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RISS v. ANGEL: WASHINGTON REMODELS THE FRAMEWORK FOR INTERPRETING RESTRICTIVE COVENANTS

Casey J. Little

Abstract: In Riss v. Angel, the Supreme Court of Washington declared that in disputes between subdivision homeowners, courts must construe restrictive covenants to give effect to the covenants' intended purposes by considering surrounding circumstances to protect the homeowners' collective interests. The court further held that when restrictive covenants grant discretion to architectural review committees (ARCs) to approve new construction or remodels, ARCs or other homeowners association committees that enforce such covenants must exercise their authority reasonably and in good faith. Riss represents a departure from prior precedent that required courts to construe strictly the terms of restrictive covenants to limit their effect. This Note observes that the court's shift from strict construction to intent-based construction was wise because it clarifies Washington law on the enforceability of restrictive covenants and was necessary because the original policy behind strictly construing covenants in favor of the free use of land has little value when applied to subdivisions. Furthermore, this Note argues that the reasonableness requirement for the architectural review process will encourage homeowners associations to adopt strict procedures for their review committees to follow when making discretionary decisions. Strict procedures will help protect individual homeowners who may be faced with a review committee that is predisposed against change, and that, through a process of group polarization, becomes even more likely to make irrational decisions regarding proposed constructions in the neighborhood. This Note concludes by proposing procedural guidelines for ARCs that will enable them to carry out their duties under Riss.

In Riss v. Angel, the Supreme Court of Washington addressed the relationship between homeowners associations and restrictive covenants. Homeowners associations are organizations consisting of

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2. Restrictive covenants are provisions in deeds that limit or prohibit certain uses of property. "The purpose behind restrictive covenants is to maintain or enhance the value of lands adjacent to one another by controlling the nature and use of surrounding lands." See Cunningham v. Hiles, 395 N.E.2d 851, 854 (Ind. Ct. App. 1979), modified, 402 N.E.2d 17 (Ind. Ct. App. 1980). Restrictive covenants governing a subdivision typically take the form of real covenants and equitable servitudes that run with the land. See James L. Winokur, The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity, 1989 Wis. L. Rev. 1, 3. The distinction between real covenants and equitable servitudes is not of great importance in the subdivision setting as "the theoretical mechanism by which such [subdivision] restrictions operate is exceedingly complicated and not at all well understood. In truth this is partly because courts, in their desire to enforce subdivision restrictions for policy reasons, have outrun their understanding of theory." William B. Stoebuck, Running Covenants: An Analytical Primer, 52 Wash. L. Rev. 861, 907 (1977). See generally id. (discussing historical differences between real covenants and equitable servitudes).
homeowners within residential developments, with the primary purpose
of providing and maintaining community facilities and services for the
benefit of the residents. Through the enforcement of restrictive
covenants, homeowners associations preserve the character of a
development. Restrictive covenants are recorded in property deeds and
regulate such broad issues as the permissible architectural designs of
homes, the size of mailboxes, and the types of vehicles that may be
maintained on or near a lot. Every individual who purchases property
within a subdivision governed by a homeowners association and subject
to restrictive covenants automatically becomes a member of the
association upon taking title and must abide by the restrictive covenants.

A discretionary consent to construction covenant is one common type
of restrictive covenant. This type of covenant requires property owners to
seek approval from a committee composed of members of the
homeowners association before constructing a new house or remodeling
an existing dwelling. When determining whether to approve a
homeowner's proposed construction or remodel under a discretionary
consent covenant, these committees, known as architectural review
committees (ARCs), often consider such factors as whether the new or
altered home will be in harmony with other buildings. Because of the
subjective nature of such judgments, consent to construction covenants
can cause conflicts between individual homeowners and ARCs.

In Riss, the court was called upon to construe a discretionary consent
to construction covenant to determine if the board of directors of the

3. See 7 Richard R. Powell & Patrick J. Rohan, Powell on Real Property ¶ 632.1[2], at 54-12

(“The ability of homeowners... to enforce restrictive covenants... helps ensure that the
community will be able to maintain its planned character and provide the lifestyle sought by its
residents in making their homes there.”); Hagemann v. Worth, 56 Wash. App. 85, 88–89, 782 P.2d
1072, 1074 (1989) (“The enforcement of this covenant does nothing more than preserve to the
homeowners the residential character of the neighborhood.”).

5. See Clayton P. Gillette, Courts, Covenants, and Communities, 61 U. Chi. L. Rev. 1375, 1383–
85 (1994).

6. See Wayne S. Hyatt, Condominium and Homeowner Association Practice: Community
Association Law § 3.03(a), at 47 (2d ed. 1988).

7. See, e.g., Riss v. Angel, 131 Wash. 2d 612, 616, 934 P.2d 669, 673 (1997); Bersos v. Cape

8. See, e.g., LeBlanc v. Webster, 483 S.W.2d 647, 648 (Mo. Ct. App. 1972) (stating that proposal
could be denied if “not in harmony with the general surroundings of such lot”); Riss, 131 Wash. 2d
at 616, 934 P.2d at 673 (stating that covenant gives board power to consider “harmony with other
dwellings” in making decision).
homeowners association, serving as an ARC, acted properly in rejecting the plaintiffs' proposal to demolish their existing home and construct a new one. Although the plaintiffs' proposed home complied with the specific height, square footage, and setback requirements in the restrictive covenants, the board summarily rejected the plan. Under an appeals process established by the covenants, the plaintiffs appealed the board's decision directly to the homeowners, who voted to ratify the decision. The plaintiffs then brought suit against the individual homeowners, claiming that the restrictive covenants were unenforceable and that, alternatively, the board and the association had acted unreasonably because the plans complied with the covenants.

The Supreme Court of Washington held that the consent to construction covenant was enforceable and, in doing so, announced a new standard for interpreting subdivision covenants. Recognizing that restrictive covenants "protect . . . public and private property owners from the increased pressures of urbanization," the court declared that it will no longer strictly construe restrictive covenants governing subdivisions to limit their impact on individual homeowners. Instead, the court held that it will liberally construe restrictive covenants to give effect to the intended purposes of the covenants, but will require bodies enforcing discretionary consent to construction covenants to act reasonably and in good faith. Applying this new standard, the court ruled that the board violated the restrictive covenants because its decision to deny the plaintiffs' plan was made without adequate investigation, was based upon inaccurate information, and thus was unreasonable and arbitrary. The court awarded the plaintiffs delay damages, attorney fees, and costs totaling approximately $200,000, entered jointly and severally against the board members and individual defendant homeowners who voted to ratify the board's decision.

