

FILED  
CLALLAM COUNTY

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NIKKI BOTNEN CLERK

1 SUPERIOR COURT OF WASHINGTON  
2 COUNTY OF CLALLAM

3 BLUE RIBBONS FARMS PROPERTY  
4 OWNERS' ASSOCIATION, a Washington  
non-profit corporation,

5 Plaintiff,

6 v.

7 MICHAEL and MARILYN MASON, and  
THE MARITAL COMMUNITY COMPOSED  
THEREOF,

8 Defendants.

NO. 22-2-00270-05

MEMORANDUM OPINION

9 On September 23, 2022, this matter came before the court on the plaintiff's Motion for  
10 Summary Judgment. Present were the plaintiff with its attorney Judy Endejan; the defendants  
11 were present with their attorney, Christos Argiannis.

12 The defendants live within the Blue Ribbon Farms Property Owners' Association.  
13 The Blue Ribbon Farms Property contains an airstrip. Pursuant to the Declaration of  
14 Covenants Conditions and Restrictions (hereafter, CC&Rs), all homeowners have a non-  
15 exclusive right to use the airstrip; however, use of the airstrip for commercial purposes is not  
16 permitted.  
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18 According to the defendants they own two businesses. Defendant Marilyn Mason  
19 owns and operates West Coast Spin Doctors LLC d/b/a Mason Wing Walking Academy  
20 (MWWA). MWWA provides the training needed to perform wing walking. Wing walking is  
21 an activity that requires a biplane, with an upper and lower wing. Wing-walkers climb from  
22 the cockpit of the plane to stand on either wing or both wings. A wing walking flight is  
23 provided by Michael Mason, which he states is operated separately from MWWA. MWWA  
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1 operates out of an airplane hangar located on the defendants' residential property located  
2 within the homeowner's association. Although this has apparently recently changed, the  
3 associated wing walking flights take off and land on the Blue Ribbon airstrip. While the  
4 wing-walker stands on one of the wings, the pilot performs a series of acrobatics, loops and  
5 rolls. Customers are charged between \$750 and \$985 for a package that includes lessons,  
6 photos and a flight in a biplane.

7 On May 13, 2022, Blue Ribbons filed a Complaint for Declaratory and Injunctive  
8 Relief alleging that the defendants are using the airstrip for a commercial purpose in violation  
9 of the CC&Rs; that they may also be in violation of the CC&Rs for not being in compliance  
10 with all FAA regulations, and that they may also be in violation of the CC&Rs for being out  
11 of compliance with the Clallam County Zoning Code.

12 Summary Judgment is appropriate if there is no genuine issue of material fact and the  
13 moving party is entitled to a judgment as a matter of law. CR 56. After the moving party has  
14 submitted adequate affidavits, the non-moving party must set forth specific facts rebutting the  
15 moving party's contentions and disclosing the existence of issues of material fact. *Young v.*  
16 *Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 770 P.2d 182 (1989). The motion should be  
17 granted only if, from all of the evidence, reasonable persons could reach but one conclusion.  
18 *Clements v. Travelers Indem. Co.*, 121 Wn. 2d 243, 850 P.2d (1993). The nonmoving party  
19 may not rely on speculation or argumentative assertions that unresolved factual issues remain.  
20 *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999).  
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Use of the Airstrip

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2 With regard to the issue of using the airstrip for commercial purposes, the defendants  
3 argue that summary judgment is not warranted because the issue is moot; i.e. that Mr. Mason  
4 has stated that he no longer uses the airstrip to operate the wing-walking flights and has no  
5 plans to do so in the future. The court does not agree.

6 “Voluntary cessation does not moot a case or controversy unless ‘subsequent events  
7 make it absolutely clear that the allegedly wrongful behavior could not reasonably be  
8 expected to recur.’ *Family of Butts v. Constantine*, 198 Wn. 2d 27, 41, 491 P. 3d 132 (2021),  
9 quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719, 127  
10 S.Ct. 2738, 168 L.Ed.2d 508 (2007). “Otherwise, a defendant could engage in unlawful  
11 conduct, stop when sued to have the case declared moot, then pick up where he left off,  
12 repeating this cycle until he achieves all his unlawful ends.” *Id.* @ 41.

13  
14 Here, the court concludes that it is not absolutely clear that Mr. Mason will not resume  
15 his use of the airstrip for his wing-walking flights should the court fail to rule on the  
16 plaintiff’s motion. Based upon his attorney’s April 4, 2022 response to the Blue Ribbons’  
17 Cease and Desist Letter i.e. that the covenant prohibiting commercial use of the airstrip had  
18 been abandoned, leaves the question of whether Mr. Mason will resume his wing-walking  
19 flights to be an open one. See Declaration of Judith Endejan.

