 SEA

SECOND DECLARATION OF
STEPHEN B. SMOLINSKE IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

17
18 I, the undersigned, declare under the pains and penalties of the laws of perjury of the
19 State of Washington:

- 20 1. I am over the age of 18 years and competent to testify to the facts hereinafter stated.
21 2. I am the son-in-law of the Defendants Vernon L. Meyers and Virginia C. Meyers.
22 3. During the last two years, the Meyers have asked for my assistance in acting as
23 their representative to deal with neighboring complaints about their large Big leaf Maple tree
24 located on the Meyers property.
25
26

SECOND DECLARATION OF
STEPHEN B. SMOLINSKE - 1

WILLIAMSON LAW OFFICE

COLUMBIA CENTER TOWER
701 5th Avenue - Suite 5500
P.O. BOX 99821
Seattle - WA - 98139-0821
TEL. 206.297.0411 / FAX 206.297.0313

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16
DECLARATION /GERALD HARKLEROAD
DECLARATION /MICHAEL A OBRIEN

819 - 869
1009 - 1014
870 - 877
922 - 959

1
2 suffers from multiple sclerosis. He is confined to life in a wheelchair.
3 small family-owned business in Tukwila. His, wife, Virginia provides most of his in-home
4 care. However, nursing assistants also aid at home and in transporting him to his business.

5 5. Having been married to Vern's and Virginia's daughter, Sherri A. (Meyers)
6 Smolinske since 1984, I have personally witnessed over three occasions where the Big leaf
7 Maple tree has been limbed and pruned by arborists. This has included trimming both the
8 height and width of the tree. Maintaining the health of the tree has been important to the
9 Meyers because it provides a needed summertime canopy for Mr. Meyers during summer
10 months while in his wheelchair.

12 6. I personally assisted the Meyers in assembling the information that they requested
13 for presentation to the Somerset Covenant Review Committee ("CRC") in 2009. This
14 information was requested by the CRC to address complaints about the Meyers Maple Tree.
15 It included a spiral packet of information that included an analysis of tree height in 1962 when
16 the covenants, conditions, and restrictions were recorded. This packet also included historical
17 black and white aerial photos assembled by Ward Carson, a certified Photogrammetrist,
18 showing what trees existed within Somerset Division 4 during the period of 1960 - 1964.
19 These photos show the Meyers' property (Lot 117), Plaintiff Saunders' property (Lot 156),
20 and Plaintiff O'Briens' property (Lot 130) during 1960 to 1964 before the Meyers bought the
21 Lot and constructed their family home in 1970. These photos are also shown in the
22 Declaration of Ward Carson, and as an attachment to Exhibit G of the Gary Albert, Saunders
23 and O'Brien declarations.
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SECOND DECLARATION OF
STEPHEN B. SMOLINSKE - 2

WILLIAMSON LAW OFFICE

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1 7. Throughout the process of working with the CRC to address the neighbors
2 complaints about the maple tree, I can recall no instance where the Plaintiffs Saunders and
3 O'Briens were able to provide any historic photographs of what views they had at the time
4 they constructed their homes in 1963 (O'Briens' former owners) and 1973 (Saunders). In
5 reviewing the Declaration of Gary Albert, Chair of the CRC, dated Nov. 15, 2011 that
6 attaches Ward Carson's historic photos, it appears that the CRC was provided no historic
7 photos by either plaintiff, the Saunders and O'Briens, other than what I provided, to determine
8 what views the Saunders and O'Briens had before they constructed their homes on Lots 130
9 and 156.

10
11 8. It was during this time in dealing with the complaints that the Saunders and
12 O'Briens were asserting against the Meyers before the Somerset CRC that I received an email
13 from the CRC Chair, Gary Albert dated March 24, 2009 at Ex. 6. This email stated that the
14 Meyers' tree was grandfathered: "Original large trees that were already tall enough so that a
15 neighbor did not have a particular view at the time of the covenants could continue to grow
16 higher. There would be no taking of a view since there was no pre-existing view to be taken."

