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Court of Appeals
Division II
State of Washington
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APPEAL NO. 50138-4-II

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

CHRISTOPHER GUEST and SUZANNE GUEST, husband and wife,
Plaintiffs/Defendants/Appellants

vs.

DAVID LANGE and KAREN LANGE, husband and wife and the marital
Community comprised thereof,

Defendants/Counterclaimants/Appellees

THE COE FAMILY TRUST and Trustee Michael Coe,
Interveners,

vs.

CHRISTOPHER GUEST and SUZANNE GUEST, husband and wife,
Appellees/Respondents

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION/STATEMENT OF CASE/FACTS/ AUTHORITIES/ ARGUMENT

This is the third *Guest v. Lange et al.* appeal. Because this is a *Guest v. Lange et al.* ‘subsequent’ appeal in the same case, pursuant to RAP 12.7(d) and RAP 2.5 (c) (2) without any Guest waiver of the Guests’ contention that the CR 54(b) *Guest v. Lange et al.* case is not final yet or the Guests’ lack of jurisdiction challenges, the Court at the instance of a party as here by the Guests may change its decision and review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the Court’s “opinion of the law at the time of the later review”. Appendix (“App.”) A, A1-2 (annotations by Guest).

Although as indicated below, it is the Guests’ contention that the CR 54(b) *Guest v. Lange et al.* case was not final in 2014, 2016 or in 2017 and is not final today invoking RAP 2.2(d) on numerous grounds (App. A, page A-3), Appellants Christopher Guest and Suzanne Guest (“Guests” or “Guest”) also alternatively invoke RAP 12.7 (d) and RAP 2.5(c)(2) as justice will best be served limiting and restricting any application of any *Guest v. Lange* law of the case doctrine against the Guests under the facts, circumstances and applicable law. As lack of jurisdiction is dispositive, the Guests will address the lack of jurisdiction issues in this Introduction

section. A superior court's lack of subject matter or other jurisdiction can be raised at any time, as well as a question regarding an appellate court's jurisdiction *at any time* in an appellate court pursuant to RAP 2.5 (a)(1) and RAP 2.5(a):

A party or the court may raise at any time the question of appellate court jurisdiction.

Because the superior court did not have subject matter or other jurisdiction over David Lange and Karen Lange's (the "Langes" or "Lange") purported quiet title and injunction counterclaim against the Guests or the Langes' 'defenses' against the Guests' lawsuit to eject the Langes from the Guests' Lot 5 property and remove the Lange constructed deck from Lot 5 under Chapter 58.17 RCW or 36.70C RCW, with respect neither did this Court as more fully outlined below.

In *Halverson v. City of Bellevue*, 41 Wn. App. 457, 461, 704 P.2d 1232 (1985), the Court made it clear in 1985 before the Spinnaker Ridge Development subdivision final plat was approved and filed and recorded in January 1986 that superior and other courts do not have any jurisdiction or any authority to alter or amend a subdivision final plat under Chapter 58.17 RCW. By legislation, and separation of powers, only the local legislative bodies that approved the final plat have jurisdiction and authority to alter or amend a recorded subdivision final plat under RCW 58.17.100.

Any SR Lot 4 owner 'deck' easement of any kind or form on any part of SR Lot 5 was and is in direct violation of the January 31, 1986 recorded SRD 58.17 RCW final plat, and is not a lawful or a legal authorized land use under RCW 58.17.215 and Chapter 58.17 RCW. Under RCW 58.17.215, the only lawful and legal land use of the Spinnaker Ridge Lot 4 and Lot 5 property is mapped, surveyed and graphically depicted on the SRD final plat. To alter that only lawful and legal land use, the Langes were required to file an application with the City pursuant to RCW 58.17.215 and comply with all of RCW 58.17.215 mandatory procedures and process which would have involved a public hearing and mandatory signatures, including the Guests' signatures, to create a valid final plat Lange easement on Lot 5 by altering the final plat. The Langes could and would not have obtained the Guests' signatures to violate the SRD recorded final plat or the original recorded CC&Rs as evidenced on the plat itself were recorded on January 31, 1986. RCW 58.17.215; CP 251, App. L, M and N.

In *Jordan v. Nationstar Mortgage, LLC*, 185 Wash. 2d 876, 883, 374 P.3d 1195, 1199 (2016), the Washington Supreme Court cited to and relied upon *State v. Nw. Magnesite Co.*, 28 Wash.2d 1, 26, 182 P.2d 643 (1947) for the principle of law that it is "the general rule that a contract

which is contrary to the terms and policy of an express legislative enactment is illegal and unenforcible[sic]”.

As evidenced by the recorded SRD final plat, Appendix L, and as admitted by the Langes at the July 2014 *Guest v. Lange* jury trial, there are no SRD final plat Lot 4 easements of any kind on any part of SR Lot 5. David Lange admitted at trial that he knew where the shared Lot 4 and Lot 5 northwest to southwest Lot property line was at all times. RP 7/9/14 at 46, lines 3 – 14. So did Karen Lange. RP 7/9/14 at 156 line 23 to 157 line 1. That absolutely straight Lot 4 and Lot 5 property boundary line as not been altered, adjusted, moved or changed. An excerpt of the SRD final plat showing the location of Lot 4 and Lot 5 and the absolutely straight Lot 4/Lot 5 boundary line is below:

The Langes further admitted through David Lange at the July 2014 *Guest v. Lange* trial that their 1993 SR Lot 5 warranty deed did not include

any 1987 recorded Lot 4 owner 'patio or deck' easement on Lot 5. RP 7/9/14 at 112: 3 to 113:24.

Although no Lange easement on any part of Lot 5 was legal or enforceable under the January 31, 1986 recorded SRD final plat, the 1947 *Magnesite* Supreme Court stare decisis opinion and the 2016 *Jordan* case as contrary to the terms and the policy of the 58.17 RCW express legislative enactment (in addition to the forged 1987 easement document), the Spinnaker Ridge Lot owners have gotten around 58.17 RCW and the Spinnaker Ridge recorded final plat by using a "friendly neighbor understanding", i.e. permission, consent and a license, between owners allowing some Lot owners to have decks crossing over Lot boundary lines onto another's property. CP 292, 293. The Guests, however, did not give the Langes permission to build a deck on their Lot 5 property and did not give the Langes' permission to use any part of the Guests' Lot 5 land. Under the SRD recorded final plat, *Jordan*, *Magnesite*, *Halverson*, the true original January 31, 1986 recorded Association CC&Rs admitted at the *Guest v. Lange* trial by the court as a Court Trial Exhibit, identified by Appellant Guest at trial as the original CC&Rs, that did not have any 'encroachment easement' provision. It is only the original January 31, 1986 CC&Rs that are relevant and operative under 58.17 RCW and RCW 58.17.215 as a condition of approval of the SRD recorded final plat.

David Lange admitted at trial that he had reviewed an excerpt of the Spinnaker Ridge Development subdivision Gig Harbor, Washington final plat before and in the process of the Langes purchasing Lot 4 and the Lot 4 Main Sail Lane house. He admitted at trial that he knew and understood that the Spinnaker Ridge Development subdivision (“SRD” and “SR”) final plat was a governing document for the Spinnaker Ridge Association and lot owners. RP 7/9/14 at 128, lines 17-23.

In *Halverson*, the Court of Appeals held that the law was clear under RCW 58.17.100 that the Legislature has granted the authority to amend and thus alter plats to the legislative bodies which in this instance is the City of Gig Harbor (the “City”), and not the courts. If a timely appeal of a recorded subdivision was filed, as it was in *Halverson*, the only authority that a court has is to set aside the plat as invalid but a court did not and does not have any other to alter or amend a subdivision final plat. No appeal was filed in 1986 regarding the January 31, 1986 recorded SRD final 58.17 RCW plat approved and certified by the City mapping and surveying the SRD final plat property and all of the approved SR Lots. There is no Lot 4 deck or any other easement on Lot 5 on the SRD recorded final plat. With respect, no court can create a Lange Lot 4 or a Lot 4 deck easement on any part of Lot 5 that does not exist on the recorded SRD Pierce County Auditor final plat.

Once a subdivision final plat is recorded, in the absence of a timely appeal which was thirty days in 1985 but is now only a 21 day period to appeal under RCW 36.70C.040(3) under the Land Use Petition Act (“LUPA”) the only opportunity that a Spinnaker Ridge Lot owner or the Spinnaker Ridge developer had to add or superimpose any deck or any other easement one Lot onto, over, or on another Lot was to file a 58.17 RCW application with the City to alter the Spinnaker Ridge recorded final plat. or has to use or to created

Although this appeal arose as a result of the Lange RCW 4.28. 320 Motion to cancel eight (8) Guest recorded documents with the Pierce County Auditor, the Guests alerted the superior court that it did not have subject matter jurisdiction over the Langes’ counterclaims. The superior court rejected these assertions. RP 2/24/17, pages 1-8. Jurisdiction is essential. If a court did not or does not have jurisdiction any and all orders, rulings, decisions, acts and judgments are null and void and must be reversed and vacated even though a mandate has issued. *Bour v. Johnson*, 80 Wn. App. 643, 647, 910 P.2d 548 (1996)(a Division 2 opinion, “a judgment may be vacated if there was no subject matter jurisdiction, even though a mandate has been issued”, jurisdiction over the subject matter of an action “is an elementary prerequisite to the exercise of judicial power”, a judgment “is void if entered without subject matter jurisdiction”); *Acshe*

v. *Bloomquist*, 132 Wash. App 784, 133 P.3d 475 (2006)(a Division II opinion, building permits are land use decisions and subject to 36.70C RCW and LUPA).

Any attempt to alter a recorded subdivision final plat after filing required compliance with the mandatory terms and provisions of Chapter 58.17 RCW, and ultimately after 1995 with 36.70C RCW statutes with their strict 21 day land use petition “LUPA” deadline from 1995 forward requiring the filing of a LUPA petition with a superior court naming the local legislative body as a named party and any other affected person or entities after a party had exhausted his, her or its administrative remedies. CP 253-262. If a party did not exhaust its 58.17 RCW administrative remedies first as a prerequisite as required by legislative enactment, any 36.70C LUPA petition was, would be and is barred. *Id.* The Langes did not exhaust their administrative 58.17 RCW remedies, i.e. submitting a RCW 58.17.215 application to alter the SRD recorded final plat, before constructing part of a Lange deck on part of Lot 5 in April 2011 on the Guests’ Lot 5 property over the Guests’ known objections when the Guests were out of state.

RCW 58.17.215 mandatory legislative enactment procedures and substantive due process and other required and mandatory process required that any person interested in altering the January 31, 1986 recorded SRD

final plat obtain SR Lot owner or unit owner signatures on any RCW 58.17.215 application to alter a recorded subdivision final plat submitted to the local legislative body as clearly identified in RCW 58.17.215. As a prerequisite and a condition precedent before the next RCW 58.17.215 step in the process could be reached, the Langes would have had to obtain both Guest signatures on any Lange RCW 58.17.215 application and/or in an agreement by any and all SR Lot owners to violate the provisions and terms of the original Association CC&Rs filed and recorded with the Pierce County Auditor on January 31, 1986. App. O.

The subsequent August 8, 1986 alleged Association CC&Rs¹ were not the original Association CC&Rs, and therefore even if valid which the Guests denied at the July 2014 trial, and therefore were and are irrelevant with regard to RCW 58.17.215. The Langes misled the Guests and the

¹ The Guests recently received City RCW 42.56 Public Record response documents that the SRD developer and its attorneys stipulated to and agreed that the developer and the not yet incorporated Spinnaker Ridge Association would not amend or alter any of the original City approved Association CC&Rs which were recorded on January 31, 1986 after the City approved them until after there was a public hearing on any potential Association CC&Rs regarding the same, and not before the City approved any amendments and/or restatements first as a condition of the approval of the SRD preliminary plat and approval of the SRD final plat. These mandatory conditions agreed to by the developer and its attorneys were preliminary plat and ultimately SRD final plat approval conditions which were not met with any subsequent January 31, 1986 *original* Association CC&Rs versions. Accordingly, the August 8, 1986 and the 2007 alleged Association restated CC&Rs by definition are null and void and were not properly adopted or enforceable, including any August 8, 1986 'encroachment easement' provision or Article.

courts that the original CC&Rs were the August 8, 1986 CC&Rs. App. O. That was not a true fact.

Notwithstanding that no alteration, no new matter and no changes could or can legally be made to any instrument already recorded by any Washington State auditor as a matter of legislative enactment and law, the January 31, 1986 recorded SRD final plat has a hand-written notation on the lower left bottom corner that restrictive covenants were filed on January 31, 1986 with an Auditor's file number. RCW 65.04.110. Without any Guest waiver, that notation establishes on the face of the currently available SRD recorded final plat as constructive notice to the public and to any person or entity that the original SRD final plat and RCW 58.17.215 operative restrictive covenants were filed and recorded on January 31, 1986, not on August 8, 1986.

By legislative enactment, the recorded SRD final plat is the only lawful and legal subdivision of the SRD platted real property and the SRD Lots, including Lot 4 and Lot 5, with the recorded surveyed and mapped Lot boundary lines and dimensions of each Lot. The SRD recorded final plat was filed and recorded earlier on January 31, 1986 than the original CC&Rs as evidenced by final plat Auditor Document No. 8601310176. App. O; RCW 58.17.215; CP 251; RCW 65.04.040.

The Langes were on constructive notice if not actual notice that the original and the operative 58.17 RCW CC&Rs were the CC&Rs recorded on January 31, 1986, not any subsequent alleged CC&Rs whether validly adopted or not that included any ‘encroachment easement’ that did not exist in the Association Articles of Incorporation or the original Association CC&Rs (subject to the Guests’ lack of waiver). *Yakima County v. Yakima City*, 122 Wn. 2d 317, 388,58 P.2d 245 (1993)(all persons are charged with constructive knowledge of the content of our state statutes).

As evidenced by City Ordinance 91, ¶¶5.2.3 and 5.2.3.4 attached to the September 29, 2014 Guest Declaration in support of the September 29, 2014 Trust Motion to Vacate, existing and even *proposed* easements were (and are) preliminary plat and ultimately City final plat land use decisions. City Subdivision Ordinance 91 was in effect for thirty (30) years from 1966 until 1996. City Ordinance 91 was in effect in 1984, 1985 and in 1986 when the Spinnaker Ridge Development preliminary plats and the SRd final plat were submitted to the City for review and approval.

The Guests have challenged and disputed the Langes’ standing throughout. Clearly, any attempt to alter a recorded final plat – the key word “attempt” - by the Langes involved and involves a land use decision.

In the absence of subject matter jurisdiction, any and all *Guest v. Lange/Lange v. Guest* orders, rulings, decisions, and/or judgments or

opinions in the Langes' favor were null, void ab initio, and invalid. The courts have a non-discretionary duty and obligation to reverse and vacate any Lange orders, rulings, decisions and judgments. *Bour*.

B. The *Guest v. Lange* Case Is Not Final

The Guests assert and contend that the CR 54 (b) multi-party and multi-Guest claim *Guest v. Lange/Lange v. Guest et al.* case is not yet final.

For example, but not limited to, on September 29, 2014 the Guests through then attorneys of record the Eisenhower Carlson law firm e-filed, served and provided working copies to the superior court and had noted or hearing the Guests' Motion to Vacate any and all orders, rulings, and/or judgments in the Coe Family Trust and related parties favor adverse to and against the Guests.

The superior court did not enter any Order with regard to that Motion which is still outstanding. Because the superior court did not enter any Order with regard to that September 29, 2014 Guest motion, the Guests did not have any Order to appeal. App. K, *Guest v. Lange*, footnote 8.

As evidenced by the Guests' September 29, 2014 still pending Motion, all the rights and all the liability of all the parties in the *Guest v. Lange et al.* CR 54(b) action have not been adjudicated yet and the *Guest v.*

Lange action is not final yet. Accordingly, on that ground alone the *Guest v. Lange et al.* action is not final yet although there are other grounds.²

C. This Is Not A Boundary Line Case

The absolutely straight SR Lot 4 and SR Lot 5 shared common northwest to southeast Lot property boundary line evidenced on the recorded SRD final plat has never been altered, adjusted, moved or changed. The Langes owned SR Lot 4 immediately adjacent to SR Lot 5. The Lot 4 and Lot 5 property boundary line remains as straight today as it was in January 1986 as evidenced by the January 31, 1986 SRD recorded final plat which has not been altered pursuant to RCW 58.17.215 since it was filed and as identified below in an excerpt from the final plat. CP 229- 230, in particular lines 22- 5, 237 – 252, 251 and 252 in particular, 387-394; App. L, M and O.

The Guests contend that the superior court (and correspondingly the Court of Appeals) lack of subject matter and lack of other jurisdiction includes lack of jurisdiction over any Lange alleged (but not properly pled) ‘quiet title’ counterclaim or any Lange request for an injunction against the

² In April 2018 as part of *Guest v. Lange* motion proceedings, Lange appellate counsel admitted for the first time in their filings that the September 19, 2014 Lange judgment was not final yet and that the *Guest v. Lange* case was not final yet. It has also developed that the Langes transferred title and ownership of SRD Lot to another or others either during the pendency of the *Guest v. Lange* appeals no later than February 2016 or possibly even before the July 2014 *Guest v. Lange* trial raising real party in interest, additional Lange standing and additional Lange “unclean hands” Guest challenges.

Guests or any threshold jurisdiction over any Lange purported 'defense' to any Guest claim and/or cause of action or any Guest request for any relief and/or remedy at any stage of the proceedings pursuant to Chapter 58.17 RCW and 36.70C RCW Land Use Petition Act ("LUPA") legislative enactments and statutes as a matter of law. CP 237-240, 253-267; see also CP 263-269 (which includes forensic document examiner, handwriting and forgery expert Robert G. Floberg's Declaration under penalty of perjury and Mr. Floberg's extensive Curriculum Vitae and expert report that the sole signature on the recorded 1987 ESM, Inc. 'patio or deck' easement document was and is "very probably" a forgery.

The Guests also contend as below that the Langes did not have any standing in this case and, further, that due to the Langes' "unclean hands" that no court had or has any equity jurisdiction over the Langes or that the Langes could even reach *even if* the Langes had a valid or an enforceable easement on any part of the Guests' SRD Lot 5 (which the Guests deny) under well-established Washington Supreme Court precedent and *stare decisis* opinions in place in the 1940's and still good law cited by the Supreme Court and the Court of Appeals today. *See J.L. Cooper & Co., v. Anchor Sec. Co.*, 9 Wn.2d 45, 71-74, 113 P.2d 845 (1941)(lack of clean hands deprives a party of reaching any court's equity jurisdiction, the courts will not even listen to a party with "unclean hands", no "court of law or

equity will enforce or give any right upon an illegal contract”, a court of equity go still further “and refuse relief, even in cases of equitable right, if the applicant has been guilty of fraud or misconduct in or about the matter in respect to which he seeks relief”). In *J.L. Cooper*, the Supreme Court held that “unclean hands” is a “figurative description of a class of suitors to whom a Court of Equity as a court of conscience will not even listen, because the conduct of such suitors is unconscionable, i.e. morally reprehensible as to known facts...”.

Also, the Guests further contend that the CR 54 (b) multi- party and multi-Guest claim *Guest v. Lange* action and case was not final in 2014, in 2016, in 2017 or final today on numerous grounds, notwithstanding the Langes’ and the superior court’s assertions to the contrary not only below but also on remand. *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 502-798 P.2d 808 (1990)(any and all orders or judgments in a CR 54(b) case adjudicating less than all the claims is modifiable until all rights and liabilities of all parties are finally adjudicated); App. D (annotated by Guest). On September 29, 2014, the Guests filed and served a “Verified Guest CR 59 Motion to Vacate, Amend And/Or Modify All Coe Family Trust Related Orders And Judgments As A Matter of Law And To Enter Judgments As A Matter of Law And To Enter Judgment In The Guests’ Favor” along with a Note for Motion scheduled for October 31, 2014, and

a Declaration with attached exhibits in support thereof, that included City Subdivision Ordinance 91, effective from 1966 forward until 1996, requiring under ¶ 5.2.3 and 5.2.3.4 that any ‘proposed’ easements must be laid out on any subdivision preliminary plat the precursor to the final plat with dimensions. CP 3389-3403; App. B and C (annotated by Guest).

Although the Motion to Vacate was filed, served and working copies were provided to the court, the superior court did not enter any order with regard to that Motion although recognizing its existence, only entering an Order on October 29, 2014, denying the Guests’ separate Motion and request for Reconsideration. App. I. Accordingly, in 2014, 2016 and in 2017 and today all the claims and all the rights and liabilities of all the parties have not been adjudicated yet in the *Guest v. Lange* case (in addition to other grounds). Also, although the Guests’ September 29, 2014 Motion for Reconsideration was filed by the Eisenhower Carlson law firm shortly after 4:30 p.m. on September 29, 2014 and was identified as filed with the superior court clerk at 8:30 am on September 30, 2014, the Guests’ supporting Declaration of Suzanne Guest was filed on September 29, 2014 beginning the filing process which the Guests understand is considered as a course of dealing as a ‘continuation process’. See App. V and W (annotated by Guest). Further, that September 29, 2014 Motion filing included a Guest Motion to vacate the summary judgments in the Langes’

favor and any other Lange Order, and also a Motion for the “Issuance of a Mandatory Permanent Guest Removal and Ejection Injunction. App. W; CP 4082-4109 which the Guests contend was or would not subject to a CR 59 ten (10) day filing period.

See also CP 311 regarding a party’s failure to move to strike, address or defeat a party’s affirmative defenses with citations to *State ex rel. Bond v. State*, *Schorno v. Kannada*, and *Stillman* including here with regard to the Guests’ Answer to the Langes’ Counterclaim affirmative defenses. Without waiver of the superior court’s lack of subject matter and other jurisdiction, the superior court did not permit any follow up trial court Lange counterclaim motion practice following the July 2014 *Guest v. Lange* trial as contemplated and agreed by the parties and the court after the jury was dismissed. *See* September 19, 2014 Record of Proceedings, pages 1 – 13, and in particular 9:10: 15 – 12:4.

At the September 19, 2014 hearing, the trial court erroneously stated at page 11, lines 18-21 that the end result was that “the title will be quieted in the Langes to that area, this 5-foot area that we’re talking about. And the case is closed, based on entry of judgment.”

An easement if an easement is legal, valid and enforceable is a “nonpossessory right to use another’s land in some way without compensation.” *Kave v. McIntosh Ridge Road Association*, 198 Wash.

App. 812, 394 P.3d 446, 452 (2017). The land remains the property of the titled owner, here the Guests' property. An easement, if valid and enforceable, is a right that is distinct from ownership. Accordingly, an easement cannot be considered the land of the 'easement holder'. *Id.*

The *Guest v. Lange* case was not and is not a "boundary line" case or a Lange "adverse possession" case. There is and has been on Lot 4 or Lot 5 boundary line adjustment. The Langes did not plead adverse possession in their Counterclaim, or otherwise.

Accordingly, with respect the Guests contend that the Court's *Guest v. Lange* Appeal No. 46802-6-II June 14, 2016, unpublished decision was and is premature, and with respect this Court did not have jurisdiction in June 2014 to issue an opinion or in 2017 to issue a mandate with regard to the opinion, and similarly with regard to aspects of the Court's *Guest v. Lange*, 195 Wash. App. 330, 381 P.3d 130 (2016) ("Lis Pendens") published opinion regarding in particular the description of the *Guest v. Lange* fact situation as opposed to the filing of the two (2) lis pendens and the effect of the filing of a supersedeas bond staying and superseding any enforcement of any real property, title, possession or use or any money judgments below. Those facts are primarily in the "FACT" section of that opinion. The Court did not reach the discovery issue in its Lis Pendens opinion, because it appeared to the Court as stated in footnote 8 that the trial

court did not rule on the discovery motions because it cancelled (in error) the lis pendens. App. K (annotated by Guest).

The trial court cancelled lis pendens recordings and other documents on February 24, 2017 also in error again in violation of the Court's *Guest v. Lange et al.* August 2, 2016 *stare decisis* and precedential Lis Pendens opinion.

To the extent needed or required for entry of judgment, relief and remedies in the Guests' favor, the Guests also invoke RAP 2.5(c)(1) which at the instance of a party as here permits the Court to review and determine the propriety of a decision of the trial court "even though a similar decision was not disputed in an earlier review of the same case". The Court indicated in its unpublished opinion that the Guests did not appeal the May 6, 2013 Lange summary judgment. If not appealed below, that summary judgment is appealed here and was appealed in the Guests' *Guest v. Lange* February 2016 Reply brief in strict response to the Langes' Answer Brief.

Although this appeal involves the cancellation of 8 recorded documents, this appeal is also a land use, superior court lack of subject matter jurisdiction, Lange lack of standing, a corresponding Court of Appeals lack of jurisdiction, and as above with respect to the Court a premature June 14, 2016 unpublished *Guest v. Lange* opinion and therefore premature mandates as more fully outlined below.

As above, this appeal involves several mandatory Washington State legislative enactments, Acts and statutes including Chapter 58.17 RCW and the 36.70C RCW “Land Use Petition Act” (“LUPA”) mandatory jurisdiction, process and procedure statutes that barred and precluded any attempt by the Langes to ‘add’ and/or to ‘superimpose’ any type of alleged Lange ‘deck easement’ on any part of the Guests’ Lot 5 Spinnaker Ridge Development subdivision Gig Harbor, Washington (“SRD” or “SR”) recorded SRD final plat property.

This appeal also involves the federal legislative Congress enactment of the Internal Revenue Code that includes 26 U.S.C. §501(c)(7) and its IRC (Internal Revenue Code) mandatory rules, regulations and Revenue Rulings which limit, curtail and restrict social and recreational clubs such as the Spinnaker Ridge Community Association, Inc. (the “Association Club”, the “Club” or ‘club’) club’s permitted activities, acts, actions and conduct. The Association club was incorporated in December 1985 as a §501 (c)(7) social and recreational club subject to federal law and IRC 501(c)(7) rules, regulations and rulings at all times. CP 294-296 with footnotes 6 through 13.

The Association was not incorporated as a U.S.C. §528 homeowner’s association. Under its charter and Articles of Incorporation, the Association club and its board and members were and are expressly and

explicitly precluded from engaging in any conduct or any activities and acts that are not permitted by IRC 501 (c)(7). Section 501(c)(7) social and recreational clubs are specifically prohibited by IRC 501(c)(7) rules, regulations and Revenue Rulings from administering or enforcing any architectural covenants or any architectural CC&Rs or regulating or maintaining the exterior of any privately owned Lot or Unit real or personal property. CP 294-296, with footnotes 6 to 13.

The Association Articles of Incorporation were admitted at the July 2014 *Guest v. Lange* jury trial as a Court Admitted Trial Exhibit. Suzanne Guest testified about the fact at the July 2014 trial that there was no Association Article of Incorporation that permitted the Association to grant any “encroachment easement” to any SR Lot owner, any Lot or to the SRD developer for any SR Lot deck, patio or structure to cross over any SR Lot boundary line onto another SR Lot under any circumstance.

Under RCW 64.38.020 also even if the Association had been incorporated as a 26 U.S.C. §528 homeowner’s association which it was not, a homeowner’s association has no power, right or any authority to grant any ‘deck’ or any other easement one Lot onto another privately owned Lot, or to any SR Lot owner onto, over, upon, under or on any other SR Lot. The Association’s Articles of Incorporation also did not and do not provide the Association with any such power, authority or right. RCW 64.38.020

only provides a homeowners association with the ability to grant easements through or over “common areas”. RCW 64.38.010(9), App. Q (annotated by Guest).

Even if the Langes had submitted an application to the the City to alter the plat, and there had been a public hearing, the City would still have to issue mandated City findings of fact and conclusions of law that the public had an interest in any such requested plat alteration and that the “public” would use any such plat alteration neither of which could be met. CP 251. The 1987 recorded (but deficient, defective and forged) ESM, Inc. ‘patio or deck’ easement document was dated and recorded more than a *year* after the SRD recorded final plat. The City could not impose that easement on the SRD final plat as the City itself as the local legislative body in this instance would have to comply with and adhere to the mandatory RCW 58.17.215 procedures also applicable to the City as well as to any person interested in altering a recorded subdivision final plat.

When the superior court entered an Order cancelling all eight documents and subsequently ruled and ordered the *Guest v. Lange et al* case closed notwithstanding that this Court had remanded the *Guest v. Lange et al.* case and action back to the superior court in its Lis Pendens opinion to “ensure that the amount of any supersedeas bond is sufficient to compensate the Langes for any damages they incur due to the appeal and lis pendens”

requiring further trial court proceedings, the court ignored and violated the Court's remand and mandate. App. K (*see Guest v. Lange et al.* opinion, 195 Wash. App. At 341 and 381 P.3d at 137. That mandate issued on February 13, 2017 and was filed in the Pierce County Superior Court records on March 17, 2017. CP 3906-3907.

The trial court did not comply with that mandate reopening trial court jurisdiction for further trial court proceedings. The Langes did not comply with that mandate either.

Some of the cancelled documents were documents related to another action involving the Langes and the Guests as parties. As evidenced by the Declaration of John Farrington and the Declaration of Wallace Tirman submitted by the Langes in support of their Motion to cancel referring to recorded document number 201603140586, and number 201402030230, the Guests filed a supersedeas bond and bonds staying and superseding applicable *Spinnaker Ridge v. Guest* orders, rulings, decisions and judgments adverse and against the Guests in that case also. It is a matter of public and recorded record that the Guests updated their *Spinnaker Ridge v. Guests* Notice of Stay and Deposit of Cash Supersedeas continuing to stay and supersede any and all *Spinnaker Ridge v. Guest* orders, rulings, decisions, acts and judgments adverse and/or against the Guests.

At a minimum, the cancellation of any document recorded related to the *Spinnaker Ridge v. Guest* action, including the March 6, 2015 Lis Pendens, results in the same precedential lis pendens holding in this Court's August 2, 2016 Lis Pendens opinion, the documents were erroneously cancelled, vacated and released. Not only did the *Guest v. Lange* opinion not reach all claims, rights and liability in the *Guest v. Lange* case, the Guests contend that the *Guest v. Lange* action was not and is not final yet, the *Spinnaker Ridge v. Guest* case was not and is not final yet, and the Guests' supersedeas in that case is still in place and forecloses any enforcement of any *Spinnaker Ridge v. Guest* order, ruling, decision, injunction and/or judgement against the Guests during the pendency of that appeal. Also, the Guest cash supersedeas was not released or disbursed on remand and is still in place staying and superseding any enforcement of any orders, rulings, decisions, acts, and judgments resulting in erroneous cancellation of the eight (8) recorded documents.

II. Assignments of Error

No. 1: The trial court erred when it refused to deny the Lange Motion to cancel the eight documents identified and attached as part of the Lange RCW 4.28.320 Motion and identified in the Order that the court signed and entered on February 2, 2017.

No. 2: The trial court erred when it failed to comply with and adhere to the Court's Lis Pendens remand and mandate.

No. 3: The trial court erred when it failed to grant the Guests' March 7, 2017 Joint and Combined Motion for Reconsideration.

No. 4: The trial court erred when it failed to grant the Guests' April 13, 2017 Guest RCW 7.40 and CR 65 Motion to Vacate And Dissolve the Injunction Issued Against the Guests.

No. 5: The trial court erred when it failed to grant the Guests' April 13, 2017 Motion for Discovery.

No. 6: The trial court erred when it refused to allow full briefing on the Guests' April 13, 2017 Motions.

No. 7: The trial court erred when it entered its April 19, 2017 Order On Motion to Vacate Injunction, Allow Additional Discovery, and Affirm Lis Pendens.

No. 8: The trial court erred when it denied the Guests' May 1, 2017 Motion for Reconsideration.

No. 9: The trial court erred when it failed to dismiss the Langes' counterclaim and defenses with prejudice on remand.

No. 10: The trial court erred when it attempted to alter the January 31, 1986 recorded 58.17 RCW SRD final plat.

No. 11: The trial court erred when it exceeded its jurisdiction.

No. 12: The trial court erred when it signed and entered its ~~May~~ *May* ~~23, 2017~~ *23, 2017* ~~and three~~ orders denying the Guests' motions,

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1: Did the superior court have any subject matter jurisdiction over the Langes' counterclaims and alleged defenses to the Guests' claims and causes of action in *Guest v. Lange/Lange v. Guest et al.*? (Assignment of Errors 1 to 12)

No. 2: Did the superior court fail to comply with and adhere to the Court of Appeals *Guest v. Lange et al.* Lis Pendens August 2, 2016 opinion, the Court Lis Pendens remand and its February 13, 2017 mandate filed with the Pierce County Superior Court on March 17, 2017? (Assignment of Errors No. 1- 12)

No. 3: Did the superior court have any authority to cancel any of the lis pendens? (Assignment of Errors 1 to 12).

No. 4: Did the superior court have any authority to reinstate only one of the two lis pendens filed and recorded by the Guests in the *Guest v. Lange* action? (Assignment of Errors 1 to 12, and also in particular Error No. 7).

No. 5: Was and is the *Guest v Lange/Lange v. Guest et al* action final?

(Assignment of Errors 1 to 12)

**IV. STATEMENT OF THE CASE, ADDITIONAL
FACTS AND STATEMENT OF THE CASE
AND ARGUMENT**

The Guests incorporate the facts, procedural outline and argument above in the Introduction, Facts and Argument Section above in Part I as if duplicated here and provide additional fact and statement of the case and procedures and argument here, incorporating also the motions, filings and Guest briefings referred to.

The Guests filed a Motion for Reconsideration of the Court's February 2017 Order on March 7, 2017. The trial court denied that Motion on March 28, 2017.

On April 13, 2017, the Guests filed a Joint and Combined Motion for Guest Discovery on Remand and a "Guest Joint and Combined RCW 7.40 and CR 65 Motion to Vacate and Dissolve the Injunction Issued Against the Guests" with an April 13, 2017 Declaration of Christopher Guest in support of the Guest Motions and a April 14, 2017 Declaration of Suzanne Guest in support of the Guest Motions. The Motions were noted for the Judge's docket. CP 3961-39623963-3964, 3965-66; 3967 – 3986, 3987-3991, 3992-4007, 4008-4019.

The Court rescheduled those Motion hearings until a later date. CP 4020 – 4027. Then, before any oppositions or any responses were due yet because of the trial court’s recess letters and rescheduling the hearings, the court without notice to the parties abruptly cancelled the hearings without any responses being filed and without full briefing, on apparently the same date that the trial court issued its *sua sponte* four page April 19, 2017 Order denying the Guests’ Motions without providing a copy of that Order to the parties to review and offer suggestions or objections prior to signature and filing. CP 4056-4057. The court wrote in its Order on page 4 that it cancelled “oral arguments” on the currently pending motions by striking the hearing “as the Court has decided “the motion on briefs”. The April 19, 2017 Order did not address the Langes’ then pending Motion. CP 3944-3960 which remains outstanding.

None of the motions rescheduled by the court for hearing had been fully briefed, as no response or oppositions or objections had been filed to any of the motions because no response was due yet, and therefore no replies had been filed either. By entering its four page order *sua sponte* on April 19, 2017 depriving the parties with their due process right to respond and the Guests’ due process right to reply to any Lange response to their motions, the Court violated the Guests’ due process and litigant rights. There was and had been no full briefing on any of the motions. The Guests

filed a May 1, 2017 Joint and Combined CR 59(A) and CR 54(f)(2) Motion for Reconsideration and To Vacate the Court's Sua Sponte April 19, 2017 Order. App. U (annotated by Guest). The trial court denied that motion on May 23, 2017. CP 4058.

The Court did not enter an order on the Langes' Motion. The Court's failure to enter an Order on the Langes' Motion supports that the remand stage of the proceedings is not yet final or over, and further that there are still trial court proceedings to be held and had.

On April 27, 2017, the Guests filed a Notice of Appeal or Motion for Discretionary Review with fee paid preserving the Guests' challenge that the CR 54 (b) *Guest v. Lange et al* case was not or is not final.

On June 23, 2017 the Guests filed a Notice of Appeal or Motion for Discretionary Review with fee paid preserving the Guests' challenge that the CR 54 (b) *Guest v. Lange et al* case was not and/or is not final.

The Guest with respect re-assert that the Langes' adoption of the 1987 forged, defective and deficient 'deck easement' document created a Lange release document releasing the Guests from any Lange claims and also with respect created a unilateral Lange indemnity duty and obligation to the Guests, adopting said document with the knowledge of its deficiencies, its defects and continuing in the present and in the future with

knowledge that it is a forged document and cannot form the basis not only of any easement but a basis for any judgment against the Guests.

The Trust related deed that Michael Coe, Carol White and their sister signed was also a forged document and it also cannot form the basis of any contract or any Trust related Lot 5 deed. The only Guest Lot 5 deed is the Lot 5 deed admitted at the *Guest v. Lange* trial that Guest testified about that the Guest signed and initialed as Guest accepted as part of their Lot 5 closing documents. The Langes stipulated prior to trial as part of the Evidence to be submitted to the court and to the jury that deed was the true and the authentic Guest Lot 5 deed, and did not object to that deed being introduced into evidence at trial. The Trust is bound by that deed that has no exceptions and is not subject to any reservations. The Guests request judgment against the Trust related parties and damages and fees in an amount to be determined.

The Guests further request an order and a judgment against the Langes and any Lange Lot 4 successor or assign permanently ejecting the Langes (and any successor or assign) from Lot 5, and immediate removal of the Lange constructed deck on Lot 5 at the Langes, or successor or assign's cost that the Langes' deck contractor testified at trial would cost about \$1,200 and might take a day or not more than a day to accomplish including reconfiguring the Lot 4 deck to be safe. The Guests rely on the

recent *Garcia v. Henley*, Appeal No. 94511-0 (April 19, 2018, Washington Supreme Court), App. F (annotated by Guest), permanent ejectment and removal injunction opinion and its authorities for the grant of the Guests' mandatory ejectment and removal injunction motion by appellate court order. Washington Supreme Court opinion. See App. V and W (annotated by Guest).

Also, the Guests respectfully request that the Court remand this case to a superior court for further trial court proceedings and for entry of judgments in the Guests' favor as this case is not yet final, and further for reinstatement of the Guests' claims and causes of action, grant of the Guests' January 2013 motion for leave to file a second amended complaint, allowing Guest supplementation of any amended complaint and an award of damages, costs and fees with the Trust related parties and the Langes continuing as Guest defendants, all Trust related orders, decisions, rulings and judgment(s) in their favor reversed and vacated, and reversal and vacation of any and all orders, rulings, decisions and judgments in the Langes' favor. Due to the trial court's apparent bias against the Guests as evidenced most recently by its April 19, 2019 Order, the Guests respectfully request that the Court either assign this case to a different superior court or assign a visiting judge to the case.

V. REQUEST FOR ATTORNEYS FEES

In addition, the Guests also respectfully request an award of appellate fees, costs and expenses to the Guests against the Langes not only under the Lange indemnity and release contract, under RCW 64.38.050, for the Langes' litigation bad faith, for the Langes' trespass on the Guests' Lot 5 property for over seven (7) years under the trespass statutes, and also under RAP 18.9 under a separate Guest RAP 18.9 motion for the delay in Guest justice that the Langes have knowingly caused the Guests, and fees, costs and expenses against the Trust related parties under the Guest purchase and sale agreement on remand.

VI. CONCLUSION

The Guests request that the Court reverse and vacate the superior court's February 24, 2017 Order and its April 19, 2017 Order with the exception of reinstating the January 2013 Guest lis pendens, dismiss the Langes counterclaim with prejudice and any Lange defenses to the Guests' claims and causes of action, reinstate all Guest claims and causes of action, grant the Guests' January 2013 motion for leave to amend the Guests' complaint and file a Second Amended Complaint, and enter judgment in the Guests' favor as a matter of law under the Washington Supreme Court 2018 *Garcia v. Henley* opinion, granting the Guests' September 19, 2014 Motion

for Mandatory Injunction ejecting the Langes (and any Lot 4 successors or assigns) from Lot 5 and removing the Lange deck constructed on Lot 5.

As above, the Guests also request that all Trust related orders, rulings, decisions and judgments be reversed and vacated and the other relief Trust related relief that the Guests requested above, in addition to an award of appellate fees, costs and expenses to the Guests not only under the Lange indemnity and release contract, under RCW 64.38.050, and also under RAP 18.9 under a separate Guest RAP 18.9 motion for the delay in Guest justice that the Langes have knowingly caused the Guests.

DATED this 21th day of June, 2018.
28

Respectfully submitted,

/s/ Suzanne Guest
Suzanne Guest
Appellant

/s/ Christopher Guest
Christopher Guest
Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, am a party to and/or are interested in the above-entitled action, and am competent to be a witness herein. On the date given below, I caused to be served the foregoing document and Appendix on the following persons and in the manner listed below through the Washington State Appellate Court Portal system:

Irene Hecht Maureen Falecki Keller Rohrback L.L.P. 1201 Third Avenue, Suite 3200 Seattle, Washington 98101-3052	<input checked="" type="checkbox"/> Electronically through the Washington State Appellate Court Portal system
Timothy Farley Farley Law 2012 34 th Street P.O. Box 28 Everett, Washington 98206-0028	<input checked="" type="checkbox"/> Electronically through the Washington State Appellate Court Portal system to: timothy.farley@thehartford.com
Patrick McKenna Betsy Gillaspay Gillaspay & Rhode PLLC 821 Kirkland Ave. Suite 200 Kirkland, WA 98033-6311	<input checked="" type="checkbox"/> Electronically through the Washington State Appellate Court Portal system

DATED this 27th day of June, 2018 at Phoenix, Arizona.

