

68249-1

68249-1

NO. 68249-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

VERNON L. MEYERS and VIRGINIA C. MEYERS, husband and wife; MEYERS REVOCABLE LIVING TRUST; JOHN DOE and JANE DOE, TRUSTEES OF THE MEYERS REVOCABLE LIVING TRUST; and JOHN DOE and JANE DOE, BENEFICIARIES OF THE MEYERS REVOCABLE LIVING TRUST,

Appellants,

v.

REGINALD PETER SAUNDERS and ELIZABETH SAUNDERS, husband and wife; and MICHAEL A. O'BRIEN and MARCY L. O'BRIEN, husband and wife,

Respondents.

2011 DEC 13 11:51 AM
COURT OF APPEALS
STATE OF WASHINGTON
FILED

RESPONDENTS' BRIEF

Allen R. Sakai, WSBA #11953
Jeppesen Gray Sakai P.S.
Attorneys for Respondents

10655 NE 4th Street, Suite 801
Bellevue, WA 98004
(425) 454-2344

TABLE OF CONTENTS

I. Statement of the Case -1-

 A. Parties and Property Ownership -1-

 B. The Relevant Covenants -2-

 C. The Dispute -2-

 D. The CRC Decisions -2-

 E. The Lawsuit -3-

II. Statement of Issues -4-

III. Standard of Review -4-

IV. Arguments -5-

 A. Trees Cannot Interfere With Views -5-

 B. The Covenants Must Be Read to Preserve Views -9-

 C. Extrinsic Evidence Including Gerald Harkleroad's Declarations Was Properly Admitted -15-

D.	<u>This Case Does Not Involve Additional Burdens Placed Upon the Appellants by the CRC's Two Letter Decisions</u>	-22-
E.	<u>The CRC Decisions Were Reasonable and There Was No Unauthorized Reconsideration by the CRC</u>	-28-
F.	<u>Decisions by the CRC Regarding the Appellants' Residence Have Nothing To Do With Their Maple Tree</u>	-32-
G.	<u>There Was No Mediation by the CRC</u>	-36-
H.	<u>No Defense of Estoppel, Laches, and Unjust Enrichment</u>	-37-
I.	<u>The CRC Was Not a Necessary Party</u>	-44-
J.	<u>Respondents Are Entitled to Attorney Fees</u>	-47-
V.	<u>Conclusion</u>	-50-

TABLE OF CASES

Bauman v. Turpen, 139 Wn. App. 78, 160 P.3d 1050 (2007) . . . -7-,
-13-, -14-, -21-, -40-, -44-, -47-

Black v. Evergreen Land Developers, Inc., 75 Wn.2d 241, 450 P.2d 470
(1969) -13-

Bloome v. Haverly, 154 Wn. App. 129, 225 P.3d 330 (2010) . . -26-,
-27-

Board of Regents of the University of Washington v. Seattle, 108
Wn.2d 545, 741 P.2d 11 (1987) -38-

Canterbury Shores Associates v. Lakeshore Properties, Inc., 18 Wn.
App. 825, 572 P.2d 742 (1977) -42-

Carillo v. City of Ocean Shores, 122 Wn. App. 592, 94 P.3d 961
(2004) -38-

Day v. Santorsola, 118 Wn. App. 746, 76 P.3d 1190 (2003) -47-

Deep Water Brewing, LLC v. Fairway Resources Ltd., 152 Wn. App.
229, 215 P.3d 990 (2009) -11-

First American Title Insurance Co. v. Liberty Capital Starpoint Equity
Fund, LLC, 161 Wn. App. 474, 254 P.3d 835 (2011) -39-, -41-

Greer v. Northwestern National Insurance Co., 36 Wn. App. 330, 674
P.2d 1257 (1984) -35-

<u>Greer v. Northwestern National Insurance Co.</u> , 109 Wn.2d 191, 743 P.2d 1244 (1987)	-35-
<u>Heath v. Uraga</u> , 106 Wn. App. 506, 24 P.3d 413 (2001)	-29-
<u>Hollis v. Garwall, Inc.</u> , 137 Wn.2d 683, 974 P.2d 836 (1999)	-19-, -21-
<u>Huff v. Northern Pacific Railway Co.</u> , 38 Wn.2d 103, 228 P.2d 121 (1951)	-38-
<u>J.L. Cooper & Co. v. Anchor Securities Co.</u> , 9 Wn.2d 45, 113 P.2d 845 (1941)	-44-
<u>Kohn v. Georgia-Pacific Corp.</u> , 69 Wn. App. 709, 850 P.2d 517 (1993)	-5-
<u>Lakes of Mercer Island Homeowners Association v. Witrak</u> , 61 Wn. App. 177, 810 P.2d 27 (1991)	-24-
<u>Leighton v. Leonard</u> , 22 Wn. App. 136, 589 P.2d 279 (1978)	-25-
<u>Lybbert v. Grant County</u> , 141 Wn.2d 29, 1 P.3d 1124 (2000)	-39-
<u>Mack v. Armstrong</u> , 147 Wn. App. 522, 195 P.3d 1027 (2008)	-10-, -23-, -33-, -47-
<u>Mahler v. Szucs</u> , 135 Wn.2d 398, 957 P.2d 632 (1998)	-48-
<u>Murphy v. City of Seattle</u> , 32 Wn. App. 386, 647 P.2d 540 (1982)	-25-

Ricicht-Price Recreation, LLC v. Connells Prairie Cmty. Council, 105 Wn. App. 813, 21 P.3d 1157 (2001), remanded, 146 Wn.2d 370, 46 P.3d 789 (2002), cert. denied, 540 U.S. 1149 (2004) -16-

Riss v. Angel, 131 Wn.2d 612, 934 P.2d 669 (1997) . -11-, -29-, -31-,
-32-, -35-

Ross v. Bennett, 148 Wn. App. 40, 203 P.3d 383 (2008); rev. denied, 166 Wn.2d 1012, 210 P.3d 1018 (2009) -11-

Skagit County v. Skagit Hill Recycling, Inc., 162 Wn. App. 308, 253 P.3d 1135 (2011) -5-

Storseth v. Folsom, 45 Wash. 374, 88 P. 632 (1907) -42-

Valley View Industrial Park v. Redmond, 107 Wn.2d 621, 733 P.2d 182 (1987) -41-

Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 118 P.3d 322 (2005) -11-

Wenatchee Sportsmen Association v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000) -5-

White v. Wilhelm, 34 Wn. App. 763, 665 P.2d 407 (1983) -18-

Wimberly v. Caravello, 136 Wn.App. 327, 149 P.3d 402 (2006) -17-,
-45-, -46-, -47-

TABLE OF STATUTES

RCW 7.07.030 -37-

RCW 64.38 -48-

RCW 64.38.020 -25-

RCW 64.38.020(4), (12)-(14) -48-

RCW 64.38.050 -49-

TABLE OF OTHER AUTHORITIES

33 Wash. Prac., Wash. Construction Law Manual, § 7:8 (2011-2012
ed.) -49-

CR 7(a) -47-

CR 19(a)(1) or (2) -47-

CR 19(c) -47-

CR 23.1 -49-

ER 408 -37-

RAP 18.1(a) -49-

I. Statement of the Case.

A. Parties and Property Ownership. Respondents Reginald Peter Saunders and Elizabeth Saunders (the "Saunders") are the owners of the real property at 14001 SE 45th Court, Bellevue, King County, Washington 98006 (the "Saunders Property"). CP 1, 10, 81. The Saunders purchased the Saunders Property on or about August 24, 1972. CP 81.

Respondents Michael A. O'Brien and Marcy L. O'Brien (the "O'Briens") are the owners of the real property at 4551 - 140th Avenue SE, Bellevue, King County, Washington 98006 (the "O'Brien Property"). CP 2, 10, 125. The O'Briens purchased the O'Brien Property on or about September 12, 1997. CP 125.

