

70049-9

70049-9

No. 70049-9-I

**IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

WILLIAM D. WAHL,

Appellant,

v.

MICHAEL L. AND HOROMI RITTER,

Respondents.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 FEB 10 PM 2:40

REPLY BRIEF OF APPELLANT

Attorneys for Appellant:

LIVENGOOD FITZGERALD
& ALSKOG, PLLC

Gregory A. McBroom, WSBA No. 33133
Timothy S. McCredie, WSBA No. 12739

121 Third Avenue,
P.O. Box 908
Kirkland, WA 98083-0908
Phone: (425) 822-9281

TABLE OF CONTENTS

	<u>Page</u>
I. COUNTERSTATEMENT OF THE CASE.....	1
II. AUTHORITY	6
A. The standard of review is <i>de novo</i>	6
B. The primary intent of Easement II’s express reservation of ingress and egress for non-recreational use is to ensure Wahl can use the area to navigate the tight radius and steep slope of the driveway. The record establishes this is exactly how the area has been used for over the past 30-years	8
C. The trial court erred by allowing the encroaching patio and planter boxes to remain in EA I without providing any relief.....	12
1. The Ritters have no rights under the 1978 Easement to unilaterally build their patio and planter boxes on Wahl’s property without any consent. Over repeated objections, the Ritters expanded their living space onto Wahl’s property for their “private” pleasure. SES’s final design drawings approved by Wahl, the Ritters and the City call for the area to be level grade with only crushed rock	12
2. Substantial evidence does not support the trial court’s “conceivable” safety findings	14

TABLE OF CONTENTS

	<u>Page</u>
3. The trial court’s refusal to provide any remedy for its finding of encroachment in EA I constitutes legal error	16
D. Easement III’s “not over two boats” requirement means what it says. The Easement does not grant the Ritters the right to moor a boat, two jet skis, three lift devices, and to run water and electricity through EA I, II and III to the dock	17
E. Contrary to the Ritters’ contention, neither <i>Sunnyside</i> nor <i>Logan</i> support unilateral expansion of the easements.....	19
F. The Ritters reliance upon the trial court’s “no added burden” criteria is an error of law	22
G. The Ritters have failed to demonstrate Wahl pleaded damages of \$10,000 or less as expressly required under RCW 4.84.270	23
Appendix A.....	A-1

TABLE OF AUTHORITIES

Page

Washington Cases

<i>224 Westlake, LLC v. Engstrom Properties, LLC,</i> 169 Wn. App. 700, 281 P.3d 693 (2012).....	19
<i>Boutillier v. Libby, McNeill & Libby, Inc.,</i> 42 Wn. App. 699, 713 P.2d 1110 (1986).....	17
<i>Brown v. Voss,</i> 105 Wn.2d 366, 715 P.2d 514 (1986).....	23
<i>Cogdell v. 1999 O'Ravez Family, LLC,</i> 153 Wn. App. 384, 220 P.3d 1259 (2009).....	16
<i>Crisp v. VanLaecken,</i> 130 Wn. App. 320, 122 P.3d 926 (2005).....	19
<i>Dev. Servs. v. City of Seattle,</i> 138 Wn.2d 107, 979 P.2d 387 (1999).....	8
<i>Gold Creek N. Ltd. P'ship v. Gold Creek Umbrella Ass'n,</i> 143 Wn. App. 191, 177 P.3d 201 (2008).....	6
<i>Green v. Lupo,</i> 32 Wn. App. 318, 647 P.2d 51 (1982).....	11
<i>Hanson v. Estell,</i> 100 Wn. App. 281, 997 P.2d 426 (2000).....	25

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Isla Verde Intern. Holdings, Inc. v. City of Camas,</i> 146 Wn.2d 740, 49 P.3d 867 (2002).....	15
<i>Lawson v. State,</i> 107 Wn.2d 444, 730 P.2d 1308 (1986).....	23
<i>Lay v. Hass,</i> 112 Wn. App. 818, 51 P.3d 130 (2002).....	25
<i>Little-Wetsel Co. v. Lincoln,</i> 101 Wash. 435, 172 P. 746 (1918).....	11
<i>Logan v. Brodrick,</i> 29 Wn. App. 796, 631 P.2d 429 (1981).....	11, 19, 21, 22
<i>MacMeekin v. Low Inc. Housing,</i> 111 Wn. App. 188, 45 P.3d 570 (2002).....	19
<i>Mielke v. Yellowstone Pipeline Co.,</i> 73 Wn. App. 621, 870 P.2d 1005 (1994).....	19
<i>Newport Yacht Basin Ass'n of Condo Owners v. Supreme Nw., Inc.,</i> 168 Wn. App. 56, 277 P.3d 18 (2012).....	6
<i>Nw. Props. Brokers Network v. Early Dawn Estates Homeowners Ass'n,</i> 173 Wn. App. 778, 295 P.3d 314 (2013).....	9, 11

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Proctor v. Huntington,</i>	
169 Wn.2d 491, 238 P.3d 1117 (2010).....	16, 17, 23
<i>Reynolds v. Hicks,</i>	
134 Wn.2d 491, 951 P.2d 761 (1998).....	24, 25
<i>Sanders v. City of Seattle,</i>	
160 Wn.2d 198, 156 P.3d 874 (2007).....	18
<i>Schoonover v. Carpet World, Inc.,</i>	
91 Wn.2d 173, 588 P.2d 729 (1978).....	8
<i>State v. Olson,</i>	
126 Wn.2d 315, 893 P.2d 629 (1995).....	17
<i>Sunnyside Valley Irrigation Dist. v. Dickie,</i>	
149 Wn.2d 873, 73 P.3d 369 (2003).....	10, 19, 20, 21
<i>Tanner Elec. Co-op. v. Puget Sound Power & Light Co.,</i>	
128 Wn.2d 656, 911 P.2d 1301 (1996).....	6
<i>Wilson & Son Ranch, LLC v. Hintz,</i>	
162 Wn. App. 297, 253 P.3d 470 (2011).....	10
<i>Wright v. Dave Johnson Ins. Inc.,</i>	
167 Wn. App. 758, 275 P.3d 339 (2012).....	6

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Zobrist v. Culp</i> , 95 Wn.2d 556, 627 P.2d 1308 (1981).....	12
<u>Washington Statutes</u>	
RCW 4.84.270	25
RCW 4.84.250 – 270	25
<u>Secondary Authorities</u>	
Restatement (2d) of Contracts §212(2) (1981)	6
<u>Washington Court Rules</u>	
CR 7(a).....	24
<u>Out of State Cases</u>	
<i>Arcidi v. Town of Rye</i> , 846 A.2d 535 (N.H. 2004)	18
<i>Copanas v. Loehr</i> , 876 S.W.2d 691 (Mo. App. E.D. 1994)	10
<i>Cotsifas v. Conrad</i> , 905 P.2d 851 (Or. App. 1995).....	10

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Grygiel v. Monches Fish & Game Club, Inc.</i> , 787 N.W.2d 6 (Wisc. 2010)	23
<i>Kallen v. Feldi</i> , 596 N.Y.S.2d 918 (N.Y. App. Div. 3 1993)	9
<i>River's Edge Homeowners' Assoc. v. City of Naperville</i> , 819 N.E.2d 806 (Ill. App. 2004)	9
<i>Strickland v. Barnes</i> , 164 S.E.2d 768 (Va. 1968).....	10
<i>Universal Broadcasting Corp. v. Inc. Village of Mineola</i> , 596 N.Y.S.2d 111 (N.Y. App. Div. 2 1993)	9

Federal Cases

<i>ADT Sec. Services, Inc. v. Lisle-Woodridge Fire Protection Dist.</i> , 807 F.Supp.2d 742 (N.D. Ill. 2011)	15
---	----

I. COUNTERSTATEMENT OF THE CASE

Because the original drafters of the easement made clear that no easement rights exist “except as specifically granted in this Agreement,” it is important to interpret the actual easement language. App. A at 2 (Tr. Ex. 105, 1978 Easement). The Ritters frequently misquote and misstate the easement, selectively including favorable phrases and omitting other critical language. For example, the Ritters claim the easement states they “have priority use with the understand [*sic*] that [EA II / EA III] is owner B’s private area.” Resp’t Br. at 9. What the easement *actually states* is that they “have priority use with the understanding that [EA II / EA III] is owner’s B’s private area, *to the extent provided herein.*” Tr. Ex. 105 at 6 (italics added). They also state, “EA II is for the Ritters’ recreational use and for access between their residence and the dock.” Resp’t Br. at 13. They omit language expressly reserving to Wahl the explicit right to use EA II for ingress and egress and other non-recreational uses. *See* Tr. Ex. 105 at 5. Thus, the following is provided to correct the record.

Preliminary landscape plan. The preliminary landscape plan (Tr. Ex. 3) was not “included in the easement.” Resp’t Br. at 7. The plan was created *after the execution of the 1978 Easement*. VRP 216:7-8. Wahl and the Podls used the preliminary plan as a starting point, which materially changed as they constructed and landscaped the area.

Appellant Br. at 16-17. The plan does *not* contain the 5' handwritten notation shown on page 8 of the Ritters' brief. *See* Tr. Ex. 3. The Ritters also omit any reference to the 22' driveway radius shown in the plan.¹

Driveway. The Ritters misrepresent that “[s]ometime after 2000, Mr. Wahl had his driveway rebuilt to encroach into EA II.” Resp’t Br. at 13. *It was the Ritters (not Wahl) who had TerraSolve remove and replace Wahl’s driveway as a result of the large oil spill.* TerraSolve was hired by the Ritters as part of the first oil remediation effort. VRP 206:14-19; Appellant Br. at 18-19. The 2000 driveway existed for more than “eight years” until the Ritters hired a contractor to unlawfully trespass and maliciously cut away the northern five feet of the 2000 driveway without any notice to Wahl. VRP 226-28, 428, 546, 835; Tr. Ex. 17.

