

No. 73752-0-I

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

LEGANIEDS, LLC,

Appellant

v.

WT PROPERTIES, LLC,

Respondent.

APPELLANT'S OPENING BRIEF

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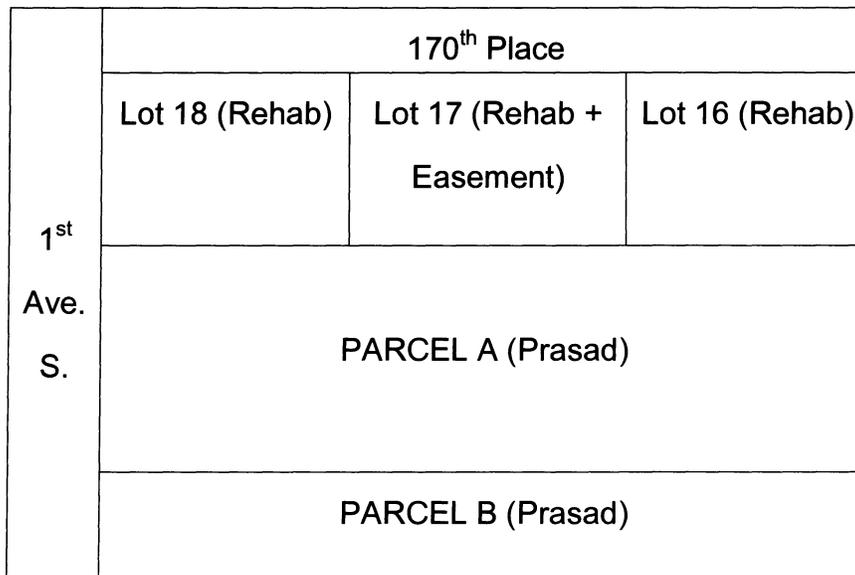
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I. INTRODUCTION

In October of 2006, Mr. and Mrs. Prasad sold lots 16, 17, and 18 of the "Maybrook Plat" to Rehabitat Northwest. At the time, Mr. and Mrs. Prasad owned "Parcel A" directly adjacent to those lots. Prasad's warranty deed to Rehabitat purported to reserve an access and utilities easement over 41 feet of Lot 17 in the Maybrook Plat for access to his Parcel A from South 170th Place.

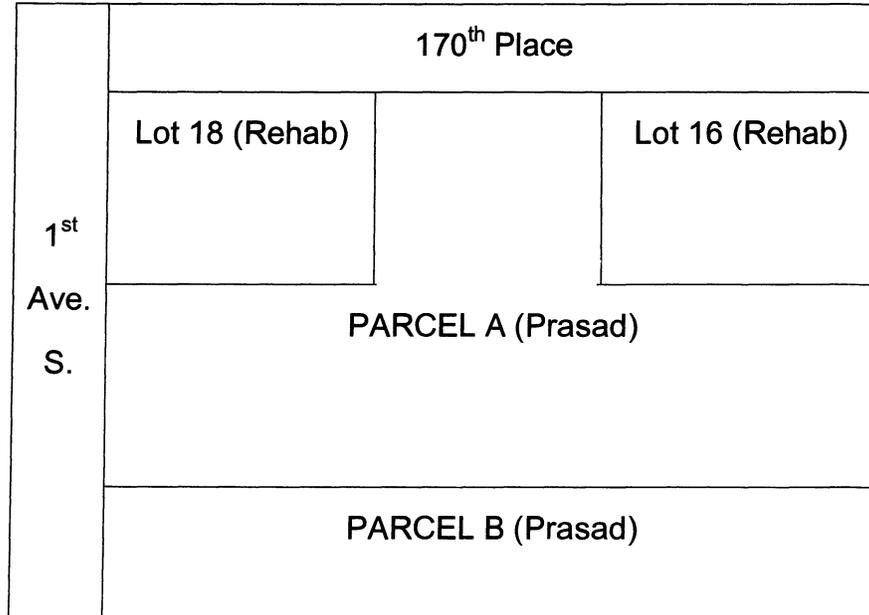
In February 2007, Mr. and Mrs. Prasad borrowed money from Viking Bank. To secure the loan, they granted Viking Bank a deed of trust on Parcel A.

At that time, the layout of the different lots looked like this:



In May 2007, a Boundary Line Adjustment between Prasad and Rehabitat NW increased the width of lots 16 and 18 in the Maybrook Plat, each taking some land from Lot 17. The width of Lot 17 was decreased to be coextensive with the 41 foot easement reserved to Prasad in 2006.

The Boundary Line Adjustment then merged what was left of Lot 17 into Prasad’s “Parcel A” creating one large Parcel A. In case of any doubt as to the result of the BLA, Rehabitat later executed a quit claim deed to Prasad conveying that portion of Lot 17 of the Maybrook Plat to Prasad. The deed was executed for the purposes of “quieting title” to the property in Prasad. After the BLA, it looked like this:



Mr. and Mrs. Prasad did not develop Parcel A, and fell behind on their loan with Viking Bank. In 2011, Viking Bank issued a Notice of Trustee Sale to start the foreclosure process. The Notice of Sale described the land consistent with Parcel A as it existed when the deed of trust was recorded. In other words, it did not include that land that had formerly been part of Lot 17. WT Properties purchased that portion of Parcel A, not including the portion formerly known as Lot 17, for \$110,001.

