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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2018 MAR 22 PM 3: 17

Linda Myhre Enlow
Thurston County Clerk

EXPEDITE (if filing within 5 court days of hearing)

Hearing is set:

Date: April 20, 2018

Time: 9:00 a.m.

Judge/Calendar: The Honorable John C. Skinder

No hearing is set

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

THERESA J. LOWE, a single woman;
LOREN J. BOSSHARD and DONNA A.
BOSSHARD, husband and wife;
BURLEIGH M. CUBERT and CAROLYN
CUBERT, husband and wife,

Plaintiffs,

v.

FOXHALL COMMUNITY
ASSOCIATION, a nonprofit corporation,

Defendant.

NO. 17-2-00812-34

**PLAINTIFF LOWE'S MOTION FOR
SUMMARY JUDGMENT**

17-2-00812-34
MTSMJG 63
Motion for Summary Judgment
2801639



I. INTRODUCTION

The Foxhall Community Association ("FCA") was organized by Virgil Adams in 1981 to manage the Foxhall Community ("Foxhall"). Foxhall is a residential community located in northeast Thurston County, between Marvin Road and Johnson Point Road. The zoning overlaying Foxhall is RRR 1/5 (rural residential, with one house per five acres) according to County mapping, which zoning is consistent with visual observations of the character of Foxhall. The FCA's protective covenants state in part that all lots "shall be used for residential purposes only..." The residents in Foxhall enjoy a peaceful setting with two parks and seven miles of trails weaving in and around their homes. Residents use the trails primarily for walking, but a few use them for running, bicycling and horse riding. Attached as Exhibit A to the March 2018

1 Declaration of Theresa Lowe in Support of Summary Judgment is a map of Foxhall Trails, which
2 displays how the trails meander through the community.

3 First and foremost, this case is about maintaining the peaceful residential setting by
4 enforcing the prohibition against commercial/business use of the private trails within Foxhall,
5 which trails are, pursuant to Foxhall’s restrictive covenants intended to be “for the benefit of, and
6 be used by, the residents.” This case is also about stopping the injustice of allowing a few
7 individuals to profit from Foxhall’s community property/amenities at the expense of the
8 membership. Specifically, the current FCA Board allows a few residents to run for profit
9 businesses that rely on the use of Foxhall’s amenities. These few profiteers board nonresidents’
10 horses and allow nonresidents to use the neighborhood’s trails in exchange for money. Foxhall
11 and/or the FCA faces potential liability if this commercial use by nonresidents is allowed to
12 continue unchecked—as it is inevitable that a nonresident rider will at some point be injured
13 and/or cause damage while riding on Foxhall’s private trail system. No insurance company has
14 guaranteed Foxhall and/or the FCA that coverage exists for claims associated with use of the
15 trails by nonresidents.

16 Plaintiff Theresa Lowe is a longtime horse owner and strong supporter of horseback
17 riding in the community. But she is against public/commercial use of Foxhall’s parks and trails.
18 Ms. Lowe did not buy a home in Foxhall so she could be in the center of commercial horseback
19 riding enterprises. The business use of Foxhall’s private trails exponentially increases the
20 amount and frequency of horses on the trails, which leads to a host of issues the FCA was not
21 organized to deal with. Quite simply, this case is about managing risks and preserving the
22 character of the community by keeping disruptive businesses out of it—which is consistent with
23 applicable restrictive covenants. Foxhall’s parks and trails are private, and not for public use.

24 Fairness in the governing of the FCA is the final issue in this case. Foxhall residents
25 passed an Amendment to the FCA Bylaws in November 2015, which supplemented the
26 restrictive covenants by more explicitly excluding nonresident business invitees of resident-

1 profiteers from using Foxhall's private trails. This Bylaw Amendment was passed in a vote that
2 included the submission of written proxies—even some of the members physically present at the
3 relevant meeting submitted written proxies and allowed the proxies to stand. However, the
4 current FCA Board refuses to recognize the vote as legitimate because a majority of the current
5 Board members are among the minority of residents who would like to allow residents to profit
6 by the use of Foxhall's community properties/amenities. The current Board has taken the
7 position that the vote to amend the Bylaws does not count since, they claim, proxies were not
8 allowed for the Bylaw Amendment vote—despite the fact proxies are referenced in the Bylaws
9 and a proxy form can be downloaded from the FCA's website. The FCA Board's position with
10 respect to proxies is blatant voter suppression. The current FCA Board wishes to prohibit
11 residents from voting on Bylaw Amendments who cannot physically attend meetings, including
12 residents who are active military personnel, disabled and/or sick, and people with schedules that
13 do not allow for their attendance at FCA meetings. Ms. Lowe believes all residents should have
14 a voice in governing the FCA—not just the few residents who can physically attend a meeting.