The Ritters falsely claim that Ms. Podl testified that EA II was not paved and not used for driving or parking.² Resp’t Br. at 13 n. 7 (citing VRP 621-23). That is not what she said. Ms. Podl testified that she had “no idea” how far Wahl’s 1979 driveway extended into EA II, only she thought the distance between the north boundary line and the driveway was greater than six inches. VRP 622:25; 630:15-22; 632:16-18; 633:16-

¹ The surveyor established that a 22 foot driveway radius extends very close to the north boundary line of the Wahl property, well into EA II. VRP 339, 1031.

² Ms. Podl did not participate in drafting the easement. VRP 614:13-14. Her former spouse negotiated the easement terms with Mr. Wahl. VRP 165; 257-58.

17. Ms. Podl further stated that she could not recall the location of the driveway in EA II, but acknowledged that the driveway had a radius. VRP 623:1-2; 638:1-11. Ms. Podl also testified that she did not know how vehicles navigated the Wahl driveway. VRP 634:6.

Encroaching Patio and Planter Boxes. The patio and planter boxes are neither a “component of the retaining wall” nor “[f]or the patio to provide drainage necessary to protect the new retaining walls.” Respondents’ sole reliance upon Mr. Ritter’s unsupported testimony at VRP 850:16-20 is misplaced. SES designed the area to be *only* crushed rock. Tr. Exs. 103 & 104. Both SES and the Ritter’s subcontractor testified that the patio and planter boxes are set back and away from the retaining wall and are not part of the structural design for the retaining wall. *See* Appellant Br. at 23-26. In addition, as found by the trial court, CP 634 (FF ¶15), the Ritters’ subcontractor established that they can build their patio and planter boxes entirely on their own property. *Id.*

The Ritters argue without citation that the planter boxes are needed “for erosion control” and “safety.” Resp’t Br. at 13. The record conclusively refutes this argument. The “final” SES landscape plan shows no plants or vegetation in this area. Tr. Ex. 41. SES designed this area to be *only* crushed rock, Tr. Ex. 103 & 104, and these were the “final” design drawings approved by the City and the parties. VRP 136-37. Mr. Ritter

even testified that the patio and planter boxes were unnecessary. VRP 796:25 & 797:1. The Ritters' subcontractor likewise testified that the Ritters have *many other options available* that would not lead to any encroachment onto Wahl's land. VRP 1080:5-10.

Remediation Agreement. Although not used by the trial court, CP 631-42, the Ritters now appear to rely upon the Agreement for Right of Entry, Tr. Ex. 88, as the basis for their unauthorized acts. Resp't Br. at 10. The Agreement neither allows the Ritters to build at their sole discretion, nor to unilaterally change dimensions or location of replaced structures. The Agreement provides that the Ritters would perform the remediation according to the design drawings; that they would restore landscaping and pavement as closely as possible to what had existed; that liability would be limited "if restrictions" prevented them from removing and replacing in the exact condition or configuration; and that they must remedy any resulting damages. Tr. Ex. 88, ¶2a. The Ritters cannot show any "*restrictions [that] prohibit* replacing or restoring landscaping, pavement, or other areas damaged or removed to the exact condition or configuration existing prior to the start of remediation." *Id.* (italics added). Neither VRP 784 nor 797 supports the Ritters' claim. Resp't Br. at 11, n. 4.

Boat. The Ritters do not just moor a "small boat." Resp't Br. at 16. They have installed "three" lift devices—one for a large boat, and two

others for jet skis—all without obtaining any approval from Wahl. VRP 239, 298, 301-05, 496-97; Tr. Ex. 46. They have omitted the fact that the easement reserves to Wahl the right to use the dock for occasional boat moorage (Tr. Ex. 105 at 6) and that there is an express mutual consent requirement for making new improvements. *Id.* at 7 (¶4).

Water/Electricity. There was *never* any water running from the Ritters' house to the dock. Resp't Br. at 16. The Ritters' citation to VRP 700-01 and 641:11-15 is unresponsive. *Id.* VRP 700-01 says nothing about water or electricity. VRP 631:11-15 is only Mr. Ritter's testimony that he started running garden hoses. Mr. Ritter even testified he had to extend his garden hose just to get to the dock. VRP 718.

Likewise, neither the Ritters nor the Podls ever had power to the dock. Resp't Br. at 16; *see also* VRP 523-24; 525:22-24; 652:23-24 & 948. The Ritters misrepresent that electricity is necessary "for powering the boat lift." Resp't Br. at 15-16. The boat lift does not use electricity. VRP 497 & 715. It is raised and lowered with water pressure. *Id.* The jet-ski lifts are also manually crank operated. Tr. Ex 46 at 2.

Stairs. The widening of the stairs from 3 to 5 feet was not "part of the remediation." Resp't Br. at 10. The remediation designer testified that Mr. Ritter unilaterally directed him to increase the stair width. VRP 832:11-20. The final design drawing *approved by both Wahl and the*

Ritters, which were used to obtain building permits, shows the width of the stairs as three feet (code). Tr. Ex. 103 & 104; VRP 136-37.

II. AUTHORITY

A. The standard of review is *de novo*.

Because the trial court's interpretation did not depend on extrinsic evidence or factual determinations about the credibility of witnesses, CP 632-38, the interpretation is a question of law reviewed *de novo*.³ See *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979) (rejecting substantial evidence review where the interpretation involved a "legal conclusion as the effect of the deed" and no extrinsic evidence and where the Court engaged in *de novo* review examining the "entire document to ascertain intent"); *Gold Creek N. Ltd. P'ship v. Gold Creek Umbrella Ass'n*, 143 Wn. App. 191, 200, 177 P.3d 201 (2008); *Wright v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758, 769, 275 P.3d 339 (2012).⁴

³ No different than the interpretation of a contract. *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

⁴ The trial court's order of permanent injunctive relief is also subject to *de novo* review. *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 77, 277 P.3d 18 (2012). These orders include enjoining Wahl from driving, parking or turning around on EA II; banning all vehicle traffic in EA II; allowing the Ritters to line the path in EA II with three rows pavers in loose sand; allowing the Ritters to install the easement path, stairs and other landscaping; allowing the Ritters to prevent vehicles from the EA II path by installing "vehicle/safety barriers;" and allowing the Ritters permanent access to electricity and water at the dock in EA III and by the easement path in EA I & II. CP 638-40 (¶¶39, 40, 41, 42, 43 & 45).

As to Easement I, the trial court ruled Owner B could construct a concrete patio and planter boxes to encroach onto Owner A's property as "rockeries and devices, steps and paths" or "landscaping" without Owner A's consent. *See* CP 634-37 (FF ¶14-17; CL ¶31). The court also ruled Owner B could unilaterally widen the stairs from 3' to 5' without Owner B's consent as within Owner B's right to "install and maintain steps and paths." CP 635-38 (FF ¶18; CL ¶32). These interpretations were made entirely on legal interpretation of the easement language.

As to Easement II, the trial court's ruling was based on its interpretation of the legal consequences of the language used in the easement. *See* CP 633 (FF ¶9) (refusing to consider extrinsic evidence of "difficulty in turning vehicles"); CP 636-37 (CL ¶27). Similarly, the court's interpretation of the easement as allowing Owner B to run power and water to the New Dock depended solely on the language of the easement. *See* CP 634-37 (FF ¶12; CL 29).

As to Easement III, the court's interpretation allowing Owner B to moor two jet skis and lifts at the dock depends on the court's interpretation of the easement language. *See* CP 635-38 (FF ¶¶19-22; CL ¶¶33-34). Except for the unsupported findings that (1) jet skis were not contemplated when the easement was executed, (2) they do not interfere with Owner A's

use, and (3) a jet ski counts as “one-half boat,” this ruling depends entirely on legal interpretation of the language used in the easement.

The trial court made no determination that any term or phrase was ambiguous. *See* CP 632-38. But, if this Court were to determine that a term or phrase is ambiguous, extrinsic evidence can be reviewed to resolve the ambiguity without remanding. *See Dev. Servs. v. City of Seattle*, 138 Wn.2d 107, 132, 979 P.2d 387 (1999) (whether a term or phrase is ambiguous is a question of law reviewed *de novo*); *Schoonover v. Carpet World, Inc.*, 91 Wn.2d 173, 177-178, 588 P.2d 729 (1978) (remand unnecessary where evidence supports but one conclusion).⁵

B. The primary intent of Easement II’s express reservation of ingress and egress for non-recreational use is to ensure Wahl can use the area to navigate the tight radius and steep slope of the driveway. The record establishes this is exactly how the area has been used for over the past 30-years.

The trial court’s interpretation and permanent injunctive relief has eliminated any meaningful use for Wahl in EA II. Unlike “ingress and

⁵ Over the past 30 years’ worth of undisputed extrinsic evidence supports but one reasonable conclusion, *inter alia*: (1) that Wahl has continuously used EA II as part of the driveway due to the tight radius and steep slope; (2) that there was *never* any patio or planter boxes in EA I; (3) that the Ritters’ new patio and deck serve no structural or drainage purpose; (4) that the approved stairs in EA I were never over 3 feet in width; (5) that the Ritters never sought Wahl’s approval for improvements to the dock; (6) that the Ritters never had any water or power rights in EA III; and (7) that the Ritters never had any material storage rights in EA III. *See* Appellant’s Statement of the Case.

egress” easements that specify particular means of access,⁶ Easement II is unrestricted as to Owner A’s access, requiring neither pedestrian use nor excluding motor vehicle use. Based on the four corners of the easement, this language should be viewed as unambiguously permitting Owner A’s use of motor vehicles.⁷ Even if the term “ingress and egress” were deemed ambiguous or silent regarding Owner A’s use of motor vehicles, extrinsic evidence overwhelmingly supports motor vehicle use, including the unchallenged 30+ year history of Wahl using motor vehicles in EA II. Where an easement is silent on “the means of access,” courts refuse to interpret ingress rights “too narrowly.” *Cf. Nw. Props. Brokers Network v. Early Dawn Estates Homeowners Ass’n*, 173 Wn. App. 778, 802, 295 P.3d 314 (2013) (posting directory and sign for short plat within easement did not exceed the scope since they are “a means of access to the easement...contemplated within an easement for ingress and egress”).