9. Riss, 131 Wash. 2d at 616, 934 P.2d at 673.
10. Id. at 618, 934 P.2d at 674.
11. Id. at 619, 934 P.2d at 674.
12. Id.
13. Id. at 622, 934 P.2d at 676 (quoting Lakes at Mercer Island Homeowners Ass'n v. Witrak, 61 Wash. App. 177, 179, 810 P.2d 27, 28 (1991)).
14. Id. at 623, 934 P.2d at 676.
15. Id. at 625, 934 P.2d at 677.
16. Id. at 638, 934 P.2d at 684.
17. Id. at 637, 934 P.2d at 683. See infra note 87 for exact amounts.
Riss improves Washington covenant law because it requires courts to construe restrictive covenants according to their underlying purposes and forces ARCs to act reasonably and in good faith. By no longer requiring strict construction of subdivision covenants, courts will better give effect to the purposes covenants seek to accomplish, thereby enabling homeowners to preserve the desirable characteristics of a neighborhood and protect property values. Moreover, the Riss decision may help protect homeowners by imposing a reasonableness requirement on ARC decisionmaking processes. Because unincorporated homeowners associations face potential joint and several liability for the decisions of ARCs, associations should reevaluate whether such committees should have any discretion. If ARCs are granted discretion to approve proposed remodels or construction, homeowner associations should adopt strict procedural guidelines for their ARCs that will ensure that ARC actions are consistent with the standards imposed by Riss.

Part I of this Note provides a brief overview of homeowners associations and restrictive covenants. Part II discusses the supreme court’s decision in Riss v. Angel. Part III analyzes the impact of Riss, discussing both its effect on how subdivision covenants should be interpreted and how ARCs make decisions. Finally, Part IV of this Note proposes procedural guidelines that ARCs should implement in their decisionmaking processes.

I. HOMEOWNERS ASSOCIATIONS AND RESTRICTIVE COVENANTS

A. Development and Structure of Homeowners Associations

Although homeowners associations are not a new creation, they have become increasingly popular. A homeowners association is an
organization consisting of homeowners within a residential development, whose primary purpose is "to provide and maintain community facilities and services for the common enjoyment of the residents." It is estimated that by the year 2000 there will be approximately 225,000 associations with fifty million members. Their growth has, in part, resulted from home buyers moving to suburban developments where homeowners associations are more prevalent.

Homeowners associations serve three primary functions: levying and collecting assessments; managing and maintaining common property for the benefit of residents; and enforcing covenants that govern developments. They derive authority to carry out these functions from several documents, including the declaration of covenants, conditions, and restrictions (CC&Rs), the association's bylaws and articles of incorporation, and the deeds to the property within a development.

The CC&Rs for the subdivision are of primary importance in the establishment of a homeowners association. The declaration generally establishes the covenants by which all owners within the development agree to be bound and the respective obligations of the owners and the association. Developers record the declaration in the land records before any lots are sold. The covenants within the declaration run with the land and bind subsequent property owners. The covenants are

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20. See 7 Powell & Rohan, supra note 3, ¶ 632.2, at 54-32. Following the introduction of these associations, their number remained relatively few in number so that by 1962 there were still less than 500. Within the last 35 years, however, a dramatic rise in the number of associations in the United States occurred. By 1992, there were 150,000 associations governing 32 million people, roughly 12% of the nation's population. See Larry J. Smith et al., Gated Communities: Private Solution or Public Dilemma?, 29 Urb. Law. 413, 415 (1997) (citing figures that include each type of common interest community).

21. See 7 Powell & Rohan, supra note 3, ¶ 632.1[2], at 54-12.

22. See Gillette, supra note 5, at 1375 n.1 (citing figures that include each type of common interest community).

23. Id. ¶ 632.1[2], at 54-14 to 54-15.


25. Id. at 356–57.

26. See 7 Powell & Rohan, supra note 3, ¶ 632.4[1][b], at 54-84. The developer records the declaration at the same time as the subdivision plat. Id. ¶ 632.4[1][a], at 54-84.

27. See Hyatt, supra note 6, § 1.05(b)(3), at 19. Treating CC&Rs as running covenants ensures that they will remain in place indefinitely and bind all future owners. Id.

28. See id. § 3.03(a), at 47.
reciprocally enforceable agreements among homeowners\textsuperscript{29} that regulate anything from the architectural design and use of structures to the number of pets or guests allowed.\textsuperscript{30} "Neighborhood uniformity is preserved"\textsuperscript{31} by enforcing the covenants.

Another legal document essential to an association is its bylaws, which establish procedures for the internal government and operation of the association.\textsuperscript{32} The bylaws are not always recorded, but may be incorporated by reference in the declaration.\textsuperscript{33} Whereas declarations have been likened to an association's constitution, bylaws can be seen as the statutes that detail the day-to-day operations of the association.\textsuperscript{34}

After they are formed, but before the title transfer of the common property to the homeowners association, an association usually incorporates.\textsuperscript{35} "Incorporation not only provides greater certainty to the association as the fee title holder but also brings to bear the entire body of statutory and case law developed in the jurisdiction's corporate law."\textsuperscript{36} In conjunction with the declaration and bylaws, the articles of incorporation establish the general boundaries of the association, including the governing structure, financing, assessment mechanisms, voting and control procedures, and the specification of ownership.\textsuperscript{37}

\begin{thebibliography}{9}
\bibitem{29} See Winokur, \textit{supra} note 2, at 3.
\bibitem{31} Winokur, \textit{supra} note 2, at 3.
\bibitem{32} See Hyatt, \textit{supra} note 6, \S\ 7.02, at 357.
\bibitem{33} See, \textit{e.g.}, Lake Arrowhead Community Club, Inc. v. Looney, 112 Wash. 2d 288, 296 n.4, 770 P.2d 1046, 1050–51 n.4 (1989) ("[T]he bylaws need not have been recorded for [plaintiff] to become bound by them. For example, he could have become bound through express agreement in a separate document [e.g., the declaration or deed].").
\bibitem{34} See Hyatt, \textit{supra} note 6, \S\ 7.02, at 357.
\bibitem{35} Id. \S\ 2.02, at 27.
\bibitem{36} Id.
\bibitem{37} Id.
\end{thebibliography}
Associations carry out their responsibilities through a board of directors, officers, and agents. The creating documents usually grant broad powers to the board of directors, which serves as the association's policymaking and supervisory body.\(^8\) The officers, in turn, are responsible for carrying out the board's policies in the day-to-day operation of the association.\(^9\)

