IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FLYING H RANCH HOMEOWNERS ASSOCIATION, a Washington non-profit corporation, Appellants, v. JAMES L. GEARY and JANICE GEARY, husband and wife; and U.S. BANK NATIONAL ASSOCIATION, N.D., Respondents.	No. 37536-2-II UNPUBLISHED OPINION

Bridgewater, J. — The Flying H Ranch Homeowners Association (HOA) appeals the trial court's decision granting summary judgment in favor of James and Janice Geary (the Gearys). The trial court found that the HOA's covenants directly conflicted, applied a strict construction standard, and construed the covenants against the HOA. It then held that the HOA waived its remedies available because it did not comply with its covenants. We agree and affirm.

FACTS

In 2003, the Gearys purchased a home and lot in a subdivision known as the Flying H Ranch, in Buckley, Washington. Roy and Gloria Hill originally owned the Flying H Ranch properties and established the HOA and recorded covenants, conditions, and restrictions (covenants) to govern the properties. The Hills originally recorded the covenants in 1988 and subsequently amended them four times through 1996. The HOA is a Washington non-profit corporation charged with enforcing the covenants. In addition, the covenants establish an architectural control committee (ACC) to administrate the covenants' provisions.

The stated purpose of the covenants is to "protect[ ] the value and desirability of, and which shall run with, the real property." CP at 276. Article V, § 2(a) of the covenants establishes that "[n]o building or other structure shall be constructed or altered until there has been filed with and approved by the [ACC] plans and specifications for same." CP at 282. Article V, § 2(e) further states:

> The [ACC's] approval or disapproval as required in these covenants shall be in writing. In the event that the [ACC], or its designated representative fails to approve or disapprove within thirty (30) days after plans and specifications have been submitted to it, or in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with.

CP at 283.

Article VII of the covenants states the permitted and prohibited uses binding on all homeowners within the Flying H Ranch. Central to the issues presented here is art. VII(3) of the covenants, which states in pertinent part:

No composition roofs shall be allowed and roofing materials shall be either shake

> or tile or other material as may [be] approved by the [ACC].

CP at 37. Further, art. VII(51) establishes that:

> Any violations of the provisions of these covenants which are not corrected within sixty (60) days after receipt of written notice of such violation from the [ACC] shall incur a penalty for such violation at the rate of Ten Dollars ($10.00) per day after the expiration of such sixty (60) day period, which penalty shall be a lien against the lot owned by the violator.

CP at 295.

In late 2005, the Gearys' roof, which was constructed of fire-free lightweight composite product, began to leak.[1] Consequently, they researched various roofing options to remedy their leaky roof and comply with the covenants. Through their research, the Gearys discovered that their house and roof could not support regular tile roofing material permitted under the covenants. In addition, they learned that, generally, contractors were not willing to warrant the lightweight roofing products like the product on their leaky roof because they were failing in the area. Based on this information, the Gearys determined that Grand Sequoia® Shingles roofing, a composition roofing product, was the best roofing material available given the structural limitations of their home.

On February 28, 2006, the Gearys submitted a proposal, seeking ACC approval of their desired composition roofing material. The following week, on March 6, the ACC thanked the Gearys for their "thorough proposal" but denied their request. CP at 340. The Gearys sent another letter to the ACC on April 15, reiterating the urgency of the situation and urging it to

[1] The previous owner submitted a declaration and letter stating that the house was constructed for "light weight [sic] composite product" and could not support tile or shakes. CP at 196. Additionally, the previous owner confirmed that the original roof material was "light weight [sic] composite product." CP at 196.

reconsider its denial. The ACC quickly responded, informing the Gearys that under art. V, § 2(d)[2] of the covenants, they had a right to appeal to the HOA board. The ACC stated that it would forward the Gearys' request for reconsideration to the HOA. On April 25, 2006, the Gearys wrote to the HOA board, stating that they had decided to move forward with their roofing project—with or without HOA approval—in an attempt to avoid any further damage to their home or to their health.

The Gearys started construction on their roof shortly thereafter. On the first day of construction, two HOA board members visited the Gearys at their home to discuss the matter. While the Gearys continued their reroofing project, the HOA board consulted its attorney.