17
18 9. However, this March 24, 2009 email memo goes onto state that there was an
19 unanswered legal question regarding grandfathered status as it dealt with the "width" of the
20 Meyers' tree and that this issue was not addressed in original CCR's. Ex. 6. CRC Chair Mr.
21 Albert states that the CRC would respect the decision of a court that "will provide a more
22 definitive answer" to the scope of grandfathered rights under ¶10 of the CCR's. After
23 meeting with the Meyers to discuss this email, they and I both believed that this was the end
24 of the matter. They and I both felt that the CRC agreed that the Meyers' tree was
25 grandfathered; and that by these statements, the CRC had not recorded any definitive "width"
26

SECOND DECLARATION OF
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1 restrictions amending the 1962 CCR restrictions that were in place when the Meyers bought
2 Lot 117 and built their home in 1970. The Meyers believed from the memo that until the tree
3 "width" issue was resolved by a court that the CRC would have to defer and could not decide
4 this issue.

5 10. In light of this May 24, 2009 email memo, the Meyers and I were surprised to
6 receive the CRC's May 28, 2009 letter at Ex. 9. This letter instructed them to trim the tree
7 width to 30.00 feet. Ex. 9. While this letter conceded the height of the Meyers' Maple tree as
8 a grandfathered right, its entire focus of this CRC letter was on the "width" of the branches of
9 the tree. In the binder of materials given to the CRC we included a Report prepared by Tina
10 Cohen, ISA, a Certified Arborist. Ms. Cohen confirmed that the Meyers' Maple tree when
11 she measured it in 2009 was actually shorter than it was in 1970 when the Meyers constructed
12 their home. She also determined that the Meyers had routinely trimmed the tree with the most
13 recent pruning occurring in 2009. She emphasized that and that any "...attempts to shorten
14 the tree, known as topping, would kill the tree." Ex. 12.

15
16
17 11. In light of the detailed information that we provided to the CRC, it was apparent
18 from reading the CRC's May 28, 2009 decision letter that they had ignored completely this
19 information and the expert advice provided by Ms. Cohen. It contained no professional
20 analysis by a Photogrammetrist or a certified arborist who are experts in their own fields
21 similar to what we had provided in the spiral binder of professional materials that we had
22 provided on April 8, 2009 to the CRC. It was clear to us that their decision to require the tree
23 to be trimmed to 30.00 feet was not based upon any science or the 1962 CCR's but was oddly
24 based upon the Declaration of a Mr. Gerald Harkleroad. Mr. Harkleroad's Declaration,
25 however, involved an entirely separate lawsuit involving an entirely different Division (No. 8)
26

SECOND DECLARATION OF
STEPHEN B. SMOLINSKE -4

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1 of the Somerset plat, and not Somerset Division 4 where the Meyers' and plaintiffs' lots were
2 located.

3 12. In reviewing the May 28, 2009 letter further with the Meyers, we could find
4 nothing in the Meyers title report or the original 1962 grandfathered tree covenants that
5 limited grandfathered trees to Madronas and Evergreens. I personally confronted Mr. Albert
6 in early June of 2009 about the "width" issue contained in the CRC's May 28, 2009 letter and
7 their reliance upon the Harkleroad Declaration as the basis for their decision. I asked him to
8 explain how large grandfathered trees could be expected grow when there were no stated
9 restrictions in the 1962 CCR's. Mr. Albert did not respond until three (3) months later in an
10 email at Ex. 13 that I have attached as a true and correct copy. He stated that:

11
12 We disagree with the concept of a grandfathered tree creating a "view easement." A grandfathered tree is
13 exactly what it sounds like, a tree that is given certain special consideration as long as it exists. Once the tree
14 dies or is removed, any replacement tree becomes a "new" tree and must comply with the covenants like other
15 trees that were not in existence at the time the covenants were recorded.

