

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES E. ORTEGO, et al.,

Plaintiffs,

v.

LUMMI ISLAND SCENIC ESTATES
COMMUNITY CLUB, INC., et al.,

Defendants.

CASE NO. 2:14-cv-01840-RSL

DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT
REGARDING PLAT COVENANTS

**Noted on Motion Calendar:
August 5, 2016**

DEFENDANTS' MOTION FOR PARTIAL SUMMARY
JUDGMENT REGARDING PLAT COVENANTS
(CASE NO. 2:14-cv-01840-RSL)

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF UNDISPUTED FACTS	1
A.	None of the Rights and Duties in the Division 1 and 2 Plats Have “Expired.”	2
1.	Division 1.....	2
2.	Division 2.....	4
3.	This Court Rejected Plaintiffs’ Claims that the Division 1 and 2 Plat Covenants “Expired.”	4
B.	The Covenants in the Plats for Divisions 3, 4, and 5.....	5
C.	The Incorporation of LISECC.	8
D.	The Covenants in the Plats for Divisions 7, 9, and 6.....	10
E.	LISECC Adopts Bylaws.	13
F.	Moksha Smith Records the Final Plat.....	13
G.	LISECC’s Water System.	14
H.	LISE Conveys Reserves to LISECC and LISECC Records Notice of Assessment.....	15
I.	LISE Conveys the Remaining Reserve Tracts to LISECC.....	16
J.	None of the Parties Has Independent Knowledge of the Developers’ Intent.	16
III.	ARGUMENT AND AUTHORITY	17
A.	This Court Has Ruled that LISECC’s Authority Over Divisions 1 and 2 Continues.	17
B.	The Parties Agree That the Plat Covenants Are Unambiguous and Their Meaning Should be Determined on Summary Judgment.	17
1.	The Sunset Clause in the Remaining Divisions Applies Only to “Restrictions,” Not to Affirmative Duties and Rights.	18
2.	The Developers Intended LISECC to Continue Perpetually.	20
C.	The Developers Intended that All Lots Be Treated the Same Vis-à-Vis the HOA.....	21
D.	If Ambiguity Exists, the Collective Interests of the Homeowners Prevail.	24
IV.	CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

<i>Green v. Normandy Park</i> , 137 Wn. App. 665, 151 P.3d 1038 (2007).....	24
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 974 P.2d 836 (1999).....	20
<i>Jensen v. Lake Jane Estates</i> , 165 Wn. App. 100, 267 P.3d 435 (2011)	18, 24
<i>Lakes at Mercer Island HOA v. Witrak</i> , 61 Wn. App. 177, 810 P.2d 27 (1991).....	21
<i>Riss v. Angel</i> , 131 Wn.2d 612, 934 P.2d 669 (1997)	18, 24
<i>Roats v. Blakely Island Maint. Comm’n, Inc.</i> , 169 Wn. App. 263, 279 P.3d 943 (2012).....	20
<i>Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.</i> , 76 Wn. App. 267, 883 P.2d 1387 (1994).....	20, 21
<i>Viking Props., Inc. v. Holm</i> , 155 Wn.2d 112, 118 P.2d 322 (2005)	24
<i>Wilkinson v. Chiwawa Cmty. Ass’n</i> , 180 Wn.2d 241, 327 P.3d 614 (2014)	18, 22

OTHER AUTHORITIES

Black’s Law Dictionary 1182 (5 th ed. 1979).....	18
MerriamWebster.com	18
The Racketeer Influenced Corrupt Organizations Act, U.S.C. Title 18, Ch. 96.....	1
TheFreeDictionary.com	18

I. INTRODUCTION

Plaintiffs, disgruntled owners in the Lummi Island Scenic Estates community (“LISE”) allege RICO,¹ fraud, breach of fiduciary duty and other assorted claims against their homeowners’ association (“HOA”) Defendant Lummi Island Scenic Estates Community Club, Inc. (“LISECC”) and some former and current volunteer members of LISECC’s Board of Directors. A small partnership developed LISE in nine divisions through plats they recorded from 1959 through 1965. Each plat intertwined its respective division with each of the other divisions in provisions conveying common areas in each division to the HOA, allowing all owners to use common areas anywhere in LISE, and granting all owners the right and obligation to be members of the HOA. Plaintiffs contend that these covenants expired 25 years after the creation of each respective plat, depriving LISECC of the authority today to govern LISE. This Court has previously dismissed Plaintiffs’ claims in regard to the lots in Divisions 1 and 2. Defendants now seek dismissal of Plaintiffs’ claims in regard to the lots in the remaining divisions because the rights and duties associated with LISECC are not “restrictions” subject to the sunset clause, the parties all agree that the developers intended one cohesive governing scheme for all of LISE, the developers intended LISECC to continue perpetually, and the collective interests of all LISECC members are served only by recognizing LISECC’s authority.

II. STATEMENT OF UNDISPUTED FACTS

LISE consists of 448 lots in nine divisions platted from 1959 through 1965.² As each of the plats was recorded, it joined its division with the other LISE divisions through four intertwined provisions in which: (1) the developers agreed to convey certain common areas in that division to the HOA; (2) future owners of lots in that division were granted the right and obligation to be members of the HOA subject to its Articles of Incorporation and Bylaws; (3) future owners of lots in that division were granted the right to share the common areas in the other past and future plats; and (4) past and future owners of lots in the other divisions were granted the right to share that

¹ The Racketeer Influenced Corrupt Organizations Act, U.S.C. Title 18, Ch. 96.

² Decl. of Mark Sexton, ECF No. 50 ¶ 3; Pls.’ Resp. to Defs.’ Partial Mot. to Dismiss, ECF No. 30, Ex. A.

1 division's common areas. Although the language from one plat to the other was largely the same,
 2 it was not identical. Unlike the plats for the first two divisions, those for the later divisions limited
 3 the "restrictions" therein to 25 years from the date of the plat. Plaintiffs erroneously point to this
 4 sunset clause in the later plats to mean that "the plat restrictive covenants requiring owners to be a
 5 LISECC member (and thus pay dues) expired by 1990" for the entire LISE community.³

6 **A. None of the Rights and Duties in the Division 1 and 2 Plats Have "Expired."**

7 **1. Division 1.**

8 On December 29, 1959, A.J. and Gertrude McMillan recorded the plat for Division 1.
 9 They set forth the rights and duties associated with the ownership of a lot in Division 1.

10 Know all men by these presents:

11 That we the undersigned owners in fee simple of the within described lands
 12 to hereby declare this plat to be known as LUMMI ISLAND SCENIC
 13 ESTATES and do hereby dedicate to the public all Streets and Roads shown
 14 on the attached plats.

15 Right being reserved to construct and maintain Public Utilities on said Streets
 16 and Roads either above or below ground and to make all necessary slopes for
 17 cuts or fills upon the lots shown in the original grading of said Streets and
 18 Roads also the right to drain the Streets or Roads over or across any lot or
 19 lots where water may take a natural course.

20 No building shall be placed or maintained on any lot except a private
 21 dwelling, garage or suitable out building for the sole use of the owner or
 22 occupant except as hereafter stated. No building shall be moved to or placed
 23 upon these lands, all buildings shall be constructed upon the property except
 24 new ready made dwellings or garages.

25 Exterior work on any building shall be completed within one year from start
 26 of construction. No imitations of any material shall be used for exterior
 finish. Exterior finish shall be of wood, stone, brick, glass, concrete or like
 material. Roofing can be of any standard roofing material.

Sewage disposal shall be by Septic Tank or by a method approved by the
 County Board of Health.

No building shall be erected within 15 feet of the street line nor within 3 feet
 of the side property line except a garage which may be within 1 foot of the
 property line.

³ Second Am. Compl., ECF No. 79 ¶ 1.1.

Each lot is entitled to one hook-up to the private water system. The cost of the hook-up, materials, labor and meter to be paid for by the owner of the lot.