SG

/s/Suzanne Guest
Suzanne Guest

APPENDIX A

Rules of Appellate Procedure

RULE 12.7 FINALITY OF DECISION

(a) Court of Appeals. The Court of Appeals loses the power to change or modify its decision (1) upon issuance of a mandate in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9, (2) upon acceptance by the Supreme Court of review of the decision of the Court of Appeals, or (3) upon issuance of a certificate of finality as provided in rules 12.5(e) and rule 16.15.(e).

(b) Supreme Court. The Supreme Court loses the power to change or modify a decision of the Court of Appeals upon issuance of the mandate of the Court of Appeals in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9. The Supreme Court loses the power to change or modify a Supreme Court decision upon issuance of the mandate of the Supreme Court in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9.

(c) Special Rule for Costs and Attorney Fees and Expenses. The appellate court retains the power after the issuance of the mandate or certificate of finality to act on questions of costs as provided in Title 14 and on questions of attorney fees and expenses as provided in rule 18.1.

(d) Special Rule for Law of the Case. The appellate court retains the power to change a decision as provided in rule 2.5(c)(2).]

[Amended December 5, 2002; September 1, 2010]

Rules of Appellate Procedure

RULE 2.5 CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim or error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) Generally. A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b) (2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) Security. If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) Conflict With Statutes. In the event of any conflict between this section and a statute, the statute governs.

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

Rules of Appellate Procedure

RAP 2.2 DECISIONS OF THE SUPERIOR COURT THAT MAY BE APPEALED

- (a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:
- (1) Final Judgment. The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.
 - (2) (Reserved.) (3) Decision Determining Action. Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.
 - (4) Order of Public Use and Necessity. An order of public use and necessity in a condemnation case.
 - (5) Juvenile Court Disposition. The disposition decision following a finding of dependency by a juvenile court, or a disposition decision following a finding of guilt in a juvenile offense proceeding.
 - (6) Termination of All Parental Rights. A decision depriving a person of all parental rights with respect to a child.
 - (7) Order of Incompetency. A decision declaring an adult legally incompetent, or an order establishing a conservatorship or guardianship for an adult.
 - (8) Order of Commitment. A decision ordering commitment, entered after a sanity hearing or after a sexual predator hearing.
 - (9) Order on Motion for New Trial or Amendment of Judgment. An order granting or denying a motion for new trial or amendment of judgment.
 - (10) Order on Motion for Vacation of Judgment. An order granting or denying a motion to vacate a judgment.
 - (11) Order on Motion for Arrest of Judgment. An order arresting or denying arrest of a judgment in a criminal case.
 - (12) Order Denying Motion to Vacate Order of Arrest of a Person. An order denying a motion to vacate an order of arrest of a person in a civil case.
 - (13) Final Order after Judgment. Any final order made after judgment that affects a substantial right.
- (b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:
- (1) Final Decision, Except Not Guilty. A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).
 - (2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.
 - (3) Arrest or Vacation of Judgment. An order arresting or vacating a judgment.
 - (4) New Trial. An order granting a new trial.
 - (5) Disposition in Juvenile Offense Proceeding. A disposition in a juvenile offense proceeding that:
 - (A) is below the standard range of disposition for the offense,
 - (B) the state or local government believes involves a miscalculation of the standard range,
 - (C) includes provisions that are unauthorized by law, or
 - (D) omits a provision that is required by law.
 - (6) Sentence in Criminal Case. A sentence in a criminal case that
 - (A) is outside the standard range for the offense,
 - (B) the state or local government believes involves a miscalculation of the standard range,
 - (C) includes provisions that are unauthorized by law, or
 - (D) omits a provision that is required by law.
- (c) Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, a party may appeal only if the review proceeding was a trial de novo. Appeal is not available if: (1) the final judgment is a finding that a traffic infraction has been committed, or (2) the claim originated in a small claims court operating under RCW 12.40.
- (d) Multiple Parties or Multiple Claims or Counts. In any case with multiple parties or multiple claims

for relief, or in a criminal case with multiple counts, an appeal may be taken from a final judgment that does not dispose of all the claims or counts as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. The time for filing notice of appeal begins to run from the entry of the required findings. In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties.

[Originally effective July 1, 1976; amended effective July 1, 1978; January 1, 1981; September 1, 1985; September 1, 1989; September 1, 1990; September 1, 1994; September 1, 1998; December 24, 2002; September 1, 2006; September 1, 2008; September 1, 2010; September 1, 2011.]

APPENDIX B

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The Honorable Stanley J. Rumbaugh

SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF PIERCE

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,

Plaintiffs,

v.

DAVID LANGE and KAREN LANGE,
husband and wife, and the marital community
comprised thereof,

Defendants.

THE COE FAMILY TRUST and Trustee
Michael Coe,

Interveners,

v.

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,

Respondents.

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,

Third-Party Plaintiffs,

NO. 11-2-16364-0

VERIFIED GUEST CR 59 MOTION TO
VACATE, AMEND AND/OR MODIFY
ALL COE FAMILY TRUST RELATED
ORDERS AND JUDGMENTS AS A
MATTER OF LAW AND TO ENTER
JUDGMENT IN THE GUESTS' FAVOR



CP 3389

VERIFIED GUEST CR 59 MOTION TO VACATE, AMEND
AND/OR MODIFY ALL COE FAMILY TRUST RELATED
ORDERS AND JUDGMENTS AS A MATTER OF LAW AND TO
ENTER JUDGMENT IN THE GUESTS' FAVOR - 1

17377-1/LCS/635944



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v.

MICHAEL COE and CAROL COE,
individually and as husband and wife and the
marital community thereof, and CAROL ANN
WHITE and JOHN L. WHITE, individually
and as wife and husband and the marital
community thereof,

Third-Party Defendants.

I. RELIEF REQUESTED

Christopher Guest and Suzanne Guest (the "Guests"), CR 59 aggrieved parties, respectfully request that this Court enter an order vacating, reconsidering, amending and/or altering any and all orders and/or judgments in the 'Coe Family Trust' and related parties favor under CR 59.

The Guests proved their Lot 5 title at the *Guest v. Lange* trial in July 2014. That Lot 5 title - dated October 28, 2004 - is evidenced by admitted Trial Exhibit 28. A true and correct copy of Trial Exhibit 28 is attached hereto as **Exhibit A**. The Langes stipulated to the admission of Trial Exhibit 28 at trial. The Langes did not challenge Suzanne Guest's Lot 5 trial title testimony. The Trust and related parties failed and refused to appear and participate at trial.

The Guests not only request that the Court vacate all Trust related orders and/or judgments in this action, but also enter an order and/or judgment in the Guests' favor that the Trust and/or related parties and also that the Langes must indemnify the Guests for any and all loss, damage, harm, costs, fees and/or expenses related to and/or arising out of the Trust and related parties' use and utilization of the 1987 ESM recorded purported 'patio or deck easement' document at any time.

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CP 3390

1 **II. STATEMENT OF RELEVANT FACTS AND PROCEDURE**

2 **A. The Trust refused to appear or participate in the *Guest v. Lange* trial.**

3 At trial, the Guests proved that title to Lot 5 was the October 28, 2004, Lot 5 Statutory
4 Warranty Deed that Fidelity National Title Company faxed to the Guests on November 1, 2004,
5 to review, examine, approve, accept and sign off on in exchange for the purchase price. By
6 contract with Carol Ann White, the Guests were entitled to receive and obtain clear, marketable
7 and unencumbered title in exchange for the purchase price. Carol Ann White signed the offer to
8 sell Lot 5 to the Guests in September 2004. The Guests accepted Carol Ann White's offer in
9 October 2004 and signed the Purchase and Sale Agreement. The Guests paid earnest money in
10 October 2004 for clear, marketable and unencumbered title *before* Fidelity National Title
11 Company faxed the Guests the clear, marketable and unencumbered October 28, 2004, title to
12 the Guests on November 1, 2004, as the Coe Family Trust, Michael Coe, Carol Ann White and
13 Marilyn LaBarbara's agent. Fidelity National Title, and therefore the principals Trust, Michael
14 Coe, Carol Ann White and Marilyn LaBarbara, directed and instructed the Guests to review,
15 examine, approve, accept and "sign off on" the October 28, 2004, title in exchange for the
16 purchase price. That purchase price included the October 2004 earnest money already deposited
17 with Fidelity National Title Company.

18 On November 1, 2004, the Guests reviewed, examined, accepted, approved and signed
19 off on the October 28, 2004, title in exchange for the purchase price as evidenced by Trial
20 Exhibit 28 and Suzanne Guest's trial testimony. The October 28, 2004, title that the Guests
21 reviewed, approved, accepted and signed off on was clear, marketable and unencumbered title,
22 as required by the Purchase and Sale Agreement. The title was fixed and set in place on
23 October 28, 2004, and again on November 1, 2004, when the Guests signed the October 28,
24 2004, title and accepted it as the title. The Lot 5 title did not have the Lot 4 deck or any other
25 easement on any part of Lot 5. Lot 5 title was not, and is not, subject to any easement of any
26 kind. The Lot 5 title did not and does not have exhibits attached to it.

1 The Guests paid the balance of the purchase price for the conveyance of Lot 5 on
2 November 10, 2004. as evidenced at trial. The October 28, 2004, title had already been fixed,
3 accepted, signed off on, paid for and solidified by contract and by RCW 7.28.070 by
4 November 1, 2004, and also November 10, 2004.

5 **B. Title to Lot 5 had automatically vested in the Guests on or by November 1, 2004,**
6 **retroactive to October 28, 2004.**

7 RCW 7.28.070 only requires that a good faith purchaser, devisee and/or an assign possess
8 the real property for seven continuous years and pay property taxes on the property for seven
9 continuous years for automatic vesting of title retroactive to the date of title, here October 28,
10 2004. As evidenced at trial, the Guests have possessed Lot 5 for a continuous seven years. The
11 Guests paid property taxes on Lot 5 for seven continuous years. The Guests met all requirements
12 of RCW 7.28.070 for automatic vesting of Lot 5. A true and correct copy of RCW 7.28.070 is
13 attached hereto as **Exhibit B**. The Guests' October 28, 2004, title automatically vested in the
14 Guests' by law as of October 28, 2004, cannot be changed or altered by any court or other action.
15 As Suzanne Guest testified at trial, the Guests reviewed, approved, accepted, signed and initialed
16 the October 28, 2004, title on November 1, 2004, and returned the signed, initialed, approved
17 and accepted title to Fidelity National Title by fax on or about November 1, 2004, and, therefore,
18 to the Trust, trustees, Michael Coe, Carol Ann White and Marilyn LaBarbara as well. See
19 *Declaration of Suzanne Guest* filed herewith.

20 **C. No other title was introduced at trial or was admitted at trial.**

21 There was no challenge to Trial Exhibit 28 at trial. There was no challenge to the
22 October 28, 2004, title at trial. The October 28, 2004, title acquired by the Guests, as a matter of
23 law and by Washington statute, is the "law of this case".

24 **III. ISSUES PRESENTED**

25 1. Must all Trust related orders and judgments, including the April 11, 2014, Order
26 ordering the Guests to pay the non-existent Trust, be vacated, amended and modified under

VERIFIED GUEST CR 59 MOTION TO VACATE, AMEND
AND/OR MODIFY ALL COE FAMILY TRUST RELATED
ORDERS AND JUDGMENTS AS A MATTER OF LAW AND TO
ENTER JUDGMENT IN THE GUESTS' FAVOR - 4

17377-1/LCS/635944



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CP339J

B-4

1 CR 59 as a matter of law as all Trust orders and judgments are voided, nullified and negated by
2 the October 28, 2004, title and RCW 7.28.070?

3 2. Must the Trust and/or any related party and/or David Lange and Karen Lange and
4 their marital community indemnify the Guests for the Trust and/or related parties use and/or
5 utilization at any time of the 1987 ESM recorded 'patio or deck easement' document?

6 **IV. EVIDENCE RELIED UPON**

7 The Guests rely on the court filings, pleadings and case records, previously filed herein,
8 including, but not limited to, the Guests' September 17, 2014, Opposition and Objection to entry
9 of any judgment in the Langes' favor on the jury verdict and/or otherwise and any "Final
10 Judgment" adverse to the Guests in this action, the Guests challenge to the Trust and related
11 parties' standing in this action and any court jurisdiction over any relief, remedy, order,
12 judgment or recovery requested by the Trust, *Guest v. Lange* Trial Exhibit 28, the Guests' July
13 2014 trial testimony, the Langes' trial admissions, any and all Guest Declarations, and *Guest v.*
14 *Lange* Trial Exhibit 20 (January 31, 1986 recorded Spinnaker Ridge Development final plat).

15
16 The Guests also rely on RCW 58.17.165, Gig Harbor Municipal Code Ord. 91 including
17 final plat provisions 5.0 to 15.0 effective 1966 to 1996, and in 1985 and 1987 (attached to Guest
18 Declaration), RCW 64.38.010(10) (the articles of incorporation and a final plat, among other
19 documents, are governing documents of a Homeowners Association), *Guest v. Lange* Trial
20 Exhibits 14, 19, 21, 27 (SR Declarations and CC&Rs and 2007 First Amendment to SR CC&Rs
21 documents without waiver), *Guest v. Lange* Trial Exhibit 11 (Rainer Title SR plat diagram
22 excerpt of Lot 4 and the Main Sail Lane SR cul de sac as part of the Langes' Lot 4 1993
23 purchase prior to closing, no Lot 4 easement on Lot 5) and any other *Guest v. Lange* Trial
24
25
26

1 Exhibit and/or applicable RCW or statute including RCW 4.84.010, RCW 4.84.080 (limiting
2 statutory attorney's fees to prevailing party to \$200.00) and RCW 4.84.185.

3 RCW 4.84.185 requires that a prevailing party motion file a motion for fees, costs and
4 expenses no later than 30 days after entry of the order, written findings of fact and conclusions of
5 law by the judge for any award of fees and/or costs to a party who purportedly was required to
6 defend against a frivolous action(s) or proceedings and/or that was advanced without reasonable
7 cause with full due process procedures to be afforded to the 'offending' party (not followed).
8 presumably requiring an affidavit of fees and costs, the court to consider all of the evidence (also
9 not done) with regard to the court's April 11, 2014 monetary order against the Guests.
10

11 In addition, the Guests also rely on the *Guest v. Lange et al* deposition transcript of
12 Hikaru McCory, formerly known as Hikaru Gomez, the notary public who witnessed Michael
13 Cox's signature on the November 4, 2004, signed and altered Trust title, the Community
14 Property Agreement between Allen Coe and Margaret Coe transferring title to any community
15 real property to the surviving spouse immediately on the death of the first deceased, in this
16 instance Allen Coe in January 1997 with all community real property transferred to Margaret
17 Coe in her name immediately upon death, and the Washington conveyance and acknowledgment
18 RCWs 64.04.010, .020, 64.08.050, .060 and .070.
19

20 The Guests also rely on RCW 48.01.040 (insurance is a contract whereby one undertakes
21 to indemnify another or pay a specified amount upon determinable contingencies), and the
22 December 2012 New York Times nationally published Opinion article entitled "Those Crazy
23 Indemnity Forms We All Sign" produced to the Langes in May 2014 as notice of ordinary people
24 become an insurer when they sign or agree to indemnify another and that 'regular' people by
25
26

VERIFIED GUEST CR 59 MOTION TO VACATE, AMEND
AND/OR MODIFY ALL COE FAMILY TRUST RELATED
ORDERS AND JUDGMENTS AS A MATTER OF LAW AND TO
ENTER JUDGMENT IN THE GUESTS' FAVOR - 6

17377-1/LCS/635944



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CP3394

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1 doing so can become a “regular Lloyd’s of London.” See September 29, 2014, *Declaration of*
2 *Suzanne Guest* filed in support of this Motion.

3
4 **V. AUTHORITIES**

5 The Trust lawsuit against the Guests, and the Guests’ defenses, affirmative defenses
6 barring, precluding and estopping any Trust or related party recovery, remedy or relief, and the
7 Guests’ Trust counterclaims and third party Trust related complaints never went to trial. The
8 Court dismissed all Guest counterclaims and third party claims against the Trust and related
9 parties as a matter of law and entered all orders and/or judgments requested by the Trust and
10 related parties in their favor as a matter of law.

11 On September 19, 2014, this Court entered a Final Judgment in this action stating that all
12 Guest claims were dismissed with prejudice. In June 2013, the Guests filed a six person jury
13 demand for any matters, issues or facts that a jury was entitled to hear and decide related to any
14 Trust claims and Guest related claims and issues. Because there was no Trust trial, there can be
15 no Guest CR 59 request here to vacate any Trust jury verdict or for a new Guest/Trust trial.
16 However, the Guests are entitled to request that the Court reconsider, amend, modify, alter
17 and/or vacate any and all orders or judgments in the Trust and/or related parties’ favor entered
18 herein, all of which were not final until the Court entered a Final Judgment in this action on
19 September 19, 2014, purportedly ending the case.

20 **A. The Guests request reconsideration, amendment, modification and an Order**
21 **vacating all of the orders and judgments entered in the Trust’s and related parties**
22 **favor under CR 59(1), (2), (4), (6), (7), (8) and (9).**

23 To substantiate the Guests’ right to an order vacating all orders and judgments in the
24 Trust and related parties’ favor which are reviewed as a matter of law de novo, the Guests must
25 only show that irregular proceedings were had, there was misconduct by the non-existent Trust,
26 non-existent trustees, Michael Coe (evidenced, at a minimum, by the deposition testimony of

CP 3395

1 Hikaru McCrory), and related parties under CR 59(1) and (2) as also evidenced by Trial Exhibit
2 28, and RCWs 4.84.010, .080 and RCW 4.84.185 as identified above.

3 To substantiate error in the assessment of Trust recovery, that there is no evidence or
4 reasonable inference to justify the Court's decisions, that there was an error of law and that
5 substantial justice has not been done under CR 59(6)-(9), the Guests only need to refer the Court
6 to the Trial Exhibit 28, the jury instruction instructing and directing the jury that the Court had
7 found that the Langes had a right to build a deck on Lot 5 and to use that deck in accordance
8 with the 1987 ESM recorded purported 'patio or deck easement' promoted by the Trust and
9 related parties "as a matter of law," and RCWs 4.84.010, .080 and RCW 4.84.185 (as well as
10 irregular proceedings).

11 RCWs 4.84.010 and .080 limit any Trust recovery of fees to no more than \$200.00 if
12 entitled and also limit the recovery of any costs. If other fees were to be awarded under
13 RCW 4.84.185, proper statutory procedures and process had to be followed and Guests' due
14 process rights protected and afforded to the Guests. RCW 4.84.185 also requires mandatory
15 findings of fact and conclusions of law before any Trust and/or related party RCW 4.84.185
16 recovery could be had with regard to the Court's April 11, 2014, \$2,000.00 attorney's fees and
17 cost order against the Guests.

18 On April 11, 2014, Trust counsel, the Guests, and Guest counsel stipulated that the Trust
19 did not exist. That stipulation was reduced to writing and was added to the April 11, 2014, Order
20 by Trust counsel consent which was then submitted to the Court for signature and entry. The
21 Court altered the parties' written stipulation by adding the word "currently" to the prior CR 2A
22 Agreement by and between the parties, altering the parties' stipulation in the signed order, but
23 Trust counsel and the related parties knew on that date that no Trust had existed. See
24 *Declaration of Suzanne Guest*.

1 **Civil Rule 59(5) does not apply here with regard to the Trust as there was no Trust**
2 **jury trial.**

3 Substantial justice has not been done in this action. The Trust repeatedly invited error in
4 this action not only for their benefit, but also for the benefit of the Langes, other parties and
5 non-parties, and error was done prejudicing the Guests. The automatic vesting of clear,
6 marketable and unencumbered title in the Guests as of October 28, 2004, was confirmed at the
7 July 2014 *Guest v. Lange* trial negating, voiding and nullifying any and all orders and judgments
8 in the Trust and related parties favor as a matter of law. The Guests unchallenged Lot 5 title is
9 memorialized by *Guest v. Lange* Trial Exhibit 28. See attached Exhibit A.

10 As evidenced above, the Guests acquired title to Lot 5 as of October 28, 2004. not only
11 under contract with Carol Ann White, Michael Coe, Marilyn LaBarbara and Fidelity National
12 Title Company, but also as a matter of law under RCW 7.28.070 and *Halverson v. City of*
13 *Bellevue*, 41 Wn. App. 457, 460, 704 P.2d 1232. The law is clear that the Guests were and are
14 entitled to the benefit of Lot 5 automatic vesting of title in the Guests as evidenced by Trial
15 Exhibit 28 as of October 28, 2004, without the necessity of any court action, any court judgment
16 or decree or adjudication. If requested, however, the Court must hold, adjudicate and enter
17 judgment in the Guests' favor that the Guests' received clear, marketable and unencumbered title
18 to Lot 5 as of October 28, 2004, for all the reasons identified above under RCW 7.28.070.

19 **There is and was no Lot 4 deck easement.**

20 As evidenced at trial, by Lange admission, stipulation and by the admitted Trial Exhibits
21 there is no Lange or any Lot 4 deck easement on any part of Lot 5 in the Lot 4 title or that was
22 conveyed by deed to the Langes at any time, as required by Washington law if the Langes had
23 and/or were to obtain any legal 'interest' in any part of Lot 5. See RCWs 64.04.010, .020,
24 RCWs 64.08.050, .060 and .070 requiring that all deeds, all conveyances of real property, and all
25 interests in real property, including the grant or the conveyance of any easement to be signed,

CP 3397

1 acknowledged and notarized, and also sealed by a notary. *See Guest v. Lange* Trial Exhibit 20 as
2 an example.

3 The non-existent Trust and non-existent trustee Michael Coe came into this case without
4 any standing to do so in May 2013 in bad faith and with “unclean hands” to defeat the Guests
5 and the Lot 5 title. Any Guest consent to intervention by a Trust and trustees already in default
6 was strictly limited by filing in writing to Trust/Michael Coe, trustee and related parties
7 indemnification of the Guests and defense of the Guests. The Trust, Trustee Michael Coe, and
8 related parties relied entirely and solely on the invalid, void, and null 1987 ESM recorded
9 purported ‘patio or deck easement’ document to defeat the Guests and therefore used and utilized
10 that document as third parties to the Guests’ still increasing damage, loss, harm, cost, expenses
11 and fees. In July 2014, the Langes voluntarily adopted and assumed the 1987 ESM recorded
12 indemnity duty, obligation, agreement and contract to indemnify the Guests under the terms of
13 that document, admitted as Trial Exhibit 15, for any and all Guest damage, loss, harm, cost,
14 expense and fees. Accordingly, not only must the Trust and related parties indemnify the costs
15 and pay fees, costs and expenses to the Guests by statute, contract and/or under common law, so
16 must the Langes indemnify the Guests for any damage, loss, harm, cost, fees and expenses that
17 the Guests have incurred and/or will incur as a result of the Trust and related parties’ use and
18 utilization of the 1987 ESM recorded purported ‘patio or deck easement’ document in this action
19 and/or any in any other matter at any time.

20 Before the Langes adopted and assumed the 1987 ESM recorded document duty,
21 obligation and contract to indemnify the Guests at trial, the Guests provided the Langes in May
22 2014 with a copy of a December 2012 New York Times nationally published Opinion article
23 entitled “Those Crazy Indemnity Forms We All Sign” annotated by Guest to review and admit
24 the authenticity and admissibility for trial and other purposes. The Langes did review that article
25 through counsel and/or otherwise before trial. The Langes admitted the authenticity of that
26 article. That article provided additional notice to the Langes that, in addition to RCW 48.01.040,

VERIFIED GUEST CR 59 MOTION TO VACATE, AMEND
AND/OR MODIFY ALL COE FAMILY TRUST RELATED
ORDERS AND JUDGMENTS AS A MATTER OF LAW AND TO
ENTER JUDGMENT IN THE GUESTS’ FAVOR - 10

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§-10

1 indemnity agreements, writings and contracts basically "make every one of us an insurer" regular
2 people into "regular Lloyd's of London." See Declaration of Suzanne Guest, attached exhibit.

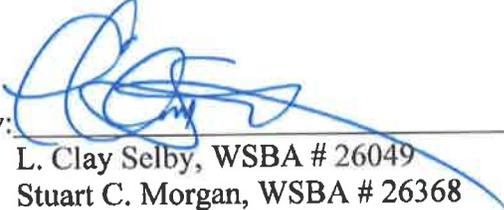
3 The Trust and related parties have no one but themselves to blame for the situation that
4 they face today. The Langes have no one but themselves to blame for the situation that they face
5 today.

6 VI. CONCLUSION

7 For all the above and any other applicable grounds, the Guests respectfully request that
8 the Court enter an order vacating any and all orders and judgments in the Trust and related
9 parties favor and enter judgment in the Guests' favor for indemnity and otherwise against the
10 Trust and related parties.

11 DATED this 29 day of September, 2014.

12 EISENHOWER CARLSON, PLLC

13
14 By: 

15 L. Clay Selby, WSBA # 26049

16 Stuart C. Morgan, WSBA # 26368

17 Attorneys for Christopher and Suzanne Guest
18
19
20
21
22
23
24
25
26

VERIFIED GUEST CR 59 MOTION TO VACATE, AMEND
AND/OR MODIFY ALL COE FAMILY TRUST RELATED
ORDERS AND JUDGMENTS AS A MATTER OF LAW AND TO
ENTER JUDGMENT IN THE GUESTS' FAVOR - 11

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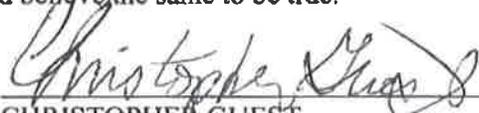
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B-11

1 **VERIFICATION**

2 STATE OF WASHINGTON)
3) ss.
4 County of Pierce)

5 The undersigned, being first duly sworn, on oath depose and say that (a) they are the
6 Plaintiffs in the above-entitled matter; (b) they have read the foregoing Verified CR 59 Motion to
7 Vacate; and (c) know the contents thereof and believe the same to be true.

8 
9 _____
10 CHRISTOPHER GUEST

11 
12 _____
13 SUZANNE GUEST

14 SIGNED AND SWORN to before me on this 29th day of September 2013, by
15 Christopher Guest and Suzanne Guest.



16 
17 _____
18 Signature of Notary Public
19 AMY JEAN SHACKELFORD
20 _____
21 Name of Notary Public
22 NOTARY PUBLIC
23 1-11-18
24 _____
25 My Appointment Expires
26

VERIFIED GUEST CR 59 MOTION TO VACATE, AMEND
AND/OR MODIFY ALL COE FAMILY TRUST RELATED
ORDERS AND JUDGMENTS AS A MATTER OF LAW AND TO
ENTER JUDGMENT IN THE GUESTS' FAVOR - 12

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

<p>John Burleigh Burleigh Law, PLLC 3202 Harborview Dr. Gig Harbor, WA 98335-2125</p>	<p><input checked="" type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile</p>
--	---

DATED this 29th day of September 2014 at Tacoma, Washington.


 Amy Jean Shackelford, PLS
 Legal Assistant to Stuart C. Morgan

CP3399

Exhibit A

CP 3400

B-14

After Recording Return to:
JOHN CHRISTOPHER GUEST
4545 N. 42ND ST #B
PHOENIX, AZ 85018

READ AND APPROVED

Filed for Record at Request of:
Fidelity National Title Company
2727 Highway St. #400
Gig Harbor, WA 98335

READ AND APPROVED

Escrow No. 7038929

Assessor's Tax Parcel No.: 783700-005-0

STATUTORY WARRANTY DEED

THE GRANTOR MARILYN JEAN LABARBARA, MICHAEL ALLEN COE AND CAROL ANNE WHITE, CO SUCCESSOR Trustees of The Coe Family Trust for and in consideration of TEN DOLLARS AND OTHER VALUABLE CONSIDERATION in hand paid, conveys and warrants to JOHN CHRISTOPHER GUEST AND SUZANNE GUEST, husband and wife, the following described real estate situated in the County of Pierce, State of Washington:

Lot 5 of SPINNAKER RIDGE, according to the plat thereof, recorded on January 31, 1988 under Recording Number 8501310176, in Pierce County, Washington.

Situate in the City of Gig Harbor, County of Pierce, State of Washington.

Dated: October 29 2004

MARILYN JEAN LABARBARA CO-SUCCESSOR TRUSTEE

MICHAEL ALLEN COE CO-SUCCESSOR TRUSTEE

CAROL ANNE WHITE CO-SUCCESSOR TRUSTEE

Ext. A

... TITLE ...

CP 3401

B-15

Exhibit B

CP 3402

B-16

7.28.070 Adverse possession under claim and color of title -- Payment of taxes.

Every person in actual, open and notorious possession of lands or tenements under claim and color of title ~~made in good faith, and who shall for seven successive years continue in~~ possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section. [1893 c 11_3; RRS_788.]

fastcase

CP3403

EXH. B

B-17

September 29 2014 4:27 PM

KEVIN STOCK
COUNTY CLERK
NO: 11-2-16364-0

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

CHRISTOPHER GUEST

Plaintiff(s),

vs.

DAVID LANGE

Defendant(s)

No. 11-2-16364-0

NOTE FOR MOTION DOCKET

TO THE CLERK OF THE SUPERIOR COURT AND TO OPPOSING PARTY:

Name: Rossi F Maddalena
Address: 3101 Western Ave Ste 200 SEATTLE, WA 98121-3017
Name: STUART CHARLES MORGAN
Address: 1201 Pacific Ave Ste 1200 TACOMA, WA 98402-4395

Phone: (206) 682-0610
Attorney for Plaintiff/Petitioner
Phone: (253) 572-4500
Attorney for Involved Party

Please take notice that the undersigned will bring on for hearing a motion for:

Pierce County Superior Court, County-City Building - 930 Tacoma Ave S - Tacoma, WA 98402

Motion - Vacate

Calendar: STANLEY J. RUMBAUGH

CALENDAR DATE: Friday, October 31, 2014 9:00 AM

WORKING COPIES SHALL BE DELIVERED TO THE COURT PURSUANT TO PCLR 7 (a) (7)

PARTY SETTING HEARING SHALL CONFIRM BY NOON TWO COURT DAYS PRIOR TO HEARING

Submitted by:

DATED: September 29, 2014.
NAME: Leland Clay Selby Jr
ADDRESS: 1201 Pacific Ave Ste 1200
TACOMA, WA 98402-4395

Signed: /s/ Leland Clay Selby Jr
Phone: (253) 572-4500
WSBA#: 26049
For: Attorney for Involved Party

Note for Motion Docket
Additional Parties Notified

11-2-16364-0

Name: THOMAS RAYMOND MERRICK
Address: 3101 Western Ave Ste 200 SEATTLE, WA 98121-3017

Phone: (206) 467-2649
Attorney for Plaintiff/Petitioner

Name: DAVID STEPHEN COTTNAIR
Address: 3101 Western Ave Ste 200 SEATTLE, WA 98121-3017

Phone: (206) 682-0610
Attorney for Plaintiff/Petitioner

Name: TIMOTHY JOSEPH FARLEY
Address: 2012 34th St EVERETT, WA 98201-5014

Phone: (425) 339-1323
Attorney for Defendant

Name: IRENE MARGRET HECHT
Address: 1201 3rd Ave Ste 3200 SEATTLE, WA 98101-3052

Phone: (206) 623-1900
Attorney for Defendant

B-19

APPENDIX C

September 29 2014 4:21 PM

KEVIN STOCK
COUNTY CLERK
NO: 11-2-16364-0

The Honorable Stanley J. Rumbaugh

SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,
Plaintiffs,

v.

DAVID LANGE and KAREN LANGE,
husband and wife, and the marital community
comprised thereof,
Defendants.

NO. 11-2-16364-0
DECLARATON OF SUZANNE GUEST
IN SUPPORT OF GUEST CR59 TRUST
MOTION

THE COE FAMILY TRUST and Trustee
Michael Coe,
Interveners,

v.

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,
Respondents

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,
Third-Party Plaintiffs,

v.

MICHAEL COE and CAROL COE et al.
Third-Party Defendants.

1 DECLARATION

2 I, Suzanne Guest, declare, certify and testify upon my oath under the laws of perjury of
3 the State of Washington as follows:

4 1. I am a party to the *Guest v Lange et al* action.

5 2. I am over the age of eighteen, competent to testify, declare and certify and have
6 personal knowledge of the following statement and facts which are true and correct.
7

8 3. Attached hereto as Exhibit 1 is a true and correct copy of the Gig Harbor Municipal
9 Code Ordinance 91 in effect from 1966 through 1996, and therefore in 1985, 1986 and 1987
10 when the Spinnaker Ridge Development final plat was approved by the City of Gig Harbor and
11 was certified, signed, acknowledged and notarized, with notary seals and filed and recorded, and
12 an email from the City of Gig Harbor Planning Department regarding the same.

13 4. Attached hereto as Exhibit 2 is a true and correct copy of the deposition transcript of
14 Hikaru McCrory, the notary public who witnessed and notarized Michael Cox's signature.

15 5. Attached hereto as Exhibit 3 is a true and correct copy of the December 2012 New
16 York Times nationally published Opinion article entitled "Those Crazy Indemnity Forms We All
17 Sign" that I produced and provided to the Langes and to Lange counsel in May 2014 prior to trial
18 and that the Langes and Lange counsel stipulated was authentic.
19

20 6. All facts stated in the Guest CR 59 Trust Motion for are true and correct including, but
21 not limited to, that my husband and I accepted Carol Ann White's offer to sell Lot 5 to us in
22 October 2004 and paid earnest money in October 2004 to purchase Lot 5 before receiving a
23 faxed copy of the October 28, 2004 clear, marketable and unencumbered Lot 5 title that was
24 required by the Lot 5 sale and purchase contract, that my husband reviewed, approved, signed
25 and initialed and accepted that Lot 5 title on November 1, 2004 the same date that it was faxed to
26

1 us and that we faxed the signed, initialed, accepted, reviewed and approved Lot 5 title back to
2 Fidelity National Title Company on or about November 1, 2004 and, therefore, Fidelity's
3 principals the Coe Family Trust, the trustees, Michael Coe, Carol Ann White and Marilyn
4 LaBarbara.

5
6 7. Trust counsel Patrick McKenna, my husband and I and Attorney David Cottnair
7 agreed and all stipulated at court on April 11, 2014 that the Trust did not exist. Trust counsel
8 agreed to add the stipulation that the Trust did not exist to the Trust proposed Order that would
9 be submitted to the Court for signature and entry that day and consented to David Cottnair
10 writing the words on the Order. The Court added the words "currently" to the Trust/Guest
11 stipulation that was not a stipulation qualification altering the parties' stipulation.

12 EXECUTED on this 29th day of September, 2014 at Gig Harbor, Washington.



Suzanne Guest
6833 Main Sail Lane
Gig Harbor, Washington 98835
(253) 495-1244

No. 9'

PROPOSED

SUBDIVISION ORDINANCE
OF THE TOWN OF GIG HARBOR

NOTE:

1. The section and subsection numbers should be changed to be in accord with the usual numbering sequence in local ordinances.
2. Lot sizes should reflect the availability of water and sewerage facilities as controlled by the zoning ordinance.

DECEMBER 5, 1965

Consulting Services Corporation
1602 Tower Building
Seattle, Washington 98101

4/10

Exh. 1

Ordinance No. 91
~~PROPOSED~~
SUBDIVISION ORDINANCE
OF THE TOWN OF GIG HARBOR

An ordinance providing rules and regulations for the municipal approval of the partitioning of land into platted subdivisions prescribing standards for the design, layout and development there-of; providing procedure for municipal approval or disapproval thereof; providing for the granting of variations and exceptions thereto; providing a penalty for the violation thereof; and repealing all other ordinances in conflict therewith.

BE IT ORDAINED BY the Council of the Town of Gig Harbor:

Title

1.0 This ordinance shall hereafter be known as the Subdivision Ordinance for the Town of Gig Harbor.

2.0 Definitions

2.1 Comprehensive Plan

The Comprehensive Plan, or portions thereof, consists of those coordinated plans in preparation or which have been prepared by the Planning Commission for the physical development of the municipality; or any plans, being portions of the comprehensive plan, prepared for the physical development of such municipality, that designate, among other things, plans and programs to encourage the most appropriate use of land, and lessen congestion throughout the municipality, in the interest of public health and welfare.

2.2 Dedication

Dedication is the deliberate appropriation of land or rights in land by its owner for any general and public use, reserving to himself no other rights than such as are compatible with the full exercise and enjoyment of the public use to which the property has been devoted.

2.3 Final Plat

Final plat is the plan of the subdivision plat, or any portions thereof prepared for filing of record by the County Auditor, and containing those elements and requirements set forth in Section 8 of this ordinance. After the County Auditor has filed for record the final plat, it shall thereafter be known as an authorized subdivision plat.

2.4 Official Maps

Official maps are those official maps or map, or portions thereof, adopted by ordinance by the Council as provided in Ch. 44, Sec. 6, Laws, 1935, as amended (RCW 35.63.110).

2.5 Planning Commission

The Planning Commission shall be that Commission established by the Council of the Town of Gig Harbor as provided in Ch. 44, Laws, 1935, as amended (Ch. 35.63, RCW).

2.6 Preliminary Plat

Subdivision → A Preliminary subdivision plat is a preliminary plan of the subdivision plat, containing the elements and requirements as set forth in Section 5 hereof.

2.7 Subdivider

A subdivider is any person, firm or corporation proposing to make, or having made, a subdivision plat.

2.8 Subdivision or Plat

A subdivision plat is an area of land, which has been divided into lots or tracts of land and must include a map, or maps related thereto, for the purpose, whether immediate or future, of transfer of ownership.

2.9 Tentative Approval

Tentative approval is the official approval given to the proposed preliminary subdivision plat, or dedication by the Planning Commission, and the Town Council, meeting in regular session.

2.10 Final Approval

Final approval is the final official approval given by the Planning Commission and the Town Council on the Final subdivision plat, or dedication or portion thereof that has previously received tentative approval.

3.0 Regulation of Land Development

No person, firm or corporation may alter or revise the boundary lines of any property or partition, or divide for separate ownership any land, or proposing to make, or having made a plat or subdivision of land containing four or more lots, plats, or tracts, or proposing to make or having made a plat or subdivision containing a dedication of any part thereof as a public street or highway, or shall enter into any contract for the sale of, or shall offer to sell said subdivision, or plat, or any part thereof until there has been obtained from the Planning Commission final approval of the subdivision plat, or dedication in accordance with the prescribed rules and regulations contained herein.

4.0 Procedure

4.1 Preliminary Review

The subdivider, his engineer and/or land surveyor, while the proposed plat, subdivision, or dedication is in sketch form shall consult with the planning commission, for the purpose of

ascertaining the requirements of Official Maps or any portions thereof, and obtaining any explanation of the rules and regulations herein contained as may be necessary and related to the proposed plat, subdivision, or dedication.

4.2 Preparation of the Proposed Plat

The subdivider shall employ a licensed professional land surveyor to prepare the proposed plat in accordance with the requirements of Section 5 hereof.

4.3 Tentative Approval

4.3.1 Four copies of all data constituting the proposed plat shall be submitted to the Town Clerk together with an application for tentative approval.

4.3.2 Fees

The application for tentative approval of a proposed subdivision plat shall be accompanied by a fee in the amount of \$5.00 for each lot to be created up to a maximum of \$125.00 per subdivision.

4.3.3 The Town Clerk will affix to the application for tentative approval of a proposed subdivision plat a file number and the date it is received.

4.3.4 The Town Clerk will transmit one copy of the proposed plat to the town engineer for recommendations regarding the proposed subdivision plat or dedication, and transmit one copy to the Planning Commission, one copy to the County Health Officer, and retain in a file one copy for public reference.

4.3.5 The Town Engineer, and other interested Town department heads within the scope of their municipal functions shall submit their recommendations regarding the proposed subdivision plat, or dedication to the Planning Commission within a period of three weeks from the day the Town Clerk receives the application for its approval.

4.3.6 Notice of public hearing on the proposed subdivision plat, or dedication shall consist of at least three copies of the notice of the hearing, posted in conspicuous places, on or adjacent to the land proposed to be platted, in which the time and place of such hearing is clearly indicated, all of which shall be posted not less than seven days prior to the hearing; and the announcement of public hearing shall be submitted by registered or certified mail not less than seven days prior to the time of the public hearing to the owners of record of all contiguous properties to the proposed subdivision plat, or dedication. Notice of each such public hearing shall be given in accordance with Ch. 216, Laws, 1935, State of Washington.