15 **II. RELIEF REQUESTED**

16 Ms. Lowe requests that the Court grant her Motion for Summary Judgment and Order
17 that: (1) the applicable restrictive covenants prohibit public use of Foxhall's trails, including use
18 by nonresident boarders of horses or other client groups or individuals who pay residents to use
19 the trails; and (2) the November 2015 Bylaw Amendment was properly passed, as the proxies
20 submitted must be counted, and the Amendment must, therefore, be enforced. Both sides are
21 moving for summary judgment and agree this case is ripe to be decided by the Court based on
22 the evidence currently before the Court.

23 Granting Ms. Lowe's Motion for Summary Judgment does not mean residents will be
24 forever barred from using the trails for business purposes. It simply means the profiteering
25 residents would need to take steps to change the covenants—in a democratic way that allows all
26 residents to have a voice. Perhaps a majority of residents could be convinced to accept some

1 kind of public use of Foxhall's trail system. But at this point in time, the governing documents
2 do not allow public/business use of the trails and the FCA is not organized to accommodate
3 business use (e.g., due to insurance issues and increased costs to the FCA associated with
4 increased trail usage due to nonresident riders). Foxhall was created as a residential community.
5 Like most residential associations, the governing documents were created to prohibited
6 public/business use of FCA managed property. Ms. Lowe's Motion for Summary Judgment
7 should be granted based on a full and plain reading of the governing documents.

8 III. STATEMENT OF FACTS

9 1. Procedural Posture of Case.

- 10 • The Complaint in the above captioned matter was filed on February 22, 2017, following
11 more than a year of confusion and discussion after the FCA Board refused to recognize
12 the vote held in November 2015 to amend the FCA's Bylaws. All of the original
13 Plaintiffs in this case, who were all residents of Foxhall and members of FCA, were
14 initially represented by attorney Jason Zittel. This case was originally assigned to Judge
15 Murphy.
- 16 ○ Plaintiffs' Complaint takes issue with the FCA Board refusing to recognize proxy
17 votes related to a proposed bylaw amendment in November 2015. Plaintiffs'
18 Complaint additionally takes issue with the FCA Board taking a position that
19 commercial use of community trails is permissible, which position is contrary to
20 the FCA's Protective Covenants.
 - 21 • In April 2017, Rose Eilts, who is also a resident of Foxhall and member of FCA, filed
22 suit against FCA. Ms. Eilts' lawsuit was assigned to Judge Lanese. Ms. Eilts' lawsuit is
23 still pending and assigned to Judge Lanese. Ms. Eilts was at the time of her filing
24 represented by Mr. Zittel, but she is currently represented by attorney Joe Scuderi.
 - 25 ○ Ms. Eilts' Complaint specifically takes issue with the FCA Board refusing to
26 recognize proxy votes related to proposed bylaw amendments.

- 1 • In May 2017, Judge Lanese ruled on a motion for an injunction filed by Ms. Eilts. Judge
2 Lanese commented that Ms. Eilts, “could potentially have a very strong claim on the
3 legal merits...I would entertain a motion for summary judgment...As I said before, I
4 believe there is potentially some merit to the legal claims of plaintiff in this case.”
5 However, Judge Lanese denied Ms. Eilts’ motion for an injunction on the basis that he
6 did not find evidence of irreparable harm that would likely be caused if the injunction
7 were not ordered back in May 2017.
- 8 • Judge Murphy recused herself in July 2017 because she knew a witness involved in this
9 case. This case was reassigned to Judge Dixon. The FCA had filed a Motion for
10 Summary Judgment prior to Judge Murphy recusing, but the motion did not go forward.
- 11 • The FCA moved to consolidate the two cases on September 21, 2017, as Ms. Eilts’
12 lawsuit involves similar legal issues as the above captioned matter. All of the parties
13 agreed the cases should be consolidated, but disagreed on the judge that should be
14 assigned the consolidated case(s). Judge Dixon denied FCA’s Motion to Consolidate.
- 15 • The above captioned lawsuit was administratively reassigned in January 2018 to Judge
16 Skinder.
- 17 • Trial in this matter is currently set for August 13, 2018.

