

NO. 41448-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PETER T. LITTLEFAIR,
Appellant,

v.

DAVID M. SCHULZE ET UX, ET AL,
Respondents.

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

The Honorable BRIAN P. ALTMAN, Judge

AMENDED BRIEF OF APPELLANT

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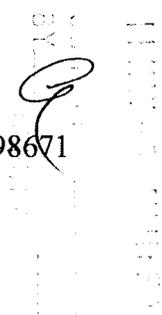


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A. ASSIGNMENTS OF ERROR

1. THE COURT ERRED IN CONCLUDING THAT GORDON ROAD IS AN EASEMENT.
2. THE TRIAL COURT ERRED IN CONCLUDING THAT GORDON ROAD WAS INTENDED TO ONLY BE A ONE-LANE ROADWAY.
3. THE TRIAL COURT ERRED IN CONCLUDING THAT GORDON ROAD ALONG LOTS 8 AND 9 WAS INTENDED TO ONLY BE “APPROXIMATELY TWELVE TO FOURTEEN FEET WIDE”.
4. THE TRIAL COURT ERRED IN CONCLUDING THAT THE FENCE DOES NOT PROJECT INTO THE ROADWAY AND DOES ALLOW USE OF THE ROADWAY CONSISTENT WITH ITS HISTORICAL USE.
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8. THE TRIAL COURT ERRED IN FINDING THAT THE ENFORCEMENT OF THE ZONING ORDINANCE WOULD WREAK HAVOC ON THE COUNTY’S ABILITY TO HAVE ANY REASONABLE USE PROCEEDINGS WHATSOEVER,

TO THEREFORE ALLOW THE COURT TO DECLINE TO ENFORCE THE CODE.

9. THE TRIAL COURT ERRED IN DENYING AN EJECTMENT AND DAMAGES.
10. THE TRIAL COURT ERRED IN CONCLUDING THAT NO NUISANCE EXISTS DUE TO THE FENCE.
11. THE TRIAL COURT ERRED IN CONCLUDING THAT NO NUISANCE EXISTS DUE TO PERSONAL PROPERTY BEING PLACED INTO THE ROADWAY.
12. THE TRIAL COURT ERRED IN CONCLUDING THAT ARTICLE VIII OF FOSTER'S ADDITION CONDITIONS AND RESTRICTIONS ARE EXTRAORDINARILY BROAD AND SO SUBJECTIVE AS TO BE ALMOST USELESS.
13. THE TRIAL COURT ERRED IN CONCLUDING THAT NEITHER THE FENCE NOR SCRAPING OF THE ROADWAY VIOLATES ARTICLE VIII OF FOSTER'S ADDITION CONDITIONS AND RESTRICTIONS.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do subdivision property owners own a fee interest or an easement interest in a roadway that was dedicated for their common use when the instruments that made that dedication, are devoid of any reference to that common roadway as an easement?
2. When substantial evidence and county ordinances indicates that a private roadway was to have two lanes, is it proper to conclude that the roadway is a single lane roadway simply based upon the testimony of one witness who is not even the common grantor of that roadway?
3. When substantial evidence and county ordinances indicates that a private roadway was to be a certain width, is it proper to conclude

that the roadway can be markedly narrowed simply based upon the testimony of one witness who is not even the common grantor of that roadway?

4. When substantial evidence and county ordinances indicates that a private roadway was to be a certain width, is it proper to conclude that a fence can be installed within that roadway based upon historical use when that use is based upon 5 years and the parties have resided and used that roadway for over 20 years without such a fence to argue over?
5. Can a fence be erected within a private roadway when county codes prohibit the placement of fences within such roadways?
6. Does a county code which prohibits the placement of fences within private roadways deny an owner of land over which a right-of-way for such a private roadway, the “best use” of that portion dedicated to such a right-of-way?
7. When no evidence supports a court’s conclusion that a nuisance per se does not exist through the existence of a fence, is it proper for such a court to conclude that no nuisance exists because of that fence?
8. When there is no evidence that supports a court’s conclusion that the enforcement of a county ordinance would wreak havoc on proceedings within that county, is it proper to decline to enforce that ordinance?
9. When a person who has interest in a private road is denied that use and enjoyment by a fence built in that roadway by another person, should that fence be removed under the ejectment statute?
10. When a fence erected within a private roadway obstructs a person who has the right to use that roadway and suffers interference in that use, does that fence present a nuisance under state statute?

11. Would the placement of personal property within a private roadway constitute a nuisance when the presence of such personal property interferes with the use of that private roadway?
12. When a private restriction in a covenant can be given reasonable application to the circumstances presented, is that restrictive covenant useless and unenforceable?
13. When the totality of the circumstances suggests that activity was done with spiteful motive, was it error to ignore the inference that otherwise excusable conduct, was done with malicious intentions?

C. STATEMENT OF THE CASE

1. The Setting:

In 1977, Leonard T. and Ruby J. Foster recorded an 18-lot subdivision called "Plat of Foster's Addition" ("Plat" hereafter) in Skamania County in Book B Page 33 of Plats and Records of Skamania County. Ex 1. The Plat locates and gives dimensions to a 40-foot wide strip of land identified as "Gordon Road (Private)".

Mr. Littlefair, the Plaintiff and Appellant herein, purchased Lots 10 and 11 of the Plat, Ex 2, from the Fosters in 1984 and 1983, respectively. Ex 2. Lot 10 is subject to a "right of way for private road designated as Gordon Road and as shown on the plat". Ex 2 page 1. Lot 11 is subject to "that portion of cul-de-sac to Gordon Road, as shown on the face of the Plat." Ex 2 page 4.

Mr. Schulze, the Defendant and Responded herein, purchased Lots 8 and 9 of the Plat in 1980 and 1987, respectively. Ex 3. Lot 8 is subject to a “40 foot right of way for private road known as Gordon Road, as delineated on the face of the Plat”. Ex 3 page 2. Lot 9 is subject to “the official Plat thereof on file and of record at Page 33 of Book B of Plats, Records of Skamania County, Washington.” Ex 3 page 4, 5, 10.

All lots in the Plat are also subject to a “Declaration of Conditions and Restrictions of Foster’s Subdivision” recorded in 1977 (“Conditions” hereafter). Ex 4. The Conditions created an easement for utilities and drainage running over the front five feet of Lots 8, 9 and 10, north of the 40-foot Gordon Road right-of-way. Ex 5.

Lots 8, 9, 10 and 11 are zoned “R2”, Ex 5 and 6.

On August 3, 2009, Mr. Littlefair demanded Mr. Schulze remove a fence and other personal property, from Gordon Road, Ex 41.

2. The Complaint

On August 31, 2009, Mr. Littlefair complained (CP 1) that:

(a) Mr. Schulze erected a permanent fence, stacked log decks, placed large boulders and would periodically place motor vehicles and other personal property, within Gordon Road; that

- (b) through the operation of heavy equipment, Mr., Schulze scraped away all road gravel and the road crown, and filled drainage ditches, to that portion of Gordon Road as it passes over lots 8 and 9; that
- (c) Mr. Schulze narrowed that portion of Gordon Road so that snow removal is severely hampered and water drainage is inadequate, and that
- (d) these actions severely hamper Mr. Littlefair's ingress and egress.

CP 1 page 3.

Mr. Littlefair pursued the following causes of action:

- (a) Ejectment per RCW 7.28.010 and rental value per RCW 7.28.150;
- (b) Damages for nuisance per RCW 7.48.010 and RCW 7.28.120;
- (c) Injunction of nuisance per RCW 7.48.020;
- (d) Enforcement of the Conditions (Ex. 4) for the nuisance;
- (e) Enforcement of the Conditions for utility and drainage easements;
- (f) Attorney fee per the Conditions; and
- (g) Any and all other statutory relief, including attorney fees.

CP 1 pages 4 and 5.

3. Pre-Trial Matters:

Mr. Littlefair filed a Trial Brief on May 24, 2010 (CP 46), briefing the fact that there is a local zoning ordinance found in Skamania County

Code (“SCC” hereafter) §21.32.050, and which, under definitions found in SCC §21.08.010, prohibits fences from being placed within easements. A copy of each is included in the Appendix. As such, Mr. Littlefair claimed nuisance per se.

4. The Bench Trial:

The bench trial was held on May 29, 2010 and July 2, 2010 (RP 1, 165), the trial court noting that this is an action in equity, CP 200.

Exhibits were entered into evidence by stipulation, RP 52-53.

a. Testimony from Mr. Dietz.

[1] Mr. Dietz has lived off Gordon Road since 2003; Gordon Road exits onto Foster Road, a public roadway, RP 17, Ex 1.

[2] Mr. Dietz lives on Lot 3, being the first lot on the left side of Gordon Road, RP 18, 19, which is a private roadway, RP 14, 21.

[3] Gordon road is 40 feet wide (RP 24) and a 25 to 30 foot wide graveled portion to drive over along Mr. Dietz’s lot (RP 14, 20);

[4] The next lot down Gordon Road adjacent to Mr. Dietz’s lot (Lot 4, Ex 1) is owned by Mr. Hurst, and its traveled portion is also between 25 and 30 feet wide. RP 20.

[5] Traffic tends to travel down the center of Gordon Road. RP 15.

[6] Towards Mr. Littlefair's property, Mr. Schulze had narrowed the road, RP 8-9, making it no longer possible for two automobiles to pass one another along that portion of the road. RP 9.

[7] Mr. Schulze would damage the roadbed by tearing off the graveled layer all the way to the bottom of the road, with equipment, RP 10.

[8] Mr. Schulze speeds down the road causing dust and disrupting the neighbors, RP 11.

b. Testimony from Mr. Russell:

[1] Mr. Russell identified Ex 7, a quote to repair that portion of Gordon Road over Lots 8 and 9 damaged by Mr. Schulze's actions, RP 28.

The cost estimate is \$2,500. RP 29.

c. Testimony from Mr. Allen:

[1] Mr. Allen lives at the second lot on the right side of Gordon Road, Lot 13. RP 36.

[2] Mr. Allen observed Mr. Schulze bulldoze snow off Gordon Road, leaving piles of scraped surface gravel from Gordon Road (RP 39).

[3] Mr. Allen observed Mr. Schulze speed up to 35mph down Gordon Road. RP 40.

[4] Mr. Allen left pot holes along his stretch of Gordon Road, to attempt to slow down Mr. Schulze's speeding habits. RP 49.

[5] Mr. Allen made observations that Mr. Littlefair drives slowly down Gordon Road, RP 49.

[6] After Mr. Allen moved onto Lot 13, he was confronted by Mr. Schulze over Mr. Allen's storing logs within the 40-foot right-of-way of Gordon Road, RP 41. This confrontation caused Mr. Allen to cut the logs up into firewood, RP 42, even though Mr. Schulze would store log decks upon Gordon Road for 3 to 4 years (RP 37).

[7] Mr. Allen's relative used to rent a home on Lot 10 from Mr. Littlefair and, at times due to the road over Lots 8 and 9, Mr. Allen needed to use a four-wheel-drive vehicle to reach that relative. RP 46.

d. Testimony from Mr. Littlefair:

[1] Mr. Littlefair owns Lots 10 and 11 of the Plat; Gordon Road is his only means of ingress and egress. RP 54.

[2] Mr. Schulze owns Lots 8 and 9 of Foster's Addition; Gordon Road crosses the southern portion of Lots 8 and 9. RP 55.

[3] When Gordon Road was built in 1977, it was graded the full 40 feet width of the right-of-way, and was still wide when Mr. Littlefair moved there, RP 74. The dimensions are shown by the "map". RP 83.

[4] In 2007, tenants move into Mr. Littlefair's rental on Lot 10, RP 81.

[5] Mr. Schulze initially erected a fence north of the 40-foot wide Gordon Road right-of-way. RP 96.

[6] Along the Gordon Road right-of-way is a utilities and drainage easement. RP 103; Ex 4; RP 104.

