

FILED
COURT OF APPEALS
DIVISION II

No. 37987-2-II

09 FEB 20 PM 12: 44

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY
DEPUTY

MICHAEL COHOON and JANICE PROUST,

Plaintiffs-Respondents,

And

GARY WILLIAMS and RAELENE WILLIAMS, husband and wife,

Intervenor Plaintiffs-Respondents

vs.

JOHN B. CUNY and SHERL CUNY,
Husband and wife and their marital community,

Defendants-Appellants

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable , Judge George Wood
Cause No. 07-2-00484-2

BRIEF OF RESPONDENTS

DAVID H. NEUPERT, WSB
Attorney for Respondent
WSBA # 16823
PLATT IRWIN LAW FIRM
403 South Peabody Street
Port Angeles, WA 98362

PM 2-12-09

TABLE OF CONTENTS

I. INTRODUCTION OF THE CASE 1

 A. Standard of Review 2

II. STATEMENT OF THE CASE..... 3

 A. Facts Relevant to Issues Presented for Review.....3

III. ASSIGNMENTS OF ERROR.....6

IV. ARGUMENT 6

 A. Argument in Support of Trial Court Decision>.....6

 1. Common Access Road.....6

 2. Equitable Estoppel.....8

 3. Reasonable Use of Easement.....10

 B. Argument in Response to Appellant's Assignment of Error.....12

 1. Indispensable Parties.....12

 2. Other Lot Owners.....14

 3. Statute of Frauds/Part Performance.....15

 4. Injunction.....16

 5. No Sixty Foot Easement.....16

V. CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Abbey Road Group LLC v. City of Bonney Lake</i> , 141 Wn.App. 184, 167 P.3d 1213 (2007).....	13
<i>Association of Rural Residence v. Kitsap County</i> , 141 Wn.2d 185, 4 P.3 115 (2000).....	13
<i>Berg v. Ting</i> , 125 Wn.2d 544, 886 P.2d 564 (1995).....	15
<i>Bland v. Mentor</i> , 73 Wn.2d 150, 385 P.2d 727 (1963).....	3, 9
<i>Coastal Building v. Seattle</i> , 65 Wn.App. 1 (1992)	12, 14
<i>Colonial Imps., Inc. v. Carlton Nw., Inc.</i> , 121 Wash.2d 726, 853 P.2d 913 (1993).....	8
<i>Davis v. Dep't. of Labor & Indus.</i> , 94 Wn.2d 119, 615 P.2d 1279 (1980).....	2
<i>Dorsey v. King County</i> , 51 Wn.App. 664, 754 P.2d 1255 (1988).....	2
<i>Endicott v. Saul</i> , 142 Wn.App. 899, 176 P.3d 560 (2008).....	3, 8, 9
<i>Estate of Pflighar</i> , 35 Wn.App. 844, 670 P.2d 677 (1983).....	9
<i>Heg v. Alldredge</i> , 157 Wn.2d 154, 137 P.3d 9 (2006).....	8
<i>King County v. Washington State Boundary Review Bd.</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993).....	2
<i>Kinnebrew v. C. M. Trucking & Const., Inc.</i> 102 Wn.App. 226, 6 P.3 rd 1235 (2000).....	8

<i>Proctor v. Huntington</i> , 146 Wn.App. 836, 192 P.3d 958 (2008)	9
<i>Save Sea Lawn Acres Association v. Mercer</i> , 140 Wn.App. 411, 166 P.3d 770 (2007)	17
<i>Sunnyside Valley Irrig. Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003)	2
<i>Thompson v. Smith</i> , 59 Wn.2d 397, 367 P.2s 798 (1962)	10, 11
<i>World Wide Video, Inc. v. City of Tukwila</i> , 117 Wn.2d 382, 816 P.2d 18 (1991), <i>cert. denied</i> , 503 U.S. 986 (1992)	2
<i>Zunino v. Rajewski</i> , 140 Wn.App. 215, 165 P.3d 57 (2007)	2