4.3.7 The Planning Commission and Town Council will either tentatively approve or disapprove the proposed subdivision plat, or dedication within a period of 60 days after the Town Clerk has received the application. A certificate of approval or disapproval shall be forwarded to the subdivider and each of the municipal officers that received a copy of the proposed subdivision plat, or dedication. ~~Tentative approval shall be effective for a period of one year. An extension of one year may be granted by the Planning Commission upon the application of the subdivider.~~

4.4 Installation of Improvements

4.4.1 When the proposed subdivision plat is approved by the Planning Commission the subdivider, before requesting final approval, shall elect by a written statement to carry out minimum improvements in accordance with the provisions of Section 7 herein contained by either of the following methods or by a combination of these methods:

4.4.2 By furnishing the Town of Gig Harbor with a subdivision plat bond, in which assurance is given the Town that the installation of the minimum improvements will be made within one year from the date of final approval and that such improvement will be carried out as provided in Section 7.0. The amount of the subdivision plat bond shall be determined by the Town Engineer. All legal costs incurred by the Town to enforce completion of site improvements shall be borne by the subdivider, ~~and~~ ^{and} become a lien against the property.

4.4.3 By actually installing the minimum improvements in accordance with the provisions of Section 7.

4.5 Final Approval

4.5.1 After completion of all improvements or complying with the requirements set forth in 4.4.2, the subdivider shall submit the original and four copies of his final subdivision plat to the Town Clerk with a request for final approval together with the required fee as specified in 4.3.2.

4.5.2 The Town Clerk will forward the subdivision plat to the Town Engineer who will check it for completeness and accuracy and indicate his satisfaction by affixing his signature and seal thereto and forward the subdivision plat to the Planning Commission.

4.5.3 The Planning Commission shall hold a public meeting to consider final approval within 30 days of the date of request.

4.5.4 The Planning Commission and the Town Council shall grant final approval after ascertaining that all requirements of these regulations and any other requirements specified by the Planning Commission and the Town Council have been met.

4.5.5 The final subdivision plat shall then be submitted by the Town Clerk to the Town Treasurer who shall affix his signature thereto after all town assessments on the property being platted have been paid.

- 4.5.6 The Town Clerk shall transmit the approved plat to the following officials:
 - 4.5.6.1 One copy to the County Assessor for the segregation of taxes and assessments.
 - 4.5.6.2 The original to the County Treasurer for endorsement of the Treasurer's Certificate.
 - 4.5.6.3 The original to the County Auditor for filing for record. Also the plat shall pay the filing fees stipulated by the County Auditor.
 - 4.5.6.4 One copy to the Planning Commission.
 - 4.5.6.5 One copy shall be retained by the Town Clerk and the same to be placed in a file available to the public.
 - 4.5.6.6 After the final plat has been filed for record by the County Auditor it shall be known as an authorized plat, subdivision, or dedication of the land as provided in Ch. 186, Sec. 7, Laws, 1937 as hereafter amended (RCW 58.16.060).

5.0 Requirements of the Preliminary Plat

5.1 General Requirements

- 5.1.1 The preliminary subdivision plat shall be prepared by a licensed, professional *Engineer and/or* land surveyor in accordance with the requirements established herein.
- 5.1.2 The maps, drawings and data of the preliminary subdivision plat shall be of size 18 inches by 24 inches.
- 5.1.3 All maps shall show the date, scale and the direction of true north, referenced to Washington Lambert Grid, North Zone.
- 5.1.4 The map of the preliminary subdivision plat shall be drawn to a scale 50 feet to the inch.
- 5.1.5 Any of the following specified maps may be combined in any way which will clearly show the information required.

5.2 Specific Requirements

The proposed Subdivision plat, shall contain the following information.

5.2.1 Identification and Description

- 5.2.1.1 Proposed name of the plat.
- 5.2.1.2 Name and address of the developer.
- 5.2.1.3 Name, address and seal of registered ^{Engineer and/or} ~~engineer and/or~~ land surveyor who prepared the plat drawings.

5.2.1.4 Location of the land to be platted by Section, Township and Range and legal description as shown in the records of the County Auditor of Pierce County.

5.2.1.5 No name streets shall duplicate others within city.

5.2.1.6 Land use classification as established by zoning ordinances.

5.2.2 Delineation of Existing Conditions

5.2.2.1 A vicinity map drawn to a scale of four hundred (400) feet to the inch showing the tract to be subdivided, the proposed streets and adjacent and existing connecting streets.

5.2.2.2 A map showing the relative location of all lots and tracts contiguous to the proposed subdivision plat and the names and addresses of the owners of these lots and tracts as shown by the record of the Auditor of the County.

Section Subdivision

5.2.2.3 A map showing existing monuments of record which will be used in the plat survey.

5.2.2.4 A map shall be prepared showing topography with contour intervals of five feet or less, referenced to the United States Coast and Geodetic Survey Datum.

5.2.2.5 A map showing existing easements within the tract.

5.2.2.6 A map showing the outline of all existing buildings within the tract and their relationship to proposed lot lines.

→ 5.2.3 Delineation of Proposed Conditions

5.2.3.1 Layout and dimensions of lots with each lot identified by number or by number and block.

5.2.3.2 Indication of all land areas to be used for purposes other than residential building sites. The nature, conditions and limitations of such uses shall be indicated.

5.2.3.3 Permanent cased survey monuments shall be indicated as specified by the Town Engineer.

→ 5.2.3.4 Layout and dimensions and profiles of proposed streets, alleys, footpaths and easements.

5.2.3.5 Storm water drainage system.

5.3 Water System

5.3.1 Application for tentative approval shall be accompanied by written evidence from the appropriate water utility that water is available and will be furnished to serve the proposed water distribution system.

5.3.2 A diagram shall be prepared showing the proposed water distribution system. Fire hydrants shall be located at 600 foot intervals as measured along streets or easements for vehicular traffic.

5.4

Sewer System

5.4.1 Application for tentative approval shall be accompanied by written evidence from the appropriate sewer utility that the proposed subdivision will be served by such sewer district - if such sewer utility exists.

5.4.2 If a public sewer main is not within 800 feet of the proposed subdivision or if connection to a public sewer is impossible, as certified by a letter from the sewer utility, a letter from the county health officer is required indicating that septic tanks or other methods of handling wastes can be installed on the proposed subdivision, without adverse effect on water supply or health of the residents of the area.

5.4.3 A diagram shall be prepared showing the proposed sewage disposal system.

6.0 General Principles of Design and Minimum Requirements for the Layout of Subdivisions

6.0.1 In the planning of a subdivision plat the subdivider shall prepare his proposed plat in conformance with the following provisions:

6.1 Provisions of the Comprehensive Plan

6.1.1 The proposed subdivision shall provide for such requirements contained in official plans or portions thereof and development plans for the Town of Cig Harbor.

6.1.2 The subdivider shall make available for public acquisition such lands in the area to be subdivided as are designated by the official map for parks, playgrounds and public buildings.

6.1.3 Land which the Planning Commission has found unsuitable for subdivision due to flooding, bad drainage, steep slopes, rock formations, or other features likely to be harmful to the safety, welfare, and general health of the future residents, and the Planning Commission considers inappropriate for subdivision, shall not be subdivided, unless adequate and feasible subdivision methods are formulated by the developer and approved by the Town Engineer and the County Health Department.

6.1.4.1 Special drainage easements shall be worded individually to suit the drainage situation on each plat.

6.1.4.2 Where appropriate, the plot shall include a drainage easement as follows: "An easement is reserved upon the following lots in _____ Subdivision, granting the right for surface water to drain across, in a natural course, said lots of the subdivision."

6.1.5 Those areas of the Town, where topographical slopes are 20 percent or more, shall be subdivided in conformance with any additional requirements which the Planning Commission shall provide to any subdivider within three weeks after preliminary review by the Planning Commission.

6.2 Streets

The following requirements are applicable when the plat is provided with dedicated public streets.

6.2.1.1 Street layout shall conform to the most advantageous development of the adjoining areas, and the entire neighborhood, and shall provide for the continuity of appropriate streets and arterials.

6.2.1.2 The length of blocks shall not exceed Thirteen hundred twenty feet (1,320 feet).

6.2.2 Rights-of-Way

6.2.2.1 Dead end streets less than Six Hundred sixty (660) feet in length shall have a minimum right-of-way of fifty (50) feet.

6.2.2.2 Through streets and dead end streets over Six hundred sixty feet in length shall have a minimum right-of way of Sixty (60) feet.

6.2.2.3 All dead-end streets and private lanes shall terminate in a cul-de-sac having a minimum diameter of eighty(80) feet or other equivalent design as approved by the Planning Commission.

6.2.2.4 Where cut slopes and street fills fall outside a normal width street, extra street right-of-way to accommodate such cuts and fills, and their maintenance, shall be provided or an easement for said cut slopes or fill slopes, falling outside of said right-of-way, may be provided for on the face of the final plat.

6.2.3 Grades and Curves

6.2.3.1 Grades of streets shall not exceed eight(8) percent unless conditions of topography require a steeper grade for practical reasons, in the judgment of the Town Engineer.

6.2.3.2 All Changes in street grades shall be connected by vertical curves meeting the standards of the Town Engineer.

6.2.3.3 The lot or tract lines at street intersections shall be rounded with a minimum radius of twenty (20) feet.

6.3 Private Lanes

The following requirements and limitations are applicable when the plat, by virtue of its unique or small size or dimensions, cannot, in the judgment of the Planning Commission, reasonable provide a right-of-way as defined in Section 6.2.2

- 6.3.1 Land may be subdivided where access is provided between the building sites and a public street via a private lane when such lane shall serve a maximum of three building sites or less and when the following conditions are met by the subdivider:
- ~~6.3.1.1~~ The total number of building sites is the maximum number of building sites permitted under the zoning ordinance area requirements, or restrictions of protective deed covenants.
- 6.3.1.2 Perpetual and reciprocal easements between the several lots of the subdivision shall be in a form approved by the Planning Commission and recorded with the Auditor. Such easements, generally, shall be for ingress and egress of vehicular and pedestrian traffic, utilities, including those underground and for the setting of poles and the stringing of wires and by the terms of its grant, it shall cease as to any dominant tenement whenever such dominant tenement shall abutt upon a public street. In particular, such easements shall perpetually grant to the Town of Gig Harbor the right of ingress and egress over and upon the same for the exercise of the police power of the town including the conduct of all municipal responsibility, the protection of life, property and the general welfare and such easements shall perpetually burden the servient tenements with the obligation of upkeep, maintenance and repair of the private lane, in accordance with minimum standards for such work prevailing in the town, so as to insure, in the future, the continuing exercise by the town, of its police power in the subdivision.
- 6.3.3 Private lanes shall have a minimum width of twenty (20) feet.
- 6.3.4 The location of all private lanes and turn-around areas shall be subject to the approval of the Planning Commission.
- 6.3.5 Private lanes are prohibited where adequate lot size and proportions can be obtained by the dedication of full width streets, notwithstanding the provisions of Section 6.3.1 or that the maximum number of lots or tracts possible with a dedicated street may be less than would be possible if the plat utilized a private lane in lieu of a dedicated street.
- 6.4 Lots
- 6.4.1 Minimum lot size shall be as specified in the zoning ordinance, provided further that any area designated as a private lane for use as access to more than one lot shall not be included in lot area computations.
- 6.4.2 Lots shall be of as simple geometric shape as possible.

- 6.4.3 Lots designed with long private driveways as a means to avoid the dedication of a public street, or a portion thereof, should be discouraged.
- 6.4.4 Excessive depth in relation to width shall be avoided. A proportion of depth to width of one and one-half to one shall be considered as desirable.
- 6.4.5 Every lot shall abutt on a public street by a minimum of twenty (20) feet, or shall have access to a public street by a private lane easement as provided in Section 6.3.
- 6.4.6 Interior lots (lots not on a corner) shall be at least eighty (80) feet wide.
- 6.4.7 Side lot lines shall be approximately at right angles to the right-of-way line of the street on which the lot faces.
- 6.4.8 Existing structures shall meet all the setback requirements of the zoning ordinance with respect to all new property lines.

7.0 Procedure for Installing Improvements and Establishing Standards Thereeto

7.1 Streets and Private Lanes

- 7.1.1 Streets shall be constructed to full width and surfaced in accordance with the Town's standard plans and under the supervision of the Town Engineer.
- 7.1.2 Private lanes shall be constructed as half width streets and surfaced in accordance with the Town's standard plans and under the supervision of the Town Engineer
- 7.1.3 Street drainage and lot drainage shall be installed in accordance with the Town standards and to the satisfaction of the Town Engineer.

7.2 Water System

The water distribution system, including the locations of fire hydrants, shall be designed and installed in accordance with the standards of the Town of Gig Harbor. Connection shall be provided for each lot.

7.3 Sewer System

- 713.1 The subdivision shall be provided with a complete sanitary sewer system providing a public sewer main is lying within eight hundred (800) feet of the proposed subdivision. The sanitary system shall be designed and installed in accordance with the standards of the sewer utility.
- 7.3.2 If a public sewer main is not located within eight hundred(800) feet of the proposed subdivision and the County Health Officer has found the soil conditions satisfactory, septic tanks or other methods of handling waste, as approved by the County Health Officer, may be installed. Septic tank drain fields may not be installed closer than one hundred (100) feet to the line of ordinary high water. Such sewage disposal systems shall be installed under the supervision of the County Health Officer and the Town Engineer. No septic tank and drain field for same shall be constructed closer than 100 feet from an existing well used for domestic purposes.
- 7.4 Underground Utilities
- All underground utilities shall be installed complete to the property line of each lot served.
- 7.5 Survey Monuments
- Permanent cased monuments and other markers shall be erected and located and each lot shall be staked under the supervision of the Town Engineer, as follows:
- (a) The surveyor shall show on the face of the plat a description of monuments and lot corner markers placed or found by said surveyor.
 - (b) Monuments shall be placed on line of sight on all plat boundaries and at corners of plat boundaries.
 - (c) Monuments shall be placed on roadway centerlines, intersections, point of curve, point of tangency, point of intersection of curve tangents, centers of cul-de-sacs, and other dimension points.
- 8.0 Requirements of the Final Plat
- 8.1 General
- The final plat shall be of form and content as specified herein.
- 8.1.2 The final subdivision plat shall not deviate from the intent of the proposed subdivision plat upon which tentative approval was granted.
- 8.1.3 The final subdivision plat shall be prepared on linen cloth, or mylar plastic, 18 (18) inches by twenty-four (24) inches including borders, drawn with india ink to a scale of one inch equals 50 feet. More than one sheet may be used as required.
- 8.1.4 All signatures shall be in india ink. No interlineations will be permitted.

8.2 Identification and Description

The following data shall be shown on the final plat:

8.2.1 Name or subdivision.

8.2.2 Location by Section, Township and Range, and the notation "Town of Gig Harbor, Washington".

8.2.3 The name of the ~~land surveyor and/or engineer.~~ *and/or P.E. Engineer and/or Land Surveyor*

8.2.4 Scale, date and the direction of North referenced to Washington Lambert Grid, North Zone.

8.2.5 Description

The description of the property platted shall be the same as that on the title certificate per Section 8.5.

8.3 Delineation

The delineation of the map shall be complete with respect to the following:

8.3.1 Section lines accurately referenced to the lines of the subdivision.

8.3.2 True courses and distances to the nearest section corners which shall accurately establish the location of the plat.

8.3.3 The plat boundary lines with accurate distances and bearings shall be shown on the map and referenced to the Washington Lambert Grid, North Zone.

8.3.4 The name, location, width, bearings and distances of the centerline and right-of-way of all streets within and adjoining the plat.

8.3.5 The location, width, bearings and distances of all easements within the plat.

8.3.6 Radii, internal or external angles, points of curvature, tangent bearings and length of all arcs.

8.3.7 All lot numbers, and lot perimeter dimensions and bearings - including block no's, if more than one block in plat.

8.3.8 The location of all survey monuments.

8.3.9 Accurate outlines of any areas to be dedicated or reserved for public use, with the purposes indicated thereon and in the dedication and of any area to be reserved by deed covenant for common uses of certain property owners.

8.3.10 Building setbacks lines, as specified by zoning ordinances, shall be accurately shown with their principal controlling dimensions.

Red. County Minimum Requirements for Platting
11-1-1911
The accuracy required for horizontal control of the plat shall be of the order of one in 4,000, with all dimensions on the face of the plat to close within plus or minus .05 feet.

8.3.11

The accuracy required for horizontal control of the plat shall be of the order of one in 4,000, with all dimensions on the face of the plat to close within plus or minus .05 feet.

8.4

Attendant Items

The final plat shall include the following forms, properly endorsed:

8.4.1

Certificate by Registered Land Surveyor (to be designated "Surveyor's Certificate"):

I hereby certify that this plat of _____ is based upon an actual survey and subdivision of Section _____, Township _____, Range _____, that the distances, courses and angles are shown hereon correctly; and that the monuments have been (or will be) set, and the lot and block corners have been (or will be) staked correctly in the ground thereof, and that I have fully complied with the provisions of the statutes of the State of Washington under the regulations of the Town of Gig Harbor governing platting.

(A two-inch diameter space shall be left blank for ~~engineer's~~ seal)
Surveyor's

8.4.2

Certificate by County Treasurer (to be designated "Treasurer's Certificate"):

I hereby certify that all property taxes are paid, there are no delinquent special assessments and all special assessments on any of the property herein contained dedicated as streets, alleys or for other public use are paid in full, this _____ day of _____ 19__.

County Treasurer

By: _____
Deputy County Treasurer

8.4.3

Certificate by Town engineer (to be designated as "Approval"):

Examined and approved this _____ day of _____ 19__.

(A two-inch diameter space shall be left blank for engineer's seal)

Engineer, Town of Gig Harbor

8.4.4

Certificate by Town Treasurer (to be designated as "Treasurer's Certificate"):

I hereby certify that there are no delinquent special assessments and all special assessments on any of the property herein contained as dedicated streets, alleys, or for other public use are paid in full, this _____ day of _____, 19 _____.

Treasurer, Town of Gig Harbor

8.4.5

Certificate by Chairman and Secretary of Town Planning Commission (to be designated as "Approval"):

I hereby certify that this plat of _____ is duly approved by the Town of Gig Harbor Planning Commission this _____ day of _____, 19 _____, by Resolution No. _____.

(A two-inch diameter space shall be left blank for Town Seal)

Chairman

Attest: _____
Clerk, Town of Gig Harbor

Secretary

8.4.6

Recording Certificate:

Filed for record at the request of the Town of Gig Harbor this _____ day of _____, 19 _____, at _____ minutes past _____ m., and recorded in Volume _____ of Plats, records of _____, County, Washington.

County Auditor

8.4.7

Dedication

Know all men by these presents that we the undersigned, owners in fee simple of the land hereby platted, declare this plat and dedicate to the use of the public forever, all streets, avenues, and easements shown hereon and the use thereof for any and all public purposes not inconsistent with the use thereof for public highway purposes, together with the right to make all necessary slopes for cuts or fills upon the lots and blocks shown thereon in the reasonable grading of the streets or avenues shown hereon.

In witness whereof we have hereunto set our hands and seals this _____ day of _____, 19 _____.

8.4.8 Acknowledgment (as applicable):

8.4.8.1 Individual

State of Washington) SS
County of _____)

This is to certify that on the _____ day of _____, 19 _____, before me the undersigned, a Notary Public, personally appeared _____, to me known to be the individuals who executed the foregoing dedication, and who acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year first above written.

(A two-inch diameter space shall be left blank for Notary Public seal)

Notary Public in and for the State of Washington, residing at _____

8.4.8.2 Corporate

State of Washington)) SS
County of _____)

On this _____ day of _____, 19 _____, before me personally appeared _____, to me known to be the _____ of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, and for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal the day and year first above written.

Notary Public in and for the State of Washington, residing at _____

8.4.9 Restrictions

8.4.9.1

Structures except wharves or piers erected upon the land are restricted, by ordinances of the Town of Gig Harbor, to lie completely within the area enclosed by the setback lines shown on each lot of this plat and such restriction shall be considered as a restrictive covenant of this plat.

8.4.9.2 All lots are subject to restrictive covenants as filed with this plat and recorded under _____ County Auditor File No. _____.

8.5 Certificate of Title

A certificate of title to the Town of Cig Harbor from a reputable abstractor, showing the ownership and title of all interested parties in the plat, subdivision or dedication, shall accompany the final plat. The certificate shall be dated not to exceed 30 days prior to the time of submitting the plat for final approval.

8.6 Deed Covenants

A properly endorsed typewritten copy of the protective deed covenants, if applicable, shall accompany the final plat.

8.7 Sewer System Approval

A letter from the sewer utility (if applicable), indicating complete and final approval and acceptance of the sewer installation system.

8.8 Water System Approval

A letter from the appropriate water utility indicating complete and final approval and acceptance of the water distribution system.

9.0 The Partition of Land by Metes and Bounds

Full compliance with all requirements of Section 4 of this ordinance may be waived at the discretion of the Planning Commission, when area or land is to be divided into four parts, or less, when all of the following requirements are satisfied:

9.1 The resulting lots meet all the requirements of Section 6.4 herein.

9.2 The resulting lots are smaller than twice the minimum size specified in the zoning ordinance, or prohibited from further partition by deed covenant.

9.3 Each lot shall abutt a public street by a minimum of twenty (20) feet, or have access to a public street by means of a private lane easement meeting all the requirements of Section 6.3 herein.

9.4 Application for the partition of Land under the provisions of this section shall be made to the Planning Commission and shall be accompanied by the following data.

9.4.1 Letter of application.

9.4.2 A drawing to a scale of fifty (50) feet to the inch depicting the area to be divided, and showing the legal description of the property.

9.4.3

A letter from the sewer utility indicating that a sewer connection is provided for each lot, or compliance with Section 5.4.2.

9.4.4

A letter from the appropriate water utility indicating that a private water connection is provided for each lot.

9.4.5

When site improvements as required by Section 6 and Section 7 are not complete, a letter is required from each public utility indicating that their respective services are available and, in addition, the applicant shall post a bond, satisfactory to the Town, in which assurance is given the Town that the installation of the minimum improvements required under Section 6 and Section 7 will be made within one year from the date of application, and that such improvements will be carried out as provided in Section 7.

10.0

Procedure and Authority for Granting Modifications and Exceptions

Any subdivider may make application to the Planning Commission for a variation or modification of any of the regulations contained herein due to pre-existing, topographic, or other physical conditions of the proposed plat, subdivision, or dedication. The Planning Commission shall hold a public hearing to consider the request and shall submit its tentative decision, together with its findings of fact in each case, to the Council for its review of the findings of fact and tentative decision. The Council, within thirty (30) days after receiving the facts and tentative decision from the Commission, shall complete its review, shall concur, modify, or reject the tentative decision of the Planning Commission, and shall issue an order to the Commission containing the standards and requirements which shall govern the subdivision approval.

11.0

Violations and Penalties

Whenever any person or persons, firm or firms, or one or more corporations, at various and successive times, or at any one time, shall have attempted to plat, subdivide, or divide into smaller parts, any parcel of land or property into four or more such lots, plots, tracts, or smaller parts, the area of each of which is five (5) acres or less, for purposes of providing building sites, now, or at any time hence, held in one ownership, either by contract for purchase, by deed or by both, and after the time of the adoption of this ordinance, and have failed to comply with the provisions of this ordinance, such attempted subdivision shall be null and void and the subdivider shall be subject to a fine in any sum not to exceed five hundred dollars (\$500.00) for each of said lots, plots, tracts, or smaller parts, or imprisonment for a period not to exceed thirty (30) days, or both such fine and imprisonment, in the discretion of the court: and whoever, being the owner or agent of the owner, of any land located within such plat or subdivision containing more than four such lots, plots, tracts, or smaller parts, transfers or sells, or agrees to sell,

or option any land, before such plat or subdivision has been approved by the Town, shall be subject to a fine of not more than five hundred dollars (\$500.00). The Planning Commission may initiate an action to enjoin such transfer, sale, agreement or option by making application for an injunction in the Superior Court; or the Planning Commission may recover said penalty for the Town of Gig Harbor by a civil action in any court of competent jurisdiction, if, in the opinion of the Planning Commission either of said actions is justifiable.

12.0 Enforcing Authority

The Town Planning Commission is designated and assigned the administrative and coordinating responsibilities contained herein, pursuant to the Laws of the State of Washington, Ch. 186, Laws, 1937, as hereafter amended (Ch. 58.1 RCW) for the approval or disapproval of plats, subdivisions, or dedications.

13.0 Conflict

The following ordinances are hereby repealed.

Ordinances No:

14.0 Validity

Should any section, subsection, paragraph, sentence, clause or phrase of this ordinance be declared unconstitutional or invalid for any reason, such decision shall not affect the validity of the remaining portions of this ordinance.

15.0 Effective Date

This ordinance shall be in full force and effect after its passage, approval and publication as provided by law.

Passed by the Council this 25th day of August, 1966.

Approved by the Mayor this _____ day of _____, 19_____.

H. H. H. H.
MAYOR

ATTEST:

A. A. H. H.
Town Clerk

I hereby certify that the foregoing is a true and correct copy of Ordinance No. _____ of the Town of Gig Harbor, the title to which is as set forth above, and that said ordinance was posted according to law on _____.

TOWN CLERK

Affidavit of Publication

STATE OF WASHINGTON, }
 COUNTY OF PIERCE. } S.S.

Dorothy Platt being first duly sworn,

on oath deposes and says that he is the Publisher of THE PENINSULA GATEWAY, a weekly newspaper. That said newspaper is a legal newspaper and it is now and has been for more than six months prior to the date of the publication hereinafter referred to, published in the English language continually as a weekly newspaper in Gig Harbor, Pierce County, Washington, and it is now and during all of said time was printed in an office maintained at the aforementioned place of publication of said newspaper.

That the annexed is a true copy of a _____

Town of Gig Harbor Ordinance

No. 61

as it was published in regular issues (and not in supplement form)

of said newspaper once each week for a period of 1

consecutive weeks, commencing on the 1 day of Sept.,

1966, and ending on the _____ day of _____, 1966,

both dates inclusive, and that such newspaper was regularly distributed to its subscribers during all of said period.

That the full amount of the fee charged for the foregoing publication

in the sum of \$134.40, which amount has been paid in full, at the rate of \$2.00 a hundred words for the first insertion and \$1.50 a hundred words for each subsequent insertion.

Dorothy Platt

Subscribed to and sworn before me this 26th day of September, 1965.

Eugene L. [Signature]

Notary Public in and for the State of Washington.

Residing at Gig Harbor, Wash.

Spreckels
 5-Lb. Bag
Sugar
49^c

Hunt's
 300 Tins
Fruit Cocktail
19^c



GR1
 SEEDLES
 U.S.



Cuts Lb.
Fryers
 Fresh Washington Grown
 (Cut-ups 4lb.)
 Whole Bodied
35

From: Shope, Christian <ShopeC@cityofgigharbor.net>
To: 'emma1g@aol.com' <emma1g@aol.com>
Subject: Gig Harbor Municipal Code: 1985
Date: Mon, Sep 29, 2014 10:30 am

I spoke with Paul Rice to gain a background on the situation and have a better understanding now.

The information you need is available online. This link is for all Gig Harbor ordinances:
<https://gigharbor.imagenetllc.net/Administration/Ordinances/>

For a little guidance: Ord 701 updated the subdivision code in 1996 which had previously been adopted and unchanged since 1966(ord 91))

The code is an ever changing document, and ordinances record each change. You can use the find feature of your web browser to quickly find any ordinances referring to GHMC 16.06, 16.07, or 16.08 or whichever code you need.

-Christian

Christian Shope

City of Gig Harbor

Assistant Planner

shopec@cityofgigharbor.net

253.851.6135

Those Crazy Indemnity Forms We All Sign

IN order for one of my boys to play indoor lacrosse this winter, I was asked to sign a release indemnifying the sports dome and a long list of its business associates, volunteers, advertisers and (presumably) their family pets against any possible claim filed on behalf of my son.

One-sided legal releases are part of modern life, but these ubiquitous documents often contain little-noticed indemnification clauses — legal provisions requiring consumers to protect a business or some other party from damage claims and legal fees, sometimes even those arising from their own negligence.

Basically, they make every one of us an insurer. Indemnification clauses have been a pernicious feature of freelance writing contracts for years. As a result, threadbare scribes ludicrously agree to protect giant publishing conglomerates not only against judgments, but against the ruinous cost of defending even the most far-fetched legal claims.

Clauses like this often are tucked into the fine print nobody reads when clicking around the Internet or otherwise doing daily business.

Try a little Googling on this score. If you used a money-back guarantee available for a while on Iams cat food in Germany, you agreed to indemnify Procter & Gamble (fiscal 2012 sales: \$83.7 billion). The official terms of use for Skype, the popular phone and messaging service, also include an indemnification clause. So does the eBay user agreement. "If anyone brings a claim against us related to your actions, content or information on Facebook," says that site's Statement of Rights and Responsibilities, "you will indemnify and hold us harmless from and against all damages, losses, and expenses of any kind (including reasonable legal fees and costs) related to such claim."

Demands for indemnification don't just come from businesses. One parent (who asked not to be named) had to sign a form indemnifying the Girl Scouts of Northern California so that her daughter could take part in a ropes course high off the ground. The mother

might not want to bother seeking help from the California Department of Consumer Affairs, since its Web site requires users to indemnify the agency (and the usual list of hangers-on) "against all claims and expenses, including attorneys' fees."

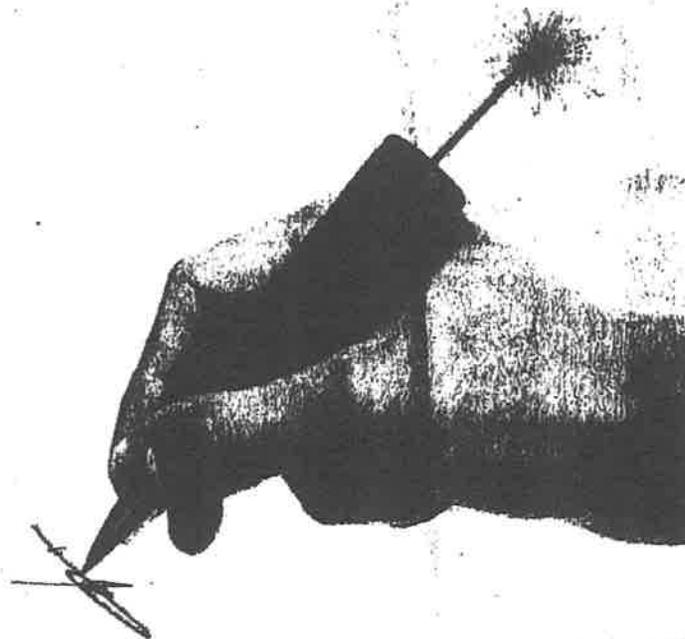
Of course, the parent didn't have to sign, but she also didn't want her daughter left out.

I've faced the same choice — give up my rights or keep my kids home. In order for my son to attend a summer program at the Simon's Rock campus of Bard College, for example, I agreed to release the institution, its trustees and (as far as I can tell) all their Facebook friends from any liability and to "fully and forever agree to indemnify" them in case of any claims arising from my son's stay.

So I'm a regular Lloyd's of London. Yet regulation of my role as an all-

purpose insurer is scandalously lax. I haven't heard a peep from my state's insurance regulator, for instance; evidently this official is blithely uninterested in just how much capital I've set aside — hang on while I go through the sofa cushions for change — to cover the vast potential liabilities lurking on our family's balance sheet.

IT'S bad enough that everywhere I go, someone wants me to promise not to sue. I was once asked to sign a release as a houseguest in a private home! And to some extent, I'm sympathetic; it's stressful and expensive to live in such a litigious society. But it's ridiculous to demand that every Tom, Dick and Mary assume a liability that can only properly rest with those who bear responsibility. And it's a perversion of the tort system, which is supposed to put the onus on the parties



JAVIER JAÉN BENAVIDES

most able to make sure things are done right. Leaving aside the adequacy of my loss reserves, are these indemnifications legally enforceable? It depends how far they go and which state you're in.

Margaret Jane Radin, a law professor at the University of Michigan, says they're intimidating at the best, and overcoming such a provision could itself require litigation. In Indiana, for exam-

Without thinking, consumers relieve businesses of their responsibilities.

ple, a trial court held that a gas station operator and his helper had to pay to defend an oil company for its own negligence in injuring them with gasoline, a ruling based in part on an indemnification clause. The state Supreme Court found that provision unconscionable, but the plaintiff had to go pretty far just to get his day in court.

At least that was a business agreement; the balance of power is even more asymmetric when consumers are involved. In a new book titled "Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law," Ms. Radin argues that an onslaught of one-sided fine print is deleting people's legal rights and making a mockery of the freedom of contract. In an interview, she observed that some other countries ban such casual rights erasures, and said the Federal Trade Commission could do likewise here.

It should. Meanwhile, people have to start objecting to these unfair agreements, which often relieve businesses and institutions of their most basic responsibilities, pressing individuals to act as their insurers. For years I've crossed out indemnity provisions in freelance contracts, and did likewise for lacrosse. But often that's not an option, and Ms. Radin warned that while deleting and initialing might help, the other side could contend that it never agreed to the changes. If things came to blows in court, I might still get stuck with the legal bill for both sides.

OPINION

BY DANIEL AKST
The author of "We Have Met the Enemy: Self-Control in an Age of Excess."

EX 4. 3

"All the News That's Fit to Print"

The New York Times

National Edition

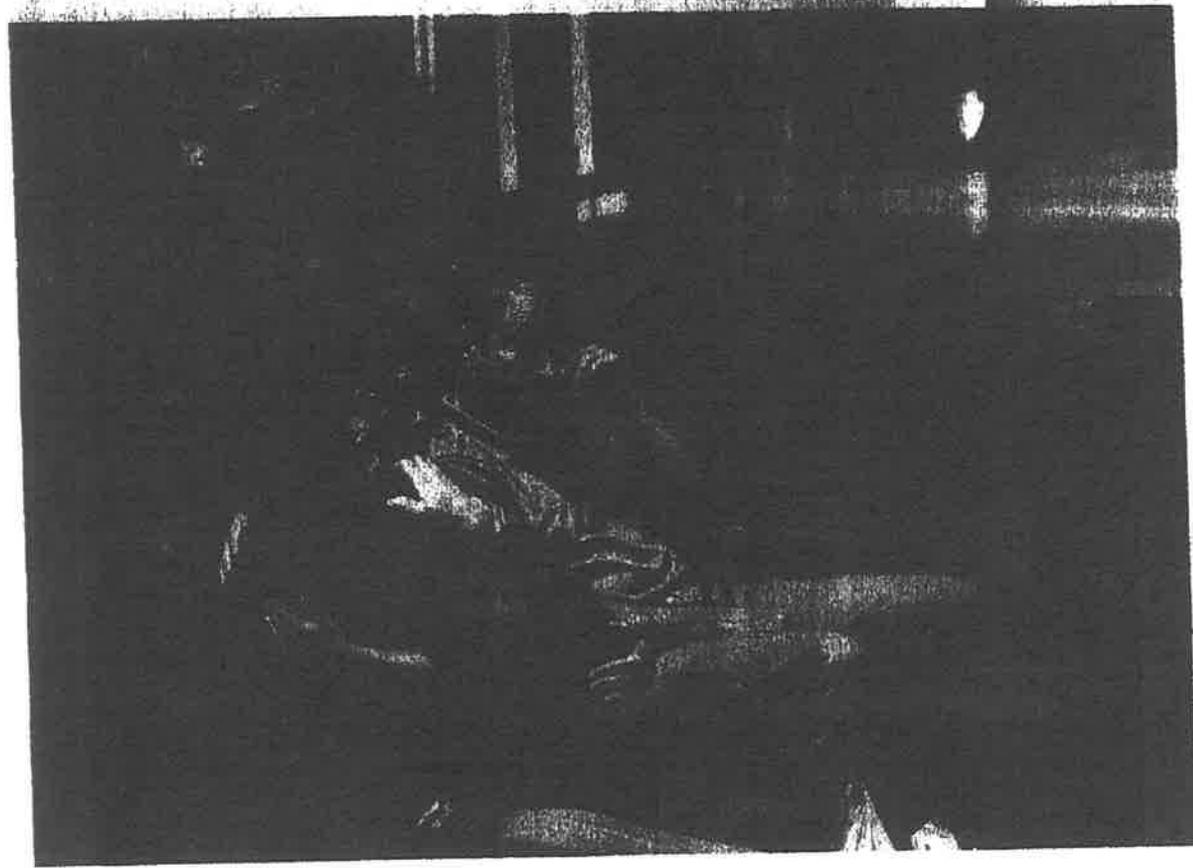
Arizona: Mostly cloudy northeast. Partly sunny elsewhere. Highs in the 30s northeast to the 70s southwest. Mostly clear tonight. Colder. Details, SportsSunday, Page 12.

L. CLXII . . . No. 55,980

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SUNDAY, DECEMBER 9, 2012

Printed in Arizona \$6.00



Morsi Extends A Compromise To Opposition

Rescinds Some Control Ahead of Vote

By DAVID D. KIRKPATRICK

CAIRO — Struggling to quell protests and violence that have threatened to derail a vote on an Islamist-backed draft constitution, President Mohamed Morsi moved Saturday to appease his opponents with a package of concessions just hours after state media reported that he was moving toward imposing a form of martial law to secure the streets and allow the vote.

Mr. Morsi did not budge on a critical demand of the opposition: that he postpone a referendum set for Saturday to approve the new constitution. His Islamist supporters say the charter will lay the foundation for a new democracy and a return to stability. But liberal groups have faulted it for inadequate protection of individual rights and loopholes that could enable Muslim religious au-

SYRIA REBELS TIED TO AL QAEDA PLAY KEY ROLE IN WAR

A CHALLENGE FOR U.S.

Jihadis Bring Weapons and Support in Drive to Unseat Assad

This article is by Tim Arango, Anne Barnard and Hwaida Saad.

LAGHDAD — The lone Syrian rebel group with an explicit stamp of approval from Al Qaeda has become one of the uprising's most effective fighting forces, posing a stark challenge to the United States and other countries that want to support the rebels but not Islamic extremists.

Money flows to the group, the Nusra Front, from like-minded donors abroad. Its fighters, a small minority of the rebels, have the boldness and skill to storm fortified positions and lead other battalions to capture military

APPENDIX D

CR 54
JUDGMENTS AND COSTS

(a) Definitions.

(1) Judgment. A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

(2) Order. Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs, Disbursements, Attorney's Fees, and Expenses.

(1) Costs and Disbursements. Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

(2) Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

(e) Preparation of Order or Judgment. The attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision, or at any other time as the court may direct. Where the prevailing party is represented by an attorney of record, no order or judgment may be entered for the prevailing party unless presented or approved by the attorney of record. If both the prevailing party and the prevailing party's attorney of record fail to prepare and present the form of order or judgment within the prescribed time, any other party may do so, without the approval of the attorney of record of the prevailing party upon notice of presentation as provided in subsection (f)(2).

(f) Presentation.

(1) Time. Judgments may be presented at the same time as the findings of fact and conclusions of law under rule 52.

(2) Notice of Presentation. No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment unless:

(A) Emergency. An emergency is shown to exist.

(B) Approval. Opposing counsel has approved in writing the entry of the proposed order or judgment or waived notice of presentation.

(C) After verdict, etc. If presentation is made after entry of verdict or findings and while opposing counsel is in open court.

[Originally effective July 1, 1967; amended effective September 1, 1989; September 1, 2007; April 28, 2015.]

APPENDIX E

Superior Court Civil Rules

CR 59

NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

- (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.
- (2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial;
- (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
- (6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;
- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
- (8) Error in law occurring at the trial and objected to at the time by the party making the application; or
- (9) That substantial justice has not been done.

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Hearing on Motion. When a motion for reconsideration or for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

- (1) Time of Hearing. Whether the motion shall be heard before the entry of judgment;
- (2) Consolidation of Hearings. Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or
- (3) Nature of Hearing. Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

(f) Statement of Reasons. In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(h) Motion To Alter or Amend Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(i) Alternative Motions, etc. Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

(j) Limit on Motions. If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made without leave of the court

first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

[Amended effective July 1, 1980; September 1, 1984; September 1, 1989; September 1, 2005; April 28, 2015.]

APPENDIX F

Superior Court Civil Rules

CR 60 RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;
- (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
- (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (5) The judgment is void;
- (6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
- (7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;
- (8) Death of one of the parties before the judgment in the action;
- (9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;
- (10) Error in judgment shown by a minor, within 12 months after arriving at full age; or
- (11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or the applicant's attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

[Amended effective September 26, 1972; January 1, 1977; April 28, 2015.]

APPENDIX G

4.28.320 Lis pendens in actions affecting title to real estate.

At any time after an action affecting title to real property has been commenced, or after a writ of attachment with respect to real property has been issued in an action, or after a receiver has been appointed with respect to any real property, the plaintiff, the defendant, or such a receiver may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of filing such notice: PROVIDED, HOWEVER, That such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced may, at its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be evidenced by the recording of the court order.