[7] In Ex 10, Mr. Littlefair documented a log deck, a truck and trailer, axles (Ex 37, RP 87), and fence which Mr. Schulze placed upon the Gordon Road right-of-way along Lots 8 and 9, which restricts ingress and egress for Mr. Littlefair. RP 55

[8] In Ex 11, Mr. Littlefair documented that in June, 2005, Gordon Road had a drainage ditch and no potholes, and that two automobiles could safely pass one another. RP 56.

[9] In Ex 12, Mr. Littlefair documented that Mr. Schulze placed a new fence within the Gordon Road right-of-way. RP 56.

[10] In Ex 13, Mr. Littlefair documented that Mr. Schulze placed this new fence right in the middle of Gordon Road itself. RP 57.

[11] This new fence causes snow to pile up during plowing, forcing Mr. Littlefair to hire snow blowers at added expense, since before this new fence, there was ample space to push the snow off the side. RP 103.

[12] In Ex 14, Mr. Littlefair documented that Mr. Schulze filled the drainage ditch which ran along Lots 8 and 9. RP 57.

[13] In Ex 15, Mr. Littlefair documented how Mr. Schulze blocked ingress and egress by parking a truck in Gordon Road. RP 57-58.

[14] In Ex 16, Mr. Littlefair documented his repair work to the drainage ditch in 2007, and also documented Mr. Schulze's erection of the new fence right in the middle of Gordon Road. RP 58.

[15] Mr. Littlefair photo-documented additional intrusions of the actual roadway by Mr. Schulze (Ex 17, RP 58, Ex 18, RP 59; Ex 19, RP 59).

[16] At one point, Mr. Littlefair was restricted to an 8 foot wide strip of road, for ingress and egress. RP 59.

[17] Mr. Schulze placed a black railroad tie in Gordon Road that had no reflectors, creating a serious hazard to unwary motorists. Ex 20, RP 59.

[18] Mr. Schulze continues to block Gordon Road with his trucks and machinery, as Mr. Littlefair documented in Ex 21, RP 60; Ex 22 (log decks), RP 60.

[19] Eventually, the drainage ditch along Lot 8 and 9 became non-existent, due to Mr. Schulze's deliberate actions, RP 61.

[20] Debris from cutting logs by Mr. Schulze constantly finds its way onto Gordon Road, RP 61-62; Ex 31, RP 66.

[21] In Ex 24, Mr. Littlefair documented how Mr. Schulze plowed two lanes of travel from Lot 8 to Foster Road, tossing the snow to the sides of

Gordon Road. The significance being that this demonstrates the problem caused by the new fence as it prevents the snow from being plowed off the traveled portion of Gordon Road along Lots 8 and 9. RP 62-63.

[22] The presence of the log decks caused snow plow contractors to refuse to plow snow off Gordon Road from Mr. Schulze's driveway to Mr. Littlefair's home. RP 63.

[23] Mr. Littlefair was forced to hire a snow thrower during 2008, due to the log decks preventing snow plows from removing the snow. This is an unnecessary extra cost for Mr. Littlefair. Ex 27, 28, RP 63-64.

[24] Ex 25 shows a 5 mph sign knocked over by Mr. Schulze after he plowed two automobile widths of snow, to his driveway, RP 64.

[25] Ex 26 documents the difficulty of traveling Gordon Road along Lots 8 and 9 due to Mr. Schulze's narrowing the road. RP 64.

[26] Ex 29 documented damage done by Mr. Schulze to a telephone box with his snow plow. RP 65-66.

[27] Ex 30 documents damage to Mr. Littlefair's automobile due to the conditions of Gordon Road created by Mr. Schulze's actions. RP 66.

[28] Ex 31 documents that no drainage ditch exists along Lots 8 and 9 of Gordon Road, due to Mr. Schulze's action. RP 66.

[29] Ex 32 documents that by May 24, 2010, at the intersection of Foster Road and Gordon Road, Gordon Road presents itself as a two-lane wide road, and Mr. Littlefair testified that is the present condition along that section of Gordon Road. RP 67.

[30] Ex 35 documented how another neighbor, Mr. Lee, built a fence along, but not within nor upon, the 40-foot right-of-way. RP 67.

Mr. Lee's fence is along Lots 6 and 7, and along that section of the right-of-way, the graveled portion of Gordon Road is 15 to 18 feet, with plenty of space to safely pull over to let opposing traffic through. RP 67.

[31] Ex 39 documents that due to Mr. Schulze's removal of the drainage ditch along Gordon Road, Mr. Littlefair is forced to drive through potholes, some of which are wider than an automobile. RP 69, 75.

[32] Mr. Littlefair tolerated Mr. Schulze's fence, log decks and other personal property placed deliberately onto Gordon Road or onto the right-of-way, for 5 years before bringing the present action; two years prior to bringing the present action, Mr. Littlefair tried to reason with Mr. Schulze through letters, RP 71. See also Ex 41.

[33] Years ago, Mr. Littlefair helped Mr. Schulze improve Gordon Road. Mr. Schulze would not care for improving Gordon Road along Lots

8 and 9. So Mr. Littlefair trucked rock and had equipment, including a grader, build a crown upon that portion to drain Gordon Road. RP 72.

[34] Mr. Littlefair made improvements upon Gordon Road along Lots 8 and 9, including bringing rocks and grading the crown upon the roadbed, at least 18 years before bringing the present action. RP 73.

[35] Five years before the present action, Mr. Schulze effectively destroyed the drainage on Gordon Road along Lots 8 and 9. RP 73.

[36] Three years before the present action, Mr. Schulze erected the fence in the middle of Gordon Road. RP 108.

[37] Since erecting the new fence in Gordon Road, two automobiles cannot pass one another safely. RP 75. There would be no way to tow a double-wide trailer to Lots 10 or 11. RP 84.

[38] The first driveway into Mr. Littlefair's property serves a trailer where tenants had to move out of because of the conditions caused by Mr. Schulze's actions. RP 81. They lived there for over 2 years. RP 82.

[39] The second driveway serves Lot 11. RP 81.

[40] The portion of Gordon Road along Lots 8, 9, 10 and 11 was covered by gravel, usually 12 to 14 feet wide. RP 85.

[41] The reason Gordon Road was no longer 40 feet wide in this section was due to tree growth and Mr. Schulze's actions. RP 86-88.

[42] Mr. Schulze would stand in the way of traffic, and would jump into the road to stop traffic. RP 88. He put objects in the road to force Mr. Littlefair to drive through the potholes. RP 105; Ex 10, 49.

[43] Mr. Schulze erected a phone pillar in the middle of the right-of-way. RP 89.

[44] Mr. Littlefair had to call the police on one occasion after access was restricted by Mr. Schulze. RP 90; Ex 8; RP 101. The police were called another time when Mr. Schulze made belligerent gestures towards Mr. Littlefair's fiancé and her children. Ex 9, RP 101.

e. Testimony from Mr. Schulze:

[1] When he purchased Lot 8, Gordon Road from Lot 8 towards Lot 11 was flat with no crown, RP 137; it only had about a nine-foot wide gravel spread atop it. RP 140.

[2] Gordon Road is no wider than 12 to 14 feet and he never placed a fence on the road. RP 141.

[3] He admitted placing a barricade to force traffic from going around "that big mud hole" in Gordon Road; that he erected the new fence to keep traffic from detouring around the pot holes; and that he intended to and did make a pasture out of a portion of the right-of-way, claiming he wanted people to stop driving onto that part of the right-of-way. RP 142-143.

[4] He admitted that he filled “tire rut[s]” with dirt: “we have different ideas about what’s a drainage ditch and what’s a tire rut.” RP 144.

[5] Regarding Ex 49, Mr. Schulze: “this is a picture of that little barricade we put up that time to try and keep people from driving clear out onto the shoulder of the road to go around that one chuck hole.” RP 154.

[6] Mr. Schulze admitted that he made it easier for water to flow onto the road and onto Mr. Littlefair’s property. RP 155.

[7] Mr. Schulze admits that there is traffic using Gordon Road to access Mr. Littlefair’s lots. RP 148.

[8] Mr. Schulze adamantly testified “it’s the historical use of that roadway is what he’s restricted to. And he has well established that as a single-lane road”. RP 157-158.

[9] Mr. Schulze erected the new fence in 2007; he did not get a permit, nor did he check the zoning regulations, before erecting it. RP 167.

[10] Mr. Schulze admitted that his own exhibit shows a crown on Gordon Road when he moved to Lot 8, and that he erected the fence in the Gordon Road right-of-way “to fence the pasture”. RP 168; Ex 14.

[11] Mr. Schulze admitted that his fence encloses a portion of the Gordon Road right-of-way. RP 170.

[12] On re-examination, Mr. Schulze testified that he never drove more than 10-12 miles per hour. RP 177.

f. Testimony from Mr. Hubner:

[1] Rebuttal witness Mr. Hubner lives on the other side of the Forster Road and Gordon Road intersection, Lots 17 and 18 of the Plat. RP 180.

[2] Mr. Hubner testified that Mr. Schulze often speeds down Gordon Road, picking up a dust storm, RP 180, and that Mr. Schulze almost hit a pedestrian on one occasion. RP 181.

[3] Asked whether he was aware of other incidents involving Mr. Schulze speeding down Gordon Road: “Just watching him. I listen to my neighbor complain all the time . . . it’s . . . pretty regular.” RP 181.

[4] When cross-examined by Mr. Schulze whether he reported the near hit of the pedestrian by Mr. Schulze to the police: “No. We didn’t report it to the police. We’re trying to keep things calm and quiet in our area. But I can assure you next time we will.” RP 182.

The trial court made oral rulings on August 12, 2010 (RP 197) and entered written Findings of Fact and Conclusions of Law (CP 60) and Judgment (CP 66) on October 14, 2010 (RP 211).

5. Disputed Findings of Facts and Disputed Conclusions of Law:

[1] That “there is a forty foot wide easement that crosses the Southern portion of the Defendants' lots for Plaintiff’s ingress, egress and utilities.” CP 60 Page 2 ¶3.

[2] That “Gordon Road is a means for the dominant estate to enter and leave property. It is that way in the deed and has been used that way historically. CP 60 Page 2 ¶4.

[3] That “the easement is described in the deeds as a right-of-way for private road known as Gordon Road.” CP 60 Page 2 ¶5.

[4] That “the existing Gordon Road is approximately twelve to fourteen feet wide as it crosses the Southern portion of Lots 3,4,5,6,7 and a portion of Lot 8 and the Northerly portion of Lots 12, 13 and 14.” CP 60 Page 3 ¶6.

[5] That “the existing Gordon Road is approximately 12 to 14 feet wide as it traverses the remainder of Lots 8 and 9, and the roadway portion of the easement has been used as, and designed for, use as a one-lane roadway with sufficient room for cars to pass one another”, CP 60 Page 3 ¶7.

[6] That “Gordon Road has been approximately twelve to fourteen feet wide for the previous five to six years and the road has been used in the

current fashion for that amount of time.” CP 60 Page 3 ¶8.

[7] That “there is no evidence that Gordon Road was ever intended to be used as a two lane road.” CP 60 Page 3 ¶9.

[8] That “historically, Gordon Road has been used as a one-lane road with enough room to comfortably pull a vehicle off to the side to let another car pass.” CP 60 Page 3 ¶10.

[9] That “the Defendants have erected a fence along the North side of the easement roadway, which fence does not project into the roadway and does allow use of the roadway consistent with its historical use.” CP 60 Page 3 ¶11).

[10] That “there is nothing inherently illegal about the fence erected by the Defendant.” CP 60 Page 3 ¶12.

[11] That “the fence does not interfere with the historical and primary use of Gordon Road.” CP 60 Page 3 ¶13.

[12] That “the Defendants have not abused or damaged Gordon Road by plowing or scraping the roadway.” CP 60 Page 3 ¶14.

[13] That “a court construing an instrument creating an easement must ascertain and give effect to the intention of the parties.” CP 60 Page 4 ¶3.

[14] That “the Plaintiff’s complaint for ejectment under RCW 7.28.010 does not apply to the fence.” CP 60 Page 4 ¶8.

