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

LINCOLN and CYNTHIA GLENISTER; AN  
HUYNH; HEATHER HANSTAD; MIKE and  
WENDY REYNOLDS; TREVOR and  
ROCHELLE PETTINGILL; JONATHAN and  
DENISE SOKOLOWSKI; BRAD and SUE  
COLBO; DAVID and TERRI ASPLUND;  
TINH V. NGUYEN; STEVE and JEANINE  
BARNDT; RON BEESLEY and KIM  
NORRIS; DAVID and CLAIRE  
GORENSTEIN; BILL NIX and VICTORIA  
JIMANO; DAN and JANET WOJTALA;  
RUSS and PEGGY BARSTOW; BRENT and  
DANA EGGLESTON; RUSS and JENNIFER  
CRUTCHER; ALAN and NORMA  
OREJANA; SEAN and SHANNON BROWN;  
COE and EILEEN LINDER; SCOTT and  
SUZANNE BERGESON; BOB and RUBY  
CHARNESS; MARK and IZZY BOYD;  
GRAHAM and ERIKA STAINES; ERNEST  
and PAMELA PETERSON; JEFF ROCKOFF  
and CHARLENE HUTCHINS; LUTHER and  
LOREILLI AGUILAR; TINH NUGYEN and  
PHUNG LE,

Plaintiffs,

vs.

No. 16-2-12121-2

DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT DISMISSAL OF PLAINTIFF'S  
COMPLAINT

1 BOARD OF DIRECTORS OF SILVER  
2 CREEK ASSOCIATION, a Washington  
3 nonprofit corporation, dba SILVER CREEK  
4 HOME OWNER'S ASSOCIATION,

Defendant.

### 5 INTRODUCTION & RELIEF REQUESTED

6 This lawsuit arises from the desire of a small subset of homeowners in a very large  
7 residential community to perform work in a common area which will improve the view from  
8 their homes but could create a landslide risk to their neighbors.

9 The large residential community—Silver Creek Homeowners Association—consists  
10 of 1,775 homes and over 3,500 members. It is managed by an elected board of directors  
11 charged with administering the affairs of the entire community and acting in the best interests  
12 of **all owners as a whole**. Plaintiffs are the owners of 28 homes within the Grayhawk  
13 neighborhood of the community. They wish to conduct forest thinning activities in a common  
14 area forest between their neighborhood and the nearby Country Hollow neighborhood to  
15 improve their view of Mt. Rainier.

16 The forest, however, has been designated a “landslide hazard area” in surveys on  
17 record with the Pierce County Auditor’s Office. Accordingly, the board of directors has been  
18 extremely cautious in evaluating Plaintiffs’ request given the risk of a landslide or mudslide  
19 that could result from any activity in the hazard area. Unsurprisingly, residents of the Country  
20 Hollow neighborhood have strongly and vociferously opposed the contemplated work as it  
21 could severely affect the safety and stability of their homes. Adding further cause for  
22 hesitation, Pierce County requirements for similar work that was proposed in 1999 have never  
23 been met.

24 As a result, the current Silver Creek board of directors has not approved the forest  
25 thinning work proposed by Plaintiffs. In so doing, the board has put the paramount interest in  
26 safety above Plaintiffs’ interest in a more appealing view. It has at all times acted in the best

1 interests of the community as a whole—consistent with the governing documents for Silver  
2 Creek as well as Washington State law—rather than in the best interest of just 28 out of 1,775  
3 homes. As neither the board’s consideration of the request nor failure to approve it can be  
4 described as arbitrary, capricious, or unreasonable, Plaintiffs’ claims fail as a matter of law  
5 and should be dismissed.

6 **STATEMENT OF FACTS**

7 Silver Creek Homeowners Association is comprised of 1,775 homes in Pierce County,  
8 Washington.<sup>1</sup> Though it is divided into nine neighborhoods, the entire association—with the  
9 exception of a condominium neighborhood which operates under the Washington  
10 Condominium Act—is managed by a single, elected, board of directors.<sup>2</sup> The current board of  
11 directors is comprised of Michael Morrey, Robert Schultz, Laura Bailey, and Phillip Durben.<sup>3</sup>  
12 In addition to being managed by a single board, the entire association is governed by a Master  
13 Declaration of Covenants, Conditions, and Restrictions (Master CCRs), and a set of Bylaws.<sup>4</sup>