Appellants Vernon L. Meyers and Virginia C. Meyers, husband and wife (the "Meyers"), owned the real property at 13911 SE 45th Place, Bellevue, in King County, Washington 98006 (the "Meyers Property"). CP 2, 10, 12. Appellant, the Meyers Revocable Living Trust ("Meyers Trust"), is the current owner of the Meyers Property. CP 4, 10, 185. The Meyers Property was transferred to the Meyers Trust on or about September 28, 2000. CP 4, 12, 185.

B. The Relevant Covenants. The Declaration of Protective Covenants, Restrictions, Limitations, Conditions, and Agreements with Respect to the Plats of Somerset 2, 4, and 6, all located in Section 15, Township 24 North, Range 5 E. W.M. were recorded on February 19, 1962 under King County Recording No. 5389232 (the "Covenants"). The parties agree that the Covenants govern the dispute which is the subject matter of this lawsuit. CP 2-4, 12, 81, 184-86.

C. The Dispute. There currently exists a single large maple tree in the back yard of the Meyers's property (the "Maple Tree"). That Maple Tree is the subject matter of this lawsuit. CP 186. The Respondents' properties are located uphill of the Appellants' property. The Respondents have complained to the Appellants about the Maple Tree interfering with the Respondents' views from their respective properties. CP 37-62, 85, 128, Despite demand from the Respondents, the Appellants refuse to trim the Maple Tree to comply with the Covenants. CP 37-62, 85, 128.

D. The CRC Decisions. At the Respondents' request (CP 37-62), the Somerset Community Covenant Review Committee (the "CRC") considered the Respondents' complaints and issued their May 28, 2009 letter decision stating that the Maple Tree was interfering

with the Respondents' views and therefore the Maple Tree needed to have its canopy width trimmed to 30 feet. CP 23-24, 63-67. The Appellants took no action to comply with the CRC's decision. CP 85-86, 128-29.

The CRC then issued its April 27, 2010 letter ordering the height of the Maple Tree to be reduced significantly. CP 24, 68-71. The Appellants did not comply with the CRC's second ruling either. CP 85-86, 128-29.

E. The Lawsuit. Because the Appellants failed to comply with the CRC's decisions, the Respondents brought suit against the Appellants. CP 1-8.

Cross motions for summary judgment were heard by the Honorable Gregory Canova on December 16, 2011. RP 1-2. Judge Canova denied the Appellants' motions to strike evidence on December 16, 2011 (RP 2, CP 484-85), granted the Respondents' motion for summary judgement on January 5, 2012 (CP 486-89), denied the Appellants' motion for summary judgment on January 5, 2012 (CP 490-92), and denied the Appellants' motion for reconsideration on February 29, 2012 (CP 578-79). The Honorable

Harry McCarthy then granted the Respondents' motion for attorney fees and costs on April 3, 2012. CP 1767-70.

The Maple Tree remains in place, neither reduced in height nor width and still in violation of the Covenants. CP 86, 128-29.

II. Statement of Issues.

The Respondents disagree with the Appellants' statement of issues.

1. Regardless of whether the Maple Tree is an existing tree or not, if the Maple Tree unnecessarily interferes with the views from the Respondents' properties, should the Maple Tree be trimmed?

2. Is the CRC the proper entity to determine view interference?

3. Did the CRC properly and reasonably apply Section 10 of the Covenants to the Maple Tree in finding that the Maple Tree was in violation of the Covenants?

4. Should the court substitute its judgment for that of the CRC?

5. Are the Respondents entitled to recover their attorney fees and costs for enforcing the Covenants?

III. Standard of Review.

The underlying matter was decided on summary judgment so this court must view the relevant facts in the light most favorable to the Appellants and confirm whether the Respondents are entitled to judgment as a matter of law. The legal conclusions made by the trial court should be reviewed de novo. Skagit County v. Skagit Hill Recycling, Inc., 162 Wn. App. 308, 317-18, 253 P.3d 1135 (2011). This court must engage in the same inquiry as the trial court. Kohn v. Georgia-Pacific Corp., 69 Wn. App. 709, 715, 850 P.2d 517 (1993). The case of Wenatchee Sportsmen Association v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000), Brief of Appellants, at 29, is not applicable because the substantial evidence standard does not apply to a case decided on summary judgment.

IV. Arguments.

A. Trees Cannot Interfere With Views.

The primary focus of this case is on Section 10 of the Covenants which states:

"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 shall be the sole judge in deciding whether there has been such an interference."

CP 81-82, 89, 125-26, 132. Based on a plain reading of Section 10 of the Covenants, the CRC properly ordered the trimming of the Maple Tree. The following chart sets forth how the Covenants must be applied. Read each column downward in answering the questions in the first column. The first two columns apply to trees in existence in 1962. The last 2 columns apply to trees not in existence in 1962.

	Trees in Existence in 1962	Trees in Existence in 1962	Trees Not in Existence in 1962	Trees Not in Existence in 1962
Does the tree unnecessarily interfere with views?	Yes	No	Yes	No
Height Limit/Width Limit	Tree must be trimmed or removed to restore views	Unlimited	Tree must be trimmed or removed to restore views	20 feet
Who determines view interference?	CRC	CRC	CRC	CRC

There are three issues which must be addressed when reviewing the Respondents' complaint about the Appellants' Maple Tree:

1. Who determines view interference?
2. Does the Appellants' Maple Tree unnecessarily interfere with the views from the Respondents' residences?
3. If the Appellants' Maple Tree does unnecessarily interfere with the views from the Respondents' residences, what should happen to the Appellants' Maple Tree?

There have been 11 formal complaints made to the CRC regarding the Maple Tree. CP 23, 37-62. In addressing those complaints (which include complaints from the Respondents), the CRC has answered the first question "yes." CP 24. There is no question from the photographs attached to the Declarations of Michael A. O'Brien (CP 126-27, 147-52) and Reginald Peter Saunders (CP 83-84, 106-12) and the photographs that were submitted to the CRC (CP 45, 52-54), that the Respondents' views are currently obstructed by the Maple Tree.

A careful reading of Section 10 literally and standing alone can only lead to one clear and unambiguous meaning - that the word "they" in the proviso portion of Section 10 applies to all trees, existing or new, short or tall, narrow or wide. "Courts are to determine the drafter's intent by examining the clear and unambiguous language of

a covenant." Bauman v. Turpen, 139 Wn. App. 78, 88-89, 160 P.3d 1050 (2007).

Regardless of the age or size of the tree, if the CRC determines that the tree unnecessarily interferes with a view from a home, then the tree must be removed or trimmed to restore that view. If the tree does not unnecessarily interfere with the view from another residence, then trees in existence in 1962 when the Covenants were recorded can grow to an unlimited height and newer trees can grow to a height of no more than 20 feet. It is a conditional height limit. You only reach the issue of the height limit if the tree isn't blocking someone's view.

The Appellants claim that "[a]pplying the ordinary meaning rule, this court should declare that any Somerset Div. 4 lot containing 'existing trees' in 1962 upon recording of the CCR's are not subject to any size (height or width) restrictions." Brief of Appellant, at 21. To read Section 10 to allow all trees existing in 1962 to grow to an unlimited height regardless of the tree's impact on views would require this court to essentially rewrite Section 10, apply the proviso and the word "they" to only new trees and render the view preservation goal of the Covenants almost meaningless.

If the Covenants are read to mean that any tree in existence in 1962 of any type or size can grow to an unlimited height, that would lead to the absurd result where a tree say two feet in height in 1962 could grow to an unlimited height, block views and there is nothing that can be done. Surely that is not what Section 10 says or means.

