CONCURRING AND DISSENTING OPINION BY FOLEY, J.

I concur in the majority opinion that the appeal of Defendants/Appellants/Cross-Appellees Steven and Elizabeth Nishimura (Nishimuras) is without merit. I respectfully dissent, however, to the majority opinion that the cross-appeal of Plaintiff/Appellee/Cross-Appellant Village Park Community Association (Association) is equally without merit.

In its cross-appeal, the Association contends the Circuit Court of the First Circuit (circuit court) ignored its factual findings and the standard of review set forth in McNamee v. Bishop Trust Co., Ltd., 62 Haw. 397, 616 P.2d 205 (1980), when the circuit court concluded that it would have been unreasonable for the Association to withhold consent to the specific trellis and retaining wall and denied the Association's request for injunctive relief.

McNamee provides that covenants requiring submission of plans and prior consent before construction are valid and enforceable as long as the authority to consent or approve is exercised reasonably and in good faith. Id. at 407, 616 P.2d at 211. McNamee noted it is not for the trial or appellate court to determine whether the construction plans are reasonable. Id. at 402 n.10, 616 P.2d at 209 n.10. In the instant case, this is a determination reserved for the Association's Design Committee, which is "most suited for this determination." Id. "The trial court's task [is] to see that the Committee's decision was not

arbitrary or made in bad faith." Id. The circuit court did not adhere to this standard as set forth in McNamee. The circuit court reviewed the Nishimuras' trellis and retaining wall and determined they were reasonable; therefore, the circuit court concluded it would have been unreasonable for the Design Committee to withhold approval.

This case is analogous to Sandstrom v. Larsen, 59 Haw 491, 501, 583 P.2d 971, 979 (1978), where there was "a deliberate and intentional or an assumed-risk violation of a restrictive covenant." Such a violation would entitle the Association to injunctive relief. The record in the instant case does not show by substantial evidence that the Design Committee's decision was arbitrary or made in bad faith. McNamee, 62 Haw. at 402, n.10, 616 P.2d at 209 n.10. I would therefore vacate the circuit court's holding that it would have been unreasonable for the Association to withhold consent to the specific trellis and retaining wall and remand this case for consideration of appropriate injunctive relief regarding the trellis and retaining wall. In all other respects, I would affirm the September 3, 2003 Final Judgment of the circuit court.

Daniel R. Foley

APPELLATE COURTS SEAL STATE OF HAWAI'I