

ORIGINAL

No. 31⁹¹87-2-II

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

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
09 SEP -9 AM 11:05
BY U
DEPUTY

RAINIER VIEW COURT HOMEOWNERS ASSOCIATION, INC.,
Appellant,

v.

EDWARD W. ZENKER and "JANE DOE" ZENKER, and RAINIER
VIEW COURT, LLC,
Respondents.

BRIEF OF APPELLANT

DAVID J. BRITTON, WSBA# 31748
Attorney for Appellant
Rainier View Court Homeowners Association, Inc.

BRITTON LAW OFFICE, P.S.
2209 North 30th Street, Suite 4,
Tacoma, WA 98403
Tel: (253) 383-7113
Fax: (253) 627-5822
brittonlaw@comcast.net

TABLE OF CONTENTS

Table of Cases	p. 3
Table of Statutes and Ordinances	p. 5
A. <u>Statement of the Case</u>	p. 7
B. <u>Assignments of Error and Issues Pertaining to Assignments of Error</u>	
Standard of Review	p. 13
Preservation of Error	p. 14
<u>Assignment of Error No. 1:</u> The trial court improperly held that the Plat of Rainier View Court, a PDD, or the Hearing Examiner decision, or the “surrounding circumstances” created and conveyed an easement to the residents of Rainier View Court, Phase III.	
<u>Issues Related to Assignment of Error No. 1:</u>	
a. An easement is an interest in real property, and any conveyance thereof must comply with the statute of frauds	p. 15
b. The intent of the grantor of an interest in real property to grant an easement cannot be shown by parol evidence	p. 17
<u>Assignment of Error No. 2:</u> The trial court improperly relied on the decision of the Pierce County Hearing Examiner as controlling legal authority in deciding legal and equitable claims between private parties on summary judgment.	

Issues Relating to Assignment of Error No. 2:

- a. The Trial Court Relied On The Hearing Examiner's Decision As Legally Binding on the Parties. p. 20
- b. The Superior Court, Not the Hearing Examiner, Has Jurisdiction Over Actions for Declaratory Relief Under Ch. 7.24 RCW p. 21
- c. A County Hearing Examiner is Without Subject-Matter Jurisdiction to Decide Legal or Equitable Issues p. 22

Assignment of Error No. 3:

The trial court improperly ignored, and dismissed, Plaintiff/Appellant Rainier View Court HOA's breach of fiduciary duty claim on summary judgment/reconsideration, despite the Homeowners' production of evidence more than sufficient to create an issue of material fact with regard to this issue.

Issues Relating to Assignment of Error No. 3:

- a. The Homeowners stated a cause of action against Defendants in their Complaint for breach of Defendant's fiduciary duty as HOA Director, and raised the issue again for the trial court in its Motion for Reconsideration. p. 25
- b. The Defendants, as the moving party on summary judgment, had the burden of showing that there were no issues of material fact, and Defendants were entitled to judgment as a matter of law, as to *all* Plaintiff's claims, not just the one Defendants addressed in their Motion. P. 26

- c. The Homeowners presented evidence in support of their breach of fiduciary duty claim sufficient to create an issue of material fact as to that claim; the trial court's grant of summary judgment to Defendants, and denial of the Homeowners' Motion for Reconsideration, were therefore inappropriate. p. 27

C. Conclusion p. 30

ALPHABETICAL TABLE OF CASES

<u>Case Name and Citation</u>	<u>Where Cited in Brief (Page)</u>
<i>Anderson v. Farmers Ins. Co.</i> , 83 Wn. App. 725, 923 P.2d 713 (1996)	14, 26
<i>Beebe v. Swerda</i> , 58 Wn. App. 375, 793 P.2d 442 (1990)	16
<i>Berg v. Ting</i> , 125 Wn.2d 544, 886 P.2d 564 (1995)	16
<i>Brust v. McDonald's Corp.</i> , 34 Wn. App. 199, 660 P.2d 320 (1983)	19
<i>Chaussee v. Snohomish County</i> , 38 Wn. App. 630, 689 P.2d 1084 (1984)	21, 22, 23, 24
<i>Dalosio v. Peninsula Land Co.</i> , 43 N.J. Super. Ct. 79, 127 A.2d 885	29
<i>Family Medical Bldg., Inc. v. DSHS</i> , 104 Wn.2d 105, 702 P.2d 459 (1985)	26
<i>Frye v. King County</i> , 151 Wn. 179, 275 P. 547 (1929)	18
<i>HJS Development co. v. Pierce County</i> , 148 Wn. 2d 451, 61 P.3d 1141 (2003)	23

ALPHABETICAL TABLE OF CASES (Continued)

<u>Case Name and Citation</u>	<u>Where Cited in Brief (Page)</u>
<u>Hiatt v. Walker Chevrolet Co.</u> , 120 Wn.2d 57, 837 P.2d 618 (1992)	26
<u>In re Jurisdiction of Hearing Examiner</u> , 135 Wn. App. 312, 144 P.3d 345 (2006)	23
<u>Kane v. Klos</u> , 50 Wn.2d 778, 314 P.2d 672 (1957)	24, 29
<u>Key Design, Inc. v. Moser</u> , 138 Wn.2d 875, 983 P.2d 653 (1999)	14
<u>McPhaden v. Scott</u> , 95 Wn. App. 431, 975 P.2d 1033 (1999)	16
<u>Marquis v. City of Spokane</u> , 130 Wn.2d 97, 922 P.2d 43 (1996)	26
<u>Martin v. Siegel</u> , 35 Wn.2d 223, 212 P.2d 107 (1949)	16
<u>McDonald Industries v. Rollins Leasing Corp.</u> , 95 Wn.2d 909, 631 P.2d 947 (1981)	20
<u>Meinhard v. Salmon</u> , 249 N.Y. 458, 164 N.E. 545	21
<u>Moore v. Clarke</u> , 157 Wn. 573, 289 P. 520 (1930)	16
<u>Newcomer v. Masini</u> , 45 Wn. App. 284, 724 P.2d 1122 (1986)	14
<u>Nielson v. Spanaway General Medical Clinic</u> , 135 Wn. 2d 255, 956 P.2d 312 (1998)	13

ALPHABETICAL TABLE OF CASES (Continued)

<u>Case Name and Citation</u>	<u>Where Cited in Brief (Page)</u>
<i>Panorama Village Condo. Owners' Ass'n v. Allstate Ins. Co.</i> , 144 Wn.2d 130, 26 P.3d 910 (2001)	19
<i>Selby v. Knudson</i> , 77 Wn. App. 189, 890 P.2d 514 (1995)	18, 19
<i>State ex rel Graham v. Northshore School Dist.</i> , 99 Wn.2d 232, 66 P.2d 38 (1983)	21
<i>State v. Munson</i> , 23 Wn. App. 522, 597 P.2d 440 (1979)	23
<i>Viking Properties, Inc. v. Holm</i> , 155 Wn.2d 112, 118 P.3d 322 (2005)	13
<i>Wilson v. Steinbach</i> , 98 Wn. 2d 434, 656 P.2d 1030 (1982)	14
<i>York v. Wahkiakum School Dist. No. 200</i> , 163 Wn.2d 297, 178 P.3d 995 (2008)	13

TABLE OF STATUTES, ORDINANCES, AND COURT RULES

<u>Statute or Rule</u>	<u>Where Cited in Brief (Page)</u>
RCW 2.08.030	21
RCW 7.24.010	21
RCW 24.03.040	28

TABLE OF STATUTES, ORDINANCES, COURT RULES (Cont.)