14 **a. The Silver Creek board of directors must represent all 1,775 Silver Creek homes**  
15 **equally.**

16 Per the Master Bylaws for Silver Creek, the association is “administered and managed  
17 by the Board of Directors.”<sup>5</sup> The bylaws confirm that the board of directors is meant to  
18 represent all 1,775 homes in all of the neighborhoods **equally**:

19 **ARTICLE 6- THE BOARD OF DIRECTORS**

20 6.1 **Number and Powers.** . . . To promote fair representation of all Silver Creek  
21 neighborhoods, no more than one (1) member from any one Silver Creek  
neighborhood . . . may serve on the board at the same time.

22 Consistent with the mandates above, the current board of directors has no two members from  
23 the same neighborhood to ensure that no neighborhood is given preferential treatment.<sup>6</sup>

24 <sup>1</sup> *Decl. of Schultz*, ¶ 2.

25 <sup>2</sup> *Decl. of Schultz*, ¶ 3.

26 <sup>3</sup> *Decl. of Schultz*, ¶ 4.

<sup>4</sup> *Decl. of Schultz*, ¶ 3, Exhibits B and C.

<sup>5</sup> *Decl. of Schultz*, Exhibit C, Master Bylaws.

1 **b. The location in which Plaintiffs wish to perform trimming work is common area,**  
2 **owned equally by residents of all 1,775 Silver Creek homes.**

3 Plaintiffs wish to perform forest thinning work to improve the view of Mt. Rainier  
4 from their homes. The area in which they wish to perform the work is a forested space located  
5 between the Grayhawk neighborhood—in which Plaintiffs live—and the Country Hollow  
6 neighborhood, which lies downhill from Grayhawk. Plaintiffs admit in their Complaint that  
7 the area in which they wish to conduct forest thinning work is common area.<sup>7</sup>

8 The status of the forest as common area, shared by all 1,775 Silver Creek homes, is  
9 confirmed by the governing documents for Silver Creek. Per the Master CCRs, common areas  
10 include the many forested acres included within the community's borders:

11 Section 1.7 "Common Areas" shall mean and refer to all real property that is  
12 owned or leased by the Association . . . including without limitation open space  
13 areas and improvements thereon, . . . lakes, ponds, wetlands, buffers, marshes, . . .  
14 and other areas available for common use and enjoyment by the members of the  
15 Association . . .<sup>8</sup>

16 All residents of the 1,775 homes within Silver Creek have equal rights to all common areas:

17 Section 7.2 Owners' Common Rights. Owners in each Phase shall have equal  
18 rights with the Owners in all other Phases to use the Common Areas in all  
19 Phases, unless certain Common Areas are specifically designated as limited  
20 Common Areas on the face of a plat or other recorded instrument creating a  
21 Phase or in an amendment to this Declaration or in a Supplementary  
22 Declaration. All easements for ingress, egress, utilities and use of facilities,  
23 unless otherwise specifically limited, shall exist in favor of all Owners in each  
24 and all Phases.<sup>9</sup>

25 Though all owners have equal rights to the common areas, the governing documents also  
26 confirm that the association as *a whole*, though its board of directors, has the sole and  
exclusive right and responsibility to maintain the common areas:

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<sup>6</sup> *Decl. of Schultz*, ¶ 4.

<sup>7</sup> *Complaint*, ¶ 3.3.

<sup>8</sup> *Decl. of Schultz*, **Exhibit B**, Master CCRs, 1.7.

<sup>9</sup> *Decl. of Schultz*, **Exhibit B**, Master CCRs, 7.2.

1 Section 7.3 Maintenance of Common Areas. . . . Any action necessary or  
2 appropriate to the maintenance and upkeep of the Common Areas, the  
3 landscaping, irrigation, sewer and water systems, all buildings, gas, telephone  
4 or electrical or television facilities applicable to the Common Areas, **shall be  
taken by the Association only.**<sup>10</sup>

5 Plaintiffs admit in their complaint that “[a]ny action necessary or appropriate to the  
6 maintenance and upkeep of the Common Areas ‘shall be taken by the Association only.’”<sup>11</sup>

7 **c. Plaintiffs request approval to perform forestry work in the common area to benefit  
only their lots.**