[2004 c 165 § 33; 1999 c 233 § 1; 1893 c 127 § 17; RRS § 243.]

NOTES:

Purpose—Captions not law—2004 c 165: See notes following RCW 7.60.005.

Effective date—1999 c 233: "This act takes effect August 1, 1999." [1999 c 233 § 24.]

APPENDIX H

4.28.328 Lis pendens—Liability of claimants—Damages, costs, attorneys' fees.

(1) For purposes of this section:

(a) "Lis pendens" means a lis pendens filed under RCW 4.28.320 or 4.28.325 or other instrument having the effect of clouding the title to real property, however named, including consensual commercial lien, common law lien, commercial contractual lien, or demand for performance of public office lien, but does not include a lis pendens filed in connection with an action under Title 6, 60, other than chapter 60.70 RCW, or 61 RCW;

(b) "Claimant" means a person who files a lis pendens, but does not include the United States, any agency thereof, or the state of Washington, any agency, political subdivision, or municipal corporation thereof; and

(c) "Aggrieved party" means (i) a person against whom the claimant asserted the cause of action in which the lis pendens was filed, but does not include parties fictitiously named in the pleading; or (ii) a person having an interest or a right to acquire an interest in the real property against which the lis pendens was filed, provided that the claimant had actual or constructive knowledge of such interest or right when the lis pendens was filed.

(2) A claimant in an action not affecting the title to real property against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens, for actual damages caused by filing the lis pendens, and for reasonable attorneys' fees incurred in canceling the lis pendens.

(3) Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

[1994 c 155 § 1.]

APPENDIX I

0057



11-2-16364-0 43550534 ORDY 10-30-14



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IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

CHRISTOPHER GUEST,
Plaintiff(s)

vs.

DAVID LANGE,
Defendant(s)

Cause No. 11-2-16364-0

ORDER DENYING REQUEST FOR RECONSIDERATION

Plaintiffs Guest file a motion to vacate pursuant to CR 59. Plaintiffs Guest also file a Motion for Reconsideration under CR 59. Pursuant to CR 59(b), Motions for Reconsideration must be submitted to the Court no later than ten days following judgment. Final judgment was entered in this case September 19th, 2014. Plaintiffs' Motion for Reconsideration was filed Tuesday, September 30th, 2014. The last day of the ten-day reconsideration period was Monday, September 29th, 2014.

CR 59(b) uses the language, "A motion for a new trial or for reconsideration shall be filed no later than ten days after the entry of judgment... (.) CR 59's time deadlines are couched in mandatory language.

Well-established case law holds that there cannot be substantial compliance with mandatory time deadlines. See City of Seattle vs. Public Employment Relations Commission, 116 Wn.2d. 929. Based on untimely filing, Plaintiffs' Motion for Reconsideration will be denied.

Based on the foregoing, it is

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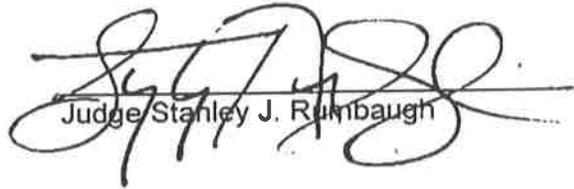
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ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for Reconsideration pursuant to CR 59 is Denied as being untimely filed.

DONE IN OPEN COURT this 29 day of October, 2014.


Judge Stanley J. Rumbaugh

FILED
DEPT. 18
IN OPEN COURT
OCT 29 2014
Pierce County Clerk
By:  DEPUTY

APPENDIX J

**CHRISTOPHER and SUZANNE GUEST,
husband and wife, Appellants,**

v.

**DAVID and KAREN LANGE, husband
and wife,
and the marital community comprised
thereof, Respondents.**

No. 46802-6-II

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

June 14, 2016

UNPUBLISHED OPINION

MELNICK, J. — Christopher and Suzanne Guest appeal the trial court's summary judgment orders and final judgment in favor of their neighbors, David and Karen Lange. We conclude that the trial court did not abuse its discretion by denying the Guests' motion to amend their complaint; it did not err by granting the Langes' motion for summary judgment dismissing the Guests' claims; it did not err by denying the Guests' motion for partial summary judgment; and, it did not err in instructing the jury. Finally, there was no cumulative error.¹ We affirm.

FACTS

The facts of this case are not in dispute. The Guests and the Langes are neighbors in the Spinnaker Ridge community in Gig Harbor. The Guests reside on Lot 5 and the Langes reside on Lot 4. Nu-Dawn Homes, Inc. developed the community in 1986. As part of the original

Page 2

development, Nu-Dawn Homes recorded the Spinnaker Ridge declaration of covenants, conditions, restrictions, and reservations (CC&Rs), and a document titled "Patio or Deck Easement" (Easement).² Clerk's Papers (CP) at 211. Both documents granted

easements for decks. The easement over the Guests' property covered an area of 5 feet by 21 feet for the Langes' deck.

In 2011, the Langes wanted to rebuild their deck because they had concerns with its structural integrity. The original deck's footprint covered the easement over the Guests' property and an additional encroachment area of approximately three feet by five feet. The Langes talked with the Guests about their intent to replace the deck. The Guests told the Langes that they did not have the right to reconstruct their deck on the original deck's footprint which ran along the edge of the Guests' house. The Langes decided to rebuild the deck in a smaller area than the original one.

Later, the Langes' lawyer informed them that they had the legal right to rebuild the deck within the location of the original deck. The Langes asked the Guests for permission to rebuild the deck as it had originally existed. The Guests refused to give their permission. Eventually, the situation deteriorated, and the Langes communicated to the Guests that they were going to rebuild the deck in the same place as the original one. In April, while the Guests were out of town, the Langes rebuilt the deck in the same footprint as the original deck.

Page 3

I. PROCEDURAL HISTORY

A. Complaint, Answers, and Counterclaims

In December 2011, the Guests filed a complaint alleging breach of contract and trespass. In May 2012, the Langes filed an answer, affirmative defenses, and counterclaims to quiet title and for trespass. The Guests answered the Langes' counterclaims and asserted affirmative defenses.



B. Amended Complaint

In October, the Guests filed their first amended complaint. It alleged breach of contract, trespass, and breach of the covenant of good faith and fair dealing. It also alleged the Langes had a duty to indemnify the Guests for all claims arising from their actions in connection with the deck and the utilization of the easement.

The Langes filed an answer with affirmative defenses and a counterclaim. They admitted that the deck might encroach on the Guests' property, but the original CC&Rs allowed it, and that the deck covered the same area as the original deck. The Langes alleged that the Guests trespassed. The Langes denied all of the Guests' causes of action. In their counterclaim, the Langes relied on the following language from paragraph 16.4 of the 1986 CC&Rs:

Encroachments: Each Lot and all Common Areas are hereby declared to have an easement over all adjoining Lots and Common Areas for the purpose of accommodating any encroachment . . . and any encroachment due to building overhang or projection, and any encroachment for a deck, patio and/or parking area or driveway constructed (and assigned for the use of a Lot) by Developer. There shall be valid easements for the maintenance of said encroachments . . . however, that in no event shall a valid easement for encroachment be created in favor of an Owner or Owners if said encroachment occurred due to the willful act or acts with full knowledge of said Owner or Owners. In the event a Lot or Common Areas are partially or totally destroyed, and then repaired or rebuilt, the

Owners agree that minor encroachments over adjoining Lots and Common Areas shall be permitted, and that there shall be valid easements for the maintenance of said encroachments so long as they shall exist.

Page 4

CP at 49.

The Guests answered the Langes' counterclaim and asserted affirmative defenses. They alleged that the indemnity provision contained in paragraph D of the Easement was an insurance contract that obligated the Langes to indemnify and insure the Guests against suits related to the deck. Paragraph D of the Easement states:

Grantee promises, covenants and agrees that the Grantor shall not be liable for any injuries incurred by the Grantee, the Grantee's guests and/or third parties arising from the utilization of said easement and further Grantee agrees to hold Grantor harmless and defend and fully indemnify Grantor against any and all claims, actions, and suits arising from the utilization of said easement and to satisfy and all judgments that may result from said claims, actions and/or suits.

CP at 212.

C. Motions to Amend Complaint and for a Continuance

On January 29, 2013, the Guests filed a motion to amend their complaint and to continue the trial. The proposed second amended complaint would have added five

new defendants and eleven new causes of action. It was 135 pages long. The Guests claimed that they received late discovery responses and the documents produced gave rise to new causes of action. The case was set for trial on June 4. The Guests requested a six month continuance of all deadlines, including those that had already passed, to join new parties and to adequately prepare for trial.

The Langes opposed the motion because the deadline to add defendants had passed and because they faced significant prejudice if the scope of this litigation expanded and was continued. The trial court denied the motion because it was untimely and because the Langes would be prejudiced.

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D. Summary Judgment Motions³

1. Guests' Motion for Summary Judgment

On March 8, the Guests filed a motion for summary judgment and dismissal of the Langes' counterclaims of trespass and to quiet title. The Guests claimed they could not trespass on their own property. Even if there was an easement, it would be for the mutual benefit of the parties. The Guests also claimed that paragraph D of the Easement barred any counterclaims by the Langes.

On April 8, the Langes responded to the Guests' motion for summary judgment and agreed that there were no genuine disputes as to the material facts, but because the Guests could not show that they were entitled to judgment on either of the Langes' counterclaims, the motion should be denied.

2. Langes' Motion for Summary Judgment

On March 22, the Langes filed a motion for summary judgment of the Guests' claims, arguing that each claim was legally insufficient. In support of their motion, the

Langes included surveys of the Guests' and Langes' lots that showed the deck easement area, the actual deck, and the disputed three feet by five feet area.

On April 9, the Guests responded and claimed the Langes did not have standing because their counterclaims were barred, and that the multiple contracts the Guests entered into with the Langes defeated the motion for summary judgment.

3. Court's Rulings on Summary Judgment Motions

On April 19, the trial court heard arguments on the summary judgment motions. On May 6, the trial court entered a written order granting the Guests' motion for dismissal of the

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counterclaim for trespass, but denying the motion to quiet title. The trial court also ruled that the indemnification language in paragraph D of the Easement did not bar the other counterclaims. On that same date, the trial court entered a written order granting the Langes' summary judgment motion in part, dismissing the Guests' claims for trespass with respect to the area described in the Easement, for breach of contract for a violation of the CC&Rs, for breach of contract based on the alleged contract to share the Langes' deck, for breach of indemnity, and for breach of duty of good faith and fair dealing.⁴

After the ruling on both motions for summary judgment, the following claims and counterclaims remained: the Guests' claim for trespass regarding the three feet by five feet encroachment area of the deck; the Guests' claim for breach of contract based on the Langes' alleged promise to not build a deck on the easement area; and the Langes' claim to quiet title.

E. Other Motions



On May 6, the Guests filed CR 56(f) declarations for postponement of entry of the summary judgment orders until the conclusion of discovery, and for denial of the Langes' motion for summary judgment because the grantor in the Easement was not the owner of the development. The Guests' declarations claimed that they acquired newly discovered evidence that proved the Easement was invalid, including that Nu-Dawn Homes Limited Partnership owned and developed the community, not Nu-Dawn Homes Inc., the listed grantor on the Easement.⁵ The trial court ruled that the declarations were untimely and declined to consider the Guests' arguments.

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II. TRIAL

The case proceeded to jury trial with testimony consisting of the same pertinent facts as summarized above. Prior to trial, the Guest's moved in limine that the parties be prevented from presenting any testimony, evidence or argument that there was any easement on the Guests' property that benefitted the Langes' property. The trial court denied the motion, stating that it did not understand the motion and it had already granted summary judgment and ruled that a valid easement existed.

A. Jury Instructions

The Guests argued about three specific jury instructions. The trial court instructed the jury using an instruction the Langes proposed. It read, "If you find that plaintiffs justifiabl[y] relied on defendants' promise not to build a new deck in the area identified in the patio or deck easement, then there was consideration." CP at 4646, 4747. The trial court gave the Langes' proposed instruction because it did not understand the Guests' proposed instruction. In ruling, the trial court explained that the instruction would still allow the Guests to argue their theory of the

case, i.e. that they justifiably relied on the Langes' promise not to build a new deck on the easement.

The Guests proposed an instruction on the implied duty of good faith and fair dealing. Although the Langes objected, the trial court agreed to give the instruction, but inadvertently failed to give it.

The trial court also instructed the jury regarding the Easement. "The Court has determined as a matter of law that Defendants had the right to rebuild in and occupy the area described in the patio or deck easement recorded under Pierce County Auditor Document No. 8704290509 [the Easement]." Report of Proceedings (RP) (July 15, 2014) at 132; CP at 4755 (Instr. 17). The trial

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court noted that it had determined the validity of the Easement at summary judgment, but the Guests could still argue that there may have been some contract that vacated the Easement.

The trial court asked the parties to check the jury instruction packet to make sure it accurately reflected the court's rulings. Both parties agreed the packet was correct apparently unaware that it did not include the good faith and fair dealing instruction.

B. Verdict

On July 16, 2014, the jury returned a special verdict in the Langes' favor. The jury found the Langes did not breach a contract with the Guests and they did not breach their covenant of good faith and fair dealing with the Guests. The jury also found that the new deck, which was in the same position as the old deck, did not trespass on the Guests' property. On September 19, the trial court entered judgment for the Langes, dismissed all of the Guests' claims with prejudice,

awarded judgment to the Langes on their claim to quiet title. It awarded the Langes \$565 for attorney fees. The Guests appeal.

ANALYSIS

I. MOTION TO AMEND COMPLAINT

The Guests argue that the trial court abused its discretion by denying their motion to amend their complaint because a motion's timeliness alone is not a proper reason to deny a motion to amend. We disagree in part because the way the Guests frame the issue does not accurately reflect the trial court's ruling. The trial court denied the motion because it was untimely and because it would prejudice the Langes.

A. STANDARD OF REVIEW

We review a trial court's ruling on a motion to amend a complaint for abuse of discretion. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 351, 670 P.2d 240

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(1983). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). To amend a pleading after the opposing party has responded, the party seeking to amend must obtain the trial court's leave or the opposing party's consent. CR 15(a).

Leave to amend a complaint should be freely granted unless the opposing party would be prejudiced. *Olson v. Roberts & Shaffer Co.*, 25 Wn. App. 225, 227, 607 P.2d 319 (1980), *repudiated on other grounds by State v. Eppens*, 30 Wn. App. 119, 633 P.2d 92 (1981). In determining prejudice, a court may consider undue delay and unfair surprise as well as the futility of amendment. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165,

736 P.2d 249 (1987). Undue delay is a proper ground for denying leave to amend. *Elliott v. Barnes*, 32 Wn. App. 88, 92, 645 P.2d 1136 (1982). "In all cases, "[t]he touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.'" *Herron*, 108 Wn.2d at 166 (quoting *Del Guzzi Constr. Co. v. Global Nw., Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986) (quoting *Caruso*, 100 Wn.2d at 350)).

Where the proposed amendment encompasses new concerns and new facts, the likelihood of prejudice to the defendant is greater. "When an amended complaint pertains to the same facts alleged in the original pleading, denying leave to amend may hamper a decision on the merits." *Herron*, 108 Wn.2d at 167. "When the amended complaint raises entirely new concerns, the plaintiff's right to relief based on the facts in the original complaint is unaffected." *Herron*, 108 Wn.2d at 167. "Moreover, the defendant in the latter case is more likely to suffer prejudice because he has not been provided with notice of the circumstances giving rise to the new claim and may have to renew discovery." *Herron*, 180 Wn.2d at 167. "Appellate decisions permitting amendments have emphasized that the moving parties in those cases were merely seeking to assert

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a new legal theory based upon the same circumstances set forth in the original pleading." *Herron*, 108 Wn.2d at 166.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

Here, the Guests moved to file an amended complaint more than seven months after the deadline to add defendants had passed. In addition, their motion came nearly nine months after the Langes filed their answer and three months after the Guests filed their first amended complaint.

The Guests attempted to add five new defendants and eleven new causes of action that were significantly different from the original claims. Many of the new claims were based on conduct that occurred well after the Langes reconstructed the deck, and many of the new claims involved conduct by third parties who were not named as defendants. The trial court concluded that the filing of the second amended complaint would have extended litigation over a long period of time, and would have caused undue delay that would clearly prejudice the Langes. Because these reasons are tenable, the trial court did not abuse its discretion. There is no error.

II. LANGES' MOTION FOR SUMMARY JUDGMENT

The Guests argue the trial court erred by granting the Langes' motion for summary judgment and dismissing the Guests' breach of contract and indemnity claims. They also argue the trial court erred by granting summary judgment on the validity of the Easement because it did not consider new evidence included in their CR 56(f) declarations.⁶ We disagree.

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A. STANDARD OF REVIEW

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We view the evidence and draw reasonable inferences from it in a light most favorable to the nonmoving party. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton*, 115 Wn.2d at 516. If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute. *Atherton*, 115 Wn.2d at 516.

The nonmoving party's response, by affidavits or as otherwise provided under CR 56, must set forth specific facts that reveal a genuine issue for trial. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). "[C]onclusory statements of fact will not suffice." *Grimwood*, 110 Wn.2d at 360. If the nonmoving party fails to do so, and reasonable persons could reach but one conclusion from all the evidence, summary judgment is proper. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

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B. DISMISSAL OF GUESTS' BREACH OF CONTRACT CLAIM

The Guests argue that the trial court erred by dismissing their breach of contract claim based on the CC&Rs.⁷ In addition, the Guests contend that because the Langes admitted that they were bound by the CC&Rs, the trial court should have vacated the interlocutory summary judgment order dismissing the Guests' claims. We disagree.

A contract is an agreement creating an obligation. *See Ketcham v. King Cty. Med. Serv. Corp.*, 81 Wn.2d 565, 593, 502 P.2d 1197 (1972). To form a contract, the parties must objectively manifest their mutual assent. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Mutual assent is expressed

by an offer and acceptance of that offer. *FDIC v. Uribe, Inc.*, 171 Wn. App. 683, 689, 287 P.3d 694 (2012). "A contract requires an offer, acceptance, and consideration." *FDIC*, 171 Wn. App. at 688. The "terms assented to must be sufficiently definite" and "supported by consideration to be enforceable." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945 (2004).

We apply principles of contract interpretation to interpret provisions in CC&Rs and other governing documents relating to real estate developments. *See, e.g., Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 273-75, 279 P.3d 943 (2012). Contract interpretation is a question of law we review de novo. *Dave Johnson Ins. Inc. v. Wright*, 167 Wn. App. 758, 769, 275 P.3d 339 (2012). "The purpose of contract interpretation is to determine the parties' intent." *Roats*, 169 Wn. App. at 274. Contractual language generally must be given its ordinary, usual, and popular meaning. *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 105, 267 P.3d 435 (2011).

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Both parties agreed that the 1986 CC&Rs applied. The resolution of this cause of action rests entirely on a legal interpretation of paragraph 16.4 and whether it formed a contractual relationship between the parties. The CC&Rs were developed for the Spinnaker Ridge community long before either the Guests or the Langes purchased a home in the community. It is clear that the plain language of this paragraph is not a contract between the Langes and the Guests. Nothing in the CC&Rs gives one homeowner a contract cause of action against another homeowner. The elements of a contract are missing. The parties did not agree with each other. Because the CC&Rs do not grant any contract rights, the Guests would have no basis to sue the Langes for breach of the CC&Rs.

The Guests rely on *Piepkorn v. Adams*, 102 Wn. App. 673, 10 P.3d 428 (2000), as support for their argument that the CC&Rs provide for a cause of action in contract. This reliance is misplaced. In *Piepkorn*, the court held that an adjoining landowner could get injunctive relief but could not recover damages. 102 Wn. App. at 685-86.

The trial court did not err by dismissing this cause of action because there is no contract between the parties based on the CC&Rs.

C. TRIAL COURT'S DISMISSAL OF GUESTS' CLAIM OF BREACH OF INDEMNITY

The Guests argue that the trial court erred by dismissing their breach of indemnity claims because the trial court's ruling was contrary to the plain language of paragraph D of the Easement. We disagree.

1. Legal Principles

"Indemnity agreements are essentially agreements for contractual contribution, whereby one tortfeasor, against whom damages in favor of an injured party have been assessed, may look to another for reimbursement." *MacLean Townhomes, L.L.C. v. Am. 1st Roofing & Builders Inc.*,

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133 Wn. App. 828, 831, 138 P.3d 155 (2006) (quoting *Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 549, 716 P.2d 306 (1986)). "When interpreting an indemnity provision, we apply fundamental rules of contract construction." *Maclean Townhomes*, 133 Wn. App. at 831. The words used in a contract should be given their plain and ordinary meaning. *Maclean Townhomes*, 133 Wn. App. at 831. "Courts may not adopt a contract interpretation that renders a term absurd or meaningless." *Maclean Townhomes*, 133 Wn. App. at 831.

2. The Trial Court Properly Granted Summary Judgment on the Breach of Indemnity Claim

The indemnity provision on which the Guests rely is contained in paragraph D of the Easement. A plain reading of this language shows that it is to bind the indemnitor with respect to claims asserted against the indemnitee by third parties. This interpretation is in accord with *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012). In *City of Tacoma*, the court interpreted the broad language of an indemnity provision. 173 Wn.2d at 593. It held that while Tacoma agreed to indemnify and defend another city, the proposed "interpretation produces an absurd result . . . : Tacoma would be forced to bear all costs for litigation when any dispute over contractual performance between parties arises. That result simply cannot be obtained from reading the provision as it currently exists." *City of Tacoma*, 173 Wn.2d at 594.

The indemnity clause does not mean, as the Guests propose, that the Langes would be required to indemnify them for all claims related to the Easement in any way. The only reasonable interpretation of the clause is that it only applies to suits related to injury, or where a plaintiff might sue the Guests because of injury caused by or on the Langes' deck. It does not apply to the circumstances of this case.

The trial court did not err by granting the Langes' summary judgment motion on the Guests' claim of breach of indemnity.

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D. THE TRIAL COURT DID NOT ERR IN REFUSING TO CONSIDER NEW EVIDENCE OR MODIFY THE PARTIAL SUMMARY JUDGMENT ORDER

The Guests argue that the trial court erred by refusing to hear additional evidence

on the partial summary judgment motion or to continue the hearing.⁸ We disagree.

1. CR 56(f) Declarations

A trial court may accept affidavits at any time before issuing its final order on summary judgment. *Felsman v. Kessler*, 2 Wn. App. 493, 498, 468 P.2d 691 (1970); see *Jobe v. Weyerhaeuser Co.*, 37 Wn. App. 718, 727, 684 P.2d 719 (1984). Its decision on whether to accept or reject untimely filed affidavits lies within the trial court's discretion. *Felsman*, 2 Wn. App. at 498. A "trial court has discretion to reject an affidavit submitted after the motion has been heard." *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987). We review the trial court's decision for an abuse of discretion. *Brown*, 48 Wn. App. at 559.

CR 56(f) states:

Should it appear from the affidavits of a party opposing the motion that, for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The trial court did not abuse its discretion by declining to consider the declarations the Guests presented. At the presentation of the summary judgment order, the Langes told the trial court they did not receive the declarations until that morning. The trial court declined to consider the Guests' declarations because they were untimely and the Guests were attempting to potentially add other parties.

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Under CR 59(b), "[a] motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision." If the Guests wanted the trial court to reconsider its decision on the summary judgment motion because of newly discovered evidence the Guests could not have obtained previously with reasonable diligence, they should have filed a motion for reconsideration on that issue. CR 59(a)(4). They failed to do so. If a party fails to timely move for reconsideration, the party is "not entitled to relitigate the facts and issues decided on summary judgment." *Barrett v. Friese*, 119 Wn. App. 823, 851, 82 P.3d 1179 (2003).

In addition, RAP 9.12 provides that:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

We will not consider this issue further because the Guests did not submit their declarations to the trial court before it considered summary judgment arguments.

III. JURY INSTRUCTIONS

The Guests argue that the trial court erred in instructing the jury because it misstated the definition of consideration, it instructed the jury that the Easement created a valid easement, and it failed to provide an instruction defining the duty of good faith and fair dealing. We disagree.

A. Standard of Review

Generally, we review a trial court's decision on whether to give a jury instruction for an abuse of discretion. *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 131, 138 P.3d 1107 (2006). But where a trial court's decision to give an instruction is based on a ruling of law, we review the ruling

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de novo. *Tuttle*, 134 Wn. App. at 131. If an instruction contains an erroneous statement of the applicable law it is reversible error if it prejudices a party. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). Our Supreme Court summarized the standard of review in *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002): "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. Even if an instruction is misleading, it will not be reversed unless prejudice is shown. A clear misstatement of the law, however, is presumed to be prejudicial." Error is prejudicial if it affects or presumptively affects the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

B. Jury Instruction 9—Definition of Consideration

The Guests argue that the trial court erred by instructing the jury on the definition of consideration because it misstated the law. We disagree.

We review this definitional instruction de novo. *Tuttle*, 134 Wn. App. at 131. The trial court's instruction stated "If you find that plaintiffs justifiably relied on defendants' promise not to build a new deck in the area identified in the patio or deck easement, then there was consideration." CP at 4747. This instruction did not misstate the law.⁹ "Every contract must be supported by a consideration to be enforceable." *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). "Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange." *King*, 125 Wn.2d at 505. To constitute

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consideration, an act or promise "must be bargained for and given in exchange for the promise." *King*, 125 Wn.2d at 505.

The trial court's instruction accurately stated the law and allowed both parties to argue their theories of the case. In fact, during closing argument the Guests argued,

You have heard evidence that when [the Langes] wrote us by e-mail on March 12th, after we had reached this agreement, after they had made the promise, after we had this contract, that they wrote us and they asked us for permission to extend further . . . and would we allow them to go further forward, which is actually south, but further forward. That all on its own is an admission to you that, yes, we did have a contract. Yes, we did have an agreement, and that they recognized that what was required at that point was to ask our permission.

RP (July 15, 2014) at 139.

We conclude that the trial court did not err by instructing the jury on the definition of consideration because the instruction properly informed the jury of the applicable law.

C. Jury Instruction 17—Valid Easement

The Guests argue that the trial court erred in instructing the jury that there was a valid easement because they demonstrated at trial that the easement was invalid. We disagree.

Here, the trial court based its decision to give the jury instruction on its previous summary judgment ruling that the Easement created a valid easement. Such ruling has not been appealed. Therefore, we review this instruction de novo. *Tuttle*, 134 Wn. App. at 131.

An express conveyance of an easement by grant or reservation must be made by written deed, signed by the party bound by the deed, and the deed must be acknowledged. RCW 64.04.010; 64.04.020. Accordingly, a deed of easement is required to convey an easement that encumbrances a specific servient estate. *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). Similarly, a "deed of easement is not required to establish the actual location of an easement, but

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is required to convey an easement' which encumbrances a specific servient estate." *Berg*, 125 Wn.2d at 551 (quoting *Smith v. King*, 27 Wn. App. 869, 871, 602 P.2d 542 (1980)). The agreement to the easement by the owner of the servient estate is a vital element in the creation of an easement. *Beebe v. Swerda*, 58 Wn. App. 375, 382, 793 P.2d 442 (1990).

"No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an

easement, . . . are sufficient." *Beebe*, 58 Wn. App. at 379. "In general, deeds are construed to give effect to the intentions of the parties, and particular attention is given to the intent of the grantor when discerning the meaning of the entire document." *Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57 (2007).

Because the Guests have not appealed from the trial court's summary judgment order determining the validity of the easement, it is valid, and the trial court properly instructed the jury.

D. Jury Instruction on Good Faith and Fair Dealing

The Guests contend that the trial court erred by failing to instruct the jury on the duty of good faith and fair dealing, despite agreeing to provide the instruction. They argue that the failure to instruct the jury on this issue prejudiced them. We do not consider the issue because the Guests' waived their right to appeal the issue when they failed to object to the missing instruction.

It is well settled that an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). The Guests did not object to the trial court's failure to give the instruction. The trial court asked the parties to check the jury instruction packet and "agree with [the court] that it encompasses the Court's ruling on the instructions." RP (July 15, 2014) at

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121. Both parties agreed the packet included the instructions. The trial court read the packet aloud to instruct the jury, and still, the Guests did not object. Finally, when the jury posed a question about the duty of good faith and fair dealing, the Guests still did not realize the mistake or object to the trial court's answer to the question.

Therefore, we do not consider the issue because the Guests failed to preserve this issue on appeal.

IV. CUMULATIVE ERROR—(JUDGMENT AND QUIETING TITLE)

The Guests argue that the cumulative errors in this case denied them a fair trial. We determined that the trial court did not commit any errors below, thus, the Guests' arguments regarding cumulative error are without merit, and we need not consider the issue further.

V. ATTORNEY FEES

The Guests argue that we should award them attorney fees as the prevailing party under RAP 18.1 and paragraph D of the Easement.¹⁰ The Langes argue that the Guests are not entitled to attorney fees because Washington courts follow the American rule, and the Guests failed to cite to any legal authority in their argument for attorney fees. Br. of Resp't at 48.

The Guests did not adequately address the issue of attorney fees in their opening brief because they failed to cite to any legal authority in support of their argument. RAP 18.1(b). Nonetheless, the Guests are not the substantially prevailing party on appeal, and they are not entitled to attorney fees. RAP 14.2; 18.1.

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We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

/s/ _____
Melnick, J.



We concur:

/s/
Johanson, P.J.

/s/
Sutton, J.

Footnotes:

1. The Guests raised many issues in their reply brief for the first time that were not raised in their opening brief. The Guests further raised issues related to the Coe Family Trust, intervenors in the original action, in their reply brief for the first time. Pursuant to RAP 10.3(c), we will not consider them.

2. The Easement was recorded under Pierce County Auditor Document No. 8704290509 and the CC&Rs were recorded under Pierce County Auditor Document No. 8608080472.

3. The facts previously outlined above are those the trial court relied on when deciding the motions for summary judgment.

4. The court orally ruled that the Langes had the right to rebuild the deck in the easement area.

5. The Guests requested the continuance to potentially add the prior owners of Lot 5 as a party to the action.

6. The Guests do not argue that the trial court improperly granted summary judgment based on the information it had at the time. Rather, they argue that with the new information contained in the declarations, summary judgment should not have been granted.

7. Because we conclude that the CC&R's did not form a contractual relationship between the parties, we do not decide whether a genuine issue of material fact existed.

8. The Guests also assign error to the trial court's denial of their motion in limine as to the invalidity of the Easement. Their brief does not argue this point or cite to authority or to the record. We do not review it. RAP 10.3(b).

9. It was based on a patterned instruction. 6A WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 301.04, at 178-79 (6th ed. 2009).

10. The trial court determined on summary judgment that the Easement did not provide for indemnification in this case, and therefore, this argument has no basis.



APPENDIX K

**195 Wash.App. 330
381 P.3d 130**

**Christopher Guest and Suzanne Guest,
husband and wife, Appellants,**

v.

**David Lange and Karen Lange,
husband and wife, and the marital
community comprised thereof,
Respondents,**

**Michael Coe and Carol Coe,
individually and as husband and wife,
and the marital community thereof;
and Carol Ann White and John L.
White, individually and as husband
and wife, and the marital community
thereof, Third Party Defendants.**

No. 47482-4-II

**Court of Appeals of Washington,
Division 2.**

August 2, 2016

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Worswick, J.

[381 P.3d 132]

[195 Wash.App. 331]

¶ 1 This case asks us to determine whether
filing a supersedeas bond prevents the
cancellation

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of a notice of lis pendens after final judgment
in the trial court. The trial court entered
judgment against Christopher and Suzanne
Guest in a property dispute and accepted the
Guests' supersedeas bond to stay enforcement
of the judgment pending appeal. The trial
court then canceled a notice of lis pendens
that the Guests had filed on David and Karen
Lange's property. The Guests argue that the
trial court lacked the authority to cancel the
lis pendens because they had filed a
supersedeas bond. The Guests further argue
that the trial court abused its discretion by
failing to rule on certain supersedeas bond-
related evidentiary issues.

¶ 2 We agree with the Guests that the trial
court lacked authority to cancel the lis
pendens. Therefore, we reverse the
cancellation of the lis pendens and remand
for additional proceedings consistent with
this opinion.

FACTS

¶ 3 The Guests and the Langes are neighbors
in a development.¹ The original developer
recorded a declaration of covenants,
conditions, restrictions, and reservations
(CC&Rs), and a document titled "Patio or
Deck Easement" (Easement), both of which
documents granted easements for decks. The
easement over the Guests' property covered
an area of 5 feet by 21 feet for the Langes'
deck.

¶ 4 By 2011, the Langes were concerned about
the structural integrity of their deck and
wanted to rebuild it. They asked the Guests
for permission to rebuild the deck in its
original footprint, and the Guests refused.
Nevertheless, the Langes rebuilt the deck in
the same footprint as the original deck.

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¶ 5 The Guests filed a complaint alleging various claims, including trespass, and that the Langes had a duty under the CC&Rs to indemnify the Guests for all claims arising from the deck easement.² The Langes counterclaimed to quiet title and answered that the CC&Rs expressly granted each lot an easement to accommodate any encroachment due to, among other things, decks and patios.

¶ 6 Meanwhile, the Guests filed a notice of lis pendens against the Langes' property. The lis pendens provided notice to third parties that the Guests had sued the Langes to quiet title and to enforce the Langes' obligations under the CC&Rs and Easement.

¶ 7 The trial court dismissed several claims on summary judgment, and the case proceeded to a jury trial on the Guests' claims for trespass and breach of contract and on the Langes' claim to quiet title. The jury returned a special verdict in favor of the Langes on each claim. On September 19, 2014, the trial court dismissed all of the Guests' claims with prejudice, awarded judgment to the Langes on their claim to quiet title to the deck, and awarded the Langes attorney fees of \$565. The Guests filed a Notice of Appeal on October 20.

¶ 8 On February 26, 2015, the Langes filed a motion to cancel the lis pendens. They argued that under RCW 4.28.320, the trial court had discretion to cancel the lis pendens because the action had been "settled, discontinued, or abated," and that all of the Guests' claims had been dismissed with prejudice.

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Clerk's Papers (CP) at 2. The Guests opposed this motion, arguing that the action had not been "settled, discontinued or abated" because the Guests

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intended to file a supersedeas bond under RAP 8.1(b) with the trial court, which bond would stay enforcement of the Langes' judgment. RCW 4.28.320. Indeed, on March 5, the Guests submitted cashier's checks for \$4,000 as supersedeas bonds to stay two orders: the judgment and an order dismissing another party to the case below. It appears that only \$1,000 of this total amount was intended to stay the Langes' judgment.

¶ 9 The Langes objected to the amount of the \$1,000 supersedeas bond to stay their judgment. They argued that their true damages from a stay of enforcement of their judgment would be at least \$215,000. In support of this amount, David Lange declared that the Langes had applied to refinance their home and had applied for a home equity loan after the final judgment in the case and that the bank refused to approve the refinancing or the loan due to the lis pendens. David Lange claimed that refinancing would save the Langes over \$134,000 over the life of their loan, that some of the home equity loan would be used to pay off higher interest debt, and that they would incur about \$50,000 of attorney costs and fees on appeal. Thus, the Langes argued, the supersedeas bond should be set at \$215,000 to properly secure against their losses from a stay of enforcement of the judgment.

¶ 10 The Guests moved for leave to conduct discovery to test the accuracy of David Lange's statements in his declaration supporting the amount of damages from the supersedeas bond. The Guests also moved the trial court to strike hearsay portions of David Lange's declaration regarding statements from the bank.

¶ 11 On March 27, the trial court canceled the notice of lis pendens, finding that the cash supersedeas bonds on file in the amount of \$4,000 were adequate to cover the Langes' damages from the judgment being stayed in the absence of

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the lis pendens.³ The trial court did not rule on the Guests' motion to conduct discovery or to strike portions of David Lange's declaration. The Guests appeal.

ANALYSIS

¶ 12 The Guests argue that the trial court erred by canceling the lis pendens because after they appealed, filed their supersedeas bond, and stayed enforcement of the judgment, the underlying action was not settled, discontinued, or abated as required for the cancellation of a lis pendens. We agree.

I. STANDARD OF REVIEW AND STATUTORY INTERPRETATION RULES

¶ 13 We review the decision to cancel a lis pendens for an abuse of discretion. *See Beers v. Ross*, 137 Wash.App. 566, 575, 154 P.3d 277 (2007). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Teter v. Deck*, 174 Wash.2d 207, 215, 274 P.3d 336 (2012). Untenable reasons include errors of law. *Cook v. Tarbert Logging, Inc.*, 190 Wash.App. 448, 461, 360 P.3d 855 (2015), *review denied*, 185 Wash.2d 1014, 367 P.3d 1083 (2016).

¶ 14 We review questions of statutory interpretation de novo. *Flight Options, LLC v. Dep't. of Revenue*, 172 Wash.2d 487, 495, 259 P.3d 234 (2011). We endeavor to give effect to a statute's plain meaning as the expression of legislative intent. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wash.2d 516, 526, 243 P.3d 1283 (2010). We derive that plain meaning from the ordinary meaning of the language at issue, the statute's context, related provisions, and the statutory scheme as a whole. *Lake*, 169 Wash.2d at 526, 243 P.3d 1283. We may use an ordinary dictionary to discern the meaning of a

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nontechnical term. *Thurston County v. Cooper Point Ass'n*, 148 Wash.2d 1, 12, 57 P.3d 1156 (2002).

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II. LIS PENDENS STATUTE

¶ 15 A "lis pendens" is an "instrument having the effect of clouding the title to real property." RCW 4.28.328(1)(a). Either party to an action affecting title to real property, or a receiver of the real property, may file a notice of lis pendens with the county auditor. RCW 4.28.320. This filing is constructive notice to third parties that the title may be clouded. RCW 4.28.320. "In Washington, lis pendens is 'procedural only; it does not create substantive rights in the person recording the notice.'" *Beers*, 137 Wash.App. at 575, 154 P.3d 277 (quoting *Dunham v. Tabb*, 27 Wash.App. 862, 866, 621 P.2d 179 (1980)).

¶ 16 RCW 4.28.320 governs when a court may cancel a notice of lis pendens. It provides that

the court in which the said action was commenced may, at its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled.

Thus, the statute sets forth three conditions that must be met for the court to cancel a lis pendens: (1) the action must be settled, discontinued, or abated; (2) an aggrieved person must move to cancel the lis pendens, and (3) the aggrieved person must show good cause and provide proper notice. RCW 4.28.320. If those conditions are met, the

statute provides the court discretion to cancel the lis pendens.

III. ACTION WAS NOT SETTLED, DISCONTINUED, OR ABATED

¶ 17 Whether the filing of a supersedeas bond deprives the trial court of authority to cancel a lis pendens under RCW 4.28.320 because the action is not settled,

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discontinued, or abated is an issue of first impression in Washington. We hold that under RCW 4.28.320, an action is not settled, discontinued, or abated when a supersedeas bond has been properly filed.

¶ 18 RCW 4.28.320 does not define the terms “settled,” “discontinued,” or “abated.” Thus, we first turn to ordinary dictionaries to elucidate the meanings of these words. *Cooper Point Ass’n*, 148 Wash.2d at 12, 57 P.3d 1156. *Webster’s Dictionary* defines “settled” in relevant part as “unlikely to change or be changed” and “established or decided beyond dispute or doubt.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2079 (2002). It defines “discontinue” in relevant part as to “give up,” to “end the operations or existence of,” and “to abandon or terminate by a discontinuance or by other legal action.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 646 (2002). And it defines “abate” in relevant part as “to bring entirely down,” to “put an end to,” to “do away with,” “to reduce or lessen in degree or intensity”, and “to become defeated or become or void (as of a writ or appeal).” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2 (2002). Thus, in an ordinary dictionary, these three terms convey finality. They suggest that the action must be completely over before a lis pendens may be canceled.

¶ 19 Further, *Black’s Law Dictionary* defines “settle” in relevant part as to “end or resolve,”

“to bring to a conclusion.” BLACK’S LAW DICTIONARY 1581 (10th ed. 2014). It defines “discontinuance” in relevant part as the “termination of a lawsuit by the plaintiff; a voluntary dismissal or nonsuit.” BLACK’S LAW DICTIONARY 563 (10th ed. 2014). And it defines “abatement” in relevant part as the “suspension or defeat of a pending action for a reason unrelated to the merits of the claim,” such as where a criminal action is ended due to the death of the defendant. BLACK’S LAW DICTIONARY 3 (10th ed. 2014). The legal definitions of these terms, therefore, also convey a sense of complete finality or voluntary dismissal.

¶ 20 As shown by these dictionary definitions, each of the three terms in RCW 4.28.320 requires finality. They contemplate either the abandonment of a case by the parties or

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the complete and final resolution of the action. We now turn to considering whether the filing of a supersedeas bond prevents an action from being sufficiently final to cancel a lis pendens.