[15] “The fence cannot be the basis for an action for damages under the nuisance statute because the fence is a legal fence.” CP60 Page 5 ¶ 9.

[16] That “the Plaintiffs complaint for nuisance under RCW 7.48 regarding personal property and log decks is not proven by a preponderance of evidence.” CP 60 Page 5 ¶10.

[17] That “Zoning laws are in derogation of common law and common law clearly allows structures under certain circumstances, such as in this case, to be within easements.” CP 60 Page 5 ¶11.

[18] That “The Plaintiffs complaint for nuisance per se under Skamania County Code 21.32.050(D)(3) does not apply because fences and other structures may exist within easements and Skamania County is laced with easements that have structures on them.” CP 60 Page 5 ¶12.

[19] That the “enforcement of the zoning ordinance Skamania County Code 2 1.32.050(D)(3) would wreak havoc on the county's ability to have any reasonable land use proceedings whatsoever, therefore, the Court declines to enforce such code.” CP 60 Page 5 ¶13.

[20] That “Article VIII of Foster's Addition covenants is extraordinarily broad and so subjective as to be almost useless.” CP 60 Page 5 ¶14.

[21] That “neither the fence nor the plowing or scraping of the roadway violate Article VIII of the covenants.” CP 60 Page 5 ¶15.

[22] That the “Defendant is enjoined from keeping logdecks on the South side of Gordon Road.” CP 60 Page 5 ¶17.

[23] That the “Defendant is enjoined from putting any private vehicles or personal property on the South side of Gordon Road.” CP 60 Page 5 ¶18.

D. ARGUMENT

Panorama Village Homeowners Ass’n v. Golden Rule Roofing, Inc., 102 Wash.App. 422, 425, 10 P.3d 417 (I, 2000):

“When the trial court has weighed the evidence, our review is limited to determining whether the court's findings are supported by substantial evidence and, if so, whether the findings support the court's conclusions of law and judgment. Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise. The party challenging a finding of fact bears the burden of showing that it is not supported by the record.” *Citations omitted.*

“In determining the facts established by the proofs, the findings of the trial court should receive consideration, but cannot be allowed to control when in the opinion of this court they are contradicted by a clear preponderance of the evidence.” *Citations omitted, Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 574, 343 P.2d 183 (1959).

“[I]n equity cases, the requirement with reference to predicating specific assignments of error on the findings of fact should not be enforced with the same strictness as in actions at law. No findings of fact are required in an equity action. When findings are made, they are considered and given great weight, but are not binding on the supreme court. The case comes up on appeal for trial de novo, and it is the duty of this court to

make an independent examination of all the evidence in order to determine what findings should have been made.” *Citations omitted*, Bedgisoff v. Morgan, 24 Wash.2d 971, 971, 167 P.2d 422 (1946).

Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc., 21 Wash.App. 194, 197, 584 P.2d 968 (II, 1978):

“The fact that a court designates its determination as a "finding" does not make it so if it is in reality a conclusion of law. Under Washington practice, a conclusion of law mislabeled as a finding, will be treated as a conclusion. . . . a finding of fact was defined as an assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.” *Citations omitted*.

Questions of law are reviewed de novo. DuVon v. Rockwell Int'l, 116 Wash.2d 749, 753, 807 P.2d 876 (1991).

Landmark Development, Inc. v. City of Roy, 138 Wash.2d 561, 573, 980 P.2d 1234 (1999):

“The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. First, we must determine if the trial court's findings of fact were supported by substantial evidence in the record. If so, we must next decide whether those findings of fact support the trial court's conclusions of law. Willener v. Sweeting, 107 Wash.2d 388, 393, 730 P.2d 45 (1986).”

Questions of law and conclusions of law are reviewed de novo, Rainer View Court Homeowners Ass'n, Inc. v. Zenker, 157 Wash.App. 710, 719, 238 P.3d 1217 (II, 2010).

Nord v. Eastside Assoc. Ltd., 34 Wash.App. 796, 798, 664 P.2d 5 (I, 1983):

“Conclusional findings reached on an erroneous basis, and not supported by substantial evidence, are not binding on appeal. Schmechel v. Ron Mitchell Corp., 67 Wash.2d 194, 197, 406 P.2d 962 (1965). We may resort to the trial judge's oral decision to ascertain the legal and factual bases upon which the trial court predicated its findings.” Id.

1. THE COURT ERRED IN CONCLUDING THAT GORDON ROAD IS AN EASEMENT.

Nowhere in the Plat (Ex 1) or in the deeds (Ex 2 and 3) or in the Conditions (Ex 4), do the Fosters convey a 40-foot wide easement for ingress and egress. Neither servient nor dominant estates are either labeled or identified, for such a purpose. There needs to be a dominant and a servient estate identified in the creation of an easement. *See, for example*, 810 Properties v. Jump, 141 Wash.App. 688, 692, 170 P.3d 1209 (2007); Rainer View Court Homeowners Ass’n, Inc. v. Zenker at 716; State v. Newcomb, 246 P.3d 1286, 1288 (II, 2011).

Gordon Road is a dedicated private road. Each of the estates (Lots 1 through 18) owns an interest in Gordon Road, making the owners tenants in common through a conveyance creating a fee interest. See Restatement of Property § 471 (1944). Each tenant got their right to use Gordon Road through a common grantor, the Fosters. This is consistent with Butler v. Craft Eng. Construction, 67 Wash.App. 684, 843 P.2d 1071 (I, 1992).

In the case of Meresse v. Stelma, 100 Wash.App. 857, 999 P.2d 1267 (II, 2000), the common grantors actually called the private road in that case, an “easement”, id. at 859. Nowhere do the Fosters even reference to Gordon Road as an “easement”. The only “easement” mentioned anywhere is that 5-foot-wide utilities and drainage easement, which they actually do call an easement.

Van Buren v. Trumbull, 92 Wash. 691, 159 Pac. 891 (1916), addressed rights to a private road after the public lost the right to use that same road through non-use (abandonment). The only difference is that in the case at bar, no public dedication existed from the outset:

“One who plats property upon which streets have been laid out, and who sells property with reference thereto, cannot, by an act of his own, defeat the right of his vendee to use the platted streets for the purposes intended. He is estopped to deny or impeach rights thus acquired.” *Citations omitted*, id. at 693.

"The doctrine has for its object the suppression of fraud and the enforcement of honesty and fair dealing. Where, therefore, lots have been offered for sale, and have been purchased in accordance with a map or plat upon which streets are made to appear, it is presumed that the purchase was induced, and the price of the lots enhanced thereby, and the seller is estopped to deny the right which has thus been acquired. To permit him to sell the lots under such circumstances, and then to close the streets, would be to permit him to perpetrate a fraud upon his vendees." *Citations omitted*, id. at 693-4.

Van Buren at 698 adopted and held that:

“[P]urchasers of the lots acquired a contract right in the street. They acquired the right to use it themselves, and the right to have the street open to all others whom they may desire to use it.”

Van Buren reasoned at 694:

"[I]f the common grantor could not deny the full effect of his deed and the right of ingress and egress, his grantee could not do so."

This reasoning is followed in Burkhard v. Bowen, 32 Wash.2d 613, 624, 203 P.2d 361 (1949).

In Barnhart v. Gold Run, Inc., 68 Wash.App. 417, 843 P.2d 545 (III, 1993), present owners claimed rights to a road located on a plat map, which was never developed. *Id.* at 418. The road did not follow the location as depicted upon the plat map. The location of a platted road right of way may be shifted to an alternate location, due to a long period of use which predated the present parties' ownership. Barnhart at 420-21 citing Curtis v. Zuck, 65 Wash.App. 377, 829 P.2d 187 (1992).

Unlike Barnhart, the location of Gordon Road has been the same since its creation in 1977.

In Curtis, the subdivision plat showed the intended location for a street, but the street was never opened in that location. Such is not the case here.

Here, both Mr. Littlefair and Mr. Schulze are either direct or subsequent (as in the case of Lots 9, 10 and 11) vendees of Mr. and Mrs. Foster. Neither can divest anybody from amongst the Lot owners within the Plat, from using the dedicated 40-foot wide roadway called Gordon Road. Because Gordon Road is not an easement, the laws of easements do not apply. Mr. Littlefair, Mr. Schulze and all other owners of Lots within the Plat have equal rights to Gordon Road as “common grantees”, *See Turner v. Davisson*, 47 Wash.2d 375, 387, 287 P.2d 726 (1955).

In a line of cases where parties tried to attain adverse possession over platted access routes which were never initially opened or developed:

"[S]ince the dedicator of a plat could not defeat a grantee's right to an easement in the street upon which his land abuts, common grantees from him cannot, as among themselves, question the right of ingress and egress over the street as shown on the plat." (Italics omitted.) *Burkhard v. Bowen*, 32 Wash.2d 613, 623, 203 P.2d 361 91949) (quoting *Howell v. King Cy.*, 16 Wash.2d 557, 559, 134 P.2d 150, 150 A.L.R. 640 (1943)).

Howell involved a strip of land platted and dedicated for a public street, *id.* at 135. Five years later that road, still unused, lapsed and the public lost access, *id.* at 138. Predecessors in interest claimed that through reversion they acquired ownership of those portions of that road, *id.* at 139. *Howell* agreed at 140; however, due to a tax sale, they did lose that private access road. *Id.* No such tax sale is involved here.

The only reasonable conclusion is that no interference is permitted within the 40-foot right-of-way for Gordon Road, that Gordon Road is not an easement, and that only road maintenance and travel, is permitted upon the 40-foot wide right-of-way, and not the storage of personal property or the erecting of fences, as permitted at CP 60 Page 5 ¶17 and ¶18.

The trial court erred as a matter of law for holding that Gordon Road is an easement and that Mr. Littlefair owns what amounts to a mere easement over Lots 8 and 9.

2. THE TRIAL COURT ERRED IN CONCLUDING THAT GORDON ROAD WAS INTENDED TO ONLY BE A ONE-LANE ROADWAY.

a. From the Record Below:

Assuming that Gordon Road is an easement, the trial court nevertheless erroneously found that it was intended to only be a one-lane roadway.

The testimony from Mr. Dietz was never contradicted: along Lots 3 and 4, the traveled portion of Gordon Road is between 25 and 30 feet wide, not a one-lane roadway by any stretch of the imagination. Mr. Dietz testified how at the present time two automobiles can no longer pass one another in that portion of Gordon Road leading into Mr. Littlefair's lots.

That supports Mr. Littlefair's testimony how two automobiles used to be able to pass one another along Lots 8 and 9, RP 56.

b. Skamania County Ordinances:

Although never cited by anybody until now, the Plat was created pursuant to Skamania County Ordinance ("SCO" hereafter) 1971-1.

Attached in the Appendix are excerpts of SCO 1971-1.

SCO 1971-1 is cross-referenced by SCO 1977-02, which applies to short plats of four or less lots. Attached in the Appendix are the first two pages of SCO 1977-2.

SCO 1971-1 reads in pertinent parts:

SCO. 1971-1-5.0 DEFINITIONS: "EASEMENT is a grant by a property owner to specific persons or to the public to use land for a specific purpose or purposes."

In the case at bar, no such grant exists, anywhere.

SCO 1971-1-11.0, DEDICATIONS, lists under section 11.40 "The Planning Board ... will determine if a private road may be platted, and if an easement will be required."

Note that this ordinance does not require that the private road actually be dedicated as an easement.

SCO 1971-1-11.50 states that convenient access to every lot shall be provided by a dedicated road.

This dedication is clear on the Plat with “Gordon Road (Private)”.

SCO 1971-1-12.0, DESIGN STANDARDS, designates that construction standards are to apply to roads within subdivisions.

SCO 1971-1-12.22 PRIVATE ROADS, requires all platted private roads be 60 feet wide. Although the Plat shows that the dedication is only 40 feet wide, SCO 1971-1-20.0 allows for variances. Evidence of a variance is pending a Public Records Request. There appears to be one.