The Gearys completed the project on May 4, 2006. On May 5, 2006, the HOA board sent a letter to the Gearys, stating that they were out of compliance with art. VII(3) of the covenants because they had installed a composition roof. It instructed the Gearys that they had 60 days to comply with the covenants or the HOA board would put a lien on their property.

Nine months later, on February 7, 2007, the HOA commenced this action. In its complaint, the HOA sought (1) a judgment against the Gearys; (2) an order requiring the Gearys to replace the composition roofing materials with materials in compliance with the covenants; (3) authorizing the HOA to do so if the Gearys refused; (4) costs for bringing the Gearys into compliance in the form of lien on the property; and (5) attorney fees and costs for the legal action.

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[2] Article V, § 2(d) states:

> Landowners may appeal any decision made by the [ACC] to the Board of Directors of the FLYING H RANCH ESTATES, INC., whose decision shall be final.

CP at 283.

The Gearys raised numerous affirmative defenses and asserted that the HOA was discriminating against them, that the HOA's claims should be dismissed as frivolous, and that they should be awarded their attorney fees and costs under the covenants and applicable statutes. The HOA filed a motion for summary judgment.

On October 19, 2007, the trial court heard and granted the HOA's motion for summary judgment. It held that,

> Defendant Geary is hereby in violation of the covenants, conditions, and restrictions as relate to the Flying H Ranch subdivision, to wit, Article 7, Section 3, by using composition roofing material on the improvements located on Defendant's property.

CP at 253. In addition to granting partial summary judgment, the trial court dismissed the Gearys' counterclaims and affirmative defenses with prejudice and denied the Gearys' request for attorney fees and costs. Nevertheless, the trial court reserved for motion or trial the question of remedies available to the HOA (such as injunctive relief ordering the Gearys to remove the composition roofing) and attorney fees.

Thereafter, in December 2007, both parties filed motions for summary judgment. The Gearys sought dismissal of the HOA's action as being untimely filed, an order denying any further remedy to the HOA, and an award of their attorney fees and costs under the covenants. The HOA sought the same remedies it had sought in its original complaint—an order enjoining and requiring the Gearys to remove their composition roofing material, penalty of $10 per day for the Gearys' noncompliance with the covenants, and an award of attorney fees and costs under the covenants.

After briefing and argument from the parties, the trial court granted the Gearys' motion for summary judgment. It found that because the HOA did not enjoin the Gearys' roofing project before they completed it, the Gearys were in compliance for purposes of a remedy under art. V, § 2(e) of the covenants. The trial court recognized the inconsistencies between art. V, § 2(e) and art. VII(51) of the covenants. It concluded that the two provisions were indirectly conflicted, that the covenants were poorly drafted, and that it must construe the poor drafting against the drafters, in this case the HOA, rather than a specific homeowner who did not draft them.

The HOA filed a motion for reconsideration, requesting that the court reconsider its ruling under CR 59(a)(7), (8), and/or (9). After briefing and arguments from the parties, the trial court denied the HOA's motion on March 7, 2008. In addition, the trial court awarded $26,395 in attorney fees and $419 in costs to the Gearys.

The HOA timely filed this appeal. There is no meaningful dispute that the Gearys violated art. VII(3) when they installed a roof made of composition materials. Therefore, the parties do not appeal the trial court's first order granting summary judgment in the HOA's favor.

The HOA argues that the trial court applied an improper standard when it constructed the covenants. Thus, it asserts that the trial court improperly granted the second summary judgment in the Gearys' favor and improperly granted them attorney fees.

ANALYSIS

I. Standard of Review

We review a summary judgment ruling de novo. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005). Summary judgment is appropriate where no genuine issues of

material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c). In considering a summary judgment motion, we view all facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. *Viking Props.*, 155 Wn.2d at 119. The moving party bears the burden of demonstrating that there are no genuine issues of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). "If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute." *Atherton*, 115 Wn.2d at 516. If the nonmoving party fails to do so, then summary judgment is proper. *Atherton*, 115 Wn.2d at 516.