The Appellants make much of the fact that the Maple Tree existed in 1962 as a full grown tree. The CRC recognized that fact by only ordering the Maple Tree to be trimmed in width and height to what the CRC found was the 1962 height and width. CP 63-71. Despite the fact that the CRC is supposed to make such determinations (CP 89, 132), the Appellants just cannot accept the CRC's decisions even after the CRC considered all of the evidence submitted by both parties. CP 63-71.

Based on the clear and unambiguous language of Section 10, the Maple Tree violates the Covenants and the trial court decision ordering the Appellants to comply with the 2009 and 2010 letter decisions of the CRC should be affirmed.

B. The Covenants Must Be Read to Preserve Views.

If this court determines that it needs to look beyond the plain language of Section 10 only of the Covenants, then it should look at

the Covenants as a whole and order the Appellants' to comply with the 2009 and 2010 decisions of the CRC as the trial court held. In looking at the Covenants as a whole and not just Section 10, the following principles should apply.

"Our goal here is to construe these restrictive covenants by reading them in their entirety to ultimately determine the intent of the parties. Riss v. Angel, 131 Wash.2d 612, 621, 934 P.2d 669 (1997). "[I]f more than one reasonable interpretation of the covenants is possible regarding an issue, we must favor that interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions." Green v. Normandy Park Riviera Section Cmty. Club, Inc., 137 Wash.App. 665, 683, 151 P.3d 1038 (2007), review denied, 163 Wash.2d 1003, 180 P.3d 783 (2008)."

Mack v. Armstrong, 147 Wn. App. 522, 527, 195 P.3d 1027 (2008).

"When we construe restrictive covenants, our primary task is to determine the drafter's intent. Wimberly v. Caravello, 136 Wash. App. 327, 336, 149 P.3d 402 (2006). While interpretation of the covenant is a question of law, the drafter's intent is a question of fact. Id. We examine the language of the covenant and consider the instrument in its entirety. Bauman v. Turpen, 139 Wash. App. 78, 89, 160 P.3d 1050 (2007). We review questions of law de novo. Bauman, 139 Wash. App. at 86, 160 P.3d 1050. Questions of fact are reviewed for substantial evidence. Bauman, 139 Wash. App. at 87, 160 P.3d 1050. But where reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law. Owen v. Burlington N. and Santa Fe R.R. Co., 153 Wash.2d 780, 788, 108 P.3d 1220 (2005)."

"[I]n conflicts between homeowners as to interpretation of restrictive covenants, courts should place special emphasis on arriving at an interpretation that protects homeowners' collective interest."

Ross v. Bennett, 148 Wn. App. 40, 49-50, 203 P.3d 383 (2008); rev. denied, 166 Wn.2d 1012, 210 P.3d 1018 (2009); See also, Riss v. Angel, 131 Wn.2d 612, 621, 934 P.2d 669 (1997).

"We, like the trial court, consider both the subject matter and the objective of the agreement, the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of their respective interpretations. See Berg v. Hudesman, 115 Wash.2d 657, 667-69, 801 P.2d 222 (1990); Stender v. Twin City Foods, Inc., 82 Wash.2d 250, 254, 510 P.2d 221 (1973).

Deep Water Brewing, LLC v. Fairway Resources Ltd., 152 Wn. App. 229, 248, 215 P.3d 990 (2009).

"More recently, however, we have indicated that 'where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable.' Riss, 131 Wash.2d at 623, 934 P.2d 669. This is because "[s]ubdivision covenants tend to enhance, not inhibit, the efficient use of land.... In the subdivision context, the premise [that covenants prevent land from moving to its most efficient use] generally is not valid." Id. at 622, 934 P.2d 669 (emphasis omitted) (second alteration in original) (quoting Mains Farm, 121 Wash.2d at 816, 854 P.2d 1072)."

Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 120, 118 P.3d 322 (2005).

The reasonable expectations of the Somerset owners (to preserve views) are expressly stated in Section 10 of the Covenants as well as in the following other sections of the Covenants. The CRC (formerly the Building Committee) is charged with reviewing and approving all house building plans under Section 4 of the Covenants:

"[T]he Building Committee shall have the right to take into consideration . . . the harmony thereof with the surroundings, and the effect of the building or other structure or alterations therein as planned on the outlook of the adjacent or neighboring property, and the effect or impairment that said structures will have on the view of surrounding building sites . . ."

CP 88, 131. Furthermore, Section 3 of the Covenants states:

"[N]o lines or wires for the transmission of current or for telephone use shall be constructed, placed or permitted to be places, upon any residential lot outside the buildings thereon unless the same shall be underground or in a conduit attached to the building. No television or radio aerial shall be erected or placed on any residential site which is more than six (6) feet in height above the highest point (exclusive of chimneys) on the building or structure upon which it is erected."

CP 87-88, 130-31. Both of these other sections of the Covenants show that preserving views is paramount and the Covenants must be

interpreted in such a way so as to give meaning to the overall goal of these Covenants - to preserve views.

Somerset is a hillside community with sweeping views of Seattle, Bellevue, Lake Washington and the Olympic Mountains. CP 24, 73, 82, 126. Therefore, the interpretation that protects the collective interests of all Somerset owners is to preserve views, even at the expense of trees. See, Black v. Evergreen Land Developers, Inc., 75 Wn.2d 241, 242, 450 P.2d 470 (1969) (Although this case involved a different part of Somerset, "priceless view[s]" in Somerset were the subject of the lawsuit).

The later adopted View Guideline states: "Somerset is a community where views add value to homes." CP 26. As 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. Footnote 1 to the View Guideline states: "The intent here is to protect the view with respect to existing structures, not vegetation." CP 26.

The case of Bauman v. Turpen, 139 Wn. App. 78, 160 P.3d 1050 (2007), has been cited by both parties. In Bauman, the court held that even though the deed restriction in question did not mention view

preservation and instead only set a building height restriction of one story, the intent of the restrictive covenant was to preserve views.

"Preservation of neighboring views is a recognized interest and is not per se unreasonable. Rather, as we have indicated in our holding in Foster, covenants preserving views will be upheld when substantial evidence supports them."

Bauman v. Turpen, 139 Wn. App. at 91. Unlike in the Bauman case, the Somerset Covenants do specifically address view preservation as a goal in three separate parts of the Covenants CP 87-89, 130-32.

The View Guidelines are consistent with the foregoing interpretation of Section 10 of the Covenants. It states in part:

"The 20' provision means two things. First, "new" trees shall not be allowed to grow more than twenty (20) feet. Second, the twenty (20) foot height restriction does not apply to Grandfathered Trees, provided they do not unnecessarily interfere with the view of another residence. If either tree unnecessarily interferes with the view of another residence 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." (Emphasis added).

CP 26, 36. The View Guideline further states that the view being protected is the view that existed at the time the Respondents' houses were built. CP 26, 36. The CRC's two letters did exactly that. They determined the view that existed when the Respondents' houses were

built and that is what the CRC ordered restored. CP 63-71. The Appellants just disagree with the CRC's determinations despite the fact that all of the evidence they submitted to the trial court was already submitted to and considered by the CRC. CP 63, 1120, 1130, 1140-43, 1157, 1172-74, 1181-82.

It is undisputed that the sweeping views of Lake Washington, Seattle and the Olympic Mountains from the Respondents' first floor living rooms are blocked now. CP 82-86, 106-12, 126-29, 148-52. The CRC's clearly found that the Maple Tree blocks the views from the Respondents' properties. CP 23-24, 63-71. The Appellants' should be ordered to comply with the CRC decisions (as the trial court held) to restore the Respondents' views. CP 24.

C. Extrinsic Evidence Including Gerald Harkleroad's Declarations Was Properly Admitted.

The Appellants moved to strike a number of items of evidence and the trial court denied the Appellants' motion. RP 2, CP 484-85. The order denying the Appellants' motion to strike was not included in the Appellants' two Notices of Appeal. CP 1377-82, 2350-64. This court should not reconsider that order because the order denying the motion to strike was not part of the Appellants' Notices of Appeal.