SCO 1971-1-12.24 COUNTY ROAD DESIGN STANDARDS indicates that local access roads have 2 lanes. In fact, no matter what category a road (there are three), the minimum is two lanes, with a minimum roadway width of 30 feet.

These strict requirements exist for the purpose to promote the “protection of the public health, safety and general welfare ... and provide proper ingress and egress ... to provide ... fire protection...”, SCO 1971-1 Page 1 (Introduction to said Ordinance). Page 2 of said Ordinance provides the date it became effective. Attached in the Appendix.

Based on the law from within Skamania County, it is clear that Gordon Road was intended to be a minimum 2-lane road with a minimum 30 foot roadway width. This trumps “historical use”.

3. THE TRIAL COURT ERRED IN CONCLUDING THAT GORDON ROAD ALONG LOTS 8 AND 9 WAS INTENDED TO ONLY BE “APPROXIMATELY TWELVE TO FOURTEEN FEET WIDE”.

Assuming that laws of easement apply, how narrow the “easement” got along Lots 8 and 9, should be of absolutely no legal concern, once the “dominant estate”, here Lots 10 and 11, exercises its rights.

Allowing a servient estate to *dictate* to a dominant estate the width of an easement, snubs at Thompson v. Smith, 59 Wash.2d 397, 367 P.2d 798 (1962):

“Mere nonuse, for no matter how long a period, would not extinguish the easement. . . . 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 the proper enjoyment of the easement.”

Citations omitted, id. at 407-408.

The trial court effectively gave the “servient estate” the right to dictate to the “dominant estate” limited use of that “easement” to only “approximately twelve to fourteen feet” of a 40-foot wide “easement”.

The trial court tries to bootstrap that conclusion through “historical use”: here the assumed easement would have been expressed in writing, since absolutely no evidence was offered that there was some oral easement between Mr. Littlefair and Mr. Schulze in altering Gordon Road (a right they could not even entertain as tenants in common). In fact, all deeds make reference to the creation of a fee interest in this roadway.

Allowing a servient estate to force a dominant estate to use only 12-14 feet of a 40-foot wide easement, is contrary to the substantial evidence pointing the other way, and is offensive to established law.

4. THE TRIAL COURT ERRED IN CONCLUDING THAT THE FENCE DOES NOT PROJECT INTO THE ROADWAY AND DOES ALLOW USE OF THE ROADWAY CONSISTENT WITH ITS HISTORICAL USE.

Evidence from Mr. Dietz’s testimony demonstrates that Gordon Road used to be wide enough going over Lots 8 and 9 to allow two lane traffic. Mr. Littlefair likewise testified that two automobiles could pass one another along that section of Gordon Road.

The Ordinance Standards under which the Plat was approved, required that Gordon Road be a 2-lane roadway.

The fact that there is no other evidence establishing the

“easement”, demonstrates that a 40-foot wide right-of-way reasonably infers more than a single-lane roadway, so ignored by the trial court.

Hence, placing the fence within the right-of-way, in and of itself makes that fence protrude into the roadway.

Ex 44 shows how far the fence originally was, from the roadway, where a line of young trees and brush running the entire length of Gordon Road along Lots 8 and 9, about the width of a lane for automobile travel, and the fence can be seen to the north of that line of vegetation. These trees and brush can also be gleaned from Ex 11 and 42.

This line of trees and brush were removed by Mr. Schulze when he commenced building the fence, as depicted in Ex 12, 13, 14, 15, 16, 26, 47, 50, through 68: The vegetation is gone.

Ex 20, 17, 18, 19, 21, 22, 23, 31, 36, 37, 38, 40, and 69 clearly depict the new fence within the Gordon Road right-of-way and clearly denying Mr. Littlefair less than the 12 to 14 feet for a roadway. How? Because it does not include a 5-foot strip within which to build a drainage ditch. What the trial court thought it generously granted to Mr. Littlefair – a mere strip 12 to 14 feet wide, is actually only 7 to 9 feet wide, due to the utter lack of the 5-foot easement for a drainage ditch. That 5-

foot wide easement clearly delineated in the Conditions (Ex 4), reflects an intention by the Grantors, the Fosters, that a 5-foot wide easement is necessary not only for underground utilities, but for drainage of the roadway to prevent pot holes from forming in the roadway.

This intention is consistent with SCO 1971-1-5.0-DEFINITIONS-ROAD: this definition explicitly includes drainage. SCO 1971-1-12.18 specifically lists Drainage as part of subdivision design standards.

How can the past 5 years be considered “historical use”, when both parties lived on their respective lots for over 20 more years? The only reasonable inference is that Mr. Schulze felt that he had the upper hand at dictating to Mr. Littlefair where the roadway will be, which he testified to that he did and which is documented by Ex 10 and 49 (those barricades deliberately erected by Mr. Schulze), and that he put that belief in motion 5 years prior to Mr. Littlefair commencing the case at bar in a court of law for redress.

A combination of local law, established case law, the exhibits, and testimony overwhelmingly leads to only one conclusion: The fence does project into Gordon Road and does not allow for the use of Gordon Road with its historical use.

Ex 24 and 25 demonstrate the large snow berms created by snow plowing, along a portion of Gordon Road not narrowed by Mr. Schulze's conduct. To plow such snow berms along the 12-14 foot wide strip along Lots 8 and 9 would cause damage either to the plowing equipment or to the fence, thus either inhibiting plowing or forcing Mr. Littlefair to pay for more expensive snow blowers, as depicted in Ex 27 and 28.

A fair-minded fact finder would conclude that since the antagonisms began from Mr. Schulze 5 years previous to Mr. Littlefair taking the matter to court, the historical use of Gordon Road was such that snow plowing would not cause damage to either snow plowing equipment or to the fence, and that such fence is contrary to any historical use.

5. THE TRIAL COURT ERRED IN CONCLUDING THAT THERE IS NOTHING INHERENTLY ILLEGAL ABOUT THE FENCE ERECTED BY THE DEFENDANT.

Hauser v. Arness, 44 Wn.2d 358, 370, 267 P.2d 692 (1954)

adopted the following from Landay v. MacWilliams, 173 Md. 460, 196 A.

293 (Md. 1938), 114 A.L.R. 984:

'Such [zoning] ordinances are in derogation of the common-law right to so use private property as to realize its highest utility, and while they should be liberally construed to accomplish their plain purpose and intent, they should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language.'

“There can be no question as to the rule that where the question of reasonableness is fairly debatable the courts will not interfere with the legislative judgment and will not substitute their judgment for that of the legislative department . . . However, such principle of law does not foreclose the courts from exercising their judicial function and the reasonableness and propriety of a zoning regulation and its application must be decided by the court from the facts and circumstances in evidence . . . Zoning ordinances, to be a valid exercise of the police power, must have a real and substantial relation to the promotion of the public health, safety, morals or welfare.” *Citations omitted, Hauser* at 368.

Development Services of America, Inc. v. City of Seattle, 138 Wash.2d

107, 979 P.2d 387, 392 (1999):

“It is the general rule, recognized and adopted by this court, that zoning ordinances should be liberally construed to accomplish their plain purpose and intent. At the same time, the court bears in mind that they are in derogation of the common-law right to use property so as to realize its highest utility and should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language.”

Mr. Schulze’s fence is illegal:

This fence does not permit Mr. Littlefair to access the 5-foot right-of-way as depicted in the Conditions and Plat, for maintenance or installation purposes: It keeps Mr. Littlefair from even reaching its location.

This fence is within a dedicated private road right-of-way, and as a tenant in common to that roadway, Mr. Schulze has no right to divest a

fellow tenant in common, from enjoying that entire 40-foot private right-of-way.

This fence, assuming that the right-of-way is an easement, is in direct violation of Skamania County Code (“SCC”) 21.32.050(D)(3), which explicitly states that no structure may be located within any easement. SCC 21.08.010(84) defines structures as including fences. These SCCs are included in the Appendix.

This fence, assuming that the right-of-way is an easement, is in direct violation of Thompson v. Smith, 59 Wash.2d 397, because here the dominant estate is attempting to exercise its rights over this “easement”, and the trial court is letting the servient estate have the final word.

As such, this fence is illegal, and Mr. Littlefair’s requests for relief should have been granted.

6. THE TRIAL COURT ERRED IN CONCLUDING THAT COMMON LAW ALLOWS THE FENCE TO BE WITHIN GORDON ROAD REGARDLESS OF WHAT ZONING LAWS DICTATE.

The trial court concluded at CP 60 Page 5 ¶11, that SCC 21.32.050(D)(3) is in derogation of common law, in order to permit the fence to remain where Mr. Schulze erected it, inside of what the trial court deems to be an easement.

The problem with this conclusion is that SCC Title 21, Skamania County's zoning law, was passed to promote the public health, safety and the general welfare. SCC 21.04.040, attached to Appendix.

The trial court seems to know what is better for Skamania County than Skamania County itself does: So what if a fire engine gets stuck on that portion of Gordon Road along Lots 8 and 9, because the trial court so narrowed and funneled that part of the road that an emergency response vehicle cannot even pass without getting stuck? Mr. Schulze's actions caused the conditions to get so bad that even Mr. Allen had to use a modified 4-wheel drive vehicle to get through to Lot 10 to visit family.

Will the trial court run to the rescue with shovel in hand?

The roadway is only 40 feet wide and Mr. Schulze testified that he placed the fence there specifically to keep traffic from going around the potholes; so there is no damage to Mr. Schulze's "best use" of his property, by respecting these local zoning laws. All he had to do was rebuild his older fence to keep his pasture fenced in.

It would seem to be a reasonable inference that the underlying motivation for Mr. Schulze in erecting the fence was to simply spite Mr. Littlefair. *See Ex 8, 9.*

A secondary fallout is when, not if, an emergency response vehicle gets stuck on the road: somebody may get hurt or die, or a home will be lost to a fire.

Skamania County's Zoning Law is a reasonable intrusion for the purpose of allowing the maintenance of a safe roadway along Gordon Road, and the trial court erred in concluding otherwise.

7. THE TRIAL COURT ERRED IN CONCLUDING THAT NO NUISANCE PER SE ACTION THROUGH A VIOLATION OF SCC 21.32.050(D)(3) EXISTS, AFTER FINDING THAT FENCES AND OTHER STRUCTURES MAY EXIST WITHIN EASEMENTS AND SKAMANIA COUNTY IS LACED WITH EASEMENTS THAT HAVE STRUCTURES ON THEM.

Nuisance per se exists when conduct is barred by rule or statute.

Hardin v. Olympic Portland Cement Co., 89 Wash. 320, 325, 154 Pac. 450 (1916): "A nuisance per se is an act, thing, omission, or use of the property which in and of itself is a nuisance, and hence is not permissible or excusable under any circumstances." Violating zoning ordinances is an act constituting nuisance per se. Harris v. Skirving, 41 Wash.2d 200, 202, 248 P.2d 408 (1952).

In addition to the court's power to grant injunctive relief under RCW 7.48.020, courts may award damages for nuisance. RCW 7.48.010;

Haan v. Heath, 161 Wash. 128, 134, 296 Pac. 816 (1931), measures damages as depreciation in market value.

There is nothing in evidence, that Skamania County is “laced with easements that have structures on them.” This finding is based upon “untenable grounds”, See Brown v. Voss, 105 Wash.2d 366, 371, 715 P.2d 514 (1986), as there is nothing in the record to support it.

Assuming for argument’s sake that the trial court can consider – or speculate - facts not in the record or otherwise documented, does that finding take into consideration similar circumstances involving an “easement” over a 40-foot wide roadway?

The case at bar does not involve a class action, to somehow allow the concerns of the trial court to take into consideration every possible party affected or scenario created by this zoning code. It was error for the trial court for doing so, and because there is no other basis for sustaining the conclusion, the nuisance per se does exist and should be found to exist.

8. THE TRIAL COURT ERRED IN FINDING THAT THE ENFORCEMENT OF THE ZONING ORDINANCE WOULD WREAK HAVOC ON THE COUNTY’S ABILITY TO HAVE ANY REASONABLE USE PROCEEDINGS WHATSOEVER, TO THEREFORE ALLOW THE COURT TO DECLINE TO ENFORCE THE CODE.