I. INTRODUCTION OF THE CASE

This case involves property located in two separate short plats in Clallam County, Washington. Plaintiffs/Respondents Michael Cohoon and Janice Proust (“Cohoon”) own Lot 3 in the Aleinikoff short plat. Defendant/Appellant John Cuny (“Cuny”) owns Lot 1 in the Aleinikoff short plat. Intervenor Plaintiffs/Respondents Gary and Raelene Williams (“Williams”) own Lot 4 in the Rindler short plat. Both short plats abut Greywolf Road. There is a thirty (30) foot dedicated easement on each side of the common boundary of the Aleinikoff and Rindler short plats.

In 1998, Cuny and several other property owners in the Aleinikoff and Rindler short plats agreed to locate a single access road from Greywolf Road to serve both short plats. Cuny proposed a twenty (20) foot wide access road. Cuny’s proposal was admitted as Trial Exhibits 15 and 17. The other property owners accepted Cuny’s proposal. An access road was installed, which straddled the boundary of the two short plats.

In June 2007, Cuny claimed he was entitled to the full use of the 30 foot easement on Cohoon’s property. At trial, Cuny asserted he was entitled to the use of both 30 foot easements (60 feet in total). Cohoon and Williams disagreed. Cohoon sought an injunction preventing Cuny from driving off the paved access road and onto Cohoon’s property or from otherwise disturbing their property. Williams sought a determination that

Cuny was not entitled to any further use of the 30 foot easement in the Rindler short plat. The trial judge viewed the area in dispute on the first day of trial. Following a bench trial, the trial court decided the case in favor of Cohoon and Williams. Memorandum Opinion, CP 25; Findings, Conclusions and Order, CP 16.

A. Standard of Review.

The appellate court reviews the trial court's decision following a bench trial to determine whether the findings of fact are supported by substantial evidence and whether those findings support the trial court's conclusions of law. *Zunino v. Rajewski*, 140 Wn.App. 215, 220, 165 P.3d 57 (2007), citing *Dorsey v. King County*, 51 Wn.App. 664, 668-69, 754 P.2d 1255 (1988). Unchallenged findings of fact are verities on appeal. *Id.*, citing *Davis v. Dep't. of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980). Conclusions of law are reviewed *de novo*. *Zunino, supra*, citing *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Substantial evidence supports a finding of fact where the "record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993) (quoting *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991), *cert. denied*, 503 U.S. 986 (1992)).

“In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party.” *Endicott v. Saul*, 142 Wn.App. 899, 909, 176 P.3d 560 (2008), citing *Bland v. Mentor*, 73 Wn.2d 150, 155, 385 P.2d 727 (1963).

II. STATEMENT OF THE CASE

A. Facts Relevant to Issues Presented for Review.

Cohoons own Lot 3 (Trial Exhibit 4) and Cuny owns Lot 1 of the Aleinikoff Short Plat (Trial Exhibit 4). Williams owns Lot 4 of the Rindler Short Plat (Trial Exhibit 6). The Aleinikoff and Rindler short plats adjoin each other on Greywolf Road. There is a 30 foot easement on each side of the common boundary of the short plats (Trial Exhibits 4, 6). An aerial photograph showing the location of the short plats including the Cohoon, Williams and Cuny properties was admitted as Trial Exhibit 1.

In 1998, Cuny and other property owners in the Rindler and Aleinikoff short plats agreed to locate a single driveway for access from Greywolf Road to serve both short plats (Trial Exhibits 15, 17; RP Day 2, Vol. I, pp. 9-11).

Jack Waud and Judy Duff each own property in the Rindler short plat, and testified regarding Cuny’s participation in the agreement. Ms. Duff testified that Cuny sent a letter (Trial Exhibit 17) in which he stated he had drawn where the common access road should be located. RP Day

2, Vol. I, pp. 9-11). Ms. Duff testified, “It made sense to all of us looking at it, to build one road centered between the two properties and then split at the corner.” RP Day 2, Vol 1, p. 11. Cuny agreed to share in the cost of the roadway improvement which provided access off of Greywolf Road. RP Day 2, Vol 1, p. 17.