Ownership of those areas marked "Reserve" and Secondary Tidelands owned will be conveyed to a private non-profit corporation to be known as "Lummi Island Scenic Estates Holdings, Inc." Interest in any lot carries the ownership of one membership in said corporation subject to the Articles and By-laws thereof.

Ownership of any lot in this plat shall convey to the owner thereof rights to areas marked "Reserve" on future plats to be known as "division" 2-3-4 etc., "of Lummi Island Scenic Estates" also owners of lots in said sub-divisions shall acquire proportionate interest in "Reserves" herein.

Ownership by voluntary conveyance or contract is restricted to one individual or marital community.

No lot, tract or portion of a lot or tract of this plat shall be changed divided or sold or resold or ownership changed or transferred whereby the ownership of any portion of this plat shall be less than 7500 square feet.

Construction on any lot shall require a building permit prior to commencement of work.⁴

The four interrelated provisions highlighted above bound this first division to each of the divisions which would follow.⁵ First, the developers agreed to convey reserve areas and tidelands in Division 1 to the to-be-formed HOA. Second, future owners of lots in Division 1 were granted the right and obligation to be members of the HOA subject to its Articles of Incorporation and Bylaws. Third, future owners of lots in Division 1 were granted the right to share the reserve areas on future LISE plats. And, fourth, future owners of lots in the future LISE divisions were granted the right to share the reserve areas in Division 1.

The Division 1 Plat does not contain any expiration period for its restrictions, rights or obligations. Three Plaintiffs own lots in Division 1.⁶

⁴ Decl. of Pl. Ortego, ECF No. 31-1 at 2-4; Decl. of Pl. Ortego, ECF No. 31-2 at 2 (highlighting added).

⁵ As Plaintiffs acknowledge: "In each division the membership clause is closely tied to the clause conveying to LISE Holdings or LISECC the Reserve lands ownership; and giving lot owners rights in the reserves in all past and future div. Each such clause, like the member obligation, is part of one scheme of promises that touch and concern the land" Pls.' Resp. to Defs.' Partial Mot. to Dismiss, ECF No. 30 at 19 n.12.

⁶ *Id.* at 3:13-14.

2. Division 2.

More than a year later, on April 28, 1961, the McMillans along with Moksha and Ruth Smith, “doing business in co-partnership as Lummi Island Scenic Estates,” recorded the plat for Division 2.⁷ Although not identical, the changes in the Division 2 plat are not substantive. Regarding the four provisions intertwining Division 2 with the rest of LISE, the Division 2 plat altered the language of the Division 1 plat only as follows:

Ownership of those areas marked “Reserve” and Secondary Tidelands owned will be conveyed to a private non-profit corporation to be known as “Lummi Island Scenic Estates Holdings, Inc.” Interest in any lot carries the ownership of one membership in said corporation subject to the Articles and By-laws thereof.

Ownership of any lot in this plat shall convey to the owner there-of rights to areas marked “Reserve” on past and future plats to be known as “~~a~~Division” #1-2-3-4 etc., “of Lummi Island Scenic Estates”²; also owners of lots in said sub-divisions shall acquire proportionate interest in areas marked “Reserves” ~~here-on~~.⁸

Again, the developers agreed to convey reserve areas in Division 2 to the to-be-formed HOA, future owners of lots in Division 2 were granted the right and obligation to be members of the HOA subject to its Articles of Incorporation and Bylaws, future owners of lots in Division 2 were granted the right to share the reserve areas on past and future plats, and, past and future owners of lots in the other divisions were granted the right to share the Division 2 reserve areas.

The Division 2 plat also does not contain any expiration of its restrictions, rights or obligations. One Plaintiff owns a lot in Division 2.⁹

3. This Court Rejected Plaintiffs’ Claims that the Division 1 and 2 Plat Covenants “Expired.”

In 2015, this Court granted Defendants’ motion to dismiss the claim that owners in Divisions 1 and 2 were not subject to LISECC governance. The Court rejected Plaintiffs’ argument that the later-filed plats could contradict the language in the Division 1 and 2 plats.

⁷ Decl. of Pl. Ortego, ECF No. 31-1 at 5-6; Defs.’ Reply in Supp. of Partial Mot. to Dismiss, ECF No. 31-2 at 3.

⁸ Sexton Decl., Ex. 1 (comparing the Division 2 plat to the Division 1 plat).

⁹ Pls.’ Resp. to Defs.’ Partial Mot. to Dismiss, ECF No. 30 at 3:13-14.

[D]ocuments that were not in existence at the time of the original covenant can hardly be considered evidence of the parties' intent when the earlier documents were drafted and recorded. Nor is there any support for the extraordinary theory that later-filed documents related to a subdivision automatically supplant the terms of the original parties' recorded agreement. If that were the case, individuals who bought property in Divisions 1 and 2 and agreed to be bound by the specified restrictions could be subjected to new and unanticipated obligations simply because later purchasers were willing to accept them.¹⁰

Hence, pursuant to the binding Division 1 and Division 2 plats:

- (1) The Division 1 and 2 reserve areas and tidelands still belong to LISECC;
- (2) The owners of lots in Divisions 1 and 2 – including four Plaintiffs – have the right and obligation to be members of LISECC subject to its Articles of Incorporation and Bylaws;
- (3) The owners of lots in Divisions 1 and 2 have the right to share the reserve areas in each of the other divisions; and
- (4) The owners of lots in all of the other divisions have the right to share the reserve areas in Divisions 1 and 2.

B. The Covenants in the Plats for Divisions 3, 4, and 5.

On July 28, 1961, three months after they recorded the plat for Division 2, the McMillans and the Smiths, "doing business as Lummi Isl. Scenic Est.," recorded the plat for Division 3.¹¹ This plat included a list of restrictions on the use of the lots in that division which had not been present in either of the prior plats and otherwise varied from the Division 1 plat as follows:

Know all men by these presents:

That we, the undersigned, Moksha W. Smith and M. Ruth Smith his wife; A.J. McMillan and E. Gertrude his wife; doing business in co-partnership as Lummi Island Scenic Estates, being owners in fee simple of the within described lands herein platted, together with Lummi Island Land Co. Inc., being mortgagees of record of said land; ~~to~~ hereby declare this plat ~~to be known as LUMMI ISLAND SCENIC ESTATES and do hereby~~ dedicate to the use of the public forever all Streets and Roads, alleys, easements, and public sites shown on the ~~attached~~ plats; also, the right-

~~Right being reserved to construct and maintain Public Utilities on said Streets and Roads either above or below ground and to make all necessary slopes for cuts or and fills upon the lots, blocks, and tracts in any reasonable shown in the original grading of said Streets and the Roads, alleys, easements, and public sites; and also the right to drain all the Streets or Roads, alleys, and public sites over or across any lot or lots where water may might take a natural course after the grading. All lots, tracts, or parcels of land embraced~~

¹⁰ Order Granting in Part Mot. to Dismiss, ECF No. 40 at 3:10-16.

¹¹ Decl. of Pl. Ortego, ECF No. 31-1 at 7; Decl. of Pl. Ortego, ECF No. 31-2 at 4.

within this plat shall be subject to the following restrictions for a period of twenty five years from the date of recording of this plat; and all sales or transfers of ownership of the lots, tracts, or parcels shall be subject to these RESTRICTIONS as follows:-

1. No lot, tract, or portion of a lot, or tract shall be subdivided and sold, or resold, or ownership changed or transferred whereby the ownership of any portion of this lot shall be less than 7500 sq. ft. or less than 60 ft. in width at the building setback line.

2. No structure or building shall be constructed on any lot, tract, or parcel of this plat closer than 20 ft. to the front property line; and in the case of corner lots, no structure or building shall be constructed closer than 15 ft. to the side property line abutting the road right-of-way.

3. Construction on any lot shall require a building permit and a sewage disposal permit from the respective County agencies; and construction of any driveway or culvert on the road right-of-way shall require a permit from the County Road Engineer, prior to commencement of work.

4. Septic tanks may be prohibited. Construction and use of private sewage disposal systems should be in accordance with the requirements of the County Health Dept. Lots determined by the County Health Dept. to be unsuitable for septic tanks shall be restricted to approved concrete riser privies chemical toilets or other approved means of sewage disposal until they are served by a public sanitary sew. system.