RAP 2.4(b) does not apply because the order properly appealed from can be reviewed without considering the trial court's decision to deny the motion to strike. See Riciht-Price Recreation, LLC v. Connells Prairie Cmty. Council, 105 Wn. App. 813, 819, 21 P.3d 1157 (2001), remanded, 146 Wn.2d 370, 46 P.3d 789 (2002), cert. denied, 540 U.S. 1149 (2004) ("The issues in the two orders must be so entwined that to resolve the order appealed, the court must consider the order not appealed.").

The Respondents believe that either a plain reading of Section 10 alone or reviewing the Covenants as a whole correctly led to the trial court's decision to order the Appellants to comply with the two CRC decisions. However, if this court finds the language of Section 10 to be ambiguous, then the declarations of Gerald Harkleroad are helpful in illuminating the terms of the written view covenant, providing context background for the court and to clarify such ambiguities.

"We apply basic rules of contract interpretation. Lane v. Wahl, 101 Wash. App. 878, 883, 6 P.3d 621 (2000). This includes the "context" rule of Berg v. Hudesman. Wahl, 101 Wash. App. at 883, 6 P.3d 621. That is, the court determines the intent of the contracting parties by viewing the contract as a whole, its subject matter and objective, the circumstances surrounding its making, the

subsequent acts and conduct of the parties, and the reasonableness of the interpretations advocated by the parties. Berg, 115 Wash.2d at 667, 801 P.2d 222. Extrinsic evidence is admissible as to 'the entire circumstances under which the contract was made' to help the court ascertain the parties' intent."

Wimberly v. Caravello, 136 Wn. App. 327, 336, 149 P.3d 402 (2006).

In Wimberly, the court allowed the testimony of one of the original plat developers as extrinsic evidence of the drafters of the covenants.

Id. at 337-40.

Mr. Harkleroad worked for the developer of Somerset and although he did not draft the Covenants, he certainly had knowledge of their intent. CP 73. More importantly, he administered the Covenants as chair of the Building Committee, the predecessor to the CRC. CP 73-78, 747. So his statements are factual and they reflect how the Covenants were applied throughout Somerset during his tenure on Building Committee. His statements are not merely unilateral statements of his subjective intent. CP 73, 747.

The CRC met with Mr. Harkleroad on April 25, 2006 "[t]o help clarify any ambiguities about the CC&R's that govern the various Somerset divisions." CP 22, 25, 74-79, 747.

"Ambiguous intent is to be clarified by reference to the instrument, together with all surrounding facts and

circumstances." Foster v. Nehls, 15 Wash.App. 749, 751, 551 P.2d 768 (1976)."

White v. Wilhelm, 34 Wn. App. 763, 771-72, 665 P.2d 407 (1983) (One of the original developers was allowed to testify as to intent of the covenants). Mr. Harkleroad's 1989 declaration states:

"The purpose or intent of the covenant restricting tree height was simple: to protect the view of the residents of Somerset No. 8. The standard we used to evaluate view obstruction was whether the view of the lake was impeded for a person in a standing position in the main living room."

CP 77. Mr. Harkleroad is factually stating the standard he used to evaluate view obstruction. CP 752. He states in his 2011 Declaration that Somerset is a view community where views should win out over trees. CP 73. He states in his 1989 Declaration that the reference to "trees in existence" only meant "full grown Madrona and other evergreen trees in the subdivision." CP 77-78. According to him, fewer than two dozen trees were intentionally preserved and they were all full grown Madrona and evergreen trees. CP 79. Other than those Madrona and evergreen trees, no other trees were to be allowed to obstruct a homeowner's view. CP 22, 25, 74, 79. These two dozen trees were the "existing trees" that were mentioned in the Covenants, not the Appellants' Maple Tree. These statements are all evidence of

surrounding facts and circumstances, not just the unilateral intent of a party. Hollis v. Garwall, Inc., 137 Wn.2d 683, 696, 974 P.2d 836 (1999).

However, even though the Maple Tree would not qualify as an existing tree under Mr. Harkleroad's definition of existing trees, neither of the two CRC decisions regarding the Appellants' Maple Tree mention the type of tree as the reason for requiring trimming of the Maple Tree. CP 63-71. If that were the case, the decisions of the CRC would have simply stated that the Maple Tree needed to be trimmed because it was the wrong type of tree.

In his 1989 Declaration, Mr. Harkleroad makes several other factual statements. He states that "any trees which were small or insignificant in size in 1962 and which over the years would grow beyond 20 feet in height and unnecessarily interfere with the view from another resident's living room, would be required by the covenants to be trimmed so as to open that view." CP 78. In his 2011 Declaration he states that even as new houses were built, trees of all types were removed or trimmed in order to ensure an unobstructed view. CP 74. These factual statements show how the Covenants have been applied and it avoids the absurd result sought by the Appellants - that even a

small tree could grow to an unlimited height just because it was planted and growing in 1962 at the time the Covenants were recorded. Brief of Appellant, at 21.

The 2006 minutes of his meeting with the CRC are telling and provide additional context. The developers wanted to maintain an even contoured roof ridge line so that no home would protrude above that ridge line. CP 25, 747. Clearly no developer would so carefully do that and then allow trees to indiscriminately grow and protrude above that same ridge line.

If this court believes that the Covenants are somehow ambiguous, then the trial court was right to consider Mr. Harkleroad's declarations. They are mostly factual statements about what he did when he was administering the view Covenants throughout Somerset. CP 73-74. They are already being used by the CRC to make decisions about trees and views throughout Somerset, with his 1989 Declaration even referenced as part of the View Guideline adopted by the CRC. CP 27. As set forth in the 2006 CRC Minutes, Mr. Harkleroad and his thoughts were also accepted and used by the CRC to clarify ambiguities in the Covenants. CP 25. If the Covenants are deemed ambiguous by this court then his statements should properly be used

to illuminate the written view covenants, provide context, clarify those ambiguities and show how the Covenants have been applied over the years.

"Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written. Nationwide Mut. Ins. Co., 120 Wash.2d at 189, 840 P.2d 851."

Hollis v. Garwall, Inc., 137 Wn.2d 683, 697, 974 P.2d 836 (1999). In a more recent case, the Court of Appeals, citing Hollis vs. Garwall stated as follows:

"The recognized principles for construing covenants are set forth in Burton v. Douglas County. Courts are to determine the drafter's intent by examining the clear and unambiguous language of a covenant. We must consider the instrument in its entirety and, when the meaning is unclear, the surrounding circumstances that tend to reflect the intent of the drafter and the purpose of a covenant that runs with the land. While the interpretation of a restrictive covenant is a question of law, intent is a question of fact. Extrinsic evidence of intent is admissible if relevant to interpreting the restrictive covenant. In Hollis v. Garwall, the Supreme Court applied the Berg v. Hudesman context rule to interpreting restrictive covenants. Under this rule, evidence of the "surrounding circumstances of the original parties" is admissible "to determine the meaning of the specific words and terms used in the covenants."

Bauman v. Turpen, 139 Wn. App. 78, 88-89, 160 P.3d 1050 (2007).

The Respondents' believe that Section 10 is clear and unambiguous. But if the court finds them ambiguous, then Mr. Harkleroad's

statements setting forth the surrounding circumstances can be used to clarify the ambiguity and help determine the specific meaning of the words used in the Covenants.

Lastly, contrary to the assertions of the Appellants (Brief of Appellants, at 40), Mr. Harkleroad had no animosity towards the Appellants and in fact had no knowledge of the Appellants or this case. CP 746-47, 752-53.

D. This Case Does Not Involve Additional Burdens Placed Upon the Appellants by the CRC's Two Letter Decisions.

The Appellants executed the First Amendment to Covenants indicating their approval of the CRC as the successor to the Building Committee. CP 102, 145.