Here, the HOA contends that the trial court applied the incorrect legal standard in construing the covenants. It therefore concludes that the trial court erroneously denied its motion for summary judgment. Conversely, the Gearys maintain that the trial court applied the correct legal standard and properly granted summary judgment in their favor. The Gearys' contention prevails.

II. Interpretation of Restrictive covenants

A. Standard of Review

Restrictive covenants are enforceable promises regarding the use of land. *Viking Props.*, 155 Wn.2d at 119. Interpreting the language in restrictive covenants is a question of law. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). Our primary objective in interpreting the covenants is determining the parties' original intent. *Viking Props.*, 155 Wn.2d at 120; *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). To determine this, we apply the basic rules of contract interpretation. *Wimberly*, 136 Wn. App. at 336. We give words in a

covenant their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates contrary intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). We may resolve any ambiguity as to the parties' intent by considering evidence of the surrounding circumstances. *Riss*, 131 Wn.2d at 623. A covenant is ambiguous when its meaning is uncertain or two or more reasonable and fair interpretations are possible. *White v. Wilhelm*, 34 Wn. App. 763, 771, 665 P.2d 407, *review denied*, 100 Wn.2d 1025 (1983).

Whether we apply the rules of strict construction or liberal construction in interpreting the covenants depends on the parties' status. Our Supreme Court expressly acknowledged that:

> [W]here 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. The court's goal is to ascertain and give effect to those purposes intended by the covenants.

Riss, 131 Wn.2d at 623 (emphasis added).

But "[c]onstruction against the grantor who presumably prepared the deed is quite a different matter from construction of covenants intended to restrict and protect all the lots of a plat and future owners who buy and build in reliance thereon." *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993). And in *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 180, 810 P.2d 27, *review denied*, 117 Wn.2d 1013 (1991), Division One of this court stated, "While [rules of strict construction] may have some validity when the conflict is between a homeowner and the maker of the covenants, it has limited value when the conflict is between homeowners."

Here, the Gearys contend that because the original covenant drafter, Gloria Hill, has

actively participated in the lawsuit, the trial court properly applied strict construction in interpreting the covenants. Indeed, it is undisputed that Hill has been involved in this controversy from its inception.[3] Hill signed the letter from the ACC informing the Gearys that they had violated art. V, § 2(d). After the HOA initiated the lawsuit, Hill testified as to the covenants' purpose and the design, in addition to her intent in drafting the covenants. Indeed, the trial court based its initial summary judgment decision, in part, on Hill's declaration. Later, when the parties brought the second round of summary judgment motions, Hill testified about the purpose and design of the ACC, including its discretion and authority. And she testified about the meaning of specific words and interpretation of the covenants as a whole. The trial court again relied on Hill's testimony in part in deciding the second round of summary judgments.

Hill's involvement is even more significant given the status she enjoys as "Declarant" under the covenants. *See* CP at 277 (art. I, § 7). Hill maintains her status as declarant and a class B member until she no longer owns properties within the community. As a class B member, Hill holds a majority vote.[4] Finally, Hill maintains her place on the ACC so long as she retains ownership of any lot. Therefore, it is reasonable to infer that Hill held the status of declarant throughout this controversy because she maintained her membership on the ACC.

Based on Hill's involvement, the trial court reasonably concluded that the conflict was between homeowners (i.e., the Gearys) and the maker of the covenants (i.e., the HOA, including

[3] Interestingly, the HOA does not dispute or even address Hill's involvement in the lawsuit, despite the fact that the trial court referenced her involvement as the reason it was strictly construing the covenant ambiguities against the HOA.

[4] The covenants define "majority vote" to mean "one more vote than the total class A members." CP at 279 (art. III, § 2).

Hill). *See Viking Props.*, 155 Wn.2d at 120; *Lakes at Mercer Island Homeowners Ass'n*., 61 Wn. App. at 180; *White*, 34 Wn. App. at 767. Accordingly, the trial court properly interpreted the covenants under the strict construction standard, construing any ambiguities against the HOA. *See Viking Props.*, 155 Wn.2d at 120; *Lakes at Mercer Island Homeowners Ass'n*., 61 Wn. App. at 180; *White*, 34 Wn. App. at 767.