18 2. The applicable legal documents in this case and the history of Foxhall, including
19 how the FCA was organized, support the exclusion of nonresident business
20 invitees from Foxhall’s private trails and also support the rights of FCA members
21 to use of proxies.

22 A. *Trails are for the benefit of Foxhall residents, not the public.*

- 23 • The FCA was incorporated by Virgil Adams on or about November 17, 1981. The
24 original directors were Virgil Adams, Katherine Adams, and Dennis Adams. See
25 *previously filed Declaration of Bert Lewis dated June 15, 2017, at Exhibit A – Articles of*
26 *Incorporation.*

- 1 • The FCA adopted covenants applicable to Foxhall on or about October 26, 1982. *Id. at*
2 *Exhibit B – Foxhall Community Association Division I-II Protective Covenants &*
3 *Division III Amendment*. The covenants were originally applicable to FCA Divisions 1
4 and 2, and they were adopted by Division 3 on or about September 3, 1985. *Id.* The
5 covenants state in pertinent part:
- 6 ○ The covenants are adopted “in order to provide for the aesthetic, healthful and
7 uniform development of [Foxhall] and so as to further provide for control of
8 structures to be erected, improvements to be made, and operations to be
9 conducted upon said real property...” *Id. (Covenants) at 3rd paragraph;*
 - 10 ○ The trails “shall be for the benefit of, and be used by, the residents...and the
11 maintenance thereof shall be the responsibility of the [FCA] and all repairs and
12 maintenance thereof shall be provided for at the expense of the [FCA] and funded
13 by assessments against all owners of lots in [Foxhall].” *Id. (Covenants) at*
14 *paragraph I.A.*
 - 15 ○ Lots in Foxhall “shall be used for residential purposes only...” *Id. (Covenants) at*
16 *paragraph II.A.*
- 17 • On or about October 26, 1984, Virgil Adams reached an agreement with an adjacent
18 property owner regarding Foxhall Division IV, which agreement expressly stated the
19 “property will not be used for commercial purposes...” See *March 2018 Declaration of*
20 *Theresa Lowe in Support of Motion for Summary Judgment, Exhibits B1 – Thurston*
21 *County Auditor’s File No. 8411020113; and B2 – File No. 8709030122.*
- 22 • Bylaws have been adopted concerning the governance of FCA. See, e.g., *June 2017*
23 *Lewis Declaration, at Exhibit C – Bylaws.*
- 24 • In 2001, the FCA’s Architectural Control Committee reached out to Dennis Adams
25 regarding the intent of the developer (i.e., the Adams’ family business) as to the meaning
26 of the covenants use of the term “benefit of” related to the community trails. Mr. Adams

1 indicated to the FCA that he was one of the individuals who drafted the covenants.
2 Mr. Adams indicated the intent was for nonresidents to only be allowed on the trails if
3 they were a guest of a resident and accompanied by a resident. *Previously filed*
4 *Supplemental Declaration of Rose Eilts Opposing Summary Judgment, filed on July 12,*
5 *2017.*

- 6 ○ The letter from Mr. Adams was in response to FCA member concerns back in
7 2001 about a proposal to allow nonresidents to use the trails. A poll of FCA
8 members in 2001 showed that 85% of the membership were against allowing
9 nonresidents to use the trails. See *March 2018 Lowe Declaration, Exhibit C –*
10 *April 2001 Foxhallian Newsletter.*
- 11 ● Over the years, some Foxhall homeowners (i.e., FCA members) have allowed
12 nonresidents to board horses on the members' property, in exchange for money, and also
13 use the community trails without being accompanied by the member/resident. This type
14 of use has always been a concern within the FCA's membership and these resident
15 profiteers have in the past been asked to stop allowing nonresidents to use the trails. See
16 *Declaration of Theresa Lowe Opposing Summary Judgment, filed on July 3, 2017; and*
17 *Declaration of Rose Eilts Opposing Summary Judgment, filed on July 3, 2017.*
 - 18 ○ Attached are copies of signs that have been posted at Foxhall over the years, some
19 of which were specifically referenced in the July 3, 2017, Declaration of Rose
20 Eilts. *March 2018 Lowe Declaration, Exhibit D – Photographs of Signs.*
 - 21 ○ FCA's Board in 2013 notified FCA members Gary and Judy Johnston, who were
22 allowing non-resident boarders to ride horses on Foxhall's trails, that the trails are
23 private. FCA's Board took the position that Foxhall's trails were for the private
24 use of residents and accompanied guests. See *March 2018 Lowe Declaration,*
25 *Exhibit E – May 2013 letter to Mr. and Mrs. Johnston.*