WT Properties then entered into a deal to sell its newly purchased land to Dan Nieder and Jason Legat, or an entity to be formed by them (Leganieds, LLC) for \$325,000. The buyers believed that access to Parcel A was through the portion of Parcel A formerly known as Lot 17 (the "Access Strip"). During their due diligence for the purchase, the title company disclosed that this Access Strip portion of Parcel A was still owned by Mr. and Mrs. Prasad.

With encouragement from WT Properties, Leganieds, LLC (owned by Mr. Legat and Mr. Nieder) then purchased the Access Strip from Mr. and Mrs. Prasad. Thus, if it finalized a deal with WT Properties, it would own all of Parcel A. If there was no deal to be

had with WT, Leganieds, LLC figured it would instead build a residence on the portion it owned.

The deal with WT Properties fell apart because WT Properties could not deliver clear title. Ultimately, WT Properties cleared up the title. But by then, WT wanted \$500,000 for Parcel A. Leganieds increased its offer to \$350,000, but was unwilling to pay \$500,000. Unwilling to “settle” for a \$240,000 profit, and apparently because it could build more houses if it could get access from 170th Place rather than 1st Ave. S, WT Properties then brought this suit claiming ownership of the Access Strip, and claiming damages for slander of title.

Defendants moved for summary judgment. Judge Heller quieted title to the “Access Strip” in Leganieds, LLC and dismissed WT’s slander of title and other claims. Thus, Leganieds LLC owns the Access Strip. WT Properties has not appealed that decision.

WT Properties then claimed to own an easement over Leganieds’ property. WT Properties wants its proposed development to have access from S. 170th rather than First Ave. South. This 41-foot-wide road over Leganieds’ 41-foot-wide property would render it worthless to Leganieds.

On a second summary judgment motion – actually cross motions – Judge Roberts ruled that WT Properties had an easement over Leganieds’ property. Although there was only one parcel of land (Parcel A), Judge Roberts held that an easement existed that bound and benefitted Parcel A.

Judge Roberts further found that Leganieds’ objection that any such easement violated the CC&R’s of the Maybrook Plat was not ripe for a decision. Leganieds filed this appeal.

Leganieds requests that the trial court’s decision be reversed because (1) the original easement plainly violated Maybrook Plat restrictions, and (2) any valid easement terminated under the merger doctrine. It did not survive the BLA because an easement cannot bind and benefit one parcel of land.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that whether such an easement violates the plat restrictions was not ripe;
2. The trial court erred in concluding that WT Properties has an easement over the land owned by Leganieds, LLC.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the claimed easement violate a private covenant in the Maybrook Plat, thus rendering the easement void?

2. Was the 2006 easement extinguished when, in 2007, the easement area became part of the “dominant” parcel, meaning that there was only one parcel and one owner of the entire parcel?

3. Does the language in the Viking Bank Deed of Trust prevent merger?

4. Is there a mortgage exception to the merger doctrine, and if so is it applicable under the facts of this case?

5. If an easement exists, must its use be enjoined?

IV. STATEMENT OF THE CASE

1. The Maybrook Plat was created in 1948 with the recording of the final plat, King County recording number 3806233. The plat contains a “RESTRICTION” stating “All lots in this plat are restricted to residence R-1 uses.” (CP 110) To this day, the one street neighborhood remains residential. (CP 209)

2. On or about October 15, 2006, Binod and Basant Prasad conveyed lots 16, 17, and 18 in the Maybrook Plat to Rahabitat Northwest. Prasad purported to reserve an easement over 41 feet of lot 17 for “ingress, egress and utilities” to their adjacent property, which are now referred to as “Parcel A” and “Parcel B.” (CP 135-136)

3. On or about February 14, 2007, Binod and Basant Prasad executed a deed of trust in favor of Viking Bank as beneficiary (the "Viking Bank Deed of Trust"). The Viking Bank Deed of Trust secured Parcels A and B owned by Prasad. (CP 139-141)

4. In May 2007, Mr. and Mrs. Prasad and Rehabitat did a boundary line adjustment (the "2007 BLA"). The 2007 BLA took 41 feet of Lot 17 of the Maybrook Plat, and made it part of Parcel A owned by Prasad. Thus, after the 2007 BLA, Parcel A then extended out to South 170th Place as one large lot. (CP 150)

5. That portion of Parcel A that was formerly known as Lot 17 was intended to provide access to the rest of Parcel A and to Parcel B from South 170th Place for purposes of a subdivision on Parcels A and B. (CP 41, CP 55) This portion of Parcel A will be referred to (for now) as the "Access Strip".