B. Conflicting Provisions

The trial court pointed to the conflict between art. V, § 2(e) and art. VII(51). Article V, § 2(e) states:

> The [ACC's] approval or disapproval as required in these covenants shall be in writing. In the event that the [ACC], or its designated representative fails to approve or disapprove within thirty (30) days after plans and specifications have been submitted to it, *or in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with.*

CP at 283 (emphasis added). Article V, § 2(e) required the HOA to file a lawsuit to enjoin the Gearys' construction project prior to completion, otherwise the Gearys were deemed to have complied with the covenants. The HOA's failure to enjoin the construction left it with no recourse under art. V, § 2(e).

On the other hand, art. VII(51) sets forth specific recourse for the HOA if a homeowner is out of compliance with the covenants. It states:

> Any violations of the provisions of these covenants which are not corrected within sixty (60) days after receipt of written notice of such violation from the [ACC] shall incur a penalty for such violation at the rate of Ten Dollars ($10.00) per day after the expiration of such sixty (60) day period, which penalty shall be a lien against the lot owned by the violator.

CP at 295. Under art. VII(51), the homeowner has the burden of bringing her property into compliance with the covenants within 60 days. If the homeowner fails to do so, the ACC may charge her $10 for every day that the property remains out of compliance.

Reading the covenants as a whole, art. V § 2(e) and art. VII(51) are inconsistent. As the trial court properly determined, art. V § 2(e) places an affirmative duty on the HOA or the ACC to bring an action to enjoin noncompliant projects and property. Meanwhile, art. VII(51) places the burden on the homeowner to bring their property into compliance. These two provisions are irreconcilable.

To complicate matters further, art. VII(48) grants the HOA the right to enforce the covenants. It states, "Failure of the [HOA] to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter." CP at 295. But again, the plain language of art. VII(48) conflicts with art. V § 2(e)'s requirement that "in any event" the HOA must enjoin noncompliant construction before its completion. CP at 283.

Under the strict construction standard, conflicts or inconsistencies in the document must be strictly construed against the drafter in favor of the free use of land. *See Viking Props.*, 155 Wn.2d at 120. It is within this context that we review the covenants. We hold that the trial court properly found that art. V, § 2(e), which places the burden on the HOA, prevails over art. VII(51), which places the burden on the homeowners.

While art. V, § 2(a) states that, "[n]o building or other structure shall be constructed or altered until there has been filed with and approved by the [ACC] plans and specifications for same," ,art. V, § 2(b) states that, "[a]pproval of said plans and specifications *may be withheld if*

the proposed improvement is at variance with these covenants." CP at 282, 283 (art. V, § 2(b) (emphasis added)). Stated another way, the ACC has discretion to approve proposed improvements that are at variance with the covenants. Applied to the circumstances here, the Gearys had to submit plans and specifications for the construction of their new roof. And the ACC had discretion to approve the Gearys' proposal for a composition roof even though art. VII(3) specifically prohibits composition roofs. .

Further, under art. V, § 2(e), the ACC must approve or disapprove a homeowner's proposal within 30 days of its submission. "[O]r in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with." CP at 283 (art. V, § 2(e)). Thus, where plans and specifications have been submitted, the ACC is required to approve or disapprove them within 30 days. *See also Mariners Cove Beach Club, Inc. v. Kairez*, 93 Wn. App. 886, 890, 970 P.2d 825 (1999).

In *Kairez*, Division One of this court construed a similar covenant. *Kairez*, 93 Wn. App. 887-88. There, the Club's covenants stated that no dock could be built, maintained or located on the property without written approval by the Club's ACC. *Kairez*, 93 Wn. App. at 887-8. In addition, the ACC had established a 30-foot maximum length for approved docks. *Kairez*, 93 Wn. App. at 888. Nevertheless, after a storm destroyed the Kairezes' 34-foot dock, they began construction on a 45-foot dock without seeking the ACC's approval. *Kairez*, 93 Wn. App. at 888. Part way through the construction, the Club's ACC chairman informed the Kairezes that they had to obtain the ACC's approval and apply for shoreline building permit from the county.

Kairez, 93 Wn. App. at 888. The Kairezes obtained a county permit and wrote a letter requesting ACC approval even though they had substantially completed construction of the new dock. *Kairez*, , 93 Wn. App. at 888.

