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1. **SUMMARY OF THE CASE**

Appellant, Rainier View Court Homeowners Association, is an association of the owners in Phases 1 and 2 of the Plat of Rainier View Court, a 3 phase Planned Development District. Respondent Edward Zenker is a managing member of Rainier View Court, LLC, the developer of the Plat of Rainier View Court, and was the president of the Rainier View Court Homeowners Association during the development period.

The Homeowners Association sought a declaratory judgment that Zenker, while President of the Association, wrongfully and without authority recorded an easement granting the owners and residents in Phase 3 the right to use the community park located in Phase 1 of the Plat. Zenker requested dismissal of the Association's Complaint on summary judgment because the recorded Plats of Rainier View Court granted an easement to use of the park to all three phases of the Plat, making the later easement signed by Zenker immaterial.

The trial court found on summary judgment that there were no material questions of fact, and that the recorded Plats of Rainier View Court, viewed in light of the Hearing Examiner's decision and all other surrounding circumstances, granted the owners and/or residents in Phase 3 an easement to use the park. (CP 495). Any question of fact regarding the authority of Mr. Zenker to sign the easement was therefore not "material"

because Phase 3 had the preexisting right to use the park pursuant to the recorded Plat. (CP 495). The court dismissed the plaintiff's complaint. (CP 496). The Homeowner's Association now appeals.

## **2. STATEMENT OF THE CASE**

Edward Zenker is a managing member of Rainier View Court, LLC, the developer of the Plat of Rainier View Court, a 29.97 acre Planned Development District (P.D.D.) in Spanaway. (CP 279, 290). The Plat of Rainier View Court was approved May 11, 2000, by Hearing Examiner Stephen K. Causseaux, Jr. for development in 3 phases. (CP 279, 290-302) Phases 1 and 2 were approved for a total of 179 residential lots for single family homes. (CP 279, 290). Phase 3 was approved as a single lot with 64 multifamily units. (CP 279, 290). Tract "B" identified as "Park" on the face of the Preliminary Plat approved by the Hearing Examiner is located within the boundaries of Phase 1, however, the Park adjoins all three phases of the Plat. (CP 314). All of the single family homes in Phases 1 and 2 were completed and sold to private individuals prior to the commencement of this action. (CP 279). Construction of the Phase 3 multifamily units has not yet begun. (CP 279).

The Plat of Rainier View Court was approved by the Hearing Examiner as a Planned Development District ("P.D.D."). (CP 290). A P.D.D. is a development that combines single family and multifamily

housing units in a single subdivision in order to achieve the required mix of residential density and open space necessary for plat approval. (CP 298-299) Each part of this P.D.D., including the single family homes, the multifamily units, and the open space were necessary to obtain the approval of the development as a whole. (CP 294-302) The property was located within the urban growth area and was zoned a High Density Residential (HRD) District. (CP 294-295). The density required by that zoning was achieved by including the multifamily housing. (CP 296). The open space created in part by the Park was necessary for the approval of both the single family and multifamily phases of the Plat. (CP 296). The Hearing Examiner approved the P.D.D. as a “combined single family and Multi-family subdivision”. (CP 298-299). The relevant portions of the Findings, Conclusions, and Decision of the Examiner are as follows:

FINDINGS:

5. ... The applicant requests preliminary plat and planned development district (PDD) approval to allow subdivision of the site into 179 single family residential lots and one lot containing 64 multi-family units for a total of 243 dwelling units on 180 lots. ...

6. ... All properties for substantial distances in all directions from the site are located in the urban growth area and residential areas are designated either Moderate Density Single Family (MSF) or High Density Residential District (HRD). The Council designated the entire site and property abutting the northeast and southwest corners HRD.

7. ... [T]he Pierce County Code (PCC) sets forth the Density and Dimension Tables which authorize a maximum base density of 20 dwelling units per acre and a maximum density of 25 dwelling units per acre upon approval of a PDD in the HRD classification. ... Thus the applicant, without submitting to the public hearing process, could construct apartments at a density of 20 dwelling units per acre on the site. However, subdivision of the site into individual lots requires approval of a preliminary plat and a public hearing.

8. ... Access to the single family residential portion of the plat is provided from both 176<sup>th</sup> St. E, and 22<sup>nd</sup> Ave. E. The multi-family lot will have its own access onto 22<sup>nd</sup>. The plat map shows a storm drainage tract adjacent to 22nd Ave. E. and a community park in the southeast portion of the plat. Amenities include street trees on internal plat roads, sidewalks/paved pedestrian pathways along one side of internal plat roads and on 176<sup>th</sup> St. and 22<sup>nd</sup> Ave., and a six foot, solid board fence around the perimeter.