5. No building shall be placed or maintained on any lot, except a private dwelling, garage, or suitable out-building for the sole use of the owner or occupant except as hereafter stated. No building shall be moved to or placed upon these lands, all buildings shall be constructed upon the property, except new, ready made dwellings or garages.

6. Exterior work on any building shall be completed within one year from start of construction. No imitations of any material shall be used for exterior finish. Exterior finish shall be of wood, stone, brick, glass, concrete, or like material. Roofing can be of any standard roofing material.

~~Sewage disposal shall be by Septic Tank or by a method approved by the County Board of Health.~~

~~No building shall be erected within 15 feet of the street line nor within 3 feet of the side property line except a garage which may be within 1 foot of the property line.~~

7. Each lot is entitled to one hook-up to the private water system. The cost of the hook-up, materials, labor and meter to be paid for by the owner of the lot.

8. Ownership of those areas marked "Reserve" and Secondary Tidelands owned will be conveyed to a private non-profit corporation to be known as "Lummi Island Scenic Estates Holdingsg Inc.," Interest ownership in any lot

carries the ownership of one membership in said corporation subject to the Articles and & By-laws thereof. Ownership of any lot in this plat shall convey to the owner thereof rights to areas marked "Reserve" on past and future plats to be known as "Division" 1, 2, 3, 4, etc., "of Lummi Island Scenic Estates" also owners of lots in said sub-divisions shall acquire proportionate interest in areas marked "Reserves" herein. Ownership by voluntary conveyance or contract is restricted to one individual or marital community.

No lot, tract or portion of a lot or tract of this plat shall be changed divided or sold or resold or ownership changed or transferred whereby the ownership of any portion of this plat shall be less than 7500 square feet.

Construction on any lot shall require a building permit prior to commencement of work.¹²

As with Divisions 1 and 2, the plat for Division 3 included the four provisions (highlighted above) intertwining Division 3 with the rest of LISE: (1) the developers agreed to convey reserve areas and tidelands in Division 3 to the to-be-formed HOA; (2) future owners of lots in Division 3 were granted the right and obligation to be members of the HOA subject to its Articles of Incorporation and Bylaws; (3) future owners of lots in Division 3 were granted the right to share the reserve areas on past and future plats; and (4) past and future owners of lots in the other divisions were granted the right to share the reserve areas in Division 3.

Three months later, on October 26, 1961, the Smiths and the McMillans recorded the plats for Divisions 4 and 5.¹³ The changes from the Division 3 plat were minor other than those made to Paragraph 1 of the Division 4 plat which changed as follows:

1. No lot, tract, or portion of a lot, or tract shall be subdivided and sold, or resold, or ownership changed or transferred whereby the ownership of any portion of this plat shall be less than 7500 sq. ft. or less than 60 50 ft. in width at the building setback line EXCEPT lots 95A, 96A, 97A, and 98A to be deeded to lots 95, 96, 97 and 98 respectively of LUMMI ISLAND SCENIC ESTATES DIVISION NO. 3 as recorded in volume 9 of plats, page 17, records of Whatcom County, Washington.¹⁴

As with Divisions 1, 2, and 3, the plat for Division 4 included the four provisions intertwining Division 4 with the rest of LISE with a few non-substantive alterations:

¹² Sexton Decl., Ex. 2 (comparing the Division 3 plat to the Division 1 plat).

¹³ Decl. of Pl. Ortego, ECF No. 31-1 at 8-9; Decl. of Pl. Ortego, ECF No. 31-2 at 5-6.

¹⁴ Sexton Decl., Ex. 3 (comparing the Division 4 plat to the Division 3 plat).

Ownership of those areas marked “Reserve” and Secondary Tidelands owned will be conveyed to a private non-profit corp. to be known as “Lummi Island Scenic Est. Holdings Inc.” Ownership in any lot carries the ownership of one membership in said corp. subj. to the Articles and By-laws thereof. Ownership of any lot in this plat shall convey to the owner thereof rights to areas marked “Reserve” on past and future plats known as Div. 1, 2, 3, 4, etc. Lummi Is Scenic Est., also owners of lots in said subdiv. shall acquire proportionate in areas marked “Reserves”.¹⁵

From the Division 4 to Division 5 plats, the only material change was that Paragraph 1 reverted back to the 60-foot restriction.¹⁶ The plat for Division 5, as with each of the prior plats, bound future lots owners to the to-be-formed HOA and to all past and future divisions with only minor changes from the prior plat.

Ownership of those areas marked “Reserve” and Secondary Tidelands owned will be conveyed to a private non-profit corp. to be known as Lummi Island Scenic Est. Holdings Inc. Ownership in any lot carries the ownership of one membership in said corp. subj. to the Articles and By-laws thereof. Ownership of any lot in this plat shall convey to the owner thereof rights to areas marked “Reserve” on past and future plats known as Div. 1, 2, 3, 4, etc. Lummi Isl Scenic Est., also owners of lots in said subdivisions shall acquire proportionate in areas marked “Reserves”.¹⁷

C. The Incorporation of LISECC.

Seven months later, on June 14, 1962, LISECC was incorporated by five people, including Moksha Smith, who had signed the plats for Divisions 2, 3, 4, and 5, was a member of the initial Board of Directors ordained by the Articles of Incorporation, and would sign each of the plats for the future LISE divisions.¹⁸ The purposes of the new HOA included improving and maintaining LISE’s boat landings, clubhouse, and swim areas “for the use and benefit of its members” and improving and maintaining roads.¹⁹ The Articles of Incorporation authorized LISECC:

To enforce liens, charges, restrictions, conditions and covenants existing upon and/or created for the benefit of parcels of real property over which said corporation has jurisdiction and to which said parcels may be subject to the extent that said corporation has the legal right to enforce the same, and to pay all expenses incidental thereto.²⁰

¹⁵ *Id.*

¹⁶ *Id.*, Ex 4 (comparing the Division 5 plat to the Division 4 plat).

¹⁷ *Id.*

¹⁸ *Id.*, Ex. 5, Art. IV.

¹⁹ *Id.*, Art. II ¶¶ 1-2.

²⁰ *Id.*, Art. II ¶ 6.

Further, LISECC was authorized:

To appropriate, purchase, divert, acquire and store water from streams, water courses, wells or any other source, and to distribute the water so appropriated and acquired to its members for use upon the lands of said members and for domestic purposes; to acquire, own, construct, hold, possess, use and maintain such pumping plants, tanks, pipe lines, reservoirs, ditches, buildings, roads, trails and appliances, and such other property, including water rights and shares of stock in other corporations as said corporation may from time to time desire to acquire or purchase for furnishing and supplying water to its members; provided that this corporation shall not use or dispose of such water as a public utility, but solely for the use and benefit of its members and for the irrigation of lands and domestic and other useful and beneficial purposes.²¹

In addition, the Articles of Incorporation gave LISECC the power:

10. To fix, establish, levy and collect annually such charges and/or assessments as may be necessary, in the judgment of the board of trustees to carry out any or all of the purposes for which this corporation is formed, but not in excess of the maximum from time to time fixed by the Bylaws.

11. To expend the moneys collected by said corporation from assessments and charges and other sums received for the payment and discharge of costs, expenses, and obligations incurred by said corporation in carrying out any and all of the purposes for which said corporation is formed.²²

The incorporators intended that all property within LISE would be “subject to the jurisdiction” of LISECC and provided that LISECC’s

purposes and powers are to be exercised and carried into effect for the purpose of doing, serving and applying the things above set forth for the benefit of all property, including, but without in any way limiting the foregoing, any portion or portions of certain real property situated on Lummi Island, Whatcom County, Washington, which is, or shall become, so subject to the jurisdiction of this corporation, **which shall include generally all real property developed and sold by Lummi Island Scenic Estates, a partnership, and all property subsequently acquired, developed and sold by the said partnership, it being intended hereby to include all contiguous or immediately adjacent areas of the classes aforesaid.**²³

Pursuant to the Articles of Incorporation, “Membership ... shall be inseparately appurtenant to tracts owned by its members, and upon transfer of ownership or contract for sale of any such tract, membership and certificate of membership shall ipso facto be deemed to be

²¹ *Id.*, Art. II ¶ 9.

