COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

ROSS WILKINSON and CINDY WILKINSON; MONTE KARNES and KIMBERLEY KARNES; DAVID BETHEL and JEANIE BETHEL; DARRELL McLEAN; JIM PAULOS and KATHY PAULOS; JUSTIN HARGIS and TABATHA HARGIS; JOE HARGIS and LINDA HARGIS; DANIEL MacINDOE and ISIDRA MacINDOE; and DAVID SPICER and MARTHA SPICER,	)	No. 28911-7-III
Appellants,	)	ORDER GRANTING MOTIONS FOR RECONSIDERATION AND WITHDRAWING OPINION
v.	)	
CHIWAWA COMMUNITIES ASSOCIATION, a Washington Non-Profit Corporation,	)	
Respondent.	)	

The court has considered appellants' and respondent's motions for reconsideration and is of the opinion the motions should be granted. Therefore,

IT IS ORDERED the motions for reconsideration of this court's decision of

March 24, 2011 are granted.

IT IS FURTHER ORDERED the opinion filed on March 24, 2011, is hereby withdrawn and a new opinion will be filed this day.

DATED:

PANEL: Judges Kulik, Brown, and Korsmo

FOR THE COURT:

_____
TERESA C. KULIK
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROSS WILKINSON and CINDY WILKINSON; MONTE KARNES and KIMBERLEY KARNES; DAVID BETHEL and JEANIE BETHEL; DARRELL McLEAN; JIM PAULOS and KATHY PAULOS; JUSTIN HARGIS and TABATHA HARGIS; JOE HARGIS and LINDA HARGIS; DANIEL MacINDOE and ISIDRA MacINDOE; and DAVID SPICER and MARTHA SPICER,	)	No. 28911-7-III
Appellants,	)	UNPUBLISHED OPINION
v.	)	
CHIWAWA COMMUNITIES ASSOCIATION, a Washington Non-Profit Corporation,	)	
Respondent.	)	

Kulik, C.J. — In 2008, a majority of the homeowners in Chiwawa River Pines voted to amend the community's covenants to prohibit rentals for a period of less than six months. A group of 17 named homeowners (named homeowners) filed this action, seeking a declaration invalidating the rental prohibitions in the 2008 Amendment. The Chiwawa Communities Association (CCA) counterclaimed, asking for declaratory and injunctive relief. Both parties moved for summary judgment. The trial court concluded

that the rental prohibitions contained in the 2008 Amendment were invalid. We agree. The court then rewrote the amendment to prohibit rentals of less than one month. The named homeowners challenge the ruling prohibiting rentals of less than one month. They contend that the court lacked the authority to make this ruling and that the court's modification is invalid. We agree that the trial court cannot rewrite the rental prohibitions contained in the 2008 Amendment. Therefore, we reverse the rental prohibitions in the 2008 Amendment and grant summary judgment to the named homeowners.

FACTS

Chiwawa River Pines is a planned community located near Leavenworth, Washington. The community consists of 367 lots. Each of the named homeowners is the owner of at least one improved residential lot located within one of the six phases of the plat of Chiwawa River Pines.

The original developer of the six phases was Pope & Talbot, Inc. As each phase was developed, Pope & Talbot recorded a separate set of "Protective Restrictions and Covenants" (covenants). Clerk's Papers (CP) at 496. In 1988, a majority of the homeowners approved the consolidation of the six sets of covenants into one set covering all phases (1988 Covenants).

The 1988 Covenants restricted land use to single family residential use and prohibited nuisance, offensive use, and industrial and commercial use. The 1988 Covenants also expressly reserved the power of the majority of the property owners to adopt new restrictions. All owners of land automatically became members of the CCA, subject to all the obligations and duties set forth in the articles, bylaws, and any amendments.

The land use provision limited use to single family residential. The provision read:

> Lots shall be utilized solely for single family residential use consisting of single residential dwelling and such out-buildings (garage, no more than one guest cottage, patio structure), as consistent with permanent or recreational residence.

CP at 285 (emphasis added).