9. ... The Land Use Element of the comprehensive plan provides that the overall density in UGAs should be high enough to provide urban level facilities and services at a reasonable cost per unit, thereby making affordable housing choices available. The applicant proposes an overall density of 8.13 dwelling units per acre, slightly over the minimum six dwelling units per acre required by the HRD zone, and substantially less than the base density of 20 dwelling unit per acre authorized by the HRD zone.

10. The plat proposes 2.76 acres of open space in the nature of a community park, open space areas, and a storm drainage tract which calculates to 9% of the site. Even through the total amount of open space is less than normal, the reduced density and single family residential yards will provide additional open space. The applicant proposes to improve the Tract B park with an outdoor play structure for children, a sport court with basketball hoop, benches, and picnic tables

...

CONCLUSIONS:

...

5. The proposed preliminary plat will serve the public use and interest by providing an attractive location for a combined single family and multi-family subdivision, and therefore should be approved subject to the following conditions:

...

2. A landscape plan, prepared by a Washington State registered landscape architect or Washington State certified professional nurseryman, shall be submitted to Planning and Land Services for review and approval, prior to final plat approval. ... The landscape plan shall also include the park area, Tract B. All planting shall be installed prior to final plat approval.

...

30. The applicant shall improve the community park in accordance with Exhibit "4".

DECISION:

The request for preliminary plat and planned development district approval for Rainier View Court is hereby granted subject to the conditions contained in the conclusions above.

(CP 290-304).

The Final Plat of Phase 1 was approved by Pierce County Planning and Land Service ("PALS") and recorded on September 11, 2002. (CP 393). The "Dedication" on the face of the Plat of Phase 1 provides as follows:

*We the undersigned owners of the herein described property dedicate these lots to the purchasers thereof. All roads are private and are not dedicated to the public. Each lot owner shall have an easement for ingress, egress and utility purposes and any other purposes not inconsistent with its use as a roadway over and across all the private roads shown on the plat. ...*

We hereby convey an easement for ingress, egress and utilities over, under, and across the private roads as shown hereon to the present and future lot owners of existing and future phases of the Plat of Rainier View Court, for all purposes not inconsistent with the use of a private road and utility easement.

(CP 393). (*Emphasis supplied*) The Dedication is separately signed and acknowledged by the grantor, Rainier View Court, LLC. (CP 393).

Tract "B" is identified as a "Park" on the face of the recorded Plat of Phase 1. (CP 398). Note 9 of the recorded Plat of Phase 1 provides "All lot owners shall have a 1/86<sup>th</sup> undivided interest in Tracts "B", "E", and "F" for taxing purposes with said tracts to be deeded to the Rainier View Court Homeowner's Association for ownership". (CP 399). However, except as set forth in the "Dedication" above, the plat does not expressly provide that any owner of any lot in any phase of the Plat has the right to use the park. A Declaration of Protective Covenants, Easements, Conditions and Restrictions of Rainier View Court was recorded the same day as the Plat of Phase 1. (CP 403). Those Covenants, however, do not discuss the park and do not expressly grant any owner in any phase of the Plat the right to use the park. (CP 403 - 422).

Planning and Land Services (PALS) approved a landscape plan for the park in September 2002 as part of the final plat approval for Phase 1. (CP 457). A construction bond guaranteeing the park's completion was posted by the developer with the final plat approval of Phase 1 in September 2002. (CP 457). The final plat for Phase 2 was approved by PALS and recorded on August 9, 2003. (CP 424, 457). The park was completed and the park bond was released in 2004. (CP 457). The final plat for Phase 3 was approved by PALS and recorded on July 17, 2007. (CP 440, 457). The final Plats for phases 2 and 3 contain the same signed and acknowledged "Dedication" as in the Plat of phase 1, stating "We the undersigned owners of the herein described property dedicate these lots to the purchasers thereof." (CP 424, 440)

In early 2007, Rob Jenkins, an employee of the Pierce County Planning Department, was contacted by a resident of Rainier View Court who objected to the future residents of Phase 3 using the park located in Phase 1 of the Plat. (CP 311). Rob Jenkins discussed the complaint with Jill Guernsey, the Deputy Prosecuting Attorney representing the Pierce County Planning Department. (CP 312). Jill Guernsey reviewed the Hearing Examiner's Decision and formed the opinion that the "community park" referred to in the Examiner's decision was for the benefit of the residents of all three phases of the development. (CP 287). Ms. Guernsey

was concerned that the lot owners within Phases 1 and 2 might try to exclude the residents of Phase 3 from using the Park. (CP 287). Ms. Guernsey asked Rob Jenkins to worked with the developer and his agent to address that concern. (CP 279, 287).