16 13. While this statement confirmed what the Meyers had understood, namely that there
17 were no express written and recorded CCR restrictions affecting grandfathered trees on how
18 large they could grow, it did not explain how the recorded protections in ¶10 could be
19 arbitrarily trumped by a personal opinion of a Mr. Gerald Harkleroad that the CRC then used
20 to require that the Meyers' tree width to be trimmed because their tree was not a Madrona or
21 Evergreen. The following statement at Ex. 13 made it clear to me that while the Meyers' tree
22 was grandfathered, it did not matter to the CRC so long as they could assist a neighbor in
23 "gaining" a view to which they were not otherwise entitled under the original 1962 CCR's:
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SECOND DECLARATION OF
STEPHEN B. SMOLINSKE -5

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1 The CRC decision found, based on the information you provided, the Meyer's tree was a grandfathered tree and
2 the CRC decision allowed that it was already in the neighbors view in the vertical plane. However, the CRC
3 agreed unanimously that the trees expansion in the horizontal plane was an unnecessary view interference and
4 the Maple tree needs to be trimmed back and maintained to a 30 foot diameter from its current 60 foot
5 diameter. This also complies with the concept found in the Harkleroad Declaration where he stated,

6 "...though it was desirable to maintain some of those existing large trees, in certain cases, we negotiated
7 thinning of those existing trees. Again, this was done in order to gain or protect the view...."

8 14. The CRC's May 28, 2009 Decision letter made no sense whatsoever me since I was
9 sent an email only two months prior from Plaintiff Peter Saunders at Ex. 7 on March 31 ,
10 2009 stating that he and the neighbors needed pictures of the Meyers' tree as it existed in the
11 mid-sixties:

12 "We desperately need pictures of that tree at the time of the initial lot purchases, around
13 the mid sixties. I need that SCA ladies name, and contact-info, so I can delve deeper
14 into her contention that she had seen really early photos of those lots. We need solid
15 evidence to support the degree of grandfathering that the Meyers are entitled to."

16 15. This email from Mr. Saunders confirmed our belief that Mr. Saunders and other
17 complaining neighbors had provided no information whatsoever to the CRC to base their May
18 28, 2009 decision upon in determining the exact views that existed when the original CCR's
19 were recorded in 1962, or at any time thereafter when the Saunders, O'Briens' and Meyers
20 lots were purchased and their homes were constructed.

21 16. Almost another year passed with the Meyers hearing nothing further from the
22 neighbors who filed the complaints with the CRC or from the CRC. We both believed that
23 because the CRC had confirmed that the width of the Maple tree was never restricted under
24 the original 1962 CCR's just like its height, and that the tree was permitted to grow and live
25 as a protected grandfathered entitlement under the CCR's.
26

SECOND DECLARATION OF
STEPHEN B. SMOLINSKE .6

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701 5th Avenue - Suite 5500
P.O. BOX 99821
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1 17. With no warning or notice, the Meyers received a completely new CRC decision
2 letter dated April 27, 2010. Ex. 14. This letter indicates that "reopened" their investigation
3 apparently at the request of Plaintiffs' attorney Mr. Sakai. I read and deal with complex
4 design specifications and governmental regulations daily in the aerospace industry. I
5 personally reviewed the CRC View Guideline (Ex. 4) and the Amended CCR's (Ex. 5). I
6 can find no provisions for "reconsideration" or "re-investigation" of CRC's first decision
7 letter under the CRC's View Guideline or the Amended CCR's. There is there no mention
8 made in this "second" decision at Ex. 14 that references any recorded CCR, Somerset Articles
9 or By-Law provision for reopening an investigation once a decision has previously been
10 made.
11

12 18. I believe that this so-called "reconsideration" decision of April 27, 2010, almost a
13 year after the first May 28, 2009 decision letter at Ex. 9, is a farce. Based upon the
14 information that our certified arborist, Tina Cohen, ISA, provided in her Report in 2009 that I
15 provided to the CRC, the CRC surely knew in issuing this letter that "...attempts to shorten
16 the tree, known as topping, would kill the tree." Please see Ex. 15 that I have attached as a
17 true and correct copy of the binder materials that I provided to the CRC on April 8, 2009.
18 This information shows that in 1962, and at the time of the O'Briens' home was constructed
19 in 1963 that a large mature Maple tree existed on the Meyers' Lot 117 that was located
20 immediately west of the O'Briens' property.
21