Typically, associations also form an architectural review committee (ARC),\(^{40}\) which operates to maintain architectural uniformity within a subdivision by enforcing the subdivision's restrictive covenants.\(^{41}\) Although restrictive covenants often specify exact height and size requirements for structures, covenants may grant ARCs discretion to approve new construction or remodels of residences based on subjective considerations such as whether the proposed change is in harmony with the surrounding development.\(^{42}\)

The developer of a subdivision will usually retain control over both common property and the association until a specified number of lots are sold within the subdivision.\(^{43}\) The deeds used to convey the individual lots to purchasers and the deed conveying the common property to the association describe what is owned by whom and generally indicate the relationship to the association through reference to the recorded declaration.\(^{44}\)

B. Judicial Treatment of Restrictive Covenants in the Context of Homeowners Associations

I. Overview

Traditionally, restrictive covenants have been disfavored in the law.\(^{45}\) They were historically regarded as encumbrances that restricted the free

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40. The board may also function as an ARC. *See* Riss v. Angel, 131 Wash. 2d 612, 616, 934 P.2d 669, 673 (1997). However, a separate committee is often established with the board acting as an appeal board. *See* Hyatt, *supra* note 6, § 6.03(g), at 297.
41. Hyatt, *supra* note 6, § 6.03(g), at 297.
42. *See* cases cited *supra* note 8.
43. *See* Hyatt, *supra* note 6, § 4.03(c), at 94.
44. *Id.* § 2.02, at 27.
45. *See* Stoebuck, *supra* note 2, at 904.
alienation of land and operated in "derogation of the common-law right to use land for all lawful purposes." In response to these concerns, courts established specific conditions that had to be satisfied before they would treat the covenants as running with the land: the covenant had to be enforceable between the original covenantee parties; the parties must have intended the covenant to run; the covenant had to "touch and concern" the land; "horizontal privity" between the original covenantee parties must have existed; and "vertical privity" between the covenantor party and the remote party sought to be benefited or burdened must have been present.

Courts also employed the doctrine of strict construction to limit the effects of restrictive covenants. The doctrine requires courts to narrowly construe covenants according to their terms and limit the application of those terms to situations explicitly covered in the covenants. Although the doctrine of strict construction remains the rule in the majority of jurisdictions, some courts that ostensibly employ the doctrine have softened the rule. For example, these courts have given great weight to the intent of the contracting parties to avoid defeating the purposes for which the covenants were created. In at least three states, strict construction of restrictive covenants no longer applies.

46. See id.; see also Roger A. Cunningham et al., The Law of Property § 2.2, at 35 (1984) (tracing public policy in favor of free alienability of land back to Quia Emptores in 1290).
48. See Stoebuck, supra note 2, at 867.
49. "Horizontal privity" exists if the covenant was created at the time when one of the parties transferred a property interest to the other. See id. at 879.
50. "Vertical privity" refers to the relationship between the original covenantor party and subsequent owners of the land. "[T]he burden of a real covenant may be enforced against remote parties only when they have succeeded to the covenantor's estate in land." Id. at 876.
51. See id. at 867.
52. See, e.g., Jones v. Williams, 56 Wash. 588, 591, 106 P. 166, 168 (1910).
53. Id.
54. See Yogan v. Parrott, 937 P.2d 1019, 1023 n.2 (Or. 1997) ("The maxim that restrictive covenants are to be construed strictly is the majority rule.").
55. See, e.g., Ezer v. Fuchshloch, 160 Cal. Rptr. 486, 491 (Cal. Ct. App. 1979) (noting limitation on rule of strict construction that "[t]he intent of the parties and the object of the deed or restriction should govern, giving [the] instrument a just and fair interpretation" (quoting Lincoln Sav. & Loan Ass'n v. Riviera Estates Ass'n, 87 Cal. Rptr. 150, 159 (Cal. Ct. App. 1970))); Hanley v. Misischi, 302 A.2d 79, 82 (R.I. 1973) (stating that strict construction "will not be used to destroy the very purpose for which the restriction was established").
The advent of zoning laws has affected how courts view restrictive covenants. Zoning laws typically divide a municipality into four types of districts, designating appropriate land uses within each. These types of zoning regulations reflect the modern philosophy that it is desirable to segregate land uses. The goal of zoning is to promote and maintain homogeneity within each respective district, thus creating a community “character.”

The movement away from strict interpretation of subdivision covenants gained momentum with the development of zoning laws. Because zoning laws already severely limit the uses of property, the additional restraints that restrictive covenants impose on land may be viewed as de minimus. As such, courts are willing to more broadly interpret and enforce restrictive covenants, especially when the covenants are part of a general scheme within a subdivision. What once were considered title encumbrances are now more likely to be viewed as ways to efficiently allocate resources using private agreements. Pre-Riss Washington case law also reflects this increasing judicial acceptance of restrictive covenants.

(“The modern viewpoint is that the former policy of strictly construing restrictive covenants is no longer operative.”); Candlelight Hills Civic Ass’n, Inc. v. Goodwin, 763 S.W.2d 474, 477 (Tex. App. 1988) (explaining that by statute restrictive covenants are to be liberally construed).

57. The U.S. Supreme Court upheld the constitutionality of comprehensive zoning in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

58. The four types of districts are residential, commercial, industrial, and special. See 12 Powell & Rohan, supra note 3, § 79C.01, at 79C-7.

59. See Winokur, supra note 2, at 21.

60. See, e.g., Brandon, 314 S.W.2d at 523 (“The general scheme and plan of the subdivision is an important factor [when construing an applicable restrictive covenant.]”); Traficante v. Pope, 341 A.2d 782, 785 (N.H. 1975) (“Where a general scheme of development can be shown, the intent to benefit land retained or previously sold by the grantor-developer will be implied so as to permit enforcement of restrictions uniformly imposed in furtherance of the overall design.”); Mt. Baker Park Club v. Colcock, 45 Wash. 2d 467, 471, 275 P.2d 733, 735 (1954) (“[O]wners of land have a right in equity to enforce covenants to which they are not parties when it appears that a general plan for development... has been adopted, which plan is designed to make it more attractive for residential purposes by... restrictions imposed on...[the] lots.”).

