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A. What Does the Restriction Mean?

Covenant restrictions are often unclear. Enforcing a restriction commonly requires first clarifying it.

Strict construction was once the rule in Washington. Courts consistently held that (1) a covenant will not be extended by implication, and (2) a covenant must be construed in favor of the free use of land. *White v. Wilhelm*, 34 Wn. App. 763, 772, 665 P.2d 407 (1983). Strict construction resolved all ambiguities in favor of the free use of land and rejected attempts to extend restrictions beyond their literal reach.

But with its decision in *Riss v. Angle*, 131 Wn 2d 621, 624, 934 P.2d 669 (1997), the Washington State Supreme Court discarded "strict construction," replacing it with the "context rule."

The "context rule", used in interpreting contract ambiguities, favors first discerning the parties' intent, then construing ambiguous terms in a way that gives effect to that intent. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-697, 974 p.2d 836 (1999). Under this broader context rule of construction, a court has more latitude to enforce what was meant, rather than enforcing only that which was actually said.

"Discerning the parties' intent" in a covenants case means identifying the developer's "common plan purpose." This is not always an easy task. *See, e.g., Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920). What future did the developer envision for the development? Something out of Leave It to Beaver: with two-story homes framed by tall shade trees? Or, instead, a place where daylight-basement-ramblers and sparse vegetation serve to preserve spectacular lake and mountain views"

It makes a real difference. In *Leave-It-To-Beaverville*, a restriction against mass plantings might be narrowly construed to preserve trees; in the view community, however, the mass plantings restriction might be broadly construed to favor and preserve views against encroaching vegetation.

B. Is the Use Restriction Valid?

The next question a court may ask is whether the use restriction is valid. In the oft-cited case *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637 (Fla. Dist Ct. App. 1981), the Florida court held that covenants recorded of record should be accorded a strong presumption of validity because a buyer presumably knows of and accepts the restrictions when he purchases his home.

C. What Standard of Review Does the Court Apply in Reviewing a Review Committee's Decision?

In *Riss*, the Court held that a board can exercise broad authority conferred by the covenants to review and approve (or disapprove) building plans, even though the decision making criteria set forth in the covenants were vague. The Court went on to hold that, in exercising its discretion to approve or disapprove plans, the board must act reasonably and in good faith. *Riss*, 131 Wn.2d at 625.

The Court held that the authority had not, in that case, been exercised reasonably and in good faith because the board, in exercising its discretion, failed to adequately investigate the relevant facts, then based its decision upon inaccurate information and then lobbied the entire membership to ratify its decision. *Riss*, 131 Wn.2d at 628. *See also Day v. Santorsola*, 118 Wn. App. 746, 758-760, 76 P.3d 1190 (2003), *rev. denied*, 151 Wn.2d 1018 (2004). A later 55 Washington State Supreme Court case that addressed the applicable standard of review, *Shorewood West Condominium Ass'n v. Sadri*, 140 Wn.2d 47, 992 P.2d 1008 (2000). is notable for its express decision *not* to adopt a standard for reviewing an association's decision making process *Sadi*, 140 Wn.2d at 49-50. At any rate, application of a reasonableness test to complex discretionary ACC decisions appears to be the trend if not the majority rule. *See, e.g., Norris v.*

88 *Phillips*, 626 P.2d 717,719 Colo. App., 1980); *Country Club of Louisiana Property Owners*
89 *Ass'n, Inc. v. Dornier*, 691 So.2d 142, 150 (La. App. 1997).

90 The precise contours of the courts' reasonableness standard are still evolving, making it hard
91 to set out specific elements of this "reasonableness" test. Attorney Marion Morgenstern, has
92 elsewhere suggested that the characteristics of "reasonable" ACC decision-making are that:

- 93 • The decision be within the scope of authority delegated to the ACC;
- 94 • The decision be consistent with the covenants;
- 95 • The decision be based on adequate investigation and on adequate facts;
- 96 • The applicant owner should have an opportunity to address issues raised by affected
97 neighbors or the ACC; and
- 98 • The decision should be rendered in writing.

99
100 *See Marion Morgenstern*, ARCHITECTURAL REVIEW RESTRICTIONS AND
101 ASSOCIATION-DECISION MAKING, WSBA 8th Annual Fall Real Estate Conference, October
102 2001.

103 As is apparent from Ms. Morgenstern's list, the "reasonableness" standard is
104 something of a broad umbrella, stretching to encompass many of the specific questions set forth
105 below. And the "reasonableness" standard is applied with the benefit of 20-20 hindsight, which
106 makes it even more important to discretely analyze each separate issue a court is likely to consider
107 in applying this broad standard of review.

108 109 **D. Does Design Review Authority Even Exist?**

110 Merely because written covenants impart design review authority to an owners'
111 association does not necessarily mean that the authority to review exists. Questions that need
112 to be considered here include:

- 113 1. Have the covenants lapsed?
- 114 2. Has the community abandoned the covenants?