6. Mr. and Mrs. Prasad defaulted on their loan with Viking Bank. On July 6, 2011, the trustee under the Viking Bank Deed of Trust recorded a Notice of Trustee Sale under King County recording number 20110706001211 (the "Notice of Trustee Sale"). The Notice of Trustee Sale was a step in a non-judicial foreclosure of the Viking Bank Deed of Trust. (CP 87)

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7. The Notice of Trustee Sale included a legal description of the property being sold at the sale, which legal description was exactly the same as the legal description in the Viking Bank Deed of Trust. In other words, the legal description in the Notice of Trustee Sale did not include the Access Strip. The Notice also did not say it was foreclosing all of the property subject to the deed of trust. Rather it specifically described the property being sold. (CP 87-88)

8. At the Trustee Sale, the Trustee announced that there was an issue with the Access Strip that would need to be resolved with Prasad. WT Properties purchased the property at the sale for \$110,001. (CP 100 ¶ 9)

9. On November 8, 2011, the trustee recorded a trustee's deed under King County recording number 20111108001382 (the "Trustee Deed"). The Trustee Deed asserts that the promissory note owed by Prasad, and secured by the Viking Bank Deed of Trust, was in the principal amount of \$98,865.30, that the trustee held the non-judicial foreclosure of the Viking Bank Deed of Trust on October 28, 2011, and that WT Properties, LLC bought the property at the sale for \$110,001. (CP 92-94)

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10. On November 21, 2011, with Viking Bank having been paid in full, the trustee under the Viking Bank Deed of Trust recorded a full reconveyance, reconveying the Viking Bank Deed of Trust to the “persons entitled thereto.” The reconveyance was recorded in King County recording number 20111121000063. (CP 97)

11. WT Properties knew that the Trustee Deed did not convey the Access Strip to WT Properties. At the October 28, 2011 trustee sale, the trustee announced to the bidders that a quit claim deed would be needed from Prasad for the Access Strip. WT Properties attorney then worked out a deal for a quit claim deed from the Prasads. (CP 100 ¶¶ 9-10) The quit claim deed from Prasad to WT Properties was never signed.

12. In sum, WT Properties purchased “Parcel A and Parcel B” at the foreclosure, and attempted to work with Prasad to obtain ownership of the Access Strip.

13. On or about January 17, 2012, WT Properties, as seller, and “Daniel Nieder and Jason Legat, or an entity controlled by them,” as buyers, entered into a Real Estate Purchase and Sale Agreement (the “REPSA”), for \$325,000, for Parcels A and B legally described as:

PARCEL A: THE SOUTH 411 75 FEET OF THE WEST ½ OF THE SOUTHWEST ¼ OF THE NORTHWEST ¼ OF THE SOUTHWEST ¼ OF SECTION 29, TOWNSHIP 23 NORTH, RANGE 4 EAST W.M. EXCEPT ROADS, SITUATE IN THE CITY OF BURIEN, COUNTY OF KING, STATE OF WASHINGTON.

PARCEL B: THE NORTH 77 63 FEET IF THAT PORTION OF THE NORTHWEST ¼ OF THE SOUTHWEST ¼ OF THE SOUTHWEST ¼ OF SECTION 29, TOWNSHIP 23 NORTH, RANGE 4 EAST W.M. LYING BETWEEN FIRST AVENUE SOUTH AND AMBAUM ROAD, EXCEPT THE EAST 285 69 FEET THEREOF, , SITUATE IN THE CITY OF BURIEN, COUNTY OF KING, STATE OF WASHINGTON
(CP 40-41, 47-53)

14. The legal description in the REPSA for Parcels A and B did not include the Access Strip. (CP 41, CP 53) WT Properties did not disclose that the Access Strip was still owned by Prasad. Rather, by early-February 2012, during their due diligence for the REPSA, Mr. Nieder and Mr. Legat discovered from their title company that the Access Strip portion of Parcel A was still owned by Mr. and Mrs. Prasad. (CP 41, 57-58)

15. Mr. Legat and Mr. Nieder, through their agent Chad Ohrt, notified WT Properties and its agent that Mr. and Mrs. Prasad still owned the Access Strip. (CP 42 ¶ 7)

16. The feasibility period and closing date of the REPSA were extended to give the parties time to address ownership of the Access Strip. WT Properties agreed to extend the closing date. (CP 42 ¶ 8)

17. In order to complete their deal with WT Properties, Mr. Legat and Mr. Nieder reached a preliminary deal with Prasad to buy the Access Strip. WT Properties was aware of these efforts. (CP 42 ¶ 9)

18. In late March 2012, WT Properties, through its agent, encouraged Mr. Legat and Mr. Nieder to purchase the Access Strip from the Prasads so that the parties could close on Parcels A and B and complete their deal. Leganieds, LLC, through its attorney, and in cooperation with WT Properties' agent, took steps to close under the REPSA on the same day that Leganieds, LLC would close on the Access Strip. (CP 42 ¶ 9 and CP 61)

19. In early April 2012, Mr. Legat and Mr. Nieder learned that Jo Mau Re Adcock had a deed of trust securing a \$250,000 loan, and the deed of trust was still a lien on Parcels A and B. The foreclosure trustee had not provided notice of the sale to Adcock, and her lien was not eliminated by the sale. WT Properties could not, therefore deliver clear title to Parcels A and B. (CP 43 ¶ 11)