Rob Jenkins asked the developer to record an easement specifically granting the owners of both phase 2 and 3 a perpetual nonexclusive easement to use the park located on Tract "B" within Phase 1. (CP 278, 312). On August 27, 2007, Edward Zenker formally incorporated the Rainier View Court Homeowners Association as a Washington non-profit corporation. (CP 280). On August 28, 2007, pursuant to the Planning Department's request, Mr. Zenker, as the President of the Rainier View Court Homeowners Association, recorded a "Grant of Easement for Community Park" granting the "owners of Rainier View Court Phase II and Rainier View Court Phase III, their guests, invitees, successors and assigns, a perpetual nonexclusive easement in all of Tract "B" of Rainier View Court, a P.D.D. - Phase I ... for ingress, egress, and use of the same as a community park, subject to any covenants, conditions and restrictions of record". (CP 280-285).

In April 2008 the Homeowners Association filed a Complaint against Mr. Zenker for Declaratory Relief. (CP 3-10). The Association later amended its complaint to add the developer, Rainer View Court,

LLC, as a defendant. (CP354-365). The Complaint alleged that Mr. Zenker did not have the “authority, capacity and/or power to grant [the easement]” in question, and prayed for an order declaring that the easement signed by Mr. Zenker is void and that the “residents or occupants of Rainier View Court Phase III do not have any right of access and/or use of Tract B”. (CP 8, 10).

Mr. Zenker filed a motion for summary judgment seeking dismissal of the Association’s Complaint because the recorded Plat of Rainier View Court granted an easement allowing all three phases of the Plat to use the park, making the later easement signed by Mr. Zenker immaterial. After reviewing the documents submitted and hearing the argument of counsel, the trial court entered an Order finding that:

(1) there are not material questions of fact; (2) the recorded Plats of Rainier View Court, a PDD, viewed in light of the Hearing Examiner ... decision, and all surrounding circumstances, 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; and (3) the plaintiff’s Complaint should be dismissed as a matter of law... .

(CP 495). Based on those findings, the court entered an order dismissing the plaintiff’s Complaint. (CP 496). The Association now appeals.

### 3. ARGUMENT

- A. The dedication in the plat of Rainier View Court, a P.P.D. – Phase 1, satisfied the statute of frauds, and conveyed an easement in the park “to the purchasers thereof”.**

As stated by the Association, an easement is an interest in land and its express creation must comply with the statute of frauds requiring conveyances to be by deed. RCW 64.04.010; *Berg v Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). A valid deed must be in writing with the acknowledged signature of the grantor. RCW 64.04.020. While no particular words are necessary to create an easement, the language must show an intent to grant with terms that are certain and definite. *Beebe v. Swerta*, 58 Wn. App. 375, 379, 793 P.2d 442 (1990).

The requirements of the statute of frauds may be satisfied by a recorded plat. See RCW 58.17.165; *M.K.K.I., Inc v. Krueger*, 135 Wn. App. 647, 653, 145 P.2d 411 (2006). RCW 58.17.165 provides that:

[A]ny dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intend by the donors or grantors as aforesaid.

A private easement in land may be created by including a dedication or grant in a recorded plat. RCW 58.17.165; *M.K.K.I., Inc*, 135 Wn. App. at 653.

Here, the recorded final Plat of “Rainier View Court, a P.D.D. – Phase 1”, of which “Tract B” designated as “Park” is a part, contains a “Dedication” which provides “We the undersigned owners of the herein described property dedicate these lots to the purchasers thereof.” (CP 393) The final recorded plats of Rainier View Court, a P.D.D. – Phases 2 and 3 each contain the exact same dedication. (CP 424, 440). The Dedication on the recorded plat for each phase is separately signed and acknowledged by the grantor, Rainier View Court, LLC. (CP 393, 424, 440). These dedications satisfy the statute of frauds. *See M.K.K.I., Inc v. Krueger*, 135 Wn. App. 647, 653, 145 P.2d 411 (2006).