8 In 2013, Plaintiffs submitted a request to the board of directors to perform forest  
9 thinning work in the common area between Grayhawk and Country Hollow to allow them  
10 better views of Mt. Rainer.<sup>12</sup> The Grayhawk neighborhood is located on the rim, at the highest  
11 elevation.<sup>13</sup> The forested area is located downhill from Grayhawk, and the Country Hollow  
12 neighborhood is located at the bottom of the hill.<sup>14</sup>

13 Though Plaintiffs all live in the Grayhawk neighborhood, they represent less than a  
14 third of that community (28 out of 99 homes) and an even smaller fraction of the Silver Creek  
15 community as a whole (28 out of 1,775 homes).<sup>15</sup> Moreover, the Pierce County Tax-Assessor-  
16 Treasurer’s Electronic Property Information Profile for each of Plaintiffs’ properties indicates  
17 that the property has a “view limited” or “view limited minus” status.<sup>16</sup> None of the properties  
18 are afforded full views. Similarly, the governing documents for Silver Creek contain no  
19 reference to view parcels or view maintenance rights.

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23 <sup>10</sup> *Decl. of Schultz, Exhibit B, Master CCRs, 7.3.*

24 <sup>11</sup> *Complaint, ¶ 3.3.5.*

25 <sup>12</sup> *Complaint, ¶ 3.6.*

26 <sup>13</sup> *Decl. of Schultz, ¶ 5.*

<sup>14</sup> *Decl. of Schultz, ¶ 5.*

<sup>15</sup> *Decl. of Schultz, ¶ 5.*

<sup>16</sup> *Decl. of Wagner, Exhibit A, Tax Assessor Documents.*

1 **d. Because the area in which the contemplated work is to occur is a landslide hazard**  
2 **area, the board requested additional information, which has not been provided.**

3 Importantly, a 2004 survey of the area between the Grayhawk and Country Hollow  
4 neighborhoods (recorded with the Pierce County Auditor's Office under Recording No.  
5 200406305029) reveals that it is a "Landslide and Erosion Hazard Area."<sup>17</sup> As a result, the  
6 Silver Creek board of directors has proceeded with extreme caution in considering Plaintiffs'  
7 request.<sup>18</sup> Because of the threat to the Country Hollow homes and their residents that a  
8 landslide imposes, the board requested that Plaintiffs submit a geotechnical report.<sup>19</sup> Plaintiffs  
9 complied, but the report submitted was not the form required by the County for areas  
10 designated as hazardous.<sup>20</sup> Specifically, Pierce County Code 18E.80.030, which governs  
11 "Landslide Hazard Area Review Procedures" states:

12 5. A field investigation and geological assessment shall be completed under the  
13 responsible charge of an appropriately licensed geotechnical professional(s) to  
14 evaluate whether or not an active landslide hazard area exists within 300 feet of  
15 the site. (See Figure 18E.80-5 in Chapter 18E.120 PCC.)

16 ...

17 c. The geological assessment shall be submitted in the form of a  
18 geotechnical report when the geotechnical professional finds that an active  
19 landslide hazard area exists within 300 feet of the proposed project area or  
20 when a geotechnical professional indicates that mitigation measures are  
21 necessary in order to construct or develop within a potential landslide  
22 hazard area. The geotechnical report shall meet the requirements contained  
23 in 18E.80.060 – Appendix C.

24 It is undisputed that the area in which the contemplated work is to be performed consists  
25 entirely of a landslide hazard area as confirmed by the surveys on record with Pierce  
26 County.<sup>21</sup> This has been further confirmed by a "Landslide and Erosion Hazards Report"  
prepared on behalf of Silver Creek and sent to the Pierce County Planning Department in May

<sup>17</sup> Decl. of Schultz, Exhibit D, Plat Maps and Surveys on Record.

<sup>18</sup> Decl. of Schultz, ¶ 6.

<sup>19</sup> Decl. of Schultz, ¶ 6; see also Complaint, ¶ 3.6.

<sup>20</sup> Decl. of Schultz, ¶ 6 Exhibit F, AGES Report from Plaintiffs.

<sup>21</sup> Decl. of Schultz, Exhibit D, Plat Maps and Surveys on Record.