Nuisances or offensive uses were prohibited in the provision stating:

> No nuisance or offensive use shall be conducted or suffered as to lots subject hereto, nor shall any lot be utilized for industrial or commercial use.

CP at 285 (emphasis added).

The 1988 Covenants also contained a sign restriction under the section entitled "Trash Disposal." CP at 286. Except for this sign restriction, the 1988 Covenants are silent as to the rental of residential property. The sign restriction clearly assumes that

rentals were allowed in the community. The sign provision read:

> No sign of any kind shall be displayed to the public view on any lot, tract or subdivision thereof in the plat, except one sign of not more than 3 feet square giving the names of the occupants of the lot, tract, or approved subdivision thereof, and one sign of not more than 6 square feet advertising the property for sale or rent.

CP at 286 (emphasis added).

The 1988 Covenants also contained a provision pertaining to the amendment of the covenants. This provision read:

> These covenants shall run with the land and shall be binding until 1998 (ten years), at which time said covenants shall be automatically extended for successive periods of ten years, unless the majority of the then owners of lots within the plat agree, by majority vote, to change these protective restrictions and covenants in whole or in part.

CP at 287.

And the 1988 Covenants included a severability clause:

> The provisions hereof are severable, and the invalidation of any part or parts hereof shall not thereby disqualify or invalidate the other provisions hereof which shall remain in full force and effect in accordance with their terms.

CP at 286.

The 1991 Covenants. The 1991 Covenants were adopted by a majority of the owners. The 1991 Covenants altered the 1988 Covenants to delete the words, "no more

than one guest cottage." Cf. CP at 285, 520. No other changes of consequence were made at that time.

2008 Amendment. The board of trustees of CCA scheduled a meeting for September 27, 2008. At this meeting, members voted on whether to allow each of the following exceptions to the industrial or commercial use covenant: (1) long-term, low-impact, service-oriented businesses; (2) long-term residential rentals (duration longer that six months); and (3) short-term rentals (duration shorter than six months). A majority of the members voted to allow long-term, low-impact, service-oriented businesses and to allow long-term residential rentals for a period of six months or more. Members also voted against allowing short-term rentals of less than six months.

At the September meeting, a majority of the members approved amendments to sections 4 and 5 of the 1991 Covenants. The 2008 Amendment prohibited short-term rentals, which were defined as rentals of less than six months. Section 4 of the 1991 Covenants entitled "Land Use" was renumbered and amended in its entirety as follows:

> Lots shall be utilized solely for single family residential use consisting of single residential dwelling and such out-buildings (garage, patio structure), as consistent with permanent or recreational residence. Lots shall not be utilized for industrial or commercial EXCEPT for the following:
> (1) Long-term, low-impact service-oriented business: . . . .
> (2) Long-term residential rentals for a period of more than six (6) consecutive months: All residential rentals for a period of six (6) consecutive months or more shall be permitted, shall be in writing, subject to compliance with local zoning and permitting regulations,

> and subject to the Protective Covenants and By-laws.
> All residential rentals for a period of less than six (6) consecutive months shall not be permitted.

CP at 524.

Section 5 entitled "Nuisances or Offensive Use" was also renumbered and amended to read:

> No nuisance or offensive use shall be conducted or suffered as to lots subject hereto, nor shall any lot be utilized for industrial or commercial use (except as authorized under section 4, "Land Use"[)].

CP at 524.

Rentals. Prior to the 2008 Amendment, increasing numbers of properties in the community were being used as rentals. Some properties were advertised on websites. CCA maintains that the named homeowners' short-term rentals ranged from 15 to 125 times per year and that their income from these rentals ranged from $3,168 to $33,481 and up.

Board Action Against Rentals. In 1987, the board was notified that an owner intended to rent his cabin on a day-to-day basis. In a letter dated July 6, 1987, this owner was advised that daily rentals would violate the land use, nuisance, and offensive use provisions of the covenants. The owner responded that he had no intention of renting his cabin on a daily basis.