The Appellants agreed with the part of the CRC's decision stating that the Appellant's Maple Tree was a grandfathered tree. CP 1495-96. However, the Appellants believed they could ignore the CRC's decisions that they decrease the width of the Maple Tree (2009 decision) (CP 63-67) and decrease the height of the Maple Tree (2010 decision). CP 68-71.

A review of the two CRC letters shows that the CRC did not make a decision on the Maple Tree based upon the species of the tree.

CP 63-71. The Appellants' claim that the CRC added a species component to the Covenants is simply not true as it applies to these Appellants. Nowhere in the two CRC letters does the species of the Maple Tree come into play. CP 63-71.

The two CRC letters do not add a size component to the Covenants. Under Section 10 of the Covenants, the CRC is expressly given the authority to determine view interference. CP 89, 132. They did so in their 2009 and 2010 letter decisions. CP 63-71. Based upon their determination that the Maple Tree interfered with the Respondents' views, the CRC stated the Appellants needed to trim the Maple Tree to restore the Respondents' views. CP 63-71. The CRC did what it was supposed to do. Section 10 gives the CRC the right to do what it did here. The CRC did not add anything to the Covenants by making its decisions in this case.

The Appellants cite to Mack v. Armstrong, 147 Wn. App. 522, 195 P.3d 1027 (2008), to support their claim that the CRC has somehow placed additional burdens on them. However, the real holding of the Mack case is that specific covenant provisions trump general covenant provisions which is not what we have in the case before this court. Mack v. Armstrong, 147 Wn. App. at 529. Section

10 of the Covenants contains a very specific statement which the Appellants have always ignored - the CRC is the sole judge of whether a view is unnecessarily blocked. There is no question that the CRC made such a determination. CP 24, 63-71. Regardless of whether the Maple Tree was an existing tree or a new tree, the CRC decided that the Respondents' views were blocked and therefore, the Appellants needed to trim their Maple Tree. CP 24, 63-71.

It is unclear why the Appellants cited the case of Lakes of Mercer Island Homeowners Association v. Witrak, 61 Wn. App. 177, 810 P.2d 27 (1991), in support of their argument on this issue. While the case does state that a court should not give broader than intended application of a covenant, it goes on to state that the covenant should not be read in such a way that it defeats the plain and obvious meaning of the covenant. Id. at 180. On the issue of the CRC's duties, the Respondents are not suggesting that the court read Section 10 of the Covenants in any way other than to give force to the specific words therein:

"The Building Committee shall be the sole judge in deciding whether there has been such an interference."

CP 89, 132. The Witrak case is not a case of imposing additional burdens on a property owner and neither did the CRC here.

The case of Murphy v. City of Seattle, 32 Wn. App. 386, 647 P.2d 540 (1982), is also not applicable. That case involved an unrecorded deed restriction that was sought to be enforced against a subsequent owner of the property. There has been no unrecorded de facto amendment to the Covenants by the CRC as claimed by the Appellants. Brief of Appellant, at 23. The CRC just did what they were expressly required to do under the recorded Covenants. They determined that the Maple Tree affected the Respondents' views and ordered the Appellants to restore the views. CP 63-71.

The case of Leighton v. Leonard, 22 Wn. App. 136, 589 P.2d 279 (1978), is also not applicable. It addressed whether a recorded instrument ran with the land. The court held that it did. Here no one challenges the binding effect of the Covenants on the parties. CP 2-4, 12, 81, 184-86.

The Appellants claim that the View Guidelines are an unapproved Covenant amendment. Brief of Appellant, at 24. They are not. Under RCW 64.38.020, the Somerset Community Association had the authority to adopt rules and regulations, which is exactly what

the CRC did when it adopted the View Guidelines. CP 22. The Appellants claim specifically that the identification of certain species as the only types of trees that would be considered existing trees was the unapproved amendment to the Covenants. Brief of Appellants, at 21. But the Maple Tree was not determined to be in violation of the Covenants just because it was a maple tree. The Maple Tree violates Section 10 because it blocks the Respondents' views. CP 63-71.

The Appellants' claim that Mr. Harkleroad's declarations added a new height limit to Section 10 of the Covenants. It does not. His Declarations just set forth how the Covenants were applied and provide evidence of surrounding circumstances.

Finally, the Appellants attempt to make much of the fact that the word "width" is not mentioned in Section 10. The word is not in Section 10. But surely the court can take judicial notice that as trees grow, they all grow taller and wider. In order to fulfill the overall intent of the Covenants (to protect views), Section 10 must be interpreted and applied to make sure that a tree does not obstruct a view whether it is the width or height of a tree that affects the view. Any other interpretation results in the absurdity of a number of view obstructing flat topped "T" shaped trees.

The decision in the case of Bloome v. Haverly, 154 Wn. App. 129, 225 P.3d 330 (2010) is particularly instructive. There a view covenant addressed the height of trees and their effect on a view corridor. But Bloome (the downhill parcel owner) filed suit for declaratory relief to confirm that the view covenant only restricted tree heights and did not place any restrictions on construction of a structure on his parcel. In its opinion, the court stated:

"In casting aside Haverly's contention, we are not required to adopt Bloome's interpretation of the view covenant. Bloome effectively seeks a declaration that the covenant does not, in any way, restrict the development rights of the owner of the estate in the downhill parcel. Taken to its logical conclusion, Bloome's interpretation would allow for the construction of a building that completely eliminates the view of Puget Sound from the uphill parcel. That interpretation directly conflicts with the express intent of the covenant. Although the covenant does not expressly address construction on the downhill parcel, we are not persuaded that it affords the owner of the estate of the uphill parcel no protection against construction that interferes with the view." (emphasis added)

Bloome v. Haverly, 154 Wn. App. 129, 143-144, 225 P.3d 330 (2010).

The argument raised by Bloome is similar to the Appellants' claim. They read Section 10 to mean that this court cannot restrict tree width because the word "width" is not in Section 10. The Appellants are asking this court to decide this case in the same way the Bloome court

would not. The Appellants' position would lead to a result in which all existing trees, whether they be 10 feet wide or 100 feet wide, could grow to an unlimited width thereby interfering with the views of the uphill owners. All because the word "width" is not in Section 10. Couple this with the Appellants' position that all existing trees be allowed to grow to an unlimited height (Brief of Appellant, at 21) and this would undermine the entire purpose of the Covenants - to protect views.

E. The CRC Decisions Were Reasonable and There Was No Unauthorized Reconsideration by the CRC.

It is important to look first at how the 2009 decision was arrived at. The CRC received 11 complaints in 2009 about the Maple Tree. CP 23, 37-62. The Appellants were allowed to respond but they did so with secret information that they did not allow the CRC to retain nor share with the aggrieved homeowners, which included the Respondents. CP 210-11, 1130. So when the CRC issued its 2009 decision (CP 63-67), it was done with little or no input from the complainants because they were not allowed to see or rebut the submissions made by the Appellants to the CRC. CP 210-11, 1130. Despite such secrecy, the CRC in 2009 ordered the Maple Tree to be

trimmed in width. CP 63-67. While the Appellants approve of the CRC's determination about the Maple Tree being "grandfathered" (CP 1495-96), they did not otherwise comply with the 2009 CRC decision anyway. CP 82-86, 126-29.

The Washington Supreme Court has stated that a court should not substitute its judgment for that of a homeowner association board. Riss v. Angel, 131 Wn.2d 612, 629, 934 P.2d 669 (1997). On the issue of whether the Maple Tree interferes with the Respondents' views, the CRC's two letters should not be disturbed because that is expressly what the CRC was supposed to determine. Since the CRC found that the Maple Tree interferes with the Respondents' views, it must be trimmed.