¶ 21 A supersedeas bond is a means of staying enforcement of a trial court judgment while on appeal. RAP 8.1. “A trial court

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decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule. Any party to a review proceeding has the right to stay enforcement of a money judgment, or a decision affecting real, personal or intellectual property, pending review.” RAP 8.1(b). Thus, when a supersedeas bond is filed, the judgment cannot be enforced. The supersedeas bond is intended to preserve the “status quo between the parties.” *Murphree v. Rawlings*, 3 Wash.App. 880, 882, 479 P.2d 139 (1970). The supersedeas bond amount should be enough to secure any money judgment plus

the amount of loss which a party may be entitled to recover as a result of the inability of the party to enforce the judgment during review. RAP 8.1(c).

¶ 22 We hold that the Guests' supersedeas bond⁴ rendered the action not "settled, discontinued, or abated." After a party timely appeals and files a supersedeas bond, the judgment is stayed and cannot be enforced until the appeal is resolved. The bond is intended to preserve the status quo—here, the status quo included the lis pendens. *Murphree*, 3 Wash.App. at 882, 479 P.2d 139. Because the action was not settled, discontinued or abated, the trial court erred by cancelling the lis pendens.

¶ 23 The Langes argue that the trial court properly cancelled the lis pendens because the trial court's judgment settled, discontinued, or abated the Guests' action. In support of this argument, they cite cases that address the finality of a judgment for res judicata and other purposes. They also cite *State ex. rel. Gibson v. Superior Court of Pierce County*, 39 Wash. 115, 117, 80 P. 1108 (1905),

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which states: "[A]n appeal and supersedeas does not destroy the intrinsic effect of a judgment; ... notwithstanding the appeal, the judgment is still the measure of such of the rights of the parties as it adjudicates; and until reversed it operates as ... *res judicata*, as effectively as it would had no appeal been taken, and no supersedeas bond given." But the issue before us is not whether the trial court's judgment was final; it is whether the action between the parties was settled, discontinued, or abated when the Guests filed a supersedeas bond. Notwithstanding the validity and res judicata effect of the trial court's judgment pending appeal, the action was not settled, discontinued, or abated by the issuance of the judgment alone where the trial court issued a supersedeas bond.

¶ 24 Indeed, the weight of authority from other jurisdictions suggests that an appeal preserves the lis pendens. At common law, a notice of lis pendens carried through an appeal. See *Bollong v. Corman*, 125 Wash. 441, 444-45, 217 P. 27 (1923); *Motion v. Le Blank*, 125 Wash. 191, 194-95, 215 P. 528 (1923). And in the vast majority of states with comparable lis pendens statutes, a lis pendens endures through an appeal.⁵ However,

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we have previously held that

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the mere filing of a notice of appeal does not prevent the cancellation of a lis pendens. See *Beers*, 137 Wash.App. at 575, 154 P.3d 277. In *Beers*, we held that the trial court did not abuse its discretion in canceling the lis pendens after a notice of appeal "because the Beerses did not request a stay." 137 Wash.App. at 575, 154 P.3d 277. But *Beers* does not analyze the language of RCW 4.28.320, and its holding appears contrary to the statute's plain language. It appears to us that a notice of appeal, by transporting a case from a trial court to a court of appeals, renders the action in that case not "settled, discontinued, or abated." RCW 4.28.320. *Beers*, therefore, appears to conflate the two concepts of when a judgment is final and when an action is final.

¶ 25 Nevertheless, even following *Beers*, we find its facts easily distinguished. In *Beers*, the appellant took no action apart from appealing. 137 Wash.App. at 575, 154 P.3d 277. But here, the Guests did all they could to preserve the lis pendens. They filed a notice of appeal, filed a supersedeas bond, and stayed enforcement of the judgment. Even if a notice of appeal alone does not prevent the canceling of a lis pendens, we hold that the filing of a supersedeas bond does.⁶

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¶ 26 The Langes also characterize their judgment as “self-executing” and argue that a supersedeas bond has no effect on a self-executing judgment. Br. of Resp’t at 24. On that basis, they argue that *Beers* cannot be distinguished. We disagree, because the question of whether a judgment is self-executing does not bear on the finality of the underlying action. It is the action, not the judgment, which must be “settled, discontinued, or abated” for the trial court to have the authority to cancel a notice of lis pendens. RCW 4.28.320.

¶ 27 Our holding advances the policy concerns of the lis pendens statute. The purpose of lis pendens is to put potential purchasers on notice of ongoing litigation so that they are aware that title may be clouded. RCW 4.28.320. When a party appeals a judgment in a real property case, litigation concerning the property is ongoing. Title to the property at issue may be clouded pending the outcome of the appeal. For a notice of lis pendens to protect the public as intended, it should remain in effect until the litigation is ended. And property owners are amply protected by the trial court setting a supersedeas bond in the proper amount, which should be sufficient to compensate them for any damages they would incur during appeal with the notice of lis pendens in place.

¶ 28 Thus, we hold that the trial court erred by cancelling the lis pendens because the Guests’ appeal and supersedeas bond meant the action was not settled, discontinued, or abated. RCW 4.28.320. Because the trial court lacked the legal authority to cancel

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the lis pendens, it abused its

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discretion in doing so.⁷ *Cook*, 190 Wash.App. at 461, 360 P.3d 855. We reverse the cancellation and remand for proceedings consistent with this opinion.⁸ On remand, the trial court should ensure that the amount of any supersedeas bond is sufficient to compensate the Langes for any damages they incur due to the appeal and lis pendens.

ATTORNEY FEES

¶ 29 The Guests request attorney fees pursuant to RAP 18.1 and under Section D of the Easement. The Guests argue that Section D, which indemnifies the Guests in the event of a lawsuit arising from the use of the deck, permits them to collect attorney fees from the Langes. We review indemnity agreements under the fundamental rules of contract construction, giving effect to the parties’ intent as expressed through the plain language. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash.2d 165, 171, 110 P.3d 733 (2005); *Knipschild v. C-J Recreation, Inc.*, 74 Wash.App. 212, 215, 872 P.2d 1102 (1994).

¶ 30 Section D is not a basis for attorney fees in this action. Instead, its plain language reveals that it is an indemnity provision intended to protect the Guests from liability for injuries sustained on the easement portion of the Langes’ deck. Its plain language applies to injuries arising from the “utilization of said easement.” Suppl. CP at

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461. See *City of Tacoma v. City of Bonney Lake*, 173 Wash.2d 584, 594, 269 P.3d 1017 (2012) (rejecting a similar argument). Therefore, we deny the Guests’ request for attorney fees.

We concur:

Bjorgen, C.J.

Lee J.

Notes:

¹ Under a separate cause number, the Guests and Langes appealed substantive issues from their property dispute. We recently affirmed. The Langes argue that the issues in this appeal are therefore moot. But because the time has not yet expired for the Guests to petition for review of that case, we hold that the issues in this appeal are not moot.

² Paragraph D of the Easement stated in relevant part that the grantor of the easement “shall not be liable for any injuries incurred by the Grantee, the Grantee’s guests and/or third parties arising from the utilization of said easement and further Grantee agrees to hold Grantor harmless and defend and fully indemnify Grantor against any and all claims, actions, and suits arising from the utilization of said easement and to satisfy [any] and all judgments that may result from said claims, actions, and/or suits.” *Guest v. Lange*, No. 46802–6–II, 2016 WL 3264419, at *1 (Wash. Ct. App. June 14, 2016).

³ The court said the “cash supersedeas bonds on file in the total amount of \$4,000.00” were sufficient. CP at 223. This appears to refer to the combination of the two bonds the Guests filed: \$1,000 to stay the Langes’ judgment and \$3,000 to stay the order dismissing another party.

⁴ We refer here to the successful filing of such a bond. We do not suggest that the mere deposit of a cashier’s check would be sufficient; instead, the trial court must accept the payment and file the bond, staying the judgment.

⁵ See D.C. Code§ 42–1207(d)(1) (2010); Haw. Rev. Stat. § 501–151 (2012); Va. Code Ann. § 8.01–269 (West 2014); *Ashworth v. Hankins*, 241 Ark. 629, 408 S.W.2d 871, 873 (1966); *Top Rail Ranch Estates, LLC v. Walker*, 327 P.3d 321, 334–35 (Colo. App. 2014);

Vonmitschke–Collande v. Kramer, 841 So.2d 481, 482 (Fla. Dist. Ct. App. 2002); *Vance v. Lomas Mortgage USA, Inc.*, 263 Ga. 33, 426 S.E.2d 873, 875 (1993); *McClung v. Hohl*, 10 Kan.App. 93, 61 P. 507, 508 (1900); *Weston Builders & Developers, Inc. v. Mcberry, LLC*, 167 Md.App. 24, 891 A.2d 430, 439–41 (Md. Ct. Spec. App. 2006); *Oldewurtel v. Redding*, 421 N.W.2d 722, 728 (Minn. 1988); *Slattery v. P.L. RenouDET Lumber Co.*, 120 Miss. 621, 82 So. 332, 333 (1919); *State ex rel. Lemley v. Reno*, 436 S.W.3d 232, 235 (Mo. Ct. App. 2013); *Kelliher v. Soundy*, 288 Neb. 898, 852 N.W.2d 718, 726 (2014) (suggesting that before the Nebraska legislature removed the phrase “settled, discontinued, or abated,” a trial court never had authority to cancel a lis pendens until the time to appeal had expired, and noting that the “right to appeal usually extends the time for which property is subject to the lis pendens doctrine”); *Salas v. Bolagh*, 106 N.M. 613, 747 P.2d 259, 261 (N.M. Ct. App. 1987); *Lazoff v. Goodman*, 138 N.Y.S.2d 684, 685 (N.Y. App. Div. 1955); *It’s Prime Only, Inc. v. Darden*, 152 N.C.App. 477, 2002 WL 1914015, at *7 (N.C. Ct. App. 2002); *Hart v. Pharaoh*, 1961 OK 45, 359 P.2d 1074, 1079 (Okla. 1961); *Berg v. Wilson*, 353 S.W.3d 166, 180 (Tex. App. 2011); *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244, 1248 (Utah 1979); *Zweber v. Melar Ltd., Inc.*, 2004 WI App 185, ¶ 10, 276 Wis.2d 156, 687 N.W.2d 818; but see Cal. Civ. Proc. Code§ 405.32 (West 1992) (requiring cancellation of lis pendens notice if the filer failed to prove his claim at trial); Del. Code Ann.tit. 25, § 1608 (West 1999) (granting discretion to cancel lis pendens if the filer is not likely to prevail); Mich. Comp. Laws§ 600.2731 (1970) (permitting courts to cancel lis pendens in certain circumstances during litigation); *Sloane v. Davis*, 433 So.2d 374, 375 (La. Ct. App. 1983) (quoting La. Code Civ. Proc. Ann.art. 3753 (1960)) (holding that appeal did not prevent cancellation of lis pendens under statute reading in part that lis pendens shall be canceled “[w]hen judgment is rendered in the action or proceeding against the party who filed the notice of the

pendency thereof...”); *Inv'rs Title Ins. Co. v. Herzig*, 2010 ND 169, ¶ 33, 788 N.W.2d 312, 324 (quoting N.D. Cent. Code§ 28–05–08 (2001)) (holding that statute permitting cancellation of lis pendens “at any time” allowed cancellation during pendency of appeal); *Carolina Park Associates, LLC v. Marino*, 400 S.C. 1, 732 S.E.2d 876, 880 (2012) (holding that appellants failed to state a claim regarding real property, therefore the lis pendens was improperly granted and could be canceled notwithstanding appeal).

portions of a declaration. It appears to us that the trial court did not rule on these motions because it cancelled the lis pendens. Because the trial court made no ruling for us to correct, and in light of our holding that the trial court lacked the authority to cancel the lis pendens, we do not reach this claim of error.

⁶ The Langes argue that under *Cashmere State Bank v. Richardson*, 105 Wash. 105, 109, 177 P. 727 (1919), a trial court may cancel a lis pendens even if the appellant has superseded the judgment. In 1919, our Supreme Court held that a trial court did not err by canceling a lis pendens after dismissing an action on its merits because the “appellant was amply protected by its superseding the judgment.” *Cashmere*, 105 Wash. at 109, 177 P. 727. *Cashmere* is a case about allegedly fraudulent mortgages and deeds, and the court’s discussion focused on whether the plaintiff had failed to prove fraud. 105 Wash. at 106–09, 177 P. 727. The case does not discuss the issue before us: whether a supersedeas bond deprived the trial court of the authority to cancel a lis pendens. It does not discuss the requirements of RCW 4.28.320, although the statute’s predecessor had been in effect since 1893. *See* Rem. Rev. Stat. § 243 (1893). In short, the single sentence in *Cashmere* that the Langes cite does not defeat the statutory language at issue in this appeal.

⁷ Because we hold that the trial court lacked the authority to cancel the lis pendens, we do not consider whether the trial court abused its discretion in canceling the lis pendens for other reasons.

⁸ The Guests also argue that the trial court abused its discretion by failing to rule on their motions to conduct discovery related to the supersedeas bond amount and to strike

APPENDIX L

SPINNAKER RIDGE A PLANNED UNIT DEVELOPMENT

A PORTION OF THE SOUTHWEST 1/4 OF SECTION 8, TOWNSHIP 21 N, RANGE 2 E, W.M.
CITY OF GIG HARBOR, PIERCE COUNTY, WASHINGTON

LEGAL DESCRIPTION

The South half of the Northeast Quarter of the Southwest Quarter of Section 8, Township 21 North, Range 2 East of the Willamette Meridian, in Gig Harbor, Pierce County, Washington.

EXCEPT the North Half of the Southwest Quarter of the Northeast Quarter of the Southwest Quarter of said Section 8.

ALSO EXCEPT the following described property:

BEGINNING at the Northeast corner of the South Half of the Northeast Quarter of the Southwest Quarter of said Section 8;

THENCE along the North line of of said subdivision S 89°56'05" W, 343 feet;

THENCE S 01°00'51" W, parallel with the East line of said subdivision, 484 feet;

THENCE N 89°56'05" E, 343 feet to the East line of said subdivision;

THENCE along said East line N 01°00'51" E, 484 feet to the TRUE POINT OF BEGINNING.

ALSO EXCEPT the East 30 feet for Wickersham County Road.

ALSO EXCEPT the following described property:

COMMENCING at the Northeast corner of said South Half of the Northeast Quarter of the Southwest Quarter of Section 8;

THENCE along the North line of said subdivision S 89°56'05" W, 30 feet to the West line of (Wickersham County Road) Soundview Drive NW;

THENCE continuing S 89°56'05" W, along said North line, 313.00 feet;

THENCE S 01°00'51" W, parallel with the East line of said subdivision, 95.00 feet to the TRUE POINT OF BEGINNING;

THENCE N 23°56'57" W, 71.07 feet;

THENCE N 89°56'05" E, 30.00 feet to a point that bears N 01°00'51" E from the TRUE POINT OF BEGINNING;

THENCE S 01°00'51" W, 64.99 feet to the TRUE POINT OF BEGINNING.

TOGETHER WITH the North Half of the Southwest Quarter of the Northeast Quarter of the Southwest Quarter of said Section 8, in Gig Harbor, Pierce County, Washington.

SUBJECT TO AND TOGETHER WITH all easements of record.

SURVEYOR'S CERTIFICATE

I hereby certify that this Planned Unit Development of SPINNAKER RIDGE is based upon an actual survey and subdivision of Section 8, Township 21 North, Range 2 East, W.M., that the distances, courses and angles are correctly shown thereon, and the monuments have been (or will be) set, and the lot and block corners will be staked correctly in the ground thereof, and that I have fully complied with the provisions of the statutes of the State of Washington under the regulations of the Town of Gig Harbor governing platting.



ROBERT D. SCHOLLES
L.S. 10618

DECLARATION OF RESTRICTIVE COVENANTS
FOR PLAT OF SPINNAKER RIDGE
AF # 8601310432 Vol. 308 pgs. 2101-2121
DATED JAN. 21, 1986

Decl. Rest. Cov. AF # 8608080473
Vol. 349 Pg. 60-115

DEDICATION

Know all men by these presents that we, the undersigned owners in fee simple of the land hereby platted, declare this plat and dedicate to the use of the public forever, all streets, avenues and easements shown hereon and the use thereof for any and all public purposes not inconsistent with the use thereof for public highway purposes, together with the right to make all necessary slopes for cuts or fills upon lots and blocks shown thereon in the reasonable grading of the streets or avenues shown thereon.

In witness whereof we have hereto set our hands and seals this 14 day of December, 1985.

[Signature] 12/24/85
NU-DAWN HOMES LTD. PARTNERSHIP

[Signature] 12/24/85
SEAFIRST MORTGAGE CORPORATION

ACKNOWLEDGEMENTS

STATE OF WASHINGTON)
COUNTY OF KING) SS

ON THE 24th DAY OF December 1985 BEFORE ME, THE UNDERSIGNED NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, PERSONALLY APPEARED [Signature] TO ME KNOWN TO BE assistant, plus one, and RESPECTFULLY OF THE CORPORATION THAT EXECUTED THE FOREGOING INSTRUMENT, AND ACKNOWLEDGED SAID INSTRUMENT TO BE THE FREE AND VOLUNTARY ACT AND DEED OF SAID CORPORATION FOR THE USES AND PURPOSES THEREIN MENTIONED AND ON OATH STATED THAT THEY WERE AUTHORIZED TO EXECUTE SAID INSTRUMENT.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED MY OFFICIAL SEAL THE DAY AND YEAR FIRST ABOVE WRITTEN.

[Signature]
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RESIDING AT Seattle

STATE OF WASHINGTON)
COUNTY OF KING) SS

ON THE 24th DAY OF December 1985 BEFORE ME, THE UNDERSIGNED NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, PERSONALLY APPEARED [Signature] TO ME KNOWN TO BE THE INDIVIDUAL DESCRIBED IN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AS GENERAL PARTNER OF THE Nu-Dawn Homes Ltd. Partnership, A LIMITED PARTNERSHIP, AND ACKNOWLEDGED TO ME THAT he SIGNED AND SEALED THIS INSTRUMENT AS his FREE AND VOLUNTARY ACT AND DEED FOR THE USES AND PURPOSES THEREIN MENTIONED AND ON OATH STATED THAT he WAS AUTHORIZED TO EXECUTE SAID INSTRUMENT.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED MY OFFICIAL SEAL THE DAY AND YEAR FIRST ABOVE WRITTEN.

[Signature]
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RESIDING AT Seattle

8601310476

451 S.W. 10th Suite 106
RENTON, WASHINGTON 98055
Phone: (206) 228-5928

Job No. 195-02-843	Date: Sept. 1985
Drawn By: SSB	Sht 1 of 5

SPINNAKER RIDGE A PLANNED UNIT DEVELOPMENT

A PORTION OF THE SOUTHWEST 1/4 OF SECTION 8, TOWNSHIP 21 N, RANGE 2 E, W.M.
CITY OF GIG HARBOR, PIERCE COUNTY, WASHINGTON

TREASURER'S CERTIFICATE

I hereby certify that there are no delinquent special assessments and all special assessments on any of the property herein contained dedicated as streets, alleys or for other public use are paid in full, this 30th day of January, 1986.



Mrs. R. Wilson
Treasurer, Town of Gig Harbor

RECORDING CERTIFICATE

Filed for record at the request of the Town of Gig Harbor this 31 day of Jan, 1986, at 10 minutes past 10 A.M., and recorded in Volume 54 of Plats, records of Pierce County, Washington.



\$ 54.00 8601310176

R.A. Shero
County Auditor
By J. Koche

TREASURER'S CERTIFICATE

I hereby certify that all property taxes are paid, there are no delinquent special assessments and all special assessments on any of the property herein contained dedicated as streets, alleys or for other public use are paid in full, this 31st day of January, 1986.



Sheldon K. Cook
County Treasurer - assessor
N. Greenburg

By _____
Deputy County Treasurer

APPROVALS

Examined and approved this 30th day of JANUARY, 1986



Thomas J. Henrich
Engineer, Town of Gig Harbor

I hereby certify that this Planned Unit Development of Spinnaker Ridge is duly approved by the Town of Gig Harbor Planning Commission this 7th day of January, 1986, by Resolution No. _____



Chairman
Donald K. Orr
Secretary

Attest Mrs. R. Wilson
Clerk, Town of Gig Harbor

451 S.W. 10th Suite 106
RENTON, WASHINGTON 98085
Phone: (206) 228-5628

Job No. 195-02-843	Date: Sept. 1985
Drawn By SSB	SHI 2 of 8

SPINNAKER RIDGE A PLANNED UNIT DEVELOPMENT

A PORTION OF THE SOUTHWEST 1/4 OF SECTION 8, TOWNSHIP 21 N, RANGE 2 E, W.M.
CITY OF BIG HARBOR, PIERCE COUNTY, WASHINGTON

STANICH
AVE.

LOT 2
SCENIC

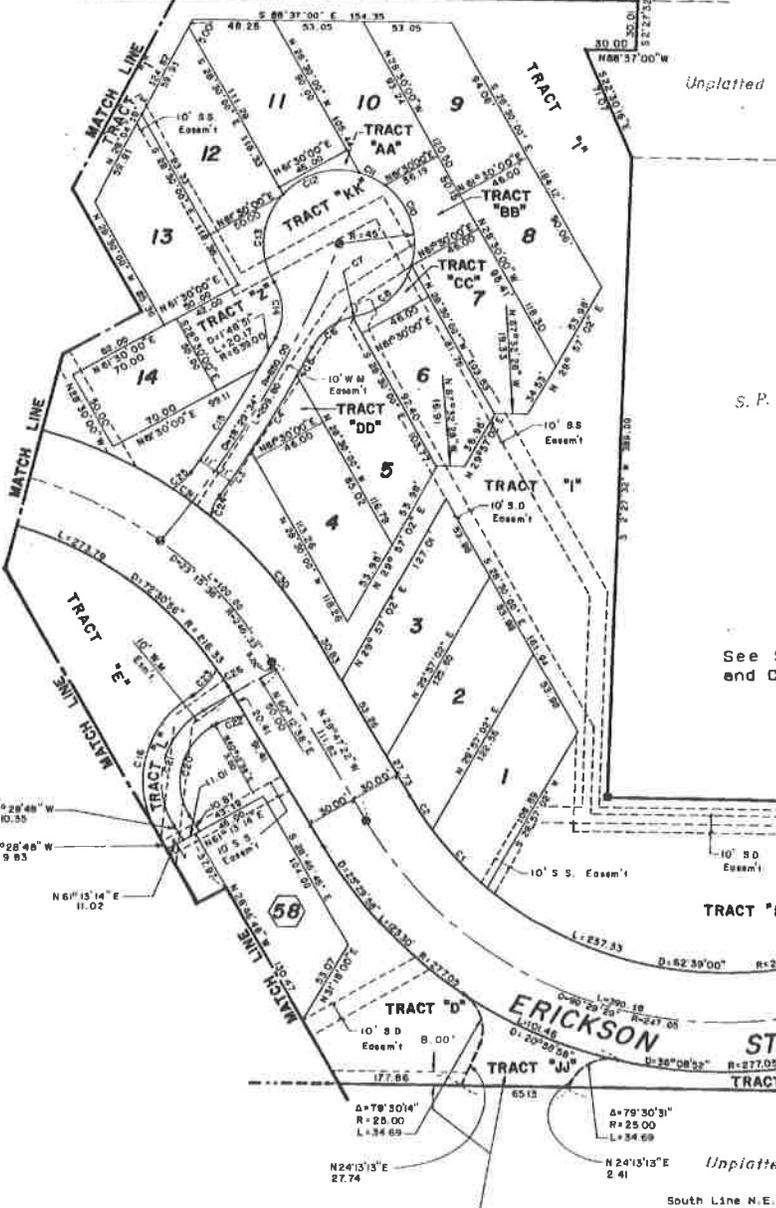
LOT 3
VIEW

LOT 6
ADDITION

N 86° 37' 00" W 986.96
North Line S. 1/2, N.E. 1/4, S.W. 1/4

LAND USE LEGEND

- "A" - "C" Detention Ponds
- "D" - "J" Common Open Space/Recreational Use & Utilities
- "L" - "Z" & "AA"-FF" Ingress - Egress, Utilities & Parking
- "G" - "LL" Ingress - Egress & Utilities (Private Drives)



S. P. # 83-01-26-02 15

SCALE: 1" = 50'

- LEGEND:**
- Found Conc. Mon. w/Bross Disc.
 - D = Curve Delta
 - Set Conc. Mon. in Case
 - W.M. = Water Main
 - S.S. = Sanitary Sewer
 - S.D. = Storm Drainage

See Sheet 5 of 5 for Notes and Curve Data Information.

Find Railroad Spikes w/Punch at Center Section 8

SOUNDVIEW DR.

Find 3 3/4" Brass Disc w/Punch at 1/15 Cor.
Find 2" Brass Disc w/"K" N 2° 72' 8" E OOI of 1/16 Cor.
N 2° 28' 28" E 1519.11

8601310176

451 S.W. 10th Suite 106
RENTON, WASHINGTON 98058
Phone: (206) 228-5628

Job No. 195-02-843	Date: Sept. 1985
Drawn By: SSB	Sh: 3 of 8

Easement for Ingress, Egress, and Utilities A.F. no. 860725015

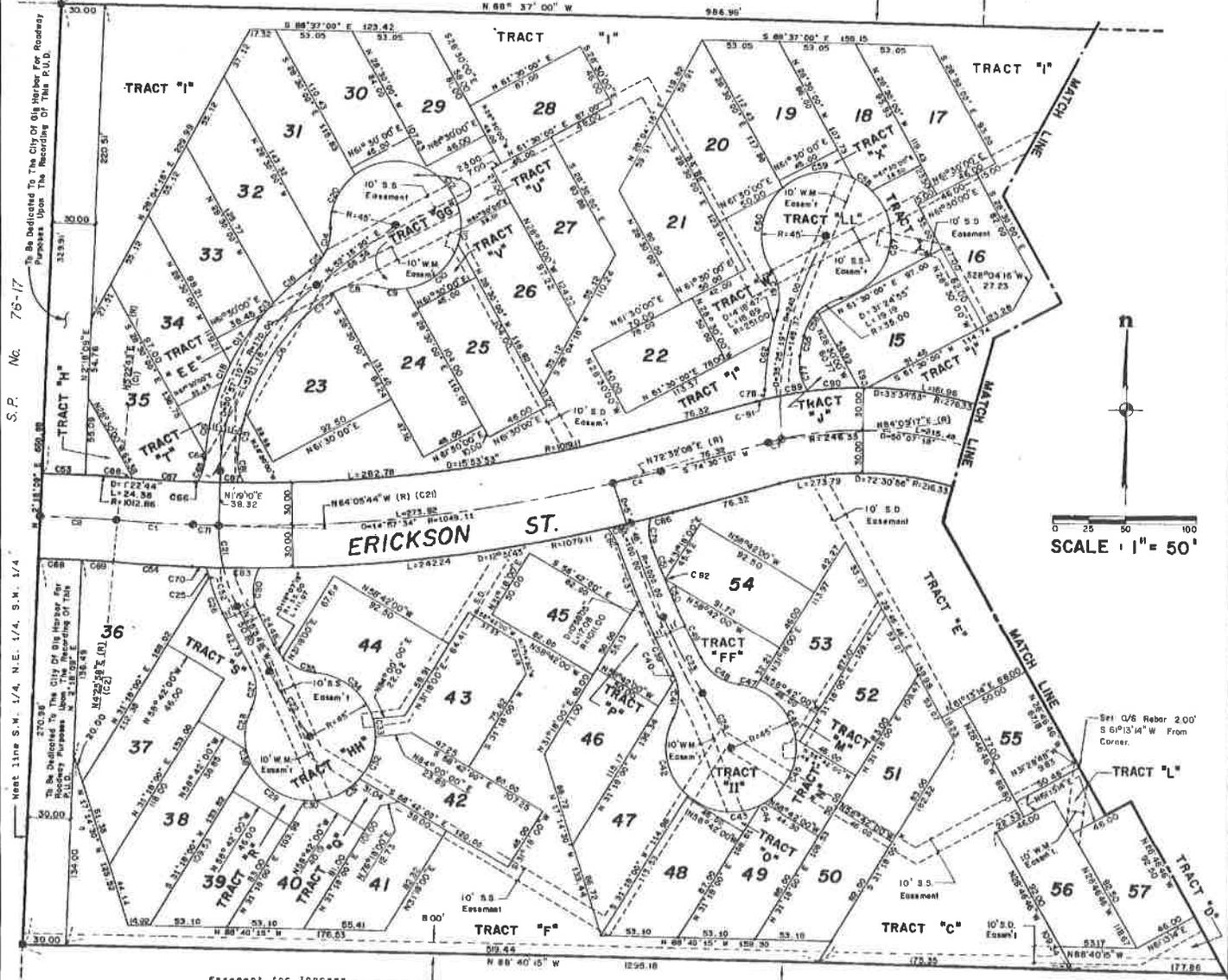
SPINNAKER RIDGE A PLANNED UNIT DEVELOPMENT

A PORTION OF THE SOUTHWEST 1/4 OF SECTION 8, TOWNSHIP 21 N, RANGE 2 E, W.M.
CITY OF BIG HARBOR, PIERCE COUNTY, WASHINGTON

Unplatted

North Line S. 1/2, N.E. 1/4, S.W. 1/4

STANICH
AVE.



SCALE 1" = 50'

Easement for Ingress,
Egress, and Utilities A.F.
No. 850750016

Unplatted

South Line N.E. 1/4, S.W. 1/4

See Sheet 5 of 5 for Notes
and Curve Data Information.



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451 S.W. 10th Suite 106
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Phone: 12061 228-5828

Job No. 195-02-843 Date: Sept. 1985
Drawn By: SSB Sht 4 of 5

PLAT 1985 1451

SPINNAKER RIDGE A PLANNED UNIT DEVELOPMENT

A PORTION OF THE SOUTHWEST 1/4 OF SECTION 8, TOWNSHIP 21 N. RANGE 2 E. W.M.
CITY OF GIG HARBOR, PIERCE COUNTY, WASHINGTON

CURVE TABLE
For Sheet 3 Of 5

CURVE	ARC	DELTA	RADIUS
C1	48.29	12° 44' 53"	217.05
C2	24.75	6° 32' 03"	217.05
C3	32.81	2° 50' 38"	661.00
C4	53.24	4° 16' 51"	661.00
C5	19.40	1° 40' 55"	661.00
C6	31.16	8° 00' 20"	35.00
C7	0.70	1° 09' 13"	35.00
C8	48.82	6° 17' 54"	45.00
C9	64.34	6° 11' 22"	45.00
C10	17.39	22° 08' 51"	45.00
C11	49.64	63° 12' 03"	45.00
C12	57.23	72° 51' 43"	45.00
C13	39.46	57° 55' 37"	35.00
C14	76.00	6° 48' 31"	839.00
C15	87.62	91° 21' 26"	81.00
C16			
C17			
C18			
C19			
C20	62.41	91° 41' 26"	39.00
C21	80.52	81° 41' 26"	39.00
C22	15.75	89° 03' 53"	35.00
C23	20.88	34° 10' 59"	35.00
C24	13.86	22° 21' 52"	35.00
C25	14.58	23° 53' 00"	35.00
C26	18.05	3° 11' 59"	216.33
C27	76.32	17° 35' 51"	235.45
C28	45.68	185° 09' 02"	35.00
C29	34.86	80° 03' 00"	25.00
C30	97.39	20° 11' 36"	276.33
C31	27.62	5° 43' 35"	276.33

NOTES

- Set Rebar 5 Cap "E.S.M. Inc. L.S. No. 10618" at all Lot Corners unless otherwise noted.
- An Easement is hereby granted to the Spinnaker Ridge Community Association for roadway purposes across any lot which may have been encroached upon by private driveway paving in the original paving of the driveways. This Easement is restricted to that area currently under existing pavement.
- Subject to an Easement for Community Antenna Television System purposes as recorded under Pierce County recording No. 2944605.
- All tracts shall remain in private ownership and are hereby conveyed to the Spinnaker Ridge Community Association.

CURVE TABLE
For Sheet 4 Of 5

CURVE	ARC	DELTA	RADIUS
C32	52.77	3° 04' 34"	982.87
C33	10.00	2° 19' 34"	249.37
C34	34.00	1° 51' 25"	1049.11
C35	29.00	10° 27' 59"	159.25
C36	83.87	37° 32' 43"	159.00
C37	1.19	1° 57' 10"	38.00
C38	31.44	51° 27' 50"	35.00
C39	29.88	25° 30' 27"	45.00
C40	48.57	63° 07' 05"	45.00
C41	11.16	44° 13' 47"	45.00
C42	103.45	102° 47' 49"	45.00
C43	6.05	0° 32' 55"	181.00
C44	18.99	32° 43' 37"	35.00
C45	14.06	22° 00' 42"	35.00
C46	33.89	10° 43' 46"	181.00
C47	43.92	13° 54' 14"	181.00
C48	18.34	4° 13' 17"	181.00
C49	63.48	16° 55' 19"	181.00
C50	42.59	54° 14' 01"	45.00
C51	56.87	27° 13' 28"	123.89
C52	51.27	11° 02' 00"	278.08
C53	68.00	0° 52' 30"	600.00
C54	43.20	2° 57' 01"	600.00
C55	7.00	11° 27' 13"	35.00
C56	26.08	11° 22' 49"	114.89
C57	30.69	50° 14' 53"	35.00
C58	29.54	36° 20' 07"	45.00
C59	46.40	61° 37' 50"	45.00
C60	6.81	8° 40' 15"	45.00
C61	40.09	44° 40' 44"	45.00
C62	32.86	41° 50' 27"	45.00
C63	12.05	15° 20' 22"	45.00
C64	54.21	69° 01' 24"	45.00
C65	28.16	41° 11' 02"	35.00
C66	11.07	18° 07' 18"	29.00
C67	47.11	2° 22' 25"	1011.00
C68	9.45	15° 01' 48"	45.00
C69	38.02	4° 21' 25"	511.00
C70	24.41	7° 19' 23"	25.00
C71	28.80	47° 08' 50"	35.00
C72	98.48	75° 21' 23"	45.00
C73	83.29	67° 51' 10"	45.00
C74	3.38	4° 12' 00"	45.00
C75	53.37	67° 24' 04"	45.00
C76	47.46	60° 25' 36"	45.00
C77	18.22	13° 27' 59"	45.00
C78	35.86	22° 28' 57"	35.00
C79	36.48	4° 18' 28"	489.00
C80	22.89	1° 18' 33"	989.00
C81	24.21	1° 24' 08"	989.00
C82	31	0° 30' 39"	35.00
C83	30.00	1° 41' 50"	1012.86
C84	24.38	3° 04' 34"	1012.87
C85	14.28	3° 33' 52"	220.29
C86	19.98	32° 40' 23"	35.00
C87	95.29	101° 19' 27"	45.00
C88	16.14	81° 03' 22"	45.00
C89	51.57	65° 40' 01"	45.00
C90	63.60	80° 58' 37"	45.00
C91	59.35	48° 02' 24"	35.00
C92	37.70	0° 55' 23"	261.00
C93	6.30	1° 18' 26"	276.33
C94	2.71	0° 51' 26"	181.00
C95	17.27	28° 16' 19"	45.00
C96	1.75	0° 05' 54"	1019.11
C97	42.03	2° 31' 39"	959.87
C98	10.00	1° 46' 14"	952.87
C99	25.16	1° 16' 20"	952.87
C100	9.81	0° 31' 34"	1079.11
C101	16.30	0° 58' 25"	1049.11
C102	9.14	8° 35' 00"	61.00
C103	29.82	189° 35' 36"	8.62
C104	14.88	33° 38' 05"	21.00
C105	28.08	38° 20' 21"	61.00
C106	14.58	23° 53' 00"	35.00
C107	25.84	42° 27' 23"	35.00
C108	6.83	11° 29' 13"	35.00
C109	20.69	34° 11' 39"	35.00
C110	32.97	53° 58' 01"	35.00
C111	21.60	35° 21' 06"	35.00
C112	13.11	21° 21' 13"	35.00
C113	37.00	1° 57' 52"	1079.11
C114	68.40	3° 37' 04"	1079.11
C115	25.49	1° 37' 08"	1079.11
C116	18.00	0° 48' 41"	1079.11
C117	38.07	1° 48' 11"	1019.11
C118	9.12	0° 32' 52"	952.87
C119	31.46	6° 11' 41"	276.33
C120	35.51	7° 21' 44"	276.33
C121	4.87	1° 00' 32"	276.33
C122	0.97	0° 03' 22"	989.00



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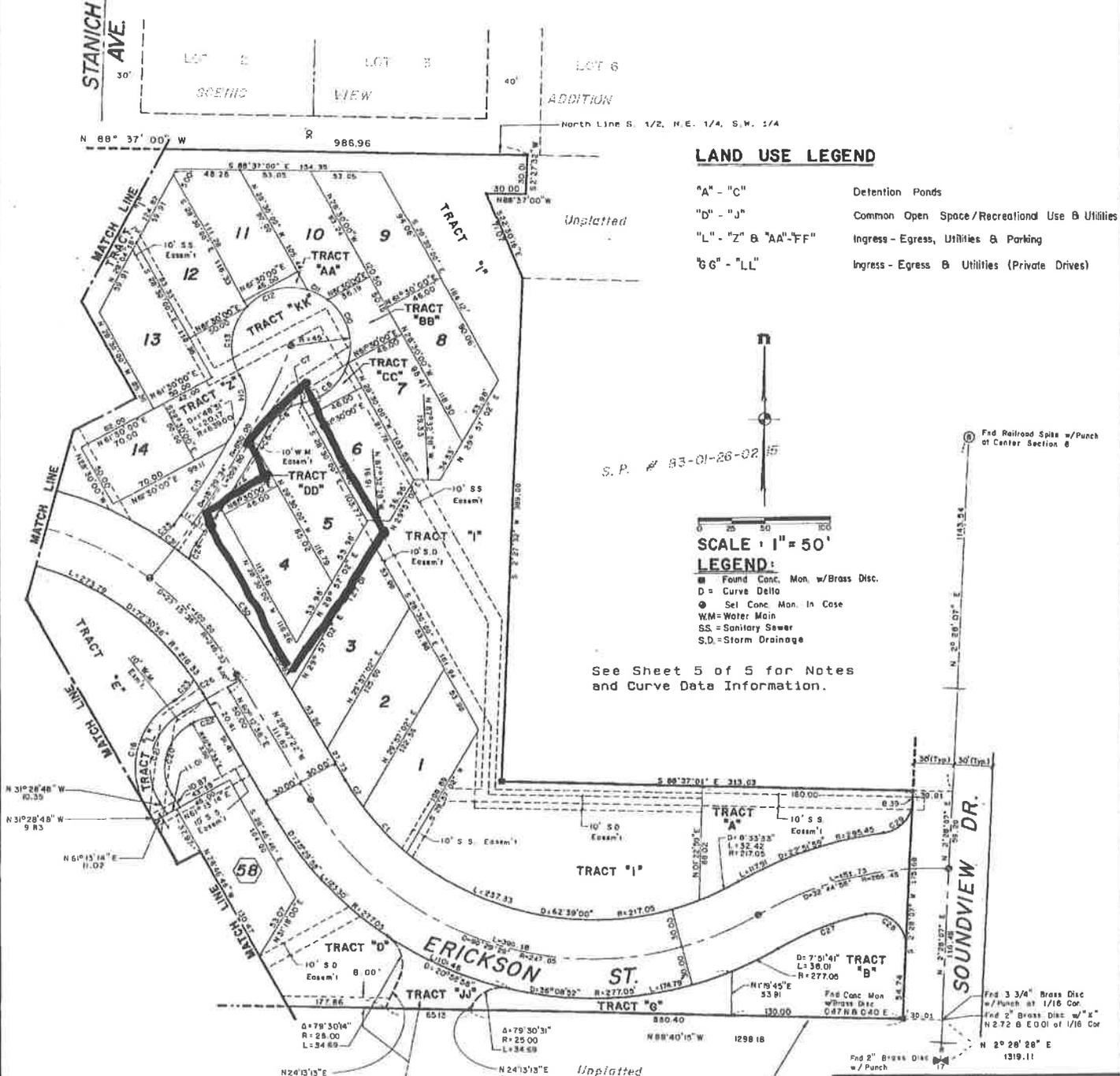
Job No. 195-02-843	Date: Sept. 1985
Drawn By: SSB	Sh: 5 of 5

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APPENDIX M

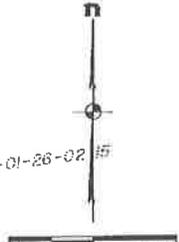
SPINNAKER RIDGE A PLANNED UNIT DEVELOPMENT

A PORTION OF THE SOUTHWEST 1/4 OF SECTION 8, TOWNSHIP 21 N, RANGE 2 E, W.M.
CITY OF GIG HARBOR, PIERCE COUNTY, WASHINGTON



LAND USE LEGEND

- "A" - "C" Detention Ponds
- "D" - "J" Common Open Space/Recreational Use & Utilities
- "L" - "Z" & "AA"- "FF" Ingress - Egress, Utilities & Parking
- "GG" - "LL" Ingress - Egress & Utilities (Private Drives)



S. P. # 83-01-26-02

SCALE: 1" = 50'
LEGEND:

- Found Conc. Mon. w/Brass Disc.
- D = Curve Delta
- Set Conc. Mon. In Case
- WM = Water Main
- SS = Sanitary Sewer
- S.D. = Storm Drainage

See Sheet 5 of 5 for Notes and Curve Data Information.