²² *Id.*, Art. II.

²³ *Id.*, Art. II at 6-7 (emphasis added).

transferred to the grantee or contract purchaser.”²⁴ And, finally, the incorporators ordained that “[t]he time of existence of this corporation **shall be perpetual**.”²⁵

D. The Covenants in the Plats for Divisions 7, 9, and 6.

One month after LISECC’s incorporation, in July 1962, Moksha Smith recorded the plats for Divisions 7 and 9.²⁶ The plat for Division 7 made several substantive and non-substantive changes to the language from the prior plat, as follows:

Know all men by these presents that ~~we the undersigned, Moksha W. Smith and M. Ruth Smith his wife; A.J. McMillan and E. Gertrude McMillan his wife; doing business in co-partnership as Lummi Island Scenic Estates, a partnership recorded in Vol. 7, Pgs. 308 thru 316 incl. under Auditors file No. 924036 records of Whatcom County, Washington being owners in fee simple of the land herein platted,~~ together with Lummi Island Land Co. Inc., being mortgagees of record of said land, hereby declare this plat and dedicate to the use of the public forever only that roadway shown as ISLAND DRIVE and in lieu of the dedication of other all roads, alleys, easements, and public sites shown on this the plat, hereby reserves forever unto all purchasers of all lots and tracts in this div. & previous & subsequent divs. Of LUMMI ISLAND SCENIC EST. a permanent exm’t for ingress & egress & public & private utilities and confined to all private roadways shown hereon,; also the right to make all necessary slopes for cuts and fills upon the lots, blocks and tracts in any reasonable grading of the roads, alleys, easements, and public sites; and also with the right to drain all roads, easements alleys, and public sites over and or across any lot or lots where water might take a natural course after the grading. All lots, tracts, or parcels of land embraced within this plat shall be subject to the following restrictions for a period of twenty-five years from the date of the recording of this plat, and all sales or transfers of ownership of the lots, tracts, or parcels shall be subject to these RESTRICTIONS as follows:

1. No lot, tract, or portion of a lot or tract shall be subdivided and sold, or resold, or ownership changed or transferred whereby the ownership of any portion of this plat shall be less than 7500 sq. ft. or less than 60 ft. in width at the building setback line.

2. No structure or building shall be constructed on any lot, tract, or parcel of this plat closer than 30 20 ft. to the centerline of easement front property line; and in the case of corner lots, no structure or building shall be constructed closer than 30 15 ft. to the centerline of easement side property line abutting the road right-of-way.

²⁴ *Id.*, Art. II at 7.

²⁵ *Id.*, Art. V (emphasis added).

²⁶ Decl. of Pl. Ortego, ECF No. 31-1 at 11-12; Decl. of Pl. Ortego, ECF No. 31-2 at 8-9. Division 6 was recorded later and there is no Division 8.

3. Construction of any lot shall require a building permit and a sewage disposal permit from the respective County agencies; and construction of any driveway or culvert on the road right-of-way shall require a permit from the County Road Engineer, prior to commencement of work.

4. Septic tanks may be prohibited. Construction and use of private sewage disposal systems shall be in accordance with the requirements of the County Health Dept. Lots determined by the County Health Dept. to be unsuitable for septic tanks shall be restricted to approved concrete riser privies, chemical toilets, or other approved means of sewage disposal until they are served by a public sanitary sewer system.

5. No building shall be placed or maintained on any lot except a private dwelling, garage, or suitable out-building for the sole use of the owner or occupant except as hereafter stated. No building shall be moved to or placed upon these lands, all buildings shall be constructed upon the property except new, ready made dwellings or garages.

6. Exterior work on any building shall be completed within one year from the start of construction. No imitations of any materials shall be used for exterior finish. Exterior finish shall be of wood, stone, brick, glass, concrete, or like material. Roofing can be of any standard roofing material.

7. Each lot is entitled to one hookup to the private water system. The cost of the hook-up, materials, labor and meter to be paid for by the owner of the lot.

8. Ownership of those areas marked "Reserve" and Secondary Tidelands owned will be conveyed to a private non-profit corp. to be known as LUMMI ISLAND SCENIC ESTATES, Holdings COMMUNITY CLUB INC. Ownership in any lot carries the ownership of one membership in said corp. subj. to the Articles & and By-laws thereof. Ownership in of any lot in this plat shall convey to the owner thereof rights to areas marked "Reserve" on past & and future plats known as Div. 1, 2, 3, 4, etc. Lummi Isl. Scenic Est., also owners of lots in said subdivisions shall acquire proportionate in areas marked "Reserve". Ownership by voluntary conveyance or contract is restricted to one individual or marriage community.²⁷

As with the plats for each of the prior divisions, the highlighted language above included the four provisions intertwining Division 7 with the rest of LISE and the now-created HOA: (1) the developers agreed to convey reserve areas and tidelands in Division 7 to LISECC; (2) future owners of lots in Division 7 were granted the right and obligation to be members of LISECC subject to its Articles of Incorporation and Bylaws; (3) future owners of lots in Division 7 were granted the right to share the reserve areas on past and future plats; and (4) past and future owners of lots in the other divisions were granted the right to share the reserve areas in Division 7.

²⁷ Sexton Decl., Ex. 6 (comparing the Division 7 plat to the Division 5 plat).

The plat for Division 9, recorded the same day, included substantive changes to the Division 7 plat in the introductory provision and non-substantive changes to the final four-part provision intertwining Division 9 with the rest of LISE and LISECC, as follows:

Know all men by these presents that Lummi Island Scenic Estates, a partnership recorded in Vol. 7, Pgs. 308 thru 316 incl. under Auditors file No. 924036 records of Whatcom County, Washington, together with Lummi Island Land Co. Inc., being mortgagees of record of said land, hereby declare this plat and ~~dedicate to the use of the public forever only that roadway shown as ISLAND DRIVE~~ and in lieu of the dedication of ~~other roads shown on this plat~~, hereby reserves forever unto all purchasers of all lots and tracts in this div. & previous & subsequent divisions: Of LUMMI ISLAND SCENIC EST. a permanent esm't for ingress and egress & public & private utilities ~~and confined to all private roadways shown hereon, with the right to drain all roads, easements, and public sites~~ over and across any lot or lots where water might take a natural course after the grading. All lots, tracts, or parcels of land embraced within this plat shall be subject to the following restrictions for a period of twenty five years from the date of ~~the~~ recording of this ~~plat~~ and all sales or transfers of ownership of the lots, tracts, or parcels shall be subject to these RESTRICTIONS as follows: ...

8. Ownership of those areas marked "Reserve" and Secondary Tidelands owned will be conveyed to a private, non-profit corp. known as LUMMI ISLAND SCENIC ESTATES COMMUNITY CLUB INC., ~~Ownership in any lot carries the ownership of one membership in said corp. subject to the Articles & By-laws thereof. Ownership in of any lot in this plat shall convey to the owner thereof rights to areas marked "Reserve" on past & and future plats known as Div. 1, 2, 3, 4 etc. Lummi Island Scenic Est., also owners of lots in said subdivs. shall acquire proportionate in areas marked "Reserve".~~²⁸

One year later, on July 2, 1963, Moksha Smith recorded the plat for Division 6.²⁹ Again, there were substantive changes in the introductory provision and non-substantive changes to the final four-part provision intertwining Division 6 with the rest of LISE and LISECC:

Know all men by these presents that Lummi Island Scenic Estates, a partnership recorded in Vol. 7, Pgs. 308 thru 316 incl. under Auditors file No. 924036 records of Whatcom County, Washington, together with Lummi Island Land Co. Inc., being mortgagees of record of said land, hereby declare this plat and in lieu of ~~the~~ dedication of roads shown on this plat, hereby reserves forever unto all purchasers of all lots and tracts in this plat an equal and undivided interest in all roads, with div. & previous & subsequent division Of LUMMI ISLAND SCENIC EST. a permanent easement for ingress and egress & public & private utilities thereon, with the right to drain all roads, easements and public sites over and across any lot or lots where

²⁸ *Id.*, Ex. 7 (comparing the Division 9 plat to the Division 7 plat).