<u>Statute or Rule</u>	<u>Where Cited in Brief (Page)</u>
RCW 24.03.127	28
RCW 61.24.070	24
RCW 64.04.010	16
RCW 64.04.020	16
PCC (Pierce County Code) 1.22.050	24
PCC 1.22.080(B)	23
SCC (Snohomish County Code) 2.02.040	23
RAP 2.4 (c) (3)	14
CR 56(c)	13
CR 59(a)	34

A. STATEMENT OF THE CASE

Rainier View Court Homeowners Association, Inc. (“Homeowners”), the Plaintiffs in a Pierce County Superior Court action entitled Rainier Court Homeowners Association, Inc. v. Edward W. Zenker and “Jane Doe” Zenker, Pierce County Superior Court No. 08-2-07179-6, appeal from the trial court’s March 27, 2009 grant of summary judgment in favor of Defendants Edward and “Jane Doe” Zenker, and the court’s subsequent denial on April 24, 2009 of the Homeowners’ Motion for Reconsideration.

The lawsuit from which appeal is taken is based on certain acts by Defendant Edward W. Zenker, (“Zenker”), who was at all relevant times the President of Rainier View Court Homeowners Association (“HOA”), Inc. It is believed that Mr. Zenker, along with his Wife Penny Zenker and a certain Ray Schaffer, were the three Directors of Rainier View Court HOA, Inc. Mr. Zenker is the developer of the Plat of Rainier View Court, a P.D.D. (Declaration of Edward W. Zenker in Support of Defendant's August 4, 2008 Motion for Summary Judgment, CP at 38-40).

The Plat was developed in three phases; Phases I and II consist of single-family homes in a gated community. Zenker intended Phases I and II to be a covenanted community with collective responsibility for common areas; he therefore recorded a "Dedication of Protective

Covenants, Easements¹, Conditions and Restrictions" ("CC&Rs") for Rainier View Court Phase I on September 11, 2002, and a second set of CC&Rs for Rainier View Court Phase II on September 4, 2003. The CC&Rs provide for the creation of a Rainier View Court Homeowners Association, control of which was to be turned over to the Homeowners after a certain number of homes had been sold. Zenker, along with his wife and Mr. Schaffer, served as Directors of the HOA until as recently as October 21, 2007, when Zenker transferred control of the HOA to the Homeowners. (August 22, 2008 Declaration of Caroline Tesch-Smith, CP at 206-09). Neither the original nor the amended CC&Rs for Phases I and II contain any provisions regarding Phase III and its future² residents. (Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, filed August 22, 2008, CP at 77-187).

While still President and Director of Rainier View Court Homeowners Association, Inc., Zenker expressly granted the residents of Phase III, along with "their guests, invitees, successors, and assigns," a perpetual easement for *use* of the community park, also known as "Tract B" of Rainier View Court Phase I. ("Grant of Easement for Community

¹ Zenker's September 11, 2002 "Dedication of Covenants Easements, Conditions and Restrictions" for Rainier View Court did *not* include the "Grant of Easement for Community Park" which is at issue in this case. That easement was recorded separately, on August 28, 2007, almost five years later.

² At this time Phase III has yet to be developed.

Park," dated August 23, 2007 and recorded August 23, 2007 under Pierce County Auditor's Recording No. 200708280719, Exhibit A to First Amended Complaint for Declaratory Relief, CP at 363-65). The Grant of Easement recites no consideration received by the Homeowners in return for the right to use the community park, or the Homeowners' assumption of the obligation to maintain it for others. *Id.*

Mr. Zenker granted the easement to Phase III in order to satisfy an administrative requirement that had been imposed upon him by the Pierce County Department of Planning and Land Services ("PALS"). (*See* September 28, 2007 Letter from David Rosenkranz, Assistant Director, PALS, Exhibit I to Plaintiff's Response in Opposition to Summary Judgment, CP at 372-461). In a letter to current Homeowners, President Caroline Tesch-Smith, Mr. Rosenkranz explains that PALS had required Mr. Zenker to "provide a legal mechanism" to ensure that Phase III residents would have use of the community park (Tract B). Mr. Rosenkranz cites as authority for this requirement Finding No. 10 (Page 7) of the May 11, 2000³ Report and Decision of Pierce County Hearing

³ Defendants have repeatedly argued that, if Plaintiffs were aggrieved by the May 11, 2000 decision of the Hearing Examiner, their only recourse was to file a Motion for Reconsideration (within *7 days* of the decision: PCC 1.22.130); or a Land Use Petition (within *21 days*: RCW 36.70C.040(3)). This would have been a bit difficult for the Homeowners: construction of homes in the Rainier View Court development did not even begin until after the Plat was recorded – *in 2002*, considerably longer than 21 days after the decision was issued. The current residents of Rainier View Court obviously purchased their homes after the Plat was recorded.

Examiner Stephen K. Causseaux, Jr., which (in PALS' view) requires that the community park (Tract B) be available for use by residents of Phase III. (In fact, Finding 10 says no such thing – it only *mentions* the Tract B park as one of the elements satisfying the County's open-space requirements for the development). (Report and Decision of Hearing Examiner Causseaux, Exhibit B to August 4, 2008 Declaration of Jill Guernsey, CP at 291-305).

The Homeowners filed their original Complaint for Declaratory Relief on April 14, 2008 (CP at 3-14), and an Amended Complaint for Declaratory Relief on February 27, 2009 (CP at 354-65). In their Amended Complaint, the Homeowners allege that Defendant Zenker lacked authority to grant the purported express easement over Tract B to the Phase III homeowners or residents, (CP at 359:10-12), and that Zenker, as its Director, breached the fiduciary duty he owed to the HOA. (CP at 360:8-11).