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Phone: (206) 228-5628

Job No. 195-02-843	Date: Sept. 1985
Drawn By: SSB	Sh: 3 of 5

APPENDIX N

APPENDIX O

**SPINNAKER RIDGE DECLARATION OF
RESTRICTIVE COVENANTS**

THIS DECLARATION is made this 31st day of January 1986, by NU-DAWN HOMES LIMITED (The Developer) with respect to certain real property and the improvements thereon located in the City of Gig Harbor, Pierce County, Washington:

R E C I T A L S :

WHEREAS, the Developer is the owner of certain real property in the City of Gig Harbor, Pierce County, Washington which is more particularly described in Exhibit "A"; and

WHEREAS, the Developer has recorded a plat known as SPINNAKER RIDGE with the Pierce County Auditor and Gig Harbor City Clerk, a copy of which is attached hereto as Exhibit "A"; and

WHEREAS, Developer desires to declare the said Spinnaker Ridge Plat to be subject to certain covenants, conditions, restrictions, and easements as hereinafter set forth in the Declaration; and

WHEREAS, the Developer has provided for the creation of a Homeowner's Association and the transfer thereto of certain tracts of real property and hereinafter created facilities; and

WHEREAS, the Homeowner's Association will accept certain obligations for the maintenance of detention ponds, storm detention ponds and related facilities; and

WHEREAS, it is the intent of the Developer that said obligations to the City of Gig Harbor for the maintenance of the detention pond system and its related facilities be a covenant running with the land and a continuing responsibility of each Lot Owner as defined in the Articles of Incorporation of the Homeowner's Association and the By-Laws thereof;

NOW, THEREFORE, to accomplish the foregoing purposes, the Developer hereby publishes and declares that the plat of Spinnaker Ridge shall be held, conveyed, hypothecated, encumbered, leased, rented, used, occupied and approved subject to the following covenants, conditions, restrictions, uses, limitations and obligations which shall run with the land and shall be a burden upon and benefit to the Developer and any other person, firm, corporation or entity of any kind

25⁰⁰

kind whatsoever acquiring or owning an interest in Spinnaker Ridge or any part thereof and their lessees, guests, heirs, executors, personal representatives, successors and assigns.

**ARTICLE I.
DEFINITION**

The following words when used in this Declaration or any amendment to this Declaration shall be defined as set forth in Article I unless the context clearly indicates a different meaning.

1.1: "Association" shall mean the incorporated non-profit association of Lot Owners in accordance with the Articles of Incorporation thereof, the By-Laws thereof, and this Declaration. The Association shall be called Spinnaker Ridge Community Association.

1.2: "Board" shall mean the Board of Trustees of the Association.

1.3: "Common Property" shall mean that land or facility to be conveyed to the Association by the Developer as provided and set forth in the Plat of Spinnaker Ridge which has been incorporated herein as Exhibit "A" together with such other property and/or facilities as the Association may hereafter acquire.

1.4: "Developer" shall mean Nu-Dawn Homes Limited

1.5: "Lot" shall mean that parcel of land segregated for the purpose of the construction of a single family residence and shall not include any parcel or tract reserved as Common Property.

1.6: "Lot Owner" shall mean one or more persons which hold the record fee interest in any lot; a real estate contract purchaser -- vendee purchaser, etc.

1.7: "Member" shall mean every person or entity who is a Lot Owner; member being further defined in Article IV herein.

1.8: "Assessment" shall mean that charge provided for by the Board of Trustees as referred to in Article V of the By-Laws and Article VI of these Declarations and without limitation a charge to meet the necessary expenses that are incurred by the Association in meeting its obligation to maintain the common areas and facilities and maintain such other areas as deemed proper and necessary by the Board of Trustees and specifically but without limitation, to maintain in proper operation condition the detention pond system and related facilities pursuant to its contractual obligation with the City of Gig Harbor.

**ARTICLE II.
PROPERTY SUBJECT TO THIS DECLARATION**

2.1: PROPERTY DESCRIPTION: This Declaration applies to and is limited to that real property specifically included in the plat and described in Exhibit "A" which is attached hereto and made a part hereof.

**ARTICLE III.
SPINNAKER RIDGE COMMUNITY ASSOCIATION**

3.1 General: The Association is a Washington non-profit corporation organized to further and promote the common interest of the Property Owners in Spinnaker Ridge and to provide for the maintenance and management of common properties and facilities as set forth in this Declaration and as hereinafter conveyed to said Association. The Association, through its Board of Trustees, shall have such powers in the furtherance of its purposes as are set forth in the Declaration and its Articles of Incorporation and By-Laws.

3.2 Membership: Every Lot Owner shall be a member of Spinnaker Ridge Community Association.

3.3 Voting Rights: There shall be two classes of voting membership. Class "A", and Class "B".

3.3.1: Class "A" Members shall be all those members other than the Developer. Class "A" members shall be entitled to one vote for each lot in which they hold the interest required for membership. If more than one person holds such interest or interests, all such persons shall be members but the vote for such lot shall be exercised as the person holding such interest shall determine between themselves, provided that in no event shall more than one vote be cast with respect to any such lot. Class "A" members shall be entitled to elect two members of the Board of the Association so long as there is a Class "B" membership.

3.3.2: Class "B" members shall be the Developer. The class "B" members shall be entitled to elect two thirds of the members of the Board of Trustees of the Association. Class "B" membership shall be converted to Class "A" membership at the option of the Class

"B" member evidenced by written notice to the Secretary of the Association, and shall be converted to Class "A" membership without further act or deed on December 31, 1990.

3.4: Management and Administration of Common Area and Facilities:

3.4.1: Board of Trustees: The Board of Trustees of the Association shall manage and administer and regulate the maintenance, repair and utilization of the Association's common area as set forth in the Plat herein.

3.4.2: Power and Duties of the Board of Trustees: In managing and administering the Association, the Board of Trustees shall have the following powers and duties and such other powers and duties as may be provided by the Articles of Incorporation and the By-Laws of the Association from time to time:

A. To enforce the provisions of this Declaration, the Articles of Incorporation of the Association and the By-Laws of the Association as presently exist and as may hereinafter be amended from time to time, and such other reasonable rules and regulations regarding the maintenance, administration and operation of the common areas and facilities.

B. To prepare and submit to the membership estimates of the expenses of the Association to be payable during the fiscal year, for administration, maintenance, repair and replacement of the common property and facilities and such other properties as the Board of Trustees may be authorized from time to time by the membership to provide for the repair, maintenance, replacement and care of.

C. To provide specifically for the maintenance of a retention pond system and the related facilities without limitation, the drainage ditches necessary therefor and cause the cost of doing same to be assessed against the property of each member and against the members individually.

D. To make assessments upon Lot Owners for common expenses of the Association and to enforce same by any means provided by laws, this Declaration, the Articles of Incorporation or the By-Laws of the Association to include, specifically, the creation by the filing of a certificate of delinquency against the Lot for which the owner of same has failed to pay his annual and/or special assessments as provided for herein, as provided for in the Articles of Incorporation and/or the By-Laws and/or as provided for by resolution of the Board of Trustees.

E. To order work which the Board of Trustees deems necessary for the operation, maintenance, repair and replacement of common property and/or facilities and/or any additions or improvements thereto and without limitation specifically for the operation, maintenance and repair of a detention pond system and its related facilities.

F. To employ attorneys, accountants and other consultants or specialists as may be reasonably necessary or convenient to carry out the functions or managements and administrations of the Association and to authorize and pay for their reasonable compensation as common expenses.

G. To take action at law or in equity on behalf of the Lot Owners, as their respective interests may appear with respect to any cause of action relating to Spinnaker Ridge Community Association.

H. To take action as may be necessary or convenient for the collection of all sums assessed against any Lot Owner for his share of the common expenses, insofar as same be not inconsistent with this Declaration, and to insure such expenses and attorney fees as may be reasonable, necessary or convenient for the accomplishment of such purposes.

I. To contract with such persons, firms or corporations as the Board of Trustees deems advisable to assist in activities and functions of the management and administration that may from time to time be necessary and proper.

J. To exercise and perform all those rights and duties that are supplemental to complimentary to and necessary for the management and administration of the Association.

ARTICLE IV. PROPERTY RIGHTS IN COMMON PROPERTIES

4.1: Extent of Common Properties: The Common Properties shall include those properties listed in Exhibit "A" which is attached hereto and made a part hereof; and shall include any other properties that may hereinafter be acquired by the Association for the purpose and benefits of the members and/or for the purpose of furthering, supplementing and/or complimenting the purposes of this Association.

4.2: Storm Drainage System: All components of the storm drainage system within and if necessary, outside, of the Spinnaker Ridge Subdivision are common properties; PROVIDED, there shall be reserved to the City of Gig Harbor certain easements which are necessary to provide access to the storm drainage system; and said storm drainage system although part of the common properties, shall have reserved to the Association the right of maintenance, repair, reconstruction and/or construction as is necessary to provide an adequate and proper storm drainage system and to comply with the requirements of the City of Gig Harbor in the construction and maintenance of said retention ponds and drainage systems and related facilities.

4.3 Members' Easements of Enjoyment: Subject to the provisions herein, every member shall have a right and easement of enjoyment in and to the common properties, and such easement shall be appurtenant to and shall pass with the title to every lot and upon recordation of a contract of sale of any lot.

4.4: Title to Common Property: Title to the Common Property shall be held by the Association, as Trustee for the Lot Owners. The Developer shall convey the Common Property located in Spinnaker Ridge Subdivision to the Association concurrent with the recording of these Declarations.

4.5: Restriction on Members: The rights and the easements of enjoyment created hereby shall be subject to the following:

4.5.1: The right of the Association to limit the number of guests of members.

4.5.2: The right of the Association to charge reasonable admission and other fees for use of any recreational facilities situated on the Common Properties.

4.5.3: The right of the Association to suspend the enjoyment rights of any member and/or his guests for any period during which any assessment remains unpaid; further, the right to suspend enjoyment rights of any member for a period not to exceed sixty (60) days for any infraction of its published rules and regulations; provided that the Association provide a pre-suspension hearing.

4.5.4: The right of the declarant and the Association in accordance with its Articles and By-Laws to mortgage said property as security for any loan, the purpose of which is improvement of the Common Properties. In the event of a default upon any such mortgage, the lenders rights hereunder shall be limited to a right after taking possession of such properties to charge

admission and other fees as a condition of the continued enjoyment by the members, and if necessary to open the enjoyment of such property to a wider public until the mortgage debt is satisfied, whereupon the possession of such property shall be returned to the Association and all rights of the members thereunder shall be fully restored; PROVIDED FURTHER, that said mortgage shall provide that the lender upon taking possession of common property shall have the specific duty to maintain, repair, restore and construct if necessary, the detention ponds, ditches and related facilities.

4.5.5: The right of the Association to dedicate or transfer all or any part of the Common Properties to any municipal corporation, public agency or authority for such uses and purpose as the same are now devoted to and subject to such conditions as may be agreed to by the members provided that the transfer of the detention ponds, ditches and related drainage facilities shall be subject to the approval of the City of Gig Harbor; that if a major portion of the properties are being conveyed, said conveyance will be subject to ratification by the membership.

4.6: Delegation of Use: Any member may delegate in accordance with the By-Laws of the Association, his right of enjoyment to the Common Properties to members of his family and his tenants.

4.6.1: A member subject to the restriction on the number of guests, may in his presence allow his guests to enjoy and utilize common properties.

ARTICLE V. CREATION OF A LIEN AND PERSONAL OBLIGATION OF ASSESSMENT

5.1: Creation of the Lien and Personal Obligation of Assessments: Each Lot Owner by acceptance of a deed or other conveyance, whether or not it shall be so expressed in any such deed or other conveyance, is deemed to covenant and agree to pay to the Association all common expenses assessed against his Lot by the Association, including, but not by way of limitation:

5.1.1: Monthly assessments or charges, and

5.1.2: Special assessments, such assessments to be fixed, established and collected from time to time as hereinafter provided. The monthly and special assessments, together with such interest thereon and

costs of collection thereof, as hereinafter provided, shall be a charge on the Lot and shall be a continuing lien upon the Lot against which each such assessment is made. Each such assessment, together with such interest and costs of collection thereof (including reasonable attorneys' fees) shall also be the personal obligation of the person who was the Lot Owner when the assessment fell due. The personal obligation shall not pass to successors of such Lot Owner unless expressly assumed by them, PROVIDED, however, that in the case of a sale on a contract for the sale of (or an assignment of a contract purchaser's interest in) any Lot which is charged with the payment of an assessment or entity who is the Lot Owner immediately prior to the date of any such sale, contract or assignment shall be personally liable only for the amount of the installments due prior to said date. The new Lot Owner shall be personally liable for installments which become due on and after said date.

5.2: Purpose of Monthly Assessments: The monthly assessments shall constitute a common expense fund and shall be used for the payment of those expenses authorized by this Declaration of the By-Laws of the Association for the benefit of the Lot Owners, including, without limitation:

5.2.1: Water, electricity, sewer, garbage collection, and other necessary utility services for the Common Property, and to the extent not separately metered or charged to the individual Lots, any assessments upon the Association with respect to such services.

5.2.2: A policy or policies insuring the Developer, the Board of Trustees, the Association and the Lot Owners against any liability to the public, or to any other Lot Owner, or to any invitees or tenants of any Lot Owner, for property damage or bodily injury incident to the ownership or use of the Common Property. Limits of liability under such insurance policy or policies shall not be less than One Hundred Thousand Dollars (\$100,000.00) for any one person injured; One Hundred Thousand Dollars (\$100,000.00) for any one accident; and Fifty Thousand Dollars (\$50,000.00) for property damage for each occurrence.

5.2.3: Workmen's compensation insurance to the extent necessary to comply with any applicable laws.

5.2.4: The salary and expenses of any personnel as may in the reasonable opinion of the Board of Directors be necessary or proper for the management and operation of the Common Property.

5.2.5: Legal and accounting services which, in the reasonable opinion of the Board of Trustees are necessary or proper in the operation of the Common Property or the enforcement of this Declaration.

5.2.6: Fees and charges due any person, firm or corporation which may be retained or hired by the Board of Trustees to perform any functions or activities incident to the management or administration of the Association.

5.2.7: Construction, replacement, improvement, maintenance in good order and repair of the Common Property and improvements thereon, as the Board of Trustees shall determine are necessary and proper.

5.2.8: Reimbursement to the City of Gig Harbor for any costs incurred by the City pursuant to paragraphs 6.1 below.

5.2.9: Garbage collection and disposal, street light electricity and other costs for any other utility services not separately metered or charged to individual Lot Owners.

5.2.10: Any other materials, supplies, labor, services, maintenance, repairs, structural alterations, insurance, taxes and assessments which the Board of Trustees may procure or pay for pursuant to the terms of this Declaration, or the By-Laws of the Association, or which the Board of Trustees shall decide is necessary or proper for the operation and maintenance of the Common Property or for the enforcement of any provisions in this Declaration or the By-Laws of the Association.

5.2.11: Maintenance and repair of any Lot or building thereon, if such maintenance or repair is reasonably necessary to protect the Common Property or preserve the appearance and value of Spinnaker Ridge, and the Lot Owner of such Lot has failed or refused to perform said maintenance or repair within a reasonable time after written notice of the necessity of said maintenance or repair is delivered by the Board of Trustees, provided, however, that the Board of Trustees shall levy a special assessment against the Lot of such Lot Owner for the entire cost of said maintenance.

Maintain, repair, establish and do all those things necessary for the maintenance and beautification and the general aesthetics of Spinnaker Ridge Subdivision such areas as from time to time are deemed necessary and proper by the Board of Trustees including, but

not limited to the designated portion of the Lots owned by members herein whether improved or unimproved.

5.2.12: Maintenance of the front yards of each lot and painting of the structures on each lot one every two years.

5.3 Amount of Monthly Assessments: The amount of monthly assessments shall be as follows:

5.3.1: The Board of Trustees shall estimate operating costs sixty (60) days prior to the date of the Association's annual meeting, and shall present to the membership at the annual meeting a detailed breakdown of said costs. Said costs shall provide a reasonable sum for contingencies and replacements; these costs may be adjusted by any anticipated surplus from the prior years assessments. Each lot owned by a Class "A" member shall be assigned one unit. The total anticipated expenses shall be divided by the number of units and each lot will be assessed the result thereof.

5.3.2: Each Lot Owner shall be obligated to pay set assessments and/or assessments that are hereinafter provided, on a monthly basis directly to the Association; (The annual assessment shall be divided into twelve equal payments. Any subsequent assessment that may be required shall be paid pursuant to resolution of the Board of Trustees either in one lump sum or as an addition to the then remaining monthly installments.)

5.3.3: The failure of the Board of Trustees to fix assessments prior to the annual meeting shall not be deemed a waiver and/or modification to the provisions hereof; nor shall it be a release either total or partial of the Lot Owners obligation to pay assessments; PROVIDED, that the prior assessment shall be continued until such time as a new assessment is properly affixed; this provision shall apply if for any reason any assessment is held to be void, voidable and/or invalid.

5.3.4: No Lot Owner may exempt himself nor waive nor release himself in any manner from liability for his contribution towards the common expenses nor shall the Lot Owner so contend by extending or tendering a waiver of his right of the use and enjoyment of the Common Property and/or by abandonment of his Lot.

5.4 Special Assessments: The Association may levy such other special assessment for capital improvements upon the Common Property, and/or for other purposes and in such manner as shall be provided for in this Declaration, the Articles of Incorporation, the By-Laws or other rules and regulations of the Association including, but not limited to, a special assessment to provide for emergency expendi-

tures that arose and/or were incurred as a result of unforeseen contingencies, casualties, acts of God and/or apparent errors in the prior established expense budget. Said special assessment by act of the Board of Trustees may be amortized over the months remaining in the fiscal year and/or may be assessed on a one time basis and said assessment being due and payable on or before the first day of each and every month following said assessment and/or if the assessment is a one time one payment assessment, then in that event on the first day of the succeeding month.

5.5: Default in Payment of Assessments - Remedies: If any assessment is not paid within thirty (30) days after it was first due and payable, the assessment shall bear interest from the date on which it was due at the highest rate permitted by law until paid, and the Association may bring an action at law against the one personally obligated to pay the same and/or foreclose the lien against the Lot, and interest, costs and reasonable attorneys' fees of any such action shall be added to the amount of such assessment and all such sums shall be included in any judgment or decree entered in such suit. No Owner may waive or otherwise escape liability for the assessments provided for herein by non-use of the Common Areas or abandonment of his Lot.

5.6: Subordination of Lien: The lien of the assessments provided for herein shall be subject to recordation by the Board of Trustees and upon said lien being recorded with the Pierce County Auditor, its priority shall be established in time. No sale or transfer shall relieve such lot from the liability of the default; PROVIDED, sale or transfer by or to a mortgagee, trustee, beneficiary, as the result of a default of a prior recorded indebtedness shall extinguish the lien created by the then existing default; PROVIDED FURTHER, that the extinguishment of said lien shall not effect the transferees duties and obligations to pay the assessments as they accrue after the transfer.

5.7 Exempt Property: The following property subject to this Declaration shall be exempt from assessments, charges and liens created therein:

5.7.1: All properties dedicated to the City of Gig Harbor and/or other municipal corporations, and/or the State of Washington.

5.7.2: All common properties.

ARTICLE VI. COVENANTS CONCERNING UTILITIES

6.1: Storm Drainage Maintenance: Maintenance of the storm drainage system including retention and/or detention ponds, ditches and related facilities is required for the

protection of all property, both public and private within the Spinnaker Ridge Subdivision, and is accordingly of concern to the City of Gig Harbor as well as to the Lot Owners and members of Spinnaker Ridge Community Association.

Each Lot Owner by acceptance of a deed or other conveyance whether or not it shall be expressed in any such deed or conveyance is deemed to covenant and agree as follows:

6.1.6: If at any time the City of Gig Harbor concludes that maintenance of the storm drainage system included in the Common Property is necessary and has not been property done by the Association, the City of Gig Harbor may perform such maintenance as agents for the Association and the City of Gig Harbor may charge the Association for the cost of any such maintenance; which charge shall be an obligation of the Association, PROVIDED however, that unless circumstances appear to the City to require quicker action, the City shall give the Association ten (10) days notice of the need for the maintenance before the City performs the maintenance itself.

6.1.2: The Association shall reimburse the City of Gig Harbor for the costs it incurs within ten (10) days of the receipt of the billing; and if the Association has insufficient funds in the treasury to meet said obligation, the Board of Trustees shall have the unqualified duty to proceed immediately with a sufficient special assessment on the Lots and to the Owners thereof so that said obligation may be paid as quickly as possible.

ARTICLE VII

RESTRICTION OF USE OF PROPERTY BY OCCUPANTS

7.1: Use Restrictions: The following restrictions shall be applicable to the use of any property subject to

this Declaration:

7.1.1: No animals or fowl shall be raised, kept or permitted upon the properties or any part thereof, excepting, in single family dwellings not more than a total of two (2) domestic dogs and/or cats and excepting caged pet birds kept within the dwelling house, provided said dogs, cats and pet birds are not permitted to run at large and are not kept, bred or raised for commercial purposes.

7.1.2: No part of the properties shall be used for the purpose of exploring for, taking therefrom or producing therefrom gas, oil or other hydrocarbon substances.

7.1.3: No noxious or offensive activity shall be carried on upon the properties or any part thereof, nor shall anything be done or maintained thereon which may be or become any annoyance or nuisance to the neighborhood or detract from its value as a high class residential district.

7.1.4: It shall be the duty of the owner or occupant of the Lot to improve and maintain in a proper aesthetic condition the area not maintained by the Association; and to refrain from the utilization of said Lot in any manner that would increase the Association's maintenance of the Common Area adjacent to said Lot and/or that portion of the Lot that the Association may from time to time assume the responsibility of maintenance over; and/or to allow said Lot to become unsightly with debris, noxious weeds and/or unkept grasses, trees, shrubs, vines, flowers, etc.

7.1.5: No garbage, refuse, or rubbish shall be deposited or kept on any Lot except in suitable containers and then same shall be substantially shield or screened from neighboring property and/or the recreation areas and/or Common Areas, and/or roadways.

7.1.6: No signs, billboards or other advertising structures or devices shall be located, placed or maintained on the Subdivision; PROVIDED a sign not to exceed three feet by three feet in area may be placed on the Lot to offer the property for sale or rent.

7.1.7: There shall be no storage of goods, vehicles boat, trailers, trucks, campers, recreation vehicles or other equipments or devices upon any Lot; EXCEPT where same is contained within a covered structure.

**ARTICLE VIII.
ARCHITECTURAL CONTROL COMMITTEE**

8.1: Architectural Control Committee: The Board of

Trustees shall appoint an Architectural Control Committee of three (3) or more persons, one of whom should be a licensed architect or engineer, who need not be a member of the Association, which Committee may act for the Board to the extent set forth in these Declarations. Initially, one member of the Architectural Control Committee shall be appointed for one year, the second member for two years, the third member for three years. Thereafter, members of the Architectural Control Committee shall be appointed or selected for three (3) year terms.

8.2: Jurisdiction and Purpose: The Committee shall adopt architectural guidelines, establishing standards for the exterior design and placement of all structures to be constructed on Spinnaker Ridge, and exterior landscaping of all such structures. The Committee may amend the Architectural Guidelines from time to time if it determines that such amendments are in the best interest of Lot Owners as a whole. The Committee shall have the right to review all plans and specifications for any building or structure to be constructed or modified within the properties and any landscaping plans and either approve or reject such plans based on whether they conform to the Architectural Guidelines. Enforcement of these covenants shall be carried out by the Association. The purpose of the Committee is to insure the development within Spinnaker Ridge maintains the aesthetic and structural quality as is established in its original design and that all future replacements of improvements and/or future improvements are compatible.

8.2.1: No building shall be erected, placed or altered on any Lot on the property until the building plans, specifications, plot plans and landscape plans are submitted by the Owner or his representative to the Architectural Committee and found by said Committee to be in accordance with the Guidelines and procedures established by the Committee. It shall be the obligation of each Owner to familiarize himself with the rules, regulations and procedures of the Committee for inspection, plan review and approval. Such rules, regulations and procedures shall provide among other things for the submission of a site plan evidencing the elevation of the structure, the finished grade of the Lot, the interior lay-out of the structure, the exterior finish materials, the colors to be utilized including the colors of roof material, the landscaping plan, etc.

8.3: Approval Procedures: All requests for approval of improvements to Lots shall be made in writing and shall be submitted to the Association headquarters unless the Committee shall record an instrument establishing a different place to submit such plans. The decision of a majority of the members of the Committee shall be the decision of the Committee.

8.3.1: The Architectural Control Committee shall have thirty (30) days upon which to approve or disapprove the Owner's application; PROVIDED, the Committee may extend said period if additional information is requested in writing by the Committee from the applicant but in no event shall the Architectural Control Committee fail to act within sixty (60) days; PROVIDED FURTHER, that if the Committee does fail to act within sixty (60) days then the applicant shall have the right to a hearing within thirty (30) days before the Board of Trustees who shall either approve or reject owner's application based upon the standards theretofore adopted by the Architectural Committee and approved by a two-thirds vote of the Board of Trustees.

8.4: Approval of Guidelines by Board of Trustees: The Architectural Control Committee shall provide to the Board of Trustees guidelines establishing standards for the exterior design and placement of all structures to be constructed in Spinnaker Ridge and the exterior landscaping of such structures and shall adopt general provisions dealing with color schemes that are aesthetically compatible with surrounding improvements, structures and landscaping. The Board of Trustees shall then approve such guidelines and standards and/or provisions by a vote of two-thirds of its members.

8.4.1: Both the Committee and the Board of Trustees when the occasion arises for the Board to make a decision upon the Committee's failure to promptly act, in the discharge of its obligations hereunder and its deliberations, shall act objectively and fairly in making decisions concerning various plans, specification plot plans, and/or landscaping plans submitted to it by various owners for consideration. Further, the determination of the Architectural Control Committee and/or the Board of Trustees as the case may be, as to non-compliance shall be in writing signed by the Committee Chairman and/or the Chairman of the Board of Trustees and shall set forth in reasonable detail the reason for non-approval.

8.5: Appeal: The decision of the Architectural Control Committee may be appealed to the Board of Trustees by the Owner requesting a hearing within ten (10) days of the date of his receipt of the Committee's decision and setting forth in writing the basis of his objection to the Committee's decision.

8.6: Approval, Rejection, Modification: The Committee and/or the Board of Trustees may either approve, disapprove, reject, and/or approve subject to certain conditions, modifications, additions and/or changes.

**ARTICLE IX.
RESTRICTIONS ON CONSTRUCTION, MAINTENANCE
AND IMPROVEMENT**

9.1: Restrictions: The following restrictions are applicable to construction, maintenance and improvements on all the residential properties:

9.1.1: No fence, hedge, wall or other structure shall be commenced, erected or maintained upon the properties, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, color, materials and location of the same have been submitted to and approved in writing by the Committee as to harmony of external design and location in relation to surrounding structures and topography.

9.1.2: All roofing material shall be approved by the Committee.

9.1.3: All driveways and parking bays shall be constructed of asphalt or concrete paving, unless approval for use of other material is granted by the Committee.

9.1.4: All outside television and radio aerials and antennas are prohibited without express written approval of the Association or the Committee.

9.1.5: No new outdoor overhead wire or service drop for the distribution of electric energy or for telecommunication purposes nor any pole, tower or other structure supporting said outdoor overhead wires shall be erected, placed or maintained within the properties. All purchasers of Lots within the properties, their heirs, successors and assigns shall use underground service wires to connect their premises and the structures built thereon to the underground electric or telephone utility facilities.

9.2: Evidence of Compliance With Restrictions: Records of the Association with respect to compliance with the provisions of this Declaration shall be conclusive evidence as to all matters shown by such records. After the expiration of six (6) months following the completion of any construction, addition, alteration or change to any building on a building site, in the absence of any notice to comply or in absence of any suit to enjoin such work or to force compliance by change or removal of such work within said period, then and in that event said structure, work, improvement or alteration shall be deemed to be in compliance with the provisions of this Declaration.

**ARTICLE X.
MAINTENANCE OBLIGATION OF OWNER**

10.1: Developed Lots: Each Lot Owner of a Developed Lot shall be obligated to maintain in clean, attractive condition the area of his Lot not maintained by the Association and shall not store unworkable vehicles or appliances and/or perform substantial repairs on same except within the closed confines of the structure. All improvements shall be maintained in a state of good repair; shall be properly painted and the Lot area having shrubs, lawn and vegetation shall be neat, tidy and trimmed. If the owner fails to correctly maintain his area after receiving notice and within thirty (30) days thereafter, the Association may enter said Lot and perform the necessary maintenance and charge the expense thereof to the Owner as a special assessment special to his Lot and to him alone and said special assessment shall be subject to the collection remedies heretofore set forth for general assessments as stated in Article V.

**ARTICLE XI.
ERECTION OF SIGNS OR STRUCTURES
BY DECLARANT**

11.1: Nothing contained in this Declaration shall be construed to prevent the erection or maintenance by Developer or its duly authorized agent of structures or signs for the conduct of its business in connection with or upon the properties while the same or any part thereof is owned by Developer.

**ARTICLE XII.
BENEFITS AND BURDENS RUN WITH THE LAND**

12.1: Covenants, Restrictions, Reservations and Conditions Run with the Land: The covenants, restrictions, reservations and conditions contained herein shall run with the land and shall be binding upon the properties and each portion thereof and all persons owing, purchasing, leasing and subleasing or occupying any Lot on the properties, and upon their respective heirs, successors and assigns. After the date on which the Declaration has been recorded, these covenants, restrictions, reservations and conditions may be enforced by the Association or Developer which shall have the right to enforce the same and expend Association monies in pursuance thereof, and also may be enforced by the Owner of any Lot.

**ARTICLE XIII.
REMEDIES AND WAIVER**

13.1: Remedies: The remedies provided herein for collection of any assessment or other charge or claim against any member, for and on behalf of the Association, or Developer, are in addition to, and not in limitation of, any other remedies provided by law.

13.2: Waiver: The failure of the Association or the Developer or any of their duly authorized agents or any of the Lot Owners to assist in any one or more instances upon the strict performance of or compliance with the Declaration or any of the Articles, By-Laws or rules and/or regulations of the Association, or to exercise any right or option contained therein, or to serve any notice or to institute any action or summary proceedings, shall not be construed as a waiver or relinquishment of such right for the future, but such right to enforce any of the provisions of the Declaration or of the Articles, By-Laws or rules and/or regulations of the Association shall continue and remain in full force and effect. No waiver of any provision of the Declaration or of the Articles, By-Laws, rules and/or regulations of the Association shall be deemed to have been made, either expressly or impliedly, unless such waiver shall be in writing and signed by the Board of Directors of the Association pursuant to authority contained in a resolution of said Board of Trustees.

ARTICLE XIV. GENERAL PROVISIONS

14.1: Enforcement: The Association and each Lot Owner (including the Developer, if the Developer is a Lot Owner) shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration, the By-Laws and the Articles of Incorporation of the Association. Failure to insist on strict performance of any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter. The receipt by the Association of payment of any assessment from a Lot Owner, with knowledge of any breach of any covenant hereof shall not be deemed a waiver of such breach, and no waiver by the Board of Directors of any provision hereof shall be deemed to have been made unless expressly in writing and signed by the authorized officers of the Association.

14.2: Personal Property: The Board of Trustees may acquire and hold for the benefit of the Lot Owners tangible and intangible personal property and may dispose of the same by sale or otherwise. A transfer of a Lot shall transfer to the transferee ownership of the transferor's undivided interest in such personal property.

14.3: Audit: Any Lot Owner may at any time at his own expense cause an audit or inspection to be made of the books and records of the Association. The Board of Trustees as a common expense, shall obtain an audit of all books and records pertaining to the Association at such intervals as the Board may determine and copies shall be furnished to the Lot Owners.

14.4: Limitation of Liability: No person who shall serve as a member of the Board of Trustees or the Initial Board of Trustees or as an officer of the Association shall be liable to any Lot Owner or to the Association except for claims, damages, liabilities, costs or expenses which arise out of the wilful misconduct of such person. Without limiting the generality of the foregoing, no person who shall serve as a member of the Board of Trustees or the Initial Board of Trustees or as an officer of the Association shall be liable to any Lot Owner or to the Association for the interruption of service of any utility which the Board of Trustees or the Initial Board of Trustees or an authorized officer of the Association is purchasing from a public utility or otherwise for the benefit of the Lots or the Lot Owners unless such interruption of service arises out of the willful misconduct of such person. Nothing contained in this Section 4 shall be construed to impose liability upon any person who shall serve as a member of the Board of Trustees, the Initial Board of Trustees, or as an officer of the Association. The limitation of liability specified in this Section 4 shall extend to the Developer if the Developer is a member of the Board of Trustees, or the Initial Board of Trustees or an officer of the Association.

14.5: Indemnification: The Lot Owners shall indemnify and hold each person who serves as a member of the Board of Trustees, including the Developer if the Developer serves in such capacity, harmless from all claims, damages, liabilities, expenses and costs (including, but not by way of limitation, the cost of attorneys, with or without litigation) which such person may incur because of his serving as a member of the Board of Trustees, whether or not such person incurs the obligation to pay such claim, damage, liability, expense or cost at the time at which such person is a member of the Board of Trustees or thereafter; provided that such claim, damage, liability, expense or costs does not arise out of the willful misfeasance or malfeasance of such person in the performance of his duties as a member of the Board of Trustees and provided further that the Lot Owners shall not be obligated to indemnify and hold such person harmless as provided in this Section 5 if such a claim, damage, liability, expense or cost is not included in a court order except to the extent that the Board of Trustees determines that the payment of such claim, damage, liability, expense or cost is in the best interest of the Association. The indemnification agreement of the Lot Owners which is provided in this Section 5 shall also apply to and be for the benefit of each person who serves as a member of the Initial Board of Trustees and to each person who serves as an officer of the Association, including the Developer if the Developer serves in such capacity.

14.6: Amendment: This Declaration may be amended or new covenants affecting Spinnaker Ridge may be added if the

owners of sixty-six and two-thirds percent (66-2/3%) of the Lots in Spinnaker Ridge approve such amendment. For purpose of this section the Developer shall be considered the owner of such Lots as he holds, on an equal basis with other Lot Owners. Any such amendment shall become effective when it has been recorded with the Auditor of Pierce County; PROVIDED, that the duties and obligations to maintain, repair, and/or replace detention and/or retention storm drainage ponds and related facilities shall be subject to amendment only upon written approval of the City of Gig Harbor.

14.7: Gender: This Declaration is to be read with all changes of number and gender required by the context.

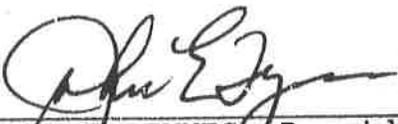
14.8: Severability: Invalidation of any one of these covenants or restrictions by judgment or court order shall in no way affect any other provisions, which shall remain in full force and effect.

14.9: Effect of Municipal Ordinances: Police, fire, health or other public safety ordinances of any municipal corporation having jurisdiction over any portion of Spinnaker Ridge shall govern where more restrictive than these covenants and restrictions.

14.10: Interpretation of Covenants: The Board shall have the right to determine all questions arising in connection with the Declaration and to construe and interpret the provisions of the Declaration and it's good faith determination, construction or interpretation shall be final and binding.

IN WITNESS WHEREOF, the undersigned being the Declarant herein executes these Restrictive Covenants on this 5 day of Dec., 1985.

NU-DAWN HOMES LIMITED


JOHN F. TYNES, President

Auditor's Note:
Complete notary omitted.

SPINNAKER RIDGE DECLARATION OF
RESTRICTIVE COVENANTS

EXHIBIT "A"

SEE PLAT RECORDED UNDER PIERCE COUNTY AUDITOR'S
RECEIVING NUMBER 8601310176, RECORDS OF PIERCE
COUNTY, WASHINGTON.

RECORDED

95 JAN 31 9 3 : 05

RICHARD A. BRECO AUDITOR
PIERCE COUNTY WASH
DEPUTY



APPENDIX P

RICARDO G. GARCIA and LUZ C. GARCIA, husband and wife, Petitioners,
v.
TED HENLEY and AUDEAN HENLEY, individually and the marital community of them composed, Respondents.

No. 94511-0

SUPREME COURT OF THE STATE OF WASHINGTON

April 19, 2018

Summaries:

Source: Justia

Ricardo and Luz Garcia and Ted and Andean Henley were neighbors in Tieton, Washington. The two families' plots shared a boundary line separated by a fence. The Henleys rebuilt the boundary fence multiple times during the 1990s. Each time, the fence crept farther and farther on to the Garcia property. The largest encroachment, extending a foot across the boundary line, occurred in 1997 while the Garcias were on vacation. The Garcias objected to this intrusion, but took no legal or other action. In 2011, the Henleys again moved the fence. Mr. Garcia placed apple bins along a portion of the 1997 fence to prevent the Henleys from creeping farther onto the property. As a result, the 2011 fence tracked the 1997 fence for that shielded portion, but arced onto the Garcia plot for the 67 feet that did not have apple bins protecting it, encroaching an additional half foot. The Garcias again requested that the Henleys move the fence, and the Henleys refused. The Garcias initiated suit in 2012, seeking ejectment and damages. The Henleys counterclaimed, seeking to quiet title in their name. In closing argument, the Henleys raised the doctrine of "[d]e[m]inimis [e]ncroachment" to argue that any minor deviation from the boundary line

of the adversely possessed property should be disregarded. The trial court determined the Henleys adversely possessed the land encompassed by the 1997 fence, but that the 2011 fence encroached an additional 33.5 square feet, and that 2011 sliver had not been adversely possessed. Rather than grant an injunction ordering the Henleys to abate the continuing trespass and move the fence, the trial court ordered the Garcias to sell the 2011 sliver to the Henleys for \$500. The Washington Supreme Court found that in exceptional circumstances, when equity so demands, a court may deny an ejectment order and instead compel the landowner to convey a property interest to the encroacher. To support such an order, the court must reason through the elements listed in *Arnold v. Melani*, 450 P.2d 815 (1968). The burden of showing each element by clear and convincing evidence lied with the encroacher. If not carried, failure to enter an otherwise warranted ejectment order is reversible error. The Supreme Court determined the Henleys failed to carry their burden. The matter was reversed and remanded to the trial court; the Garcias were entitled to ejectment as a matter of law.

En Banc

OWENS, J. — This is an encroachment case in which the petitioners were denied a mandatory injunction compelling removal of respondents' encroaching structure. The right to eject an unlawful encroaching structure is among the most precious contained within the bundle of property rights. In exceptional circumstances, when equity so demands, a court may deny an ejectment order and instead compel the landowner to convey a property interest to the encroacher. To support such an order, the court must reason through the elements this court listed in *Arnold v. Melani*, 75

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Wn.2d 143, 437 P.2d 908, 449 P.2d 800, 450 P.2d 815 (1968) and reaffirmed in *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010). The burden of showing each element by clear and convincing evidence lies with the encroacher. *Arnold*, 75 Wn.2d at 152. If this burden is not carried, failure to enter an otherwise warranted ejectment order is reversible error. Because the respondents failed to carry their burden, we reverse and remand to the trial court for the entry of judgment consistent with this ruling.

FACTS

Ricardo and Luz Garcia and Ted and Audean Henley are neighbors in Tieton, Washington. The two families' plots share a boundary line separated by a fence. The Henleys rebuilt the boundary fence multiple times during the 1990s. Each time, the fence crept farther and farther onto the Garcia property. The largest encroachment, extending a foot across the boundary line, occurred in 1997 while the Garcias were on vacation. The Garcias objected to this intrusion, but took no legal or other action. In 2011, the Henleys again moved the fence. Mr. Garcia placed apple bins along a portion of the 1997 fence to prevent the Henleys from creeping farther onto the property. As a result, the 2011 fence tracked the 1997 fence for that shielded portion, but arced onto the Garcia plot for the 67 feet that did not have apple bins protecting it, encroaching an additional half foot. The Garcias again requested that the Henleys move the fence, and the Henleys refused.

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The Garcias initiated suit in 2012, seeking ejectment and damages. The Henleys counterclaimed, seeking to quiet title in their name. In closing argument, the Henleys raised the doctrine of "[d]e [m]inimis [e]ncroachment" to argue that any minor deviation from the boundary line of the adversely possessed property should be

disregarded. Verbatim Report of Proceeding (Oct. 14, 2015) at 146. The Garcias responded in their closing argument that "de minimis encroachment" was equivalent to "balanc[ing] [the] equities," and orally cited *Proctor* before briefly summarizing why the five elements from *Proctor* and *Arnold* were not met. *Id.* at 149-50.