Furthermore, the actions of the CRC need to have been reasonable. Riss v. Angel, 131 Wn.2d 612, 624, 934 P.2d 669 (1997); Heath v. Uruga, 106 Wn. App. 506, 516-19, 24 P.3d 413 (2001). Both CRC letters outline what steps the CRC took in considering evidence. The CRC met with all affected parties including the Appellants. CP 63. They reviewed the 2009 report from Tina Cohen, arborist. CP 63, 1117, 1120, 1140-43. They reviewed the 2009 report from Ward Carson, photogrammetrist. CP 63, 1149-56. They reviewed the 2009

report from Mark Harman. CP 1174. They considered the Appellants' submissions even though they were deemed confidential and not allowed to be shared with the Respondents and other complainants so the Respondents and other complainants could not respond directly to them in 2009. CP 210-11, 1130. Despite considering those confidential reports with no rebuttals from the Respondents, the CRC found in 2009 that the Maple Tree was twice as wide as it was in 1964 and thus needed to be trimmed to 30 feet in width. CP 64. The CRC even attached copies of pictures submitted by the Appellants (CP 1151-53) to their 2009 letter. CP 65-67.

The 2010 decision by the CRC was not an unauthorized reconsideration of the CRC's 2009 decision. The Appellants admit that there is no formal CRC procedure on how the CRC conducts its investigation. CP 1504-05. The 2010 decision was instead the result of the complainants finally being able to respond to the secret evidence submitted by the Appellants to the CRC in 2009. The CRC found the photographs submitted to them by Robin Hodgson and attached to their April 27, 2010 letter convincing as to the height of the Maple Tree in 1967. CP 68-71, 453-56. So in 2010 after receiving

additional information from the complainants, the CRC determined that the Maple Tree needed to be reduced in height also. CP 68-71.

This is not a case where a "misleading photo montage" was presented. Riss v. Angel, 131 Wn.2d at 628. In the Riss case, in addition to other shortcomings, the decision makers did not even visit the site. Here the CRC did that. CP 63. They considered several pictures and reports of experts, even those that the Appellants did not want shown to the Respondents. The CRC considered the evidence and made their decisions being partly convinced by the Respondents' evidence and partly convinced by the Appellants' evidence because the CRC allowed the Maple Tree to remain as an existing tree albeit shorter and narrower than the Appellants wanted (and taller and wider than the Respondents wanted). CP 63-71. The CRC cannot be accused of "completely ignor[ing]" the Appellants' evidence (Brief of Appellant, at 36) if the CRC attached parts of the Appellants' own evidence (CP 1151-53) to their 2009 letter decision. CP 65-67.

Finally, contrary to the Appellants' position at Page 32 of their Brief, the Respondents never conceded that the 2010 decision by the CRC was the result of a secret process.

"Their photographs have been seen by the parties, and so we don't think that there was anything secret at all."

RP 21. Instead the record shows that it was the Appellants that provided secret documents to the CRC in advance of their 2009 decision. RP 20; CP 210.

Taken together, the two CRC decisions show that the CRC reasonably considered the evidence presented, met with the parties affected, visited the site, reviewed the Covenants and then made decisions regarding view interference and the actions required of the Appellants to cure their Covenant violation. If this court does not affirm the trial court's decision, it will not only be substituting its decision for that of the CRC contrary to the holding in Riss v. Angel, 131 Wn.2d at 629, but it will thrust the courts into the role of the CRC to determine each and every violation of the Somerset Covenants.

F. Decisions by the CRC Regarding the Appellants' Residence Have Nothing To Do With Their Maple Tree.

The Building Committee may have approved the Appellants' house building plans but approval of the house plans was not approval of the Maple Tree. The CRC's power to make decisions on the proposed building of residential structures is set forth in Sections 3

and 4 of the Covenants. CP 88, 131. Specifically Section 4 of the Covenants provides for approval of "house plans" and in the only reference to views in this Section 4, the Covenants state that the CRC may consider "the effect of the building or other structure or alterations therein as planned on the outlook of the adjacent or neighboring property." CP 88, 131. Section 4 is completely silent as to trees. Thus the CRC's prior approval of the house plans was just that - approval of their house plans. The CRC had no authority to consider existing trees when it approved house plans under Sections 3 and 4 of the Covenants. CP 88, 131. Only Section 10 governs tree heights since that is the specific Covenant section that applies to trees. Mack v. Armstrong, 147 Wn. App. 522, 529-30, 195 P.3d 1027 (2008).

The Appellants inexplicably cite to Section 10 of the Covenants to support their position on this issue. Other than fences and boundary walls, Section 10 has nothing to do with construction approvals. CP 89, 132. The Appellants then take random words from Sections 4 and 10 out of context to support their position. Brief of Appellants, at 25-26. All of the words pulled from Section 4 by the Appellants have to do with the house itself. While the words selected from Section 10 do apply to trees, Section 10 does not apply to houses.

The Appellants cite to no authority to support their attempt to combine the two sections and most importantly, there is no support for the Appellants' attempt to try and put the word "existing trees" into Section 4. It is helpful to re-read the actual language of Sections 4 and 10 of the Covenants:

". . . [T]he Building Committee shall have the right to take into consideration the suitability of the proposed building or other structure, . . . the harmony thereof with the surroundings, and the effect of the building or other structure or alterations therein as planned on the outlook of the adjacent or neighboring property, and the effect or impairment that said structures will have on the view of surrounding building sites, and any and all other factors which in the Building Committee's opinion shall affect the desirability or suitability of such proposed structure improvements or alterations."

"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. . ." (Emphasis added to highlight the words quoted in the Brief of Appellants, at 25-26.)

CP 88-89, 131-32. The Appellants cherry pick certain words and phrases from two different sections of the Covenants to support its position that the Building Committee considered the Maple Tree when it approved the Appellants' house plans. The CRC did not and any

reading of the Covenants will show that the Building Committee was not authorized to do so.

There is no proof that the Building Committee in 1970 considered the Maple Tree under Section 10 either. There is mere speculation from Mrs. Meyers as to what the Building Committee would have done or could have done. CP 574, 1186.

The citation to Riss v. Angel, 131 Wn.2d 612, 934 P.2d 669 (1997), to support the Appellants' position here is incorrect. The Building Committee did not approve the Maple Tree under the consent to construction provision of Section 4 of the Covenants. The Maple Tree already existed according to the Appellants. So while the Respondents agree that the CRC's 2009 and 2010 letter decisions should not be replaced by a court's judgment, the holding of Riss does not apply in the way the Appellants cite to it here. The finality of the Building Committee's prior approval of the Appellants' house plans is not in question here.

Finally, the citation to Greer v. Northwestern National Insurance Co., 36 Wn. App. 330, 674 P.2d 1257 (1984), is not applicable since the case was reversed in part in Greer v. Northwestern National Insurance Co., 109 Wn.2d 191, 743 P.2d 1244 (1987), on the

very issue cited by the Appellants. But more importantly, there was no meaningless act performed by the CRC by having approved the Appellants' house plans.

G. There Was No Mediation by the CRC.

The Appellants constantly refer to the CRC having only the power to mediate and make written recommendations. See, e.g. Brief of Appellants, at 12 and 47. In fact, Section 10 of the Covenants gives the CRC the authority to determine view interference, not just mediate. CP 89, 132.

Besides there was no mediation under the Covenants in this case. The First Amendment to the Covenants does set up a voluntary mediation process and either party "may request" a mediation. CP 94, 137. But the parties never initiated the voluntary mediation procedures set forth in the First Amendment to Declaration of Covenants. CP 86, 128.