61. See Winokur, supra note 2, at 4–5 (“But as the Industrial Revolution completed the great transformation of feudal society into modern industrial capitalism, courts began to see promissory servitudes as efficiently allocating resources and enhancing individual liberty.”).

2. Pre-Riss Washington Case Law

Prior to *Riss*, courts typically relied on the standard established in *Burton v. Douglas County* to interpret restrictive covenants. The *Burton* standard required strict construction of restrictive covenants. Drawing on prior Washington case law, the court set forth principles of construction. These principles required courts to give effect to the clear, unambiguous language of the covenants, refrain from extending the covenants to include any use not expressed clearly, and resolve doubts in favor of the free use of land.

The Washington Court of Appeals, however, began to question the doctrine of strict construction of subdivision covenants required by *Burton*. In 1978, one appellate court noted that “[t]he policy favoring the free use of land has...undergone substantial erosion. As public restrictions in the form of zoning have gained favor, so have private restrictions.” Another court in 1991 expressly declined to construe strictly a subdivision covenant. The court explained that although strict construction may retain “some validity” when a dispute involves a homeowner and the maker of a covenant, which is typically the subdivision developer, “it has limited value when the conflict is between homeowners.”

63. 65 Wash. 2d 619, 399 P.2d 68 (1965). The *Burton* court incorporated the policy of strict construction that the supreme court first established in 1910. See *Jones v. Williams*, 56 Wash. 588, 591, 106 P. 166, 168 (1910). The *Jones* court reasoned that real estate, as an article of commerce, constantly changes uses to meet the needs of an ever-changing economy, and to saddle land with restrictions that inhibit the expansion of commerce contradicts the “well-recognized business policy of the country.” *Id.* at 592, 106 P. at 168; *see also Leighton*, 22 Wash. App. at 141, 589 P.2d at 282 (citing *Burton* standard); *Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wash. App. 70, 72–73, 587 P.2d 1087, 1089 (1978) (same).

64. *Burton*, 65 Wash. 2d at 621–22, 399 P.2d at 70.


67. *Witrak*, 61 Wash. App. 177, 810 P.2d 27. The dispute in *Witrak* concerned the planting of a row of 12 Douglas Fir trees along the boundary of a homeowner's lot. *Id.* at 178, 810 P.2d at 28. The subdivision covenants prohibited fences along lot boundaries higher than six feet and required the architectural control committee to approve any fence prior to construction. *Id.* at 179, 810 P.2d at 28. The defendant homeowner sought strict judicial construction of the covenant, which would have excluded a row of trees from the covenant's definition of a fence. The court declined to do so, instead holding that the overall purposes of the covenants included maintaining aesthetic harmony, preserving an open natural appearance, and maintaining the view and light of each homeowner. Allowing a row of trees along the boundary of a lot would contradict the collective interest of the subdivision. *Id.* at 181, 810 P.2d at 29–30.

68. *Id.* at 180, 810 P.2d at 29.
property owners from the "increased pressures of urbanization." Furthermore, the court explained that in a dispute between homeowners, rather than strictly construing subdivision covenants, it would place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests.

Perhaps sensing the growing discord among the courts of appeals, the Supreme Court of Washington announced in Mains Farm Homeowners Ass'n v. Worthington that it would reexamine the rule of strict construction in an appropriate case. Riss v. Angel gave the court such an opportunity.

II. RISS v. ANGEL

A. Facts and Procedural History

In 1992, William and Carolyn Riss purchased a residential lot in Mercia Heights, a subdivision in the city of Clyde Hill. Restrictive covenants, recorded by the original developer in the 1950s, governed the subdivision and required the Mercia Homeowners Association to approve any new construction or remodeling. The association, originally organized as a nonprofit corporation, consisted of the development's homeowners. In 1985, the corporation administratively

69. Id. at 179, 810 P.2d at 28.

70. Id. at 180–81, 810 P.2d at 29. In arriving at this conclusion, the court relied on the supreme court holding in Berg v. Hudesman, 115 Wash. 2d 657, 801 P.2d 222 (1990). The Berg court adopted the "context rule" for interpreting contracts, rejecting the "plain meaning" principle. Id. at 665–69, 801 P.2d at 227–30. The Witrak court explained:

In Berg the Supreme Court recognized that even the most ordinary words are only understood in the context of the surrounding document, the subject matter and objective of the contract, the surrounding circumstances, the subsequent acts and conduct of the parties, and the reasonableness of the respective interpretations of the contract. Of particular interest to this case is the Berg court's emphasis on rejecting interpretations that are unreasonable and imprudent and accepting those which make the contract reasonable and just.

Witrak, 61 Wash. App. at 181, 810 P.2d at 29.

71. Mains Farm Homeowners Ass'n v. Worthington, 121 Wash. 2d 810, 816, 854 P.2d 1072, 1074 (1993) (stating that "rule of strict construction should be reexamined in an appropriate case with a proper record"). Mains involved an action brought by a homeowners association alleging that an adult family home violated the subdivision covenant that property was to be used for single-family residential purposes only. Id. at 813, 854 P.2d at 1073.


73. Id. at 616, 934 P.2d at 673.

74. Id.
dissolved, leaving the homeowners to govern the subdivision as an unincorporated association acting through an elected board of directors.\footnote{75} The covenants governing the subdivision contained express requirements for residences, including minimum square footage, minimum setback, and maximum roof heights.\footnote{76} In addition, the covenants granted the association's board of directors the authority to approve or disapprove any proposed construction or remodeling within the subdivision.\footnote{77} In 1990, the association amended the covenants to allow aggrieved owners to appeal board decisions directly to the Mercia homeowners, who would then vote whether to overturn the board's decision.\footnote{78}

Following an open meeting, the board rejected the Risses' plan to replace their existing house with a new residence, even though the plan complied with all of the specific restrictions enunciated in the covenants, including the square footage, height, and setback requirements.\footnote{79} In a letter to the Risses, the board explained that it rejected the proposed house because of its height, bulk, exterior finish, and proximity to neighboring houses. The board did not, however, specify how the proposed plan could be modified to satisfy the covenants.\footnote{80}