⁶ *E.g., River’s Edge Homeowners’ Assoc. v. City of Naperville*, 819 N.E.2d 806, 812 (Ill. App. 2004) (easement restricted to walkway for pedestrian traffic could not be used for bicycles); *Universal Broadcasting Corp. v. Inc. Village of Mineola*, 596 N.Y.S.2d 111 (N.Y. App. Div. 2 1993) (easement for ingress and egress “for both pedestrian and motor vehicle use”); *Kallen v. Feldi*, 596 N.Y.S.2d 918, 920 (N.Y. App. Div. 3 1993) (1896 right-of-way permitting ingress and egress “on foot or with horse, oxen, cattle, beasts of burden, wagon carts, sleigh or other vehicles or carriages” held “conceptually broad enough to permit access by motor vehicle” to subdivision homes).

⁷ The original parties knew how to restrict “ingress and egress” rights when that was their intention. Easement I restricted Owner B’s “ingress and egress” to “pedestrian only and shall not include parking.” Tr. Ex. 105 at 4. But, the same restrictions do not appear in Owner A’s reserved ingress/egress rights in Easement II. *See id.* at 5-6; *Sunnyside*

Where, as here, “[t]he express language in the deed place[s] no limitations on its use other than that it be used for ingress and egress,” motor vehicle traffic is generally assumed to be permitted. *See Wilson & Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 306, 253 P.3d 470 (2011) (non-exclusive easement for “ingress and egress over and across a strip of land 20 feet in width” used in connection with commercial fish hatchery later changed to hosting temporary outdoor events).⁸

Without finding *any* safety risk, the trial court ruled Owner A could not drive or park in EA II because of “the recreational nature of [Owner B’s] primary use and Owner B’s privacy rights.” CP 633 (¶9). Disregarding Easement II’s express protection of Owner A’s [Wahl] non-recreational use rights of “ingress and egress” and “privacy...in the enjoyment of his residence” (Tr. Ex. 105 at 5), this interpretation was made *without any finding that Wahl’s use of motor vehicles in EA II*

Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) (“The intent of the original parties to an easement is determined from the deed as a whole.”).

⁸ *See also Cotsifas v. Conrad*, 905 P.2d 851, 853 (Or. App. 1995) (“Easement for ingress and egress” interpreted to permit motor vehicle access since “[t]here is no evidence in the record of any danger to anyone posed by plaintiff’s use of the easement in the same manner that it has been used for the past 40 years”); *Copanas v. Loehr*, 876 S.W.2d 691, 696-697 (Mo. App. E.D. 1994) (where steep slope terrain caused dominant owner “difficulties...in day-to-day living because of lack of motor vehicle access to his home,” right of “ingress and egress” included right to drive motor vehicles to and from residences served by easements, even if the word “walk” appeared in easements); *Strickland v. Barnes*, 164 S.E.2d 768 (Va. 1968) (easement “reserved for future R.R. siding” interpreted to permit “ingress and egress by motor vehicle” based on 19-year history of vehicular access without objection).

invaded or unreasonably interfered with Ritters' recreational or privacy interests in EA II. CP 633; *see Veach v. Culp*, 92 Wn.2d 570, 575, 599 P.2d 526 (1979) (since servient owner retains use of easement so long as it does not materially interfere with use by dominant owner, courts must look to “actual use” being made, rather than a hypothetical use).

By banning motor vehicles in EA II, the trial court violated the intent of the parties, preventing any meaningful use by Wahl.⁹ A complete ban on motor vehicles without consideration of less drastic measures is generally an abuse of discretion. *See Nw. Props.*, 173 Wn. App. at 782, 791 (reversing decision that servient owner unreasonably burdened dominant owner’s ingress/egress rights by placing restrictions on use of locked gate under abuse of discretion standard); *Green v. Lupo*, 32 Wn. App. 318, 324-25, 647 P.2d 51 (1982) (reversing ban on motorcycles —“a common means of transportation”—in easement “for ingress and egress for road and utilities purposes” as abuse of discretion and remanding for consideration of less drastic restrictions).

⁹ In 1978 when the easement was executed, the parties contemplated the normal development of the Wahl property into a home where he would need to drive vehicles in EA II to access his garage via the driveway in a tight radius curve on a steep slope. *Cf. Logan v. Brodrick*, 29 Wn. App. 796, 800 (1981). However, disregarding Wahl’s “evidence of the difficulty in turning vehicles from the driveway into his garage if he was unable to cross the [EA II] easement path,” CP 633 (§9), the trial court changed the character of EA II into a “pedestrian only” pathway. *See Little-Wetsel Co. v. Lincoln*, 101 Wash. 435, 445, 172 P. 746 (1918) (dominant estate cannot “change [the easement’s] character in any way so as to increase the burden on the servient estate”).

C. The trial court erred by allowing the encroaching patio and planter boxes to remain in EA I without providing any relief.

1. The Ritters have no rights under the 1978 Easement to unilaterally build their patio and planter boxes on Wahl's property without any consent. Over repeated objections, the Ritters expanded their living space onto Wahl's property for their "private" pleasure. SES's final design drawings approved by Wahl, the Ritters and the City call for the area to be level grade with only crushed rock.

Even though the patio and planter boxes were undisputedly not part of the remediation design and SES had designed the area to be only crushed rock, the trial court concluded that the encroaching patio and planter boxes could be permitted by Easement I as a form of "retaining device." *See* CP 634 (FF ¶14); Tr. Ex. 105 at 4. Further, the court concluded that Wahl's consent was not required because "[t]he reference in [Easement] I to paragraph 6 *relates to maintaining the landscaping* in accordance with the landscaping plan identified in paragraph 6." CP 634 & 637 (FF ¶¶14, 17; CL ¶31) (emphasis added).¹⁰ But, the actual language of Easement I does not comport with the trial court's interpretation. *See Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981) (construing easement requires court to arrive at and enforce

¹⁰ Contrary to Resp't Br. at 29, Wahl challenges Findings of Fact ¶¶16 and 17 and Conclusion of Law ¶31 interpreting Easement I as not requiring Wahl's consent to build structures within EA I. *See* Assignment of Error No. 7 (Appellant Br. at 5).

intention of the parties derived from whole instrument, not to effect “a substantial revision in the instrument”).

Easement I provides in relevant part, “Owner B shall have control *over the landscaping and rockeries etc., of Easement I* and shall be responsible to *maintain the same* in accordance with paragraph 6 *in a manner mutually agreeable to Owner B and Owner A* at Owner B’s sole expense.” Tr. Ex. 105 at 5 (italics added).¹¹ When read in context, this sentence modified the preceding sentence of Easement I granting Owner B the right to install and maintain “rockeries, like retaining devices and steps and paths” for the “safety of their property.” *Id.* at p. 4.

The trial court’s erroneous interpretation disregards Easement I’s reference to “rockeries etc.,” which includes “retaining devices,” while at the same time regarded the Ritters’ encroaching patio and planter boxes (an enlargement of the Ritters’ house) to be a “similar retaining device” although not part of the retaining wall design and was added by the Ritters after the retaining wall was completely installed.¹² Under the trial court’s

¹¹ Paragraph 6 of the Easement refers to a “landscaping plan with assigned maintenance responsibilities” that was only “agreed in principle.” There is no dispute that the parties did not reach agreement on any final landscaping plan, a possibility contemplated in Paragraph 6. Throughout Paragraph 6, every provision provides that no significant changes will be made without the mutual consent of Owners A and B. The only exception is where “either Owner A or Owner B fails to maintain his/her respective area, then the other owner may do so.” Tr. Ex. 105 at 8 (¶6).

¹² The photo of the encroaching patio (Resp’t Br. at 12) shows this is not landscaping, a rockery, a retaining device, or steps and paths that would facilitate Ritters’ pedestrian

interpretation, the patio and planter boxes were a device or structure that required Owner A [Wahl]'s consent, which he did not give.

2. Substantial evidence does not support the trial court's "conceivable" safety findings.

If this Court concludes the Ritters had the unilateral right to build structures in EA I (after conducting *de novo* review on interpretation of the easement), only then would the analysis move to reviewing whether there is substantial evidence to support the "conceivable" safety finding made by the trial court. Although finding the patio encroached onto Wahl's property, the trial court found the patio's as-built location "at the edge of a steep slope...could conceivably be a safety hazard." CP 634 (¶15).¹³ The trial court dismissed its own finding that "Owner B's witnesses also testified on cross examination that the patio and the drainage could have

access across EA I or promote "safety of their property." The patio is a palatial extension of the Ritters home (not in photo) that has no nexus to the limited purposes of Easement I: ingress and egress, view control or safety. *See* Tr. Ex. 105 at 4.