Cuny testified that his partner Sherl Ouren, a/k/a Sherl Cuny, had driven on the Cohoon’s property off the paved access from Greywolf Road. RP Day 2, Vol. II, p. 234, 239-240. Gary Williams observed both John Cuny and Sherl Ouren drive off the roadway onto the grassy area on the Cohoon’s side of the driveway. RP Day 2, Vol. 1, pp. 87-88.

Cuny testified that he needed use of the entire thirty (30) foot easement on Cohoon’s property to provide access for emergency vehicles. He said that he was concerned that if there was a fire on his property as to whether emergency vehicles would be able to reach his property. RP Day 3, pp. 9-10. Cuny said that the local fire district official had communicated to him that he needed to provide greater access than what was provided by the access road from Greywolf Road. RP Day 2, Vol. II, pp. 246-247. Cuny claimed that the fire department official said there might be some problems with access to Cuny’s property. RP Day 2, Vol. II, pp. 246-247. That testimony was rebutted by Roger Moeder, the Assistant Fire Chief/Fire Marshall for Clallam County Fire District 3. Mr.

Moeder was the fire district official who met with Cuny at Cuny's residence. Mr. Moeder spoke to Mr. Cuny about the fire district access to Cuny's property. Mr. Moeder testified as follows:

Q And what was your purpose of meeting Mr. Cuny at his residence?

A I had questioned by the County Fire Marshall, Leon Smith, about the access to the residence and I went out there and took a look as far as Fire District access for in event of emergencies and, you know, I talked with them about it.

Q You talked to Mr. Cuny about it?

A Yes, and his wife.

Q Did you tell Mr. Cuny that in your opinion there would be a problem for emergency vehicles to reach his property given the current configuration of the access?

A None whatsoever and I wish that all of our residences in our Fire District had that good of access.

Q And then does that include, Sir, the access off of Greywolf Road that I'm indicating you described?

A Yes , it does.

Q And does that include the access from this drive along this surface of Mr. Cuny's property?

A Yes, it does.

RP Day 3, pp. 23-24.

Trial concluded on March 12, 2008. Judge Wood issued his Memorandum Opinion on March 26, 2008. CP 25. A copy of the Memorandum Opinion is attached as Exhibit A.

III. ASSIGNMENTS OF ERROR

Respondents do not assign error to the trial court's findings of fact or conclusions of law. Appellants did not assign error to findings of fact 1 through 8; 13; 15 through 18.

IV. ARGUMENT

A. Argument in Support of Trial Court Decision.

1. Common Access Road.

At trial, Cuny, Jack Waud and Judy Duff testified regarding the agreement to locate a single access road from Greywolf Road to serve the Aleinikoff and Rindler short plats. Jack Waud testified regarding a letter he received from Cuny in 1998 in which Cuny proposed a single 20 foot drive from Greywolf Road. RP Day 1, pp. 149-151; Trial Exhibit 15. Judy Duff testified regarding a diagram Cuny provided with a letter regarding where the single paved access road off of Greywolf should be located. RP Day 2, Vol. 1, p. 11; Trial Exhibit 17. Judy Duff testified that Mr. Cuny's diagram was "his idea of how we should install the roads." The idea Cuny proposed was centered between what is now the Williams and Cohoons properties along the boundary of the two short plats. RP Day 2 Vol. 2, p. 11. The road bed was installed in June 1995. The road was paved in May 2000. RP Day 2, Vol. 1, p. 13. Six property owners,

including Cuny, shared in the cost of paving the 20 foot access road from Greywolf Road to serve both short plats. RP Day 2, Vol. p. 19.

On April 6, 2006, Cuny wrote a letter to Cohoon claiming there were “obstructions within the easement.” Cuny said, “I am also concerned for the safety of my family and home, because the obstructions would slow and might entirely block fire trucks and other rescue vehicles from reaching my house in an emergency.” Trial Exhibit 25.