20. In late April, knowing the REPSA would not close because of the Adcock deed of trust, WT Properties said it would take Parcels A and B off the market. (Id)

21. On or about April 26, 2012, Mr. Legat and Mr. Nieder notified WT Properties that it was terminating the REPSA. They terminated the REPSA because of the \$250,000 Adcock lien that WT Properties could not remove before closing. (CP 43 ¶ 12)

22. On or about May 4, 2012, Leganieds, LLC, purchased the Access Strip for \$18,000, with another \$17,000 to be owed if Leganieds LLC was able to close on Parcels A and B from WT. Leganieds, LLC hoped to also still purchase Parcels A and B from WT Properties once WT Properties removed the Adcock lien. Alternatively, if the Adcock lien prevented a sale, Leganieds expected it could build a single-family residence on the parcel, ensuring that its purchase price would still be a good investment. (CP 43 ¶ 13 and CP 66-67)

23. To that end, Leganieds, LLC, then obtained from King County a parcel number for the Access Strip (now known as the "Access Parcel"). King County reviewed the issues, and decided to provide a separate parcel number for the Access Parcel because it was not part of the Viking Bank Deed of Trust, and was not

foreclosed on or conveyed to WT Properties. King County then apportioned the property taxes owed for the new parcel, which were paid by Leganieds, LLC. King County assigned parcel number 523580-0082 and Leganieds pays the taxes each year. (CP 43-44 ¶¶ 14 and CP 69-70)

24. After closing on the Access Parcel, Leganieds notified WT Properties that it now owned the Access Parcel, and was willing to close under the terms of the REPSA if WT Properties removed the Adcock deed of trust. WT Properties did not remove the Adcock deed of trust and so no deal occurred. (CP 44 ¶¶ 15)

25. In late 2013, WT Properties worked out a deal with Ms. Adcock to remove her deed of trust. WT Properties was no longer willing to sell for anything close to the price in the REPSA. Instead, WT wanted an additional \$175,000. (Id) When Leganieds, LLC refused, WT Properties then filed this lawsuit trying to gain title to the Access Parcel.

26. Judge Heller ruled that Leganieds, LLC owns the Access Parcel. (CP CP 116-117) WT then claimed an easement for ingress, egress, and utilities over Leganieds, LLC's property, even though it has access from 1st Ave. South.

27. Although it became part of Parcel A through the 2007 BLA and subsequent quit claim deed, the Access Parcel is, obviously, still part of the Maybrook Plat. The land did not move. It is still located on the same neighborhood street. It is still a portion of the land area formerly known as “Lot 17” of the Maybrook Plat. It is still subject to the RESTRICTIONS on the face of the plat. (CP 110)

V. ARGUMENT

A. Standard of Review

A trial court’s ruling on summary judgment is reviewed de novo. *Wash. Fed. Sav. & Loan Ass’n v. McNaughton*, 181 Wn. App. 281, 299, 325 P.3d 383, 391 (2014).

B. The Easement Was Invalid Upon Its Formation

The Maybrook Plat was created in 1948 with the recording of the final plat, King County recording number 3806233. The plat contains a “RESTRICTION” stating “All lots in this plat are restricted to residence R-1 uses.” (CP 110) To this day, the one street neighborhood remains residential. (Appendix A) With this restriction on the face of the plat, this case is controlled by *Hollis v. Garwall*, 137 Wn.2d 683, 974 P.2d 836 (1999), and *Rush v. Miller*, 21 Wn.App. 156, 584 P.2d 960 (2001).

In *Hollis v. Garwall*, the Court held that a “restriction” on the face of the plat limiting use of the lots to residential purposes was enforceable to prevent non-residential uses by subsequent purchasers. The plat in *Hollis v. Garwall* contained the following:

RESTRICTIONS

3. *This plat is approved as a residential subdivision and no tract is to have more than one single family residential unit. Conversion of any lot to other than its authorized occupancy must be in accordance with authorizations associated with separate application and procedure. Hollis, 137 Wn.2d at 687.*

The Washington Supreme Court held that this was an equitable covenant that runs with the land to bind and benefit future owners in the plat. *Id.* at 690-693. As the Court noted, “[t]he elements which are necessary for finding an equitable restriction in the subdivision setting are: (1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant.” *Id.* at 692.

Ultimately, the Washington Supreme Court held that the language “This plat is approved as a residential subdivision and no

tract is to have more than one single family residential unit,” prohibited a buyer from using a tract as for mining and rock crushing activities. Such activities are not “residential.”

So, as in *Hollis*, this case concerns a plat with a “Restriction” on its face stating “All lots in this plat are restricted to residence R-1 uses.” As in *Hollis*, the “Restrictions” on the face of the Maybrook Plat (1) are in writing, (2) touch and concern the land because it limits the use of real property, (3) are sought to be enforced by a successor owner (Leganieds) against another successor (WT Properties) claiming an easement, and (4) everyone had notice of the “Restrictions” because the plat is recorded. *Id* at 692.