Where in the record was it established that Skamania County would suffer “havoc” through the enforcement of SCC 21.32.050(D)(3)? There is absolutely no testimony from public officials taken by the trial court, in order to justify such a finding or conclusion.

As such, the fact that this “finding” was then used to conclude as a matter of law that the trial court will not enforce the zoning law, makes such conclusion itself “untenable”, ill-conceived, and without support.

What the trial court is allowing is tantamount to giving a green light to the sort of conduct frowned upon in State v. Newcomb, 246 P.3d 1286.

9. THE TRIAL COURT ERRED IN DENYING AN EJECTMENT AND DAMAGES.

RCW 7.28.010 allows a person having an interest in real property, to recover damages against the tenant wrongfully in possession, and eject that tenant’s wrongful conduct.

Newcomb at 1289:

“a person can be convicted of malicious mischief for damaging any property in which another person has a possessory or proprietary interest. . . " property of another" is broader than fee ownership interest). Whether the defendant or someone other than the intended victim also has an interest in the property makes no difference; " it is necessary only that the

property belong at least in part to someone other than the accused."
Citations omitted.

Newcomb established for criminal proceedings that interests in easements is a property right. Such interests are a necessary element to a claim under RCW 7.28.010.

RCW 64.04.175 states that easement rights are property rights. Mr. Littlefair does not approve of what Mr. Schulze is doing to the Gordon Road "easement". And a servient estate has no right to make changes to an easement. Crisp v. VanLaeken, 130 Wash.App. 320, 324, 122 P.3d 926 (II, 2005).

This is consistent with Thompson v. Smith, 59 Wash.2d 397, in that the dominant estate dictates its use of an easement, and the servient estate has no place to deny that use.

The trial court needs to eject Mr. Schulze's fence from the easement and award damages. It has failed to do so.

10. THE TRIAL COURT ERRED IN CONCLUDING THAT NO NUISANCE EXISTS DUE TO THE FENCE.

At CP 60 Page 5 ¶9, the trial court found that the fence cannot be the basis of an action for damages in nuisance under the nuisance statute, RCW 7.48.

RCW 7.48.010 defines a nuisance:

“The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.”

RCW 7.48.140(4) describes a particular nuisance:

“To obstruct or encroach upon public highway, private ways, streets, alleys, commons, landing places...”.

Mr. Littlefair owns an interests in Gordon Road. Whether it is as a tenant in common or as a dominant estate to an easement, that property interest is being violated by Mr. Schulze. Local zoning laws are being violated. And the intent of the common grantor, the Fosters, is not being honored. This should not be tolerated. Mr. Littlefair should not be forced to endure such conduct. It is clear that the State statute calls for a remedy, which is well overdue.

11. THE TRIAL COURT ERRED IN CONCLUDING THAT NO NUISANCE EXISTS DUE TO PERSONAL PROPERTY BEING PLACED INTO THE ROADWAY.

The trial court at CP 6 Page 5 ¶10 finds that by the preponderance of the evidence, Mr. Littlefair did not prove that Mr. Schulze’s log decks

and other personal property does not constitute a nuisance under RCW 7.48.

The plethora of exhibits and testimony, which have already been cited, should demonstrate to a reasonable fact finder that the personal property does get placed onto the roadway, that it does interfere with the quiet enjoyment of the use of the roadway, and that it is nuisance under State law. It damages Mr. Littlefair's automobile, Ex 30, and poses a hazard to unwary motorists, Ex 20, 63 (log and railroad ties placed along the roadway without reflectors). It forced tenants to move out of Mr. Littlefair's rental. With the documented history of police calls by Mr. Littlefair and his fiancé, the attitude of speeding down Gordon Road picking up dust and nearly hitting a pedestrian, Mr. Schulze's motivation for building the fence and storing personal property upon the right-of-way seems to be anything but some honorable "best use" excuse.

12. THE TRIAL COURT ERRED IN CONCLUDING THAT ARTICLE VIII OF FOSTER'S ADDITION CONDITIONS AND RESTRICTIONS ARE EXTRAORDINARILY BROAD AND SO SUBJECTIVE AS TO BE ALMOST USELESS.

Parry v. Hewitt, 68 Wash.App. 664, 668, 847 P.2d 483 (I, 1992):

“The interpretation of language contained in a restrictive covenant is a question of law. As stated in Burton v. Douglas Cy., 65 Wash.2d 619, 621, 399 P.2d 68 (1965), the following rules govern the interpretation of restrictive covenants:

(1) The primary objective is to determine the intent of the parties to the agreement, and, in determining intent, clear and unambiguous language will be given its manifest meaning. (2) Restrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of the free use of land. (3) The instrument must be considered in its entirety, and surrounding circumstances are to be taken into consideration when the meaning is doubtful.”

Citations omitted.

Article VIII NUISANCES, Ex 4 page 4, reads:

“No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood.”

The plain meaning of the words in Article VIII:

There is clearly nothing out of the ordinary in how Article VIII defines a nuisance. And what would clearly be anything but a nuisance, can easily be discounted in any potential enforcement action as frivolous, with proper sanctions. The complaint made by Mr. Littlefair is anything but frivolous: he is trying to access his home without getting stuck or damaging his automobile, and he is trying to no longer lose tenants

because of the road conditions which Mr. Schulze created. Such a purpose should be reasonably construed in giving Article VIII its intended affect.

Common law derogations are not present:

Here, there is nothing that Mr. Littlefair seeks to enforce, to be in derogation of the common law right to use land for all lawful purposes: Mr. Schulze can still drive on the land and use it so long as Mr. Littlefair, under the easement theory of the case, does not need certain portions of the “easement”. Of course under the tenants in common theory, all Mr. Schulze can do is maintain and use the roadway for travel purposes. Under either theory, Mr. Schulze’s common law rights are not offended.

There are no doubts of application to the present circumstances:

Applying Article VIII to the use of Gordon Road clearly promotes the original intentions of the Fosters in giving unhindered access to the owners of the lots created in the Plat.

Article VIII as written and as Mr. Littlefair wishes to apply it to the given circumstances, does not present itself as “extraordinarily broad and so subjective to be almost useless”, and the trial court erred in ruling otherwise.

13. THE TRIAL COURT ERRED IN CONCLUDING THAT NEITHER THE FENCE NOR SCRAPING OF THE ROADWAY VIOLATES ARTICLE VIII OF FOSTER'S ADDITION CONDITIONS AND RESTRICTIONS.

Under the circumstances of this case, these acts were spiteful acts made to frustrate Mr. Littlefair's enjoyment of accessing his home without undue hardship. Mr. Schulze testified that he placed barricades to keep the traffic over Lots 8 and 9 restricted to that portion over which his own conduct created the potholes and mud. He scrapped off the crown off the roadway along with the gravel covering, and deliberately filled the drainage ditch and angled his pasture to drain the rain run-off onto Gordon Road, creating conditions for potholes and muddy conditions. He placed logs without affixing reflectors upon them to cause road hazards along the roadway, and yelled obscenities at a woman and her children.

The only reasonable inference is that Mr. Schulze built the fence and tore off the crown and gravel to spite, annoy and harass Mr. Littlefair. The evidence is so substantial to come to this conclusion that the trial court's conclusions are puzzling.

Mr. Schulze's conduct clearly manifests itself as a nuisance and is clearly the sort of conduct that Article VIII prohibits. This sort of conduct would seem sufficient under Newcomb, to warrant criminal charges for

malicious mischief. Just the damage to the roadway is in excess of \$1,500 (Ex 7), constituting a class B felony.

E. CONCLUSION

This Court should conclude and declare that Gordon Road is a private road to which each owner of each lot within the Plat have equal access as tenants in common, that the Gordon Road 40-foot wide right-of-way is not an easement, that it was intended to serve as a two-lane roadway for proper ingress and egress of tenements, their guests, emergency response vehicles, and other lawful purposes, and order Mr. Schulze to immediately remove the fence, the boulder, log decks, telephone box, and any other personal property items, from within that 40-foot Gordon Road right-of-way.

Should this Court conclude that Gordon Road is an easement, then this Court should enforce Skamania County's Zoning Ordinances and order Mr. Schulze to remove the fence and all other personal property from any portion of Gordon Road where Mr. Littlefair wishes to restore the roadway for ingress and egress purposes.

This Court should order Mr. Schulze to pay to repair the Gordon Road roadway as it passes along Lots 8 and 9, to a condition that allows for proper rainwater drainage, a proper crown and gravel covering, and for a proper width to allow automobiles to safely pass by one another.

This Court should order Mr. Schulze to pay for damages done to Mr. Littlefair's automobile and to the loss of rent from the tenants who moved out on account of the deteriorated road access conditions.

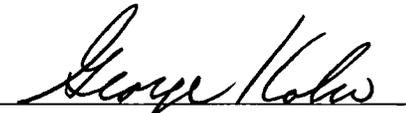
This Court should order that Mr. Schulze pay for Mr. Littlefair's trial and appellate counsel fees, trial court and appellate costs.

This Court should remanded the case the trial court with instructions to fulfill Mr. Littlefair's requested relief per his Complaint and for other consistent relief.

Should this Court conclude that other issues, such as the theory that the Gordon Road is a common grant and not an easement, and that further findings need to be developed such as what Skamania County required of the Common Grantor prior to approving the Plat, including conditions, standards, and variances, since this action does lie in equity, then the case should be referred to the trial court with instructions to develop the record and to see whether the trial court would reach a different conclusion in light of these new developments.

For the reasons set forth herein, the Appellant prays for the relief
so stated.

Respectfully Submitted this 4th day of May, 2011.


George A. Kolin, WSBA #22529
Attorney for Appellant

APPENDIX

Appendix 1

Skamania County Code
§21.04.040 Standards, Scope and Compliance
(1 page)

CHAPTER 21.04 - GENERAL PROVISIONS

Sections:

- 21.04.010 General title.
- 21.04.020 Short title.
- 21.04.030 Zoning map.
- 21.04.040 Standards, scope and compliance.
- 21.04.045 Effect on previously created parcels
- 21.04.050 Text and zoning map relationship.

21.04.010 **GENERAL TITLE**

The document codified in this title shall be known as and may be cited as the Skamania County zoning code.

21.04.020 **SHORT TITLE**

The document codified in this title may refer to itself internally as "this title". (Ord. 1985-05 §1.0.20).

21.04.030 **ZONING MAP**

- A. A zoning map will be made a part of this title as community areas are zoned which shall be known as the "zoning map". The zoning map shall show the zone classifications and special purpose district boundaries assigned to specific parcels of property.
- B. The zoning map(s) shall be placed on file with the Department of Planning and Community Development. Retired zoning maps shall remain in the archives on file with the Department of Planning and Community Development.

21.04.040 **STANDARDS, SCOPE AND COMPLIANCE**

Standards provided by this title for particular districts and circumstances are determined to be the minimum requirement in the interest of public health, safety, and general welfare to achieve the objectives of the Skamania County Comprehensive Plan A. A parcel of land may be used or developed by land division or otherwise, and a structure may be used or developed by construction, reconstruction, alteration, occupancy or otherwise, only as this title permits. In addition to complying with criteria and other provisions within this title, each development shall comply with the applicable standards set forth in the Supplementary Development Standards section (see 21.70) of this title. The requirements of this title apply to the person undertaking a development or the user of a development, and to the person's successors in interest.

21.04.045 **EFFECT ON PREVIOUSLY CREATED PARCELS**

- A. The applicable minimum lot size shall not be used to prohibit a use which is otherwise allowable on any legally created parcel of land.
- B. Any legally created parcel of land which contains more than one (1) legally placed or constructed single-family dwelling may be divided so as each single-family dwelling is on a separate parcel of land, regardless of the applicable minimum lot size, pursuant to SCC Section 21.70.140.