The “Park”, being a lot described in the plat of “Rainier View Court, a P.D.D.” was dedicated to “the purchasers thereof” by the recorded plat. (CP 393, 398). In *The Rainier Avenue Corp. v. Seattle*, our Supreme Court said “absent an intent to convey a fee, a [plat] dedication for public park purposes creates a public easement only.” *Id.*, 80 Wn2d 362, 366, 494 P.2d 996 (1972). There is no reason the rule should be different for a private park. The dedication of a private park in a plat conveys an easement in the park in favor of the dedicator’s intended grantees. *See The Rainier Avenue Corp.*, 80 Wn2d at 366; *Also see Finch v. Matthews*, 74 Wn.2d 161, 167, 443 P.2d 833 (1968). As such, the

dedication on the face of the Plat of Rainier View Court, a P.D.D. – Phase 1, conveyed an easement in the park to “the purchasers thereof”.

**B. The intended grantee of the park dedication was all of the owners in all of the phases of the plat of Rainier View Court, a P.D.D., not just the owners in phase 1.**

When interpreting the meaning of a plat dedication, the intention of the plat dedicator controls. *Selby v. Knudson*, 77 Wn. App. 189, 194, 890 P.2d. 514 (1995); *Rainier Avenue Corp.*, 80 Wn2d at 366. “The intention of the dedicator is to be adduced from the plat itself, where possible, as that furnishes the best evidence thereof”. *Selby*, 77 Wn. App. at 194. In construing a plat a reviewing court is not limited to considering the words of the dedication alone; lines and designations appearing on the plat are also to be considered. *Rainier Avenue Corp.*, 80 Wn2d at 366.

If the plat is unambiguous, the intent, as expressed in such plat, cannot be contradicted by parol evidence. *Selby*, 77 Wn. App. at 194. If, however, the plat is ambiguous “surrounding circumstances may be considered to determine the dedicator’s intention”. *Id.*, 77 Wn. App. at 194. A plat is ambiguous when “its terms are uncertain or capable of being understood as having more than one meaning.” *Id.*, 77 Wn. App. at 194-195.

Here, the dedication provides “We the undersigned owners of the herein described property dedicate these lots to the purchasers thereof.”

An examination of both the face of the plat and the surrounding circumstances establishes that the dedicator of the plat intend the phrase “the purchasers thereof” to refer to all of the purchasers in all three phases of the plat, not just the purchasers in Phase 1.

1. **The Face of the Plat.** Rainier View Court is a singular P.D.D. development containing both single family and multi family units. Each page of the recorded plats clearly indicates that each phase is part of a comprehensive PDD; i.e. each page of the plat of phase 1 is entitled “RAINIER VIEW COURT, A P.D.D. – PHASE 1” (CP 396-400). Phase one is only the first phase of a larger P.D.D. development. The phrase “the purchasers thereof” in the Dedication refers to the whole of “Rainier View Court, a P.D.D.”, not just “Phase 1” which is only a portion thereof.

The 1.23 acre Park is the central amenity to the entire residential P.D.D. development. (CP 314, 398). It is clearly labeled as a “Park”. (CP 314, 398). All three phases of the plat abut the park. (CP 314, 398). The owners in all three phases are given an express easement over the private roadways in Phase 1, a gated community. (CP 393). Phase 3 has direct vehicular access onto 22<sup>nd</sup> Avenue East, a public thoroughfare. (CP 441). Phase 3 has no need to use the internal private roads in phase 1, except to access the amenities therein, including the park.

Just as important is what is not on the plat. Nothing in the plat dedication shows an intent to restrict the park to use by the owners in phase 1 alone. In *Neighbors & Friends of Viretta Park v. Miller*, the court considered whether a plat dedication of a public way was intended to limit its use to pedestrian traffic only. The court said “to place a restriction on the use of dedicated property, the dedicators must use language clearly indicating the intent to do so.” *Id.*, 87 Wn. App. 361, 375; 940 P.2d 286 (1997). The same rule should apply to the dedication of a private park. In the case at hand, if the dedicator had intended to limit the use of the park to either phase 1 or phases 1 and 2 alone, they could have expressly done so. They did not. Such a restriction should not be implied. The court should construe the language of the plat to the benefit of the community as a whole, not to the benefit of a select few that are not clearly identified.