¹³ For example, the trial court speculated that the concrete patio necessarily had to encroach onto EA I to reach the subsurface steel reinforced barrier in order to cover the soil between the Ritter home and the barrier. *See* CP 634 (¶15). No evidence was offered to corroborate any such concern. As designed by SES, the contractor installed state-of-the art retaining walls in the hillside reinforced with steel beams sunk deep into the earth and sophisticated drainage systems to withstand any weather or seismic events. The final design drawings from SES show the patio area *as level grade with only crushed rock*. Tr. Exs. 103 & 104. Moreover, since Wahl's purchase of his property, the area next to the Ritters' home was completely uncovered. In fact, the retaining Wahl in place before the remediation was much less structurally sound and contained no drainage, and yet there was never a single incident of slides or drainage problems.

been constructed without encroaching on the easement.”¹⁴ *Id.* Without explanation or finding of necessity or “actual” safety risks, the trial court also found the Ritters’ widening of the steps in EA I was “done for safety reasons,” CP 635 & 637-38 (¶¶18, 32), contrary to the testimony of both the City and SES. The code requirement is 3 feet consistent with the final SES design drawings. VRP 121; Tr. Ex. 103 & 104.

Behind the trial court’s superficial references to a conceivable safety matter, there is no analysis of facts and/or reasons why it would be unsafe any other way—especially here where SES designed and the City approved the area to be level grade with only crushed rock. Tr. Exs. 103 & 104. All we have here is pure speculation and unsupported opinion.¹⁵ There is no evidence to sustain the trial court’s safety findings. It is inappropriate to merely opine on “safety” without providing any rationale and proof that other, less invasive alternatives were unsafe. *Cf. Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 767-68, 770, 49 P.3d 867 (2002) (legitimate safety concerns found where city considered

¹⁴ The Ritters’ contractor, Dan Reynolds, testified that (1) the concrete patio/planter boxes could easily have been built on the Ritters’ own property and still be safe; and (2) any safety concern could have been satisfied with a simple railing. VRP 1076-80. Mr. Ritter likewise testified that a simple railing would suffice. VRP 796:25 & 797:1

¹⁵ *Cf. ADT Sec. Services, Inc. v. Lisle-Woodridge Fire Protection Dist.*, 807 F.Supp.2d 742, 746 (N.D. Ill. 2011) (“District’s claimed bugaboo of endangering the health and safety of the alarm monitoring system customers glosses over—or more accurately ignores entirely—the record’s silence as to any such risks during the years that the independent alarm companies have been providing their services to consumers...”).

all the evidence, including Fire Marshall's testimony and recommendations, testimony about poor road conditions, problems posed by topography, and no "less drastic solution" would be as effective).

3. The trial court's refusal to provide any remedy for its finding of encroachment in EA I constitutes legal error.

Refusing to require removal or compensation, the trial court found "[t]he encroachment of the patio does not interfere with any other use of the property covered by EA I." CP 637 (¶30). But, the court's rationale is unsupported by Washington law. See, e.g., *Proctor v. Huntington*, 169 Wn.2d 491, 503, 238 P.3d 1117 (2010) (affirming trial court's remedy requiring encroacher to pay landowner \$25,000 fair market value for acre encroached upon—1/30th of neighbor's land—"heavily forested, hilly, and contains some marshland"); *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn. App. 384, 392-93, 220 P.3d 1259 (2009) (applying *Proctor* where residence, pool and well encroached on plaintiff's property without excuse, trial court abused its discretion ordering easement that allowed encroachments without offsetting relief to plaintiff; by not considering damages, ejectment or forced sale as equitable remedies, trial court "rewarded...wrongful encroachment without meaningful remedy").

The Ritters argue the "oppression" exception applies (Resp't Brief at 20) even though they failed to assert any such affirmative defense; their

own subcontractor testified that the patio and planter boxes can be built entirely onto their own property; and the trial court did not do a *Proctor/Arnold* analysis of the oppression elements (169 Wn.2d at 500). But even if that is the case, and removal is inequitable, the Ritters should still be required to pay fair market value for the property.¹⁶

D. Easement III’s “not over two boats” requirement means what it says. The Easement does not grant the Ritters the right to moor a boat, two jet skis, three lift devices, and to run water and electricity through EA I, II and III to the dock.

The trial court interpreted the easement as enabling Ritters to unilaterally moor a boat and two jet skis and their lift devices, and water and electricity at the New Dock.¹⁷ FF ¶¶ 19-22 (boat lifts); FF ¶11 (water/power); Order ¶45 (utilities). The court’s rationale to enable Owner B to have “the full use of EA II, and the dock,” CP 633-34 (¶11),

¹⁶ Review is not precluded because Wahl did not make an additional challenge to the trial court’s last general conclusion ¶35 (CP 638) dismissing Wahl’s claims for damages. *See State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995) (where nature of appeal is clear and relevant issues are argued in appellant’s brief, citations are supplied so that court is not greatly inconvenienced, and respondent is not prejudiced, there is no compelling reason for appellate court not to consider merits); *Boutillier v. Libby, McNeill & Libby, Inc.*, 42 Wn. App. 699, 705 n. 2, 713 P.2d 1110 (1986) (“While defendant did not assign error to conclusion of law 23, such a conclusion naturally follows from and is ‘clearly disclosed’ in the associated issues raised by conclusions 21 and 22.”). Wahl clearly challenged each of the wrongful trespasses and sought fees under the trespass statute. *See Appellant Br.* at 2, 5, 22, 43, 45, 46 & 47.

¹⁷ The trial court’s finding of “not being contemplated” is erroneous as jet skis were readily available in 1978. *See* http://en.wikipedia.org/wiki/Jet_Ski (last visited January 27, 2014) (jet skis around since at least 1972). Boat lift devices were also common. That jet skis and boat lift devices were not included in the easement is instructive on the drafter’s intent to not include them. The Ritters also argue without support that the City of Bellevue counts jet skis as ½ boat. There is no support for this.

was error. *See, e.g., Sanders v. City of Seattle*, 160 Wn.2d 198, 215, 156 P.3d 874 (2007) (“A party is privileged to use another’s land only to the extent expressly allowed by the easement.”).

No language in Easements I, II or III allows utilities, jet skis or boat lifts.¹⁸ *Cf. Arcidi v. Town of Rye*, 846 A.2d 535, 542-543 (N.H. 2004) (because parties to original conveyance “did not intend the easement to be used for utilities,” city had no right to install water line in easement for “ingress and egress”). The trial court’s interpretation failed to give any meaning to Paragraph 4 of the easement. Paragraph 4 provides that “[a]ny additional improvements to the New Dock shall be *as mutually agreed by Owners A and B.*” Tr. Ex. 105 at 7 (emphasis added).

Despite this clear language, the trial court overrode Wahl’s objection to avoid “an absurd result” by re-writing the easement to insert an “unreasonably withhold consent” clause the parties purposely omitted. *See* CP 633-34 (¶11); CP 640 (Order, ¶45) (“Plaintiff shall not unreasonably withhold approval of the installation of any utilities [at the dock in EA III].”). There is no language in Paragraph 4 that prevents Owner A (Wahl) from withholding consent to improvements to the New

¹⁸ The surrounding circumstances also show the original parties purposely kept utilities out of the 1978 Easement. A draft letter dated October 6, 1978 memorializes discussions about the 1978 Easement and includes general references to water and

Dock. Cf. *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 718, 281 P.3d 693 (2012) (without lease language specifically forbidding unreasonably withholding consent, lessee’s assignments void without examining whether lessor unreasonably withheld consent).

E. Contrary to the Ritters’ contention, neither *Sunnyside* nor *Logan* support unilateral expansion of the easements.

Because fixed easements cannot be unilaterally expanded by the dominant owner, *Sunnyside* requires a two-step analysis: (1) first determine whether “the express terms of the easement manifest a *clear intention* by the original parties to modify the initial scope based on future demands;” and (2) only if the requisite intent is found under Step 1, determine whether expansion is necessitated by future demands contemplated by the original parties—the doctrine of reasonable enjoyment.¹⁹ *Sunnyside*, 149 Wn.2d at 884-85.

The trial court failed both steps deciding without analysis of the easement language that Owner B’s rights could be expanded in the future

electricity. Tr. Ex. 4 at 1 & 3. Notably, there are no specific agreements in the letter concerning running utilities across EA I & II to service the dock in EA III.

¹⁹ See *Crisp v. VanLaecken*, 130 Wn. App. 320, 324, 122 P.3d 926 (2005) (“[E]asements may not be relocated absent mutual consent of the owners”); *MacMeekin v. Low Inc. Housing*, 111 Wn. App. 188, 199, 45 P.3d 570 (2002) (courts lack authority to order relocation “even if the change is necessary to one estate and would not inconvenience the other”); *Mielke v. Yellowstone Pipeline Co.*, 73 Wn. App. 621, 625, 870 P.2d 1005 (1994) (“replacement could not be located anywhere on the property, but must be within the scope of the easement established by the original [structure]”).

merely at Owner B’s convenience. *Cf. Sunnyside*, 149 Wn.2d at 887-888 (expansion of easement “is not unbridled and must be reasonably within the anticipated expansion factors contemplated by the parties”). Here, the original parties to the 1978 Easement intended a limited scope of easement rights to the dominant estate “as specifically granted in this Agreement” and no expansion of rights in the future “by way of adverse possession, use or otherwise.” Tr. Ex. 105 at 2-3 (¶2). Since the easement provides only limited rights and mutual consent to changes, the trial court misapplied Step 1 of the *Sunnyside* analysis.²⁰

Under Step 2, the scope of the easement is restricted “to that which is reasonably necessary and convenient to effectuate the original purpose for granting the easement.” *Sunnyside*, 149 Wn.2d at 880. The dominant estate has “the burden of showing the practical interpretation of the easements given the prior conduct of the parties” shows the “reasonable necessity” for expanded use. *Sunnyside*, 149 Wn.2d at 885-886. In *Sunnyside*, numerous facts proved the necessity of power equipment—

²⁰ In numerous areas, the easement requires mutual consent before improvements could be added or changed. See EA I (“in accordance with paragraph 6 in a manner mutually agreeable to Owner B and A”); EA II (“maintenance of landscaping, rockeries, etc. on Easement II in accordance with paragraph 6”); EA III (“Maintenance of the New Dock to be built on Easement III in accordance with paragraph (4) below shall be the joint responsibility of Owners A and B.”); ¶4 (“Any additional improvement to the New Dock shall be as mutually agreed by Owners A and B.”); ¶6 (no material landscaping or structural changes without mutual consent).

changes in the law, increased water demands, greater efficiency, reduced risks, and lower cost. *See* 149 Wn.2d at 886-887.