The ACC forwarded the Kairezes' request to its board of trustees that eventually denied it on the basis that the dock was over 30 feet long. *Kairez*, 93 Wn. App. at 888. Three months after the Kairezes completed their construction, the Club sued, seeking an injunction to remove the dock. *Kairez*, 93 Wn. App. at 888. The Kairezes contended that the Club waived its right to enjoin or prevent the dock's construction because it failed to promptly initiate the suit in a timely manner under the covenants. *Kairez*, 93 Wn. App. at 889. They relied on the following language from covenant 8:

> The committee's approval or disapproval as required in these covenants shall be in writing. In the event that the committee or its designated representative, fails to approve or disapprove within 10 days after plans and specifications have been submitted to it, *or in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof*, approval will not be required and the related covenants shall be deemed to have been fully complied with.

Kairez, 93 Wn. App. at 889. Division One held that the "in any event" clause of covenant 8, the covenant requiring committee approval, must "be deemed to have been fully complied with." *Kairez*, 93 Wn. App. at 891. Specifically it held that under covenant 8, the Club was precluded from bringing an action based on the ACC's disapproval of the dock. "The Club by its delay waived its right to approve the dock." *Kairez*, 93 Wn. App. at 891. And significantly, Division One rejected the Club's contention that the "in any event" clause could not have been intended to provide a means by which an applicant can avoid a design standard by racing to complete a

project before a lawsuit can be filed. *See Kairez*, 93 Wn. App. at 890-91. Division One noted that was not the situation presented in the case; rather, the Club failed to file its claim in a timely fashion. *Kairez*, 93 Wn. App. at 890-91.

Similarly here, the HOA failed to timely file its lawsuit against the Gearys. There is no question that the HOA was aware that the Gearys were constructing their roof with composition materials. In fact, the ACC president visited the Gearys on the first day of construction and sought legal counsel from the HOA's attorney shortly thereafter. Nevertheless, the HOA did not file its lawsuit seeking injunctive relief until nearly nine months after the Gearys completed construction. Under the "in any event" clause of art. V, § 2(e), the Gearys' construction must "be deemed to have been fully complied with." CP at 283; *see also Kairez*, 93 Wn. App. at 891.

C. General Review vs. Specific Covenant Restrictions

Moreover, our conclusion that the HOA had to timely file suit to enjoin construction is consistent with our Supreme Court's decision in *Riss*, where the primary issue was whether the HOA could use its discretion to impose greater restrictions than those delineated in the covenants. *See Riss*, 131 Wn.2d at 619, 625. In *Riss*, the covenants at issue included a consent-before-construction clause with express conditions on minimum square footage of residences, minimum set back requirements, and maximum height restrictions. *Riss*, 131 Wn.2d at 616. In addition, the covenants set for a discretionary clause regarding "improvements, construction [sic] and alterations." *Riss*, 131 Wn.2d at 616. The discretionary clause gave the association

> the right to refuse to approve the design, finishing [sic] or painting of any construction or alteration which is not suitable or desirable in said addition for any reason, aesthetic or otherwise . . . [considering] harmony with other dwellings . . . the effect on outlook of adjoining or neighboring property and any and all other

> factors which in their opinion shall affect the desirability or suitability of such proposed structure, improvement [sic] or alterations.

Riss, 131 Wn.2d at 616.

The *Riss* plaintiffs submitted their construction plans to the homeowners' association's covenant compliance and review designee. *Riss*, 131 Wn.2d at 617. The designee, in turn, informed the plaintiffs that, except in minor respects, their plans satisfied the covenants. *Riss*, 131 Wn.2d at 617. Under the covenants, the homeowner's association board and the homeowners had to approve the plans. *Riss*, 131 Wn.2d at 617. The board and homeowners eventually denied the plaintiffs' request, partly because of the proposed height of the construction, which incidentally was within the maximum height under the covenants. *Riss*, 131 Wn.2d at 618. The issue on appeal was whether under the consent-to-construction provision of the covenants, the homeowners association had authority to impose restrictions that were more burdensome than the specific covenant requirements. *Riss*, 131 Wn.2d at 619-20.