²⁹ Decl. of Pl. Ortego, ECF No. 31-1 at 10; Decl. of Pl. Ortego, ECF No. 31-2 at 7.

water might take a natural course after the grading. All lots, tracts or parcels of land embraced within this plat shall be subject to the following restrictions for a period of twenty five years from the date of recording of this, and all sales or transfers of ownership of the lots, tracts or parcels shall be subject to these RESTRICTIONS as follows: ...

8. Ownership of those areas marked "Reserve" and Secondary Tidelands owned will be conveyed to a private non-profit corp. known as LUMMI ISLAND SCENIC ESTATES COMMUNITY CLUB INC., ownership in any lot carries the ownership of one membership in said corp. subject to the Articles & By-laws thereof. Ownership of any lot in this plat shall convey to the owner thereof rights to areas marked "Reserve" on past and future plats known as Div. 1, 2, 3, 4 etc. Lummi Island Scenic Est., also owners of lots in said subdivs. shall acquire proportionate in areas marked "Reserve".³⁰

As before: (1) the developers agreed to convey reserve areas in Division 6 to LISECC; (2) future owners of lots in Division 6 were granted the right and obligation to be members of LISECC subject to its Articles of Incorporation and Bylaws; (3) future owners of lots in Division 6 were granted the right to share the reserve areas on past and future plats; and (4) past and future owners of lots in the other divisions were granted the right to share the reserve areas in Division 6.

E. LISECC Adopts Bylaws.

Several weeks later, LISECC adopted Bylaws.³¹ They provided that each lot owner was a LISECC member and "no member may withdraw except upon transfer of title to the real estate to which his membership is appurtenant."³² Pursuant to the Bylaws, the "powers of" LISECC are "vested in a Board of Trustees."³³ Furthermore, "[t]he members" of LISECC are "liable for the payment of such annual dues as may from time to time be fixed and levied by the Board"³⁴

F. Moksha Smith Records the Final Plat.

More than two years later, on August 23, 1965, Moksha Smith recorded the plat for the final part of LISE, Division 10.³⁵ This final plat included substantive changes to the preliminary paragraph, which reinforced the bond among all of the divisions, and immaterial changes to the four-part provision intertwining Division 10 with the rest of LISE and LISECC, as follows:

³⁰ Sexton Decl., Ex. 8 (comparing the Division 6 plat to the Division 9 plat).

³¹ *Id.*, Ex. 9.

³² *Id.*, Art. II, §§ 1, 4.

³³ *Id.*, Art. IV, § 1.

³⁴ *Id.*, Art. IX, § 1.

³⁵ Decl. of Pl. Ortego, ECF No. 31-1 at 13; Decl. of Pl. Ortego, ECF No. 31-2 at 10.

Know all men by these presents that Lummi Island Scenic Estates, a partnership recorded in Vol. 7, Pgs. 308 thru 316 incl. under Auditors file No. 924036 records of Whatcom County, Washington, together with Lummi Island Land Co. Inc., being mortgagees of record of said land, hereby declare this plat and dedicate to the use of the public forever only that roadway shown as ISLAND DRIVE and in lieu of dedication of other roads shown on this plat, hereby reserves forever unto all purchasers of all lots and tracts in this div. & previous & subsqnt. divs. of LUMMI ISLAND SCENIC ESTATES, ~~plat an equal and undivided interest in all roads, with a permanent easement for ingress & egress & public & private utilities over but confined to all private roadways shown hereon~~ thereon, with the right to drain all roads, easements and public sites over and across any lot or lots where water might take a natural course after the grading. All lots, tracts or parcels of land embraced within this plat shall be subject to the following restrictions for a period of twenty five years from the date of recording of this plat; and all sales or transfers of ownership of the lots, tracts, or parcels shall be subject to these RESTRICTIONS as follows:...

8. Ownership of those areas marked "Reserve" and Secondary Tidelands owned will be conveyed to a private non-profit corp. known as LUMMI ISLAND SCENIC ESTATES COMMUNITY CLUB INC., ownership in any lot carries the ownership of one membership in said corp. subject to the Articles & By-laws thereof. Ownership of any lot in this plat shall convey to the owner thereof rights to areas marked "Reserve" on past & and future plats known as Div. 1, 2, 3, 4, etc. Lummi Island Scenic Est. also owners of lots in said subdivs. shall acquire proportionate in areas marked "Reserve".³⁶

G. LISECC's Water System.

In September 1966, 10 months after it recorded the final plat, the Lummi Island Scenic Estates Partnership applied to the State of Washington for a permit to construct a reservoir for the storage and use of water in LISE.³⁷ The State granted the permit to LISE on May 26, 1967.³⁸ In 1968 and 1969, the State issued Certificates of Surface Water Right to LISE.³⁹

As explained by Plaintiff Charles Ortego, today, "LISECC operates the water system and recreational facilities" which include a "marina, clubhouse, swimming lake and cabana."⁴⁰ "The

³⁶ Sexton Decl., Ex. 10 (comparing the Division 10 plat to the Division 6 plat).

³⁷ *Id.*, Ex. 11.

³⁸ *Id.*, Ex. 12.

³⁹ *Id.*, Exs. 13-14.

⁴⁰ Thulin Decl., Ex. 1 at 2:25-3:1.

water system includes a reservoir, a plant, and a distribution system.”⁴¹ The water system also “includes the lake, a filtration house, and piping reaching the 215 hookups.”⁴²

H. LISE Conveys Reserves to LISECC and LISECC Records Notice of Assessment.

As provided in each of the plats, on August 7, 1968, the Lummi Island Scenic Estates Partnership, the developer of LISE, executed a statutory warranty deed transferring to LISECC twelve parcels of property within LISE.⁴³ Plaintiffs recognize that the “Reserves tracts include the LISECC water reservoir used for the LISECC water system.”⁴⁴

Several months later, on November 30, 1968, LISECC recorded a Notice to Public of Assessment on Real Property which provided notice to “owners and future purchasers of real property described as LUMMI ISLAND SCENIC ESTATES” of the four-part provision intertwining each LISE division with the other divisions and with the HOA and

Of an annual assessment for maintenance and improvements against each and every Lot in the hereinbefore described Realty, by LUMMI ISLAND SCENIC EST. COMMUNITY CLUB, INC. pursuant to provisions contained in original Plat of said Divisions as recorded in the Auditor’s office of Whatcom, County, Washington, wherein it is provided:

“Ownership of those areas marked “Reserve” and Secondary Tidelands owned will be conveyed to a private, non-profit Corp. to be known as Lummi Island Scenic Est. Holdings Inc. Ownership in any Lot carries the ownership of one membership in said Corp., subject to the ARTICLES AND BY-LAWS thereof. Ownership of any Lot in this plat shall convey to the owner thereof rights to areas marked “Reserve” on past and future Plats known as Divisions #1, 2, and 4, etc., Lummi Island Scenic Est., also owners of Lots in said subdivision shall acquire proportioned shares in areas marked “Reserve”.⁴⁵

The recorded Notice confirmed that LISECC was “the successor of Lummi Island Scenic Est. Holdings Inc.” and advised the public of the Bylaw provisions authorizing LISECC to assess and collect dues and fees “against all of the Lots” in LISE.⁴⁶ The stated purpose of the Notice was “to notify Title Companies and the general public” of these dues assessments and that title to any

⁴¹ *Id.* at 3 n.1.

⁴² *Id.*

⁴³ Sexton Decl., Ex. 15.

⁴⁴ Pls.’ Resp. to Defs.’ Partial Mot. to Dismiss, ECF No. 30 at 4:20-21.