Defendants moved for summary judgment on February 25, 2009. Their legal arguments, as set forth in their Memorandum in Support of the Motion (CP at 44-74) address the validity or invalidity of the easement only; the breach of fiduciary duty claim is not addressed. Defendants essentially argue that Zenker's express grant of easement was superfluous, because the Plat of Rainier View Court, a PDD, and/or the Hearing

Examiner's decision approving the application for the Plat, conveyed *per se* a valid easement in and over the Tract B Park, from the Phase I and II Homeowners as grantors, to the future owners or occupants of Phase III as grantees. *Id.*

At the March 27, 2009 hearing on Defendant's Motion for Summary Judgment, the court did not address the Homeowners' breach of fiduciary duty claims. Instead the trial court, Judge Lisa Worswick, presiding, granted summary judgment in favor of Defendants, on the following grounds:

[T]he recorded Plats [sic] of Rainier View Court, viewed in light of the Hearing Examiner's decision . . . granted the owners or residents in phase 3 of the Plat an easement to use the park designated on the face of the Plat as Tract B for recreational purposes

(Order Granting Defendants' Motion for Summary Judgment, CP at 495:19-23). The trial judge further clarified her rationale in her March 27, 2009 oral ruling from the bench on the Motion:

The Hearing Examiner's decision is clear. I don't find that it's ambiguous at all. I find it's very clear. I find that [approval of] the PDD would never have been granted [by Pierce County], except for the use of Tract B by all of the residents.

. . .

I'm not sure that . . . the HOA would have had any right to exclude the residents of Phase III *because they would be bound by the Hearing Examiner's decision* that the park is there for the purpose of every single resident . . .

(RP at 29:24-30:3; RP at 30:6-17) (emphasis added). On April 3, 2009, the Homeowners moved for reconsideration of the trial court's grant of summary judgment, raising both the easement-invalidation and the fiduciary duty claims. (CP at 497-506). The trial court denied the Homeowners' motion for reconsideration at a hearing on April 24, 2009. (CP at 523-24). This appeal followed.

III. LEGAL ARGUMENT

The relief requested by the Homeowners in their Complaint was: (1) a declaratory judgment invalidating a purported easement granted for no consideration by Defendant Zenker, in his capacity as President of Rainier View Court Homeowners Association, Inc., to third parties (i.e., residents of Phase III of Defendants' real estate development, who are not, and will not be, members of the HOA); and (2) an action for reasonable attorney's fees and postjudgment interest for Defendants' breach of their fiduciary duties as officers and/or directors of Rainier View Court HOA, Inc. (First Amended Complaint, CP at 361:4-11). Neither of these causes of action has the slightest thing to do with administrative land-use decisions, or the law of plats and development permitting. Neither can be decided by a County hearing examiner or a County administrative subagency with limited authority over development permitting.

STANDARD OF REVIEW

This is an appeal from a grant of summary judgment by the trial court. An order granting summary judgment is reviewed de novo. York v. Wahkiakum School Dist. No. 200, 163 Wn.2d 297, 302, 178 P.3d 995 (2008).

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to *any* material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); Nielson v. Spanaway General Medical Clinic, 135 Wn. 2d 255, 261, 956 P.2d 312 (1998); CR 56(c). In reviewing the trial court’s grant of summary judgment, the Court of Appeals must review all facts and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 119, 118 P.3d 322 (2005). A motion for summary judgment should only be granted if, from all the evidence, viewed in a light most favorable to the nonmoving party, reasonable persons could reach but one

conclusion. *Wilson v. Steinbach*, 98 Wn. 2d 434, 437, 656 P.2d 1030 (1982).

PRESERVATION OF ERROR

This appeal is taken from the trial court's March 27, 2009 Order Granting Defendant's Motion for Summary Judgment, *and* its April 24, 2009 Order Denying Plaintiff's Motion for Reconsideration of Order Granting Defendant's Motion for Summary Judgment. (Notice of Appeal to Court of Appeals, CP at 525:16-21). A timely filed Motion for Reconsideration preserves the underlying summary judgment for review on appeal. RAP 2.4(c)(3); *Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P.2d 1122 (1986).

Furthermore, an issue that does not depend on new facts and is closely related to an issue previously raised, may be preserved for appellate review by a timely motion for reconsideration. *Anderson v. Farmers Ins. Co.*, 83 Wn. App. 725, 734, 923 P.2d 713 (1996). Both the issues raised by the Homeowners in their Summary Judgment briefing, and those raised by the Homeowners in their subsequent Motion for Reconsideration, have therefore been preserved for appellate review.

ASSIGNMENT OF ERROR NO. 1:

The trial court improperly held that the Plat of Rainier View Court, a PDD, created and conveyed an easement to the residents of Rainier View Court, Phase III.

ISSUES RELATED TO ASSIGNMENT OF ERROR NO. 1:

- a. **An Easement Is An Interest in Real Property, and Any Conveyance Thereof Must Comply With The Statute of Frauds**

This case has to do primarily with an easement for use of the Tract B Community Park (or lack thereof). Defendants have argued, and the trial court held, that the Plat of Rainier View Court created an easement on and across Tract B for the future residents of Phase III of the development:

[T]he court finding that: (1) there are no issues of material fact; (2) the recorded Plats [sic] of Rainier View Court, a PDD . . . granted the owners and/or residents in phase 3 of the Plat an easement to use the park designated on the face of the Plat as Tract B for recreational purposes

(Order Granting Defendants' Motion for Summary Judgment, CP at 495:19-23). While a recorded plat may include a valid grant of an easement, the Plat of Rainier View Court did not.

An easement is an interest in real property; as such, an express grant of an easement must comply with the statute of frauds, which provides that “every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.” RCW 64.04.010; *McPhaden v. Scott*, 95 Wn. App. 431, 434-35, 975 P.2d 1033 (1999); *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995). Deeds must be “in writing, signed by the party to be bound thereby, and acknowledged.” RCW 64.04.020; *McPhaden*, 95 Wn. App. at 435. Furthermore, such a grant of easement must include “words which clearly show the intention to give an easement.” *Id.*, (quoting *Beebe v. Swerda*, 58 Wn. App. 375, 379, 793 P.2d 442 (1990)). Even in a case where a dotted line on a plat map was held to convey a valid easement, the line was at least marked “sewer easement.” *McPhaden*, 95 Wn. App. at 435; *Moore v. Clarke*, 157 Wn. 573, 578, 289 P. 520 (1930).

The Plat of Rainier View Court has only this to say about the “Tract B Park:”

TRACT “B” PARK TO BE CONSTRUCTED WITH PHASE I

(Plat of Rainier View Court, Exh. A to Declaration of Jill Guernsey, CP at 289). This language does not even begin to satisfy the requirements of the Statute of Frauds, or the most basic requisites of a valid deed. It does not mention an easement, or a right to use of the Tract B Park, and does not purport to convey anything to anyone. Under these circumstances, there is no way this Plat can be said to convey *any* rights in real property, and it certainly does not convey any right or interest in Tract B. The Plat does not dispose of any rights of the parties in this matter; it was error for the trial court to rely on it in granting Defendants' Motion for Summary Judgment.

b. The intent of the grantor of an interest in real property to grant an easement cannot be shown by parol evidence

In making its ruling on Defendants' Motion for Summary Judgment, the trial court held that a grant of easement could be inferred, *inter alia*, from "all surrounding circumstances." (Order Granting Defendants' Motion for Summary Judgment, CP at 495:21) (*see also* RP at 29:24-30:3). The only circumstance under which "surrounding circumstances" could be relevant to the trial court's decision is a finding by the trial court that the written instrument or instruments conveying the

easement were ambiguous. *See, e.g., Selby v. Knudson*, 77 Wn. App. 189, 194-95, 890 P.2d 514 (1995). But language granting an easement must first be *there* before it can be ambiguous.

