

November 20, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEVEN D. BANG, in his individual
capacity and as trustee for the
CANEPA BANG TRUST,

Respondent,

v.

LACAMAS SHORES HOMEOWNERS
ASSOCIATION, a Washington
nonprofit corporation,

Petitioner.

No. 58562-6-II

RULING DENYING
DISCRETIONARY REVIEW

Lacamas Shores Homeowners Association (HOA) seeks review of the superior court's order partially granting Steven Bang's motion for summary judgment. Because the HOA fails to show that review is appropriate under RAP 2.3(b), this court denies review.

FACTS

In June 1988, the City of Camas (City) granted a substantial land development and conditional use permit (Shoreline Permit) for the Lacamas Shores residential development project. The Lacamas Shores development included 254 residential

properties and common areas. Because the development site was located on the southwest shore of Lacamas Lake, the Washington State Department of Ecology and the City of Camas were concerned that pollutants might impact Lacamas Lake and the adjacent wetlands.

In September 1990, the current version of the Lacamas Shores Homeowners Association's (HOA) declaration of covenants, conditions, and restrictions for the Lacamas Shores Development (Declaration) was recorded. The Declaration contemplates five development phases and provided:

2.4 Conveyance of Common Areas. At such time or times as the Declarant, or its successor as developer, shall deem the Lacamas Shores Homeowners Association, a Washington non-profit corporation, financially capable of operation of the Common Areas, it shall convey to the Association some or all of the Common Areas; . . . The Lacamas Shores Homeowners Association shall accept each such conveyance, and thereupon shall be vested with authority to govern the areas so conveyed and shall be responsible to operate, maintain, support the area, and pay taxes and assessments on same, and the Declarant thereafter shall have no control over, or responsibility for, the area

2.5 Private Roadway and Wetlands. The owners, by and through the Homeowners Association, shall provide for the maintenance and operation of private roadways, if any, and wetlands upon the Lacamas Shores Development, as shown and described on the Lacamas Shores Plats.

....
2.7 Wetlands and Other Improvements.

2.7.1 The owners, by and through the Homeowners Association, are responsible for maintaining the wetlands of the Lacamas Shores Development, which shall be considered a Common Area. The Homeowners Association shall make an apportionment and assessment of expenses of maintenance, repair and/or restoration of the wetlands as provided in the assessment section of these Declarations. . .

2.7.2 A portion of the property depicted as the “newly-created wetlands” on the final site plan shall immediately be developed as part of the man made wetlands created as part of the biofilter storm drainage system. The newly-[]created wetlands, existing wetlands and land reserved for potential future wetlands shall be governed by the conditions and monitoring program set forth in the existing permit conditions. The water quality monitoring and contingency program shall continue for the longer of five (5) years (from the date of reissuance of the Substantial Development Permit and Conditional Use Permit) or when 75% of the lots depicted on the final site plan as “lots within biofilter drainage” are developed.

....

4.3 Purpose of Assessment. The assessment levied by the Association shall be used exclusively to promote the recreation[], health, safety, and welfare of the residences in The Proper[]ties and for the improvements and maintenance of the Common Areas, including, but not limited to, real property taxes, insurance, construction, establishment, improvement, repair and maintenance of the Common Areas....

....

4.13 Common Area Maintenance Responsibility. Maintenance of the Common Areas . . . shall be the responsibility of the Homeowners Association....

....

5.18 Compliance with Shoreline Master Plan, Conditional Use Permit and Substantial Development Permit. The Lacamas Shores Homeowners Association, all lot owners in the Lacamas Shores Development, [and] all subsequent improvements shall comply with the City of Camas and/or Clark County Shoreline Master Program and/or any substantial development permit and/or conditional use permit issued in connection with Lacamas Shores Development and any other regulating or Administrative rule, order or determination, except to the extent otherwise provided by the City of Camas, Clark County, or other responsible agency.

Mot. for Disc. Rev., Appendix at 100-01, 103-05.