No similar necessity factors were considered in this case. Unlike *Sunnyside*, the Ritters presented no evidence of necessity and the trial court made no findings of necessity. The trial court’s only “standard” was *convenience to the dominant estate* (the Ritters).²¹

Respondents argue that *Logan* endorses unbridled expanded uses over time to “accommodate the dominant estate.” Resp’t Br. at 20. *Logan* does not so hold. In *Logan*, the *only issue* was whether expansion of resort use overburdened the road easement by causing increased traffic, speeding vehicles, litter and blockage. 29 Wn. App. at 799-800. The only change at issue in *Logan* was the “degree of use,” *i.e.*, the “increased volume of traffic,” not the types or kinds of vehicles. *Id.* The trial court in *Logan* had already ruled in an unchallenged finding that “only those types of vehicles used or *reasonably anticipated*, during and prior to 1965 may use this public access road.” *Id.* at 798.

Here, unlike *Logan*, the Ritters want to use the easement in a

²¹ *See* FF ¶¶7-9 (convenience for Owner B using EA II as pedestrian path without potential conflict with Owner A’s motor vehicles); FF ¶¶10-12 (convenience for Owner B providing water and electricity to vessels docked in EA III); FF ¶¶13-17 (convenience to Owner B extending concrete patio and planter boxes to nearby retaining wall); FF ¶18 (convenience for Owner B to widen EA I stairs from 3 to 5 feet); and FF ¶¶19-22 (convenience to Owner B installing boat lifts and mooring jet skis at dock in EA III).

manner not intended by the original drafters. Easement III expressly limits the use to the “mooring of not over two boats,” Tr. Ex. 105 at 6, clearly expressing the limitations intended by the original drafters. But, the trial court trial court also ruled that “use of jet skis was *obviously not contemplated* when this easement was granted.” CP 636 (¶22) (italics added). If jet skis were “obviously not contemplated,” the trial court erred in concluding that Easement III allows for the mooring of two jet skis (1/2 boats) on attached lift devices without Wahl’s consent. *Logan* also held “[t]he law assumes parties to an easement contemplated a *normal* development,” “*natural* development of the dominant estate,” and “[*n*]ormal changes in the manner of use and resulting needs.” 29 Wn. App. at 800 (italics added). Nothing in this case resembles the *normal development of a resort* that occurred in *Logan*.

F. The Ritters reliance upon the trial court’s “no added burden” criteria is an error of law.

Ritters repeatedly couch their arguments upon the trial court’s finding that their unilateral expansions did not interfere with, nor impair, any use of the property by Wahl. See FF ¶16 (patio in EA I); FF ¶18 & CL ¶32 (width of stairs in EA I); FF ¶21 (boat lifts and moorage of jet skis on New Dock in EA III). This is an error of law.

a court’s focus should be on the language of the easement grant, *and not on the presence or absence of added burden*, in

determining whether certain conduct contravenes the terms of the express easement. That analysis honors the expectations of the contracting parties and creates predictability in the respective parties' property rights. Parties who negotiate a deed granting an express easement expect courts to enforce its terms

Grygiel v. Monches Fish & Game Club, Inc., 787 N.W.2d 6, 16 (2010) (italics added); *Lawson v. State*, 107 Wn.2d 444, 451, 730 P.2d 1308 (1986); *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986).

Confusing “misuse” with “overburdening,” the trial court improperly concluded the Ritters did not misuse the easement because they did not overburden it. *See Brown*, 105 Wn.2d at 372 (misuse of easement does not depend on increased burden). Whether an encroachment is “slight” is “not the key question.” *Proctor*, 169 Wn.2d at 503. “A court asked to eject an encroacher must instead reason through the *Arnold* elements as part of its duty to achieve fairness between the parties.” *Id.* at 502-503. Unexamined by the trial court, these elements are bad faith–calculated risk, whether damage is slight and benefit of removal equally small, limitations on property’s future use, practicality of moving structure, and disparity of hardships. *Id.* at 500.

G. The Ritters have failed to demonstrate Wahl pleaded damages of \$10,000 or less as expressly required under RCW 4.84.270.

According to the Ritters, whether a party has pleaded \$10,000 or less is irrelevant. Resp’t Br. at 41. They are wrong. Under the statute’s

plain language, a party must have “pleaded” an amount of \$10,000 or less before the statute may be used. *See* RCW 4.84.270 (“where the amount pleaded, exclusive of costs, is equal to or less than [\$10,000]”); *Reynolds v. Hicks*, 134 Wn.2d 491, 502, 951 P.2d 761 (1998) (because plaintiff had not pleaded in its complaint amount of \$10,000 or less, defendants had no right to fees). “Pleadings” are defined as a complaint, answer, reply to a counterclaim, answer to a cross claim, a third party complaint and a third party answer. CR 7(a) (“No other pleadings shall be allowed....”).

The Ritters have not demonstrated that Wahl pleaded an amount of \$10,000 or less—because Wahl did not. Analogous to the plaintiff in *Reynolds*, Wahl’s complaint requested “an award of *treble damages* caused by the wrongful acts of defendants in an amount to be proven at trial” (CP 1332), stated no limitations on relief, and Wahl sought and could have been awarded much more than \$10,000.²² *See Reynolds*, 134 Wn.2d at 502. The Ritters knew this as Wahl similarly sought more than \$10,000 in mediation. CP 1181. Since Wahl did not pursue a small claim

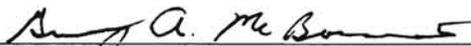
²²Wahl sought “treble” damages under RCW 4.24.630 (damage to land) and RCW 64.12.030 (timber trespass). *See* CP 1332 at 8-9. At trial, Wahl sought an amount exceeding \$10,000, whether trebled or not. *See, e.g.*, Tr. Ex. 53 (driveway, \$2,600 plus sales tax); Tr. Ex. 54 (value of land taken by patio and planter boxes, \$22,356 = 138 sq. ft. taken x \$162 per square foot); Tr. Ex. 55 (dock structures, \$2,000 plus sales tax); Tr. Exs. 56 & 57 (timber trespass, \$68,000 to \$113,500); Tr. Ex. 58 (property damage, \$659.32); and Tr. Ex. 59 (survey, \$2,931). Even the erroneous \$7,059.32 amount the Ritters claim when trebled exceeds \$10,000. Wahl disclosed all of these potential damage claims to the Ritters prior to trial. CP 1043-1167; 1306-19; 1322-23.

of \$10,000 or less, awarding fees to the Ritters violated the purpose of the fee shifting statute. *Id.* at 502 (intent of RCW 4.84.250 – 270 is to “enable a party to pursue a meritorious small claim of \$10,000 or less without seeing the award diminished...by legal fees”). CP 1181.

The Ritters cite two cases that are easily distinguishable. In *Lay v. Hass*, 112 Wn. App. 818, 824 (2002), the central issue was whether plaintiff provided “adequate notice” of an offer of settlement. In *Hanson v. Estell*, 100 Wn. App. 281, 290-91 (2000), the central issue was whether an offer of settlement communicated before judgment precluded awarding fees under the statute. Unlike *Lay* and *Hanson*, the Ritters cannot show Wahl pleaded \$10,000 or less as RCW 4.84.270 requires.

DATED this 7th Day of February, 2014

LIVENGOOD, FITZGERALD
& ALSKOG, PLLC



Gregory A. McBroom, WSBA No. 33133
Timothy S. McCredie, WSBA No. 12739
Attorneys for Appellant Wahl

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

Clerk of the Court of Appeals, Division I 600 University St. One Union Square Seattle, WA 98101-1176 Phone: (206) 464-7750	Messenger Service <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>
Alfred Donohue William Sean Hornbrook Wilson Smith Cochran Dickerson 901 5th Ave Ste 1700 Seattle, WA 98164-2050 Phone: (206) 623-4100	Messenger Service <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>

DATED: February 10, 2014, at Kirkland, Washington



Karen H. Suggs

APPENDIX A

Trial Exhibit 105

Easement and Agreement, dated October 19, 1978
Highlights Included in the Original Trial Exhibit

NOV-15-78 00476 7811151011 - B

Seattle First Bank Bldg.-440 Seattle, WA 98

EASEMENT AND AGREEMENT

A. PARTIES

This Agreement is between WILLIAM D. WAHL and PATRICIA W. WAHL, his wife ("Wahl"); and THOMAS M. PODL and AUDREY C. PODL, his wife ("Podl").

B. BACKGROUND

Wahl owns the real property located in the city of Bellevue, King County, Washington, described on Exhibit A hereto ("Parcel A"). Podl owns and occupies certain real property adjoining Parcel A which is described on Exhibit B hereto ("Parcel B").