⁴⁵ Goldman Decl., Ex. 6.

⁴⁶ *Id.*

LISE lots would “be subject to forfeiture unless said assessments are paid in full.”⁴⁷ The Notice did not contain or reference any sunset provision.

I. LISE Conveys the Remaining Reserve Tracts to LISECC.

In March 1975, the Lummi Island Scenic Estates Partnership executed a quitclaim deed transferring to LISECC five additional parcels of property within LISE.⁴⁸ In May 1978, the bankruptcy trustee for the Partnership quit claimed to LISECC five more parcels within LISE.⁴⁹

J. None of the Parties Has Independent Knowledge of the Developers’ Intent.

None of the original developers is alive today.⁵⁰ The only party to have been an original owner of lots in LISE is Lummi Island Land Company (“LILCO”), a closely-held family company presided over today by Jim Dickinson who was a teenager at the time LISE was developed.⁵¹ Neither he nor anyone else at LILCO has knowledge about conversations his now-deceased father had with the LISE developers.⁵² Mr. Dickinson has testified that the first time he looked at a plat for LISE was “[p]robably about 2010.”⁵³ As he explained, “I think the only thing we have to go by is the plat. Remember, I was a teenager at the time.”⁵⁴ Of all of the other Plaintiffs, the first to purchase a lot in LISE was John Weber who did so in 1985.⁵⁵ The first of the Defendants to purchase a lot in LISE was Ron Bain who did so in 1980.⁵⁶ None of the parties has independent knowledge of the developers’ intent.⁵⁷

⁴⁷ *Id.*

⁴⁸ Sexton Decl., Ex. 16.

⁴⁹ *Id.*, Ex. 17.

⁵⁰ Thulin Decl., Ex. 2 at 4:15.

⁵¹ Goldman Decl., Ex. 1 at 81:25-82:8.

⁵² *Id.* at 81:25-82:9, 63:24-64:1.

⁵³ *Id.* at 56:17.

⁵⁴ *Id.* at 63:10-23; *accord id.* at 76:24-77:1 (“I believe that’s well spelled out on the plat.”).

⁵⁵ Sexton Decl. ¶ 19.

⁵⁶ *Id.* ¶ 20.

⁵⁷ *See, e.g.*, Goldman Decl., Ex. 2 at 84:24-25 (Pl. L. Weber: “I do not know the developers, but I can read what they wrote, and that’s how I understand.”); *Id.*, Ex. 3 at 38:13-40:11 (Pl. Barry: “Q. Do you have any reason to believe that the 25-year time limit expired other than what your lawyer has told you? A. No.”); *id.*, Ex. 4 at 49:8-21 (Pl. J. Weber: “I wasn’t around when they originally developed the Scenic Estates. I didn’t own any property then. I didn’t talk to any of the original developers.... I don’t have any firsthand knowledge on what they intended, no.”); *id.*, Ex. 5 at 46:7-13 (Plaintiff Armfield derives the intent of the original developers from reading the Articles of Incorporation and the Bylaws).

III. ARGUMENT AND AUTHORITY

Three basic propositions dictate the outcome of this Motion. This Court already has ruled that Divisions 1 and 2 continue today to be subject to LISECC governance. All of the parties agree on the other two propositions. They agree that the meaning of the plat covenants is an issue of law to be decided on summary judgment. They also agree that the developers of LISE intended that the entire community be subject to uniform member obligations. These propositions can support only one conclusion of law here, namely that the 25-year sunset clause which applied to some plats but not others and which, where applicable, concerned only “restrictions” on owners’ use of their lots, **did not** apply to the rights and duties associated with LISECC which was intended to govern the entire development in perpetuity.

A. This Court Has Ruled that LISECC’s Authority Over Divisions 1 and 2 Continues.

This Court **dismissed** Plaintiffs’ claims that any of the plat covenants for Divisions 1 and 2 has expired.⁵⁸ Hence, no matter how the plats of the other divisions are interpreted in this lawsuit, the binding, non-expiring Division 1 and Division 2 plats decree that:

- (1) The reserve areas in Divisions 1 and 2 continue to belong to LISECC;
- (2) The owners of lots in Divisions 1 and 2 have the right and obligation to be members of LISECC subject to its Articles of Incorporation and Bylaws;
- (3) The owners of lots in Divisions 1 and 2 have the right to share the reserve areas in each of the other divisions; and
- (4) The owners of lots in all of the other divisions have the right to share the reserve areas in Divisions 1 and 2.

B. The Parties Agree That the Plat Covenants Are Unambiguous and Their Meaning Should be Determined on Summary Judgment.

In June 2013, the primary Plaintiffs before this Court, Charles Ortego and LILCO, under the name Lummi Island Homeowners Alliance (“LIHA”), moved the Superior Court for summary judgment on their claim that the requirements of membership in LISECC had “expired” due to the sunset clause in the plats for Divisions 3-10 because “there is no genuine issue as to any material fact.”⁵⁹ LIHA conceded that “there is no ambiguity” in the plat language.⁶⁰

⁵⁸ Order Granting in Part Mot. to Dismiss, ECF No. 40.

⁵⁹ Thulin Decl., Ex. 3 at 9:13-14. The court denied LIHA’s summary judgment motion. Thulin Decl. ¶ 5.

⁶⁰ *Id.*, Ex. 3 at 11:17.

Defendants agree that the plats are not ambiguous and that their meaning is an issue of law.⁶¹ “The court’s goal is to ascertain and give effect to those purposes intended by the covenants” and “[c]ourts place special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.”⁶² “The relevant intent, or purposes, is that of those establishing the covenants.”⁶³ The Court must “give covenant language its ordinary and common usage and will not construe a term in such a way so as to defeat the plain and obvious meaning.”⁶⁴ Washington courts recognize that “subdivision covenants tend to enhance, not inhibit, the efficient use of land.”⁶⁵ Finally, the instrument must be considered in its entirety.⁶⁶

1. The Sunset Clause in the Remaining Divisions Applies Only to “Restrictions,” Not to Affirmative Duties and Rights.

By their terms, the sunset provisions in the plats for the divisions that followed 1 and 2, applied only to “restrictions.” For example, the Division 3 plat provides:

All lots, tracts, or parcels of land embraced within this plat shall be subject to the following restrictions for a period of twenty five years from the date of recording of this plat; and all sales or transfers of ownership of the lots, tracts, or parcels shall be subject to these RESTRICTIONS as follows:....⁶⁷

A “restriction” is “[a] limitation, often imposed in a deed or lease respecting the use to which the property may be put.”⁶⁸

⁶¹ *Wilkinson v. Chiwawa Cmty. Ass’n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). This is particularly so given there is no evidence of what the developers intended besides the written instruments they created.

⁶² *Id.* at 250 (quotation marks & citations omitted).

⁶³ *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997).

⁶⁴ *Wilkinson*, 180 Wn.2d at 250 (quotation marks & citation omitted).

⁶⁵ *Id.* at 249-250 (quotation marks, brackets & citation omitted); *accord Riss*, 131 Wn.2d at 623 (“Private land use restrictions have been particularly important in the twentieth century when the value of property often depends in large measure upon maintaining the character of the neighborhood in which it is situated”) (quotation marks & citations omitted); *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 106, 267 P.3d 435 (2011) (“covenants also tend to enhance the value of the land”).

⁶⁶ *Wilkinson*, 180 Wn.2d at 250.

⁶⁷ Decl. of Pl. Ortego, ECF No. 31-1 at 7; Decl. of Pl. Ortego, ECF No. 31-2 at 4 (emphasis added).

⁶⁸ *Black’s Law Dictionary* 1182 (5th ed. 1979) (emphasis added); *accord* TheFreeDictionary.com (last visited May 13, 2016), <http://legal-dictionary.thefreedictionary.com/restriction> (“any limitation on activity, by statute, regulation or contract provision. In multi-unit real estate developments, condominium and cooperative housing projects managed by homeowners associations or similar organizations are usually required by state law to impose restrictions on use.”); MerriamWebster.com (last visited May 13, 2016), <http://www.merriam-webster.com/dictionary/restriction> (“a limitation on the use or enjoyment of property”).