The Supreme Court held that "[c]ovenants providing for consent before construction or remodeling will be upheld so long as the authority to consent is exercised reasonably and in good faith." *Riss*, 131 Wn.2d at 625. But "[i]f covenants include specific restrictions as to some aspect of design or construction, the document manifests the parties' intent that the specific restriction apply rather an inconsistent standard under a general consent to construction covenant." *Riss*, 131 Wn.2d at 625-26. Thus, a "construction covenant cannot operate to place restrictions on a lot which are more burdensome than those imposed by the specific covenants." *Riss*, 131 Wn.2d at 625.

Contrary to the HOA's contention, *Riss* does not hold that any general discretionary review covenant pertaining to design or construction is inapplicable in the face of a specific restrictive design or construction covenant. *Riss*, 131 Wn.2d at 626. Rather, under *Riss*, a homeowners association may exercise general discretionary review covenants so long as it does so reasonably, in good faith, and does not impose more burdensome restrictions than any specific restrictive covenants. *Riss*, 131 Wn.2d at 625.

Here, the HOA did not attempt to impose more burdensome restrictions on the Gearys under art. V, § 2(e) than those restrictions set forth under art. VII(3). To the contrary, the HOA failed to follow the procedures in art. V, § 2. Thus, *Riss* does not require that we disregard the consent-to-construction provision in art. V, § 2(a) because art. VII(3) specifically prohibits composition roofing. *See Riss*, 131 Wn.2d at 625.

D. Gearys' Compliance with Consent-to-Construction Covenant

Moreover, the HOA's contention the Gearys never availed themselves of art. V and the processes set forth therein because they failed to submit a proposal is unconvincing. The undisputed evidence in the record shows that the Gearys submitted a binder containing their proposed roofing plans and specifications. Indeed, in its initial letter to the Gearys the ACC thanked them for their "thorough proposal regarding [their] upcoming roofing project." CP at 340. There is no evidence that the Gearys failed to submit a proposal. Instead, the evidence shows that despite its awareness of the Gearys' construction project for several months, the HOA failed to enjoin their construction before completion.

There are no genuine issues of material fact that the HOA failed to comply with the

express provisions of article V, § 2(e). The HOA failed to enjoin the Gearys' construction prior to its completion and, thus, the HOA was left with no remedies. Further, the HOA is not entitled to damages under article VII(51). The trial court's ruling was proper under the strict construction standard. *See Viking Props.*, 155 Wn.2d at 120; *Lakes at Mercer Island Homeowners Ass'n*, 61 Wn. App. at 180; *White*, 34 Wn. App. 767. And it properly granted summary judgment in the Gearys' favor. CR 56(c).[5]

III. Attorney Fees

HOA also challenges the trial court's attorney fee award, contending that the covenants do not authorize attorney fees. The Gearys contend that the trial court properly awarded attorney fees under RCW 4.84.330. The Gearys are correct.

We review a trial court's award of attorney fees for an abuse of discretion. *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). A trial court abuses its discretion when it awards fees "on untenable grounds for untenable reasons." *Choung*, 159 Wn.2d at 538 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

A trial court has discretion to award attorney fees when authorized by a private agreement, statute, or on recognized equitable grounds. *Riss v. Angel*, 80 Wn. App. 553, 563-64, 912 P.2d 1028 (*aff'd and remanded*, *Riss*, 131 Wn.2d 612); *Mack v. Armstrong*, 147 Wn. App. 522, 531, 195 P.3d 1027 (2008). RCW 4.84.330[6] provides that, where a contract or lease

[5] Because we hold that the trial court properly granted summary judgment in favor of the Gearys, we do not address the HOA's contention that it is entitled to injunctive relief.

[6] RCW 4.84.330 states in pertinent part:
[W]here such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party . . . .

authorizes attorney fees for one but not all of the parties, the prevailing party is entitled to fees, whether that party is the plaintiff or the defendant. Waiver of fees by one party to the contract is prohibited. A prevailing party is the party who receives an affirmative judgment in his or her favor. *Riss*, 131 Wn.2d at 633. If neither party wholly prevails, then the determination of prevailing party depends on which party is the substantially prevailing party and that question depends on the extent of the relief afforded to the parties. *Riss*, 131 Wn.2d at 633.

