IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL B. MCGRAW and CONNIE MCGRAW, husband and wife; AL DOUD and PATRICIA DOUD, husband and wife, Appellants/Cross Respondents, v. JOSEPH M. BLACKWELL and CYNTHIA BLACKWELL, husband and wife; GREGG R. BIEBER and LYNNE M. BIEBER, husband and wife, Respondents/Cross Appellants.	No. 37472-2-II ORDER GRANTING MOTION FOR RECALL OF MANDATE AND AMENDING OPINION

The unpublished opinion in this matter was filed on July 7, 2009. The respondents have filed a motion for recall of mandate and for clarification of this filed opinion. After consideration by the court, it is hereby

ORDERED that the motion for recall of mandate is granted. It is further

ORDERED that the unpublished opinion filed on July 7, 2009, be amended as follows:

Page 6, line 10, the name "Blackwaters'" shall be replaced with "Blackwells'".

Page 9, line 3, the text "and backfilling issues" shall be deleted. The following text shall be added: "issue."

Page 9, line 5, after the word "issues" the following text shall be added: "and the backfilling issues."

IT IS SO ORDERED.

Dated this _____ day of _____, 2009.

Armstrong, J.

We concur:

Bridgewater, P.J.

Hunt, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL B. MCGRAW and CONNIE MCGRAW, husband and wife; AL DOUD and PATRICIA DOUD, husband and wife, Appellants/Cross Respondents, v. JOSEPH M. BLACKWELL and CYNTHIA BLACKWELL, husband and wife; GREGG R. BIEBER and LYNNE M. BIEBER, husband and wife, Respondents/Cross Appellants.	No. 37472-2-II UNPUBLISHED OPINION

Armstrong, J. — The four parties here own adjoining lots in Chestnut Hills II, a four-lot subdivision. They share a private road and are subject to the subdivision's covenants, restrictions, and conditions (CRCs). Michael and Connie McGraw sued the other owners, seeking an order that they could widen the paved part of the private road, and an order preventing Gregg and Lynne Bieber from backfilling compost against the McGraws' fence. Biebers counterclaimed seeking orders requiring the McGraws to reface the Beiber side of the McGraws' retaining wall with brick and to lower their fence to six feet in height. The Beibers and Blackwells also claimed that the McGraws' fence, a vinyl composite, did not meet the CRC's standards. The trial court denied the McGraws relief and ordered them to lower their fence to six feet and reface the Biebers' side of the retaining wall with brick. The court also ruled that the McGraws' fence met the CRC's construction standards. The McGraws appeal; the Biebers and Blackwells filed a cross-appeal. We reverse the trial court on the paving and backfilling issues, remand for clarification on the brick refacing issue, and we affirm the trial court on the fence height and fence composition

issues.

FACTS

The Chestnut Hills II subdivision in Vancouver, Washington contains four lots. The McGraws own Lot 2, which is bordered by Lot 1 (the Biebers) to the west and Lot 3 (the Blackwells) to the north. The Douds own Lot 4, which lies to the north of the Blackwells. All four owners purchased their property subject to the CRCs contained in the "Dedication of Chestnut II." Clerk's Papers (CP) at 10-13.

The CRCs state in part: "Easements for the installation of utilities and drainage facilities are reserved as shown on the official plat recorded herewith. The area included in said easements, including road easements, shall be maintained in as attractive and well kept condition as the reminder [sic] of the lot." CP at 13. Under the short plat, the four owners share an easement for a "nonexclusive private road easement[] for ingress egress and utilities" that runs south through the Doud and Blackwell properties and ends at a cul-de-sac abutting the McGraw and Beiber properties. CP at 14. The easement is 40 feet wide with a paved roadway that is 16 feet wide.

The CRCs also state that (1) "[a]ll fences are to be 6 foot maximum height of a wood, brick or cyclone design"[1] and "are to be kept in good repair so that they do not detract from subdivision atmosphere." CP at 12. A "Garbage and Refuse Disposal" provision states that "[n]o lot shall be used or maintained as a dumping ground for rubbish" and that "[t]rash, garbage or other waste shall not be kept except in sanitary containers, pending collection and removal." CP at 12. Finally, a "Nuisances" provision states that "[n]o noxious or offensive activity shall be carried out upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood. Yards, grounds, and buildings shall be kept and

[1] "Cyclone" refers to "chain link" fencing.

maintained in a neat and sightly fashion at all times." CP at 11.