In a letter dated July 12, 2006, Cuny’s attorney claimed that Cohoon’s “existing landscaping and light posts located on the southeast corner of your lot within the easement area will have to be removed to allow proper access to my client’s lot.” Cuny’s attorney threatened to have a contractor remove Cohoon’s landscaping at their cost if they did not do so by August 14, 2006. Trial Exhibit 26. Michael Cohoon testified that he owned a motor home which was shown parked at the northwest corner of his property in Trial Exhibit 1. He testified that he had never parked his motor home within the paved access road off Greywolf Road. RP Day 1, p. 61.

There was substantial evidence at trial by which the court found that Cuny and other lot owners had agreed to establish a single twenty foot wide access road off Greywolf Road to serve both short plats. Findings of Fact 9-12.

2. Equitable Estoppel.

The trial court applied the doctrine of equitable estoppel to Cuny's conduct. Findings of Fact 9, 10, 11, 12, 15, 19, and 20; Conclusion of Law 4.

Equitable estoppel requires a showing that the party to be estopped: (1) made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied on the admission, statement, or act; and (3) that the other party would suffer injury if the party to be estopped was allowed to contradict or repudiate the earlier admission, statement or act. *Heg v. Alldredge*, 157 Wn.2d 154, 165, 137 P.3d 9 (2006). The party asserting estoppel must prove each element by clear, cogent, and convincing evidence. *Kinnebrew v. C. M. Trucking & Const., Inc.* 102 Wn.App. 226, 235, 6 P.3rd 1235 (2000). The trial court determines whether the burden of proof of estoppel has been met. As Division II of the Court of Appeals recently stated:

The trial court, not a reviewing court, determines whether evidence meets the "clear, cogent and convincing" standard of persuasion, which is met if the evidence makes the fact in issue " 'highly probable.' " *Endicott v. Saul*, 142 Wn.App. 899, 910, 176 P.3d 560 (2008) (quoting *Colonial Imps., Inc. v. Carlton Nw., Inc.*, 121 Wash.2d 726, 735, 853 P.2d 913 (1993)). This determination "necessarily requires a process of weighing, comparing, testing, and evaluating—a function best performed by the trier of the fact, who usually has the advantage of actually hearing and seeing the parties and the witnesses, and whose right and duty it is to observe

their attitude and demeanor.” *Endicott*, 142 Wn.App. at 910, 176 P.3d 560 (quoting *Bland v. Mentor*, 63 Wash.2d 150, 154, 385 P.2d 727 (1963)).

Proctor v. Huntington, 146 Wn.App. 836, 846, 192 P.3d 958 (2008).

To meet the clear, cogent and convincing evidence burden, the ultimate facts and issue must be shown by evidence to be “highly probable”. *Estate of Pflighar*, 35 Wash. App. 844, 847 670 P.2d 677 (1983). The pattern jury instruction defining the burden of clear, cogent and convincing evidence states:

When it is said that a proposition must be proven by clear, cogent and convincing evidence, it means that the proposition must be proven by evidence which carries greater weight and is more convincing than a preponderance of evidence, however, it does not mean that the proposition must be proven by evidence which is convincing beyond a reasonable doubt. WPI 160.02.

As stated in *Endicott v. Saul, supra*, at 567:

The clear, cogent and convincing burden of proof contains two components: (1) the amount of evidence necessary to submit the question to the trier of fact or the burden of production, which is met by substantial evidence; and (2) the burden of persuasion. As to the burden of persuasion, the trier of fact, not the appellate court, must be persuaded that the fact in issue is “highly probable.”