The Association points out that Note 9 of the Plat of Phase 1 provides “All Lot owners shall have a 1/86<sup>th</sup> undivided interest in Tracts “B”, “E”, and “F” for taxing purposes with said tracts to be deeded to the Rainier View Court Homeowner’s Association for ownership”. (CP 399). This note, however, addresses only the fee ownership of Tract B; it does not address who has the right to use the park. The Association’s ownership of the park is not inconsistent with the dedicated easement allowing all three phases of the development to use the park. The right to

use of the park is determined by the intent of the plat applicant as demonstrated by the face of the plat and the surrounding circumstances. *Selby*, 77 Wn. App. at 194. The face of the plat shows that the plat applicant intended all three phases of the development to have the use of the park.

2. **The Surrounding Circumstances.** If the court finds that the face of the plat is ambiguous, the surrounding circumstances clearly demonstrate the applicant's intent, and requirement, that all three phases of the plat have use of the park. The Plat of Rainier View Court was approved by the Hearing Examiner as a Planned Development District. (CP 290-310). A residential P.D.D. is authorized by the Pierce County Code as a means to provide "one or more types of housing at densities of dwellings the same as densities permitted by the underlying zone and where all other uses shall be considered accessory, supportive, or adjunct to housing". PCC 18A.75.050(B). Various types of housing, including single family residences, condominiums, and adjoining townhomes are allowed within a single P.D.D. in order to achieve the densities required within urban growth areas (UGAs). PCC 18A.75.050(F)(2). The applicant may elect or the Examiner may require that the development of a P.D.D. be accomplished or constructed in phases. PCC 18.75.050(D).

The essence of a Residential P.D.D. is to allow various forms of housing to achieve appropriate urban densities within in a single comprehensive development supported by common amenities which are “considered accessory, supportive or adjunct to [the] housing”. PCC 18A.75.050(B) Here, the park was intended as a common amenity for all three phases. Although the phase 3 multifamily units will be the last to be constructed, and although phase 3 will be multifamily rather than single family, the owners in phase 3 are equally entitled to use the park and other amenities established for the benefit of the entire development.

The Hearing Examiner’s decision, viewed as a whole, shows that the park was a necessary amenity for development and approval of the entire P.D.D. The relevant portions of the Findings, Conclusions, and Decision of the Examiner are set forth above in the Statement of the Case. The Examiner approved the Plat of Rainier View Court as a “combined single family and multifamily subdivision”. (CP 299). Each component of the P.D.D., including the single family homes, the multifamily units, and the open space, supports the other components of the plat.

The site is designated a High Density Residential District requiring a minimum density of 6 residential units per acre. (CP 296). That density could not have been obtained but for the inclusion of the multifamily housing. (CP 296). The 2.76 acres of park and other open space within

the plat were necessary to achieve the open space requirements for the approval of both the single family and multifamily phases of the Plat. (CP 296). Throughout the Examiner's decision the P.D.D. is referred to as a single "site" and all 3 phases of the Plat are considered a single comprehensive proposal. (CP 290, 291, 295, 296). The Examiner concludes "the proposed preliminary plat makes appropriate provision for ... parks and recreation, playgrounds ... and safe walking conditions", and "will serve the public use and interest by providing an attractive location for a combined single family and multi-family subdivision" (CP 298-299).

After reviewing the Hearing Examiner's Report and Decision, the trial court said:

The Hearing Examiners decision is clear. I don't find that it's ambiguous at all. I find it's very clear. I find that the P.D.D. would never have been granted, except for the use of Tract "B" by all of the residents of that. That is just clear from the Decision.

(RP 38-39) Based on that finding the court held:

(1) there are not material questions of fact; (2) the recorded Plats of Rainier View Court, a PDD, viewed in light of the Hearing Examiner ... decision, and all surrounding circumstances, 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; and (3) the plaintiff's Complaint should be dismissed as a matter of law... .

(CP 496). Both the face of the plat and the surrounding circumstance clearly show that the plat applicant intended to dedicate use of the park to the owners within all three phases of the P.D.D. development.