On June 10, 1955, King County Water District No. 68, a municipal corporation, deeded Parcel B to Leonard R. Greenaway, by Statutory Warranty Deed recorded on September 16, 1955 under Receiving No. 4617124, Records of King County, Washington, which Deed included and created the following easement over certain other property then owned by King County Water District No. 68 (which easement is herein called "the Recreational Easement"):

Together with an easement to use the balance of said Lots 2 and 3, Block 5, Moorland, for recreational purposes such as will not materially interfere with the present or future use of the property for water supply facilities and the right of ingress and egress over said Lots 2 and 3 and the vacated north 40 feet of Moorland Avenue adjacent to said Lots 2 and 3

10/10/78

-1-

1% EXCISE TAX PAID BY THE COUNTY OF KING
By *[Signature]*, County

of Block 10, Moorland. Recreational use shall include the right to construct and maintain beautifications to the property such as rockeries, lawn, and plantings.

A residence and certain other improvements have been constructed on Parcel B and are presently occupied by Podl. Parcel A is presently improved by an abandoned pumping station, dock and the substantially completed Wahl residence. The parties each declare that privacy is of paramount importance and intend that this instrument be construed so as to preserve and maintain the privacy of each in the use of their respective properties.

In consideration of the covenants and agreements herein contained, the parties agree as follows:

1. The Recreational Easement is hereby terminated. Any and all improvements and beautifications on Parcel A are and shall remain the property of the owner of Parcel A, subject to the rights of the owner of Parcel B, as hereinafter provided.

2. Neither Podl nor anyone under whom Podl claims or anyone claiming under Podl has or claims any right, license or interest in, to, over or on Parcel A or any part thereof (except as specifically granted in this Agreement) by way of adverse possession, use or otherwise. By way of confirmation Podl hereby waives and releases any rights, claims, license or interest in, to, over or on Parcel A or any part thereof

10/10/78

7811151011

7811151011

except as specifically granted herein and except as provided in any easement of record other than Auditor's Receiving no. 4617124, records of King County, Washington.

3. The term "Owner A" as used in this Agreement shall include the Wahls, their heirs, successors and assigns as owners of Parcel A, including tenants of Owner A. The term "Owner B" as used in this Agreement shall include the Podls, their heirs, successors and assigns as owners of Parcel B, including tenants of Owner B. Owner A hereby grants Owner B, as owner of Parcel B, the following easements for the use of Owner of Parcel B, family, personal guests, and authorized tradespeople, workers and contractors only:

(a) An easement ("Easement I") over so much of Parcel A as is described on Exhibit C as Parcel I;

(b) An easement ("Easement II") over so much of Parcel A as is described on Exhibit C as Parcel II;

(c) An easement ("Easement III") over so much of Parcel A as is described on Exhibit C as Parcel III;
and

(d) An easement ("Easement IV") over so much of Parcel A as is described on Exhibit C as Parcel IV.

Easements I, II, III and IV are designated on Exhibit D and numbered as such, shall be appurtenant to Parcel B and perpetual and shall be neither assignable nor transferable

by Owner B other than in connection with a sale and conveyance or other transfer of ownership of Parcel B or by mutual agreement of Owner A and Owner B. The interests of Owner A in Easements I, II, III and IV shall be appurtenant to Parcel A and perpetual and shall be neither assignable nor transferable by Owner A other than in connection with a sale and conveyance or other transfer of ownership of Parcel A or by mutual agreement of Owner A and Owner B; provided, however, in the event Parcel A is partitioned into two legal parcels, one lying easterly and constituting all or substantially all of the area lying easterly of Parcel B and the other lying southerly and westerly of Parcel B, each such owner shall have all the rights and duties of Owner A, as presently expressed in the Agreement, except that the owner of the parcel lying easterly of Parcel B shall have no rights or duties with respect to Easements I and IV (nor with respect to Areas V and VI as described in paragraph [6] below).

The purposes for which Easements I, II, III and IV have been granted and the rights afforded and limitations thereon are as follows:

Easement I: This Easement shall be for ingress and egress (pedestrian only and shall not include parking or storage of anything), and to permit view control by Owner B and safety of their property by installing and maintaining rockeries, like retaining devices and steps and paths.

7811151011

Owner B shall have control over the landscaping and rockeries, etc., of Easement I and shall be responsible to maintain the same in accordance with paragraph 6 in a manner mutually agreeable to Owner B and Owner A at Owner B's sole expense. Neither Owner B nor Owner A will construct any fence or gate over this Easement I without Owner B's prior written consent.

Easement II: This Easement shall be for recreational use, including but not limited to access, gardening, lawns, rockeries, boating, picnicking, fishing, swimming, lawn sports, ingress and egress, or any other recreational use. Owner B has priority use of Easement II. It is intended that the use of this Easement does not unreasonably interfere with the privacy of Owner A in the enjoyment of his residence. Owner B shall have the responsibility and authority for the maintenance of landscaping, rockeries, etc. on Easement II in accordance with paragraph 6. Temporary storage by Owner B of small equipment used in the above-mentioned recreational activities is allowed so long as it does not detract from the aesthetics of the landscaping. It is understood that this use does not include storage of items such as boats, trailers, automobiles, etc. Owner A shall have the right to the use of Easement II for ingress and egress and landscape maintenance, and such other non-recreational uses which do not unreasonably interfere with Owner B's priority use of this easement. In the event of a

conflict between Owners A and B over use of Easement II, Owner B shall have priority with the understanding that Easement II is Owner B's private area, to the extent provided herein.

Easement III: This Easement shall be for recreational use, including but not limited to use of the dock, for the permanent mooring of not over two boats belonging to Owner B, neither of which shall exceed 50 feet, access, swimming, boating, fishing, ingress, egress or any other recreational use. Owner B shall have priority use of Easement III. It is intended that the use of this Easement does not unreasonably interfere with Owner A's privacy in the use and enjoyment of his residence. Maintenance of the New Dock to be built on Easement III (in accordance with paragraph [4] below) shall be the joint responsibility of Owners A and B. Owner A shall have the right to use Easement III for ingress and egress, short-term or occasional boat moorage (on a space available basis) and maintenance so long as the same do not unreasonably interfere with Owner B's priority use of this easement. In the event of a conflict between the Owners A and B over use of Easement III, Owner B shall have priority with the understanding that Easement III is Owner B's private area, to the extent provided herein.

Easement IV: With respect to Easement IV, Owner B shall have the unlimited right of ingress and egress, but not parking or storage. Maintenance of and landscaping of Easement

IV shall be at the sole responsibility and expense of Owner B.

4. Wahl shall use his best efforts to construct as soon as possible a new dock ("New Dock") on Easement III, pursuant to the plans and specifications attached as Exhibit E.

The New Dock shall be paid for by Wahl and become a part of Parcel A and the property of Owner A, subject to the rights of Owner B as herein provided. Any additional improvements to the New Dock shall be as mutually agreed by Owners A and B.

5. Owner A may not build, rebuild, remodel or permit the construction of any structure on that part of Parcel A lying south or west of Parcel B which exceeds a height of 65 feet above sea level (the maximum height of the completed Wahl residence being 62 feet and the parties incorporating the elevations indicated on Exhibit D which was assumed to be materially accurate). The Podl home on Parcel B at its highest point is 96 feet above sea level. Owner B shall not build, rebuild, remodel or permit the construction of any structure on Parcel B which exceeds a height of 102 feet above sea level.

6. In connection with execution of this Easement and Agreement, and settlement of an existing lawsuit (King County cause no. 835517), Wahl and Podl have agreed in principle upon a landscaping plan with assigned maintenance

10/10/78

responsibilities for portions of Parcel A of mutual concern, including Easements I, II, III and IV, and Areas V and VI (as the latter are legally described on Exhibit C and designated on Exhibit D). Areas V and VI, as described in Exhibits C and D, are common interest areas. These common areas will be split for maintenance purposes, with Area V to be maintained by Owner B and Area VI to be maintained by Owner A, both in accordance with this paragraph 6. No significant landscape or structural changes will be made in these common interest areas without the mutual consent of Owners A and B. Neither party will construct any fence in these common interest areas without the mutual consent of Owners A and B. If either Owner A or Owner B fails to maintain his/her respective area, then the other owner may do so. The parties have agreed in good faith to finalize and implement such plan, and not materially change the same without the other's consent, which will not be reasonably withheld. In the event a dispute arises regarding finalization, implementation, or otherwise with respect to the plan, such dispute shall not effect the validity or enforceability of this Easement and Agreement, or the finality of the settlement of cause no. 835517.

7. Owner A hereby grants Owner B a license to:

(a) Use the Old Dock including access thereto (as shown on Exhibit E) until such time as the New Dock

10/10/78

is completed. For so long as Owner B uses the Old Dock Owner B shall pay one-half the actual cost of maintaining the same. This license shall be limited to mooring two boats of not more than 45 total feet in length (neither of which shall exceed 30 feet) in a manner which does not unreasonably interfere with use of the Old Dock by Owner A. After construction of the New Dock, Owner A shall be free to remodel, reconstruct or relocate the Old Dock as Owner A in his sole discretion may determine; and

(b) Use the driveway now or hereafter existing on Parcel A to transport items to and from the New Dock (and the Old Dock for so long as the license afforded under (a) exists) which are too large or heavy to transport over the Easements I and II; provided that this license over the driveway shall not be used before 9:00 a.m. or after 7:00 p.m., normally not more often than once a week. Occasionally additional use shall be permitted with the consent of Owner A, which consent shall not be unnecessarily withheld.

This license as contained in paragraph 7 shall be subject to performance by Owner B of all his covenants and obligations under this paragraph (7) and may be terminated by Owner A upon 30 days' written notice to Owner B specifying the breach or breaches unless the same are cured to Owner A's reasonable satisfaction, within such 30 days.

10/10/78

8. (a) Podl hereby grants Wahl the right of first refusal to purchase all or any part of Parcel B upon the same terms and conditions as are contained in any bona fide offer to buy all or any part of Parcel B which Podl has determined to accept.