22 19. It is readily evident that a year after the CRC's Decision letter, that neither I nor the
23 Meyers were provided any notice of a "reconsideration" process underway with the CRC to
24 change their earlier May 28, 2009 decision letter. It is readily apparent that the Plaintiffs did
25 not like the first May 28, 2009 decision letter, and then got the CRC to withdraw it. Neither I,
26

SECOND DECLARATION OF
STEPHEN B. SMOLINSKE - 7

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COLUMBIA CENTER TOWER
701 5th Avenue - Suite 5500
P.O. BOX 99821
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TEL. 206.292.8411 / FAX 206.292.0312

1 nor the Meyers, were provided any opportunity whatsoever to respond to the photos presented
2 to the CRC by the Plaintiffs before the April 27, 2010 letter was issued. Even the most
3 inexperienced novice unfamiliar with camera settings and focal lengths, could have seen that
4 the attached color photos used to support this letter could have been taken from any location
5 with a telephoto lens to support any intended result. There was no certification by any expert
6 Photogrammetrist such as Ward Carson, indicating who took the photos. I believe that the
7 expert opinion of photogrammetrist Ward Carson explains why these lay photos cannot be
8 interpreted in the manner that the Somerset CRC and the neighbors have tried to present
9 them. I can find no precise date and location and elevation they were taken. It is impossible
10 to tell what type of lens was used, or that these photos were taken using the View Guideline's
11 "observation zone" criteria at Appendix A to Ex. 4.

12
13 20. I have also read Mr. Saunders' Declaration dated November 17, 2011 and Mr.
14 O'Brien's Declaration dated November 14, 2011. Both Declarations state under oath that on
15 November 12, 2010 all parties and counsel participated in a formal mediation with Judge
16 Steve Scott at Judicial Dispute Resolution ("JDR"). Both Mr. Saunders and Mr. O'Brien state
17 that "The mediation was, unfortunately, unsuccessful." In making this statement, they
18 unfairly imply to the court that the Meyers were somehow the cause for the mediation being
19 unsuccessful.
20

21 21. This statement is upsetting to both me and the Meyers because Judge Scott of JDR
22 told the Meyers, both in writing and orally, that all mediation matters were privileged and
23 confidential. Judge Scott told us that he had also provided this confidentiality warning to the
24 Plaintiffs and their attorney. Compelled to now answer what I believe is a breach of the
25 confidentiality agreement as part of this costly mediation, I was told by Judge Scott at the
26

SECOND DECLARATION OF
STEPHEN B. SMOLINSKE . 8

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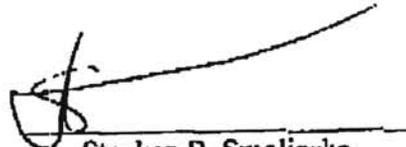
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conclusion of the mediation that his suggestion that both parties employ and agree to the recommendations of a panel made up of three certified arborists that he (Judge Scott selected) to determine how the Meyers' tree could be annually managed was rejected by the Plaintiffs.

22. I have also attached a copy of a King County Department of Assessments eReal Property Report at Ex. 16 that I downloaded from the internet and printed on November 11, 2011 that I certify as true and correct copy. This Report indicates that the Plaintiff Saunders' residence was constructed in 1973. This construction would have occurred some three (3) years after the Meyers constructed their home in 1970.

Dated this 6th day of December 2011 at Seattle, WA.


Stephen B. Smolinske

Stephen B. Smolinske Declaration-120611.doc

SECOND DECLARATION OF
STEPHEN B. SMOLINSKE - 9

WILLIAMSON LAW OFFICE
COLUMBIA CENTER TOWER
701 5th Avenue - Suite 5500
P.O. BOX 99821
Seattle, WA - 98138-0871
Tel. 206.292.0411 / FAX 206.292.0313