1 The covenants which follow the sunset provision in the Division 3 Plat include both
 2 “restrictions” and affirmative rights and duties. Paragraphs 1 through 6 contain restrictions on
 3 how owners can use their lots. Paragraph 1 restricts the subdivision of lots. Paragraph 2 restricts
 4 where a house can be placed on the lots. Paragraph 3 restricts construction on the lots to properly-
 5 permitted projects. Paragraph 4 restricts the construction of sewage disposal systems on the lots.
 6 Paragraph 5 restricts the use of the lots to private dwellings and restricts the type of building that
 7 can be constructed or placed on the lots. Paragraph 6 restricts exterior work on any buildings on
 8 the lots to one year from the start of construction and restricts the type of materials which can be
 9 used for buildings on the lots. In addition, the last sentence of Paragraph 8 restricts ownership of
 10 the lots to one individual or married couple.⁶⁹

11 However, Paragraph 7 and the rest of Paragraph 8 are different. They say nothing about
 12 what owners can or cannot do on or with their lots. They are not “restrictions.” To the contrary,
 13 they describe affirmative rights and duties in relation to the development as a whole. Paragraph 7
 14 grants to each lot the right to “hook-up to the private water system.”⁷⁰ Paragraph 8 states four
 15 other provisions intertwining each division with the rest of LISE:

16 Ownership of those areas marked “Reserve” and Secondary Tidelands owned
 17 will be conveyed to a priv. non-profit corp. to be known as “Lummi Island
 18 Scenic Est. Holdings Inc., ownership in any lot carries the ownership of one
 19 membership in said corp. subj. to the Articles & By-laws thereof. Ownership
 20 of any lot in this plat shall convey to the owner thereof rights to areas marked
 “Reserve” on past and future plats known as Div. 1, 2, 3, 4, etc. Lummi Is
 Scenic Est., also owners of lots in said sub-divs. shall acquire proportionate
 in areas marked “Reserves”.⁷¹

21 Because only the “restrictions” expire pursuant to the sunset clause, the affirmative duties
 22 and rights relative to the HOA do not.

25 ⁶⁹ Decl. of Pl. Ortego, ECF No. 31-1 at 7; Decl. of Pl. Ortego, ECF No. 31-2 at 4.

26 ⁷⁰ Decl. of Pl. Ortego, ECF No. 31-1 at 7; Decl. of Pl. Ortego, ECF No. 31-2 at 4.

⁷¹ Decl. of Pl. Ortego, ECF No. 31-1 at 7; Decl. of Pl. Ortego, ECF No. 31-2 at 4.

2. The Developers Intended LISECC to Continue Perpetually.

In interpreting covenants, courts “look to the surrounding circumstances of the original parties to determine the meaning of specific words and terms used in the covenants.”⁷²

[A]rticles of incorporation, by-laws, and covenants are “correlated documents” that are construed together. Because the governing documents are correlated, the scope of a homeowners’ association’s authority is not determined based solely upon one such document; rather, such a determination requires analyzing the documents as a whole.⁷³

Indeed, the developers of LISE demonstrated in all of their governing documents their intent that the HOA govern LISE perpetually. They provided in each of the plats that they would convey common areas to the HOA and that “ownership in any lot carries the ownership of one membership in said corp. subj. to the Articles & By-laws thereof.”⁷⁴ Not only were HOA membership rights and obligations subject to the Articles of Incorporation, but those Articles were signed by Moksha Smith who also signed the LISE plats on behalf of the Partnership for all but Division 1 before and after incorporation.⁷⁵ The Articles of Incorporation, which Mr. Smith signed and which the plats incorporate, provide that “[t]he time of existence of this corporation shall be perpetual.”⁷⁶

So, the Plats ordained that LISE would be governed by an HOA but left the determination of how the HOA would function to the detailed Articles of Incorporation. This Court recently held this to be the case, finding that “[t]he plats’ limited description of the relationship between lot ownership and membership is ‘subject to’ LISECC’s Articles and By-Laws.”⁷⁷

⁷² *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999); *accord Roats v. Blakely Island Maint. Comm’n, Inc.*, 169 Wn. App. 263, 274, 279, 279 P.3d 943 (2012) (The context rule “allows a court, while reviewing the contract as a whole, to consider extrinsic evidence, such as the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties’ respective interpretations.”).

⁷³ *Roats*, 169 Wn. App. at 274 (citations omitted); *accord Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 275, 883 P.2d 1387 (1994); Thulin Decl., Ex. 2 at 3:10-13 (It is “certainly true” that “the Court should consider all governing documents together, in context, when contemplating the scope of a homeowner association’s authority.”).

⁷⁴ Decl. of Pl. Ortego, ECF No. 31-1 at 7; Decl. of Pl. Ortego, ECF No. 31-2 at 4 (emphasis added). While this language is directly quoted from the plat for Division 3, each of the other plats contains materially identical language. Decl. of Pl. Ortego, ECF No. 31-1 at 2-6, 8-13; Decl. of Pl. Ortego, ECF No. 31-2 at 2-3, 5-10.

⁷⁵ Sexton Decl., Ex. 5, Art. IV.

⁷⁶ *Id.*, Art. V.

⁷⁷ Order Granting Defs.’ Mot. for Summ. J. Regarding Bound Lot Claims, ECF No. 80 at 5:8-10.

A plain reading of the recorded instruments show that they specifically referenced and incorporated the Articles and By-Laws when defining the relationship between lot ownership and membership in LISECC. The relationship described in the referenced documents cannot, therefore, be a breach of any promise or covenant in the recorded land records.⁷⁸

Therefore, LISECC's continued existence as provided in the Articles **cannot** violate the plats.

The perpetual existence and authority of LISECC also is confirmed by the fact that the developers conveyed to LISECC the reserve tracts – including the swim lake, the drinking water reservoir, the club house, and the dock – without any reversionary clause.⁷⁹ Had the developers intended for LISECC's authority to expire within 25 years of the date of each respective plat, they would have provided for ownership of the community's common areas to revert to the owners as tenants in common. It would have been illogical for the developers to have permanently deeded the common areas to an expiring HOA which would deprive LISE owners of the right to use LISECC's reserve areas after 25 years.⁸⁰

C. The Developers Intended that All Lots Be Treated the Same Vis-à-Vis the HOA.

Plaintiffs and Defendants also agree that, as generally is the case, the developers intended a unified HOA governance scheme for all of the lots within LISE.⁸¹ In opposing Defendants' successful motion to dismiss the expiration claims in regard to Divisions 1 and 2, Plaintiffs argued that the developers intended that those divisions be governed precisely like the seven plats which followed. They adamantly rejected the notion that

LISE was planned to be split into two parts – one with mandatory dues and assessments obligations via the membership *covenant in perpetuity* (div. 1 and 2), and one without any further dues or assessment obligations (div. 3-7 and 9-10). This sundering could not have been the plan, as it leads to bizarre,

⁷⁸ *Id.* at 4:22-5:3.

⁷⁹ *See supra* §§ II, H-I.

⁸⁰ *See, e.g., Lakes at Mercer Island HOA v. Witrak*, 61 Wn. App. 177, 181, 183, 810 P.2d 27 (1991) (“Adopting a definition of ‘fence’ as excluding trees and being limited only to a structure frustrates the purpose of the covenants” to “protect the aesthetic harmony of the community, preserve an open natural appearance, and maintain the view and light of each property owner.” “Given the covenant’s clear concern with height and obstruction of neighbors’ light and view, it would be a strange reading indeed that would require prior approval of relatively low shrubbery delineating a lot line but allow a property owner to plant large trees along the same lot line without ACC approval.”).