(b) Wahl hereby grants Podl the right of first refusal to purchase all or any part of Parcel A upon the same terms and conditions as are contained in any bona fide offer to buy all or any part of Parcel A which Wahl has determined to accept.

(c) The party receiving such a bona fide offer shall deliver a true copy thereof to the party entitled to notice, or shall mail a true copy thereof by certified mail return receipt requested to the party entitled to notice and that party's designee (as below provided).

(d) The party having the first right to refuse shall give notice to the other party in writing of that party's intention to purchase on the same terms and conditions as stated in such offer. The time for acceptance shall be 14 days of personal delivery or 17 days from date of mailing of notice, whichever sooner occurs.

(e) Wahl's designee for purpose of receiving notice shall be:

Richard E. Keefe and
Foster, Pepper & Riviera
4400 Seattle-First National Bank Building
Seattle, Washington 98154

10/10/78

-10-

or such other person or firm as Wahl may hereafter designate in writing to Podl.

(f) Podl's designee for purpose of receiving notice shall be:

Richard C. Reed and
Reed, McClure, Mocerri and Thonn, P.S.
1701 Bank of California Center
Seattle, Washington 98164

or such other person or firm as Podl may hereafter designate in writing to Wahl.

(g) The rights of first refusal shall not apply to transfers of interest by testate or intestate succession, nor to a gift by Wahl or Podl to immediate family members, nor to a realization sale by an institutional lender holding a first mortgage lien on either Parcel A or Parcel B.

(h) The rights of first refusal shall apply only to the first bona fide sale of Parcel A and to the first bona fide sale of Parcel B.

DATED: October 9, 1978.

William D. Wahl
William D. Wahl

Patricia W. Wahl
Patricia W. Wahl, his wife

Thomas M. Podl
Thomas M. Podl

Audrey C. Podl
Audrey C. Podl, his wife

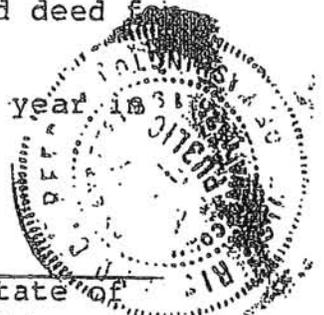
10/12/78

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

THIS IS TO CERTIFY that on this 9th day of November, 1978, before me, the undersigned, a notary public in and for the state of Washington, duly commissioned and sworn personally appeared THOMAS M. PODL and AUDREY C. PODL, his wife, to me known to be the individuals described in and who executed the within instrument, and acknowledged to me that they signed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

Richard C Reed
Notary public in and for the state of
Washington, residing at Bellum



STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

THIS IS TO CERTIFY that on this 19th day of October, 1978, before me, the undersigned, a notary public in and for the state of Washington, duly commissioned and sworn personally appeared David E. Vandenberg, to me known to be the So. Vice-president of WASHINGTON MUTUAL SAVINGS BANK, a Washington corporation, the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

WITNESS my hand and official seal the day and year in this certificate first above written.

Richard M. Keefer
Notary public in and for the state of
Washington, residing at Bellum



STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

THIS IS TO CERTIFY that on this 9th day of Nov., 1978, before me, the undersigned, a notary public in and for the state of Washington, duly commissioned and sworn personally appeared David N. Spears, to me known to be the OFFICER of METROPOLITAN FEDERAL SAVINGS & LOAN ASSOCIATION OF SEATTLE, the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

WITNESS my hand and official seal the day and year in this certificate first above written.



Marsh. McDell
Notary public in and for the state of
Washington, residing at Seattle

EXHIBIT "A"

7811151011

Lots 2 and 3, in Block 5 of MOORLAND, as per plat recorded in Volume 4 of Plats, on page 103, records of King County; EXCEPT the Easterly 20.00 feet thereof; TOGETHER WITH the Westerly 65.00 feet of Lots 2 and 3, in Block 10 of said plat of MOORLAND; TOGETHER WITH that portion of the Northerly 40.00 feet of vacated Moorland Avenue, adjoining said Block 5 and 10 lying Westerly of the Southerly projection of the easterly line of said Westerly 65.00 feet of Lots 2 and 3 of said Block 10; TOGETHER WITH that portion of said Northerly 40.00 feet of said vacated Moorland Avenue lying Southerly of a line connecting the Southwest corner of said Block 10 and the Southeast corner of said Block 5, which attached thereto by operation of law;

TOGETHER WITH second class shorelands adjoining; Situate in the County of King, State of Washington.

EXHIBIT "B"

7811151011

The Easterly 20 feet of Lots 2 and 3, Block 5, MOORLANDS ADDITION, according to plat recorded in Volume 4 of Plats, page 103, in King County Washington and the vacated portion of Shoreland Drive (Aqua Avenue) between Lots 2 and 3, Block 5 and Lots 2 and 3, Block 10 of said plat; TOGETHER WITH an easement for ingress and egress over an existing concrete driveway which lies within the Northerly 40 feet of vacated Moorland Avenue adjoining said premises; TOGETHER WITH an easement to use the balance of said Lots 2 and 3, Block 5, said plat, for recreational purposes.

EXHIBIT "C"
(Page 1 of 6)

PARCEL I

That portion of Lots 2 and 3, Block 5, Moorland, according to plat recorded in Volume 4 of Plats, page 103, records of King County, Washington, described as follows:

Beginning at the southwest corner of the easterly 20 feet of said lots; thence south $84^{\circ}49'$ west along the southeasterly line of said Lot 3 a distance of 4.00 feet; thence north $44^{\circ}43'$ west 33.50 feet; thence north $28^{\circ}06'$ west 44.00 feet; thence north $73^{\circ}26'$ west 4.15 feet to a point on a curve with radius of 20 feet from which the radial center bears south $55^{\circ}09'28''$ west, said center being south $5^{\circ}11'$ east 22 feet from the northwesterly line of said Lot 2; thence northwesterly along said curve through a central angle of $12^{\circ}16'04''$ an arc distance of 4.28 feet; thence north $5^{\circ}11'$ west 8.63 feet, more or less, to the northwesterly line of said Lot 2; thence north $84^{\circ}49'$ east along said line 40 feet, more or less, to the northwest corner of the easterly 20 feet of Lots 2 and 3; thence southerly 80.48 feet, more or less, to the point of beginning.

EXHIBIT "C"
(Page 2 of 6)

PARCEL II

That portion of Lot 2, Block 5, Moorland, according to plat recorded in Volume 4 of Plats, page 103, records of King County, Washington, described as follows:

Beginning at the southwest corner of the easterly 20 feet of Lot 3, in said block; thence south $84^{\circ}49'$ west along the southeasterly line of said Lot 3 a distance of 4.00 feet; thence north $44^{\circ}43'$ west 33.50 feet; thence north $28^{\circ}06'$ west 44.00 feet; thence north $73^{\circ}26'$ west 4.15 feet to a point on a curve with radius of 20 feet, from which the radial center bears south $55^{\circ}09'28''$ west, said center being south $5^{\circ}11'$ east 22 feet from the northwesterly line of said lot 2; thence northwesterly along said curve through a central angle of $12^{\circ}16'04''$ an arc distance of 4.28 feet to the point of beginning; thence continuing along said curve in a westerly and southerly direction to a line 50 feet southerly of and parallel with the northwesterly line of said Lot 2; thence south $84^{\circ}49'$ west along said parallel line to the shoreline of Lake Washington; thence northerly along said shoreline to said northwesterly line or the westerly production thereof; thence north $84^{\circ}49'$ east along said line to a point north $5^{\circ}11'$ west from the true point of beginning; thence south $5^{\circ}11'$ east 8.63 feet, more or less, to the point of beginning.

Notwithstanding any dimension provided above, there shall be a minimum dimension of five (5) feet southerly from the northerly line of said Parcel II at its narrowest point, and a minimum dimension of twenty (20) feet in an easterly-westerly direction from the shoreline of Lake Washington on the southerly line of said Parcel II.

7811151011

EXHIBIT "C"
(Page 3 of 6)

PARCEL III

That portion of Lots 2 and 3, Block 5, Moorland, according to plat recorded in Volume 4 of Plats, page 103, records of King County, Washington, if any and of second class shorelands of Lake Washington lying westerly of the shoreline of said lake and between the northerly line of said Lot 2 and its westerly projection and a line 44 feet southerly and parallel with said line.

EXHIBIT "C"
(Page 4 of 6)

PARCEL IV

That portion of the northerly half of vacated S.E. 6th (Moorland Avenue) Street adjoining Blocks 5 and 10, Moorland, according to plat recorded in Volume 4 of Plats, page 103, records of King County, described as follows:

Beginning at the southwest corner of said Block 10; thence south $84^{\circ}49'$ west along the production of the southerly line of said Block a distance of 8 feet, more or less, to a line 2.0 feet northeasterly of the northeasterly edge of an existing asphalt driveway; thence southeasterly parallel with said edge 72 feet to the true point of beginning; thence northwesterly along said parallel line 72 feet; thence south $84^{\circ}49'$ along said production 51 feet, more or less, to a line 2.0 feet southwesterly of the southwesterly edge of the aforementioned driveway; thence southeasterly parallel with said southwesterly edge 90 feet, more or less, to the northerly edge of a connecting asphalt driveway; thence easterly to the true point of beginning. Together with that portion of the existing driveway lying easterly and southerly of the area described above now used for ingress or egress connecting to easement described in King County Auditor's No. 4549806 or to existing roadway which provides access to both Parcel A and Parcel B.

