Comfort, Davies & Smith, P.S.

LAWYERS

Brian T. Comfort
en W. Davies
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November 1, 2010

Re: ***Seaview Terrace and Seaview Terrace First Addition***

Dear :

It was a pleasure meeting with you're the other day in reference to the covenants impacting Seaview Terrace and Seaview Terrace First Addition. The background facts are that two pages of covenants were filed and recorded in April of 1968 impacting Seaview Terrace. Another two pages of covenants were filed and recorded in 1971 impacting Seaview Terrace First Addition. Both covenants have view restriction language that presumably burdens some property owners within Seaview Terrace and benefits other property owners.

I do have some questions regarding the covenants that were recorded. The versions I saw do not reflect signatures and notarizations. Normally for a document to validly impact real property it needs to be notarized and verified. It needs to be signed by the actual owners of the property. I expect if somebody actually obtains a copy of the true recorded documents (recording number 928532) for Seaview Terrace and (recording number 1010995) for Seaview Terrace First Addition, they will be signed by the alleged owners, Paul M. Wick and Ethel M. Wick.

Additionally, there is no reference within the covenants I reviewed legally describing the property covered other than the terms "Seaview Terrace and Seaview Terrace First Addition." Usually, covenants refer specifically to the plat by recording number or actually incorporate the legal descriptions of the lots within the covenants. The reason for this is so it is clear the property being impacted by the covenants.

So there may be some technical issues with these covenants including whether they were signed and notarized by the owners of the property, and if they are clear enough as to the property that is intended to be covered by the covenants. I recommend obtaining from the auditor copies of the actual recorded covenants, as well as the plat maps identifying when each of these plats were recorded.

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In the past covenants were looked at as restrictions on land. In order for a covenant to be enforced it had to be clearly written because historically the law did not favor restricting the use of property by an owner. This principal has been eroded though by more modern case authority which view reasonable restrictions in the form of covenants as enforceable. This can be true even if the covenant is not clear. In that case the court is put into the position of interpreting the covenant. That also means even if there are some technical issues with the covenants such as they were not properly signed and notarized the court still could enforce the covenant. If the covenants does not properly incorporate the legal description, if it is clear enough as to the property covered they still could be enforceable.

The easier question for me to answer is whether the board of directors is responsible for the enforcement of the covenants. There is nothing within the covenants that make the board of directors responsible for enforcing them. The bylaws do not answer that question either, but it is important to remember that the recorded covenants take precedence over the bylaws anyway. There is nothing within these covenants that indicate how they are amended or revised, which from a legal standpoint means it would take all the owners within Seaview Terrace to agree to any amendments to the covenants or all the owners within Seaview Terrace First Addition to agree to the amendment of those covenants. I view the covenants as establishing the private rights among the homeowners either within Seaview Terrace or Seaview Terrace First Addition. I view the covenants at best as providing a private right of action among the owners. As a board you can only do what you are commanded to do, and there is nothing within these covenants that give the board any right to enforce the covenants.

The more difficult question is answering whether the covenants are enforceable and how they are enforced. I already discussed some of the legal issues, including whether the covenants were properly signed and notarized. My feeling is even if they were not properly notarized and verified that the covenants are enforceable among the impacted lot owners, provided that the covenants can be tied to the plats that were filed for either Seaview Terrace or Seaview Terrace First Addition. If the plats though were not recorded at or around the same time as the covenants there very well may be legal issues as to the enforceability of these covenants. Otherwise I view the covenants as enforceable under more modern authority that the purpose behind the covenants is to preserve the views of properties within either Seaview Terrace or Seaview Terrace First Addition.

Interpreting the covenants is a more difficult question because the language is not clear. The beginning sentence of the covenant indicates that no hedge or fence shall exceed five feet in height. Please note it uses the term hedge or fence. A reasonable reading of that means that it does not cover trees since a tree is not a hedge. The second sentence indicates no trees will be permitted of such height that they restrict the view. The question then is what type of view was the covenant intended to preserve? A reasonable presumption would be the view that existed at the time the covenants were recorded. The restriction goes on to say that the existing trees at the time the plat was recorded be permitted to remain, but the owner can be requested to trim those trees so that they shall not restrict the view to any greater degree than they do at the filing of the plat. I cannot tell from these covenants when each of the plats was filed and recorded. Obviously, if the plats were filed thirty plus years ago defining the view that existed then is not easy. Defining the amount or extent of growth would likely take an arborist or someone else with expertise. Growth can also be determined through old aerial photographs by an expert with the proper equipment looking at aerial photographs at or around the time the plats were recorded. Regardless, it is not easy to determine.

The covenant also does not describe what must be done with those trees other than they be trimmed. It does not use terminology such as topping. Trimming is different from topping and arguably trimming only imposes a restriction that only allows some limbing or trimming of the trees, but not topping. At least insofar as the existing trees on the property, the expense of trimming those trees falls on the owner of the lot, but the covenant is silent as to whether it applies to other trees on the property or to the hedges. I do feel the most reasonable interpretation is the owner of the lot would be responsible for those costs too.

So you have a covenant that has different standards. It has one standard for a hedge or fence. It has another standard for trees that existed at the time the plat was filed. It has a final standard for any other trees. Since there is no specific height limitation on trees and the actual view to me is unknown as it existed when the plats were recorded, it is impossible for me to tell you to what extent the view restriction is enforceable and how much trimming has to be done. Normally the benefitted and impacted owner try and reach resolution on these issues. While the costs of trimming the trees may fall on the owner, certainly the benefitted parties have some burden identifying the view that existed when the plats were recorded. Nothing within the covenants define who pays the costs of defining the view or developing a proper cutting plan. I can see costs involved in potentially retaining a geotech engineer, an arborist and possible other experts to review past photographs and aerial photography to determine the view back when these plats were recorded.

Also impacting view covenants is whether there are any county ordinances applying to view properties. It is entirely possible the properties fall within areas subject to critical area ordinances. These ordinances typically impact the cutting and trimming of vegetation on property. These restrictions many times require providing a cutting plan usually from an arborists or a forester, and then a geotech engineer reviewing the plan and preparing a geotech report regarding the impact to the property and slope. So in some cases the restrictions of critical area ordinances can now be more than what the old covenants allow.

So in summary, I do feel the view restriction language is likely enforceable. There may be legal issues including whether the covenants were ever properly notarized and verified, and if it is clear the impacted property. Interpreting how the covenants are to be enforced is more difficult because clearly the covenants allowed existing trees are to remain. The view restriction only speaks about trimming and there are questions whether that would also include topping or limbing. There is also the difficulty of defining what the view was at the time the plat was recorded. While that arguably is a definable standard, determining what the view was back when the plat was recorded is difficult.

Also impacting the covenants is whether the critical area ordinances for Kitsap County apply. Normally these issues are resolved between the impacted lot owners. If the impacted lot owners cannot agree the only other avenue usually is if the benefitted owner sues to enforce the covenant. The burdened lot owner could also bring an action asking the court to interpret the covenants, but that would be highly unusual. I do view it as the responsibility of the burdened and benefitted parties to deal with the enforceability issues, not the homeowners association or the board of directors.

I trust this answers your questions. If you see any other issues to discuss, please do not hesitate to let me know.

Very truly yours,

COMFORT, DAVIES & SMITH, P.S.

Brian T. Comfort

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