1 of 2000.<sup>22</sup> Yet the report submitted by Plaintiffs in 2014 did not meet the requirements of  
2 18E.80.060. In fact, the report stated the opinion that the “area is not a potential or active  
3 landslide area.”<sup>23</sup>

4 Plaintiffs have been advised that the report is noncompliant with Pierce County  
5 requirements. In fact, they have conceded—through their attorney—that the report does not  
6 comply:

7 . . . We chatted briefly with Paul Barber from Pierce County regarding your  
8 inquiry on the previously submitted geotechnical report. He said technically, yes,  
9 it is not the full report that the county would require for a landslide hazard area  
within 300 feet of the proposed site.<sup>24</sup>

10 Despite the admission, Plaintiffs have yet to submit a geotechnical report that properly  
11 considers the nature of the land on which the proposed thinning work is to be conducted.<sup>25</sup>

12 ***e. The work proposed by Plaintiffs contemplates removal of a significant number of***  
13 ***trees.***

14 The threat to Plaintiffs’ neighbors from the proposed work was even more concerning  
15 to the board due to the scope of work contemplated.<sup>26</sup> Rather than simple thinning and  
16 pruning, the arborist report submitted to the board by Plaintiffs revealed that the work entailed  
17 removal of 50 of the 81 trees in part of the forested area.<sup>27</sup> Given that tree removal is known  
18 to reduce root structures that prevent erosion, this revelation enhanced the concern that the  
19 board already had for the downhill Country Hollow residents.<sup>28</sup>

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22 <sup>22</sup> Decl. of Schultz, Exhibit E, GeoResources Report.  
23 <sup>23</sup> Decl. of Schultz, Exhibit F, p. 4.  
24 <sup>24</sup> Decl. of Wagner, Exhibit B, Email Correspondence.  
25 <sup>25</sup> Decl. of Schultz, ¶ 6.  
26 <sup>26</sup> Decl. of Schultz, ¶ 7, Exhibit G. Plaintiffs’ Arborist Report.  
<sup>27</sup> Decl. of Schultz, ¶ 7, Exhibit G. Plaintiffs’ Arborist Report.  
<sup>28</sup> Decl. of Schultz, ¶ 7.

1 **f. A condition imposed by Pierce County in 1999 for forest thinning work in the**  
2 **subject common area has never been complied with.**

3 A second factor that compelled the board of directors to scrutinize Plaintiffs' request  
4 arises from a Pierce County condition that was imposed in 1999 but never complied with.<sup>29</sup>  
5 When the Silver Creek builder originally requested permission from the County to "limb or  
6 prune" the forested area, the County set forth several conditions for approval.<sup>30</sup> Specifically, a  
7 letter from Peirce County Planner Adonais Clark responded to the request for tree trimming  
8 work with the following:

9 It is Pierce County's determination to allow the requested pruning and/or limbing  
10 of trees within Phase 4—Community Park adjacent to lots 8-26 of the approved  
11 Final Plat of the Rim, to no lower than 6 feet higher than the curb elevation of  
12 each lot. **This approval is contingent upon the inclusion of language in the**  
13 **Codes, Covenants and Restrictions (CCR) for Silver Creek Homeowner's**  
14 **Association notifying the residents of Silver Creek that Pierce County has**  
15 **approved view corridor pruning and/or limbing of trees within Phase 4—**  
16 **Community Park adjacent to lots 8-26 of the approved Final Plat of The Rim, to**  
17 **no lower than 6 feet higher than the curb elevation of each lot.**<sup>31</sup>

18 It is undisputed that this condition was **never satisfied.**<sup>32</sup>

19 **g. Country Hollow residents are strongly opposed to the scope of work proposed by**  
20 **Plaintiffs due to the potential for a landslide impacting their homes.**

21 Finally, after learning of Plaintiffs' request, the board received feedback from  
22 residents of the downhill neighborhood, Country Hollow, in strong opposition to any "view  
23 maintenance" forest thinning work.<sup>33</sup> In correspondence to the board, members of the Country  
24 Hollow community expressed their concern about landslides and erosion as well as  
25 preservation of the forest which had been a factor in their decision to purchase property in  
26 Silver Creek:

29 *Decl. of Schultz*, ¶ 8.

30 *Decl. of Schultz*, ¶ 8.

31 *Decl. of Schultz*, **Exhibit H**, 1999 Letter from Pierce County (emphasis added).

32 *Decl. of Schultz*, ¶ 8.

33 *Decl. of Schultz*, ¶ 9, **Exhibit I**, Letter from Country Hollow.