115 A court will not enforce a covenant when it has been habitually and substantially
116 violated so as to create an impression that it has been abandoned." *Sandy Point Improvement*
117 *Co. v. Huber*, 26 Wn. App 317, 319, 613 P.2d 160 (1980). In practice, courts are reluctant to
118 find that covenants have been abandoned, perhaps because such rulings may foster an undesirable
119 hyper-vigilant stance by associations on enforcement matters, a stance driven by fear that
120 failure to aggressively prosecute each and every violation may result in ruling that the
121 covenants have been abandoned.

- 122 3. Has the ACC ceased to exist?

123 A once-functioning ACC can evaporate due to lack of interest, need or volunteers.
124 *White*, 34 Wn. App 770-771.

125 126 **E. May the Current Members of the ACC Actually Serve?**

127 A seemingly valid ACC may lack authority to act as a body because one or some of
128 its members are not entitled to serve. In exploring this, a court may ask the following
129 questions:

- 130 1. Did the members currently serving validly gain their seat on the ACC?

131 In *Hartstene Pointe Maintenance Association v. Diehl*, 95 Wn. App. 339, 343-344. 397 P.2d
132 854 (1999), the Court invalidated the action of an ACC because it did not have two Board members
133 on the ACC, as required by its governing documents.

- 134 2. Does a member of the ACC have a conflict of interest that disqualifies the member
135 from serving on the committee in the specific case in question?

136 This was a significant problem for the reviewing committee in *Day v. Santorsola, supra*.

138 **F. Does the ACC Have Subject Matter Jurisdiction?**

139 Covenants frequently use imprecise words to describe the object or activity that
140 will trigger the owner's duty to submit to design review and the ACC's right to approve,
141 condition or deny the proposal. This imprecision gives rise to arguments about whether a particular
142 object or activity actually triggered design review. Resolving this dispute often involves
143 applying the context rule and interpreting the ambiguous term in a manner that best advances the
144 common plan purpose(s). The inquiry is basically whether the vague
145 word used was intended to reach the object or activity in question in the particular case.

146

147 **G. What is the Scope of the ACC's Authority?**

148 The two main questions regarding scope of the ACC's authority are these:

149 1. Did the ACC approve a design that will violate a simple absolute restriction?

150 Absent the express creation of a right to grant variances in the covenants
151 themselves, an ACC cannot approve a proposal that will violate a simple absolute
152 restriction. For example, an ACC cannot grant approval to build a fence within the
153 front yard set back where the covenants specifically prohibit fences within the front yard
154 setback.

155 2. Did the ACC reject a design by applying a restriction more stringent than simple
156 absolute restrictions in the covenants?

157 This is a more vexing problem. It often involves an ACC that imposes a more stringent
158 restriction on a specific proposal than the more general simple absolute restriction in the
159 covenants. In *Riss*, our Supreme Court held that "a homeowners association may not impose
160 restrictions under a general consent to construction covenant which are more burdensome than
161 provided for by specific objective restrictive covenants." *Riss*, 131 Wn.2d at 638.

162 Some observers first viewed the ruling in *Riss* as creating a bright line standard, flatly
163 prohibiting an ACC from ever imposing more stringent restrictions than those simple
164 absolute restrictions contained in the covenants. This view has given way in recent years to
165 the view that it really depends on the intent of the declarant, as embodied in the covenants. If the
166 declarant intended to give the ACC the power to impose more stringent restriction, then the ACC
167 has that power. If the declarant did not so intend, then the ACC does not possess the power.
168 In *Piepkorn v. Adams*, 102 Wn. App. 673, 10 P.3d 428 (2000), for example, the Court upheld a
169 front yard setback condition that an architectural control committee imposed on a proposed fence
170 through the committee's exercise of its authority to consider the "harmony" of a proposed fence
171 design. See also Restatement (Third) of Servitudes & 6.9 cmt. C (2000).

172

173 **H. Did the Owner Know What to Expect?**

174 As previously noted, courts are more willing to hold an owner to the "terms of the bargain"
175 if that owner had a good inkling of what those terms were. There are two ways in which notice of
176 those "terms" can be imparted to the owner. The first is actual notice through written standards
177 and guidelines that the ACC adopts and distributes to owners. The second is constructive notice: in
178 the absence of written standards and guidelines, notice of these "terms" can be imparted by
179 consistency in the outcome of prior ACC decisions on similar proposals. Therefore, the two
180 questions a court will consider here are these:

181 1. Were there written standards?

182 2. Was the owner constructively aware of unwritten standards?

183

184 **I. Did the ACC Have Its Own Affairs in Order?**

185 A court that has a sense that the ACC generally had its act together is slightly more likely
186 to grant the ACC a presumption of validity when examining the specific ACC decision being
187 challenged in the case. An answer to any one question below does not necessarily determine the
188 outcome of a case, but positive answers obviously "help" the court gain some degree of confidence

189 that the ACC knew what it was doing. Note that because application of a "reasonableness"
190 standard is, by its very nature, an interactive process, some questions listed elsewhere also appear
191 on this list.