Appendix 2

Skamania County Code
§21.08.010 Definitions
(2 pages)

CHAPTER 21.08 - DEFINITIONS

21.08.010 DEFINITIONS - INTERPRETATION

Whenever the following words and phrases appear in this title they shall be given the meaning attributed to them by this section. When not consistent with the context, words used in the present tense shall include the future; the singular shall include the plural, and the plural the singular; the word "shall" is always mandatory, and the words "should" and "may" indicates a use of discretion in making a decision. Words used in this title which are not defined in this section shall (when necessary) be defined as to the meaning used in a college level dictionary; or (where required or necessary) as defined in state law under the appropriate RCW, WAC regulations, or county ordinances.

1. Accessory Use or Structure: One which is subordinate to the principal use or structure on the lot serving a purpose clearly incidental to the use or structure.
2. Access Panhandle: A strip of land less than 30 feet wide, primarily used for ingress and egress.
3. Accessory Equipment Structure: an un-staffed structure used to contain the equipment necessary for processing communication signals. The accessory equipment structure does not include guyed, lattice or monopole towers.
4. Agriculture, Commercial: All agricultural practices, including animal husbandry, resulting in commercial sales, whether on or off the premises.
5. Agriculture, Domestic: All agricultural practices, including animal husbandry, which are limited to personal, family use and do not result in commercial sales.
6. Amateur (or Ham) Radio: Radio transmission or receiving antenna or communication device operated for non-commercial purposes by individuals licensed by the Federal Communications Commission (FCC).
7. Antenna Array: One or more rods, panels, discs or similar devices used for the transmission or reception of communication signals, which may include omni-directional antenna (rod), directional antenna (panel), and parabolic antenna (disc). The antenna array does not include the communication tower.
8. Attached Communication Facility: An antenna array that is attached to a building or structure used for other than communication purposes. The term includes but is not limited to utility poles and water towers.
9. Billboard: Any freestanding sign exceeding twelve (12) feet in total height and ninety-six (96) square feet in area.
10. Board: The Board of Skamania County Commissioners.
11. Building: A structure of permanent construction, having a roof and intended to be used for sheltering people, animals, property, or business activities. The term shall include mobile homes, mobile home units, and buildings which are capable of being moved. The term shall also include decks and balconies attached to a permanent structure.
12. Building, Accessory: A building which is on the same lot with, and of a nature customarily incidental and subordinate to, the principal building.
13. Building Coverage: The maximum percent allowable of the total lot area on which buildings and accessory buildings shall be permitted to occupy.
14. Building Location: Any area that is covered by a building, appendage, or architectural projection, to or from the building such as bays, porches, balconies, cornices, belt courses, water tables, sills, capitals, bases, or any other projection.
15. Child Day Care: The provision of supplemental parental care and supervision:
 - a. For a non-related child or children,
 - b. On a regular basis,

- entities which provide a public service required by local governing bodies and state laws.
70. **Recreational Facility:** Facilities intended for public or private group recreation.
 71. **Recreational Vehicle:** A vehicle or trailer designed or used for recreational camping or travel use, whether self-propelled or mounted on or drawn by another vehicle, or any structure inspected, approved and designated a recreational vehicle by and bearing the insignia of the State of Washington or any other state or federal agency having the authority to approve recreational vehicles. Recreational vehicles include any dependent or independent recreational vehicle which are described as follows:
 - a. **Dependent Recreational Vehicle:** any tent, trailer, camper, motor home or similar recreational vehicles that do not have self-contained sewer, water or electrical systems, which is dependent upon a service building for toilet and lavatory facilities.
 - b. **Independent Recreational Vehicle:** any trailer, camper, motor home, or similar recreational vehicles, which can operate independent of connections to sewer, water and electrical systems. The vehicle may contain a water-flushed toilet, lavatory, shower or kitchen sink, all of which are connected to water storage and sewage holding tanks located within the vehicle.
 72. **Safe Home:** A shelter that has two or less lodging units and has a working agreement with or is owned and/or operated by the Skamania County Domestic Violence Council.
 73. **Semi-public Facilities:** Facilities intended for public use which may be owned and operated by a private entity.
 74. **Setback:** The unobstructed distance from adjacent property lines to the building location.
 75. **Shelter Home:** A shelter that has three or more lodging units and either is a component of or has a working agreement with or is owned and/or operated by the Skamania County Domestic Violence Council.
 76. **Sign:** Any device which identifies, describes, illustrates, or otherwise directs attention to a product, place, activity, person, institution, or business, and which is affixed to a building, structure, or the land. Each display surface of a sign shall be considered a separate sign.
 77. **Sign, Free Standing:** A sign which is higher than five feet above the ground and supported by one or more poles, columns, or supports anchored in the ground.
 78. **Sign, Off-Premise:** A sign which advertises a product, service, or company (cottage occupation or light home industry) not located on the property on which the sign is situated.
 79. **Sign, On-Premise:** A sign which advertises a product, service, or company (cottage occupation or light home industry) located on the property on which the sign is situated.
 80. **Site:** A parcel of land intended or suitable for development. It may also refer to the physical location on which a building exists or may be constructed.
 81. **Site Plan:** A scale drawing showing proposed uses and structures for a parcel of land as required by the applicable regulations. A site plan is a more detailed representation of a proposed development than shown in a plat, and may also include density and statistical data.
 82. **Site Plan Review:** The process whereby the Hearing Examiner and Planning staff review the site plan of a development to assure that it meets the purpose and standards of zoning and other county regulations.
 83. **Slope:** The horizontal to vertical distance standard in feet.
 84. **Structure:** Anything constructed or erected with a fixed location on the ground or attached to something having a fixed location on the ground including, but not limited to, buildings, mobile homes, walls and fences.
 85. **Substantial Change in Circumstances:** A significant change in conditions affecting the planning area as a whole or a substantial portion thereof. Examples include, but are not limited to, substantial in-fill affecting the rural character of a community, 60% in-fill in any zone, or legal circumstances sufficient to defeat the purposes of a policy established in the comprehensive plan or subarea plan. However, the creation of the National Scenic Area and any zone changes

Appendix 3

Skamania County Code
§21.32
(3 pages)

CHAPTER 21.32 - RESIDENTIAL 2 ZONE CLASSIFICATION (R-2)

Sections:

- 21.32.010 Purpose - Intent.
- 21.32.020 Allowable uses.
- 21.32.025 Administrative Review Uses
- 21.32.031 Conditional uses.
- 21.32.040 Temporary uses permitted.
- 21.32.050 Minimum development standards.

21.32.010 **PURPOSE - INTENT**

The R-2 zone classification is intended to provide a transition zone of medium density residential development which will maintain a rural character of the areas in the Rural I and Rural II Land Use Areas of the County Comprehensive Plan A. (Ord. 1985-05 §6.2.10).

21.32.020 **ALLOWABLE USES**

- A. Single-family dwellings
- B. Commercial and domestic agriculture
- C. Forestry
- D. Public facilities and utilities
- E. Professional services
- F. Cottage occupation (In accordance with Chapter 21.70)
- G. Light home industry (In accordance with Chapter 21.70)
- H. Residential care facilities (In accordance with Chapter 21.85)
- I. Family day care home (In accordance with Chapter 21.86.020)
- J. Safe home
- K. Accessory equipment structures
- L. Attached communication facilities located on BPA towers (In accordance with Section 21.70.160) (Ord. 1992-06 (part): Ord. 1991-06 (part): Ord. 1991-01 (part))

21.32.025 **ADMINISTRATIVE REVIEW USES**

- A. Child mini day care center (In accordance with Section 21.56.030)
- B. Attached communication facilities, not located on BPA towers. (In accordance with Section 21.70.160)

21.32.031 **CONDITIONAL USES**

- A. Recreation facilities
- B. Geothermal energy facilities
- C. Public displays
- D. Surface mining
- E. Cluster development
- F. Duplexes
- G. Mobile home parks

- H. Semi-public facilities
- I. Child day care center (In accordance with Section 21.86.040)
- J. Communication towers (In accordance with Section 21.70.160)
- K. Co-location of communication towers (In accordance with Section 21.70.160)
(Ord. 1992-06 (part); Ord. 1991-06 (part); Ord. 1990-01 (part))

21.32.040 **TEMPORARY USES PERMITTED**

Temporary uses shall be permitted in accordance with the requirements of Section 21.70.120. (Ord. 1985-05 §6.2.40).

21.32.050 **MINIMUM DEVELOPMENT STANDARDS**

A. LOT SIZE

Minimum lot size shall be 2 acres. The lot depth should not exceed the lot width by more than a ratio of four to one (four being the depth). Minimum lot width shall be 200 feet. Access panhandles shall not be taken into account as part of the area calculations relative to minimum lot size indicated above.

B. DENSITY REQUIREMENTS

1. Single-family: Each single-family housing unit (including mobile homes) shall require the minimum lot area listed under Section 21.32.050(A).
2. Duplex: Each duplex shall require 150 percent of the minimum lot area listed under Section 21.32.050(A).

C. SETBACKS

The standard setback requirements shall be as follows:

1. Front yard: No building or accessory building shall be constructed closer than 50 feet from the centerline of the public road right-of-way or 35 feet from the centerline of a private road (not including private driveways), or 20 feet from the front property line, whichever is greater.
2. Side yard: On each side of the building or accessory building a side yard shall be provided of not less than 20 feet.
3. Rear yard: A rear yard shall be provided of not less than 20 feet, including accessory buildings.
4. Non-conforming lots: Lots of less than 2 acres in size shall conform to standard Building Code setback requirements.
5. A Yard That Fronts On More Than One Road: A setback requirement for the front yard of a lot that fronts on more than one road shall be the required setback for that zone classification. All other frontages shall have a setback of 15 feet from the property line, or the edge of the public road right-of-way or private road easement, whichever is greater if the parcel is less than 2 acres. If the parcel is greater than two (2) acres, the setback shall be 20 feet from the property line, or the edge of the public road right-of-way or private road easement, whichever is greater.
6. Setbacks from cul-de-sacs and hammerhead turn arounds shall be 20 feet from the property line, or the edge of the public road right-of-way or private road easement, whichever is greater.

D. OTHER STANDARDS

1. Building height limit for permitted residential uses shall not exceed 35 feet above average site grade, with the exception of Section 21.70.050.
2. Standards for off-street parking shall comply with Section 21.70.070. (Ord. 1991-06 (part): Ord. 1985-05 §6.2.50 - §6.2.54).
3. No building or structure may be located within any easement.

Appendix 4

Skamania County Ordinance 1971-1
Title page through -3.20 Exemptions
(2 pages)

ORDINANCE NO. 1971-1

AN ORDINANCE RELATING TO SUBDIVISIONS AND FLATS; DEFINING CRIMES; PRESCRIBING PENALTIES; AND REPEALING PRIOR ORDINANCES RELATING TO THE SAME SUBJECT.

WHEREAS, protection of the public health, safety and general welfare requires that the division of land into five or more lots proceed in accordance with standards to prevent the overcrowding of land; to lessen congestion of streets and highways and provide proper ingress and egress; to provide adequate space, light and air; to facilitate adequate provisions for water, sewerage, parks and recreation, fire protection, schools, ways and other public uses, and to assure uniform monumenting of land subdivisions and conveyancing by accurate legal descriptions; and,

WHEREAS, by enacting Chapter 271, Laws of 1969, First Ex. Session, the Legislature has prescribed a method for accomplishing the aforesaid purposes, and has vested counties with responsibility for controlling the division of land in unincorporated areas; and

WHEREAS, this Board deems the controls, standards, procedures, and penalties set forth in this Ordinance to be essential to the protection of the public health, safety and general welfare of the citizens of Skamania County; and the adoption thereof to be in the public interest;

NOW THEREFORE, BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF SKAMANIA COUNTY, WASHINGTON AS HEREIN FOLLOWS:

1.0 REPEALER. Ordinance No. (none), enacted August 1, 1967, relating to the subdividing and platting of land, is repealed, effective as of the effective date of this ordinance.