1 . . . We love the beautiful trees located next to our back yard looking up to the  
2 green belt. We were told at the time of the sale there were covenants and rules in  
3 place so that those trees would never ben cut down. THIS WAS A  
4 DETERMINING FACTOR to us building a home here in Silver Creek. It is very  
5 unjust that the Grayhawk residents at the top of the green belt feel they have  
6 justification to over rule (sic) the covenants to cut trees so they can have a better  
7 view of Mt. Rainier at the expense of those who live at the bottom of the green  
8 belt. **We have grave concern for the stability of the hill behind our home if  
9 trees and soil are disturbed, remember the mudslides last year that took  
10 hillsides down because of cutting down the trees?**<sup>34</sup>

11 This sentiment has been shared by multiple other Country Hollow residents who have voiced  
12 their concerns to various board members both verbally and in writing.<sup>35</sup>

13 ***h. The Silver Creek board of directors has not approved Plaintiffs' request.***

14 Because of the risk of the risk of a landslide, the failure to adhere to original  
15 conditions imposed by the County, Plaintiffs' failure to submit an appropriate geotechnical  
16 report, and the strong opposition from Country Hollow residents rooted in concerns of safety,  
17 the Silver Creek board of directors has not approved Plaintiffs' requested forest thinning  
18 activities.<sup>36</sup> Given the competing interests, however, and the fact that the board must act on  
19 behalf of **all** Silver Creek residents, there is strong justification for the board's position. It  
20 cannot be said that the board is acting illegally, unreasonably, arbitrarily or capriciously by  
21 placing the safety of some association members over the desire for a view of others. Nor has  
22 the board breached any duty.

23 **ISSUE STATEMENTS**

24 Washington law and the governing documents for Silver Creek vest the board of  
25 directors with sole and exclusive authority to regulate and maintain common area,  
26 which includes the forest area in which Plaintiffs wish to perform forest thinning  
work to improve the views from their homes. The board has not approved the  
work due to the designation of the land as a "Landslide Erosion Hazard Area" and  
the potential threat to downhill property owners if the work is undertaken.  
Additionally, the board has not approved the request as a prior Pierce County

<sup>34</sup> *Decl. of Schultz, Exhibit I*, Letter from Country Hollow (capitalization in original; bolded emphasis added).

<sup>35</sup> *Decl. of Schultz*, ¶ 9.

<sup>36</sup> *Decl. of Schultz*, ¶ 10.

1 requirement for such work was never satisfied. Should all claims against Silver  
2 Creek be dismissed given that it has acted in the best interests of the community as  
3 a whole and has complied with all statutory and common law duties as well as the  
governing documents for Silver Creek? **YES.**

4 Is Silver Creek entitled to the fees incurred in defending against this lawsuit as it  
5 has at all times acted consistently with Washington statutory and common law, as  
well as with the governing documents for Silver Creek? **YES.**

#### 6 **EVIDENCE RELIED UPON**

7 This motion relies upon the Court's records and pleadings in this matter as well as the  
8 attached Declarations of Gabriella Wagner and Robert Schultz, including all exhibits thereto.

#### 9 **ARGUMENT & AUTHORITY**

##### 10 ***a. Summary judgment standard.***

11 Summary judgment shall be granted if there are no genuine issues of material fact in  
12 dispute, such that the moving party is entitled to judgment as a matter of law.<sup>37</sup> An issue of  
13 material fact "is one upon which the outcome of the litigation depends."<sup>38</sup> The party moving  
14 for summary judgment "bears the initial burden of showing the absence of an issue of material  
15 fact."<sup>39</sup>

16 There is more than one way to meet this burden.<sup>40</sup> A party moving for summary  
17 judgment may "attempt to establish through affidavits that no material factual issue exists or,  
18 alternatively, [it] can point out to the trial court that the [claimant] lacks competent evidence  
19 to support an essential element of his or her case."<sup>41</sup> A complete failure of proof concerning  
20 an essential element of the nonmoving party's case necessarily renders all other facts  
21 immaterial and judgment as a matter of law is appropriate.<sup>42</sup>

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24 <sup>37</sup> CR 56(e).

<sup>38</sup> *Atherton Condo Ass'n v. Blume Dev.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

<sup>39</sup> *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

<sup>40</sup> *See Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 23, 851 P.2d 689 (1993).

<sup>41</sup> *Id.* (citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)).