During a 2005-06 remodel on their property, the McGraws put up wood-patterned vinyl fencing along their western and northern borders, which they share with the Beibers and Blackwells. The McGraw property is at a different grade than the Beiber and Blackwell properties, so the vinyl fences are on top of concrete walls. The McGraws faced the retaining walls on their side of the fence with brick but painted the Beiber and Blackwell sides with black sealant. In some places, the combined height of the wall and fence is over six feet, measured from the McGraw side.

In 2004, the McGraws bought a new recreational vehicle (RV) that was six feet longer than their previous RV. The new RV is more difficult to get in and out of the driveway, so the McGraws wrote the Beibers, Blackwells, and Douds that they intended to widen the paved roadway adjacent to their driveway. Specifically, they wanted to pave a 5-foot by 60-foot extension of the private road into the Blackwell property. The Blackwells and the Beibers objected to the pavement proposal.

The McGraws sued the Beibers and Blackwells, seeking (1) declaratory judgment that they could expand the paved portion of the easement for ingress and egress, (2) an injunction requiring the Beibers and Blackwells to remove obstructions from the easement,[2] and (3) damages arising from the Beibers' piling of compostable yard clippings and debris against the McGraw retaining wall. The Beibers and Blackwells filed counterclaims alleging that the McGraws' retaining wall and fence violated the CRC's provisions pertaining to fence height and composition.

After a bench trial, the trial court concluded that because "the McGraws [we]re able to

[2] This claim is not at issue on appeal.

maneuver the new R.V. in and out of their home with the assistance of a second 'ground' person and some jockeying," they had "failed to establish a reasonable necessity for expanding the paved surface of the private roadway." CP at 578, 580. The trial court also rejected the McGraws' claim that the Beibers' composting constituted dumping "trash or rubbish," or was a nuisance, as defined in the CRCs. CP at 580. The trial court ruled that the McGraws' fence violated the CRC's six-foot height limit but did not violate the CRC's requirement that it be "wood, brick or cyclone design" because the vinyl "resemble[d]" wood siding. CP at 582. Finally, the court ruled that the CRCs required the McGraws to reface the retaining wall with brick on the Beiber and Blackwell sides.

ANALYSIS

We review a trial court's factual findings to determine whether substantial evidence supports them and, if so, whether those findings support the trial court's conclusions of law. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). We review conclusions of law de novo. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

This case turns in large part on interpretation of the CRCs. When interpreting a restrictive covenant, we give clear and unambiguous language its plain and obvious meaning. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999). Restrictive covenants are designed to make residential subdivisions more attractive for residential purposes and are enforceable by injunctive relief if the claimant shows (1) a clear legal or equitable right and (2) a well-grounded fear of immediate invasion of that right. *Hollis*, 137 Wn.2d at 699.

I. Easement

The McGraws contend that the trial court erred as a matter of law in concluding that they were required to show "reasonable necessity" to expand their easement. Br. of Appellant at 12. There is no dispute as to the easement's location, width, or the McGraws' intent to use it for its designated purpose: ingress and egress. The issue is whether the McGraws have the right to *expand* that allowed use.

The owner of the dominant estate, here the McGraws, cannot enlarge or alter their use of the easement character in a way that increases the burden on the servient estate. *Little-Wetsel Co. v. Lincoln*, 101 Wash. 435, 445, 172 P. 746 (1918). Therefore, in determining whether the McGraws' proposed use would go beyond the scope of the easement, the trial court should have looked to the alleged *harm* to the Blackwells rather than the McGraws' *need*.

The trial court denied the McGraws relief because it found the expanded paving was not "reasonably necessary," the standard court's use in considering condemnation issues or claims to easements by implication. *See Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 144, 18 P.3d 540 (2001); *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 668, 404 P.2d 770 (1965). This standard does not apply to determining whether the dominant estate's conduct exceeds the scope of an easement. Furthermore, the two cases the trial court relied on are not on point. *Butler v. Craft Engineer Construction Company*, 67 Wn. App. 684, 843 P.2d 1071 (1992), concerned the rights of *co-owners* of the same property, not an easement. And in *Standing Rock Homeowners Association v. Misich*, 106 Wn. App. 231, 241, 23 P.3d 520 (2001), the issue was when a *servient estate* may change the scope of an easement "in a reasonable fashion necessary for [its] protection." *Standing Rock* does not require a dominant estate owner—here, the McGraws—to

prove reasonable necessity in order to change the scope of an easement.