The trial court could readily determine from the evidence that it was highly probable that the elements of equitable estoppel were fulfilled in this case. Cuny agreed to locate a single access road off of Greywolf Road to serve both plats. He later claimed that he needed to use the entire

30 foot easement on Cohoon's property for emergency vehicle access to his property. RP Day 2 Vol. II, pp. 225-228. He also claimed that he was entitled to use both 30 foot easements in the Aleinkoff and Rindle short plats. His agreement to use a combined, single access road is entirely inconsistent with his later claim that he needed use of the entire 30 foot easement on Cohoon's property. Cuny also testified that he agreed to the location and paving of the access road. Both Cohoon and Williams would suffer injury if Cuny was allowed to contradict or repudiate his earlier act. Trial Exhibit 1 shows the mature landscaping on the Cohoon and Williams property near the access road. The landscaping would be damaged if Cuny was allowed to use the area outside the existing paved surface for access to his property.

3. Reasonable Use of Easement.

In an easement case, the respective rights of the owners of the servient estate and the dominant estate are not absolute. The rights of the parties must be construed to permit a due and reasonable enjoyment of both the interests so long as that is possible. *Thompson v. Smith*, 59 Wn.2d 397, 408-409, 367 P.2s 798 (1962). In *Thompson*, the owner of the servient estate constructed a concrete slab on his property which encroached on a 10 foot easement which benefited the dominant estate. The court determined there was no evidence that the easement had ever

been used for a road and there was no evidence that it would be used as a road in the immediate future. The dominant owner had sued, claiming the concrete slab interfered with their easement rights. The court rejected the claim, holding in part: “However, it is also the law that the owner of the property has the right to use his land for purposes not inconsistent with its ultimate use for the reserved purpose during the period of non-use. The rule is that where a right of way is established by reservation, the land remains the property of the owner of the servient estate and he is entitled to use it for any purpose that does not interfere with proper enjoyment of the easement”; *Thompson, supra* at 407-408. The court determined that it would not be proper to prevent the servient property owner’s use of the concrete slab until such time as the 10 foot strip was required for road purposes. The court recognized the need to balance the respective rights of the dominant and servient estate owners and stated: “The respective rights of the two parties are not absolute, but must be construed to permit due and reasonable enjoyment of both interests so long as that is possible.” *Thompson, supra*, at 409. In this case, the court determined from the evidence that Cuny provided no reason to expand use of the 30 foot easement on Cohoon’s property, and he had no right to expand his use onto Williams’ property. Finding of Fact 26.

B. Argument in Response to Appellant's Assignments of Error

1. Indispensable Parties.

Appellants argue that the trial court erred in not determining that Clallam County and other lot owners in the Aleinikoff and Rindler short plats were indispensable parties to the litigation. The trial court considered and rejected the appellant's claim that Clallam County was an indispensable party. Memorandum Opinion. CP 25. The trial court cited *Coastal Building v. Seattle*, 65 Wn.App. 1, 5 (1992) in determining whether a party is necessary to an action. The trial court properly stated, "The flaw in the defendant's [Appellant's] argument is that the plaintiff's [Respondent's] claim does not seek to amend the short plats, either directly or indirectly." Cohoon and Williams sought at trial only to enforce Cuny's agreement to establish a single 20 foot wide access road off Greywolf Road to serve both short plats. Appellants also alleged that Clallam County Ordinance 292 governed the Aleinikoff and Rindler short plats. Clallam County Planning Manager Steve Gray testified that the initial subdivision ordinance of Clallam County, Ordinance 40, was adopted in 1972. RP Day 1, pp. 131-132; Trial Exhibit 53. The 1972 subdivision ordinance (Trial Exhibit 53) was amended by Clallam County Ordinance No. 57 in 1975 (Trial Exhibit 51). Mr. Gray testified that Clallam County Land Division Ordinance No. 292 was adopted in 1986.