- 192 1. Did the ACC have written standards?
- 193 2. Did owners have or know of the written standards?
- 194 3. Did the ACC have written procedures?
- 195 4. Did the written procedures create an adequate opportunity for the proponent and
196 opponent to provide meaningful input so that the ACC's final decision could be a fully
197 informed decision'?
- 198 5. Did the ACC act consistently on prior proposals of this type?

199
200 **J. Did the ACC Apply Its Procedures and Standards to the Case at Hand?**

201 There is a potential downside to written standards and procedures: The ACC might forget
202 to use them. Washington appellate courts have invalidated ACC actions that did not conform to
203 written standards or procedures. *See, e.g., Mariners Cove Beach Club, Inc. v. Kairez*, 93 Wn. App.
204 886, 970 P.2d 825 (1999).

205
206 **K. Did the ACC Perform Its Function Diligently and in Good Faith?**

207 All the preceding questions lead to this, the ultimate question under Washington's
208 "reasonableness" standard: Did the ACC, in this case, exercise its authority reasonably and in
209 good faith? And the Court arrives at its answer to the question by first examining a series of
210 questions that isolate, for consideration, the various parts of the ACC decision making process
211 that the court should consider in order to arrive at an accurate decision on whether the ACC
212 action passes (or fails) the "reasonableness" test. Again, some of the questions here are also
213 considered – and thus listed - in connection with other questions identified above. And, again,
214 these questions capture factors the Court should consider -the answer to any one question is
215 typically not determinative of the ultimate outcome.

- 216 1. Did it exclude biased persons from the ACC? *See Day*, 118 Wn, App. at 759.
- 217 2. Did its members fully inform themselves, including visiting the site? *See Riss*, 131
218 Wn.2d at 627, 628.
- 219 3. Did it afford interested parties a full and fair opportunity to present information for the
220 ACC to consider? *See Riss*, 131 Wn.2d at 627
- 221 4. Did it gather all the relevant information it needed to have in order to make a fully
222 informed decision? *See Riss*, 131 Wn.2d at 633; *Heath v. Uraga*, 106 Wn, App. 506,
223 519, 24 P.3d 413 (2001), *rev. denied*, 145 Wn.2d 1016 (2002).
- 224 5. Did it take steps to verify that the information it intended to rely upon was accurate? *See*
225 *Riss*, 131 Wn.2d at 628,
- 226 6. Did it seek information from an "expert"? *See Heath*, 106 Wn. App. at 518, 520.
- 227 7. Did it actually consider the information it collected? *See Heath*, 106 Wn. App. at 518.
- 228 8. Did it correctly apply the standards to the facts? *See Heath*, 106 Wm App. at 518;
229 *Mariners Cove Beach Club, Inc.*, 93 Wn. App. at 891.
- 230 9. Does its decision advance the common plan? *Shafer v. Board of Trustees of Sandy*
231 *Hook Yacht Club Estates, Inc.* 76 Wn, App. 267, 273-274, 883 P.2d 1387 (1994).
- 232 10. Is the decision consistent with ACC decisions on similar applications? *See, e.g., Beckett*
233 *Ridge Ass'n-I v. Agne*, 498 N.E.2d 223, 226 (Ohio App 1985) (upholding clothesline
234 restrictions that had been "strictly and uniformly applied").
- 235 11. If the decision is different than decisions on past similar applications, has the ACC
236 articulated valid and reasonable justifications for distinguishing the present application
237 from the previous ones? *See, e.g., Ladner v. Plaza Del Prado Condominium Ass'n, Inc.*
238 423 So.2d 927, 930 (Fla. Dist. Ct. App. 1982) (association not engaged in selective

- 239 enforcement of covenant requiring approval of terrace-railing changes; prior changes
240 made without board approval occurred while association still under developer control).
- 241 12. Is its decision in writing? *See, e.g., Snowmass Am. Corp. v. Schoenheit*, 524 P.2d 645,
242 648 (Colo. Ct. App 1974) (committee gave written notice of reasons for
243 disapproval, made suggestions to remedy defects, and allowed owner time to modify
244 plans to obtain approval).
- 245 13. Does it set forth its findings and conclusions supporting its decision—that is, does it
246 explain how it got from the evidence to the decision? *See, e.g., Snowmass, supra*.
- 247 14. If the decision denies approval of a proposal, does it describe why the proposal was
248 rejected or what alternative actions might be approved? *See, e.g., Snowmass, supra*.
- 249 15. Does it afford the applicant with an opportunity to revise the proposal? *See, e.g.,*
250 *Snowmass, supra*.
- 251

252 Conclusion

253 So whose home is it, yours or ours? It's a little of both, according to the reported cases
254 thus far.

255 Yes, the architectural control committee has a say in what form your castle takes. But
256 there are limits. Limits on who can decide. Limits on what process the ACC must follow.
257 Limits on what standards the ACC may apply in reaching its decision. And as more cases are
258 decided, the line that distinguishes "mine" from "ours" may become ever easier to discern.

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