The parties did agree to a formal mediation before the lawsuit was ever filed. CP 86, 128. However, that was not a mediation under the First Amendment to the Covenants. It was instead a mutually agreed upon private mediation with former Judge Steven Scott of JDR acting as mediator. CP 86, 128. The Appellants inexplicably and

improperly provided the details of such mediation to Judge Canova who heard the summary judgment case (CP 1121-22) and Judge McCarthy who decided the attorney fees motion (CP 1507-11). While such disclosures were in violation of RCW 7.07.030, ER 408 and the signed Agreement for Mediation (CP 1724), the disclosures do show that this was not a Somerset mediation held pursuant to the First Amendment to the Covenants. CP 1724, 1726.

H. No Defense of Estoppel, Laches, and Unjust Enrichment.

The Appellants claim that certain equitable defenses apply based on the prior approval of the Appellants' house plans by the CRC. That issue is addressed elsewhere in this brief. Suffice to repeat that the CRC did not address the view blocking qualities of the Maple Tree when the Appellants' house plans were approved.

As for estoppel, the Appellants cannot meet all of the elements.

"Applying the doctrine of equitable estoppel requires a showing that the party to be estopped (1) made an admission, statement, or act that was inconsistent with his later claim; (2) that the other party relied on it; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement, or act. Henderson Homes, 124 Wash.2d at 248-49, 877 P.2d 176; Pub. Util. Dist. No. 1 of Klickitat County v. Walbrook Ins. Co.

Ltd., 115 Wash.2d 339, 347, 797 P.2d 504 (1990); Wendle v. Farrow, 102 Wash.2d 380, 382-83, 686 P.2d 480 (1984). Equitable estoppel is not favored, and the party asserting estoppel must prove each of its elements by clear, cogent, and convincing evidence. Chemical Bank v. Washington Pub. Power Supply Sys., 102 Wash.2d 874, 905, 691 P.2d 524 (1984), cert. denied, 471 U.S. 1065, 105 S.Ct. 2140, 85 L.Ed.2d 497 (1985) (Chemical Bank II)."

Carillo v. City of Ocean Shores, 122 Wn. App. 592, 610-11, 94 P.3d 961 (2004). The Respondents had nothing to do with the approval of the house plans. CP 214-17. Huff v. Northern Pacific Railway Co., 38 Wn.2d 103, 228 P.2d 121 (1951), and Board of Regents of the University of Washington v. Seattle, 108 Wn.2d 545, 741 P.2d 11 (1987), are not applicable because when the Appellants bought their lot in 1970 (CP 574), the Respondents did not even own their properties. CP 81, 125. So there was no estoppel by silence. The statements made or acts done had to have been done by someone other than the Respondents.

Based upon the Building Committee's house plan approval, the Appellants built their home. CP 574. Now 40 years later the house is not at issue. Since the Respondents did not own their properties in 1970, there was certainly nothing done by the Respondents that was relied upon by the Appellants when they built their house in 1970. CP

214-17, 1501. If the Maple Tree was already in existence when the Appellants' built their house (CP 1186), then obviously neither the CRC nor the Respondents approved of it. CP 1501. There is no proof the Appellants did anything in reliance on any statements, acts or admissions made by the Respondents. Citing a case cited by the Appellants:

"[I]t is essential to an equitable estoppel that the person asserting the estoppel changed his position in reliance upon the representations or conduct of the party sought to be stopped."

First American Title Insurance Co. v. Liberty Capital Starpoint Equity Fund, LLC, 161 Wn. App. 474, 254 P.3d 835 (2011). Here there were no representations made by the Respondents to the Appellants prior to the Appellants building their home.

The case of Lybbert v. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000), is not applicable. The Lybbert case involved an auto accident where there was a dispute as to whether defendant Grant County was properly served. Grant County's attorneys appeared, associated with outside counsel, sent discovery requests to the Lybberts, communicated with the Lybberts's counsel and expressed that they would cooperate with the Lybberts's counsel in discovery.

But once the statute of limitations passed, Grant County filed its answer and for the first time raised the defense of failure to serve the county. The Washington Supreme Court found that by seeming to cooperate with the Lybberts and then later raising the defense of failure to serve the county after the statute of limitations had run, the Lybberts met the first and third prongs of the 3 part test. The county did perform acts inconsistent with their later claim that service was not completed. The Lybberts also proved that they were damaged because they relied on what Grant County had done. But the Lybberts could not prove that they justifiably relied on what Grant County had done because they had ignored/missed a very specific service of process statute. So the Lybberts's estoppel claim was thrown out. While the statement of law may be correct in Lybbert, factually, the case is nothing like our case.

The Appellants further cite to Bauman v. Turpen, 139 Wn. App. 78, 160 P.3d 1050 (2007), in support of their position. Yet the Bauman court rejected the defenses of laches, equitable estoppel, and acquiescence because the party raising such defense knew of the view covenants when they purchased their lot, just as the Appellants knew

that they were subject to a view covenant when they bought their lot. CP 4, 12-13, 185-86; Bauman v. Turpen, 121 Wn. App. at 93.

The Appellants cannot show that they suffered any damage at all from a large tree growing in their backyard (a tree that the Appellants claim was already there and that they want to keep anyway). CP 574. So the Appellants do not meet the standards in Valley View Industrial Park v. Redmond, 107 Wn.2d 621, 733 P.2d 182 (1987). In fact for all these years, the Appellants have received a benefit by having kept the Maple Tree in place despite it being in violation of Section 10 of the Covenants. CP 575.

The Appellants also claim that the Respondents would be somehow unjustly enriched. They would not be. The Respondents are merely asserting their rights under Section 10 of the Covenants. The Appellants cite to the 3 part test for unjust enrichment in First American Title Insurance Co. v. Liberty Capital Starpoint Equity Fund, LLC, 161 Wn. App. 474, 254 P.3d 835 (2011). The Appellants fail to meet this test. The Respondents are merely trying to restore what they were supposed to have when they bought their homes in Somerset - a protected view. CP 215, 217. This is not a new or added benefit that the Respondents are seeking.

To claim that the circumstances would make it unjust for the Appellants to have to remove their Maple Tree is to ignore the fact that the Covenants were equally applicable to the Appellants. CP 4, 12-13, 185-86. Yet the Appellants chose to accept their lot knowing that the Maple Tree already was or might later 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. The Respondents did nothing to influence their decision to buy or build. CP 214-17. It is not unjust that the Appellants now have to come in compliance with the Covenants after all these years of blatantly ignoring them.

The Appellants cite as support for their unjust enrichment claim the decisions in Storseth v. Folsom, 45 Wash. 374, 88 P. 632 (1907) and Canterbury Shores Associates v. Lakeshore Properties, Inc., 18 Wn. App. 825, 572 P.2d 742 (1977). The facts in those cases are nowhere close to those in our case. In the Storseth case, the defendant lied to the plaintiff to get the plaintiff to construct a road. After the road was constructed, the defendant blocked the road and revealed that the property over which the road was constructed was actually not owned by the defendant. The court found the defendant

liable because the parties entered into a specific agreement that was unenforceable at law, the plaintiff paid the defendant, and then the defendant watched as the plaintiff damaged himself based upon his misguided reliance on the unenforceable contract. Nothing of the kind happened here as the Respondents didn't even own their properties when the Appellants built their home. CP 214-17.

In the Canterbury Shores case, there was again a specific oral agreement between two parties. In exchange for relinquishing an existing access easement and dedicating a street to the city by Lakeshore, Edgewater was to grant a new access easement to Lakeshore. But after the first two things were accomplished, the new access easement was never recorded. The court found that Edgewater was estopped by its conduct to deny the existence of the unrecorded easement. Here again there was a specific oral agreement between two parties and part performance of the contract by one party. In fact, the word estoppel is barely mentioned in the opinion. The case really turned on the statute of frauds and part performance. Either way, the Canterbury Shores case is nothing like our case.