- 1 • Dennis Adams confirmed again in October 2015 that FCA’s covenants, which he
2 participated in drafting, were not intended to allow nonresident boarders to use Foxhall’s
3 private trail system. *Supplemental Declaration of Denise Solveson filed July 12, 2017.*
- 4 • On November 19, 2015, a Special Meeting of the FCA was called to order to consider
5 passage of a proposed bylaw clarifying the FCA Protective Covenants in regards to use of
6 community trails. Forty-two members signed in as being physically present, in-
7 attendance at the special meeting; there were 122 members on the FCA roster at the time.
8 Including proxies, ninety-six members voted on the proposed bylaw. The in person vote
9 was 18-5 against adopting the bylaw, but the proxy vote was 73-0 in favor of the bylaw.
10 As only twenty-three of the forty-two present members who signed in at the meeting
11 voted “in-attendance”, it is apparent that members who were present considered their
12 proxies as valid votes. Had all of those members present voted “in-attendance” the math
13 indicates the vote would have been 24-18 in favor of the bylaw by those members who
14 were physically present. At all rates, the proxies were counted and the final tally of the
15 vote was seventy-eight members in favor of the bylaw and eighteen members opposed.
16 *March 2018 Lowe Declaration, Exhibit F – Minutes of November 19, 2015 special*
17 *meeting and referenced attachments.*

- 18 ○ Pursuant to the November 19, 2015, meeting minutes, “The Motion to pass the
19 proposed Bylaw passed.” The proposed Bylaw states, as follows: **Foxhall Parks**
20 **and Trails are for the exclusive use of residents, families and friends.**
21 **Nonresident visitors must be accompanied by a resident when using Foxhall**
22 **Parks and Trails. Foxhall Association members’ businesses may not extend**
23 **their business activities onto Foxhall Parks and Trails. Members’ business**
24 **invitees, customers, or patrons, whether in trade or in barter, are prohibited**
25 **from using Foxhall Parks and Trails, even when accompanied by a Foxhall**
26 **member. *Id.***

- 1 • The minutes of the November 19, 2015, special meeting were adopted by the FCA at the
2 FCA’s annual meeting on April 25, 2016. See *Declaration of Rose Eilts Opposing*
3 *Summary Judgment, filed on July 3, 2017.*

4 B. *Proxies encourage free elections and voter participation—proxies must be*
5 *counted in votes on FCA matters.*

6 The FCA Bylaws in effect at the time of the November 2015 meeting stated in pertinent
7 part, “A member may exercise his right to vote by proxy.” See *March 2018 Lowe Declaration,*
8 *Exhibit G – March 7, 2017, meeting agenda, Bylaws at Section V.5.* The Bylaws also state, “The
9 Bylaws may be amended at any time by a vote of a majority of the corporation present at any
10 meeting of the membership duly called for such purpose. See *June 2017 Lewis Declaration at*
11 *Exhibit C (Bylaws), at Section X.*

12 Seventy-eight members, or 63.9%, of the FCA voted to adopt the November 2015 Bylaw.
13 At least fifty-four of the members voting in favor of the Bylaw did not physically attend the
14 special meeting. Only eighteen members, or 14.8%, of the FCA opposed the Bylaw. This vote
15 demonstrates the reason why allowing proxies is important—less than 15% of the population
16 must not be allowed to impose their will on the community. Foxhall, like other neighborhoods,
17 consists of disabled people, people with work commitments, people who take vacations, people
18 who take their children to sports/music/dance practice, people in the military, and people who
19 would simply rather sign a proxy form versus attending a long association meeting—all of these
20 groups of people must have a say in Bylaw amendments. Requiring physical presence at an
21 association meeting to vote on bylaw amendments will preclude many members from being able
22 to vote. *March 2018 Lowe Declaration.*