While it is true, as Defendants argued before the trial court, that “the intention of the dedicator controls in construing a plat,” *Selby*, 77 Wn. App. at 194, it is equally true that “[t]he intention of the dedicator is to be adduced from the plat itself, where possible.” *Id.*; *Frye v. King County*, 151 Wn. 179, 182, 275 P. 547 (1929).

The first essential of a dedication is the intention of the owner of the land to dedicate it, and such intention is usually shown on the plat. *The contrary intention cannot be shown by something hidden in the mind of the land owner.*

Selby, 77 Wn. App. at 194 (emphasis added) (quoting *Frye*, 151 Wn.2d at 182). This is an apt description of the purported “dedicatory intent” of Mr. Zenker with respect to the Plat of Rainier View Court (or of the Hearing Examiner in his decision): no trace of a dedication appears on the face of the documents (see CP at 289-90; CP at 291-305). We are meant to take his word for it.

“If the plat is unambiguous, the intent, as expressed in such plat, cannot be contradicted by parol evidence.” *Selby*, 77 Wn. App. at 194. The Plat of Rainier View Court is in fact unambiguous – it unambiguously

does not contain any dedication of an easement. Appellant does not conceded that the Plat is ambiguous in this respect; however, for the sake of argument, the language in the Plat cited above is only “ambiguous” if its terms are “uncertain or capable of being understood as having more than one meaning.” *Selby*, 77 Wn. App. at 195; *Brust v. McDonald’s Corp.*, 34 Wn. App. 199, 207, 660 P.2d 320 (1983); *Panorama Village Condo. Owners’ Ass’n v. Allstate Ins. Co.*, 144 Wn.2d 130, 137, 26 P.3d 910 (2001). It is hard to imagine how one could find uncertainty, or a second meaning, in the language from the Plat pertaining to Tract B:

TRACT “B” PARK TO BE CONSTRUCTED WITH PHASE I
(Plat of Rainier View Court, Exh. A to Declaration of Jill Guernsey, CP at 289). The “plain meaning” of this language is to set forth *when* the park will be built, and as part of what phase – that’s it. Nothing could be further from a grant of an easement. It was error for the trial court to rely on this language, or on unspecified “surrounding circumstances,” to construe a grant of easement.

ASSIGNMENT OF ERROR NO. 2:

The trial court improperly relied on the decision of the Pierce County Hearing Examiner as controlling legal authority in deciding legal and equitable claims between private parties on summary judgment.

ISSUES RELATING TO ASSIGNMENT OF ERROR NO. 2:

a. **The Court Did Rely On The Hearing Examiner's Decision As Legally Binding on the Parties.**

The trial court makes it quite clear that it is in effect relying on, and following, the May 11, 2000 Report and Decision of the Pierce County Hearing Examiner approving Defendants' application for preliminary approval of the Plat of Rainier View Court *as legal precedent which the trial court was bound to follow* in rendering its decision in the Homeowners' action for a declaratory judgment with regard to their private property rights:

[T]he recorded Plats [sic] of Rainier View Court, viewed in light of the Hearing Examiner's decision . . . granted the owners or residents in phase 3 of the Plat an easement to use the park designated on the face of the Plat as Tract B for recreational purposes

(Order Granting Defendants' Motion for Summary Judgment, CP at 495:19-23). Even more indicative of the trial court's reliance on the Hearing Examiner's decision is the trial judge's March 27, 2009 oral ruling from the bench:

The Hearing Examiner's decision is clear. I don't find that it's ambiguous at all. I find it's very clear. I find that [approval of] the PDD would never have been granted [by Pierce County], except for the use of Tract B by all of the residents.

...

I'm not sure that . . . the HOA would have had any right to exclude the residents of Phase III *because they would be bound by the Hearing Examiner's decision* that the park is there for the purpose of every single resident . . .

(RP at 29:24-30:3; RP at 30:6-17) (emphasis added). The trial court's reliance on the decision of a County hearing examiner as binding legal precedent from which it could not deviate, constitutes a clear error of law. The Hearing Examiner has no jurisdiction to decide general legal issues between private parties to a civil lawsuit.

b. The Superior Court, Not the Hearing Examiner, Has Jurisdiction Over Actions for Declaratory Relief Under Ch. 7.24 RCW.

The Uniform Declaratory Judgments Act, Ch. 7.24 RCW, authorizes "courts of record"⁴ to "declare rights, status, and other legal relations" between parties. RCW 7.24.010; *State ex rel Graham v. Northshore School Dist.*, 99 Wn.2d 232, 240, 66 P.2d 38 (1983). "The declaration of legal rights and interpretation of legal questions is the province of the courts and not of administrative agencies." *Graham*, 99 Wn.2d at 240. Even the County Council itself does not have general jurisdiction to consider all legal and equitable issues. *Chaussee v. Snohomish County*, 38 Wn. App. 630, 639, 689 P.2d 1084 (1984). The

⁴ "Courts of record" are Superior Courts. RCW 2.08.030; *State v. Puapuaga*, 164 Wn.2d 515, 524, 192 P.3d 360 (2008).

Hearing Examiner and PALS were thus without authority to reorder the *legal* relations between the parties to this dispute. While either of these subagencies has the authority to condition the granting of a permit to Mr. Zenker on his compliance with County land-use regulations, including open-space requirements, the County can no more order Mr. Zenker to give away property rights lawfully belonging to another in order to *achieve* such compliance, than it can order him to set fire to two of the residents' houses and create a park from the newly-empty lots.

c. **A County Hearing Examiner is Without Subject-Matter Jurisdiction to Decide Legal or Equitable Issues.**

In *Chaussee v. Snohomish County*, 38 Wn. App. 630, 689 P.2d 1084 (1984), a real-estate developer appealed an administrative decision of the Snohomish County Planning Department to the County Hearing Examiner. Among the developer's issues were "due process, effective date of ordinance, . . . and estoppel." *Chaussee*, 38 Wn. App. at 633. The Hearing Examiner found that these issues were beyond the scope of his authority. *Id.*, at 633-34. The County Council later upheld the Hearing Examiner's decision, and the developer appealed.