The issue then is whether WT Properties can use a lot in Maybrook to access Parcels A and B, which are not in the Maybrook plat. The answer is no, and it is controlled by *Rush v. Miller*, 21 Wn.App. 156, 584 P.2d 960 (2001).

Rush v. Miller involved a plat recorded in 1959, with a restrictive covenant stating: “All lots shall be used for residential purposes unless otherwise zoned.” Plaintiffs owned other property in the subdivision subject to the same restriction. Plaintiffs sued to enjoin defendants from building a road across a restricted lot to reach land outside the plat. The Court of Appeals upheld an

injunction preventing the road building. As the Court held, “the term ‘residential’ has a clear meaning and [we] agree with those courts which hold that a roadway which is designed primarily to benefit or serve property outside a restricted subdivision is simply not a residential purpose.” *Rush v. Miller*, 21 Wn.App. 156, 160.

In this case, WT Properties claims an access and utilities easement over a 41 foot portion of lot 17 of the Maybrook plat, which is now owned by Leganieds, LLC. The only possible use of the easement is to benefit WT Properties’ land, which is outside of the Maybrook Plat. Under *Rush v. Miller*, this is not allowed by the residential use restriction on the face of the Maybrook Plat. The residential homeowners in that neighborhood do not have to allow a road through one of its lots. Notably, WT has other access off of 1st Ave. but chooses not to use it because it reduces the development potential for its property.

An easement that authorizes a non-residential use in violation of a restrictive covenant should be voided. See *Buick v. Highland Meadow Estates at Castle Peak Ranch, Inc.*, 21 P.3d 860, 865, (Colo. 2001) (affirming “trial court ruling invalidating the easement” because building a road to reach property outside of the subdivision violated residential use restriction).

The trial court did not reach this issue, instead ruling that the issue was not ripe. The trial court dismissed the claim to enforce the covenant without prejudice. (CP 237) The trial court apparently agreed with WT Properties' argument that it might just build a "driveway" instead of a "road," and that "to the extent that Defendants' claim is based on their speculation that Plaintiff will build a road in the future, the Defendants' claim is not ripe for consideration." (CP 227) The trial court's determination that the issue was not ripe was error. See *e.g. Dickson v. Kates*, 132 Wn. App. 724, 737, 133 P.3d 498, 505 (2006) (granting declaratory judgment on the existence of a covenant).

The easement is for ingress, egress and utilities. The intent behind the easement was to provide access to a subdivision. (CP 41 ¶ 4, CP 55) But regardless of whether WT Properties (or a future owner) wants to build a "driveway" and install utilities to reach homes outside of the plat, or wants instead to build a "road" with utilities to reach those homes, the only possible uses of the easement are prohibited by *Rush v. Miller*, 21 Wn.App. 156, 160.

Using a lot solely for a road or a driveway to reach property outside of the Plat is inconsistent with a residential use restriction. A driveway associated with a house on the same lot is a residential

use of that lot. But using a lot for a “driveway” to access houses outside of the plat is not a residential use. See *id.* People who buy subject to residential restrictions have the right to rely on the plat in believing that the next door lot will be a house or a yard, and not a through-fare to other properties. A buyer has a right to rely on the plat in believing they are not buying a corner lot. Allowing a residential lot to be used as road or a driveway to access a separate plat undermines that right.

In sum, whether or not the easement was *void ab initio* was ripe. This Court should find that it is invalid and void under *Rush v. Miller*, 21 Wn.App. 156, 160, a case decided five years before the easement grant at issue.

C. Even if it was Not Void *ab initio*, The 2006 Easement Was Extinguished by a Boundary Line Adjustment

In October 2006, Mr. and Mrs. Prasad sold lots 16, 17, and 18 to Rehabitat Northwest and reserved a recorded easement over a portion of lot 17. (CP 135-136) The buyer built houses on lots 16 and 18, with the houses completed in 2007.

Prasad joined with Rehabitat in the May 2007 Boundary Line Adjustment (2007 BLA). In that 2007 BLA, the east 12 feet of lot 17 became part of lot 16, and the west 7 feet of lot 17 became part of

lot 18. In other words, lot 17, which was in the middle of 16 and 18, was decreased in size from 60 feet to 41 feet. The other 19 feet were divided between lots 16 and 18, making each of them 72 feet wide. The remainder of lot 17 was then conveyed to Prasad through both the 2007 BLA and a subsequent quit claim deed. Lots 16 and 18 were then sold to home buyers. (CP 84-85, CP 112-115)

Thus, through the 2007 BLA and the quit claim deed, the remainder of lot 17 became part of Parcel A, the 2.5 acre lot behind lots 16, 17, and 18. In other words, after the 2007 BLA, there was only one lot and it was Parcel A. Parcel A was owned by Prasad. When that occurred, the easement over the strip of land formerly known as lot 17 (but now part of Parcel A) was extinguished by the merger doctrine. See *Schlager v. Bellport*, 118 Wn. App. 536, 76 P.3d 778 (2003).