EXHIBIT "C"
(Page 5 of 6)

PARCEL V

That portion of the northerly half of vacated S. E. 6th Street adjoining Blocks 5 and 10, Moorland, according to plat recorded in Volume 4 of Plats, page 103, records of King County, Washington, described as follows:

Beginning at the southeast corner of said Block 5; thence south $84^{\circ}49'$ west along the southerly line thereof 24 feet, more or less, to an existing rockery; thence easterly along said rockery on a curve to the left with a radius of approximately 60 feet a distance of 45 feet, more or less, to the end of said rockery; thence approximately north 40° east 15 feet, more or less, to the westerly end of a second rockery; thence easterly along said second rockery 35 feet, more or less, to the middle of a concrete stairway; thence northerly along the mid-line of said concrete stairway to a line 2.0 feet, more or less, southerly of the southerly edge of an existing asphalt driveway; thence westerly parallel with said southerly edge 40 feet, more or less, to the easterly extension of the southerly line of said Block 5; thence south $84^{\circ}49'$ west 20 feet, more or less, to the point of beginning.

7811151011

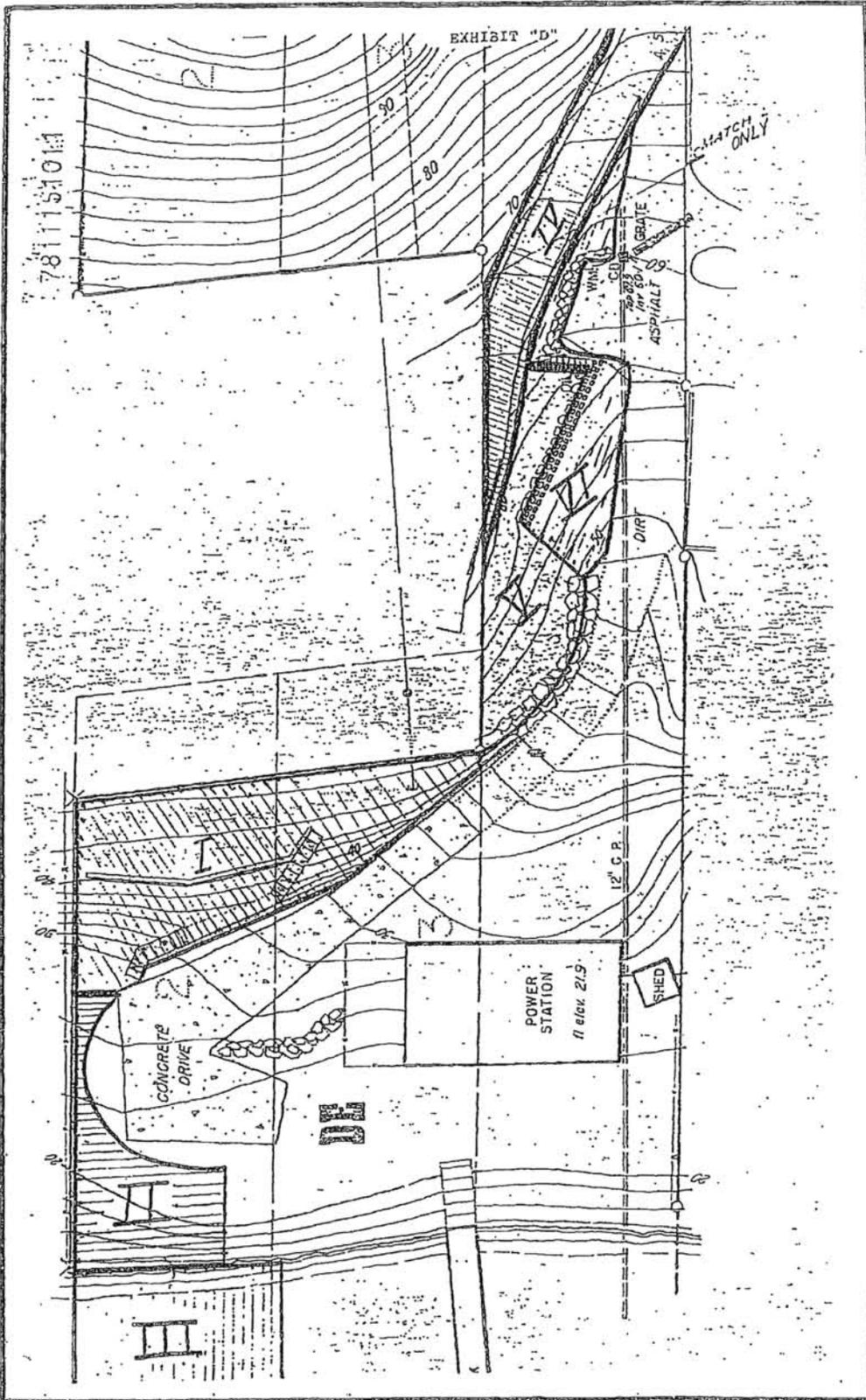
EXHIBIT "C"
(Page 6 of 6)

PARCEL VI

7811151011

That portion of the northerly half of vacated S. E. 6th Street adjoining Blocks 5 and 10; Moorland, according to plat recorded in Volume 4 of Plats, page 103, records of King County, Washington, described as follows:

Beginning at the southeast corner of said Block 5; thence south $84^{\circ}49'$ west along the southerly line thereof 24 feet, more or less, to an existing rockery; thence easterly along said rockery on a curve to the left with a radius of approximately 60 feet a distance of 45 feet, more or less, to the end of said rockery and the true point of beginning; thence approximately north 40° east 15 feet, more or less, to the westerly end of a second rockery; thence easterly along said second rockery 35 feet, more or less, to the middle of a concrete stairway; thence northerly along the mid-line of said concrete stairway, to a line 2.0 feet, more or less, southerly of the southerly edge of an existing asphalt driveway; thence easterly parallel with said southerly edge 50 feet, more or less to the northerly edge of a connecting asphalt driveway; thence in a westerly direction along the edge of the easterly part of said asphalt and across the westerly part of said asphalt and the northerly line of a dirt driveway to the southeast corner of the first above-mentioned rockery; thence northerly to the true point of beginning.



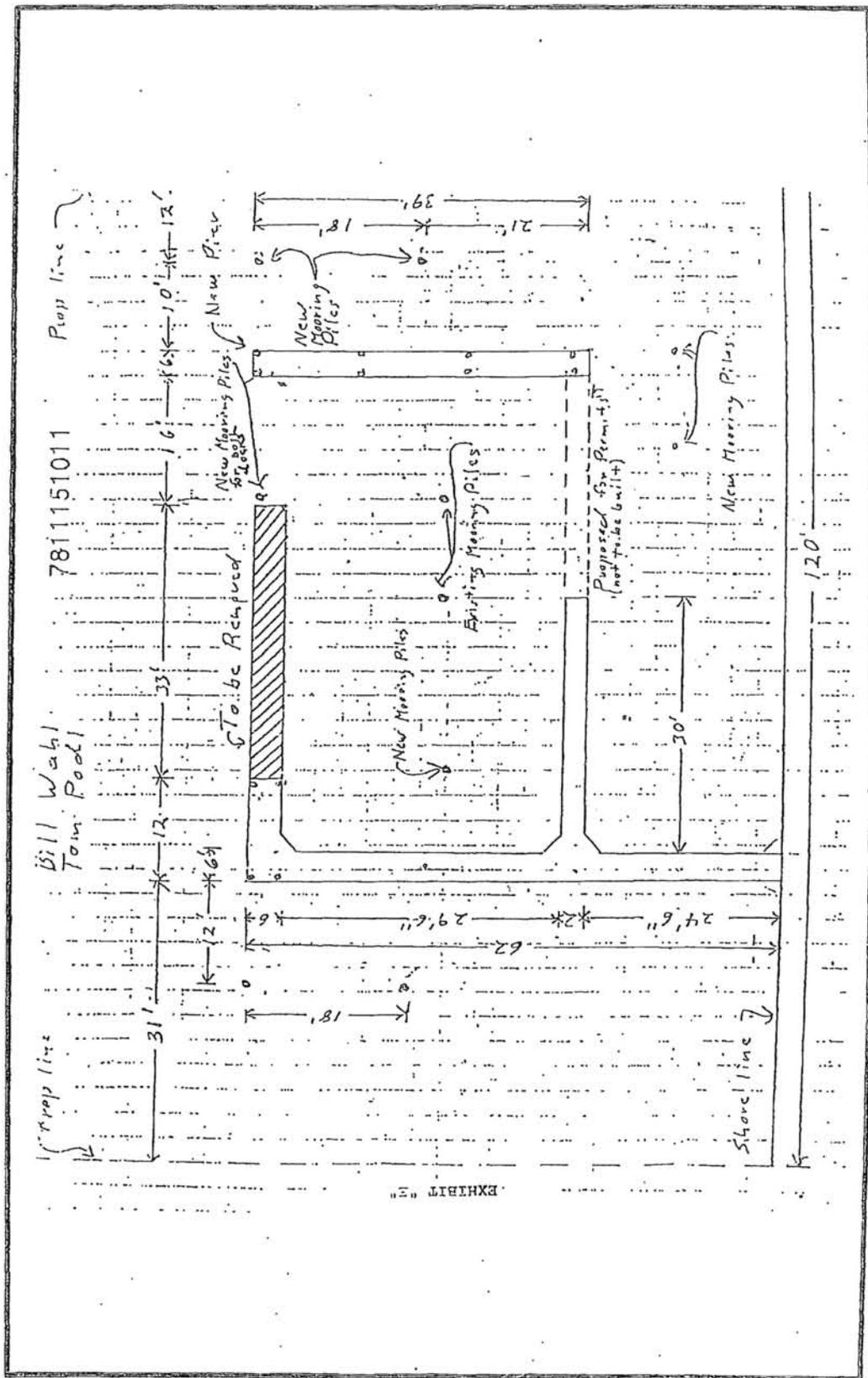


EXHIBIT "A"