20 Further, given that Mr. Mason claims to operate completely separately from MWWA,  
21 and yet his name appears as the only proprietor of Spin Doctors<sup>1</sup> on the 2019 Profit and Loss  
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23  
24 <sup>1</sup> Spin Doctors is the corporate name of MWWA.

1 Statement, leaves the court in the position of questioning his credibility on the issue of  
2 whether or not he would resume commercial use of the airstrip.

3 As indicated above, the CC&Rs prohibit the use of the airstrip for commercial  
4 purposes. Interpretation of a restrictive covenant presents a question of law. The court's goal  
5 is to ascertain and give effect to those purposes intended by the covenants. *Wilkinson v.*  
6 *Chiwawa* 180 Wash. 2d 241, 250-251, 327 P.3d 614 (2014). "While interpretation of the  
7 covenant is a question of law, the drafter's intent is a question of fact." "But where reasonable  
8 minds could reach but one conclusion, questions of fact may be determined as a matter of  
9 law." *Id.* 250-251. In determining the drafter's intent, we give covenant language "its  
10 ordinary and common use" and will not construe a term in such a way "so as to defeat its  
11 plain and obvious meaning." *Id.* 250-251.

12 The court concludes "commercial purposes" is not ambiguous and reasonable minds  
13 could reach but one conclusion. Commercial means "of or relating to, or characteristic of  
14 commerce; engaged in commerce; prepared, done or acting with sole or chief emphasis on  
15 salability, profit or success; able to yield or make a profit. Dictionary.com.

16 Here the court concludes that operating a wing-walking training class, including the  
17 wing-walking flights, for money constitutes commercial activity. The Profit and Loss from  
18 Business statements from Spin Doctor's 2019 and 2021 Federal Tax Return constitutes  
19 substantial evidence that MWWA, including the wing-walking flights, are engaged in a  
20 commercial enterprise. See Second Declaration of Andrew Zacharias.  
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1 The court does not agree with the defendants that the wing-walking flights are free,  
2 nor does it agree that even if the flights are operated independently, that they do not constitute  
3 commercial activity. MWWA advertised rates are \$750.00 to ride the upper wing and \$985 to  
4 ride the upper and lower wings. See Declaration of Andrew Zacharias. This assertion is not  
5 contradicted in any declarations provided by the defendants. As indicated among other  
6 things, “commercial” means acting with sole or chief emphasis on salability, profit or success.

7 With regard to this issue, the court concludes that even if the flights are advertised as  
8 free, such a representation is an advertising gimmick to promote salability, profit or success.  
9 This is particularly true when the defendants have not presented evidence to support their  
10 assertion that Mr. Mason operates the wing-walking flights as a separate business. A review  
11 of the Masons’ 2021 Federal Tax Return indicates that they earned \$96,575.00 in other  
12 income; that figure is taken directly from the 2021 profit and loss statement for Spin Doctors,  
13 which lists Michael Mason as the only proprietor. See Second Declaration of Andrew  
14 Zacharias.

15 With regard to the issue of using the airstrip for commercial purposes, the court  
16 concludes there is no genuine issue of material fact and the property owners’ association is  
17 entitled to a judgment as a matter of law.

18 As part of its motion the plaintiff is requesting an injunction preventing MWWA and  
19 Mr. Mason from using the airstrip for commercial purposes. Restrictive covenants are  
20 designed to make residential subdivisions more attractive and are enforceable by injunctive  
21 relief without showing substantial damage from the violation. *Metzer v. Wojdyla*, 125 Wn. 2d  
22 445, 450, 886 P. 2d 154 (1994). In order to obtain an injunction, the party seeking the  
23 injunction must establish the following:

1 (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of  
2 immediate invasion of that right, and (3) that the acts complained of are either  
3 resulting in or will result in actual and substantial injury to him. *LYFT, Inc. v. City*  
4 *of Seattle*, 190 Wash. 2d 769, 784, 418 P.3d 102 (2018).

5 The court finds that the property owners' association has a clear legal or equitable  
6 right. As indicated, restrictive covenants are enforceable by injunctive relief. The court finds  
7 that that the property owners' association has a well-grounded fear of immediate invasion of  
8 that right. Based upon the Mason's position that the covenant prohibiting commercial use of  
9 the airstrip had been abandoned<sup>2</sup>, leaves the question of whether Mr. Mason will resume his  
10 wing-walking flights to be an open one. Additionally, Mr. Mason's claim that he operates  
11 completely separate from MWWA, and yet his name appears as the only proprietor of Spin  
12 Doctors<sup>3</sup> on the 2019 and 2021 Profit and Loss Statements, leaves the court in the position of  
13 questioning his credibility on the issue of whether or not he would resume use. The court  
14 finds that the acts complained of, are either resulting in, or will result in substantial injury to  
15 the property owners' association. As indicated in the Declaration of Mark Long, there are  
16 concerns that MWWA did not/does not have liability insurance and that this could expose the  
17 Association to liability for allowing wing-walking flights. Regardless, restrictive covenants  
18 are enforceable by injunctive relief without showing substantial damage from the violation.  
19 *Metzer @ 450.*

20 "The granting or withholding of an injunction is addressed to the sound discretion of  
21 the trial court to be exercised according to the circumstances of the particular case." *Holmes*  
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23 <sup>2</sup> Please see the Masons' attorney's letter dated April 4, 2022.