The judge determined that the Henleys had adversely possessed the land encompassed by the 1997 fence, roughly 288 square feet. However, the judge also found that the 2011 fence encroached an additional 33.5 square feet, and that the 2011 sliver had not been adversely possessed. Rather than grant an injunction ordering the Henleys to abate the continuing trespass and move the fence, the trial court ordered the Garcias to sell the 2011 sliver to the Henleys for \$500. The judge failed to enter findings of fact regarding the *Arnold* elements. The Garcias appealed, alleging that the trial court erred by not entering findings relating to each of the five *Arnold* elements. The Court of Appeals affirmed, over a dissent in part by Chief Judge Fearing. *Garcia v. Henley*, noted at 198 Wn. App. 1037 (2017). The Garcias appealed to this court, and we granted review. *Garcia v. Henley*, 189 Wn. 2d 1002,

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400 P.3d 1249 (2017). At issue is solely whether the fence should be relocated to the boundary line as set by the 1997 fence. We hold that it should.

ISSUE

Did the trial court err by failing to order ejectment of a trespassing structure without reasoning through the *Arnold* factors?

ANALYSIS

This court first set forth the relevant test in a 1968 case with similar facts. *Arnold*, 75 Wn.2d at 143. Due to a shared

misapprehension of the property line, the Arnolds' fence, two corners of their house, and a set of concrete steps encroached on the Melani estate. *Id.* at 145. The Melanis engaged in self-help and removed the encroaching fence, and petitioned the court for a mandatory injunction compelling removal of the other encroachments. *Id.*

This court addressed the potential equitable bases for declining to issue such an injunction, despite it being the typical property remedy, and instead issue a damages award and compel the landowner to convey a property interest to the encroacher under a liability approach. *Id.* at 146-53. After surveying precedential cases, *Arnold* set forth the "test for when a court may substitute a liability rule for the traditional property rule in encroachment cases." *Proctor*, 169 Wn.2d at 500.

[A] mandatory injunction can be withheld as oppressive when, as here, it appears . . . that: (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and

Page 5

the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.

Arnold, 75 Wn.2d at 152. In *Proctor*, we reaffirmed the application of this five-part test and noted that due to its equitable nature, the question of whether each *Arnold*

element has been met should be analyzed using the "inherently flexible and fact-specific" equitable power of the court to fashion remedies that do equity. *Proctor*, 169 Wn. 2d at 503. We reaffirmed that a "court asked to eject an encroacher must instead reason through the *Arnold* elements as part of its duty to achieve fairness between the parties." *Id.*

Despite this mandate, the trial court in this case made no specific findings regarding the *Arnold* elements. The only conclusion of law or finding of fact relating to *Arnold* or *Proctor* is conclusion of law 6, which reads in its entirety:

Although Plaintiffs typically would be entitled to an injunction, the Washington Supreme Court in *Proctor v. Huntington*, 169 Wash.2d 491, 238 P.3d 1117 (2010) recognized in certain adverse possession cases that equitable principles may dictate a different result as to an appropriate remedy. The court concludes that this case does warrant application of such equitable principles, and thus the court concludes that the fence between the Plaintiffs' and Defendants' properties should remain in its current location, and that title to the Plaintiffs' property that is subject to ejectment should be granted to the Defendants.

Clerk's Papers (CP) at 74-75. The Garcias moved for reconsideration in part because the court failed to "reason through the *Arnold* elements." *Id.* at 85 (quoting *Proctor*, 169 Wn.2d at 503). That motion was denied.

Page 6

The question before this court is whether the trial court erred in compelling the sale of

the Garcias' land without making findings of fact for each *Arnold* element. Generally, "findings of fact need not be made concerning every contention made by parties to a case." *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707, 592 P.2d 631 (1979). However, "a finding must be made as to all of the 'material issues.'" *Id.* (quoting *Bowman v. Webster*, 42 Wn.2d 129, 134, 253 P.2d 934 (1953); *Wold v. Wold*, 7 Wn. App. 872, 875, 503 P.2d 118 (1972)). As this court said in *Daughtry*, all that is required is that the trial court inform the appellate court, on material issues, "what questions were decided by the trial court, and the manner in which they were decided." *Id.* (internal quotation marks omitted) (quoting *Bowman*, 42 Wn.2d at 134). This provides appellate courts the ability to determine "whether there was substantial evidence to support the findings which are challenged in appellant's assignments of error." *State v. Marchand*, 62 Wn.2d 767, 770, 384 P.2d 865 (1963). The trial court's failure to enter findings of fact in this case precludes this court from determining whether the trial court found each *Arnold* element by clear and convincing evidence, the appropriate evidentiary standard.

This court generally cannot make findings of fact, and will not endeavor to do so based on an incomplete record in which neither party properly briefed or argued the *Arnold* elements. See *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). In *Old Windmill Ranch v. Smotherman*, 69 Wn.2d 383, 390, 418

Page 7

P.2d 720 (1966), this court collected cases in which it reversed judgments and remanded the cases to the trial court for the purpose of making material findings of fact that had been omitted. Typically, this would be the disposition of a case such as this one.

However, because the burden of proof regarding the *Arnold* elements lies with the encroaching party, this court need not make

any findings of fact in order to reverse the trial court's order.

Because a court-ordered conveyance of property from a rightful landowner to an encroacher is "exceptional relief for the exceptional case," we held in *Arnold* that "the evidence of the elements listed above" must be "clearly and convincingly proven by the encroacher." *Arnold*, 75 Wn.2d at 152. Nothing in *Proctor* changed that allocation of the burden of proof. The absence of findings of fact relating to the *Arnold* elements is equivalent to a finding of their absence. *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn. App. 463, 475, 767 P.2d 961 (1989). Because the Henleys failed to carry their burden of proof, the trial court erred in failing to issue an injunction compelling removal of the encroaching fence.

CONCLUSION

An encroacher bears the burden of establishing the existence of each *Arnold* element by clear and convincing evidence before a trial court may deny a landowner an injunction ordering ejection of an encroaching structure. Because the Henleys

Page 8

failed to carry this burden, the trial court erred. Accordingly, we reverse and remand to the trial court for the entry of judgment consistent with this ruling.

Page 9

/s/ _____

WE CONCUR:

/s/ _____

/s/ _____

/s/ _____

/s/ _____



/s/ _____

/s/ _____

/s/ _____

/s/ _____

Page 10

YU, J. (concurring) — I agree with the result the majority reaches in this case. However, I would go one step further and explicitly hold that trial courts must always enter findings of fact and conclusions of law when denying a rightful owner's request for an injunction to remove a trespasser from private property. I therefore respectfully concur.

Petitioners Ricardo and Luz Garcia proved that respondents Ted and Audean Henley wrongfully built their fence on the Garcias' property. The Garcias were therefore presumptively entitled to an injunction ordering the Henleys to remove the fence and stop violating the Garcias' sacred right to the exclusive use and possession of their private property. *Proctor v. Huntington*, 169 Wn.2d 491, 504, 238 P.3d 1117 (2010); *Arnold v. Melani*, 75 Wn.2d 143, 152, 437 P.2d 908, 449 P.2d 800, 450 P.2d 815 (1968).

The only way for a trespasser to avoid such an injunction is to prove all five of the *Arnold* elements by clear and convincing evidence. *Arnold*, 75 Wn.2d at

Page 11

152. If the trespasser meets this burden, then the court may deny an injunction to the rightful owner, and instead order an equitable remedy that compensates the owner but does not require the trespasser to leave. *Proctor*, 169 Wn.2d at 500. The trial court in this case did attempt to fashion such an equitable remedy, essentially ordering the Garcias to sell the encroached portion of their property

to the Henleys for \$500. The Garcias appealed.

Where this type of order is entered without findings of fact and conclusions of law about each *Arnold* element, as it was here, appellate courts can almost never determine from the record whether the order was properly issued. Therefore, it is almost always necessary to reverse and remand for the entry of findings and conclusions. *Garcia v. Henley*, No. 34189-5-III, slip op. at 4-5 (Wash. Ct. App. Apr. 11, 2017) (unpublished) (Fearing, C.J., dissenting in part), http://www.courts.wa.gov/opinions/pdf/341895_unp.pdf. To avoid such inefficiency in future cases, I would explicitly hold that trial courts *must* enter findings of fact and conclusions of law on each *Arnold* element in all cases where a private property owner is denied an injunction to eject a proven trespasser.

However, I agree with the majority in result that this is one of the rare cases where we can simply reverse, rather than remanding for the entry of findings and conclusions. The record does *not* indicate that the trial court actually found that the Henleys failed to meet their burden and then merely neglected to enter those

Page 12

findings. *Contra* majority at 7 ("The absence of findings of fact relating to the *Arnold* elements is equivalent to a finding of their absence."). We cannot know for certain what the trial court thought, but we do know that the court denied the Garcias' request for an injunction to eject the Henleys without stating any factual basis for doing so. This can indicate only that the trial court failed to undertake the appropriate analysis of the *Arnold* elements and did not make the necessary findings in the first place. The court's failure to do so was likely caused by the Henleys' failure to properly raise that issue, neglecting to even allude to either

Arnold or *Proctor* in their answer to the complaint, in their trial brief, or at any other point in the proceedings prior to closing argument at the bench trial. See majority at 3; *Garcia*, slip op. at 5-6 (Fearing, C.J., dissenting in part).

Thus, in this particular case, we can be certain of three dispositive points of law and fact, allowing us to reverse based on the record presented rather than remanding for the entry of explicit findings and conclusions. First, the fundamental rule of encroachment law is that trespassers must bear the burden of establishing by clear and convincing evidence that, despite their trespass, they are entitled to stay where they are and pay damages to the rightful property owners. Second, if the trespassers do not meet their burden, then the owners are absolutely entitled to ejectment. And third, because it is indisputably clear from the record that the Henleys never even pleaded that they should receive an equitable remedy

Page 13

instead of being ejected, the Garcias are entitled to ejectment as a matter of law. *Lybbert v. Grant County*, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000).

Therefore, I agree with the majority that an order must issue on remand directing the Henleys to remove their fence from the Garcias' property. I respectfully concur.

Page 14

/s/ _____

APPENDIX Q

64.38.020 Association powers.

Unless otherwise provided in the governing documents, an association may:

- (1) Adopt and amend bylaws, rules, and regulations;
- (2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from owners;
- (3) Hire and discharge or contract with managing agents and other employees, agents, and independent contractors;
- (4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more owners on matters affecting the homeowners' association, but not on behalf of owners involved in disputes that are not the responsibility of the association;
- (5) Make contracts and incur liabilities;
- (6) Regulate the use, maintenance, repair, replacement, and modification of common areas;
- (7) Cause additional improvements to be made as a part of the common areas;
- (8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property;
- (9) Grant easements, leases, licenses, and concessions through or over the common areas and petition for or consent to the vacation of streets and alleys;
- (10) Impose and collect any payments, fees, or charges for the use, rental, or operation of the common areas;
- (11) Impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association;
- (12) Exercise any other powers conferred by the bylaws;
- (13) Exercise all other powers that may be exercised in this state by the same type of corporation as the association; and
- (14) Exercise any other powers necessary and proper for the governance and operation of the association.

[1995 c 283 § 4.]

NOTES:

Speed enforcement: RCW 46.61.419.

APPENDIX R

February 15 2017 3:27 PM

KEVIN STOCK
COUNTY CLERK
NO: 11-2-16364-0

The Honorable Stanley J. Rumbaugh
Department 18

Hearing Date: February 24, 2017

Hearing Time: 9:00 a.m.

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

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,
Plaintiffs,

v.

DAVID LANGE and KAREN LANGE,
husband and wife and the marital community
comprised thereof,

Defendants.

THE COE FAMILY TRUST and Trustee
Michael Coe,
Interveners,

v.

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,

Respondents.

No. 11-2-16364-0

DECLARATION OF WALLACE TIRMAN

I, WALLACE TIRMAN, hereby states and declares, as follows:

1. I am over the age of 18 years, have knowledge of the facts stated herein, and am, therefore, competent to testify as to the matters set forth below.

2. I reside within the Spinnaker Ridge community in Gig Harbor, Washington and have thus been a member of the Spinnaker Ridge Community Association since I

DECLARATION OF WALLACE TIRMAN

Page 1

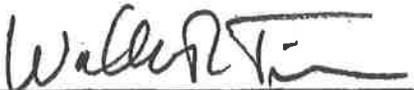
purchased my home in 2012. I have also served on the Association's Board of Trustees since January 2014 and am currently Vice President, a position I have held since May 2014.

3. I am aware that the Guests recorded a declaration of Kay Bickford with the Pierce County Auditor, document #201402030230. I am also aware that the Guests identified the SRCA as both a Grantor and Grantee at the time of recording. The SRCA, however, did not record or participate in the recording of this document. Further, the SRCA did not provide the Guests or anyone else with authority to record the document on the SRCA's behalf or to otherwise list the SRCA as a Grantor or Grantee. Shortly after the Guests recorded this document, the SRCA demanded that the Guests take steps to withdraw the unauthorized recording, but they did not do so.

4. I have recently been made aware that the Guests recorded a document entitled "RAP 8.1(b)(1) & (2) Notices of Stay and Cash Supersedeas Bonds & RCW 6.17.040 Stay of Execution Affidavit" with the Pierce County Auditor, document #201603140586 which recording cover sheet identifies the SRCA as well as Valerie Tirman and me as Grantees. Neither the SRCA nor Valerie or I recorded or otherwise participated in the recording of this document and we did not provide the Guests or anyone else with authority to record the document on our behalf or to otherwise list us as Grantees.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED at Bothell, Washington, this 14 day of February, 2017.


WALLACE TIRMAN

1 **CERTIFICATE OF SERVICE**

2 I, Keeley Engle, declare under penalty of perjury under the laws of the State of Washington
3 that at all times hereinafter mentioned, I am a resident of the State of Washington, over the age of
4 eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

5 On the date below, I caused a copy of the foregoing document to be served on the
6 individuals identified below:

7 via Email and First Class U.S. mail, postage prepaid:

8 Christopher Guest
9 Suzanne Guest
10 6833 Main Sail Lane
11 Gig Harbor, WA 98335
12 Email: emmalg@aol.com
13 *Pro Se Plaintiffs*

14 via Email:

15 Betsy A. Gillaspy, WSBA #21340
16 Patrick McKenna, WSBA #35834
17 Gillaspy & Rhode PLLC
18 821 Kirkland Avenue, Suite 200
19 Kirkland, WA 98033-6311
20 FAX: (425) 462-4995
21 Email: bgillaspy@gillaspyrhode.com
22 pmckenna@gillaspyrhode.com
23 *Counsel for The Coe Family Trust, Michael Coe,
24 Carol Coe, Carol Ann White and John L. White*

25 Timothy J. Farley, WSBA #18737
26 Farley & Dimmock LLC
2012 34th Street
P.O. Box 28
Everett, WA 98206-0028
Fax: (425) 339-1327
Email: tim@tjfarleylaw.com
Counsel for David and Karen Lange

DATED this 15th day of February, 2017, at Seattle, Washington.



Keeley Engle, Legal Assistant

APPENDIX S

February 15 2017 3:27 PM

The Honorable Stanley J. Rumbaugh
Department of
Hearing Date: February 24, 2017
Hearing Time: 9:00 a.m.

KEVIN STOCK
COUNTY CLERK
NO: 11-2-16364-0

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

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,
Plaintiffs,

v.

DAVID LANGE and KAREN LANGE,
husband and wife and the marital community
comprised thereof,

Defendants.

THE COE FAMILY TRUST and Trustee
Michael Coe,
Interveners,

v.

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,

Respondents.

No. 11-2-16364-0

DECLARATION OF JOHN FARRINGTON

I, JOHN FARRINGTON, hereby states and declares, as follows:

1. I am over the age of 18 years, have knowledge of the facts stated herein, and am, therefore, competent to testify as to the matters set forth below.

2. I am currently the President of the Spinnaker Ridge Community Association (SRCA), a Washington nonprofit corporation. I have been a member of the SRCA since my

DECLARATION OF JOHN FARRINGTON

Page 1

1 wife and I purchased our home in this Gig Harbor community in 2004. I have also
2 consistently served since 2005 as a member of the SRCA Board of Trustees.

3 3. I am aware that the Guests recorded a declaration of Kay Bickford with the
4 Pierce County Auditor, document #201402030230. I am also aware that the Guests identified
5 the SRCA as both a Grantor and Grantee at the time of recording. The SRCA, however, did
6 not record or participate in the recording of this document. Further, the SRCA did not
7 provide the Guests or anyone else with authority to record the document on the SRCA's
8 behalf or to otherwise list the SRCA as a Grantor or Grantee. Shortly after the Guests
9 recorded this document, the SRCA demanded that the Guests take steps to withdraw the
10 unauthorized recording, but they did not do so.

11 4. I have also recently been made aware that the Guests recorded a document
12 entitled "RAP 8.1(b)(1) & (2) Notices of Stay and Cash Supersedeas Bonds & RCW
13 6.17.040 Stay of Execution Affidavit" with the Pierce County Auditor, document
14 #201603140586 which recording cover sheet identifies the SRCA as well as my wife and me
15 as Grantees. Neither the SRCA nor my wife, Jean, and I recorded or otherwise participated in
16 the recording of this document. Neither the SRCA nor my wife or I provided the Guests or
17 anyone else with authority to record the document on our behalf or to otherwise list us as
18 Grantees.

19 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
20 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

21 DATED at 8:16 pm, Gig Harbor, Washington, this 14th day of February, 2017.
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John Farrington

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John Farrington

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1 **CERTIFICATE OF SERVICE**

2 I, Keeley Engle, declare under penalty of perjury under the laws of the State of Washington
3 that at all times hereinafter mentioned, I am a resident of the State of Washington, over the age of
4 eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

5 On the date below, I caused a copy of the foregoing document to be served on the
6 individuals identified below:

7 via Email and First Class U.S. mail, postage prepaid:

8 Christopher Guest
9 Suzanne Guest
10 6833 Main Sail Lane
11 Gig Harbor, WA 98335
12 Email: emmalg@aol.com
13 *Pro Se Plaintiffs*

14 via Email:

15 Betsy A. Gillaspy, WSBA #21340
16 Patrick McKenna, WSBA #35834
17 Gillaspy & Rhode PLLC
18 821 Kirkland Avenue, Suite 200
19 Kirkland, WA 98033-6311
20 FAX: (425) 462-4995
21 Email: bgillaspy@gillaspyrhode.com
22 pmckenna@gillaspyrhode.com
23 *Counsel for The Coe Family Trust, Michael Coe,
24 Carol Coe, Carol Ann White and John L. White*

25 Timothy J. Farley, WSBA #18737
26 Farley & Dimmock LLC
2012 34th Street
P.O. Box 28
Everett, WA 98206-0028
Fax: (425) 339-1327
Email: tim@tjfarleylaw.com
Counsel for David and Karen Lange

27 DATED this 15th day of February, 2017, at Seattle, Washington.

28 
Keeley Engle, Legal Assistant

APPENDIX T



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

CHRISTOPHER GUEST,

Cause No: 11-2-16364-0

Plaintiff(s),

ORDER ON MOTION TO VACATE INJUNCTION, ALLOW ADDITIONAL DISCOVERY, AND AFFIRM LIS PENDENS

vs.

DAVID LANGE,

Defendant(s).

The Court, on motion of Plaintiffs Guest, has reviewed Plaintiffs Guests' Motion for Discovery, Motion to Vacate Injunction, and Notice of Updated Guests' Stay and Cash Supersedeas Deposit.

On February 24th, 2017, the Court granted Defendants' Motion to Cancel Lis Pendens filed under eight separate auditor numbers. Notice of Appeal of the Court's February 24th, 2017, order was filed on March 27th, 2017, during the pendency of a Motion for Reconsideration which was filed March 7th, 2017. The Court's order denying reconsideration was entered March 28th, 2017.

On April 4th, 2017, the Plaintiffs Guest filed a, "Notice of Updated Guest Stay and Cash Supersedeas Deposit." On April 10th, 2017, Defendants Lange filed a motion objecting to Notice of Updated Guest Stay and Cash Supersedeas Deposit.

ORDER ON MOTION TO VACATE INJUNCTION,
ALLOW ADDITIONAL DISCOVERY, AND AFFIRM LIS
PENDENS - 1

1 On April 13th, 2017, Plaintiffs Guests filed a Motion to Vacate Injunction and a Motion
2 for Discovery on Remand. The Plaintiffs' motions were supported by the Declaration
3 of Suzanne Guest and the Declaration of Christopher Guest

4 The order under appeal applies only to the action which was involved in the
5 February 24th, 2017, order (Pierce County Cause No. 11-2-16364-0). All other cases
6 related to the lis pendens filed against Defendant Lange's property have been resolved
7 with finality. Consequently, lifting the lis pendens in those actions is appropriate, and
8 the Court's February 24th, 2017, order will be enforced as to all lis pendens except
9 that one which is directly related to Cause 11-2-16364-0, recorded under Pierce
10 County Auditor No. 201301231320.

11 At issue is a mixed question of law and fact relating to interpretation of
12 RCW 4.28.320, as that statute allows for lifting of previously filed lis pendens when the
13 subject action has been "settled, discontinued or abated." RCW 4.28.320 does not
14 contain a definition of those terms. It is clear to the Court that the mandate entered by
15 the Court of Appeals in this case on January 24th, 2017, is now a final order and the
16 case has been "abated," as that term is used in the context of the statute.

17
18 Left unresolved is the question of whether, following issuance and finality of an
19 appellate mandate, the Trial Court's decision to lift a previously entered lis pendens is
20 properly subject to appellate review. If appeal of such an order is proper, does the
21 subsequent appeal leave the order under appeal in conflict with the prohibition in
22 RCW 4.28.320 against lifting lis pendens in cases which have not been "settled,
23 discontinued or abated?"

24
25 ORDER ON MOTION TO VACATE INJUNCTION,
ALLOW ADDITIONAL DISCOVERY, AND AFFIRM LIS
PENDENS - 2

1 County Auditor No. 201301231320, which shall remain pending further action by the
2 Court, and it is further

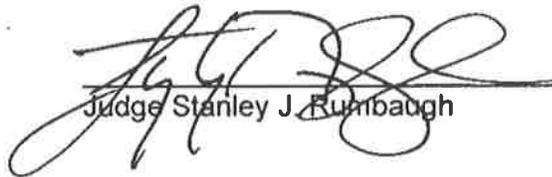
3 ORDERED that Plaintiffs' cash and supersedeas bond in the Court's registry
4 shall remain on deposit until further order of the Court, and it is further

5 ORDERED that Plaintiffs' Motion to Vacate Injunction is DENIED, and it is further

6 ORDERED that Plaintiffs' Motion for Discovery is DENIED, and it is further

7 ORDERED that oral arguments on the currently pending motions will be stricken,
8 as the Court has decided the motion on briefs.

9 DATED this 19th day of April, 2017.

10
11 
12 Judge Stanley J. Rumbaugh

13 cc: Christopher Guest
14 Suzanne Guest
15 Irene Hecht, Attorney for David & Karen Lange
16 Timothy Farley, Attorney for David & Karen Lange



ORDER ON MOTION TO VACATE INJUNCTION,
ALLOW ADDITIONAL DISCOVERY, AND AFFIRM LIS
PENDENS - 4

APPENDIX U

May 01 2017 4:23 PM

KEVIN STOCK
COUNTY CLERK
NO: 11-2-16364-0

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The Honorable Stanley J. Rumbaugh
Department 18
Hearing Date: Friday May 26, 2017
Hearing Time: 9:00 am

**SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF PIERCE**

**CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,**
Plaintiffs,

NO. 11-2-16364-0

vs.

**GUEST JOINT AND COMBINED
CR 59(A) and CR 54(f)(2) MOTION FOR
RECONSIDERATION AND TO VACATE
THE COURT'S SUA SPONTE APRIL 19,
2017 ORDER**

**DAVID LANGE and KAREN LANGE,
husband and wife and the marital community
comprised thereof,**

Defendants,

**THE COE FAMILY TRUST and Trustee
Michael Coe,**

Interveners,

vs.

**CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,**
Respondents.

GUEST JOINT AND COMBINED CR 59(A) and CR 54 (f)(2)
MOTION FOR RECONSIDERATION AND TO VACATE THE
COURT'S SUA SPONTE APRIL 19, 2017 ORDER - 1

Suzanne Guest
Christopher Guest
6833 Main Sail Lane
Gig Harbor, Washington 98335
P (253) 495-1244; F (877) 335-9686

1 Suzanne Guest individually and Christopher individually two separate parties in this
2 action collectively referred to below for convenience and for judicial economy only as the
3 "Guests" or "Guest" file and submit this joint and combined CR 59(a) and CR 54(f)(2) Motion
4 for Reconsideration and to Vacate the Court's null, void, invalid and premature composite April
5 19, 2017 Order. The trial court signed and entered its sua sponte Order seven (7) days before the
6 date that the Guests' answer, response, objection and opposition to the Langes' April 10, 2017
7 Motion objecting to the Guests' April 4, 2017 Notice of Updated Stay and Cash Supersedeas was
8 due and before the alleged date that the Langes' response to the Guests' two (2) filed and noted
9 April 13, 2017 Motions were due after the court rescheduled the pending Motions from the
10 originally noted April 21, 2017 motion docket to the court's April 28, 2017 docket. The court
11 entered its sua sponte Order without the advance 5 day CR 54(f)(2) notice of presentation to the
12 Guests or to the parties to the Guests' prejudice in violation of the Guests' due process rights.
13 The court did not decide the motions on the briefs as stated on the Order on page 4. The briefing
14 was not complete. The Guests file this Motion without any Guest waiver of any kind. The Court
15 also cancelled and struck the two (2) Guest filed, served and noted Motions – and also the Lange
16 filed, served and noted Motion – without any notice to the Guests in disregard of court rules.

19 INTRODUCTION/BACKGROUND/ FACTS AND AUTHORITY

20 I. THE TRIAL COURT RESCHEDULED THE MOTIONS

21 As evidenced by the eight (8) April 14, 2017 "recess" notice documents that were filed
22 in the clerk's records in this action the day after the Guests filed, served and submitted working
23 papers for the two (2) Guest affirmative April 13, 2017 pending Motions noted for hearing along
24 with the Langes' April 10, 2017 Motion noted for April 21, 2017 but rescheduled by the court to
25

1 April 28, 2017 that the Guests' relied upon for briefing response and other deadlines that the
2 court also separately mailed to each Guest (and to the Langes' attorney rescheduling the April
3 21, 2017 motion hearings to the court's April 28, 2017 motion docket) ~~before any Guest answer,~~
4 response, objection or opposition was due or filed to the Lange April 10, 2017 Motion. The court
5 transferred the submitted motion working papers over to the court's April 28, 2017 motion
6 docket when it rescheduled the hearings. When the hearings were rescheduled, the Guests'
7 answer, response, objection and opposition to the Langes' Motion was not due until **seven (7)**
8 **days after** the court entered its April 19, 2017 Order, and therefore none of the Motions were
9 fully briefed when the court entered its April 19, 2017 Order. Therefore, the Motions could not
10 be decided on the "briefs" on April 19, 2017 as there were no *responses, oppositions or*
11 *objections to any of the Motions that were due yet or filed.* Although a party may not always
12 have a due process right to oral argument on a motion, a party does have a due process right to
13 an opportunity, deprived by the court, to present its position before a competent tribunal and
14 given the opportunity to argue its position and its version of the facts and law in writing which
15 includes full briefing, an opportunity not provided here. Washington Handbook on Civil
16 Procedure, Karl B. Tegland and Douglas J. Ende (2015-2016 Edition), Section 63, Hearing and
17 Decision, §§63.1- 63.5; *Hanson v. Shim*, 87 Wash. App. 538, 943 P.2d 322 (Div. I 1997); *State v.*
18 *Bandura*, 85 Wash. App. 87, 931P.2d 174 (Div.2 1997).

21
22 A court's failure to comply with the CR 54(f)(2) 5 day notice of presentment requirement
23 renders the court's entry of judgment and/or order as here void. *See City of Seattle v. Sage*, 11
24 Wash. App. 481, 523 P.2d 942 (Div. 1 1974). The Guests were and are prejudiced by the court's
25 sua sponte actions without the required notice to the Guests as the Guests relied on the
26

1 rescheduled motion dates for the extended briefing deadlines and did not have the opportunity to
2 file a written response, objection and opposition to the Lange Motion within the court's new and
3 rescheduled deadlines and did not have notice of entry of the court's order which was not
4 presented to the Guests in any event with the required 5 days notice of presentment. The Guests
5 only learned about the cancellation of the hearings and entry of an order that was mailed to the
6 Guests and the Langes on April 20, 2017 because Suzanne Guest called the trial court's judicial
7 assistant on April 20, 2017 after noticing that the April 28, 2017 motion hearings had been
8 cancelled and struck on the LINX on-line docket.
9

10 II. THE COURT CANCELLED 8 GUEST RECORDED DOCUMENTS

11 The Guests do not concede that the 8 recorded documents that the court cancelled were
12 all lis pendens documents and , again, file this Motion without any Guest waiver.
13

14 III. THE TRIAL COURT IGNORED THE COURT OF APPEALS 15 FEBRUARY 13, 2017 MANDATE AND REMAND

16 When the court entered its April 19, 2017 Order it not only ignored the Guests'
17 due process rights, it also ignored and disregarded the Court of Appeals February 13, 2017
18 mandate, remand and remand instructions and directions. The trial court had no authority,
19 discretion or option to ignore or to disregard an appellate mandate and remand. *Bank of Am. v.*
20 *Owens*, cited and relied upon by the Guests in their affirmative motions that the court denied.
21 On February 13, 2017, the Court of Appeals remanded the *Guest v. Lange et al.* action to this
22 court with explicit and express instructions and directions regarding the Guest supersedeas on
23 file with the Pierce County Superior Court Clerk and the court's instruction for further
24 proceedings on remand to determine the amount, nature, extent and type of damage and/or loss
25
26

1 that the Langes had incurred as a result of the Guest appeals and lis pendens filing in this jury
2 action. The Guests demanded a jury of twelve (12) persons in this action in June 2012. The
3 court had a duty and an obligation to strictly comply with the February 13, 2017 mandate,
4 remand and the remand directions and instructions. The court did not comply with the Court of
5 Appeals February 13, 2017 mandate, remand and remand instructions and/or directions in
6 violation of the Guests' due process and litigant rights.
7

8 It is clear from the published August 2, 2016 *Guest v. Lange et al.* Lis Pendens opinion
9 that an appeal and the existence of a supersedeas bond or cash supersedeas deposit on file with
10 the superior court prevents an action from being "settled", "discontinued" or "abated". The
11 August 2, 2016 *Guest v. Lange et al.* Lis Pendens opinion, stare decisis for this court, defined
12 what the words "settled", "discontinued" or "abated" meant. It is not "unsettled" what it means
13 for an action to be "abated" under RCW 4.28.320 under the *Guest v. Lange et al.* Lis Pendens
14 appeal mandate and remand.
15

16 **III. THE COURT HAD NO JURISDICTION UNDER RCW 4.28.320**
17 **TO CANCEL THE TWO GUEST v. LANGE et al. LIS PENDENS**
18 **OR ANY OF THE OTHER 6 GUEST RECORDED DOCUMENTS**

19 The Court had no jurisdiction to cancel the two (2) *Guest v. Lange* lis pendens in March
20 2015 under RCW 4.28.320 or in February 2017, or to cancel any of the 8 Guest Pierce County
21 Auditor recorded documents. On April 19, 2017, the court "affirmed" the continued validity of
22 the January 2013 Guest Lis Pendens, but ignored the Guest March 6, 2015 corrected, amended,
23 updated and supplemented Lis Pendens. All 8 recorded documents must be affirmed and in
24 place, not just one. By its terms, RCW 4.28.320 explicitly states and provides that at "any time
25 after an action affecting title to real property has been commenced" (emphasis in underline
26

1 added), "the plaintiff, the defendant...may file with the auditor of each county in which the
2 property is situated a notice of the pendency of the action...". Only "the court in which the said
3 action was commenced" under the circumstances, prerequisites and mandatory pre-conditions
4 identified in RCW 4.28.320 can a superior court order "the notice authorized in this section
5 [RCW 4.28.320]" cancelled. RCW 4.28.320 identifies "the notice" referred to in RCW 4.28.320
6 as "the" notice filed in the action before the court- not in a different action – that was filed with
7 the auditor identifying the "notice of the pendency of the action, containing the names of the
8 parties, the object of the action, and a description of the real property in that county affected
9 thereby".
10

11 The court did not have any subject matter jurisdiction as a threshold matter under RCW
12 4.28.320 as a matter of law to cancel the two (2) filed and recorded *Guest v. Lange et al.* Lis
13 Pendens or any of the other 6 Guest recorded documents on February 24, 2017 or any Guest
14 recorded document as part of its April 19, 2017 Order. As above, and below the April 19, 2017
15 court Order was and is null, void, invalid and ineffective.
16

17 **IV. THE GUESTS CHALLENGED/CHALLENGE THE COURT'S**
18 **SUBJECT MATTER JURISDICTION**

19 Not only did the court not have any subject matter jurisdiction over any Lange
20 counterclaim against the Guests or the non-existent Coe Family Trust intervention in this action
21 as a threshold matter voiding, invalidating and nullifying any and all orders, rulings, decisions
22 and 'judgments' below as previously briefed by the Guests in response, opposition and objection
23 to the Langes' February 2017 Motion, the court did not have any subject matter or any
24 procedural jurisdiction over its February 24, 2017 Order on April 19, 2017 when it entered its
25

1 null and void April 19, 2017 sua sponte Order allegedly "enforcing" its February 24, 2017 Order
2 that had been stayed and superseded over documents and actions that the court also had no
3 subject matter jurisdiction over as a threshold matter and reversing part of its February 24, 2017
4 Order that was already on appeal. April 19, 2017 Order at 2, lines 4-10.

5 The Guests appealed the February 24, 2017 Order on March 27, 2017 and stayed and
6 superseded that Order. The Guest deposit of \$13,000.00 cash supersedeas with the Pierce
7 County Superior Court Clerk has remained on deposit with the superior court in this action from
8 March 2015 and May 2017 forward to this date and was on deposit with the court in March
9 2017. The court entered its sua sponte April 19, 2017 Order in direct violation of the Guests'
10 due process, statutory and litigant rights, and in direct violation of RAP 7.2 (c)(no enforcement
11 of a trial court decision that has been stayed and superseded), (e)(if a trial court decision will
12 change a decision then being reviewed by the appellate court (here the February 24, 2017 Order),
13 the permission of the appellate court must be obtained prior to the formal entry of the trial court
14 decision) and (h)(trial court has authority to action on matters of supersedeas as provided in RAP
15 8.1) and RAP 8.1(g) as well as in direct violation of RCW 4.28.320 and the August 2, 2016
16 published *Guest v. Lange et al.* opinion and the Court of Appeals February 13, 2017 remand to
17 this court.
18
19

20 The Guests filed their notice of appeal on March 27, 2017 and filed an updated Guest
21 Notice of Stay and Cash Supersedeas on April 4, 2017, six days before the Langes filed their
22 April 10, 2017 Motion and fifteen (15) days before the court signed and entered its sua sponte
23 April 19, 2017 Order before the Guests' **April 26, 2017 rescheduled deadline** under the rules of
24 civil procedure for the superior courts and the local Pierce County Superior Court rules to file a
25
26

1 Guest answer, response, objection and opposition to the Lange April 10, 2017 Motion that the
2 court had rescheduled to be heard and entertained by the court on April 28, 2017.

3 The court had no subject matter jurisdiction to enter its sua sponte April 19, 2017 Order
4 under the RAP rules, RCW 4.28.320 or the stare decisis August 2, 2017 *Guest v. Lange et al.*
5 published opinion, among other grounds. The court asserted in its April 19, 2017 Order at 2 that
6 the order “under appeal” applies “only to the action which was involved in the February 24th,
7 2017, order” identifying that action as Pierce County Cause No. 11-2-16-16364-0, yet admitted
8 in doing so that the court had attempted to cancel Guest recorded documents that related to
9 different but ‘related’ actions, which the court then astonishingly and erroneously wrote were
10 actions that had been “resolved with finality”. Order at 2, lines 5-7 (“All other cases related to
11 the lis pendens filed against Defendant Lange’s property have been resolved with finality”).
12 Presumably, the court was referring to the *Spinnaker Ridge Community Association, Inc. v.*
13 *Guest*, Pierce County Superior Court Cause No. 14-2-08865-1 action in its Order, an action that
14 is not under this court’s subject matter jurisdiction, this court’s superior court appellate court
15 jurisdiction or this court’s procedural jurisdiction. The court then erroneously concluded that it
16 was “appropriate” for this court to ‘lift’ lis pendens filed in *other* court actions - “those actions”
17 – on the alleged basis that the *Spinnaker Ridge Community Association v. Guest* action that also
18 involves the Lange deck that the Langes constructed on the Guests’ Lot 5 property and the
19 former deck on the Guests’ Lot 5 property has been “resolved with finality” erroneously stating
20 and ruling by doing so that the other action had been “settled”, “discontinued” and “abated” in
21 the face of the Guests’ *Association v. Guest* pending appeals in that action and the Guests’ lack
22 of subject matter jurisdiction challenges in that action as well, and the Court of Appeals August
23
24
25
26

1 2, 2016 published opinion and February 13, 2017 mandate and remand.

2 In entering its sua sponte Order, the court admitted that it had attempted to cancel lis
3 pendens filings and recordings in other actions that were not before this court and over which
4 this court did not and does not have any subject matter jurisdiction or any procedural jurisdiction
5 over. The court also admitted in its April 19, 2017 sua sponte Order given its recitations and its
6 rulings that it entered the April 19, 2017 Order in direct violation of RAP 7.2 (c) and 7.2(e)
7 nullifying, invalidating and voiding the Order *ab initio*. Although the *Spinnaker Ridge*
8 *Community Association, Inc. v. Guest* Complaint was barred, precluded and estopped under
9 RCW 58.17 et. seq. and RCW 36.70C et seq. as a matter of law as a threshold matter and this
10 court and the *Spinnaker Ridge Association* superior court did not have any subject matter
11 jurisdiction over any Lange counterclaim or any Association Complaint under the Washington
12 State constitution, separation of powers, the Association Club's charter and its Articles of
13 Incorporation or federal law and therefor it is final in that context that the Association
14 Complaint was void, null, invalid and legally ineffective *ab initio*, the Guests' *Spinnaker Ridge*
15 counterclaim, third party complaints and damage claims are not yet final.
16

17
18 The court did not cite to any law, statute or case authority to support its April 19, 2017
19 Order 'ruling' that this court had any authority or any jurisdiction including, but not limited to,
20 any subject matter jurisdiction or any RCW 4.28.320 jurisdiction to 'lift' any lis pendens filed
21 and recorded with the Pierce County Auditor in this case in the face of the Court of Appeals
22 remand, in a different and/or another court action, or to "enforce" the court's already stayed and
23 superseded February 24, 2017 Order "as to all lis pendens" including the alleged lis pendens
24 documents that the court identified and admitted in its April 19, 2017 Order were documents
25
26

1 filed in and related to other actions not before this court “except that one which is directly related
2 to Cause No. 11-2-16364-0, recorded under Pierce County Auditor No. 201301231320.” There
3 were two (2) *Guest v. Lange et al.* Lis Pendens filed and recorded with the Pierce County
4 Auditor “directly related” to Cause No. 11-2-16364-0, the Lis Pendens recorded on January 23,
5 2013 and the corrected, amended, updated and supplemental Lis Pendens filed and recorded on
6 March 6, 2015 that the Court erroneously cancelled on March 27, 2015 which were the subject
7 matter of the August 2, 2016 published *Guest v. Lange et al.* opinion, mandate and remand to
8 this court for further trial court proceedings. The March 6, 2015 recorded Lis Pendens is filed of
9 record in the clerk record of this action and is directly related to the *Guest v. Lange et al.* Cause
10 No. 11-2-16364-0 action.
11

12 The Langes and their attorneys (and the non-existent Coe Family Trust and Michael Coe
13 and their attorneys) knew at all times before, after, during this litigation and throughout any and
14 all appeals and on remand that the Langes had no right to be on any part of SRD Lot 5 or to
15 construct, use, or be on any deck, structure or any “fixture” or any “improvement” on any part of
16 SRD Lot 5 without the “friendly neighbor understanding” of the Coes and subsequently the
17 Guests as the title fee simple owners of Lot 5 and that there was no valid or enforceable Lot 4
18 easement of any kind on any part of Lot 5 including, but not limited to, the forged 1987 recorded
19 ESM, Inc. “Nu Dawn Homes, Inc.” easement document or any Association Club “encroachment
20 easement”. The Langes and the Coes knew at all times that the Association did not have title to
21 and did not own the Spinnaker Ridge Development open space, common and recreational facility
22 recorded final plat Tract property, that the individual residential Lot owners including the Langes
23 and the Coes, and subsequently Margaret Coe as the survivor and then the Guests and other
24
25
26

1 individual residential Lot owners each owned their individual Lots "according to" the SRD
2 recorded final plat and an undivided and indivisible interest and title to the SRD final plat open
3 space, common and recreational facility and other Tracts along with any and all improvements
4 and "fixtures" thereon. The Langes and the Coes and the Association Club and its Board knew
5 at all times that the Association was a social and recreational club subject to federal law at all
6 times. The Langes and the Coes knew at all times that the Association and its Board and its
7 members could not administer or enforce any architectural covenants and/or any architectural
8 CC&Rs under the Association's charter and Articles of Incorporation or under federal law which
9 the incorporator of the Association elected would be the law that would apply to the
10 Association, its Board and its members at all times when he incorporated the Association in
11 December 1985 which remains the law that applies to the Association. The Association was
12 not incorporated as a homeowner's association and does not meet the mandatory RCW
13 64.38.010(11) requirement and elements to qualify as a homeowner's association.