“An easement is a property right separate from ownership that allows the use of another’s land without compensation.” *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 654, 145 P.3d 411, 416, (2006). An appurtenant easement “necessarily requires a dominant estate which benefits from the easement and a servient estate which is burdened by the easement.” *M.K.K.I.*, 135 Wn.

App. 647, 655. “As a general rule, one cannot have an easement in one's own property.” *Radovich v. Nuzhat*, 104 Wn. App. 800, 805, 16 P.3d 687, 690, (2001).

With the 2007 BLA, the easement area became part of Parcel A to form one larger Parcel A. Thus, after the BLA, there was only one parcel with one owner. When that occurred, there could be no easement because an easement “necessarily requires a dominant estate which benefits from the easement and a servient estate which is burdened by the easement.” *M.K.K.I.*, 135 Wn. App. 647, 655. Thus, as a matter of law, an easement cannot survive the joinder of the two parcels to make one large parcel. It is not a question of intent or of equity, but of that fact that a continuing easement is legally impossible. An owner of one parcel of land cannot grant himself, or retain for himself, an easement over that parcel.

According to the most recent Restatement the “rationale” for the merger doctrine is because:

A servitude benefit is the right to use the land of another or the right to receive the performance of an obligation on the part of another. A servitude burden is the obligation not to interfere with another's use of the burdened party's land, or the obligation not to use land in the burdened party's possession in particular ways, or the obligation to render a specified

performance to another. When the burdens and benefits are united in a single person, or group of persons, the servitude ceases to serve any function. Because no one else has an interest in enforcing the servitude, the servitude terminates. The previously burdened property is freed of the servitude. If the ownership of the property is separated, no new servitude arises unless a new servitude is created under the rules stated in Chapter 2. Restat 3d of Prop: Servitudes, § 7.5; see also *Schlager v. Bellport*, 118 Wn. App. 536, 539, 76 P.3d 778, 780 (2003) (“Because no one else has an interest in enforcing the servitude, the servitude terminates”).

There are cases in Washington stating that the merger doctrine is “disfavored” and that “courts will not compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united, nor will they recognize a claim of merger where to do so would prejudice the rights of innocent third persons.” *In re Tr.'s Sale of the Real Prop. of John W. Ball*, 179 Wn. App. 559, 564, 319 P.3d 844, 846, 2 (2014).

However, the merger doctrine is not “disfavored” in the context of easements and covenants. Merger is a concept that mostly comes up in the mortgage world, such as when the lender with a deed of trust becomes the owner in fee. See *In re Tr.'s Sale of the Real Prop. of John W. Ball*, 179 Wn. App. 559, 564. It is said

that the two interests merge unless there is a contrary intent. In mortgage cases, the merger doctrine has been disfavored since at least 1922. *See id.*

However, the most recent such case noted that “unlike in the mortgage context, the merger doctrine has been accepted in the context of extinguishing real property encumbrances, such as easements.” *Id.* at n.1. Although the Court, somewhat oddly, cited *Radovich v. Nuzhat*, 104 Wn. App. 800, 805, 16 P.3d 687, 690 (2001) for that statement, the statement is accurate. *See Schlager v. Bellport*, 118 Wn. App. 536; *Witt v. Reavis*, 587 P.2d 1005, 1009, 284 Ore. 503, 510 (Or. 1978) (“We are not aware of any case, and none has been cited to us, that holds that a merger like the one in the case at bar is ‘not favored in equity’”).

In fact, the *Radovich* case appears to have been the first easement/covenant case in Washington to state that the merger doctrine is “disfavored” in the context of an easement, and that statement was dicta because the Court assumed the doctrine applied, but found the easement was re-established by a grant in a subsequent conveyance. *Radovich*, 104 Wn. App. 800. Two years later in *Schlager*, the same court made no mention of the doctrine being disfavored in the easement/covenant context. In *Schlager*,

the Court held that a view easement / covenant terminated because the two lots were owned by the same person for 12 years. *Schlager*, 118 Wn. App. 536.

The law as it applies to merger in the mortgage context vs. the easement context is so different that the Restatement (Third) Property: Mortgages, § 8.5 takes the position that the “doctrine of merger does not apply to mortgages” and provides a long explanation as to why it should not apply, while the Restatement (Third) Property: Servitudes, § 7.5 says nothing about the merger doctrine being disfavored. In fact, Washington courts have no trouble applying the merger doctrine to covenants or easements. *See Schlager v. Bellport*, 118 Wn. App. 536.

Additionally, there is no evidence that Prasad intended to keep the easement alive when they became the owners of the underlying fee. The BLA brought the underlying fee into and a part of Parcel A.

WT Properties is also not an “innocent” third party that needs to be protected, or is deserving of protection, by an exception to the merger doctrine. WT purchased the property from the bank, with notice of an issue over the easement area that would require a quit claim deed. (CP 100 ¶¶ 9-10, 16-17) They tried to get that deed,

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and failed. WT Properties then encouraged Leganieds to buy the land for access to Parcel A, which Leganieds then had under contract to buy from WT Properties. After encouraging Leganieds to buy the land (CP 42 ¶ 9), WT Properties increased the asking price from \$325,000 to \$500,000. (CP 44) When Leganieds refused, WT Properties sued, and is now claiming an easement that would render Leganieds property worthless. WT Properties is not an innocent third party. See *Schlager* 118 Wn. App. at 542.