23 It is absurd to read the Bylaws in a way that would allow a member to exercise his or her
24 right to vote by proxy except for proposed bylaw amendments. The word “present” in the
25 context of a bylaw amendment vote is not limited to physical presence. This point was
26 demonstrated by the FCA when it amended the Bylaws in March 2017. For example, in March

1 2017 the FCA adopted a bylaw amendment to Section IV.4, which changed the language
2 regarding removal of a director from “vote of the voting power in the Association in person or by
3 proxy...” to “vote of the voting power in the Association **present**, in person or by proxy...” The
4 addition of the word “present” where the term “in person” already existed signifies that “present”
5 does not only mean “in person”. The construction of this sentence, which is consistent with
6 statute, indicates the word “present” can mean either “in person” or “by proxy”. See *March*
7 *2018 Lowe Declaration Exhibit G (March 7, 2017 meeting agenda), Bylaws at Section IV.4.*

8 Additionally, the FCA adopted a bylaw amendment in March 2017 that limits the scope
9 of proxies in that they are now, according to the purported bylaw amendment, only allowed if the
10 proxy specifically describes the member’s intent regarding a specific subject. These “Limited
11 Proxy Form[s]” can be downloaded from the FCA website and appear to allow a limited proxy
12 for purposes of bylaw amendment voting. See *Id. (March 7, 2017 meeting agenda), Bylaws at*
13 *Section V.5; and March 2018 Lowe Declaration, Exhibit H – Limited Proxy Form.*

14 3. Public use of Foxhall’s private trails must be prohibited under a plain reading of
15 historical FCA documents whether or not the vote passing the November 2015
16 Bylaw Amendment was valid. But it remains a fact the vote was valid. And this
17 vote confirms that Foxhall private trails are not for the public.

18 The facts outlined above describe how the intent of the protective covenants is to
19 maintain the character of the community as a residential neighborhood. Signs that have
20 historically been posted in the community signal the trails were for FCA resident/member use.
21 Unfettered public use of Foxhall trails by business invitees is prohibited by the covenants. The
22 November 2015 Bylaw Amendment clarifies the covenants in this regard.

23 The November 2015 special meeting to consider the bylaw amendment was duly called
24 based on appropriate notice consistent with bylaws. See *June 2017 Lewis Declaration, Exhibit D*
25 *– Special Meeting Notice*. Forty-two members signed in at the meeting, which constitutes a
26 quorum. See *March 2018 Lowe Declaration, Exhibit F (Minutes of November 19, 2015, special*

1 *meeting.*) A vote was held and proxies were counted consistent with Bylaw provisions
2 governing proxies in effect at the time—in November 2015, there were no “Limited Proxy
3 Form[s]” and there was no prohibition on a person carrying more than two proxies. See *Id.* The
4 amended bylaw was adopted. *Id.* The amended bylaw’s adoption was confirmed at the April 25,
5 2016 FCA annual meeting. See *Declaration of Rose Eilts Opposing Summary Judgment, filed on*
6 *July 3, 2017.*

7 4. Residents of Foxhall and members of the FCA do not, on the whole, benefit from
8 non-resident business invitees using Foxhall’s private trails. The trails need more
9 work because of public use. Trail work has been draining FCA financial reserves
10 ever since the current FCA Board signaled public use would be tolerated. And
11 public use of trails may expose the community to increased liability risk. Only a
12 select few members benefit at the expense of their neighbors.

13 The FCA’s cash reserves have decreased significantly ever since the FCA Board decided
14 to ignore the November 2015 Bylaw amendment. Expanding the use of trails to business
15 invitees creates the need for more maintenance and safety measures. These costs are passed on
16 to all FCA members, not just the members who attempt to run for profit businesses using
17 community amenities. See *March 2018 Lowe Declaration, including Exhibit I – Cash Balance*
18 *Graph.*

19 The Plaintiffs in this case have not benefitted from public use of Foxhall’s private trails.
20 There is no benefit to having strangers ride near your house on horses and/or to have increased
21 traffic on private trails you pay a portion of the maintenance of. There is also increased road
22 traffic, including numerous horse trailers that must park along community roads since there is
23 not parking for businesses. See, e.g., *Declaration of Monica Wilder.* Further, Plaintiffs and
24 many others who voted for the November 2015 Bylaw Amendment are concerned about
25 nonresidents using the trails. One issue of concern is that allowing public use of Foxhall’s trails
26 will preclude law enforcement from being able to distinguish trespassers from paying customers.