RP Day 1, p. 131; Trial Exhibit 52. Ordinance 292 was passed and adopted on July 29, 1986. It went into effect ten days after the date of adoption. Trial Exhibit 52, p. 82. Ordinance 292 repealed Ordinance No. 40, as amended by Ordinance No. 57. Trial Exhibit 52, p. 81. The Rindler and Aleinikoff short plat applications were both submitted to Clallam County prior to the effective date of Ordinance 292. The Aleinikoff and Rindler short plat applications vested under Clallam County Ordinance 57 (Finding of Fact No. 14). RP Day 1, pp. 133-134. Both short plat applications were vested under Washington's Vested Rights Doctrine prior to the effective date of Ordinance 292. *Association of Rural Residence v. Kitsap County*, 141 Wn.2d 185, 193, 4 P.3 115 (2000). In his opening appeal brief, Cuny mistakenly stated that Clallam County Ordinance 292 (adopted in 1986) was amended by Ordinance 57 (adopted in 1975). Appellants reliance on *Abbey Road Group LLC v. City of Bonney Lake*, 141 Wn.App. 184, 167 P.3d 1213 (2007) to defeat application of the vested rights doctrine is misplaced. In that case, Abbey Road urged expansion of the vested rights doctrine to allow vesting when an applicant files an application for review of site development plan. The appellate court declined to expand the vested rights doctrine to a site development plan review application, absent a building permit application because the municipality's ordinances and processes satisfied statutory

and constitutional concerns. *Abbey Road Group, supra* at 199. In this case, the evidence showed that the Rindler and Aleinikoff short plat applications were submitted to Clallam County on or about July 29, 1986. Both were vested before the effective date of Ordinance No. 292.

The final Aleinikoff short plat was admitted as Trial Exhibit 4. The final Rindler short plat was admitted as Trial Exhibit 6. Each exhibit said clearly on its face “Pursuant to Section 7.27 of Ordinance No. 57 of 1975, a drainage plan for each lot shall be required prior to the development of any lot within this short subdivision.” That information provided the court with substantial evidence that each short plat application vested under Clallam County Ordinance 57 prior to its repeal by Ordinance No. 292.

2. Other Lot Owners

The other lot owners in the Aleinikoff and Rindler short plats were not necessary parties under the facts in this case and the decision in *Coastal Building v. Seattle, supra*. As the trial court noted in its Memorandum Opinion, this was an action to enforce Cuny’s agreement against Cuny, and not against the other lot owners. It was simply unnecessary to involve other persons in the litigation in order to determine the respective rights of the plaintiffs, intervenor plaintiffs and defendants regarding Cuny’s use of the easements off Greywolf Road and the single

20 foot paved access route that “straddled” the common boundary of the parallel easements.

3. Statute of Frauds/Part Performance.

Cuny raises the issue of part performance at pages 11-12 of his opening appeal brief. Cuny appears to argue that the statute of frauds defeats any claim that the parties’ agreement on location of the paved driveway from Greywolf Road was sufficient. Cuny’s argument regarding the statute of frauds is defeated by the doctrine of part performance, which is “. . . based on the premise that in certain situations it would be fraudulent to permit a party to escape performance of his or her duties under an oral contract after . . . [permitting] the other party to perform in reliance upon the agreement.” *Berg v. Ting*, 125 Wn.2d 544, 557, 886 P.2d 564 (1995). *Berg* identified three elements to examine to determine partial performance of an agreement so as to remove it from the Statute of Frauds:

1. Delivery and assumption of actual and exclusive possession;
2. Payment or tender of consideration; and
3. The making of permanent, substantial and valuable improvements , referable to the contract.

In this case, the evidence included correspondence from Cuny, with a diagram where he proposed the location and width of the common

driveway off Greywolf Road. Trial Exhibit 15, 17. The lot owners, including Cuny, shared the expense of establishing and improving the common access road. RP Day 2, Vol. 1, pp. 23-27; Trial Exhibits 19, 20, 21, 22, 23, 24. Respondents do not concede that the Statute of Frauds applies in this case. Nevertheless, there was substantial evidence of part performance to defeat its applicability under the facts of the case.