Because the trial court erred in requiring the McGraws to prove that paving was a "reasonable necessity" instead of requiring them to prove that the paving would not unduly burden the neighbors, we reverse and remand for the trial court to consider the issue under the proper test.

II. Backfilling

The McGraws appeal the trial court's conclusion that the Beibers' and Blackwaters' composting materials in their yards did not constitute "trash or rubbish" under the "Garbage and Refuse" provisions of the CRCs and was not a nuisance. CP at 13-16.

The CRCs state that "[n]o lot shall be used or maintained as a dumping ground for rubbish. Trash, garbage or other waste shall not be kept except in sanitary containers, pending collection and removal." CP at 12. The Beibers testified that they had been spreading yard clippings around their yard for years, including the ditch along the border with the McGraw property. Michael McGraw testified that the composting gave off an offensive smell, like "decaying garbage." Report of Proceedings (RP) at 239. Gregg Bieber testified that any odor was "not offensive or obnoxious in terms of like a cow manure smell or anything like that" and that he would cover his composting piles with dirt to "encapsulate[]" the smell whenever he could. RP at 334. The trial court resolved this conflicting testimony in favor of the Biebers. And we cannot say as a matter of law that composting activity constitutes dumping garbage or waste or that it is a nuisance. The trial court did not err in finding that this activity did not violate the CRCs. *See State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (appellate court defers to trier of fact on issues of conflicting testimony and credibility of witnesses).

III. Brick Refacing

The McGraws appeal the trial court's order requiring them to reface the Beiber and Blackwell sides of the McGraw wall with brick.

The McGraws argue first that it is inequitable to order them to reface the wall if the Beibers continue to backfill that area, therefore covering up the decorative facing. But Gregg Beiber testified that the main reason he backfilled compost against the wall was that he "really d[id]n't like to look at the black, tar, concrete wall." RP at 55. Under these circumstances, the trial court could find that Beiber did not intend to backfill all the way up the wall if it were more aesthetically pleasing.

The McGraws also contend that because the CRCs state that fences may be "wood, brick *or* cyclone design," the trial court erred in requiring them to reface with brick. CP at 12 (emphasis added). We agree. The CRCs are intended to "make residential subdivisions more attractive for residential purposes." *Hollis*, 137 Wn.2d at 699. But absent some evidence that refacing the Bieber-Blackwell sides of the fence with any of the allowed alternatives would result in a less attractive neighborhood, the trial court erred in requiring brick. On remand, the trial court must reconsider this issue. If the Biebers and the Blackwells demonstrate that only brick will satisfy neighborhood standards, the court can again require the brick refacing; otherwise, the court must allow any of the three CRC alternatives.

IV. Fence Height

The McGraws appeal the trial court's conclusion that their fence violates the height restriction for fences in the CRCs, contending that because the Beibers' backfilling activities will ultimately result in higher elevation on the Beiber property, the height of the fence should be measured from the Beiber side of the fence. They argue that a finding to the contrary undermines the purpose of their fence to provide privacy.

Substantial evidence supports the trial court's finding that the McGraws' fence surpassed the six-foot height limit. While the method of applying the height restriction is ambiguous because of the varying grades, a planner with Clark County Permit Services testified that it was standard practice in the industry to measure fences from the grade of the higher property. The McGraws admitted that the combined height of their fence, measured from grade at the base of the wall where the fence sits, exceeds six feet in certain places. The trial court did not err in ordering the fence height reduction.

V. Fence Material

The Beibers and Blackwells appeal the trial court's finding and conclusion that the McGraws' vinyl fence conforms to the composition requirements of the CRCs because it "resembles a painted, vertical slat wood fence." CP at 582. They assert that under the CRC's provision requiring "wood, brick or cyclone design" for fences, it is not sufficient for the fence to merely "resemble[]" one of those materials. Br. of Appellant at 13-14.

The plain language of the "Fences" provision of the CRCs states that fences must be of "wood, brick or cyclone *design*." CP at 12 (emphasis added). The trial court's interpretation of "design" is consistent with "a pattern or figuration applied to a surface." Webster's Third New

Int'l Dictionary 612 (2002). Accordingly, we affirm the trial court's conclusion that the McGraws' fence design conforms to the CRCs.

We reverse the trial court on the paving and backfilling issues. We remand for clarification on the brick refacing issue. We affirm the trial court on the fence height and fence composition issues.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Hunt, J.