<sup>42</sup> *Id.*



1 Where the moving party has made this showing, the party opposing summary  
2 judgment must come forward with competent evidence to rebut the movant's position.<sup>43</sup> The  
3 opposing party may not rest on allegations in its pleadings to meet its burden.<sup>44</sup> Likewise,  
4 argumentative assertions, conclusory statements and speculation are insufficient to defeat  
5 summary judgment.<sup>45</sup> If the non-moving party fails to "establish the existence of an element  
6 to that party's case, and on which the party bears the burden of proof at trial," then summary  
7 judgment should be granted.<sup>46</sup>

8 Here, the following facts are undisputed: (1) the forested area in which Plaintiffs wish  
9 to perform work is common area; (2) the Silver Creek board of elected directors has sole and  
10 exclusive authority to maintain common areas; (3) the forested area in which Plaintiffs wish  
11 to perform work is designated as "Landslide and Erosion Hazard Area" on recorded surveys  
12 and plat maps; (4) a condition imposed by Pierce County in 1999 concerning forestry work  
13 has never been satisfied; and (5) members of the Country Hollow neighborhood, which lies  
14 directly below the forest at issue, have voiced concern about the impact that the proposed  
15 forestry work could have on them given that the area is a landslide hazard area. Because  
16 these facts are undisputed, summary judgment in Silver Creek's favor is appropriate.  
17 Plaintiffs' complaint, which is nothing more than an attempt to usurp the power of the Silver  
18 Creek board of directors in furtherance of Plaintiffs' agenda, should be dismissed.

19 **b. The board's actions to date have been consistent with its required standard of care.**

20 Plaintiffs' claims for breach of fiduciary duty and breach of the Silver Creek  
21 governing documents are governed by the Washington Homeowners Association Act, RCW  
22 64.38, and the Nonprofit Corporation Act, RCW 24.06. Under the Homeowners Association  
23 Act, by definition, the board has "primary authority to manage the affairs of the  
24

25 <sup>43</sup> *First Class Cartage, Ltd. V. Fife Service and Towing, Inc.*, 121 Wn. App. 257, 89 P.3d 226 (2004).

26 <sup>44</sup> CR 56(e).

<sup>45</sup> *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 736-37, 150 P.3d 633 (2007) (emphasis added).

<sup>46</sup> *Young*, 112 Wn.2d at 225.

1 association.”<sup>47</sup> As set forth in RCW 64.38.025(1), a board of directors for a homeowners  
2 association must act in all instances on behalf of the entire association:

3 (1) Except as provided in the association's governing documents or this chapter,  
4 the board of directors shall **act in all instances on behalf of the association**. In  
5 the performance of their duties, the officers and members of the board of directors  
6 shall exercise the degree of care and loyalty required of an officer or director of a  
7 corporation organized under chapter 24.03 RCW.

8 (emphasis added). The standard of care owed by the board is set forth in RCW 24.03.127:

9 A director shall perform the duties of a director, including the duties as a member  
10 of any committee of the board upon which the director may serve, in good faith,  
11 **in a manner such director believes to be in the best interests of the**  
12 **corporation**, and with such care, including reasonable inquiry, as an ordinarily  
13 prudent person in a like position would use under similar circumstances.

14 Per the foregoing statutes, Silver Creek’s board of directors is held to the standard of an  
15 ordinarily prudent person. This duty is breached when a board acts unreasonably, illegally,  
16 arbitrarily, or capriciously in interpreting the controlling documents and administrating the  
17 affairs of the community under those documents.<sup>48</sup>

18 Here, that standard is simply not met. The board has not approved Plaintiffs’ request  
19 due to concerns about the safety of Country Hollow residents. Given that the area between the  
20 two neighborhoods is a landslide hazard area, the board has placed the safety of Country  
21 Hollow residents above the desired views of a small subset of Grayhawk residents. This  
22 hardly qualifies as unreasonable, illegal, arbitrary, or capricious, particularly as Grayhawk has  
23 failed to provide evidence that the contemplated work will not create a risk to other  
24 homeowners.

25 Further, the board has considered the fact that an original Pierce County requirement  
26 for forestry work in the subject common area, asserted in 1999, has never been complied with.  
Approval of Plaintiffs’ request would therefore place the association in a position of violating

<sup>47</sup> RCW 64.38.010(3).

<sup>48</sup> See *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997).