4. Injunction.

The trial court properly issued a permanent injunction as part of its final order in the case. CP 6, p. 8, lines 14-25. There was substantial evidence at trial that Cuny had intentionally driven off the existing paved surface and onto the Cohoon's lawn and landscaping and if he continued to do so, the Cohoon's property would be further damaged. RP Day 2, Vol. 1, pp. 133-136; Trial Exhibit 56,

5. No Sixty Foot Easement

Cuny's claim that he is entitled to use of a combined 60 foot easement is unfounded. The Aleinikoff and Rindler short plats were filed separately with Clallam County. Trial Exhibit 4, 6. The fact that the short plats were filed separately and that each had a distinct 30 foot easement off Greywolf Road is substantial evidence that a "combined" 60 foot easement to serve both short plats was not intended. It is plain on the face of each short plat that the 30 foot easement was established to serve the

lots in one short plat and not the other short plat. Cuny can not assert any right to expand his use of the 30 foot easement on Williams' property within the Rindler short plat. *Save Sea Lawn Acres Association v. Mercer*, 140 Wn.App. 411, 417, 166 P.3d 770 (2007).

V. CONCLUSION

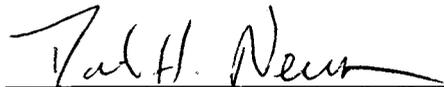
The trial court fully, fairly and carefully considered the evidence. There was substantial evidence upon which the court could determine that the Doctrine of Equitable Estoppel was established by evidence that was clear, cogent and convincing. The trial court determined that Cuny agreed to locate a single twenty foot wide access from Greywolf Road to serve both the Aleinikoff and Rindler short plats. Cuny's testimony that he needed to widen the access within the easement on the Cohoon property for safety reasons was rebutted by the testimony of Assistant Fire Chief Roger Moeder. The evidence conclusively established that the Rindler and Aleinikoff short plat applications were vested under Clallam County Ordinance 40 as amended by Ordinance 57. That ordinance was cited on the face of each final plat. Clallam County Ordinance 292 did not go into effect until after both short plat applications were vested. There was no requirement of a 60 foot wide access from Greywolf Road. An issuance of a permanent injunction was appropriate and necessary to enjoin Cuny from causing further damage or encroachment on the Cohoon's property

within the 30 foot easement. Clallam County and the other lot owners in the short plats were not necessary parties to the action. Accordingly, the decision of the trial court should be affirmed and the appeal taken therefrom denied.

Respondents respectfully request that the Court affirm the Findings of Fact, Conclusions of Law, Judgment and Order entered by the trial court on June 13, 2008 for the reasons stated herein.

DATED this 19th day of February, at Port Angeles, Washington.

Respectfully submitted,



David H. Neupert, WSBA# 16823
Attorney for Respondent
PLATT IRWIN LAW FIRM
403 South Peabody Street
Port Angeles, WA 98362-3210

09 FEB 20 PM 12: 44

STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS
THE STATE OF WASHINGTON

MICHAEL COHOON and JANICE PROUST,)
Plaintiffs-Respondents,)
vs.)
GARY WILLIAMS and RAELENE)
WILLIAMS, husband and wife,)
Intervenor Plaintiffs-Respondents)
vs.)
JOHN B. CUNY and SHERYL CUNY,)
husband and wife and their marital community,)
Defendants/Appellants.)

NO. 37987-2-II
AFFIDAVIT OF SERVICE BY MAIL

STATE OF WASHINGTON)
: ss.
County of Clallam)

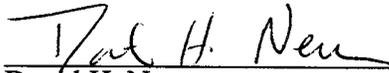
The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 19 day of February, 2009, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Respondents Brief, addressed as follows:

Mr. David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Craig A. Ritchie
Ritchie Law Firm PS
P. O. Box 2085
Port Angeles, WA 98362-0378

Malcolm S. Harris
Harris Mericle & Wakayama PLLC
999 3rd Avenue, Suite 3210
Seattle, WA 98104-4077



David H. Neupert

SUBSCRIBED AND SWORN TO before me this 19th day of February, 2009.

Elaine L. Sundt

Elaine L. Sundt

NOTARY PUBLIC in and for the State of Washington

Residing at Port Angeles, Washington

My commission expires: 9/10/2010