1 Another issue of concern is the issue of liability. As expressed in previously filed declarations,
2 there is no evidence Foxhall and/or the FCA is insured for potential claims made by nonresident,
3 business invitees. It is the FCA that owns the trails. As the landowner, the FCA would likely get
4 sued if a rider is injured on the trails. See, e.g., *March 2018 Lowe Declaration*.

5 According to public data from the National Electronic Injury Surveillance Systems of
6 United States Consumer Products, horseback riding is classified as a rugged, adventure
7 recreational sport activity. Horses are 5 to 15 times larger, 20 to 40 times more powerful, and 3
8 to 4 times faster than a human. If a rider falls from a horse it will generally be at a distance of
9 3.5 to 5.5 feet to the ground. Horseback riding is the only sport where a much smaller, weaker
10 predator animal (human) tries to impose its will on, and become one unit of movement with,
11 another much larger, stronger prey animal with a mind of its own (horse).

12 IV. STATEMENT OF THE ISSUES

13 Plaintiffs' Complaint requested an order declaring, "the [November 2015] bylaw was
14 validly adopted and is consistent with the Protective Covenants." *Complaint at paragraph VI.A*.
15 If the bylaw is consistent with the covenants, it is in many ways a moot point whether the bylaw
16 was validly passed—because the bylaw does nothing more than clarify the existing covenant,
17 which should be enforced and prohibits commercial use of neighborhood amenities. In other
18 words, FCA members should not be allowed to let nonresident boarders pay members a fee to
19 use community trails even if there is no bylaw. This is because the protective covenants prohibit
20 such use by their very terms. However, a clarifying bylaw was appropriate.

21 The November 2015 Bylaw was properly passed. A special meeting was called with
22 appropriate notice. A vote was held consistent with the voting procedures set forth in the bylaws
23 at the time of the vote. The bylaw passed by a vote of 78-18. The minutes of the special
24 meeting to pass the bylaw were adopted at the following FCA annual meeting. No action has
25 been taken to reverse the November 2015 vote—the FCA is simply choosing to ignore the will of
26 its members as expressed through a valid, democratic vote.

1 The Court should Order the FCA Board to enforce FCA's Protective Covenants, which
2 are consistent with the November 2015 Bylaw.

3 **V. EVIDENCE RELIED UPON**

4 Plaintiff Theresa Lowe relies on the following in support of her Motion for Summary
5 Judgment:

6 1. March 2018 Declaration of Theresa Lowe in Support of Motion for Summary
7 Judgment, and the following Exhibits attached thereto:

- 8 A. Exhibit A – Foxhall Trails;
- 9 B. Exhibits B1 and B2 – Recorded documents related to Foxhall Division IV;
- 10 C. Exhibit C – April 2001 Foxhallian Newsletter;
- 11 D. Exhibit D – Photographs of Signs;
- 12 E. Exhibit E – May 2013 letter to Johnstons;
- 13 F. Exhibit F – Minutes of the November 19, 2015 Special Meeting, with
14 referenced attachments;
- 15 G. Exhibit G – March 2017 Special Meeting agenda/proposed bylaw
16 amendments;
- 17 H. Exhibit H – Limited Proxy Form; and
- 18 I. Exhibit I – Budget analysis and Cash Balance notes, with graph;

19 2. Declaration of Monica Wilder; and

20 3. The Courts records and files, including, but not limited to the following
21 previously filed pleadings:

- 22 A. Plaintiffs' Complaint filed on or about February 22, 2017;
- 23 B. Exhibits attached to June 2017 Declaration of Bert Lewis;
- 24 C. Plaintiffs' Response to Defendant's Motion for Summary Judgment filed
25 on or about July 3, 2017;
- 26 D. July 3, 2017, Declaration of Theresa Lowe Opposing Summary Judgment;

- 1 E. July 3, 2017, Declaration of Rose Eilts Opposing Summary Judgment;
2 F. July 3, 2017, Declaration of Denise Solveson Opposing Summary
3 Judgment;
4 G. Plaintiffs' Supplemental Response to Defendant's Motion for Summary
5 Judgment filed on or about July 12, 2017;
6 H. July 12, 2017, Supplemental Declaration of Rose Eilts; and
7 I. July 12, 2017, Supplemental Declaration of Denise Solveson.