In 1991, Gloria Fisk, then president of the board, asked an owner to remove her driveway sign advertising lodging because no businesses were allowed in the community under the protective covenants. The minutes of a special meeting of the board memorialized the fact that Ms. Fisk informed the board of the problem and that she would advise the owner that lodging was not allowed in the community.

Action for Declaratory Judgment. The board set January 1, 2009, as the original date for compliance with the 2008 Amendment on short-term rentals. The board extended the compliance date to July 1. The named homeowners then filed suit, seeking a declaratory judgment that the rental prohibitions contained in the 2008 Amendment were invalid. The CCA counterclaimed for declaratory and injunctive relief. The parties filed cross motions for summary judgment.

The trial court concluded that: "The 2008 Amendment to the Protective Covenants is invalid and unenforceable for rentals of a period of more than one month." CP at 858. The trial court also determined that "[r]entals for a duration of less than one month violate the single-family residential use restriction and [the] prohibition against commercial use, nuisance, and offensive use in the 1988 and 1991 Amended Protective Covenants." CP at 858. In this way, the court invalidated the rental prohibitions in the 2008 Amendment. The court then rewrote these provisions to prohibit rentals of less than

one month. As part of the order on summary judgment, named homeowners were ordered to immediately cease and desist from advertising, in print or on the Internet, and from operating short-term rentals for less than one month.

In short, CCA wanted to limit rentals to those six months and over, but the trial court invalidated this provision. The court then prohibited rentals of less than one month.

Bond. The trial court denied named homeowners' motion for reconsideration. Named homeowners then filed this appeal. Named homeowners also posted a cash bond of $1,720 in an attempt to stay enforcement of the order. The trial court declared the bond void and reiterated the cease and desist order. Not all named homeowners complied with the order and several were found in contempt of court. Named homeowners then moved this court for a stay of the enforcement of the trial court's order. The commissioner granted the motion and, later, the trial court set the bond at $36,920. Named homeowners posted the bond. CCA moved to modify the commissioner's ruling. The commissioner denied the motion. Named homeowners filed a motion asking for the bond to be reduced to $1,720.

Appeal. Named homeowners agree with the portion of the trial court's decision invalidating the rental prohibitions of the 2008 Amendment, but they challenge the part of the trial court's decision prohibiting rentals of less than one month. Although the trial

court invalidated the CCA-supported rental prohibitions contained in the 2008 Amendment, CCA does not challenge that portion of the court's decision. While named homeowners challenge the ruling prohibiting rentals of less than one month, CCA agrees with this ruling. CCA did not cross appeal to challenge the overall invalidation of the rental prohibitions contained in the 2008 Amendment. Moreover, in its opening brief, counsel for CCA conceded that "[t]he Association is not appealing the trial court's invalidation of the portion of the 2008 Amendment prohibiting rentals for more than one month, but less than six months." Resp't's Br. at 22.

ANALYSIS

Standard of Review. Summary judgment is proper if the pleadings and supporting declarations show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). When reviewing a grant or denial of summary judgment, the reviewing court engages in the same standard as the trial court and conducts a de novo review. Davis v. Microsoft Corp., 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003). Facts and reasonable inferences are construed in the light most favorable to the nonmoving party. Our Lady of Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 452, 842 P.2d 956 (1993).

2008 Amendment. After the approval of the 2008 Amendment, named

homeowners filed an amended complaint for declaratory judgment against CCA in which they sought the following relief:

> That the Court declare invalid and null and void the Protective Covenant recorded under Chelan County Auditor's File Number 2291058 that prevents the Plaintiffs from renting their tracts for short term rental purposes.

CP at 49. CCA's answer and counterclaim sought the opposite relief.

Both parties filed motions for summary judgment. CCA filed a motion for summary judgment stating:

> [CCA] requests this Court enter an Order on Summary Judgment declaring that the 2008 amendment to the Chiwawa River Pines Protective Restrictions and Covenants is valid and enforceable against [named homeowners].

CP at 102.