The Risses appealed the board's decision to the Mercia homeowners. Twenty-four of the thirty-four lot owners cast votes, with a final count of twenty-one to three against approval of the Risses' plan.\footnote{81} The Risses then brought an action in superior court against the individual members of the association. They claimed that the covenants were unenforceable and that the board had acted unreasonably in rejecting their plan because

\begin{itemize}
  \item \footnote{75} Id.
  \item \footnote{76} The express restrictions established a 1400 minimum square footage requirement and prevented rooflines from rising more than 20 feet above the highest point of finished grade on the lot. Id.
  \item \footnote{77} The consent to construction provision stated:
    As to improvements, construction and alterations in Mercia Heights addition, the... Mercia Corporation shall have the right to refuse to approve the design, finishing or painting of any construction or alteration which is not suitable or desirable in said addition for any reason, aesthetic or otherwise... [considering] harmony with other dwellings... the effect on outlook of adjoining or neighboring property and any and all other factors which in their opinion shall affect the desirability or suitability of such proposed structure, improvement or alterations.
  \item \footnote{78} Id. at 616–17, 934 P.2d at 673.
  \item \footnote{79} Id. at 618, 934 P.2d at 674.
  \item \footnote{80} Id.
  \item \footnote{81} Id.
\end{itemize}

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the proposed home complied with the covenants. Five lot owners signed a stipulation stating that they would not oppose the Risses' proposal and agreed to be bound by the court's decision. The remaining lot owners were defendants at trial.

The trial court held that the covenants were enforceable, but that the association had acted unreasonably in rejecting the Risses' plan. It concluded that the association could not restrict the size, height, and proximity to neighbors of the Risses' proposed home beyond the requirements stated in the covenants. The court also found that the association had acted unreasonably by failing to compare the Risses' proposed home with other residences in the neighborhood, failing to investigate thoroughly, and relying upon inaccurate information in making its decision. The court awarded the Risses delay damages, attorney fees, and costs totaling approximately $200,000, entered jointly and severally against the individual defendant homeowners.

The homeowners appealed, and the court of appeals affirmed. Based on a strict construction of the covenants, the court of appeals held that the board lacked the discretion to deny approval for the Risses' proposed house because their plan satisfied all the specific requirements of the covenants. Thereafter, the homeowners appealed to the Supreme Court of Washington.

82. Id.
83. Id. at 619, 934 P.2d at 674.
84. Id.
85. Id. at 619-20, 934 P.2d at 674-75.
86. Id. at 620, 934 P.2d at 675.
87. The trial court awarded the Risses delay damages of $103,989.85 and attorney fees and costs of $102,250.31. Id.
88. Riss v. Angel, 80 Wash. App. 553, 912 P.2d 1028 (1996), aff'd, 131 Wash. 2d 612, 934 P.2d 669 (1997). The court of appeals held that the restrictive covenants were enforceable but were to be strictly construed, and that the board had acted unreasonably in rejecting the Risses' plan. Id.
89. Id. at 562-63, 912 P.2d at 1033-34. The court of appeals held that the Mercia homeowners were to be treated as the drafters of the covenants because in the process of amending the covenants in 1990, they had examined the restrictions and voted not to amend them. Therefore, according to the court of appeals the covenants were to be strictly construed. Id. at 558, 912 P.2d at 1031. The supreme court did not adopt this reasoning, merely noting the court of appeals' reasoning and saying nothing further regarding it. Riss, 131 Wash. 2d at 621, 934 P.2d at 675.
B. The Supreme Court of Washington Abandons Strict Construction

Although the Supreme Court of Washington affirmed the appellate court’s decision, it did so on different grounds. The court held that the board possessed the authority under the covenants to make discretionary decisions regarding whether to deny approval for a proposed remodel or new construction even if a proposed plan complied with all the requirements specified in the covenants. However, the court declared that ARCs must exercise their discretion reasonably and in good faith. Applying this standard, the court found that the Mercia board failed to act reasonably in rejecting the Risses’ plan.

In its decision, the supreme court established a new framework for interpreting restrictive covenants when disputes involve subdivision homeowners. The court found that the traditional principle requiring strict construction of restrictive covenants should not apply in disputes between homeowners. The doctrine of strict construction of covenants against the grantor, which in these cases would be the developer of the subdivision, is similar to the contract principle that ambiguities in contracts will be construed against the drafter. When parties other than the developer attempt to enforce restrictive covenants, however, this justification does not apply, because neither the party seeking enforcement nor the party challenging the covenant created the covenant.

In this situation, the court will interpret the covenant in the following manner. First, it will ascertain and give effect to those purposes intended by the covenants. Second, the court will resolve ambiguities about the intent of those who established the covenants by considering evidence of the surrounding circumstances. Finally, the court will attempt to

90. Riss, 131 Wash. 2d at 628, 934 P.2d at 678.
91. Id. at 625, 934 P.2d at 677.
92. Id. at 630, 934 P.2d at 679.
93. Id. at 623–24, 934 P.2d at 676–77.
94. Id. at 623, 934 P.2d at 676.
96. See Mains Farm Homeowners Ass’n v. Worthington, 121 Wash. 2d 810, 816, 854 P.2d 1072, 1074 (1993) (noting this difference).
97. Riss, 131 Wash. 2d at 623, 934 P.2d at 676.
98. Id.
interpret the covenant in a way that will protect the collective interest of the homeowners.99

After establishing the appropriate framework for interpreting restrictive covenants, the Riss court discussed how ARCs must exercise their discretion under a general consent to construction provision. Citing decisions from other jurisdictions,100 the court declared that covenants requiring homeowners to seek approval from an ARC (or similar body) before construction or remodeling will be upheld provided that the ARC exercises its authority consistently, reasonably, and in good faith.101 An ARC may not use a general consent to construction covenant, however, to impose restrictions on a lot that are “more burdensome” than those contained in specific covenants.102

Turning to the facts presented in Riss, the court stated that the specific minimum square footage and maximum height restrictions did not foreclose consideration of bulk and size under the more general consent provision.103 Under the general consent provision, the board could consider the structure’s harmony with other dwellings, its effect on adjoining or neighboring property’s outlook, and all other factors that affect the desirability or suitability of the proposed structure, improvement, or alteration.104 When dealing with minimum or maximum specific requirements, the court found that the board lacked discretion to permit any house with less than the minimum or more than the maximum requirement.105

Although the court found that under the general consent provision the board possessed the discretionary power to deny the Risses’ application,
it held that the board acted unreasonably in exercising this power. The court stressed that the focal point of a court’s review should be an ARC’s decisionmaking process or procedure, which must not be unreasonable. It listed numerous examples of such “unreasonable decisionmaking” by the Mercia board, including the board’s rejection letter to the Risses, which was stated in conclusory language; the board’s failure to consult an architect before it made its decision; and the board’s failure to make any objective size and height comparisons with existing houses, although these were reportedly major concerns of the board. As a result, the court held the board members and the homeowners who had ratified the board’s decision, as members of an unincorporated association, jointly and severally liable for violating the covenants.