8 **VI. LAW & ANALYSIS**

- 9 1. Interpreting the FCA's restrictive covenants is a question of law. And the
10 covenant provision stating that trails "shall be for the benefit of, and be used by,
11 the residents of Foxhall" should be interpreted as prohibiting use by nonresident
12 business invitees.

13 The interpretation of a restrictive covenant is a question of law. *Wimberly v. Caravello*,
14 136 Wn.App. 327, 336, 149 P.3d 402 (2006). Restrictive covenants are interpreted to give effect
15 to the intention of the parties to the agreement incorporating the covenants and to carry out the
16 purpose for which the covenants were created. *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669
17 (1997). "The purpose of those establishing the covenants is the relevant intent...Subdivision
18 covenants tend to enhance the efficient use of land and its value. The value of maintaining the
19 character of the neighborhood in which the burdened land is located is a value shared by the
20 owners of the other properties burdened by the same covenants." *Green v. Normandy Park*
21 *Riviera Section Cmty. Club, Inc.*, 137 Wn.App. 665, 683, 151 P.3d 1038 (2007). Accordingly,
22 the Court must place "special emphasis on arriving at an interpretation that protects the
23 homeowners' collective interests." *The Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61
24 Wn.App. 177, 181, 810 P.2d 27 (1991). "[I]f more than one reasonable interpretation of the
25 covenants is possible regarding an issue, [the Court] must favor that interpretation which avoids
26

1 frustrating the reasonable expectations of those affected by the covenants' provisions.” *Green*,
2 137 Wn.App. at 683.

3 In determining the intent of the parties to the agreement incorporating the covenants, a
4 Court must give “covenant language ‘its ordinary and common use’ and [must] not construe a
5 term in such a way ‘so as to defeat its plain and obvious meaning.’” *Wilkinson v. Chiwawa*
6 *Cmtys. Ass’n*, 180 Wn.2d 241, 250, 327 P.3d 614 (2014) (quoting *Mains Farm Homeowners*
7 *Ass’n v. Worthington*, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993); *Riss*, 131 Wn.2d at 623). A
8 Court must examine the instrument in its entirety and use extrinsic evidence to “illuminate what
9 was written, not what was intended to be written.” *Wilkinson*, 180 Wn.2d at 250-51 (quoting
10 *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 697, 974 P.2d 836 (1999)).

11 The covenant provision stating that trails “shall be for the benefit of, and be used by, the
12 residents in Foxhall” is part of the FCA’s “Protective Covenants”. The provision is meant to
13 restrict the use of the community trails. It is a reasonable interpretation that the trails are
14 restricted to personal/social use by residents and accompanied guests. It is an unreasonable
15 interpretation that “for the benefit of” is intended to mean any activity that benefits only a few
16 FCA members or just a single member—if this were correct, the provision at issue would not be
17 a restrictive/protective covenant and would be essentially meaningless.

18 Allowing nonresident boarders to use community trails for horseback riding probably
19 does benefit the few individual residents who profit from such nonresident use. It is logical to
20 assume that boarders would be more attracted to boarding in a location where boarders could use
21 private trails. Similarly, a resident who is a dirt bike enthusiast and competitive dirt bike rider
22 might personally benefit from organizing a dirt bike race on the community trails. But whether
23 any such use benefits a few FCA members or a single member is not part of the analysis. As
24 stated in *Witrak*, supra., the covenants must be interpreted to protect the collective interests of
25 homeowners, not the interests of a few residents.

1 Collectively, the residents do not benefit from allowing nonresident boarders to use
2 community trails. Nor would the residents collectively benefit from an interpretation of the
3 covenants that does not restrict use—i.e., a reading that would allow organized, professional dirt
4 bike races or any other conceivable use that might “benefit” a single FCA member. Allowing
5 public use of the trails creates more wear and tear of the trails that diminishes the quality of the
6 trails and/or increases maintenance costs for residents. Allowing public use of the trails makes
7 them more crowded, which impacts residents’ enjoyment of the trails and also increases the
8 noise and traffic around residences. And, perhaps most importantly, allowing public use of the
9 trails exposes Foxhall and/or the FCA to significant potential liability, which the FCA is not
10 insured for.

11 Foxhall and/or the FCA has significant liability exposure if commercial uses are allowed
12 unchecked. Horseback riding is a rugged, adventure sport. Horses are large, strong animals with
13 a will of their own. Allowing additional use the trail system by non-resident riders mean
14 increasing odds that accidents may happen and there is no evidence the FCA can procure
15 insurance to shield the community from liability if a claim is made by a nonresident business
16 invitee. Financial risk is a huge reason that commercial use does not “benefit” the residents of
17 Foxhall.