In contrast, named homeowners' cross motion for summary judgment sought the opposite relief:

> [Named homeowners] request that this Court enter an Order on Summary Judgment declaring that the 2008 AMENDMENT TO PROTECTIVE COVENANTS FOR ALL OF CHIWAWA RIVER PINES . . . prohibiting short-term rentals of less than six consecutive months is invalid and unenforceable against the [named homeowners] and their successors and assigns as owners of the tracts/lots.

CP at 443.

Here, both parties agreed on the material facts. And, as a result, one party was

entitled to judgment as a matter of law. See Citizens for Des Moines v. Petersen, 125 Wn. App. 760, 772, 106 P.3d 290 (2005).

The single issue raised and litigated before the trial court was the validity of the rental prohibitions of the 2008 Amendment. The trial court responded by invalidating the rental prohibitions of the 2008 Amendment. The trial court then went beyond the requests of the parties and modified the amendment to prohibit rentals of less than one month. Again, CCA, which previously sought to have the 2008 Amendment enforced, does not appeal the court's decision to invalidate the rental prohibitions of the 2008 Amendment.

Consequently, the only issue on appeal is whether the court erred by rewriting the 2008 Amendment to prohibit rentals for periods of less than one month. Resolution of this issue is dispositive of this case. If named homeowners are successful, the covenants will contain no restrictions on the length of rentals.

The 1988 Covenants, and all following covenants, provided for the change of covenants by a majority vote. Here, the 2008 Amendment was adopted by majority vote and then challenged by named homeowners.

When construing a restrictive covenant, a court's primary task is to determine the drafter's intent. Wimberly v. Caravello, 136 Wn. App. 327, 336, 149 P.3d 402 (2006).

The goal is to ascertain and give effect to those purposes intended by the covenants, while placing "'special emphasis on arriving at an interpretation that protects the homeowners' collective interests.'" Riss v. Angel, 131 Wn.2d 612, 623-24, 934 P.2d 669 (1997) (quoting Lakes at Mercer Island Homeowners Ass'n v. Witrak, 61 Wn. App. 177, 181, 810 P.2d 27 (1991)).

Basic rules of contract interpretation apply to the review of covenants. Wimberly, 136 Wn. App. at 336. Courts "are 'not at liberty, under the guise of construing the contract, to disregard contract language or revise the contract.'" Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co., 139 Wn.2d 824, 833, 991 P.2d 1126 (2000) (quoting Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co., 92 Wn. App. 214, 221, 963 P.2d 204 (1998)).

Here, the court was asked to determine the validity of the rental prohibitions of the 2008 Amendment. The court answered this question, but then went on to fashion a new covenant. The court lacked the authority to do so.

Equally important, the purpose of the civil rules is to give notice to the other party of the relief sought. "CR 7(b)(1) requires that a motion 'shall state with particularity the grounds therefor, and shall set forth the relief or order sought.'" Pamelin Indus., Inc. v. Sheen-U.S.A., Inc., 95 Wn.2d 398, 402, 622 P.2d 1270 (1981). Here, the trial court went

beyond the scope of relief requested and deprived the parties and others of notice that such relief would be granted. See id.; Meresse v. Stelma, 100 Wn. App. 857, 866, 999 P.2d 1267 (2000). In Meresse, the court determined that an amendment to a covenant was invalid because "'[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants.'" Meresse, 100 Wn. App. at 866 (quoting Boyles v. Hausmann, 246 Neb. 181, 191, 517 N.W.2d 610 (1994)).

We conclude that all rental prohibitions in the 2008 Amendment are invalid. And we reverse the trial court's ruling rewriting the 2008 Amendment to prohibit rentals of less than one month. This means that all rental prohibitions are stricken from the 2008 Amendment to section 4 and section 5 of the covenants. Given our decision, we also strike the remaining findings and rulings in the trial court's summary judgment order. A trial court's findings and conclusions entered on summary judgment are superfluous. Wash. Optometric Ass'n v. County of Pierce, 73 Wn.2d 445, 448, 438 P.2d 861 (1968).

Because named homeowners prevail here, the issue of the amount of the bond is moot.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Kulik, C.J.

WE CONCUR:

_____ _____
Brown, J. Korsmo, J.