The biofilter system was implemented and monitored for a five-year period as required by the Shoreline Permit. The results were reported and studied to obtain

baseline information, and assess system effectiveness at removing nutrients and solids from the stormwater runoff.

In 1999, Bang bought his property, which is not part of the HOA complex, but is next to the section of the HOA property with the biofilter. After living there for some time, he began to notice an increase in mosquitos and he saw that areas in the nearby biofilter contained standing water.

In April 2015, the HOA retained professional wetland scientist John McConnaughey to conduct a wetland delineation evaluation. The HOA took this step after it “approached the city with a request to manage the vegetation” on its property and the City responded by recommending that the HOA pursue a wetlands assessment. Resp. to Mot. for Disc. Rev., Appendix at 152. In February 2017, McConnaughey produced his evaluation which classified a 5.87-acre portion of the property as “Sloped Wetland” (Wetland A), which he estimated expanded since development by about 440 percent. Wetland A is the location of the biofilter, or stormwater drainage and treatment system. McConnaughey noted photographs from 1989 show this land as an “emergent wetland.” Resp. to Mot. for Disc. Rev., Appendix at 158. At the time of his assessment, McConnaughey reported that a variety of “Alder, Ash and Red Osier Dogwood [had] colonized much of the wetland area now turning it to a mixed/scrub/shrub and forested wetland.” Resp. to Mot. for Disc. Rev. at 158.

In April 2020, public health officials closed Lacamas Lake based on elevated toxin levels. And in August 2021 and August 2022, Clark County public health officials issued warnings of elevated toxin levels.

In August 2021, the HOA submitted a “Request for Proposal” for outside consultants Landau Associates, Inc. (Landau) to conduct an evaluation and report on “the condition and effectiveness of the [Lacamas Lake] stormwater facility.” Mot. for Disc. Rev., Appendix at 420. The HOA asked experts to consider

the stormwater, wetland health, Lake health, shorelands and other environmental resources as part of the assessment of facility. Recommendations shall be made for any repairs, retrofits or reconstruction to improve the functionality of the facility along with a no-build option for comparison.

Mot for Disc. Rev., Appendix at 420. The request required that the reviewing specialists be qualified as a “Stormwater Engineer registered as a PE [professional engineer] in [Washington]” and a “Certified Wetland Biologist.” Mot. for Disc. Rev., Appendix at 421. Landau conducted the evaluation, and in April 2022, professional engineer Dan Joseph and environmental scientist Jennifer Wynkoop–produced a technical memorandum after investigating the storm drainage and treatment system. The specialists reported that “[t]he perforated pipe networks of bubbler systems B-1 and B-2 . . . have limited hydraulic capacity due to clogging within the pipe, which has led to somewhat regular stormwater overflows at the access manholes.” Mot. for Disc. Rev., Appendix at 268. They explained, “[t]he bubbler systems were jetted with water

and cleaned by a vector service in the spring of 2019 in an attempt to restore hydraulic capacity through the bubblers and reduce overflows at the manholes,” but the “cleaning was not successful in restoring flow.” Mot. for Disc. Rev., Appendix at 268. Their report included a recommendation to install above-ground bubblers.

In June, Wynkoop created another technical memorandum that addressed the system’s regulatory status and made recommendations for potential solutions. Wynkoop reported that the current “distribution of stormwater from the bubblers is not ideal due to clogging and water flow is channelized in several areas.” Mot. for Disc. Rev., Appendix at 277. She also detailed several options for system improvement and recommended:

Wetland A is a natural jurisdictional wetland that has expanded over time due to stormwater input and natural progression. The diverse native vegetation and vegetation structure contribute to the health and function of Wetland A. Modification of the overall vegetation structure that includes emergent, shrub and forest layers is not recommended. However, improvements to the stormwater bubbler system could be made to better distribute stormwater across the wetland and improve water retention time, a measurement associated with improved water quality. Natural features and additional native emergent vegetation could also be added to existing channels within the wetland to slow water movement. Any modifications to the wetland require permits and approvals from federal, state, and local agencies and no modifications should be made without a complete set of permits and approvals.