The Court of Appeals held that "administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise *only* those powers conferred either expressly or by necessary

implication." Chaussee, 38 Wn. App. at 636 (emphasis added) (*quoting State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979)). In the case of the Pierce County Hearing Examiner, PCC 1.22.080(B) enumerates (and so, under Chaussee, strictly limits) the Hearing Examiner's jurisdiction to land-use matters, and certain enumerated non-land-use matters expressly governed by County ordinances. PCC 1.22.080(B) (*see attached copy of Ordinance*); HJS Development Co. v. Pierce County, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003) (authority of Pierce County Hearing Examiner is limited to that authority granted by statute and County ordinance). There is absolutely nothing in the Pierce County Code that confers authority on a County hearing examiner or administrative agency to rule on general legal issues.

Under like circumstances, the Chaussee court held that the hearing examiner was "without jurisdiction" to consider equitable issues, and that "[h]is determination is limited to an administrative proceeding to determine whether or not a particular piece of property is subject to a county land ordinance." Chaussee, 38 Wn. App. at 638; *see also In re Jurisdiction of Hearing Examiner*, 135 Wn. App. 312, 321-22, 144 P.3d 345 (2006). The Court of Appeals in Chaussee also noted that the hearing examiner was not, under SCC 2.02.040, required to be an attorney, "and

would lack the legal expertise to handle such questions." *Id.* Similarly, PCC 1.22.050 makes legal training *optional* for a hearing examiner:⁵

The Examiner shall have such training and experience as will qualify the Examiner to conduct administrative or quasi-judicial hearings utilizing land-use and other regulatory codes and must have expertise in planning, and *should have knowledge or experience in at least one* of the following areas: environmental sciences, law, architecture, economics or engineering.

PCC 1.22.050 (emphasis added). The Court of Appeals' reasoning applies to all general legal issues not expressly delegated to the hearing examiner by the Council, and the *Chaussee* holding applies *directly* to equitable issues such as Plaintiff's second cause of action, for breach of fiduciary duty by a corporate officer, because such an action sounds in equity. *Kane v. Klos*, 50 Wn.2d 778, 786, 314 P.2d 672 (1957).

We believe that *Chaussee* controls this dispute, and that the court erred in relying on the Hearing Examiner's decision to decide the purely legal and equitable issues raised by Plaintiff.

⁵ The fact that Mr. Causseaux happens to be a licensed attorney does not change the analysis – the plain language of PCC 1.22.050 shows that the Council does not *require* the hearing examiner to be law-trained, and in and of itself strongly implies that the Council never intended that its hearing examiner should rule on general legal issues.

ASSIGNMENT OF ERROR NO. 3:

The trial court improperly ignored, and dismissed, Plaintiff/Appellant Rainier View Court HOA's breach of fiduciary duty claim on summary judgment/reconsideration, despite the Homeowners' production of evidence more than sufficient to create an issue of material fact with regard to this issue.

ISSUES RELATING TO ASSIGNMENT OF ERROR NO. 3:

- a. **The Homeowners stated a cause of action against Defendants in their Complaint for breach of Defendant's fiduciary duty as HOA Director, and raised the issue again for the trial court in their Motion for Reconsideration.**

The Homeowners' Complaint clearly states a cause of action against Defendant Edward Zenker for violating his fiduciary duty as a director of the HOA by conveying property rights to non-HOA members without consideration, and imposing a burden on HOA members, for his own personal gain. (First Amended Complaint, CP at 359:10-360:2; CP at 360:8-11). The breach of fiduciary duty claim was raised by the Homeowners in their Motion for Reconsideration. (CP at 243-44).

Unfortunately, neither Defendants, nor the trial court, addressed the Homeowners' breach of fiduciary duty claim, either on summary judgment or on reconsideration. However, this does not change the fact that the breach of fiduciary duty claim was raised on reconsideration; it is therefore preserved for appeal. *Anderson v. Farmers Ins. Co.*, 83 Wn. App. 725, 734, 923 P.2d 713 (1996).

b. **The Defendants, as the moving party on summary judgment, had the burden of showing that there were no issues of material fact, and Defendants were entitled to judgment as a matter of law, as to all Plaintiff's claims, not just the one Defendants addressed in their Motion.**

On summary judgment, the moving party (in this case the Defendants) had the burden of showing the absence of any issue of material fact. The burden then shifts to the nonmoving party to establish specific and material facts to support each element of their claims. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996); *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65-66, 837 P.2d 618 (1992). In this case, not only have Defendants failed to meet their burden of showing an absence of any issue of material fact on one of the Homeowners' two

claims: they failed even to address this claim in their Motion for Summary Judgment. (CP at 317-49).

Furthermore, the trial court did not address the Homeowners' breach of fiduciary duty claim either, even when it was directly raised by the Homeowners in their Motion for Reconsideration. The Homeowners were at least entitled to notice and an opportunity to present evidence in support of this claim before it was summarily (and possibly inadvertently) dismissed by the trial court. Even if the breach of fiduciary claim is ultimately to be dismissed, it must be dismissed on the merits after presentation of evidence and a full hearing.

c. **The Homeowners presented evidence in support of their breach of fiduciary duty claim sufficient to create an issue of material fact as to that claim; the trial court therefore erred in granting summary judgment to Defendants, and denying the Homeowners' Motion for Reconsideration.**

As pointed out in the Homeowners' Motion for Reconsideration, the undisputed evidence in this case shows, at the very least, that Mr. Zenker engaged in self-dealing with respect to the grant of an easement on Tract B to Phase III of the Plat of Rainier View Court. At a time when

Mr. Zenker was still a Director and officer of the HOA, a Washington non-profit corporation, he deeded a property interest belonging to that corporation, to-wit, a nonexclusive easement for use of the Tract B community park, to Rainier View Court LLC, a limited liability company owned and controlled by that same Mr. Zenker and his wife, as the owner of the undeveloped Tract III. (See Declaration of Edward W. Zenker, CP at 40:6-13).

Under RCW 24.03.040, Mr. Zenker's actions as a corporate director and officer of Rainier View Court HOA, Inc., in giving away a valuable property right of the Homeowners collectively, and conversely, imposing a financial burden on the Homeowners with no corresponding benefit, were *ultra vires* in that said actions violated the statutory duties of a corporate director to act in good faith and in the best interests of the corporation. RCW 24.03.127; RCW 64.38.025(1).

The same evidence also shows that Mr. Zenker breached his fiduciary duties to the Homeowners while still a corporate officer of the HOA. Corporate officers are fiduciaries. Kane, 50 Wn.2d at 784. As such, the law holds them to "something stricter than the morals of the market place. Not honesty alone, but the punctillio of an honor the most sensitive, is then the standard of behavior." Id., at 785 (quoting Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (Cardozo, J.)). Corporate directors

likewise "owe loyalty not only to the majority of stockholders, or to the minority, but to all of them, *represented by the corporate entity*. To disregard the rights of either group, *or of the corporation as such* - even for a moment – is a violation of their fiduciary obligation." *Kane, id.* (emphasis added) (*quoting Dalosio v. Peninsula Land Co.*, 43 N.J. Super. Ct. 79, 127 A.2d 885, 891).