III. RISS COMPORTS WITH PUBLIC POLICY AND PROTECTS HOMEOWNERS FROM IRRATIONAL DECISIONMAKING BY ARCS

The Riss decision significantly improves Washington covenant law. The court’s rejection of the doctrine of strict construction will help protect home buyers’ investments because subdivision covenants help maintain property values. By focusing on “homeowners’ collective interests” when interpreting subdivision covenants, courts will more effectively achieve the covenants’ purposes. Moreover, the reasonableness and good faith standard imposed on ARC decisions will protect individual homeowners from the irrational decisions these committees may make. In response to Riss, homeowners associations should adopt strict procedural guidelines for the ARC to follow, which

106. Id. at 628, 934 P.2d at 679.
107. The court noted that “‘[a]s with questions of substantive validity, a court may examine the fact-finding and other procedures undertaken by association officials in the course of judicial determination of whether the association’s [ad hoc decision on architectural plans] is reasonable.’” Id. at 630, 934 P.2d at 679 (quoting Robert G. Natelson, Law of Property Owners Associations § 5.2, at 173 (1989)). The court also stated that “two of the board members inaccurately representing the impact of the structure is not part of a reasonable decisionmaking process.” Id. at 629, 934 P.2d at 679 (emphasis added).
108. Id. at 628, 934 P.2d at 679.
109. Id. at 636, 934 P.2d at 683. The court remanded the case for further fact-finding to determine which homeowners voted to ratify the board’s decision. Id. at 637, 934 P.2d at 683.
110. Restrictive covenants protect investments in land because “the value of property often depends in large measure upon maintaining the character of the neighborhood in which it is situated.” Traficante v. Pope, 341 A.2d 782, 784 (N.H. 1975).
will ensure that rationality is forced back into ARC decisions and shield the associations from liability for the ARC's acts.

A. A Shift to Intent-Based Construction Better Protects Homeowners' Investments

The *Riss* decision comports with public policy. The policy underlying strict construction of restrictive covenants—enabling land to change uses as the economy grows—is no longer a primary concern in modern subdivisions. The Supreme Court of Washington first established the principle of strict construction almost ninety years ago. At that time, the demands of a burgeoning economy and population necessitated flexible land use. Restrictive covenants limited the ability of land owners and subsequent owners to use land freely for some desired purpose, thus diminishing the land's value.

Interpreting restrictive covenants as a value-diminishing burden makes less sense given present zoning laws and the increasing importance of residential developments. Subdivision covenants do not radically alter the way land is used, but only ensure that a district zoned as residential will remain that way. This allows homeowners to protect one of the biggest investments they have: their homes. Restrictive covenants protect investments in land because "the value of property often depends in large measure upon maintaining the character of the neighborhood in which it is situated," and restrictive covenants, such as consent to construction covenants, help ensure that unwanted changes will not occur.

112. Id. at 592, 106 P. at 168.
113. Id.
114. See, e.g., Mains Farm Homeowners Ass'n v. Worthington, 121 Wash. 2d 810, 816, 854 P.2d 1072, 1074 (1993) ("Subdivision covenants tend to enhance, not inhibit, the efficient use of land.") (quoting Robert D. Brussack, *Group Homes, Families, and Meaning in the Law of Subdivision Covenants*, 16 Ga. L. Rev. 33, 42 (1981)). But see Winokur, * supra* note 2, at 19-21 (arguing that there is little hard evidence that segregation of land uses enhances value of land).
The new rule for interpreting subdivision covenants in Washington allows courts to implement more effectively the purposes of these useful private agreements. When a covenant is clear and unambiguous, it will be given effect as stated; the new standard does not change this. In the case of ambiguity in the covenant, however, the new standard will better protect homeowners' investments. If the covenant is ambiguous, the goal of the new standard is arriving at an interpretation that protects the homeowners' collective interest. This goal allows courts to consider all the circumstances within a subdivision. The principle of strict construction, by contrast, merely requires courts to resolve doubts in favor of the free use of land. Rather than being boxed in by the strict construction doctrine, the new standard will allow courts to weigh the equities in each case and arrive at a just interpretation.

B. The Reasonableness Requirement Helps Protect Homeowners from Irrational Decisions Made by ARCs

To balance the interests of associations and individual homeowners, the Riss court required ARCs to follow reasonable procedures when making discretionary decisions. Although the Riss court's standard for interpreting covenants favors associations by liberally interpreting covenants, the court limited associations' power by requiring ARCs acting under a consent to construction covenant to act reasonably and in good faith. The court acknowledged that it will not simply defer to the judgment of an ARC even if its decision is made in good faith. Thus, to protect individual homeowners burdened by restrictive covenants, an ARC must be able to prove its decisionmaking process is reasonable.

Evidence suggests, however, that ARCs may be prone to make irrational decisions because of two main factors. First, their members lack expertise in real estate management. Second, ARCs may be predisposed against change, a tendency that is only heightened by the phenomenon of group polarization.

118. Not strictly construing restrictive covenants would enhance the possible scope of the restrictions. Thus, because an association maintains control over the development by use of restrictive covenants, the association's power is necessarily increased.
119. Riss, 131 Wash. 2d at 632–33, 934 P.2d at 681.
120. Id. at 630, 934 P.2d at 680 ("Plaintiffs' evidence supported their claim of arbitrary, unreasonable decisionmaking.").
1. **Lack of Expertise**

Members of ARCs almost always consist exclusively of volunteers with no professional expertise in the real estate business.\(^{121}\) They may be ill-equipped to determine whether a proposed project will increase or decrease (or, for that matter, have any effect at all on) the development’s property values, or have an impact on other homes. Similarly, members may misinterpret proposals because they lack knowledge regarding architecture. Furthermore, members may not truly understand the intricacies of the applicable covenants they must enforce.\(^{122}\) As a result, ARC decisions may be based on sloppy and inadequate investigation.