Mot. for Disc. Rev., Appendix at 278.

Wynkoop also produced an updated technical memorandum in February 2023. She classified the Lacamas Shores Wetland A as a Category III wetland, which are

“considered to have a moderate level of functions and are often located within developed landscapes that isolate them from other natural resources[.]” Mot. for Disc. Rev., Appendix at 287 (Jennifer Wynkoop, Wetland Evaluation, Feb. 3, 2020 at 7 n.4). Wynkoop determined that “the wetland scored only moderate for its site potential to provide water quality function because of the surface water outlets.” Mot. for Disc. Rev., Appendix at 287. She quantified that “[r]educing surface water outflow from the wetland and increasing retention time and ponding within the wetland could improve both the water quality and hydrologic functions” of Wetland A. Mot. for Disc. Rev., Appendix at 287. She projected this could be achieved through “structural modifications that would improve the retention time of water in the wetland” and that “[s]uch modifications could include better distribution of stormwater entering the wetland, limiting or increasing the elevation of the outflow structures, and natural barriers, such as logs and large branches, to slow down the water flow within the wetland.” Mot. for Disc. Rev., Appendix at 287.

Procedural History

On August 12, 2022, Bang sued the HOA seeking damages and equitable relief claiming the Association violated many terms of the declaration, and that the HOA created a public and a private nuisance. Bang alleges that “[b]y failing to properly maintain the stormwater drainage and treatment system on the HOA [p]roperty, the HOA is contributing to the degradation and impairment of Lacamas Lake and [his]

ability to recreate in the Lake.” Mot. for Disc. Rev., Appendix at 94. He contends the storm drainage and treatment system has not been maintained pursuant to the Declaration. And Bang asserts that water test results from 2018 to 2020 to show a contrast in water quality since the 1990s. In support of his allegations, Bang states that in 2018, a wastewater expert tested water samples taken at the inlets and outlets of the biofilter for “chemical oxygen demand,” and the test results “indicated that the outlets of the Biofilter had lower water quality compared to the inlets.” Mot. for Disc. Rev., Appendix at 17. And that in December 2019 and May 2020, the City tested stormwater runoff from two locations downstream of the biofilter’s outlets, and the results “had elevated and noncompliant levels of phosphorous, total suspended solids, and dissolved inorganic chemicals.” Mot. for Disc. Rev., Appendix at 17-18. Additionally, in his complaint, Bang references the 2020 concerned citizens group investigation of the water quality of the discharge from the biofilter into the Lacamas Lake wetlands to analyze whether

the Biofilter was meeting the compliance standards established in the Shoreline Permit, comparing water quality parameters at the Biofilter’s inlets to the outlets. The abstract of their report summarizes their analysis and results as follows:

By comparing the 1990 results with current results, we see that inlet/incoming concentrations are little changed; the efficiency of the Biofilter today is degraded.

. . . The results from the 2020 water quality sampling contrasts with earlier analyses of the Bio filter from the 1990s, where the water quality had fewer pollutants at the Biofilter’s outlets compared to its inlets. These results demonstrate that the lack of maintenance of the

Biofilter has transformed the Biofilter from a system that removes pollutants into a system that actually adds pollutants

Mot. for Disc. Rev., Appendix at 18.

On April 28, 2023, Bang moved for partial summary judgment on the claim that the HOA breached the terms of the Declaration. The HOA responded and attached a declaration of Wynkoop in which she explained:

Maintaining manmade wetlands calls for different methods than maintaining natural wetlands used for stormwater treatment. A manmade wetland is constructed by excavating upland (*i.e.*, non-wetland), planting wetland vegetation, and supplying soil media and water to simulate wetland conditions. Wetland A is a natural wetland used for the treatment of stormwater.