Certainly, the admitted *gifting* by a corporate officer and director of property rights belonging to the corporation, to an LLC owned and controlled by that same officer and director, is at the very least a breach of an officer or director's fiduciary duty to the corporate entity. A grant of summary judgment in favor of someone who has engaged in such behavior, to the detriment of each and every one of the 178 Homeowners of Rainier View Court and their families, at least creates an issue of material fact with regard to that Director's breach of fiduciary duty. The trial court erred in ignoring this issue, erred in ignoring the evidence submitted in support thereof and the further evidence contained in the numerous declarations on file in the case, and erred in granting summary judgment for Defendants despite the existence of an issue of material fact.

D. CONCLUSION

For the reasons set forth above, Appellant Rainier View Court Homeowners Association, Inc. asks the Court of Appeals to REVERSE the trial court's March 27, 2009 Order Granting Defendants' Motion for Summary Judgment, and REMAND this matter back to the trial court for further proceedings in accordance with the opinion of the Court of Appeals.

RESPECTFULLY SUBMITTED this 9th day of September, 2009.

BRITTON LAW OFFICE, P.S.

by:



DAVID J. BRITTON, WSBA# 31748
*Attorney for Appellant Rainier View Court
Homeowners Association, Inc.*

ATTACHMENTS:

1. PCC 1.22.080
2. March 27, 2009 Order Granting Defendants' Motion for Summary Judgment, Pierce County Superior Court Cause No. 08-2-07179-6

ATTACHMENT 1

Chapter 1.22

PIERCE COUNTY HEARING EXAMINER CODE

Sections:

- 1.22.010 Purpose.**
- 1.22.020 Application of Hearing Examiner Code.**
- 1.22.030 Definitions.**
- 1.22.040 Hearing Examiner – Creation.**
- 1.22.050 Examiner – Qualifications.**
- 1.22.060 Selection of Examiner.**
- 1.22.070 Examiner – Conflict of Interest and Freedom from Improper Influence.**
- 1.22.080 Examiner – Powers and Duties.**
- 1.22.090 Appeals of Administrative Decisions to the Examiner.**
- 1.22.100 Departmental Report to the Examiner.**
- 1.22.110 Public Hearing.**
- 1.22.120 Examiner's Decision.**
- 1.22.130 Reconsideration.**
- 1.22.140 Appeal of Examiner's Decision.**
- 1.22.150 Examiner's Report to Council.**
- 1.22.160 Multiple Applications – Consolidation.**
- 1.22.170 Severability.**

1.22.010 Purpose.

The Council recognizes the need to provide efficient and effective hearing procedures which integrate land use and non land use matters. The purpose of this Chapter is:

- A. To provide orderly procedures for those matters considered within the Pierce County Hearing Examiner system; and
 - B. To create a single appeal system for license, land use, and administrative appeals.
- (Ord. 94-112S § 1 (part), 1994)

1.22.020 Application of Hearing Examiner Code.

The provisions of the Pierce County Hearing Examiner Code, as set forth in this Chapter, shall supersede any conflicting references to Hearing Examiner procedures in the Pierce County Code. (Ord. 94-112S § 1 (part), 1994)

1.22.030 Definitions.

As used in this Chapter, the following terms shall have the following meanings:

- A. "Aggrieved" means adversely affected by proceedings before or decisions of the Examiner, Council, or any Pierce County department.
- B. "Council" means the Pierce County Council.
- C. "County" means Pierce County, together with any of its subdivisions, departments, or agencies.
- D. "Examiner" means the Office of the Pierce County Hearing Examiner or Deputy Examiner.

- E. "Land Use Advisory Commission" means an advisory commission established by the County Council and adopted in Title 2 of the Pierce County Code for the purpose of making recommendations to the Hearing Examiner on applications for proposed development as set forth in PCC 2.45.110 C.
 - F. "Land use matters" includes the items enumerated in subsection 1.22.070 B.1.
 - G. "May" means optional and permissive, and does not impose a requirement.
 - H. "New evidence" means any and all evidence that is submitted or received after the date the Examiner closes the official record. The official record is closed at the end of the public hearing, unless the Examiner specifically allows the official record to remain open for a time certain.
 - I. "Newspaper of general circulation" means a newspaper which is regularly distributed in (i) one of the four geographic areas identified by the Planning Department and (ii) the area where the subject of the application has been proposed.
 - J. "Non land use matters" includes those items enumerated in subsection 1.22.070 B.2.
 - K. "Official record" means the written and oral information, exhibits, reports, testimony and other evidence submitted in a timely manner and accepted by the Examiner.
 - L. "Parties of record" means those persons or entities who:
 - 1. Testified before the Examiner; or
 - 2. Listed their names on a sign-up sheet, which shall be available during the Examiner's hearings; or
 - 3. Specifically advised the Planning Department or Examiner by individual written letter of their desire to become a party of record; or
 - 4. The applicant or appellant and any of the applicant's or appellant's agents.
 - M. "Person" means any individual, partnership, corporation, association, Pierce County department, or public or private organization.
 - N. "Planning Department" means the Pierce County Planning and Land Services Department, the Director thereof, or his or her designee.
 - O. "Shall" means mandatory and imposes a requirement.
- (Ord. 2004-78 § 1 (part), 2004; Ord. 94-112S § 1 (part), 1994)

1.22.040 Hearing Examiner – Creation.

The office of Pierce County Hearing Examiner is hereby created. (Ord. 94-112S § 1 (part), 1994; Ord. 90-154 § 1 (part), 1990; Res. 20489 § 1, 1978)

1.22.050 Examiner – Qualifications.

The Examiner shall have such training or experience as will qualify the Examiner to conduct administrative or quasi-judicial hearings utilizing land use and other regulatory codes and must have expertise and experience in planning, and should have knowledge or experience in at least one of the following areas: environmental sciences, law, architecture, economics or engineering. (Ord. 94-112S § 1 (part), 1994; Ord. 90-154 § 1 (part), 1990; Res. 20489 § 1, 1978)

1.22.060 Selection of Examiner.

The Examiner shall be selected by the Council. (Ord. 94-112S § 1 (part), 1994; Ord. 90-154 § 1 (part), 1990; Res. 20489 § 1, 1978)

1.22.070 Examiner – Conflict of Interest and Freedom from Improper Influence.

- A. The Appearance of Fairness Doctrine, as set forth in Chapter 42.36 RCW, shall apply to the Examiner and Deputy Examiners.

- B. No Councilmember, County official, or any other person shall interfere or attempt to interfere with the Examiner or Deputy Examiners in the performance of their designated duties.