1 County instructions. It is hardly unreasonable, arbitrary, or capricious for the board of  
2 directors to proceed in a manner that does not subject the 1,775 Silver Creek homes to  
3 potential penalties asserted by Pierce County.

4 **c. Plaintiffs' request for declaratory relief should be denied.**

5 Plaintiffs' request that this Court interpret the Master CCRs in a manner that would  
6 benefit only 28 out of 1,775 Silver Creek association members while endangering others. This  
7 request flies in the face of well-settled principles of Washington law.

8 The interpretation of restrictive covenants like those contained within the Master  
9 CCRs for Silver Creek is a question of law to be determined by the court using principles of  
10 contract interpretation.<sup>49</sup> Applying such principles, a court must give words in a covenant  
11 their ordinary, usual, and popular meaning unless the entirety of the agreement clearly  
12 demonstrates a contrary intent.<sup>50</sup> Courts will reject "forced or strained" interpretations of  
13 covenant language if they lead to absurd results.<sup>51</sup>

14 Further, the court's goal in interpreting CCR provisions is to "ascertain and give effect  
15 to the purposes intended by the covenants."<sup>52</sup> The homeowners' **collective interest** is  
16 paramount and special emphasis is placed on arriving at an interpretation that **protects the**  
17 **collective interest.**<sup>53</sup>

18 Here, the requested interpretation of the governing documents to favor a small group  
19 of homeowners' request for a view over the safety of other homeowners goes against each  
20 principle of contract interpretation discussed above. The collective interest of the homeowners

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22 <sup>49</sup> *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614, 619 (2014) (citing *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006); *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 273-75, 279 P.3d 943 (2012) (interpreting homeowners' association articles of incorporation, bylaws and covenants); *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 105, 267 P.3d 435 (2011) (interpreting restrictive covenant).

24 <sup>50</sup> *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

25 <sup>51</sup> *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 255, 327 P.3d 614, 621 (2014) (citing *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 122, 118 P.3d 322 (2005)).

26 <sup>52</sup> *Riss v. Angel*, 131 Wn.2d 612, 621-24, 934 P.2d 669 (1997).

<sup>53</sup> *Riss*, 131 Wn.2d at 623-24 (quoting *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 181, 810 P.2d 27 (1991)).

1 is not furthered by forestry work that improves the views for 28 out of 1,775 homes while  
2 placing the downhill neighbors at risk of erosion or a landslide.<sup>54</sup> To interpret the governing  
3 documents in a manner that places a pleasing view above life and limb is exactly the type of  
4 “forced or strained” interpretation that Washington Courts have cautioned against and exactly  
5 the type of “absurd result” contemplated by that caution.

6 Great deference is given to an organization’s interpretation of its governing  
7 documents.<sup>55</sup> Washington Courts “will only invalidate an interpretation if it is arbitrary and  
8 unreasonable.”<sup>56</sup> In this case, the board has interpreted the governing documents to require  
9 careful consideration of a request for work that enhances the aesthetic appeal of some homes  
10 while threatening the safety of others. As neither arbitrary nor capricious, the board of  
11 directors requests that its determination as to how to act in the best interests of the community  
12 as a whole is afforded deference.

13 **d. The board of directors’ consideration of Plaintiffs’ request has been appropriate.**

14 An entity authorized to render a decision arising from a covenant must engage in a  
15 reasonable review process.<sup>57</sup> In *Heath v. Uraga*, the appellate court evaluated whether the  
16 plaintiff had reasonably withheld consent to a proposed residential building plan submitted by  
17 the defendant.<sup>58</sup> The review process that the plaintiff had employed included a thorough  
18 examination of the plan, requests to defendant for additional information, and invitations for  
19 input from others.<sup>59</sup> Noting that defendant had taken extra care to assure an objective  
20 evaluation of the request, the court held that he had acted “fairly, reasonably, and in good  
21 faith” in reviewing the building plan.<sup>60</sup>

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23  
24 <sup>54</sup> RCW 64.32.040.

<sup>55</sup> *Parker Estates Homeowners Ass'n v. Pattison*, 198 Wn. App. 16, 28, 391 P.3d 481, 487 (2016).

<sup>56</sup> *Id.*

<sup>57</sup> *Heath v. Uraga*, 106 Wn. App. 506, 517–18, 24 P.3d 413 (2001).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 519.