Mot. for Disc. Rev., Appendix at 500. The HOA also attached a declaration from civil engineer Ryan Moore, who was a former HOA board member, and was appointed by the HOA's current Board of Directors as a liaison for wetland matters. Moore declared that the 2019 attempt to clear the "blockages in the bubblers. . . . restored some but not all of the functionality of the bubbler system." Mot. for Disc. Rev., Appendix at 417. Moore explained that the HOA hired Wynkoop, who recommended that the HOA "replace the bubblers with a design that would be easier to maintain going forward rather than try to repair the existing bubblers," and she "rejected the suggestion that the natural vegetation within the stormwater facility be altered." Mot. for Disc. Rev., Appendix at 417-18. Moore said that he is "in the process of soliciting bids to conduct

modifications to the bubbler system recommended by Ms. Wynkoop.” Mot. for Disc. Rev., Appendix at 418.

On July 3, 2023, the superior court granting in part and denying in part Bang’s motion for partial summary judgment.¹ The order states in relevant part:

Because a genuine issue of material fact does not exist regarding Defendant’s violation of the Declaration, the Plaintiff is entitled to a partial summary judgment as follows: the Defendant is in violation of the Declaration of Covenants, Conditions, and Restrictions for the Lacamas Shores Development by failing to maintain the storm drainage and treatment system located on the Defendant’s property.

Court Spindle, Notice of Disc. Rev. at 2.

ANALYSIS

Washington strongly disfavors interlocutory appellate review, and it is available only “in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest.” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010); *Right-Price Recreation, LLC v. Connells Prairie Cmty Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). This court may grant discretionary review in only four specific instances:

(1) The superior court has committed an obvious error which would render further proceedings useless;

¹ Bang’s public and private nuisance claims are not at issue. This court notes that the HOA moved for summary judgment on these claims and the superior court issued an order partially granting summary judgment in its favor as to some of the nuisance per se claims.

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). The HOA moves for review under RAP 2.3(b)(1).

To “Maintain”

The HOA contends that the superior court obviously erred when it ruled the HOA breached the Declaration by failing to maintain the storm drainage and treatment system, without resolution of what it means to “maintain” the system. In contrast, Bang asserts that interpretation of the term “maintain” as used in the Declaration is a legal, not a factual, question.

“Interpretation of covenants is a question of law based on the rules of contract interpretation.” *Bangerter v. Hat Island Cmty. Assoc.*, 199 Wn.2d 183, 189, 504 P.3d 813 (2022). The standard of review is de novo. *Bauman v. Turpen*, 139 Wn. App. 78, 86, 160 P.3d 1050 (2007). This court’s role is to determine the intent of the original parties that established the covenants. *Bangerter*, 199 Wn.2d at 189. “In determining intent, language is given its ordinary and common meaning.” *Bangerter*, 199 Wn.2d at 189 (quoting *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997)). Extrinsic

evidence, however, may be considered in some cases. *Saunders v. Meyers*, 175 Wn. App. 427, 439, 306 P.3d 978 (2013), observed:

Extrinsic evidence is admissible to determine the meaning of specific words and terms used in the covenant. *Ross v. Bennett*, 148 Wn. App. 40, 46, 203 P.3d 383 (2008). But, admissible extrinsic evidence does not include (1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; (2) evidence that would show an intention independent of the instrument; or (3) evidence that would vary, contradict, or modify the written word. *Id.*

Several provisions of the Declaration reference the HOA's duty to "maintain" or provide "maintenance" of the wetlands and the Lacamas Shores development's common areas. *Supra* at 4-5. To "maintain" is "1 : to keep in an existing state (as of repair, efficiency, or validity: preserve from failure or decline[.]" Maintain, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/maintain> (last visited Nov. 17, 2023). And "maintenance" is defined as "3 : the upkeep of property or equipment." Maintenance, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/maintenance> (last visited Nov. 17, 2023).

The HOA says that the meaning of this term is factual and submits that maintenance practices vary depending on the type of the wetlands. The HOA contends that a court may consider extrinsic evidence under these circumstances. But this argument about wetland type ignores that the court's decision focused on the (non)operational status of the "the storm drainage and treatment system," in

particular, the biofilter system. Court Spindle, Notice of Disc. Rev. at 2. So it is questionable whether wetland type was material here.