2.0 EFFECTIVE DATE. This Ordinance shall become effective September 7, 1971.

3.0 APPLICABILITY

3.10 GENERAL. Every subdivision of land within the unincorporated area of Skamania County shall proceed in compliance with this Ordinance. Land divided as a short subdivision within five years immediately preceding may be resubdivided pursuant to this Ordinance.

3.20 EXEMPTIONS. The provisions of this Ordinance shall not apply to;

- (1) Any division of land not containing a dedication, in which the smallest lot created by the division exceeds ten acres;
- (2) Any cemetery or burial plot, while used for that purpose;
- (3) Any division of land made by testamentary provisions, the laws of descent, or upon court order.

4.0 ADMINISTRATION.

4.10 GENERAL. The County Planning Director, hereinafter referred to as the Administrator, is vested with the duty of administering subdivisions and platting regulations within unincorporated areas of the county, subject to the review of the Planning Commission.

Appendix 5

Skamania County Ordinance 1971
-1-5.0 Definitions
(2 pages)

5.0 DEFINITIONS.

Whenever the following words and phrases appear in this Ordinance they shall be given the meaning attributed to them by this Section. When not inconsistent with the context, words used in the present tense shall include the future; the singular shall include the plural, and the plural the singular; the word "shall" is always mandatory, and the word "may" indicates a use of discretion in making a decision.

ADMINISTRATOR is the Skamania County Planning Director.

ALLEY is a strip of land dedicated to public use providing vehicular and pedestrian access to the rear side of properties which abut and are served by a public road.

BLOCK is a group of lots, tracts or parcels within well defined and fixed boundaries.

BOARD is the legislative authority of Skamania County.

DISTRICT HEALTH OFFICER is a representative of the Southwest Washington Health District, Vancouver, Washington. Branch offices are located in Stevenson, Goldendale and White Salmon, Washington.

CUL-DE-SAC is a road closed at one end by a circular area of sufficient size for turning vehicles around.

DEDICATION is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat showing dedication thereon; and, the acceptance by the public shall be evidenced by the approval of such plat for filing by the Board of County Commissioners of Skamania County.

EASEMENT is a grant by a property owner to specific persons or to the public to use land for a specific purpose or purposes.

FINAL PLAT is the final drawing of the subdivision and dedication prepared for filing for record with the County Auditor and containing all elements and requirements set forth in Chapter 271, Laws of 1969, First Extraordinary Session, and in this Ordinance adopted pursuant thereto.

LOT is a fractional part of subdivided lands having fixed boundaries, being of sufficient area and dimension to meet minimum requirements for width, depth and area. The term shall include tracts or parcels.

LOT DEPTH is the distance measured from the mid-point of the lot line fronting a road or street, to the mid-point of the lot line opposite.

LOT WIDTH is the distance measured between the mid-points of the two principal side lot lines and at approximately right angles to the lot depth.

PLANNING COMMISSION is the Skamania County Planning Commission.

PLAT is a map or representation of a subdivision, showing thereon the division of a tract or parcel of land into lots, blocks, roads and alleys or other divisions and dedications.

PRELIMINARY PLAT is a neat and approximate drawing of a proposed subdivision showing the general layout of roads and alleys, lots, blocks and other elements of a plat or subdivision which shall furnish a basis for the approval or disapproval of the general layout of a subdivision.

PUBLIC UTILITY DISTRICT is the Public Utility District No. 1 of Skamania County, Stevenson, Washington.

REVERSE FRONTAGE LOT is a lot having road frontage along two opposite boundaries.

ROAD is an improved and maintained public right-of-way which provides vehicular circulation or principal means of access to abutting properties, and which may also include provisions for public utilities, pedestrian walkways, public open space and recreation areas, cut and fill slopes, and drainage.

SHORT SUBDIVISION is the division of land into four or fewer lots, tracts, parcels, sites or divisions for the purpose of sale or lease.

STANDARD SHEET is 22" x 32" with a one-half inch border on three edges and a two inch border along the left hand edge for binding purposes. For FINAL PLAT the material will be a reproducible tracing cloth, stable base mylar polyester film or equivalent approved by the County Engineer.

SUBDIVIDER is a person, including a corporate person, who undertakes to create a subdivision.

SUBDIVISION is the division of land into five or more lots, tracts, parcels, sites or divisions for the purpose of sale or lease and shall include all resubdivision of land.

Appendix 6

Skamania County Ordinance 1971-1
-11.0 Dedications through -11.50 Lot Access
(1 page)

11.0 DEDICATIONS.

11.10 INDICATION. All dedications of land shall be clearly and precisely indicated on plats.

11.20 FLAT APPROVAL REQUIREMENT. No plat shall be approved unless adequate provision is made in the subdivision for such drainage ways, roads, alleys, easements, sidewalks, parks, playgrounds, sites for schools, school grounds, and other general purposes as may be required to protect the public health, safety, and welfare.

11.30 PROTECTIVE IMPROVEMENTS. Protective improvements, and easements to maintain such improvements shall be dedicated.

11.40 PRIVATE ROADS. The Planning Commission, after considering the County Engineer's recommendations, will determine if a private road may be platted, and if an easement will be required.

The construction, maintenance and snow removal of private roads are the responsibility of the land owner or a home owner's association, and Skamania County is in no way obligated until the roads meet County standards and are accepted by the County.

11.50 LOT ACCESS. Convenient access to every lot shall be provided by a dedicated road.

11.60 PUBLIC WATER ACCESS. Subdivision plats containing land adjacent to publicly owned or controlled bodies of water shall provide dedications of access to such bodies of water. The standards of this access shall be commensurate to its use and character. The access shall extend to the low water mark.

In addition, it may be required that a pedestrian easement of fifteen (15) feet maximum width, bordering along and placed above the high water mark, be dedicated if the Planning Commission determines that public use and interest will be served thereby.

11.70 CONVEYANCE TO CORPORATION. Land dedicated in a subdivision for protective improvements, drainage ways, roads, alleys, sidewalks, parks, playgrounds, recreational, community or other general purposes may be conveyed to a home-owner's association or similar corporation if the Planning Commission determines that public interest will be served thereby.

A subdivider who wishes to make such a conveyance shall at least two weeks prior to filing a final plat with the Administrator, supply the Board and the Administrator with copies of the grantee organization's articles of incorporation and bylaws, and with evidence of the conveyance or a binding commitment to convey. The articles of incorporation shall provide that membership in the organization shall be appurtenant to ownership of land in the subdivision; that the corporation is empowered to assess the said land for costs of construction and maintenance of the improvements and property owned by the corporation, and that such assessments shall be a lien upon the land. The Board may impose such other conditions as it deems appropriate to assure that property and improvements owned by the corporation will be adequately constructed and maintained.

Appendix 7

Skamania County Ordinance 1971-1
-12.0 Design Standards through -12.22 Private Roads
(3 pages)

12.0 DESIGN STANDARDS.

12.10 STANDARDS. All roads, bridges, drains, culverts, sidewalks, curbs, storm sewers, fire protection systems, and related structures or devices shall be constructed in accordance with standards currently in effect at the time of construction. These standards shall be those contained in this Ordinance or those promulgated by the Board or may be other than a county standard if approved by the County.

12.11 TOPOGRAPHIC HAZARDS AND PROTECTIVE IMPROVEMENTS. Land on which exist any topographic conditions hazardous to the safety or general welfare of persons or property in or near a proposed subdivision shall not be subdivided unless the construction of protective improvements will eliminate the hazards or unless land subject to the hazard is reserved for uses as will not expose persons or property to the hazard.

Protective improvements and restrictions on use shall be clearly noted on the final plat.

12.12 STANDARD MINIMUM LOT SIZES AND DIMENSIONS.

- (1) Where water supply is individual wells and individual sewage disposal systems are used minimum lot size shall be two (2) acres. Lots shall be proportioned to facilitate future subdivision. Minimum lot width or depth shall be two hundred (200) feet.
- (2) Where an adequate public water supply and individual sewage disposal systems are used the minimum lot size shall be twelve thousand (12,000) square feet. Minimum lot width shall be ninety (90) feet and minimum lot depth shall be one hundred twenty (120) feet.
- (3) Where adequate public water supply and adequate public sewer lines are used the minimum lot size shall be eight thousand (8,000) square feet. Minimum lot depth shall be one hundred ten (110) feet. Minimum lot width shall be seventy (70) feet.

12.13 BLOCKS. Blocks shall be so designed as to assure traffic safety and ease of traffic control and circulation. Blocks shall be wide enough to allow for two lot depths unless the topography or other factors make this impractical.

12.14 REVERSE FRONTAGE LOTS.

- (1) No residential lots shall have road frontage along two opposite boundaries unless topographical features or the need to provide separation of the lots from arterials, railways, commercial activities or industrial activities, justify the designing of reverse frontage lots.

- (2) Reverse frontage lots shall be designed with an easement at least ten feet wide to be dedicated along the lot lines abutting the traffic arterial or other disadvantageous use, across which there shall be no right of access for the general public or adjoining property owners.

12.15 LOT ACCESS.

- (1) Every lot shall be provided with satisfactory access by a public road connecting to an existing public road, or by an easement which is permanent and inseparable from the lot served.
- (2) Lots adjacent to a road which has been designated an arterial by the County Engineer shall be provided with access other than the arterial, unless a variance is granted to this requirement.
- (3) The plat of a subdivision containing lots adjacent to a designated arterial shall not be approved unless the plat recites a waiver of the right to direct access to the arterial, or a variance is granted to this requirement.

12.16 UTILITY EASEMENTS. Easements for electric, telephone, water, gas and similar utilities shall be of sufficient width to assure maintenance and to permit future utility installations.

12.17 UNDERGROUND UTILITIES INSTALLATION. In areas designated by the Public Utility District, underground utility installation is required.

12.18 DRAINAGE AND STORM SEWER EASEMENTS. Easements for drainage channels and ways shall be of sufficient width to assure that the same may be maintained and improved. Easements for storm sewers shall be provided and shall be of sufficient width and proper location to permit future installation.

12.19 WATER SUPPLY AND SANITARY SEWER SYSTEMS. Where a public water supply is the source of water, potable water shall be provided by the subdivider for each lot within a subdivision.

Where a public sanitary sewer is installed a connection shall be provided for each lot within a subdivision.

All facilities and devices of water supply and sanitary sewer systems shall meet the standards of the Southwest Washington Health District and any local or state regulations.

12.20 SIDEWALKS. Sidewalks may be required in subdivisions. This determination will be made by the Planning Commission. Where required, sidewalks or sidewalk easements in residential subdivisions shall be at least five feet wide, and in business district subdivisions shall be at least eight feet wide. Sidewalks or sidewalk easements shall be properly located and sufficient to meet the circulation needs of the subdivision.

12.21 SUBDIVISION ROADS.

- (1) All subdivisions shall be served by one or more public roads providing ingress and egress to and from the subdivision at not less than two points unless approved otherwise by the Planning Commission.
- (2) Major roads within every subdivision shall conform with any comprehensive plan and shall provide for the continuation of major roads which serve property contiguous to the subdivision.
- (3) Road intersections shall be as nearly at right angles as is practicable and in no event shall be less than sixty (60) degrees.
- (4) Cul-de-sacs shall be designated as to provide a circular turn-around right of way at the closed end which has a minimum radius of 45 feet.
- (5) Road networks shall provide ready access for fire and other emergency vehicles and equipment, and routes of escape for inhabitants.
- (6) The road pattern shall conform to the general circulation of the area and provide for future roads and connections.
- (7) If topographical features warrant, the County Engineer may require wider rights of ways than specified in this Ordinance.

12.22 PRIVATE ROADS. Any platted private roads shall have a minimum right of way width of sixty (60) feet, to facilitate the eventual dedication of these roads for public use, and shall conform to the standards and regulations of this ordinance.

12.23 STREET RIGHT OF WAY WIDTH. When an area within a subdivision is set aside for commercial uses or where probably future conditions warrant, the Planning Commission may require street right of way dedication of a greater width than required.

The street right of way in or along the boundary of a subdivision may be half the required width when it is apparent that the other half will be dedicated from adjacent properties.