In sum, because the two parcels were merged into one large parcel with one owner, and because an easement cannot exist in such a situation, the 2006 easement was extinguished.

D. The Deed of Trust Does Not Prevent Merger

WT Properties argues that a clause in the Viking Bank deed of trust prevents merger. Relying largely on *Hamilton Court v. East Olympic*, 215 Cal.App.4th 501 (2013), WT Properties argues that the deed of trust contains an agreement that no merger will occur.

In *Hamilton Court*, there was an easement to allow a building to encroach on another party's lot, and an agreement between the lender and the borrower that the two lots could come into common ownership only if the conveyance did not "affect the priority of this Deed of Trust in any manner whatsoever." The Court ultimately

held that this was an agreement that merger would not apply, because if it did, the deed of trust would have “no priority” as to the easement at issue.

In this case, the deed of trust does not prohibit merger. The anti-merger language in the deed of trust only applies to a merger of the security interest with any other interest of the lender. It says: “There shall be no merger of the interest or estate created by this Deed of Trust with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without the written consent of Lender.” (CP 80)

Avoiding merger of the lien created by the deed of trust with the Property allows the lender to take ownership of the Property through a deed in lieu of foreclosure or by buying the property at foreclosure, and still enforce the deed of trust if necessary to foreclose out junior liens. It does not address or prohibit application of the merger doctrine as it applies to easements. Most importantly, it does not make the impossible – an easement over one lot owned by one person – possible.

E. No Mortgage Exception

With regard to WT Properties’ argument that the very existence of any deed of trust prevents merger, Washington has

not adopted such a “mortgage exception” to the merger of easements or covenants – and this is not the case to adopt it for the first time.

In the few states that have addressed and adopted a “mortgage exception,” “the mortgagee of dominant estate is protected from losing its interest in an easement otherwise extinguished when fee title to the dominant estate and fee title to the servient estate have been united in one fee owner. This exception is grounded in equity and is intended to protect the mortgagee of the dominant estate from losing the value of its interest in an easement that is otherwise extinguished. *Pergament v. Loring Props.*, 599 N.W.2d 146, 149-150 (Minn. 1999). Under these cases, the mortgagee of the dominant estate retains an “inchoate interest” in the easement, which comes back to life if the mortgagee’s interest becomes possessory through foreclosure or otherwise. *See id.*

Washington courts have not addressed a “mortgage exception” to the merger doctrine, and this is not the case in which adopt a new exception. Even if Washington were to adopt a new exception, it is an equitable doctrine that would depend on the facts and circumstances of each case. *See e.g. City of Kent v. Bel Air &*

Briney, 358 P.3d 1249 (2015) (“Subrogation is an equitable remedy, and is founded on the facts and circumstances of each particular case”); *Cascade Timber Co. v. N. P. R. Co.*, 28 Wn.2d 684, 711, 184 P.2d 90, 104 (1947).

The undisputed facts in this case show that

(1) The easement was created in 2006 (CP 135-136), and violated the “residential use” restriction on the face of the plat (CP 110);

(2) The deed of trust was granted in February 2007 encumbering Parcel A and all easements (but without specifying any particular easement) (CP 74);

(3) The May 2007 BLA brought the land burdened by the easement into Parcel A (CP 85);

(4) The lender foreclosed on Parcel A, but not on the easement area (CP 87-95; CP 116-117);

(5) The trustee announced at the trustee sale that there was a dispute or potential problem with the easement area that would require a deed from Prasad, the prior owner (CP 100 ¶¶ 9-10);

(6) WT Properties, at the sale with the prior owner’s son, bought the property and apparently had a deal with the prior owner (CP 101 ¶¶ 16-17);

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(7) WT Properties then failed to get that deed from the prior owner;

(8) With Parcel A under contract to Leganieds, WT Properties encouraged Leganieds to buy that easement area (CP 42 ¶ 9);

(9) After Leganieds bought the easement area, WT Properties then demanded an additional \$175,000 before it would sell Parcel A. (CP 44 ¶ 16) When Leganieds refused, WT filed suit seeking ownership of the easement area. (CP 1-10) When that failed, WT claimed an easement (CP 118-129); and

(10) WT Properties now claims that “equity” should prevent the application of the merger doctrine and reinstate the easement over the full width of Leganieds’ property, rendering the property worthless to Leganieds.

WT Properties is not an innocent third party who purchased without knowledge of the issue. They were told at the sale that they had to get a deed for the parcel. (CP 100 ¶ 9-10) And they then encouraged Leganieds to get that deed (CP 42 ¶ 9), only to later claim an easement that would render Leganieds’ property worthless. That is not equitable. Under these facts, there is no basis for applying a mortgage exception to the merger doctrine,

even if Washington Courts might decide to apply it under other circumstances.