The clear and unambiguous language of the Declaration states that the HOA is “responsible for maintaining the wetlands of the Lacamas Shores Development[.]” Mot. for Disc. Rev., Appendix at 101. And the HOA’s declarations cannot “vary, contradict, or modify” the terms of the covenant. *Saunders*, 175 Wn. App. at 439. The superior court reasoned that the HOA “fail[ed] to maintain the storm drainage and treatment system located on the Defendant’s property.” Court Spindle, Notice of Disc. Rev. at 2. Under these circumstances, the superior court, in concluding that the HOA failed to keep the storm drainage and treatment system in an existing state of repair and to preserve it from failure or decline, did not obviously err in its interpretation of “maintain” according to well-settled contract principles.

Business Judgment

The HOA further argues interpretation of the Declaration is subject to a business judgment rule analysis. The business judgment rule “immunizes management from liability in a corporate transaction . . . where a reasonable basis exists to indicate that the transaction was made in good faith.” *Bangerter*, 199 Wn.2d at 192 (quoting *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 833, 786 P.2d 285 (1990) (alteration in original) (quoting *Interlake Porsche + Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986))). But “the role of the business judgment rule where

homeowners' associations [are] concerned is the subject of ongoing debate." *Id.* (alteration theirs) (quoting *Riss*, 131 Wn.2d at 631). The superior court's refusal to apply the business judgment rule at summary judgment, where there is recent precedent proclaiming it is undecided in the HOA context in Washington, does not amount to obvious error.

Summary Judgment

The HOA contends the superior court committed obvious error when it found a genuine issue of material fact does not exist as to its failure to maintain the storm drainage and treatment system located on its property.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). "The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party." *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

Bang presented evidence from McConnaughey that the HOA contacted the City to ask about managing vegetation in the wetland in 2014. As a result, the City

recommended the HOA solicit a wetland delineation. According to the delineation, the manmade wetland had expanded since its development in the late 1980s. In 2017, McConnaughey noted the landscape featured a variety of trees and shrubs which contrasted with the original photographs which showed noticeably less trees. Bang also presented reports prepared by Joseph and Wynkoop which described the limited hydraulic capacity of two bubbler systems. These specialists explained the decline of the hydraulic capability caused “somewhat regular stormwater overflows at access manholes.” Mot. for Disc. Rev., Appendix at 268. And they recommended a new bubbler system for better operation.

Joseph, Wynkoop, and Moore described the HOA’s 2019 attempt to clear the clogged bubblers. Joseph and Wynkoop’s 2022 technical report described the effort as “unsuccessful in restoring flow,” while Moore characterized the cleaning as having restored “some but not all” bubbler functionality. Mot. for Disc. Rev., Appendix at 268, 417. Moore said the HOA is in the beginning stages of upgrading the bubbler system following Joseph and Wynkoop’s recommendations.

The evidence before the superior court showed a lack of effort by the HOA to preserve or maintain the water treatment system until around 2014, when it contacted the City about managing the wetland vegetation. Then five years later, the HOA attempted to clear the declining bubbler systems, an impermanent fix. Absent from the record is any evidence of the HOA’s actual maintenance of the biofilter prior

to 2019. In contrast, experts acknowledge the malfunctioning bubblers and the need to upgrade the system. The record also includes uncontroverted evidence about the degrading water quality downstream from the outlets of the biofilter. Thus, it was not obvious error to grant summary judgment on the issue of the HOA's failure to maintain the storm drainage and treatment system and its wetland property.

Effect Prong

Where there is obvious error, further proceedings must also be rendered useless. RAP 2.3(b)(1). But because this court finds no obvious error, it need not reach the effect prongs. Accordingly, it is hereby

ORDERED Lacamas Shores Homeowner Association's motion for discretionary review is denied.



Aurora R. Bearse
Court Commissioner

cc: Christopher M. Tingley
David M. Phillips
Samuel W. Plauché, IV
Jesse G. DeNike
Hon. Derek J. Vanderwood