Appendix 8

Skamania County Ordinance 1971-1
-12.24 County Road Design Standards
(1 page)

12.24 COUNTY ROAD DESIGN STANDARDS.

AVERAGE DAILY TRAFFIC (ADT) Current	Local Access Under 250	Secondary & Collector 250 to 400	Major Arterial 400 +
DESIGN HOURLY VOLUME (DHV) 15 Years Hence	0 - 100	100 - 200	200 - 400
SHARPEST CURVE (Degrees, and Radius in Feet)	Max. - Min.		Max. - Min.
	D°	R'	D° R'
Flat	8.5	694	7.5 758
Rolling	13.5	427	12.5 464
Mountainous	25.0	231	23.0 250
<u>GRADIENT*</u>	Maximum	Maximum	Maximum
Flat	6%	6%	4%
Rolling	8%	7%	5%
Mountainous	11%	9%	7%
<u>PAVEMENT WIDTH</u>	Minimum	Minimum	Minimum
	22'	22'	24'
<u>STOPPING SIGHT DISTANCE</u>			
Flat	350'	350'	350'
Rolling	275'	275'	350'
Mountainous	200'	200'	350'
<u>WIDTH OF ROADWAY**</u>	30'	34'	40'
<u>NUMBER OF LANES</u>	2	2	2
<u>NEW BRIDGES#</u>			
Curb to Curb Width (Ft.)	26'	28'	40'
Design Load (AASHO)	H-20	H-20	H-20
Vertical Clearance	14.5'	14.5'	14.5'
<u>RIGHT OF WAY WIDTH</u>	60'	60'	70'

* May be steeper for short distances.

** For guardrail installation, width of shoulder to be additional two feet.

All bridge curbs to meet state standards.

Geometric Design Standards for over 600 DHV shall be determined from the results of an engineering study based on AASHO or acceptable standards.

Appendix 9

Skamania County Ordinance 1971-1
-12.25 Road Improvements
(1 page)

12.25 ROAD IMPROVEMENTS. Roads or streets in subdivisions shall be improved as follows:

(1) Major Arterials:

Clear and grub full width of right of way.
Roadway is to be graded, including ditches and back slopes.
Drainage facilities are to be installed.

(2) Secondary and Collectors:

Clear and grub full width of right of way.
Grade roadway including ditches and back backslopes.
Install all drainage facilities.

(3) Local Access and Cul-de-sacs.

Clear and grub full width of right of way.
Grade roadway including ditches and back slopes.
Install all drainage facilities.

12.26 ROAD IMPROVEMENT INSPECTION. The County Engineer, or his representatives, shall inspect road work for conformity to the standards of this ordinance, approved plans and County construction standards.

Inspection is required as follows:

(1) Prior to grading the subdivider shall notify the County Engineer of his intention to start grading, in writing.

(2) When grading is complete and prior to any surfacing, the subdivider shall notify the County Engineer in writing. The County Engineer will then inspect the work.

Appendix 10

Skamania County Ordinance 1971-1
-15.0 Preliminary Plat Standards
(2 pages)

15.0 PRELIMINARY PLAT STANDARDS.

15.10 GENERAL. Every preliminary plat shall consist of one or more maps, the horizontal scale of which shall be a minimum of one hundred (100) feet to the inch, on standard sheets.

Plans, profiles and sections of streets and roads to be dedicated as public highways and sewers shall be prepared at convenient scale on standard sheets.

Maps, drawings and written data are to be in such form that when considered together shall clearly and fully disclose the information listed herein following within this section.

- (1) Proposed subdivision name.
- (2) The names, addresses and telephone numbers of all persons, firms, and corporations holding interests in said land.
- (3) If a field survey has been made, the name, address, telephone number and seal of the registered land surveyor who made it or under whose supervision it was made.
- (4) The date of the said survey.
- (5) All existing monuments and markers located by the said survey.
- (6) The boundary lines of the proposed subdivision along with the bearings and lengths of these lines.
- (7) The boundaries of all blocks and lots within the subdivision, together with the numbers proposed to be assigned each lot and block, and the bearings and lengths of these lines.
- (8) The location, names and width of all proposed and existing streets, roads and easements within the proposed subdivision and adjacent thereto.
- (9) The location and, where ascertainable, sizes of all permanent buildings, wells, water courses, bodies of water, high and low water marks, all overhead and underground utilities, railroad lines, municipal boundaries, section lines, township lines, and other important features existing upon, over or under the land proposed to be subdivided.
- (10) Plans of proposed water distribution systems, sewage disposal systems and drainage systems, indicating locations.
- (11) Contour lines of at least five feet intervals to show the topography of the land to be subdivided referenced to either the United States Coast and Geodetic Survey datum, county datum, or other datum acceptable to the County Engineer.

- (12) A layout of proposed streets, alleys, utility easements, and parcels proposed to be dedicated or reserved for public or community school, park, playground or other uses.
- (13) A sketch of the general vicinity in which the land proposed for subdivision lies, upon which are identified owners of land adjacent to the subdivision, the names of any adjacent subdivisions, section corners and section boundaries.
- (14) A copy of all restrictive covenants proposed to be imposed upon land within the subdivision.
- (15) In subdivisions requiring percolation tests, the location of test holes together with data regarding percolation rates.
- (16) Indicate minimum lot sizes in acreage or square feet, which ever is more appropriate, and the total amount of lots and acreage within the subdivision.

Appendix 11

**Skamania County Ordinance 1971-1
-16.0 Final Plat Standards
(1 page)**

16.0 FINAL PLAT STANDARDS.

16.10 GENERAL. Every final plat shall consist of one or more standard sheets. All drawing and lettering shall be in permanent black ink.

The subdivision perimeter shall be depicted with heavier lines than appear elsewhere on the plat. The scale shall be a minimum of one hundred (100) feet to the inch.

All signatures affixed to a final plat shall be original and written in permanent black ink.

16.20 MAP. Every final plat shall include an accurate map of the subdivided land, based upon a complete survey thereof, which map shall include:

- (1) All section, township, municipal and county lines lying within ⁷ of adjacent to the subdivision;
- (2) The location of all monuments or other evidence used as ties to establish the subdivision's boundaries;
- (3) The location and description of all permanent control monuments found and established within the subdivision;
- (4) The boundary of the subdivision with complete bearings and lineal dimensions;
- (5) The length and bearings of all straight lines; the radii, arcs and semi-tangents of all curves;
- (6) The length of each lot line, together with bearings and other data necessary for the location of any lot line in the field;
- (7) The location, width, center line, and name or number of all streets within and adjoining the subdivision;
- (8) The location and width, shown with broken lines, and description of all easements;
- (9) Numbers assigned to all lots and blocks within the subdivision;
- (10) Protective improvements and restricted areas;
- (11) The seal of the registered land surveyor performing the survey and making the plat.

Appendix 12

Skamania County Ordinance 1971-1
-20.0 Variances
(1 page)

20.0 VARIANCES.

20.10 GENERAL. When the Planning Commission finds that extraordinary hardship will result from strict compliance with the provisions contained within this Ordinance, they may vary the regulations providing that the adjustment authorized does not grant a special privilege inconsistent with the limitations imposed upon other properties in the vicinity and that the following circumstances are found to exist:

- (1) Because of special circumstances applicable to subject property, including size, shape, topography, location or surroundings, strict compliance will cause undue hardship and deprive subject property of rights and privileges enjoyed by other properties in the vicinity;
- (2) That the granting of the variance will not be detrimental to the public welfare or injurious to the property or improvements in the vicinity;
- (3) That the granting of the variance will not have the effect of nullifying the intent and purpose of these regulations.

20.20 RESTRICTIVE VARIANCES. Variations and exceptions to more restrictive standards than those herein set forth may be made by the Planning Commission in those instances where it is deemed that hardship, topography or other factual deterrent conditions prevail, and in such manner as it considers necessary to maintain the intent and purposes of this Ordinance.

21.0 AGGRIEVED PARTIES. Any person aggrieved by a final decision of the Administrator not to accept a plat for filing may appeal this decision to the Planning Commission. When such an appeal is made the Administrator shall cooperate in bringing this matter to the attention of the Planning Commission. The Planning Commission may affirm or reverse the decision and instruct the Administrator to accept the plat for filing.

Any person aggrieved by a final decision of the Planning Commission to approve or disapprove a proposed plat may appeal the decision of the Board of Skamania County Commissioners within thirty (30) days following issuance of the Planning Commission's decision. The Board, following a public meeting thereon, may affirm or reverse the Planning Commission's decision, or may remand the application to the Planning Commission with instructions to approve the same upon compliance with conditions imposed by the Board.

Any decision approving or disapproving any plat shall be reviewable for unlawful, arbitrary, capricious or corrupt action or nonaction by writ of review before the superior court of the county in which such matter is pending. The action may be brought by any property owner in the city, town or county having jurisdiction, who deems himself aggrieved thereby; PROVIDED, that application for a writ of review shall be made to the court within thirty (30) days from any decision so to be reviewed. The cost of transcription of all records ordered certified by the court for such review shall be borne by the appellant.

Appendix 13

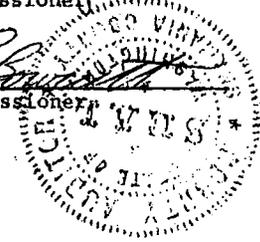
Skamania County Ordinance 1971-1
Signatory page
(1 page)

PASSED BY THE BOARD OF COUNTY COMMISSIONERS, this 7th day of September,
1971.

Leif W. Demaree
Chairman

Donald Lundy Sr.
Commissioner

Thomas H. ...
Commissioner



ATTEST:

[Signature]
Skamania County Auditor & Ex-Officio
Clerk of the Board

APPROVED:

Robert E. Rogers
Chairman, Skamania County Planning Comm.

September 7, 1971
Date

Appendix 14

Skamania County Ordinance 1977-02
Title page through-3.20 Exemptions
(2 pages)

ORDINANCE NO. 1977-02

AN ORDINANCE RELATING TO SHORT PLATS AND SHORT SUBDIVISIONS.

WHEREAS, By amending the statutes relating to Plats - Subdivisions - Dedications, Chapter RCW 58.17, the Legislature has mandated that cities, towns and counties adopt regulations, procedures, and appoint personnel for the approval of Short Plats and Short Subdivisions; and

WHEREAS, protection of the public health, safety and general welfare requires that the division of land into four or less lots, proceed in accordance with standards to prevent the overcrowding of land; to lessen congestion of streets and highways; to provide adequate space, light and air; to provide adequate facilities for water, sewerage, and other public and general uses; to provide for proper ingress and egress, and to require conveyancing by accurate legal description;

NOW THEREFORE, BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF SKAMANIA COUNTY, WASHINGTON HEREIN FOLLOWS:

1.0 REPEALER AND EFFECTIVE DATE Ordinance No. 1974-2 enacted October, 15, 1974, relating to Short Plats and Short Subdivisions, is repealed effective as of the effective date of this Ordinance, which shall be
JUNE 7 1977.

2.0 SEVERABILITY If any provision of this Ordinance or its application to any person or circumstance is held invalid, the remainder of this Ordinance or the application of the provision to other persons or circumstances shall not be affected.

3.0 APPLICABILITY

3.10 General Every division of land within the unincorporated area of Skamania County for the purpose of lease and/or sale into four (4) or less lots, parcels or tracts, shall proceed in compliance with this Ordinance. The total amount of lots includes all lots under 10 acres in size.

3.20 Exemptions The provisions of this Ordinance shall not apply to:

- (1) Any cemetery or burial plot, while used for that purpose;
- (2) Any division of land in which the smallest lot created by the division equals or exceeds (10) ten acres in area. In computing the upward limit of ten-acre lot sizes with regard to this Ordinance, the lot size includes that area bounded by the centerline of any adjacent roads or streets and the side lotlines projected to such centerline.
- (3) Any divisions of land made by testamentary provision, or the laws of descent;
- (4) Any division of land made in compliance with Ordinance No. 1971-1.