**C. The trial court did not wrongfully rely on or delegate jurisdiction to either PALS or the Hearing Examiner to adjudicate the legal and equitable issues in this matter.**

Plaintiff argues that the trial court improperly relied on or delegated adjudicative authority to either the Hearing Examiner and/or Planning Land Use Services (PALS) to decide this matter. (*Appellant's Brief* at 20-24) That argument, however, is without merit. The trial court examined the circumstances surrounding the execution of the plat to determine the plat dedicator's intent, as the law provides it should. *See Selby*, 77 Wn. App. at 194. In doing so, the trial court reviewed and interpreted the Hearing Examiner's Decision approving the plat of Rainier View Court, and applied the same to the issues presented in this case. The trial court did not, however, delegate adjudicative authority over this case to the Hearing Examiner. The trial court did not rely "on the decision of the County hearing examiner as binding legal precedent from which it could not deviate". (*Appellant's Brief* at 21) The Hearing Examiner has not seen, considered, or decided anything regarding this P.D.D. since May 2000. The issues in this case were never presented to or considered by the

Hearing Examiner. The Hearing Examiner has not asserted any subject matter jurisdiction over this dispute.

*Chausee v. Snohomish County*, 38 Wn. App. 630, 689 P.2d 1084 (1984), relied on by the appellant, is not applicable to this case. *Chausee* holds that a hearing examiner's subject matter jurisdiction is limited to the authority expressly or impliedly granted the examiner by the Legislature or local legislative body. *Id.*, 38 Wn. App. at 636. That holding, however, has no application to this case. The Hearing Examiner did not assert subject matter jurisdiction in this matter. The issues decided by the trial court were never submitted to the Hearing Examiner, considered by the Hearing Examiner, or decided by the Hearing Examiner. Appellant's argument regarding subject matter jurisdiction is without merit.

**D. Mr. Zenker did not breach a fiduciary duty to the Association by recording an easement in favor of Phase 3 when Phase 3 already had an easement to use the park by virtue of the Dedication.**

Appellant argues that Mr. Zenker breached a fiduciary duty to the Association by recording a grant of easement in favor of Phase 3 which is currently owned by his company, Rainier View Court, LLC, and that the trial court erred in dismissing Appellant's claim for the same on summary judgment. (*Appellant's brief* at 27) Appellant's argument, however, is based entirely on the incorrect assumption that the Grant of Easement

recorded by Mr. Zenker granted to Phase 3 some right that Phase 3 did not already have. Appellant's brief describes the alleged wrongful act by Mr. Zenker as follows:

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 the 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.

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 virus* 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. (*Emphasis supplied*)

(*Appellant's Brief at 28*)

In fact, however, as argued above and as found by the trial court, the Dedication contained in the recorded Plat of Rainier View Court, a P.D.D. – Phase 1, conveyed to the owners in Phase 3 an easement to use the community park. (CP 496). That Plat was recorded September 11, 2002, 5 years before the Grant of Easement recorded by Mr. Zenker. (CP 393, 452). The Grant of Easement was recorded by Mr. Zenker only to make a greater public record of a right that already existed. The Grant of Easement did not convey any interest to Phase 3 that Phase 3 did not

already have. The Grant of Easement did not “deed a property interest belonging to the corporation” or “[give] away a valuable property right of the Homeowners collectively”. (*Appellant’s Brief* at 28). Mr. Zenker did not, as a matter of law, breach a duty owed to the Association by recording an instrument reflecting a right that already existed. The trial court properly dismissed Appellant’s claim for breach of fiduciary duties.

#### 4. CONCLUSION

The plat of Rainier View Court, a P.P.D. – Phase 1 contains a “Dedication” which provides “We the undersigned owners of the herein described property dedicate these lots to the purchasers thereof.” This dedication satisfied the statute of frauds, and conveyed an easement in the park, which is a lot in the plat, “to the purchasers thereof”. Both the face of the plat and the circumstances surrounding the recording of the plat clearly show that the intended grantee of the park dedication was the owners in all of the phases Rainier View Court, a P.D.D., not just the owners in phase 1. Reasonable minds could not differ. The court properly entered summary judgment.

The trial court did not wrongfully rely on the Decision of the Hearing Examiner to decide this matter. The trial court did not improperly delegate subject matter jurisdiction over this matter to either PALS or the

Hearing Examiner. Neither PALS nor the Hearing Examiner played any part in the trial court's decision on the issues presented.

The plat "Dedication" conveyed to the owners in Phase 3 the right to use the park, long prior to the Grant of Easement recorded by Mr. Zenker. Mr. Zenker did not breach a fiduciary duty to the Association by recording an easement in favor of Phase 3 when Phase 3 already had an easement to use the park by virtue of the Dedication. There are no material questions of fact. The trial court properly dismissed the Association's Complaint.

Respectfully submitted this 2<sup>nd</sup> day of October 2009.

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