This is not the case to create a mortgage exception that would prevent termination of easements or covenants so long as a deed of trust was outstanding on the benefitted parcel. There is no basis for using such an exception to protect WT Properties in this case, and the Court should not adopt a bright line rule that such an exception will always apply to prevent a merger.

The consequences of such an exception are unknown and potentially problematic. For example, if there is a mortgage exception, then does the existence of a deed of trust prevent adverse possession or a prescriptive easement? Why protect a lender's interest in an easement from the actions or inactions of the owner, and not the lender's interest in the fee? Similarly, would property owners be required to get their lender's consent in order to terminate or amend easements? If there is a mortgage exception, then any termination or amendment of an easement would be subject to later challenge if there was no lender consent and a lender foreclosed.

In sum, the day may come to address whether Washington would adopt a mortgage exception, but today is not that day. The

facts and circumstances of this case do not support such an exception.

Moreover, as noted above, regardless of what equity might hold, as a matter of law an easement cannot exist in one lot with one owner and no other “estates.” For an easement to exist there must be two “estates” owned by different parties – a dominant and servient estate. *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 655. This could be an owner and a tenant, or an owner and another owner of a future interest. However, a deed of trust does not change this. It is not an estate.

A “mortgage is a lien in support of the debt which it is given to secure.” *See Bain v. Metropolitan Mortgage*, 175 Wn.2d 83, 92, 285 P.3d 34 (2012). A deed of trust is a type of mortgage. It is a “three party transaction, in which land is conveyed by a borrower, the ‘grantor,’ to a ‘trustee,’ who holds title in trust for a lender, the ‘beneficiary,’ as security for credit or a loan the lender has given the borrower.” *Bain*, 175 Wn.2d 83, 92-93. “The property pledged as security for the debt is not conveyed by these deeds, even if on its face the deed conveys title to the trustee, because it shows that it is given as security for an obligation. *Bain*, 175 Wn.2d 83, 93.

Thus, a deed of trust is a lien, and a lien is not an "estate." See Restatement 1st of Property § 9 (defining "estate" and noting that "when a mortgagee has a lien on land for his repayment, he has an interest in land and this interest can become possessory by a default in the payment of the sum due and a foreclosure of the lien, but he has not an "estate").

With the 2007 BLA, the easement area became part of Parcel A creating one parcel with one owner. And there was only one "estate." Thus, as of the BLA, there could be no easement because an easement cannot exist when there is one lot owned by one person with no other person owning an "estate", i.e. a lease, or future interest. It is therefore legally impossible for an easement to survive, whether it is "inchoate" or choate.

F. If An Easement Exists, its Use Must be Enjoined

If the easement is not void, and if it survived the 2007 BLA, the trial court should have permanently enjoined use of the easement. Restrictive covenants are designed to make residential subdivisions more attractive for residential purposes and are enforceable by injunctive relief. *Metzner v. Wojdyla*, 125 Wn.2d 445, 450, 886 P.2d 154 (1994).

To establish the right to an injunction, the party seeking relief must show (1) that he or she has a clear legal or equitable right, and (2) that he or she has a well-grounded fear of immediate invasion of that right. *Hagemann v. Worth*, 56 Wn. App. 85, 87, 782 P.2d 1072 (1989); *Metzner*, 125 Wn.2d at 450 (no showing of substantial damage from the violation of a restrictive covenant need be shown to enjoin a violation).

Leganieds' lot is 41 feet wide. If WT is allowed to build a road or install utilities to reach property outside of the Maybrook Plat, the lot would be worthless to Leganieds. Thus, although not required to show "substantial damage," such damage is clear. Alternatively, even without the easement, WT can still access its property from 1st Avenue South.

Again, the trial court found that this issue was not ripe, apparently believing that an injunction could not be granted until WT started using the easement in violation of the plat restriction. As noted above, the only uses allowed by the easement would violate the plat restriction. Thus, if the easement is not void and was not merged out of existence, its use should have been enjoined.

VI. CONCLUSION

The 2006 easement was never valid to begin with because Lot 17 of the Maybrook Plat is restricted to residential purposes only, and a road or utilities to serve properties outside of the plat is not, as a matter of law, a residential use under Washington law.

Furthermore, with the 2007 Boundary Line Adjustment and subsequent quit claim deed to "quiet title," the "Access Strip" became part of Parcel A to form one parcel. At that time, the easement was extinguished because an easement cannot exist without a dominant and a servient estate. Here, there was only one parcel and one estate, and thus the easement terminated. The trial court's ruling granting WT Properties an easement and rendering Leganieds' property worthless must be reversed.

DATED this 17th day of December, 2015.

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CERTIFICATE OF SERVICE

I, Kelli Huerta, state and declares:

1. I am a legal assistant with the law firm of Jameson Babbitt Stites & Lombard, PLLC, over the age of 18 years, a resident of the State of Washington, and not a party to this matter.

2. On December 17, I served the foregoing Appellant's Opening Brief on:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 17th day of December 2015.


Kelli Huerta