24 <sup>3</sup> Spin Doctors is the corporate name of MWWA.

1 *Harbor Water Co., Inc. Page*, 8 Wn. App. 600, 603, 508 P.2d 628 (1973). “A trial court  
2 upon considering whether to grant or deny an injunction may recognize circumstances and  
3 weigh as equitable factors: (a) the character of the interest to be protected, (b) the relative  
4 adequacy to the plaintiff of injunction in comparison with other remedies, (c) the delay, if  
5 any, in bringing suit, (d) the misconduct of the plaintiff if any, (e) the relative hardship likely  
6 to result to the defendant if an injunction is granted and to the plaintiff if it is denied, (f) the  
7 interest of third persons and of the public, and (g) the practicability of framing and enforcing  
8 the order or judgment.” *Id.* @603.

9         However, the benefit of the doctrine of balancing the equities, or relative hardship, is  
10 reserved for the innocent defendant who proceeds without knowledge or warning that his  
11 structure encroaches upon another's property or property rights. *Bach v. Sarich*, 74 Wn. 2d  
12 575, 582, 445 P. 2d 648 (1968). Here the court concludes that the Masons are not innocent  
13 defendants. It appears to the court that one of the foremost factors driving this lawsuit is the  
14 fact that the wing-walking business has no liability insurance.<sup>4</sup> As it turns out, despite  
15 representations made to the Association to the contrary, MWWA does not carry liability  
16 insurance.  
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18         With regard to the use of the airstrip, when presented, the court will enter an  
19 injunction preventing the defendants from using the airstrip for any commercial enterprise.  
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23 <sup>4</sup> See Declaration of David Woodcock para. 4; Declaration of Mark Long para. 16; Declaration of Judith Endejan  
24 exhibit D.

Abandonment and Right to Enforce Covenants

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2 The defendants further argue that the covenant cannot be enforced because it has been  
3 abandoned. The court disagrees. By its own CC&Rs, failure of the Board to enforce any  
4 covenant does not constitute a waiver of the right: “Failure of the Board of Directors to  
5 enforce any covenant or restrictions herein contained shall in no event be deemed a waiver of  
6 the right to do so thereafter.” See Article VI, section (3) (d).

7 Article VI, section 3 (d) of the CC&Rs states that “The Association, by means of a  
8 two thirds vote of the Board of Directors, shall have the right to enforce, by any proceeding at  
9 law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or  
10 hereafter provided by the provisions of this Declaration. Failure of the Board of Directors to  
11 enforce any covenant or restrictions herein contained shall in no event be deemed a waiver of  
12 the right to do so thereafter.” The section goes on to say, “Complaints shall be submitted in  
13 writing to the Board of Directors.” And then further states “The Board shall at its next  
14 regularly scheduled meeting consider each complaint to determine its validity and hold  
15 hearings as necessary to resolve each dispute.”  
16

17 The defendants argue that the Board may have not followed the procedural  
18 requirements of Article VI, section 3 (d). However, the plaintiff submitted a Declaration from  
19 the Secretary of the Board, stating that on April 8, 2022, the Board held a meeting and during  
20 an executive session, authorized its attorney to commence legal action should she not be able  
21 to reach a resolution with the attorney for the Masons.<sup>5</sup>  
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24 <sup>5</sup> See Second Declaration of David Woodcock;



1 As indicated above<sup>6</sup>, a non-moving party may not rely on speculation or argumentative  
2 assertions. That is essentially what has been done here. The defendants have not submitted  
3 any specific facts to rebut the plaintiff's contention that the Board followed its own rules  
4 regarding the Board's vote, but rather have proffered only an assertion that the Board may  
5 have not complied with the procedural requirements of the CCRs. (emphasis added).

6 The court will grant the request for injunctive relief as to MWWA's use of the airstrip.

7 Compliance with County Ordinances

8 Article II, section 2 of the CC&Rs states that "all residences shall be single family and  
9 in full compliance with all state and county zoning ordinances and building codes. Article II,  
10 section 4 of the CC&Rs states in part that "there shall be no specific architectural building  
11 restrictions other than those imposed by County and State zoning and building codes and any  
12 other applicable laws . . . subdued natural colors."

13  
14 The court received no information regarding the zoning designation for Blue Ribbon  
15 Farms. As such, the court is not able to determine whether MWWA would be required to  
16 obtain a conditional use permit in order to operate as a home enterprise, or whether home  
17 enterprises are an allowed use in its zoning designation.