The trial court found that both parties prevailed on different aspects of the proceedings but that the Gearys were the substantially prevailing party. It reduced the Gearys' award of attorney fees to reflect this finding. Based on the record, the trial court's award of attorney fees to the Gearys was not untenable. *See Choung*, 159 Wn.2d at 538; *Mack*, 147 Wn. App. at 531. Therefore, the trial court did not abuse its discretion when it awarded attorney fees and costs to the Gearys. *See Choung*, 159 Wn.2d at 538; *Mack*, 147 Wn. App. at 531.

Likewise, the Gearys are entitled to attorney fees on appeal. RAP 14.3 (substantially prevailing party is entitled to attorney fees and costs on appeal upon compliance with RAP 18.1).

Affirmed.

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.

Bridgewater, J.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease . . . . Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

I concur:

Van Deren, C.J.

Penoyar, A.C.J. (dissent) — I respectfully dissent. It is hard to understand why the other homeowners would not accede to Geary's desire to replace their roofing with high quality composition shingles. However, I cannot agree with the majority's reasoning because it seems to me to be inconsistent with the intent of the restrictive covenants that the homeowners all agreed to.

I. Rules of Construction

> [W]here 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. The court's goal is to ascertain and give effect to those purposes intended by the covenants.

Riss v. Angel, 131 Wn.2d 612, 623, 934 P.2d 669 (1997) (emphasis added). It seems to me that Mrs. Bell's status as a developer should not, after over thirty years, affect the right of all the other homeowners to have the restrictive covenants construed to give effect to the purposes intended by the covenants.

II. The Purposes Intended by the Covenants

First, I note that the covenants flatly prohibit a number of things, including outbuildings, above ground utilities and, here, composition roofs. Next, I see nothing in the covenants allowing the Architectural Committee to allow these uses; they are "prohibited."[7] Thirdly, I note that the covenants contain broadly worded remedial provisions for what can be done if improvements are out of compliance. Both article V, section 2(f) and article VII(51) provide 60 day notice

[7] That the architectural committee's approval must be sought for all construction does not somehow change the prohibited uses to what amounts to conditional uses. The express authority to withhold approval if the improvement is "detrimental to the community" does not by implication grant authority to approve prohibited uses. Article V, section 2(b).

provisions for any violations, including completed structure. It is in this context that we should consider the meaning of article V, section 2(e):

> …in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with.

Clerk's Papers (CP) at 283.

The majority finds that this language applies to all completed construction projects. This eliminates any remedy for completed projects whether they are prohibited uses or not. A survey of the extensive prohibited uses reveals many that could be built or installed quite quickly, certainly before any legal action could be commenced. Clearly this result is inconsistent with the intent of the covenants. The question is whether there is a way to construe article V, section 2(f) that is both consistent with the rest of the covenants and the language of section 2(f) itself. I think there is.

I construe section 2(f) to apply only to improvements that the Architectural Committee has the discretion to approve. This would not include improvements that are prohibited but would include the elements listed in section 2(b) and (c), such as grading, height, style, color schemes and landscaping. I reach this result by construing the words "the related covenants shall be deemed to have been fully complied with" to apply only to the covenants that relate to discretionary approval by the Architectural Committee. CP at 283. Specifically, this includes the obligation to submit plans and the right to appeal to the Board, to have a written and timely decision. This also includes the right to complete and retain the improvement if the Architectural Committee fails to fulfill its obligations.[8] To me, this construction does far less damage to the

intent of the covenants than does the majority's. Thus, I would reverse and allow the covenant prohibiting composition roofing to be enforced, as this is what all the parties originally agreed to.

Penoyar, A.C.J.

[8] Similar covenant language was construed to prohibit an injunction in *Mariners Cove Beach Club, Inc. v. Kairez*, 93 Wn. App. 886, 970 P.2d 825 (1999), but there the limitation on dock length was an Architectural Committee policy, not a prohibited use, and thus was an improvement that the Architectural Committee had discretion to allow. Thus the result in *Mariners Cove Beach Club* would be the same under my construction of the "too late to sue" language.