2. **Predisposition Against Change**

In addition, ARCs may be predisposed against change because their members have a vested interest in any decision. Since changes on any one homeowner’s property can affect the value of surrounding property, committee members will likely attempt to protect their property values by either allowing or denying a proposed construction or remodel. In situations in which it is difficult to determine whether a proposed change will impact property values, members most likely will vote against the change.

Compounding the problem of ARCs’ predisposition against change is the social-psychological phenomenon of group polarization,\(^{123}\) which predicts that members of ARCs will become even more opposed to change when they discuss a proposal. Group polarization describes the tendency of group discussion to strengthen the prevailing opinions of individual group members.\(^{124}\)

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121. See, e.g., Hyatt, supra note 6, § 6.02(a), at 208 (“Officers and directors are almost always volunteers who serve as an additional function of their home life, rather than as a part of their everyday work life.”); Winokur, supra note 2, at 64 (describing associations as “composed of and often managed by resident amateurs, [that] often seem inept in the delicate task of enforcing restrictions against neighbors”).

122. See, e.g., infra notes 130–32 and accompanying text (discussing board’s failure to take into account actual height restriction contained in covenant).


124. Group polarization has been confirmed by “dozens of studies.” Myers, supra note 123, at 333. See, e.g., Ethan Golgor, *Group Polarization in a Non-Risk-Taking Culture*, 8 J. Cross-Cultural Psychol. 331 (1977) (finding group polarization among Liberian high school students discussing various “culturally relevant” topics); Verlin B. Hinsz & James H. Davis, *Persuasive Arguments*
At least two theories have been put forward explaining the phenomenon of group polarization: informational influence and normative influence.125 Under the informational influence model (also known as the persuasive argument theory), group members influence each other by exchanging information while conversing.126 During a discussion, group members are exposed to new and persuasive information, which often strengthens an individual’s initial opinion.127 The normative influence model (also known as the social comparison/value theory) explains that group polarization results “from the dependence of individuals on the valued opinions of others and their desire to be at least as extreme as or, preferably, even more extreme than their peers in the socially desirable or prevailing direction.”128 People like to be liked and may express stronger opinions after discovering that other members of a group with which they identify share the same views.129 Under either model, one would expect to find group polarization among ARCs that will have the overall effect of strengthening the ARC’s prejudice against change.


126. See McGarty, supra note 124, at 2.

127. Id.


129. See Myers, supra note 123, at 337.
C. Irrationality of the Board's Decision in Riss

The board's actions in Riss suggest the board members lacked expertise. Prior to an open board meeting, the president of the association and his wife took photographs in front of various other houses in the subdivision to illustrate the height of twenty-three feet, the height of the Risses' proposed house.\(^{130}\) This "photographic study" failed to take into account the covenants' specification that a structure's height be calculated from the highest point of finished grade on the lot; the actual height of the home is irrelevant. The Risses' proposed house would have been eleven-and-one-half feet above the highest grade, well within the maximum height restriction.\(^{131}\) Another board member sent a letter to all the other lot owners before the meeting expressing concern with the proposal and inaccurately representing the height and square footage of the proposed house.\(^{132}\) These actions demonstrate that the board members were not well acquainted with the technical requirements of the covenants, a deficiency that led to an irrational decision to deny the Risses' proposal.

The board's actions may also have been an example of the group polarization effect. At least two of the members opposed the Risses' proposal prior to the meeting that decided the fate of the project. The other members of the board, already concerned that the Risses' lot was more visible to those entering the neighborhood,\(^{133}\) may have become even more prejudiced against the proposal through discussion at the meeting.

Following the meeting, the board notified the Risses that they had unanimously rejected the plan,\(^{134}\) even though the proposal complied with the covenants in all material respects. Whether the rejection resulted from the board's lack of expertise or the group polarization effect (or a combination of both), strict procedural guidelines would have helped to protect the Risses by forcing the board to investigate adequately before making its decision.

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131. The height restriction of the covenants stated that roof lines were to be no higher than 20 feet above the highest point of finished grade on the lot. Id.
132. The letter stated that the house would have a height of 25 feet, but failed to take into account the actual covenant. Id. at 628, 934 P.2d at 679.
133. Id. at 618, 934 P.2d at 674.
134. Id. at 637, 934 P.2d at 683.
IV. PROPOSED PROCEDURAL GUIDELINES FOR ARCS TO FOLLOW WHEN MAKING DISCRETIONARY DECISIONS

The Riss court attempted to protect individual homeowners by requiring that the ARC’s decisionmaking process not be unreasonable or arbitrary. As a result of this new reasonable procedure requirement, homeowners associations should reevaluate how their ARCs make discretionary decisions. Associations seemingly have two options: they can revoke their ARCs’ discretionary power and create very detailed restrictions in their governing covenants in hope of addressing every issue, or they can adopt strict procedural guidelines for their ARCs to follow when making discretionary decisions. Because a detailed, exclusive list of restrictions may prevent ARCs from responding to changing circumstances, associations should opt for creating strict procedural guidelines.

Strict procedural requirements serve at least two purposes. First, they force some level of rationality into the ARC’s decision by requiring the ARC to support its decision with credible reasoning. For example, if an ARC must demonstrate in a letter to the applicant the exact reasons for denying a proposal, the ARC would be forced to consider these reasons more carefully. The second function served by procedural requirements is to shield ARCs and associations from liability if ARCs follow the reasonable procedure guidelines in good faith. Because of Riss, the unpaid, amateur volunteers who make up ARCs may be inclined simply to resign from the committees. This would greatly diminish the enormous amount of good work done by ARCs. Appropriate procedural guidelines, however, would counteract this effect. If implementing reasonable procedures constitutes evidence of a reasonable decision-making process under Riss, then ARC members who act in good faith and in accordance with these procedures need not fear liability for rejecting a homeowner’s proposal.

Although the Riss court did not set forth a general procedure for ARCs to follow, the court did explain its reasons for finding that the Mercia board’s decisionmaking process was unreasonable. Extrapolating from the court’s reasoning, the remainder of this section proposes specific procedural guidelines that will enable ARCs to meet the Riss standard when making discretionary decisions.