18 Compliance with Home Enterprise Restrictions

19 Article V, Section 6 of the CC&Rs states:

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21 \_\_\_\_\_  
22 <sup>6</sup> After the moving party has submitted adequate affidavits, the non-moving party must set forth specific facts  
23 rebutting the moving party's contentions and disclosing the existence of material fact. *Young v. Key*  
24 *Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 770 P.2d 182 (1989). The motion should be granted only if, from all of  
the evidence, reasonable persons could reach but one conclusion. *Clements v. Travelers Indem. Co.*, 121 Wn. 2d  
243, 850 P.2d (1993). The nonmoving party may not rely on speculation or argumentative assertions that  
unresolved factual issues remain. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999).

1 Home Business Enterprises: the home enterprise shall be carried on entirely within  
2 the lot owners residential type structures.

3 (a) The operator of the home enterprise shall live in the residential structure as his  
4 primary residence.

5 (b) The home enterprise shall operated [sic] in a manner which gives no outward  
6 appearance of a business.

7 (c) The home enterprise shall not increase vehicular traffic beyond that which is  
8 normal for residential use or require parking on private roads except those used  
9 exclusively by the owner of the enterprise.

10 With regard to the issue of whether MWWA is being carried on entirely within the lot  
11 owners' residential structure, the court finds there is a genuine issue of material fact as to  
12 whether in this type of neighborhood, i.e. where hangars are contemplated, a hangar qualifies  
13 as a residential type structure.

14 With regard to the issue of whether MWWA is being operated in a manner that gives  
15 no outward appearance of a business, the court concludes there is no genuine issue of material  
16 fact and that the plaintiff is entitled to a judgment as a matter of law. The Plaintiff has  
17 submitted several declarations setting forth that the business is not being operated in a manner  
18 which gives no outside appearance of a business. In her Declaration, Nancy Powell states that  
19 the taxi way is being used as class space for the business. She further states that lessons are  
20 given with hangar door open.<sup>7</sup> Neither of these assertions are contradicted by the defendants.<sup>8</sup>

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23 <sup>7</sup> See Declaration of Nancy Powell.

24 <sup>8</sup> In his Declaration, Mr. Mason states only that he is not using the taxiway to park vehicles.

1 According to Declaration of Andrew Zacharias<sup>9</sup>, students and spectators hang out on the  
2 taxiway; i.e. outside of the hangar. This assertion is also not contradicted by the defendants.

3 Additionally, and most obviously, MWWA's wing walking flights take place outside  
4 of the hangar. By their own admission, a wing walking flight is part of the academy  
5 experience. According to the Declaration of Andrew Zacharias, the MWWA airplanes were  
6 constantly being shuffled in and out to the runway.

7 The home enterprise is also exhibiting the outward appearance of a business by  
8 having, by their own admission, up to six vehicles parked outside of the hangar.<sup>10</sup>

9 With regard to the prohibition on increasing vehicular traffic beyond that which is  
10 normal for residential use, the court concludes that the operation of MWWA increases  
11 vehicular traffic beyond what is normal for residential use. Here again by Marilyn Mason's  
12 own admission, the operation of MWWA includes parking of up to six vehicles per day.

13 With regard to the issue of whether MWWA is in violation of the restrictions on home  
14 enterprises as set forth in the CCRs, the court concludes there is no genuine issue of material  
15 fact and the property owners' association is entitled to a judgment as a matter of law.  
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17 The Association has also requested the court to enter an injunction preventing the  
18 operation of the training class part of the business. The court finds that the same findings  
19 and/or conclusions reached when addressing the requirements necessary for the granting of  
20 the injunction and balancing of the equities with regard to use of the airstrip, also apply to  
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23 <sup>9</sup> See Declaration of Andrew Zacharias, including photographs.

24 <sup>10</sup> See Declaration of Marilyn Mason.

1 violations of the restrictions on operation of home enterprises. The court will issue an  
2 injunction when presented.

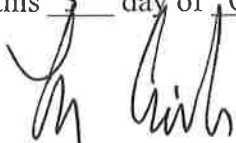
3 ATTORNEY FEES

4 Article VI, section 3 (e), states that in any action brought by the Association against  
5 any lot owner to enforce any term, condition or covenant herein contained, the prevailing  
6 party shall be entitled to recover, in addition to costs, a reasonable sum fixed by the court for  
7 attorney fees. The court concludes that the Association is the prevailing party and therefore is  
8 entitled to reimbursement of costs and attorney fees.

9 CONCLUSION

10 When presented, the court will sign orders consistent with this Memorandum Opinion.

11  
12 DATED this 3<sup>rd</sup> day of October, 2022.

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15 LAUREN ERICKSON  
16 JUDGE