Here there was no contract between the Respondents and the Appellants. There was no consideration paid to the Respondents by

the Appellants. There was no damage done to the Appellants by anything done by the Respondents. In fact, all that happened was that the Maple Tree, ostensibly loved by the Appellants, grew for many years in violation of the Covenants. CP 1186-87

As for unclean hands, both parties knew of the Covenants when they bought their properties. In Bauman v. Turpen, 139 Wn. App. 78, 92-95, 160 P.3d 1050 (2007) (A covenant case as opposed to J.L. Cooper & Co. v. Anchor Securities Co., 9 Wn.2d 45, 113 P.2d 845 (1941)), the court mentioned unclean hands but in a case where it found that both parties were aware of the covenants, it did not find either party with unclean hands. Besides, the point missed by the Appellants is that CRC's two decisions put the parties back where they were in 1967 by requiring the Maple Tree to be trimmed, not completely removed. CP 63-71.

I. The CRC Was Not a Necessary Party.

First and foremost, the claim by the Respondents is that the Appellants violated the Covenants, specifically Section 10 thereof. CP 5-6. The Respondents brought suit in order to enforce the Covenants and have the trial court affirm the CRC's decisions that the Maple Tree violated Section 10 of the Covenants (which the trial court did).

CP 486-89. The Covenants at Section 1 specifically state that any owner may bring legal action against any other owner:

"If the parties hereto or any of them or their heirs or assigns shall violate or attempt to violate any of the covenants herein, it shall be lawful for any person or persons owning any real property in . . . Somerset Division No. 4 . . . to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenant and either prevent him or them from so doing or to recover damages or other dues for such violation."

CP 87, 130. So the trial court had jurisdiction over this matter and the Respondents had the right to sue the Appellants for having violated the Covenants.

The Appellants claim that the CRC (and the developer) is the only one that can file suit to enforce the Covenants. Brief of Appellants, at 46. A strange argument since the Appellants claim that all the CRC can do is mediate and recommend. Brief of Appellants, at 12 and 47. If the Covenants meant to say that only the CRC could file suit to enforce the Covenants, there would have been no reason to include Section 1. Sections 1 and 10 show that any owner can file suit to enforce the Covenants and that the CRC also has the same enforcement rights that each owner has, if it chooses to file suit.

This court should follow the decision in the case of Wimberly v. Caravello, 136 Wn. App. 327, 149 P.3d 402 (2006). The Wimberly case arose from a dispute involving two homeowners. The association board was not made a party to the lawsuit. The court held that the board was not a necessary party.

"We review the trial court's decision that a party is indispensable for abuse of discretion. It is the trial court's call whether or not to join a party so long as the court can completely resolve the issues without adding parties. Here, the Wimberlys' standing to invoke the court's jurisdiction is found in the plain language of the bylaws. (Citations omitted)" . . .

"Ultimately, the court is obligated to join only entities that could be prejudiced one way or another by the decision. Here, the Association Board would not be prejudiced one way or another by this litigation. The Board's president and treasurer signed a letter that the Association "has no interest in or is involved in any way" with this action. CP at 656. And the Wimberlys neither asserted nor defended a claim against the Association."

Wimberly v. Caravello, 136 Wn. App. at 334. As was the case in Wimberly, the Respondents did not assert any claim against the CRC. CP 1-8. The CRC, through its chair and members, stated that it would abide by whatever decision was made by this court so they are not unfairly prejudiced by the court's decision. CP 1402, 1405, 1408. Section 1 of the Covenants allows any owner to bring suit to enforce

the covenants, the same as the governing documents in the Wimberly case. Wimberly v. Caravello, 136 Wn. App. at 335.

It should also be noted that most of the covenant cases cited by both parties do not involve the homeowner associations as parties. See e.g. Mack v. Armstrong, 147 Wn. App. 522, 529-30, 195 P.3d 1027 (2008); Bauman v. Turpen, 139 Wn. App. 78, 160 P.3d 1050 (2007); Wimberly v. Caravello, 136 Wn. App. 327, 149 P.3d 402 (2006); Day v. Santorsola, 118 Wn. App. 746, 76 P.3d 1190 (2003).

Moreover, CR 19(c) requires that the party asserting a claim for relief under CR 19 must state in its pleadings the name of the party to be joined under CR 19(a)(1) or (2) and the reason why they are not joined. In Appellants' CR 7(a) Answer and Counterclaim (CP 9-18), they do raise the affirmative defense of there being an indispensable party (CP 11), but they did not comply with CR 19(c) by identifying the necessary party or stating why the party was not joined.

J. Respondents Are Entitled to Attorney Fees.

The Covenants address the issue of attorney fee recovery in Section 18:

"In the event of litigation arising out of enforcement of these restrictive covenants of Somerset No. 2, Somerset No. 4 and Somerset No. 6, the grantee or grantees so

involved, shall be liable for the payment of all attorney fees, court costs and/or other expenses or loss incurred by Evergreen Land Developers, Inc., in enforcing these restrictive covenants of Somerset No. 2, Somerset No. 4, and Somerset No. 6."

CP 90, 133. The Respondents as owners are unnamed "grantees" under Section 18 of the Covenants. The O'Briens became grantees when they bought their property in 1997. CP 125. The Saunders became grantees in 1972. CP 81. This case is entirely about enforcing the Covenants. Even though the attorney fee provision is a one-way attorney fee provision, it should be construed to apply equally to the parties in this case. "[W]ashington public policy forbids one-way attorney fee provisions." Mahler v. Szucs, 135 Wn.2d 398, 425, 957 P.2d 632 (1998) (Footnote 17).

RCW 64.38 allows a homeowners association to institute litigation on behalf of itself with respect to matters like enforcement of covenants. RCW 64.38.020(4), (14). This is consistent with the provisions of Section 10 of the Covenants which state that the CRC could enforce their decisions of view blockage in cases like this. CP 89, 132. Had the CRC brought suit against the Appellants, they would have been entitled to an award of attorney fees.

"Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party."

RCW 64.38.050. The Appellants admit that the CRC would have been entitled to attorney fees under RCW 64.38.050. Brief of Appellant, at 48. In our case, the CRC made its May 28, 2009 and April 27, 2010 decisions requiring the Appellants to trim the Maple Tree (CP 63-71) but the CRC did not to take legal action to enforce its two decisions against the Appellants. So the Respondents took on the role of the CRC and filed suit to enforce the CRC's decisions. "In essence, claims under the Homeowners' Association [law] are similar to shareholder derivative actions, and case law regarding the duties of the Directors and Officers can be applied via analogy." 33 Wash. Prac., Wash. Construction Law Manual, § 7:8 (2011-2012 ed.); See also, CR 23.1. The Respondents were acting as the CRC to enforce the Covenants as the CRC could do but elected not to. So the Respondents should be entitled to recover attorney fees under the Covenants and RCW 64.38.050.

Finally, pursuant to RAP 18.1(a), this court should award the Respondents their additional attorney fees and costs incurred to

defend against this appeal based upon the same rationale set forth above.

V. Conclusion.

Based on the foregoing, the Appellants' appeal should be denied and the trial court's summary judgment and attorney fee judgment should be affirmed.

This court should also award the Respondents their additional attorney fees and costs incurred in defending this appeal.

DATED this 9th day of July, 2012.

Respectfully submitted,

JEPPESEN GRAY SAKAI P.S.



ALLEN R. SAKAI
WSBA #11953
Attorneys for Appellants
10655 NE 4th Street, Suite 300
Bellevue, WA 98004
(425) 454-2344

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the document to which this certification is attached was served via ABC Legal Messengers on July 9, 2012 on the following individual:

William H. Williamson
5500 Columbia Center
701 5th Ave., Suite 5500
P.O. Box 99821
Seattle, WA 98139-0821

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 9th day of July 2012 at Bellevue, Washington.


Carole A. Corona

COURT OF APPEALS
STATE OF WASHINGTON
2012 JUL -9 PM 12:56