18 The purpose for the applicable covenants was stated by the developer, Virgil Adams, in
19 the preamble of the covenants: “to provide for the aesthetic, healthful and uniform development
20 of [Foxhall] and so as to further provide for control of structures to be erected, improvements to
21 be made, and operation to be conducted upon said real property...” The covenants then go on to
22 state that, “[a]ll of the lots...shall be used for residential purposes only...” Further, as evidenced
23 by the previously filed “Supplementary Declaration of Denise Solveson Opposing Summary
24 Judgment” and “Supplemental Declaration of Rose Eilts Opposing Summary Judgment”,
25 Mr. Adams did not intend to allow nonresident boarders to use the community trails.

1 The character of Foxhall is a peaceful, residential neighborhood. Interpreting the
2 covenants to restrict commercial use of Foxhall's trails is consistent with a full reading of the
3 covenants, including a provision that limits lot uses to residential uses. Such a restriction is also
4 consistent with the intent of the developer as stated by Dennis Adams, one of the drafters of the
5 covenants. Homeowners who already live in Foxhall and future Foxhall residents who buy
6 homes in the community with notice of the Protective Covenants, have a reasonable expectation
7 that they are going to be part of a residential community as opposed to a place where anyone can
8 use the trails for unlimited commercial uses. And residents have a reasonable expectation that
9 their FCA membership dues will pay for membership benefits as opposed to supplementing
10 commercial ventures and/or enhancing the enjoyment of nonresident business invitees.

11 The FCA's Protective Covenants already prohibit commercial use of community trails
12 based on a reasonable interpretation of those covenants. As such, the bylaw confirming that
13 community trails are not for commercial use is not a further restriction on FCA members.

14 2. The November 2015 Bylaw appropriately clarifies the existing covenants.

15 The bylaw passed at the November 19, 2015, special meeting clarifies the covenant in an
16 effort to prevent the character of the community as a residential neighborhood from being
17 eroded. It is appropriate for bylaws to clarify and supplement the covenants.

18 The parties are in agreement that a bylaw should not impose a restriction that conflicts
19 with restrictive covenants. But as detailed above, the November 2015 Bylaw does not conflict
20 with FCA's Protective Covenants. The applicable covenants state that lots are for residential
21 uses only. The applicable covenants state that trails are for the benefit of members. A bylaw
22 clearly expressing that commercial use of community trails does not benefit members and is not
23 allowed, is consistent with the FCA's Protective Covenants.

24 Case law discussing the interaction of covenants and bylaws was briefed in the parties'
25 previously filed pleadings in 2017. Plaintiff Lowe will not repeat that analysis here, but instead
26 adopts it by reference.

1 running a business out of their residence in such a way that it negatively impacts neighbors.
2 Foxhall is a homeowners association that restricts commercial/business use by its members of
3 property located within Foxhall; any business that might be allowed (e.g., piano tutoring) should
4 be residential in nature and not impact neighbors. The FCA's Protective Covenants state that
5 lots are for residential purposes only. Another document specifically states "property will not be
6 used for commercial purposes..." Ms. Lowe simply requests that the FCA Board take
7 appropriate steps to preclude commercial use of community trails. It is not the intent of the
8 covenants to allow for commercial use. Commercial use does not fit within the character of the
9 community. And FCA members do not, on the whole, benefit from commercial use of the trails.

10 DATED this 22nd day of March, 2018.

11
12 BEAN, GENTRY, WHEELER
13 & PETERNELL, PLLC
14 Attorneys for Plaintiff Theresa J. Lowe

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16 _____
17 JOHN A KESLER III, WSBA #39380
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PROOF OF SERVICE

I certify that I caused to be served a copy of the foregoing document on the following parties of record on the date below as follows:

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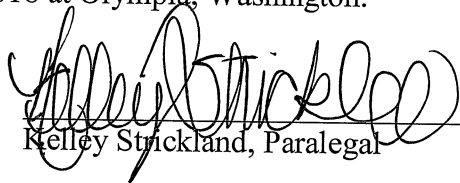
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of March, 2018 at Olympia, Washington.



Kelley Strickland, Paralegal