(Ord. 96-19S § 4 (part), 1996; Ord. 95-112 § 1 (part), 1995; Ord. 95-1 § 1, 1995; Ord. 94-112S § 1 (part), 1994)

1.22.080 Examiner – Powers and Duties.

- A. The Examiner shall have the power to appoint Deputy Hearing Examiners subject to confirmation by the Council. The Deputy Hearing Examiners shall assist the Examiner in the performance of the duties conferred upon the Examiner and shall have all the powers and duties of the Examiner.
- B. The Examiner shall receive and examine available relevant information, including environmental documents, conduct public hearings, cause preparation of the official record thereof, prepare and enter findings of fact and conclusions of law, and issue final decisions for:
1. Land Use Matters.
 - a. Applications for zone changes or amendments to the classification of specific parcels of land; provided that area-wide amendments to the Zoning Atlas, amendments to the text of the Zoning Code, community plans, Countywide Comprehensive Plan initiated in whole or part by the County Council, County Departments or Planning Commission are not within the Examiner's jurisdiction.
 - b. Appeals of decisions or orders of a County Administrative Official under the Site Development Regulations.
 - c. Applications for preliminary and final plats.
 - d. Applications for, and major amendments to, Planned Development Districts – PDDs.
 - e. Application for Transfer of Development Rights.
 - f. Applications for Shoreline Management Substantial Development Permits, Variances, Conditional Use Permits and Nonconforming Use Permits pursuant to the Shoreline Management Use Regulations.
 - g. Appeals from any final administrative order or decision of the Planning and Land Services Department in the administration, interpretation or enforcement of the Pierce County Code.
 - h. Appeals contesting the approval or denial of short plats and large lot divisions.
 - i. Applications for, and major amendments to, variances, conditional use permits, public facility permits, permits for the alteration, or expansion or replacement of a nonconforming use.
 - j. Amendments to plats.
 - k. Appeals from the following environmental determinations:
 - (1) final threshold determinations, including revised threshold determinations;
 - (2) determinations of adequacy of final environmental impact statements and supplemental environmental impact statements;
 - (3) the exercise of SEPA substantive authority to condition or deny actions.
 - l. Petitions for Plat Vacations, Alterations, Time Extensions, Revocations, Modifications, Reclassifications.
 - m. Appeals of Cease and Desist Orders.
 - n. Applications for Youth Cabaret licenses.
 - o. Wetland variances and appeals of any order or decision of the Planning Department under the Pierce County Wetland Management Regulations.

- p. Reasonable use exceptions and any order or decision of the Planning Department under the Critical Areas and Natural Resource Lands Regulations.
 - q. Applications for a request for removal of development moratorium pursuant to Title 18H, Development Regulations – Forest Practices.
 - r. Appeals of decisions or orders of the Planning Department under Title 18H, Development Regulations – Forest Practices.
 - s. Any other land use matters assigned by the Council to the Examiner.
2. Non Land Use Matters.
- a. Appeals of issuance, denials, revocations, or suspensions of business licenses. (Title 5)
 - b. Appeals of potentially dangerous dog declarations. (6.07)
 - c. Appeals of Notice of Violation and Abatement (Public Nuisances) (8.08)
 - d. Appeals of Notice of Violation and Abatement (Public Nuisance Vehicles). (8.10)
 - e. Appeals of denials of Solid Waste Handling Facility designations. (8.30)
 - f. Referrals from City of Tacoma's Human Rights and Human Services Department regarding complaints alleging violations of Fair Housing Regulations. (8.68)
 - g. Appeals from decisions of County in the administration or enforcement of the Road and Storm Drainage Design and Construction Standards. (Title 17A)
 - h. Appeals from decisions of Public Works Director regarding underground utility installations. (11.22)
 - i. Sewer Assessment Protests. (13.20)
 - j. Appeals from administrative decisions or orders of the Building Official or Fire Marshal regarding the Uniform Construction Codes. (Title 17C)
 - k. Appeals from decisions of the Building and Fire Codes Board of Appeals regarding water mains, fire hydrants, and fire flow standards. (Title 17C)
 - l. Appeals from any final administrative order or decision of the Planning Department in administration, interpretation or enforcement of the Pierce County Code.
 - m. Any other non land use matter assigned by the Council to the Examiner by ordinance.
 - n. Latecomers Agreement appeals (13.10.080)
 - o. Appeals concerning impact fees for parks, schools and roads. (4A)
 - p. Appeals of denials of permits for parades, motorcades, runs and assemblies. (12.44)
- C. Subpoena Authority. The Examiner shall have the authority to issue subpoenas compelling the appearance of witnesses and the production of documents.
- 1. A subpoena issued by the Hearing Examiner may be served by any person 18 years of age or over, competent to be a witness, but who is not a party to the matter in which the subpoena is issued.
 - 2. Each witness subpoenaed by the Hearing Examiner as a witness shall be allowed the same fees and mileage as provided by law to be paid witnesses in courts of record in Washington State.
 - 3. If a person fails to obey a subpoena issued by the Hearing Examiner in an adjudicative proceeding, or obeys the subpoena but refuses to testify or produce documents when requested concerning a matter under examination, the Hearing Examiner or attorney issuing a subpoena may petition the Pierce County District Court for enforcement of the subpoena. The petition shall be accompanied by a copy

of the subpoena and proof of service, shall set forth in what specific manner the subpoena has not been complied with, and shall request an order of the court to compel compliance. Upon such petition, the court shall enter an order directing the person to appear before the court at a time and place fixed in the order to show cause why the person has not obeyed the subpoena or has refused to testify or produce documents. A copy of the court's show cause order shall be served upon the person. If it appears to the court that the subpoena was properly issued, and that the particular questions the person refused to answer or the requests for production of documents were reasonable and relevant, the court shall enter an order that the person appear before the Hearing Examiner at the time and place fixed in the order and testify or produce the required documents, and on failing to obey this order the person shall be dealt with as for contempt of court.

- D. **Decision of Hearing Examiner.** When acting upon any of the above specific applications or appeals, the Examiner shall have the power to attach any reasonable conditions found necessary to make a project compatible with its environment and to carry out the goals and policies of the applicable comprehensive plan, community plan, Shoreline Master Program, or other relevant plan, regulations, Federal or State law, case law or Shorelines Hearing Board decisions. In his/her decision, the Hearing Examiner shall consider the recommendations of the applicable Land Use Advisory Commission, the applicant, Planning and Land Services staff, and all other comments and recommendations, and the reason such recommendations are included or not included in the decision.
- E. The Examiner shall prescribe rules and regulations for the conduct of public hearings before the Examiner and shall provide a copy of the rules and regulations to the Council and to each County Department. The Examiner's rules may also include, but are not limited to: provisions for the issuance of preliminary decisions in complex cases; authorization for parties to propose draft findings of fact; and criteria for determining "expert witnesses" establishment of prehearing conference procedures and mediation sessions.