Before an ARC or other governing body may make discretionary decisions, it must be empowered to do so in the association’s enabling
documents.\textsuperscript{135} Once authorized, an ARC must apply its discretionary power consistently.\textsuperscript{136} Furthermore, the ARC must always comply with the specific requirements set forth in those documents and may not impose restrictions "more burdensome" than the covenants provide.\textsuperscript{137}

Once the ARC has received a proposal, the committee should meet within a reasonable time to discuss potential concerns, keeping a detailed record of its discussions and activities. It should investigate the size and height, view and proximity, and aesthetics of the proposed project. In addition, the committee should notify applicants and explain the reasons for its decision.

First, if the ARC is concerned about the overall size or height of a proposed structure, it should conduct an objective comparison study.\textsuperscript{138} The study should compare existing houses in the development with the proposed house and clearly demonstrate that the proposed house would be "out of place" in the development.

Second, if the ARC is concerned about the negative impact on neighboring views or the proximity to neighboring residences, it should physically visit the site and interview surrounding neighbors, recording

\textsuperscript{135} In \textit{Riss}, the court noted that vague approval standards "have been upheld where covenants with such standards clearly established that discretion to approve had been granted." \textit{Id.} at 625, 934 P.2d at 677.

\textsuperscript{136} The \textit{Riss} court declared that a covenant requiring a structure to be in harmony with surroundings "will not be enforced where it has been applied so inconsistently as to result in a wide variety of buildings." \textit{Id.}

\textsuperscript{137} \textit{Id.} at 625, 934 P.2d at 677. The court stated that "[i]f covenants include specific restrictions as to some aspect of design or construction, the document manifests the parties' intent that the specific restriction apply rather than an inconsistent standard under a general consent to construction covenant." \textit{Id.} at 625–26, 934 P.2d at 677–78. It held, however, that the board had no discretion to permit a house that did not satisfy the minimum square footage requirement, but did have discretion to deny a house that satisfied the minimum requirement but was inharmonious with the surrounding houses because of its extraordinary size. Seemingly, the board would be imposing restrictions "more burdensome" than those contained in the covenants. This part of the \textit{Riss} holding needs to be clarified by the court. The court may have meant that if specific requirements in the covenant foreclose consideration under a general standard, the specific requirements control. The court noted that "[t]he specific restrictions [in this case] do not foreclose consideration of size and bulk under the more general provision." \textit{Id.} at 626, 934 P.2d at 678. Thus, one must consult the applicable covenants to determine whether the specific restrictions control.

\textsuperscript{138} The \textit{Riss} court noted: "There is no evidence in the record that the Board made any objective comparisons with existing homes to compare size and height, though those were major reasons for rejecting the proposed plans." \textit{Id.} at 628, 934 P.2d at 679. The court also noted that "had the association made valid comparisons of its own, its decision might have been different." \textit{Id.} at 630, 934 P.2d at 680.
any objections in writing. Additionally, the individual making the proposal should be given the opportunity to be present during the visit, both to ensure that it actually occurred and that the ARC in fact addressed the potential problems.

Third, if the ARC has aesthetic concerns about a proposed change, it should be able to demonstrate that it has consistently applied its discretionary power within the subdivision. Aesthetic concerns include most other possible reasons for rejecting a proposed house, such as its color, type of material, and overall design. Absent consistency, a court is likely to find an ARC’s rejection unreasonable if the decision is based solely on aesthetic concerns. An ARC may not enforce blanket prohibitions that are not within the specific restrictions. For example, courts have invalidated ARC-created bans on factory-built homes and above-ground swimming pools. Each proposal must be addressed individually.

If the ARC opposes a plan after completing the necessary investigation, the committee should write a letter to the applicant explaining its reason for rejecting the proposal. In the letter, the committee should state clearly, if possible, how the plans could be changed to satisfy the committee. This letter is very important because it forces the ARC to support its decision to reject a proposal with solid reasoning.

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139. The supreme court noted there was “no evidence [in the record that] the Board visited the site, much less with an eye to neighbors’ views or privacy.” *Id.* at 628, 934 P.2d at 679; see also *Leonard v. Stoebling*, 728 P.2d 1358, 1360–61 (Nev. 1986) (finding ARC’s decision unreasonable because ARC failed to visit site and take neighbor’s views into consideration).

140. See supra note 136 and accompanying text; see also *McHuron v. Grand Teton Lodge Co.*, 899 P.2d 38, 42 (Wyo. 1995) (“Since the Committee in the past had limited other roofs in the subdivision to either gravel or wood shakes, its decision not to permit fiberglass was in keeping with that precedent and, therefore, ‘reasonable.’”).

141. See, e.g., *Town & Country Estates Ass’n v. Slater*, 740 P.2d 668, 669 (Mont. 1987) (holding “harmony of external design” standard unenforceable where development was mixture of styles).

142. See, e.g., *Chesapeake Estates Improvement Ass’n v. Foster*, 288 A.2d 329, 333 (Md. 1972) (invalidating restriction against modular homes).


144. The *Riss* court noted that “[i]n this case, the Board’s decision reflected in the letter to Plaintiffs was in conclusory language about height, bulk, and proximity.” *Riss*, 131 Wash. 2d at 628, 934 P.2d at 679; see also *Oakbrook Civic Ass’n v. Sonnier*, 481 So. 2d 1008, 1012 (La. 1986) (holding that “the conclusory statement of [the ARC chairman] asserting that the building was not harmonious with the surrounding structures” could not prove that ARC acted reasonably).
V. CONCLUSION

The Supreme Court of Washington seized the opportunity in *Riss v. Angel* to declare that strict construction of subdivision covenants no longer applies in disputes between subdivision homeowners. This case clarifies Washington law on the enforceability of restrictive covenants and better reflects modern thinking about the usefulness of restrictive covenants. Moreover, the decision imposes reasonableness and good faith requirements on discretionary decisions made by ARCs that will force these bodies to reform their decisionmaking processes.

In response to *Riss*, associations should adopt specific procedural guidelines for their ARCs to follow when making discretionary decisions. Specific guidelines will better protect individual homeowners by assuring that ARCs will evaluate proposals using objective criteria. Furthermore, by adopting specific guidelines according to the general principles laid out in *Riss*, ARCs acting in good faith will avoid liability for challenged decisions.