1 In this case, the board has engaged in a similar fair, reasonable, and good faith  
2 consideration of Plaintiffs' request. It has reviewed prior correspondence with the County  
3 concerning a similar request (in which a condition was imposed by the County which was  
4 never complied with), it has requested more information from Plaintiffs (which has not been  
5 provided) and has sought input from other community members (which is in vehement  
6 opposition to Plaintiffs' request). Both the process undertaken by the board in consideration  
7 of Plaintiffs' request and the board's decision not to approve the request are reasonable,  
8 appropriate, and take the collective interests of the association as a whole into account.

9 **e. Plaintiffs' claims against Silver Creek should be dismissed.**

10 Because the Silver Creek board has the authority and obligation to render the decision  
11 with which it has been presented, and has considered that decision carefully and in good faith,  
12 Plaintiffs' claims against it should be dismissed as baseless. Plaintiffs' request for injunctive  
13 relief is self-defeating as they have never filed a motion seeking a permanent—or even  
14 temporary—injunction, thus vitiating critical elements to such a claim. Their request for  
15 declaratory relief is an inappropriate attempt to usurp clear board authority to promote their  
16 own agenda. Their breach of duty claims fail as they are not sustainable under the undisputed  
17 facts of this case and the application of the law to those facts. Summary judgment dismissal of  
18 Plaintiffs' claims against Silver Creek is therefore appropriate.

19 **f. Silver Creek is entitled to an award of attorney's fees.**

20 Both the Master CCRs for Silver Creek and the Washington Homeowners Association  
21 Act authorize an award of attorney fees in Silver Creek's favor should it prevail on summary  
22 judgment. Specifically, RCW 64.38.050, states:

23 Any violation of the provisions of this chapter entitles an aggrieved party to any  
24 remedy provided by law or in equity. The court, in an appropriate case, may  
award reasonable attorneys' fees to the prevailing party.

25 Similarly, the Master CCRs for Silver Creek state:  
26

1 Section 11.4 Attorneys' Fees. In the event of a suit or action to enforce any  
2 provision of this Declaration . . . the unsuccessful party in such suit or action shall  
3 pay the prevailing party all costs and expenses, including title reports and all  
4 attorneys' fees that the prevailing party has incurred in connection with the suite  
(sic) or action in such amounts as the court may deem to be reasonable therein . . .

5 Plaintiffs' complaint alleges that the board of directors has failed to comply with the Master  
6 CCRs as well as the law, bringing their claims under the umbrella of both aforementioned  
7 provisions. Accordingly, Silver Creek respectfully requests that the Court grant its motion and  
8 award it the fees incurred in defending this lawsuit. A full accounting will be provided with  
9 Silver Creek's reply briefing.

### 10 CONCLUSION

11 Based upon the foregoing, Silver Creek respectfully requests dismissal of Plaintiffs'  
12 claims and an award of its attorney fees. A proposed order is attached hereto.

13 DATED this 27<sup>th</sup> day of July, 2017.

14 WILSON SMITH COCHRAN DICKERSON

15  
16  
17 By s/Gabriella Wagner

Gabriella Wagner, WSBA #42898

Wilson Smith Cochran Dickerson

901 Fifth Avenue, Suite 1700

Seattle, WA 98164

Telephone: 206-623-4100

Fax: 206-623-9273

Email: [wagner@wscd.com](mailto:wagner@wscd.com)

*Attorney for Defendant*

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26 <sup>61</sup> Decl. of Schultz, **Exhibit B**, Section 11.4.



1 **CERTIFICATE OF SERVICE**

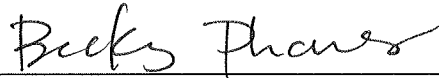
2 The undersigned certifies that under penalty of perjury under the laws of the State of  
3 Washington that on the below date I caused to be served the foregoing document on:

4 **Attorney for Plaintiffs**

5 Jason M. Whalen  
6 Shasta L. Kelley  
7 Ledger Square Law, P.S.  
8 710 Market Street  
9 Tacoma, WA 98402

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- Via U.S. Mail
  - Via Facsimile: 253-327-1700
  - Via Hand Delivery
  - Via Email: Jason@ledgersquarelaw.com
  - Via Email: shasta@ledgersquarelaw.com

**SIGNED** this 27<sup>th</sup> day of July, 2017, at Seattle, Washington.



Becky Phares