(Ord. 2008-61 § 4, 2008; Ord. 2008-88 § 2, 2008; Ord. 2006-60s § 5, 2006; Ord. 2005-95 § 4, 2005; Ord. 2004-78 § 1 (part), 2004; Ord. 2003-32s2 § 3 (part), 2003; Ord. 2002-133 § 1, 2003; Ord. 98-87 § 2, 1998; Ord. 96-19S § 4 (part), 1996; Ord. 94-112S § 1 (part), 1994; Ord. 90-154 § 1 (part), 1990; Res. 22571 § 2, 1980; Res. 21132 § 2, 1978; Res. 20489 § 1 (part), 1978)

1.22.090 Appeals of Administrative Decisions to the Examiner.

- A. **Right to Appeal.** Any person aggrieved, or any officer, department, board, agency, district or bureau of the County or State affected by any decision of an administrative official, as set forth in Section 1.22.080 B., may file a notice of appeal.
- B. **Time Limits.**
 - 1. Land Use Matters.
 - a. A notice of appeal, together with the appropriate appeal fee, shall be filed at the Planning and Land Services Department within 14 days of the date of an Administrative Official's decision. In the case of an appeal of a Determination of Nonsignificance requiring a comment period which is issued concurrently with a final decision, the appeal period shall be extended to 21 days.
 - b. The Administrative Official shall prepare a written report with findings of fact and conclusions of law regarding the administrative decision.
 - c. Staff reports shall be filed with the Examiner, mailed to the applicant and appellant and made available to the public at least 10 working days prior to the

ATTACHMENT 2



08-2-07179-6 31770896 ORGSJ 03-30-09



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

RAINIER VIEW COURT
HOMEOWNERS ASSOCIATION, INC., a
Washington non-profit corporation,

NO. 08-2-07179-6

Plaintiff,

**ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

vs.

EDWARD W. ZENKER and "JANE DOE"
ZENKER, individually and the marital
community they together compose,

Defendants.

THIS MATTER having come before the court on the motion for summary judgment by the defendants EDWARD W. ZENKER and "JANE DOE" ZENKER, individually and the marital community they together compose; defendants appearing through their attorneys, Davies Pearson, P.C., by James R. Tomlinson; plaintiff appearing through her attorney, Dalton Lee Pence; the court having heard the arguments of the parties on March 27, 2009, and having reviewed the records and files herein, including:

1. Defendants' Motion for Summary Judgment filed February 25, 2009;
2. Defendant's Memorandum in Support of Motion for Summary Judgment filed February 25, 2009;

**ORDER GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

Page 1 of 3

jn / s:\xxxx\134xx\134472\pleadings\order - sj.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 3. Declaration of Edward D. Zenker in Support of Defendants' Motion for
2 Summary Judgment filed February 25, 2009;

3 4. Declaration of Jill Guernsey filed February 25, 2009;

4 5. Declaration of Robert Jenkins in Support of Defendants' Motion for
5 Summary Judgment filed February 25, 2009;

6 6. Plaintiff's Response in Opposition to Defendants' Motion for Summary
7 Judgment filed March 13, 2009;

8 7. Declaration of Dalton Lee Pence filed March 13, 2009;

9 8. Declaration of Caroline Tesch-Smith filed March 13, 2009;

10 9. Plaintiff's motion to the strike re: (1) the declaration of Jill Guernsey, (2)
11 the declaration of Robert Jenkins, and (3) the Declaration of Edward W. Zenker filed
12 March 13, 2009;

13 10. Defendants' memorandum in Reply to Plaintiff's Response to Motion for
14 Summary Judgment to Dismiss Plaintiff's Complaint filed March 20, 2009.

15 12. Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike
16 filed March 23, 2009;

17 13. Reply in Support of Plaintiff's Motion to Strike filed March 26, 2009; and

18 12. Order on Motion to Strike;

19 and the court finding that: (1) there are no material questions of fact; (2) the recorded
20 Plats of Rainier View Court, a PDD, viewed in light of ^(u)the plat applicant's intent, the
21 Hearing Examiner hearing examiner's decision, and all surrounding circumstances,
22 granted the owners and/or residents in phase 3 of the Plat an easement to use the park
23 designated on the face of the Plat as Tract B for recreational purposes; and (3) the
24 plaintiff's Complaint should be dismissed as a matter of law, it is hereby:
25

26 **ORDER GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

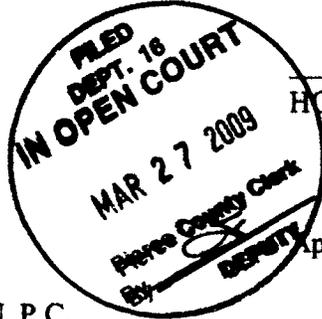
Page 2 of 3

jit - s:\xxxx\134xx\134472\pleadings\order - sj.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT - P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 ORDERED, ADJUDGED AND DECREED that defendants' Motion for
2 Summary Judgment is granted. Plaintiff's complaint is dismissed with prejudice.

3 DATED this 27 day of March, 2009.



4
5 Lisa Worswick
6 HONORABLE LISA WORSWICK

7
8 Presented by:

9 DAVIES PEARSON, P.C.

10 James R. Tomlinson
11 James R. Tomlinson, WSBA #14559
12 Attorney for Defendants

8 Approved as to form:

9
10 Dalton Lee Pence
11 Dalton Lee Pence, WSBA #30339
12 Attorneys for Plaintiffs

13
14
15
16
17
18
19
20
21
22
23
24
25
26 **ORDER GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

Page 3 of 3

jr / s:\xxxx\134xx\134472\pleadings\order - sj.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

FILED
COURT OF APPEALS
DIVISION II

09 SEP -9 AM 11:06

STATE OF WASHINGTON
BY 
DEPUTY

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

RAINIER VIEW COURT HOMOWNERS'
ASSOCIATION, INC., a Washington
non-profit corporation,

Plaintiff,

vs.

EDWARD W. ZENKER AND "JANE
DOE" ZENKER, individually, and the
marital community they together compose,

Defendants.

Superior Court
No. 08-2-07179-6
Court of Appeals
No. 39187-2-II

CERTIFICATE OF SERVICE

I, David J. Britton, hereby declare and certify that on September 9, 2009, I did personally serve true and correct copies of the following pleadings in the above captioned matter:

1. BRIEF OF APPELLANT
2. VERBATIM TRANSCRIPT OF PROCEEDINGS

on opposing counsel James R. Tomlinson at the following address: Davies Pearson, 920 Fawcett Avenue, Tacoma, Washington 98401-1657. I affirm under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED this 9 day of September, 2009, at Tacoma, Washington.



DAVID J. BRITTON