⁸¹ *See Shafer*, 76 Wn. App. at 276 (“[A] review of the plat dedication, Articles, and By-laws, which are ‘correlated documents’, clearly indicate that Sandy Hook’s developers intended to provide for a planned and uniform scheme of development that would be applicable to all lots.”).

forced and harsh results including [a] large increase in potential dues for the div. 1 and 2 owners, as they would be the only ones left. The drafters did not plan this 1990 sundering of LISE. Their intent was a unified LISE, with uniform member obligations throughout⁸²

According to Plaintiffs, the drafters of the plats did not intend the “confusion and chaos” that would result from treating Divisions 1 and 2 differently than the later divisions.⁸³ Plaintiffs recognize that “the Bylaws drafters believed the Land Covenants treated all parts of LISE as one”⁸⁴ As they explain, the “Bylaws [] evince intent for one LISE with a uniform set of Restrictions in all subdivisions”⁸⁵ And, they agree that “LISECC was intend as the HOA for all parts of LISE.”⁸⁶

All the parties recognize that “[t]he Court must reject forced or strained interpretations of covenant language if they lead to absurd results.”⁸⁷ Yet, if Plaintiffs’ view were accepted, the following illogical results would follow:

- (1) The owners of lots in Divisions 1 and 2 – but no others – remain subject to LISECC’s governance in perpetuity;
- (2) The owners of lots in Divisions 1 and 2 – but no others – have the right to water from LISECC’s distribution system, to swim in LISECC’s lake, to park their boats at LISECC’s dock, and to use LISECC’s club house;
- (3) The owners of lots in Division 3 – but not the owners of lots in later divisions – ceased being subject to LISECC’s governance in July 1986;
- (4) The owners of lots in Divisions 4 and 5 – but not the owners of lots in later divisions – ceased being subject to LISECC’s governance in November 1986;
- (5) The owners of lots in Divisions 7 and 9 – but not the owners of lots in later divisions – ceased being subject to LISECC’s governance in August 1987;

⁸² Pls.’ Resp. to Defs.’ Partial Mot. to Dismiss, ECF No. 30 at 4:5-11; *accord id.* at 18:10-11.

⁸³ *Id.* at 23:12-13.

⁸⁴ *Id.* at 9:2-3; *accord id.* at 20:21-21:1 (“it is clear that the drafter’s intent here was for all plats to be read as one”); *id.* at 17:6-7 (“The different subdivisions’ plats refer to each other and the bylaws, showing the drafters’ plain intent to create one uniform LISE plat”).

⁸⁵ *Id.* at 9:12; *accord id.* at 17:12-13 (“The plaintiffs offer a ‘unity theory.’ The Court should adopt the unified, uniformity theory.”); *id.* at 4:1 (“In effect, they all make one plat, or one integrated whole”).

⁸⁶ *Id.* at 18:7-8.

⁸⁷ Pls.’ Resp. to Defs.’ Mot. for Partial Summ. J. Re: Bound Lot Claims, ECF No. 63 at 18:5-7 (citations & quotation marks omitted); *accord Wilkinson*, 180 Wn.2d at 254.

(6) The owners of lots in Division 6 – but not the owners of lots in the final division – ceased being subject to LISECC’s governance in July 1988;

(7) The owners of lots in Division 10 ceased being subject to LISECC’s governance in November 1990,⁸⁸ and

(8) After 1990, when only the owners of lots in Divisions 1 and 2 remain subject to governance by LISECC, the owners of lots in the other divisions have the right to use the common areas in Divisions 1 and 2 at no expense, but not to use the common areas in the other divisions.

The developers of LISE could not have intended to create an HOA which was required to maintain all of the reserve areas in perpetuity with a dues base which included the lots in nine divisions until July 1986, the lots in eight divisions from July 1986 until November 1986, the lots in six divisions from November 1986 until August 1987, the lots in four divisions from August 1987 until July 1988, the lots in three divisions from July 1988 until November 1990, and the lots in two divisions from November 1990 in perpetuity.⁸⁹

This Court has ruled as a matter of law that the drafters of the Division 1 and 2 plats **did** **not** intend for the rights and duties associated with the mandatory membership in LISECC to “expire” after 25 years and, hence, the owners of lots in Divisions 1 and 2 – including four Plaintiffs – continue subject to LISECC governance **today**.⁹⁰ Consequently, to avoid the unintended “sundering” and “chaos” which would result from treating the lots in the later divisions differently, the lots in the remaining divisions **must** also be subject to continued LISECC governance without expiration. As Plaintiffs concede, “[t]he subdivision plats for 1 and 2, *expressly refer to* the plats for 3, 4, 5, 6, 7, 9 and 10, so they must be read as one instrument.”⁹¹

⁸⁸ Plaintiffs concede that the failure to read the plats to create uniform HOA governance duties and rights “produces a series of differing ‘expiration dates’ for each subdivision in turn, with expiration in 1986 for Div. 3-5, in 1987 for Div. 7 and 9, in 1988 for Div. 6, then 1990 for Div. 10” which would be “bizarre.” Pls’ Resp. to Defs’ Partial Mot. to Dismiss, ECF No. 30 at 23:1-3.

⁸⁹ Plaintiffs wrongly contend that “[t]he water system may be conveyed to a public utility.” Second Am. Compl., ECF No. 79 ¶ 15.5; *accord id.* at 66:7-9. Even under Plaintiffs’ “sundering” of LISECC, the water system, deeded without qualification to LISECC by the developers, remains owned today by LISECC and the Articles of Incorporation prohibit “dispos[ing] of such water as a public utility.” Sexton Decl., Ex. 5, Art. II ¶ 9.

⁹⁰ Order Granting in Part Mot. to Dismiss, ECF No. 40.

⁹¹ Pls’ Resp. to Defs’ Partial Mot. to Dismiss, ECF No. 30 at 18:2-4; *accord id.* at 20:7-9 (“By referring to the later recorded plats, the Div. 1 and 2 plats give notice of all plats, and indicate intent to create one single scheme for all LISE.”).

D. If Ambiguity Exists, the Collective Interests of the Homeowners Prevail.

While the developers' instruments plainly demonstrate their intent to create a cohesive and unified community subject to governance by LISECC in perpetuity, if there were any ambiguity as to their intent, the homeowners' collective interests must prevail.⁹² In Washington, courts "will place special emphasis on arriving at an interpretation that protects the homeowners' collective interests"⁹³ and "gives effect to the purposes intended by the drafters of those covenants to further the creation and maintenance of the planned community."⁹⁴ So, for example,

[w]here a subdivision developer drafts and records restrictive covenants and reserves the power to enforce those covenants for itself but does not explicitly state whether its successors or any other entity will have that authority, Washington courts acknowledge that the purposes of the covenants as well as the expectations of the property owners would be frustrated if the power to enforce the covenants ended when the developer ceased to exist.⁹⁵

Hence, even "if more than one reasonable interpretation of the covenants is possible regarding an issue, we must favor the interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions."⁹⁶

Plaintiffs' view would serve the disaffected few while sacrificing the community's collective interests in a rational system which provides them access to the water and amenities which they expected when they purchased in LISE.

IV. CONCLUSION

For each of these reasons, Defendants respectfully move for summary judgment dismissal of Plaintiffs' claims that LISECC's authority has expired over the owners of lots in Divisions 3-10 and for a grant of summary judgment in favor of Defendants' on their related counterclaim.

⁹² Pls.' Resp. to Defs.' Mot. for Partial Summ. J. Re: Bound Lots Claims, ECF No. 63 at 18:8-9 ("There is special emphasis on arriving at an interpretation that protects homeowners' collective interests.").

⁹³ *Riss*, 131 Wn.2d at 623 (quotation marks & citation omitted); *accord Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 123, 118 P.2d 322 (2005).

⁹⁴ *Jensen*, 165 Wn. App. at 106; *accord Green v. Normandy Park*, 137 Wn. App. 665, 683, 151 P.3d 1038 (2007) ("The value of maintaining the character of the neighborhood in which the burdened land is located is a value shared by the owners of the other properties burdened by the same covenants.").

⁹⁵ *Jensen*, 165 Wn. App. at 106; *accord Green*, 137 Wn. App. at 684.

⁹⁶ *Green*, 137 Wn. App. at 683.

1 DATED this 14th day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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