14
15
16 **VII. THE COURT OF APPEALS DEFINED WHAT THE RCW 4.28.320**
17 **WORD "ABATED" MEANS**

18 The Court of Appeals defined in its August 2, 2016 published opinion what the meaning
19 of the word "abated" is in RCW 4.28.320. The meaning of the RCW 4.28.320 word "abated" is
20 not subject to the trial court's interpretation as this court states that it is on Order page 2, lines
21 11-17. By definition, this action is not "abated" under RCW 4.28.320 as defined by the Court of
22 Appeals in its August 2, 2016 published opinion, stare decisis for this court, the Langes and the
23 Trust related parties.

24 a result of any Guest appeal or the filing of any Guest lis pendens in this action.

1 **VIII. THE LANGES BOOTSTRAPED THE ENTIRE CASE**

2 The Langes and the Trust related parties knew at all times that the Langes had no right to
3 ~~be on or to construct, use or enjoy a deck or any structure on any part of Lot 5 at any time~~
4 without the fee simple title owner of Lot 5's permission and continuing "friendly neighbor
5 understanding". The Langes and the Trust related parties knew at all times that any deck or any
6 other structure that any Lot 4 owner constructed on any part of Lot 5 was a Lot 5 "fixture" and a
7 Lot 5 "improvement" that by accession became the property of the owner of Lot 5 and that
8 would be conveyed to any subsequent owner and purchaser of Lot 5. See May 1, 2017 Guest
9 Declarations in support of this Motion.
10

11 At Order page 3, the court stated that the Guests' appeal of the court's null and void
12 February 24, 2017 Order appeared to be a "bootstrap process". Black's Law Dictionary defines
13 the verb "bootstrap" to mean in pertinent part "1. To succeed despite sparse resources. 2. To
14 reach an unsupported conclusion from questionable premises, esp. to use two legal presumptions,
15 one based on the other." Black's at 219 (10th ed. 2014). Black's Law Dictionary defines
16 "bootstrap doctrine", in pertinent part, as a doctrine that "cannot give effectiveness to a judgment
17 by a court that had no subject-matter jurisdiction", for example "parties cannot, by appearing
18 before a state court, "bootstrap" that court into having jurisdiction over a federal matter". *Id.*
19

20 The Langes and the Trust related parties and their attorneys also knew at all times that
21 any Lot 4 or any Lot 4 owner deck constructed on any part of Lot 5 was the property of the Lot 5
22 title fee simple owners as a voluntary Lot 4 owner constructed Lot 5 "fixture" and a Lot 5
23 improvement that belonged to the fee simple title owners of Lot 5, currently the Guests. Any
24 former Lot 4 owner constructed deck on any part of Lot 5 by necessity was a Lot 5 "fixture"
25
26

1 attached to the Lot 5 real property that conveyed to any subsequent Lot 5 purchaser as part of the
2 Lot 5 real property “fixtures” and “improvements”. Under well-established Washington property
3 ~~law and well-established Washington real property purchase and sale law, when the Guests~~
4 purchased Lot 5 in November 2004, the Guests purchased the entirety of Lot 5 and any and all
5 “fixtures” and improvements existing on and thereafter constructed on any part of Lot 5. The
6 Langes admitted and stipulated in writing below prior to the 2014 *Guest v. Lange* trial and also at
7 the 2014 *Guest v. Lange* trial that the Guests’ true and authentic title and deed to Lot 5 was the
8 title and deed that the Guests signed on November 1, 2004 as part of the Coe-Guest closing
9 documents “according to” the recorded SRD final plat recorded as Pierce County Auditor
10 Document No. 8601310176 at 10:20:00 am by the City of Gig Harbor alone, a Guest Lot 5 title
11 and deed document that the court admitted as the Guests’ true and authentic Lot 5 title and deed
12 that the Court admitted as Court Trial Exhibit 28, binding the Langes in this and in any other
13 action. Black’s Law Dictionary defines the word “fixtures”, in pertinent part, to mean: “Personal
14 property that is attached to land or a building and that is regarded as an irremovable part of the
15 real property”, for example, if bricks “are purposely stacked to form a wall, a fixture results. But
16 if the bricks are merely stacked for convenience until used for some purpose, they do not form a
17 fixture”. Black’s at 755 (10th ed. 2014); May 1, 2017 Suzanne Guest Declaration. The Langes
18 deliberately constructed a deck on part of Lot 5 in April 2011 in a location on Lot 5 where the
19 Langes knew that the Guests intended to construct a deck and intended that the Lange
20 constructed deck on Lot 5 would be a “fixture” as evidenced by the fact that the Langes
21 excavated part of the Lot 5 real property to anchor cement blocks on Lot 5 to support the Lange
22 Lot 5 deck risers, girders and deck planks that became “attachments” to the Lot 5 land
23
24
25
26

1 buttressing up against the siding of the Guests' Lot 5 6833 Main Sail Lane. The Langes
2 constructed their new deck on part of Lot 5 in April 2011 as a Lot 5 real property "fixture" at
3 their risk.

4 **IX. THE LANGES ASKED FOR AN INJUNCTION, THE COURT GRANTED IT ,**

5 The Langes specifically requested an injunction in their November 13, 2012
6 Counterclaim Prayer for Relief and in their Motion for Presentment of Judgment. *See* S. Guest
7 Declaration and the pleadings and the filings below, and the court granted it. In doing so, the
8 court did not comply with the mandatory RCW 7.40 et seq., CR 65, RCW 58.17 et seq., RCW
9 58.17.180, 58.17.215 and/or RCW 36.70C pre-requisite and pre-condition process and
10 procedures to do so as a condition for doing so, and did not have subject matter jurisdiction to do
11 so. "Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise
12 of judicial power". *Bour v. Johnson*, 80 Wn.App. 643, 646, 910 P.2d 548, 550 (Ct. App. Div. II
13 1996). A judgment is void if entered without subject matter jurisdiction. *Id.* A judgment,
14 including the injunction in the September 19, 2014 Lange 'Judgment' can be vacated if there was
15 no subject matter jurisdiction even though a mandate has been issued. *Id.* at 647, and 550.

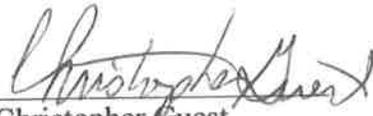
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18 **X. REQUEST FOR RELIEF**

19 Suzanne Guest requests that this court reconsider its April 19, 2017 Order and enter an
20 Order vacating the April 19, 2014 Order, the September 19, 2014 Lange Judgment and the
21 injunction included in that 'judgment', any and all orders, rulings, decisions and/or 'judgments'
22 in the Langes' and the Trust related parties' favor (there was no money "judgment" entered in
23 the Trust's favor) and grant the Guests' motion for remand discovery including, but not limited
24 to, an order compelling the Langes to present themselves for remand depositions in accordance
25
26

1 with the August 2, 2016 *Guest v. Lange et al.* published Opinion, mandate and remand, the Court
2 of Appeals not reaching this court's failure to grant the Guests' March 2015 motion for
3 discovery during the pendency of the underlying appeal as it did not appear that the court ruled
4 or entered an Order on that issue, and an order reinstating the Lange April 10, 2017 Motion and
5 rescheduling it on the court's motion docket to enable the Guests to file a response, objection
6 and opposition to that Motion and a motion to strike that Motion, and reinstating the two
7 affirmative Guest motions and rescheduling them on the court's motion docket for a hearing after
8 briefing.
9

10 DATED this 1st day of May, 2017.

11
12 
13 Suzanne Guest

14 
15 Christopher Guest

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

<p>Irene Hecht Keller Rohrback L.L.P. 1201 Third Avenue, Suite 3200 Seattle, Washington 98101-3052</p>	<p><input checked="" type="checkbox"/> LINX e-serve <input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile</p>
<p>Timothy Farley Farley Law 2012 34th Street P.O. Box 28 Everett, Washington 98206-0028</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> LINX e-serve</p>
<p>Patrick McKenna Betsy Gillaspy Gillaspy & Rhode PLLC 821 Kirkland Ave. Suite 200 Kirkland, WA 98033-6311</p>	<p>LINX e-serve <input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile</p>

DATED this 1st day of May, 2017 at Phoenix, Arizona.



Suzanne Guest

APPENDIX V

September 29 2014 4:30 PM

KEVIN STOCK
COUNTY CLERK
NO: 11-2-16364-0

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The Honorable Stanley J. Rumbaugh

SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,
Plaintiffs,

v.

DAVID LANGE and KAREN LANGE,
husband and wife, and the marital community
comprised thereof,
Defendants.

NO. 11-2-16364-0
DECLARATON OF SUZANNE GUEST
IN SUPPORT OF GUEST CR59
LANGE MOTION

THE COE FAMILY TRUST and Trustee
Michael Coe,
Interveners,

v.

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,
Respondents

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,
Third-Party Plaintiffs,

v.

MICHAEL COE and CAROL COE et al.
Third-Party Defendants.

1 **DECLARATION**

2 I, Suzanne Guest, declare, certify and testify upon my oath under the laws of perjury of
3 the State of Washington as follows:

4 1. I am a party to the *Guest v Lange et al* action.

5 2. I am over the age of eighteen, competent to testify, declare and certify and have
6 personal knowledge of the following statement and facts which are true and correct.
7

8 3. All facts asserted in the Guest CR59 Lange Motion are true and correct.

9 4. Attached hereto as Exhibit 1 is a true and correct copy of David Gordon's September
10 23, 2011 email to the Nold law firm referred to in the Guest CR 59 Lange Motion.

11 5. Attached hereto as Exhibit 2 is a true and correct copy of the December 2012 New
12 York Times nationally published Opinion article entitled "Those Crazy Indemnity Forms We All
13 Sign" that I produced and provided to the Langes and to Lange counsel in May 2014 prior to trial
14 and that the Langes and Lange counsel stipulated was authentic.
15

16
17 EXECUTED on this 29th day of September, 2014 at Gig Harbor, Washington.

18
19 
20 Suzanne Guest
21 6833 Main Sail Lane
22 Gig Harbor, Washington 98835
23 (253) 495-1244
24
25
26

Jodi Graham

From: Dave Gordon [dave@davegordonlaw.com]
Sent: Friday, September 23, 2011 3:32 PM
To: 'Jodi Graham'
Subject: RE: David and Karen Lange

Jodi:

Please let Brian Muchinsky know that I have forwarded your email, along with his letter and his summons and complaint to the Langes (who will be very disappointed that your clients have taken this step). Please advise him that I have asked Langes to authorize me to accept service and I will let you/him know promptly what they will allow me. May I assume that a settlement acceptable to the Guests would have us go back to their version of the settlement they allege with the Langes?

David Gordon
 7525 Pioneer Way, Suite 101
 Gig Harbor, WA 98335
 (253) 858-6100
 (253) 858-9747
 dave@davegordonlaw.com

Note: This e-mail transmission and any documents accompanying it may contain confidential information which is protected by the attorney-client privilege or other grounds for confidentiality or nondisclosure. If you are not the intended recipient of the transmitted information, you are hereby notified that disclosing, copying, distributing, or taking action in reliance on the contents of this information is strictly prohibited. If you have received this transmission in error, please notify the sender and then delete the information.

From: Jodi Graham [mailto:jgraham@noldmuchlaw.com]
Sent: Thursday, September 22, 2011 4:29 PM
To: dave@davegordonlaw.com
Cc: 'Brian Muchinsky'
Subject: David and Karen Lange

See attached letter from Brian Muchinsky

NOLD ♦ MUCHINSKY

JODI GRAHAM

Paralegal

10500 NE 8th Street, Suite 930

Bellevue, WA 98004

Phone: 425-289-5555

Fax: 425-289-6666

www.noldmuchlaw.com

* Note email and website address change

2/26/2013

EXH. 1

Those Crazy Indemnity Forms We All Sign

IN order for one of my boys to play indoor lacrosse this winter, I was asked to sign a release indemnifying the sports dome and a long list of its business associates, volunteers, advertisers and (presumably) their family pets against any possible claim filed on behalf of my son.

One-sided legal releases are part of modern life, but these ubiquitous documents often contain little-noticed indemnification clauses — legal provisos requiring consumers to protect a business or some other party from damage claims and legal fees, sometimes even those arising from their own negligence.

Basically, they make every one of us an insurer. Indemnification clauses have been a pernicious feature of freelance writing contracts for years. As a result, threadbare scribes ludicrously agree to protect giant publishing conglomerates not only against judgments, but against the ruinous cost of defending even the most far-fetched legal claims.

Clauses like this often are tucked into the fine print nobody reads when clicking around the Internet or otherwise doing daily business.

Try a little Googling on this score. If you used a money-back guarantee available for a while on Iams cat food in Germany, you agreed to indemnify Procter & Gamble (fiscal 2012 sales: \$83.7 billion). The official terms of use for Skype, the popular phone and messaging service, also include an indemnification clause. So does the eBay user agreement. "If anyone brings a claim against us related to your actions, content or information on Facebook," says that site's Statement of Rights and Responsibilities, "you will indemnify and hold us harmless from and against all damages, losses, and expenses of any kind (including reasonable legal fees and costs) related to such claim."

Demands for indemnification don't just come from businesses. One parent (who asked not to be named) had to sign a form indemnifying the Girl Scouts of Northern California so that her daughter could take part in a ropes course high off the ground. The mother

might not want to bother seeking help from the California Department of Consumer Affairs, since its Web site requires users to indemnify the agency (and the usual list of hangers-on) "against all claims and expenses, including attorneys' fees."

Of course, the parent didn't have to sign, but she also didn't want her daughter left out.

I've faced the same choice — give up my rights or keep my kids home. In order for my son to attend a summer program at the Simon's Rock campus of Bard College, for example, I agreed to release the institution, its trustees and (as far as I can tell) all their Facebook friends from any liability and to "fully and forever agree to indemnify" them in case of any claims arising from my son's stay.

So I'm a regular Lloyd's of London. Yet regulation of my role as an all-

purpose insurer is scandalously lax. I haven't heard a peep from my state's insurance regulator, for instance; evidently this official is blithely uninterested in just how much capital I've set aside — hang on while I go through the sofa cushions for change — to cover the vast potential liabilities lurking on our family's balance sheet.

IT'S bad enough that everywhere I go, someone wants me to promise not to sue. I was once asked to sign a release as a houseguest in a private home! And to some extent, I'm sympathetic; it's stressful and expensive to live in such a litigious society. But it's ridiculous to demand that every Tom, Dick and Mary assume a liability that can only properly rest with those who bear responsibility. And it's a perversion of the tort system, which is supposed to put the onus on the parties

most able to make sure things are done right. Leaving aside the adequacy of my loss reserves, are these indemnifications legally enforceable? I depends how far they go and which state you're in.

Margaret Jane Radin, a law professor at the University of Michigan, says they're intimidating at the least, and overcoming such a provision could itself require litigation. In Indiana, for exam-

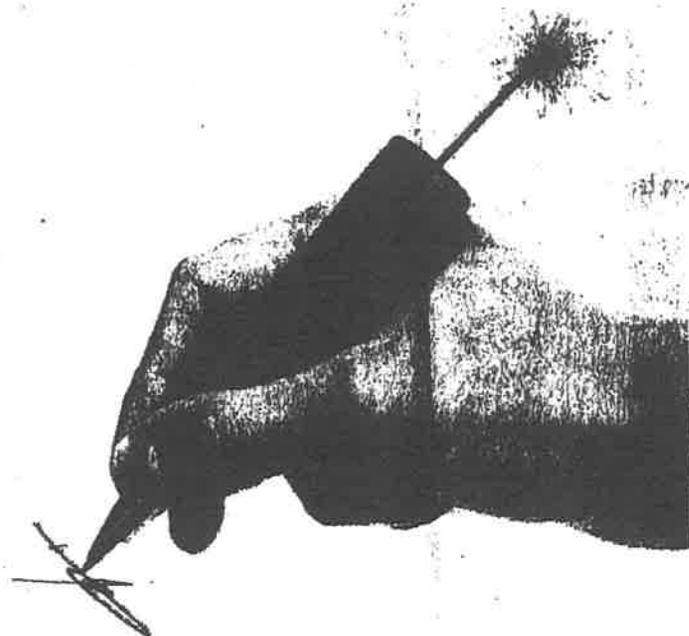
Without thinking, consumers relieve businesses of their responsibilities.

ple, a trial court held that a gas station operator and his helper had to pay to defend an oil company for its own negligence in injuring them with gasoline, a ruling based in part on an indemnification clause. The state Supreme Court found that provision unconscionable, but the plaintiff had to go pretty far just to get his day in court.

At least that was a business agreement; the balance of power is even more asymmetric when consumers are involved. In a new book titled "Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law," Ms. Radin argues that an onslaught of one-sided fine print is deleting people's legal rights and making a mockery of the freedom of contract. In an interview, she observed that some other countries bar such casual rights erasures, and said the Federal Trade Commission could do likewise here.

It should. Meanwhile, people have to start objecting to these unfair agreements, which often relieve businesses and institutions of their most basic responsibilities, pressing individuals to act as their insurers. For years I've crossed out indemnity provisions in freelance contracts, and I did likewise for lacrosse. But often that's not an option, and Ms. Radin warns that while deleting and initialing might help, the other side could contend that it never agreed to the changes. If things came to blows in court, I might still get stuck with the legal bill for both sides.

OPINION
BY DANIEL AKST
The author of "We Have Met the Enemy: Self-Control in an Age of Excess."



JAVIER JAÉN BENAVIDES

EXIT 2

"All the News That's Fit to Print"

The New York Times

National Edition

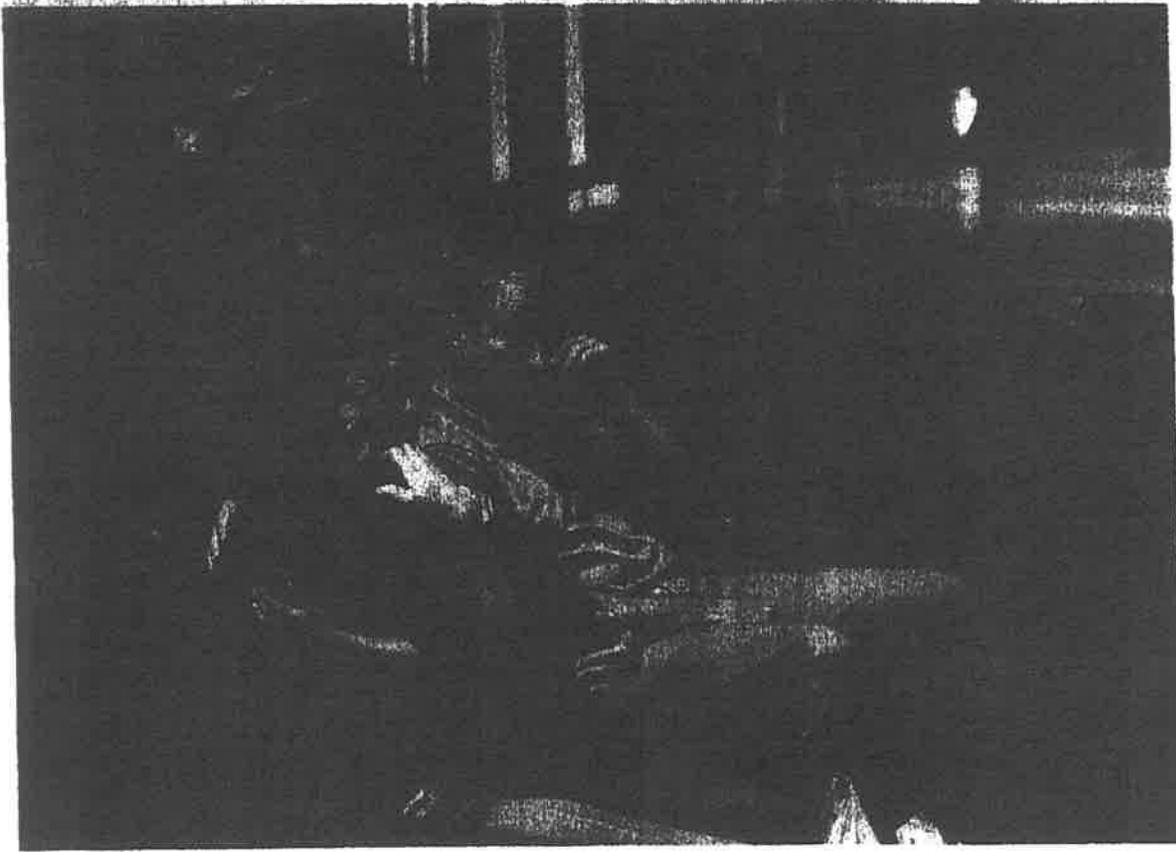
Arizona: Mostly cloudy northeast. Partly sunny elsewhere. Highs in the 50s northeast to the 70s southwest. Mostly clear tonight. Colder. Details, Sports Sunday, Page 12.

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Morsi Extends A Compromise To Opposition

Rescinds Some Control Ahead of Vote

By DAVID D. KIRKPATRICK

CAIRO — Struggling to quell protests and violence that have threatened to derail a vote on an Islamist-backed draft constitution, President Mohamed Morsi moved Saturday to appease his opponents with a package of concessions just hours after state media reported that he was moving toward imposing a form of martial law to secure the streets and allow the vote.

Mr. Morsi did not budge on a critical demand of the opposition: that he postpone a referendum set for Saturday to approve the new constitution. His Islamist supporters say the charter will lay the foundation for a new democracy and a return to stability. But liberal groups have faulted it for inadequate protection of individual rights and loopholes that could enable Muslim religious au-

SYRIA REBELS TIED TO AL QAEDA PLAY KEY ROLE IN WAR

A CHALLENGE FOR U.S.

Jihadis Bring Weapons and Support in Drive to Unseat Assad

This article is by Tim Arango, Anne Barnard and Hwalda Saad.

BAAGHDAD — The lone Syrian rebel group with an explicit stamp of approval from Al Qaeda has become one of the uprising's most effective fighting forces, posing a stark challenge to the United States and other countries that want to support the rebels but not Islamic extremists.

If money flows to the group, the Nusra Front, from like-minded donors abroad, its fighters, a small minority of the rebels, have the boldness and skill to storm fortified positions and lead other battalions to capture military

APPENDIX W

September 30 2014 8:30 AM

KEVIN STOCK
COUNTY CLERK
NO: 11-2-16364-0

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The Honorable Stanley J. Rumbaugh

SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,

Plaintiffs,

v.

DAVID LANGE and KAREN LANGE,
husband and wife, and the marital community
comprised thereof,

Defendants.

NO. 11-2-16364-0

**GUEST CR 59 MOTION
FOR RECONSIDERATION,
AMENDMENT AND/OR TO VACATE
THE FINAL JUDGMENT, THE JURY
VERDICT, FOR A NEW GUEST
TRIAL, VACATE THE SUMMARY
JUDGMENTS IN THE LANGES'
FAVOR AND ANY OTHER LANGE
ORDER, AND FOR THE ISSUANCE
OF A MANDATORY PERMANENT
GUEST REMOVAL AND
EJECTMENT INJUNCTION**

THE COE FAMILY TRUST and Trustee
Michael Coe,

Interveners,

v.

CHRISTOPHER GUEST and SUZANNE
GUEST, husband and wife,

Respondents.

CP 4087

GUEST CR 59 MOTION FOR RECONSIDERATION - 1



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1
2
3 CHRISTOPHER GUEST and SUZANNE
4 GUEST, husband and wife,

5 Third-Party Plaintiffs,

6 v.

7 MICHAEL COE and CAROL COE,
8 individually and as husband and wife and the
9 marital community thereof, and CAROL ANN
WHITE and JOHN L. WHITE, individually
and as wife and husband and the marital
community thereof,

10 Third-Party Defendants.

11 **I. RELIEF REQUESTED**

12
13 Christopher Guest and Suzanne Guest (the “Guests”) are CR 59 “Final Judgment”
14 aggrieved parties.

15 The Guests previously challenged and briefed and preserved the Langes’ lack of
16 standing in this action renewed here by incorporation including, but not limited to, in the Guests’
17 December 2012 Lange Counterclaim Answer, affirmative defenses and prayer for relief, in the
18 Guests’ proposed Second Amended Complaint, in the Guests’ March/April/May 2013 motion for
19 summary judgment filings and motion hearing arguments which the Guests also renew here by
20 incorporation, and also in the Guests’ September 17, 2014 Opposition and Objection to the entry
21 of any “Final Judgment” in the Langes’ favor.
22

23 Here, the Guests move pursuant to CR 59 and also pursuant to the full indemnity contract
24 that the Langes adopted and assumed at trial for reconsideration, amendment, alteration,
25
26

1 modification and to vacate any and all prior orders, decisions, verdicts and/or judgments in this
2 action in the Langes' favor.

3 The Guests are filing a separate 'Trust' CR 59 Motion. Both motions will be noted for
4 hearing on the same day.

5 The Guests' Lot 5 title is not subject to any Lange or Lot 4 owner deck or patio easement
6 on any part of Lot 5, that no Lange or Lot 4 owner deck easement was conveyed to the Langes
7 by deed at any time as required by law if any Lange deck easement on Lot 5 could exist, and that
8 the governing Association and Spinnaker Ridge Development documents including the 1985
9 Association Articles of Incorporation and the January 31, 1986 recorded Spinnaker Ridge
10 Development final plat prohibited the grant of any SR Lot deck or other easement on, over,
11 under and/or "upon" any other SR Lot including prohibiting any Lot 4 deck or other easement on
12 Lot 5 as admitted by the Langes at trial and as evidenced by the admitted *Guest v. Lange* trial
13 exhibits.
14

15 Also, the 1987 ESM recorded purported Lange and/or Lot 4 owner 'patio or deck
16 easement' did not comply with Washington conveyance of real property or an interest in real
17 property, deed, final plat, and/or acknowledgment laws and statutes, or the Gig Harbor
18 Municipal Code in effect in 1985 – 1987, Ordinance 91.
19

20 In addition, the Guests' Lot 5 RCW 7.28.070 title proved at trial cannot be altered or
21 modified by the Court, by the Langes or by any other person, entity or individual.
22

23 Further, the Guests have an absolute right and entitlement under Washington's well-
24 established traditional "property rule" favoring a titled landowner over any encroacher to a
25 mandatory Guest permanent removal and ejection injunction permanently removing the Lange
26

GUEST CR 59 MOTION FOR RECONSIDERATION - 3



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W-3

1 deck and all Lange personal property from Lot 5 and ejecting the Langes from Lot 5 under the
2 Washington Supreme Court's 1968-1969 *Arnold* and 2010 *Proctor v. Huntington* opinions as
3 more fully outlined and addressed below.

4 Moreover, the Court erroneously instructed the jury that the Langes had a right to rebuild
5 a Lange deck on Lot 5 and to use said deck "as a matter of law" under the 1987 ESM recorded
6 alleged 'patio or deck easement' materially affecting, interfering with, destroying and damaging
7 the Guests' substantial property, contract, statutory and constitutional rights including the
8 Guests' constitutional contract rights.

9
10 At trial, the Langes abandoned any SR Declaration and/or CC&Rs as any basis for any
11 Lange deck on Lot 5 and any Lange reliance of any SR Declaration or CC&R, which including
12 the Langes' abandonment of any reliance on any SR CC&R "deck encroachment easement."
13 The Langes admitted at trial and notified the jury, the court and the Guests by doing so that any
14 SR 'deck encroachment easements' CC&Rs had 'nothing to do' with the Lange deck on Lot 5.
15 Instead, the Langes fatally stipulated, admitted and notified the jury, the court and the Guests at
16 trial that the Langes were relying entirely, completely and solely on the 1987 ESM recorded
17 'patio or deck easement' for any Lange deck to be on any part of Lot 5 or for the Langes to be on
18 any part of Lot 5.

19
20 Further, the Langes adopted, admitted and assumed the 1987 recorded ESM indemnity
21 contract, duties and obligations to the Guests as defined by the document itself which prohibited
22 the Langes from making any claims of filing against actions or suits against the Guests and
23 required that the Langes provide the Guests with full indemnity, payment, reimbursement and/or
24 compensation for and/or against any claims, suits, damages, losses, harm, costs, fees and/or
25
26



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CP 4005

1 expenses with limit or limitation, without any limiting time period, and without exemption or
2 exclusion arising out of and/or related to the use and/or utilization of the 1987 ESM recorded
3 'patio or deck easement' document or any Lot 4 owner or Lange deck or patio on Lot 5 or use of
4 any such deck or patio.

5 To the extent necessary, the Guests also request a new trial pursuant to CR 59 due to
6 material prejudicial errors at the July 2014 *Guest v. Lange* trial including, but not limited to, the
7 court's failure to give the Guests' WPI proposed "breach of the duty of good faith and fair
8 dealing instruction" to the jury and the court's objected to Jury Instruction that the Langes had a
9 "right" to rebuild a Lange deck on Lot 5 and to use said deck under the 1987 recorded ESM
10 'patio or deck easement' "as a matter of law".
11

12 The Guests request that the Court vacate all orders and/or judgments in the Langes'
13 favor. Further, the Guests request that the Court issue a mandatory Guest and Lot 5 permanent
14 removal and ejection injunction against the Langes and/or any Lot 4 owner permanently
15 removing any Lange deck and personal property from Lot 5 and permanently ejecting the Langes
16 from Lot 5.
17

18 The Guests also request an order from this Court directing the Langes to fully indemnify
19 the Guests for all past, present and/or future damage, loss, harm, cost, expense and/or fees
20 incurred and/or sustained - or to be incurred or sustained - by the Guests as the result of, related
21 to and/or arising out of any claims, lawsuits, actions, damages, losses, harm, costs, expenses
22 and/or fees related in any way to the use and/or utilization by any person, entity or individual of
23 the 1987 ESM recorded 'patio or deck easement' document, any Lot 4 owner or Lange deck or
24
25
26

CP4086

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1 patio on any part of Lot 5 or any use of any Lange or Lot 4 owner deck or patio on Lot 5 at any
2 time.

3 II. SUMMARY OF ARGUMENT

4 Washington's well-established "property rule" favoring titled landowners against
5 encroachers requires that an encroacher on the land of another – here the Langes - prove by clear
6 and convincing evidence that they have met and satisfied five (5) test factors *before* a
7 Washington court may substitute a "liability rule" permitting a court to balance equities for the
8 traditional Washington absolute "property rule" that ejects an encroacher and removes an
9 encroaching structure on the titled owner's request by mandatory injunction.
10

11 In Washington, a titled landowner has an absolute right and entitlement to remove an
12 encroacher and an encroaching structure from that landowner's property if an encroacher cannot
13 meet and satisfy *each* of the five factors by clear and convincing evidence. *Proctor v.*
14 *Washington*, 169 Wash. 2d 491, 238 P.3d 1117 (2010) and *Arnold v. Melani*, 75 Wash. 2d 143,
15 437 P.2d 908, 449 P.2d 800, 450 P.2d 815 (1968-69)¹.
16

17 If an encroacher, here the Langes, does not and/or cannot meet and satisfy all five test
18 factors, the court's equitable jurisdiction cannot be reached and the court has no discretion to
19 refuse to issue a requested mandatory removal and ejectment injunction.
20

21 As recently as September 19, 2014, the Court excused the Langes' admitted
22 encroachment on the Guests' Lot 5 property at the Lange "Final Judgment" presentment hearing
23 stating that the jury heard at trial that the SR CC&Rs – that the Langes abandoned and
24 disavowed at trial and the Guests challenged as invalid permitted the Lange encroachment.
25 Although the CC&Rs did not permit the encroachment and the Langes abandoned the CC&R
26

¹ These opinions are *stare decisis* for this Court and for the Langes.

CP4097

W-6

1 alleged 'encroachment easement' which would not apply in this instance in any event, the fact
2 remains that the Langes admitted at trial that there was an encroachment.

3 Under *Proctor* and *Arnold*, the Langes have the burden of proof – if they are even
4 permitted to challenge the Guests' claims which the Guests deny that they are – to prove all five
5 (5) identified Supreme Court test factors *before* any court can use any equity or substitute a
6 "liability rule" for the traditional Washington "property rule" that favors the Guests as the titled
7 owners of SR Lot 5.
8

9 The mandatory five (5) test factors that the *Langes* must meet and satisfy by clear and
10 convincing proof under *Arnold* and *Proctor* post-verdict and post-judgment to avoid the
11 immediate issuance of a mandatory removal and ejection permanent injunction in the Guests'
12 favor are:

- 13 1. The Langes as encroacher must prove that the Langes did not
14 simply take a calculated risk, act in bad faith, *or* negligently,
15 willfully or indifferently locate the encroaching Lange deck
16 structure on Lot 5 by clear and convincing evidence; *and also*
- 17 2. The Langes must prove by clear and convincing evidence
18 that the damage to the landowner – here the Guests - was slight
19 and that the benefit of the removal of their deck from Lot
20 5 - and themselves - from Lot 5 would be equally small; *and also*
- 21 3. The Langes must also prove that there was ample room for a
22 Guest structure suitable for the area notwithstanding that there
23 is a Lange deck on Lot 5, and also prove that there is no real limitation
24 on the Guests' or any Lot 5 owner future use of Lot 5 property by clear
25 and convincing evidence; *and also*
- 26 4. The Langes must prove that it is impractical to move the
Lange deck on Lot 5 as built and Lange personal property
by clear and convincing evidence as well; *and further*
5. The Langes must prove that there is an enormous disparity
in the resulting hardships between the Guests and the Langes –

1 by clear and convincing evidence if even reached as the Langes
2 must prove all four (4) prior test factors first before reaching
3 Lange test factor 5.

4 In the absence of “clear and convincing” evidence proving each of the five mandatory
5 factors, a court cannot substitute a “liability rule” for Washington’s traditional “property rule” to
6 provide an encroacher – even a good faith encroacher – the “exceptional relief” of refusing to
7 enforce the Guests’ private citizen property (and contract) rights for “the benefit of another”
8 private citizen, here the Langes. See *Arnold* at 152, 449 P.2d 800, 450 P.2d 815, cited by the 5 to
9 4 *Proctor* dissent, *Proctor* at 1124.

10
11 The Court’s “equitable jurisdiction” cannot even be reached in this instance or in this
12 action with regard to the Langes and the Lange deck, including any equitable jurisdiction with
13 regard to the Lange quiet title counterclaim which it is undisputed the jury did not reach and was
14 not part of the jury’s verdict. It is undisputed that the Langes’ trespass counterclaim against the
15 Guest was dismissed with prejudice.

16
17 In order to reach any court quiet title equity jurisdiction, the Langes would have had to
18 overcome their lack of clean hands, overcome their adoption and assumption of full indemnity to
19 the Guests at trial and the submission and admission of the 1987 ESM ‘patio or deck easement’
20 indemnity document at trial, and meet and satisfy all five (5) mandatory *Arnold* and *Proctor* test
21 factors by clear and convincing evidence which the Langes cannot do.

22 **III. STATEMENT OF RELEVANT FACTS AND PROCEDURE**

23 As titled landowners, the most the Guests had to show at trial or otherwise by the
24 preponderance of the evidence is only one or more of the following, which the Guests have done:

25 (1) the Guests owned SR Lot 5;
26

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1 (2) the Guests had title to Lot 5;

2 (3) the Langes did not own or have any title to Lot 5; and

3 (4) the Langes were encroaching on Lot 5 and the Guests objected to the encroachment.

4 See Trial Exhibit 28 (the Guests' Lot 5 title), and Trial Exhibit 20 (the January 31, 1986
5 recorded Spinnaker Ridge Development final plat).

6
7 The Guests preserved their right to seek a permanent mandatory injunction from this
8 Court in all versions of every Guest Complaint and also in the Guests' 2012 Answer, Affirmative
9 Defenses and Prayers for Relief in response to the Lange Counterclaims – an answer, defenses
10 and prayers for relief that this court has never reached.

11 The Guests seek that permanent mandatory injunction from this Court today preserving
12 all Guest rights. The Lange trial admissions, the admitted trial evidence and exhibits and the
13 Lange trial stipulations as well as the court's post-trial rulings support the Guests' right and
14 entitlement to the requested mandatory Guest permanent removal and ejection injunctions.

15
16 As outlined above, the Guests do not have any mandatory injunction burden of proof.
17 Only the Langes have a mandatory injunction burden of proof, and that burden is a high one.
18 The injunction is a mandatory injunction because the court does not have the discretion under
19 any circumstance to refuse to issue the injunction on request if the Langes in this instance cannot
20 meet and satisfy all five *Arnold* and *Proctor* test factors and even then refusal and denial is not
21 certain. The Guests will address each factor below.

22
23 **1. THE FIRST TEST FACTOR:
24 LANGES FAIL:**

25 **The Langes took a "calculated risk", acted in bad faith
26 or negligently, willfully or indifferently located the encroaching
Lange structure on Lot 5.**

CP 4090

W-9

1 The Langes cannot meet or satisfy the first *Proctor* and *Arnold* test factor by clear and
2 convincing evidence to even reach the second test factor or the equity jurisdiction of the court.
3

4 The Langes did take a “calculated risk” that the Guests would not sue to remove the
5 Lange deck on Lot 5. The Langes used their position as SR Trustees, Board members and SR
6 Officers and corralled other SR Board buddies to support them – and defeat the Guests - for their
7 own personal benefit and advantage as part of a plan to steal part of the Guests’ Lot 5 land.

8 The Langes did act in bad faith to and towards the Guests as established by Lange
9 documents that the court would not admit at trial including Karen Lange’s April 2011 email to
10 her adult son Mark Zoske that the Langes did not “give a damn” about the Guests or the Guests’
11 loss of part of their Lot 5 land, the Guests’ rights or what the Langes had done to the Guests, the
12 Langes just loved their new deck so much. Clear evidence of bad Lange animus and Lange bad
13 faith, as well as willful, indifferent and at a minimum negligent behavior and conduct locating
14 the encroaching – objected to - Lange deck on Lot 5. See September 29, 2014 *Declaration of*
15 *Suzanne Guest* in support of this Motion.
16

17 The Langes admitted at trial that the Langes knew in 1993 when the Langes purchased
18 SR Lot 4 that there was no Lot 4 deck or any other easement on any part of Lot 5. The Langes
19 also admitted at trial that no deck or any other easement on Lot 5 was conveyed to the Langes by
20 deed. At trial, David Lange admitted that the Langes’ deck on Lot 5 had ‘nothing’ to do with
21 any easement on any part of Lot 5.
22

23 At trial, the Langes also admitted at trial that any SR CC&R ‘deck encroachment
24 easement’ had ‘nothing to do with this case’ instructing and directing the jury, the court and the
25 Guests to disregard the SR CC&Rs and any SR governing documents, including the SR
26

CP 409)

W-10

1 Association Articles of Incorporation and the January 31, 1986 recorded SR Development final
2 plat, that the only thing that mattered was the 1987 ESM recorded alleged 'patio or deck
3 easement' and nothing else.

4 The evidence at trial demonstrated that the Langes knew **before** the Langes built their
5 new deck on Lot 5 in April 2011 that the Guests objected to any deviation from the Guest and
6 ACC March 14, 2011 approved Lange deck plans, clearly taking a calculated if not a knowing
7 risk that the Langes were wrong and that the Guests would not sue. The undisputed evidence at
8 trial was that the Guests hired an attorney to serve a "cease and desist" notice on the Langes on
9 April 8, 2011 to stop all Lange deck construction on any part of Lot 5 but the Langes ignored
10 that cease and desist notice and continued to build their new deck on Lot 5 in the Guests'
11 absence.
12

13 When the Guests sued the Langes in September 2011 by serving a *Guest v. Lange*
14 complaint on the Langes through Lange counsel David Gordon, the Langes responded through
15 David Lange that they were "disappointed" that the Guests had sued them. The Langes inquired
16 through Lange counsel on September 23, 2011 after David Gordon had been in contact with the
17 Langes could Lange counsel "assume that a settlement acceptable to the Guests would have us
18 go back to their version of the **settlement**" they Guests alleged they had with the Langes in the
19 Complaint (emphasis in bold added). See May 6, 2013 Guest Declaration, ¶¶ 30 -34, and
20 attached Dec. exhibit 5; and September 29, 2014 *Guest Declaration*.
21
22

23 Further, the Langes admitted at trial that the Langes knew before they built the Lange
24 2011 new deck on Lot 5 that they had to obtain a Lot 4 survey before construction but did not do
25 so. Also, the Langes admitted at trial that Karen Lange had raised the issue of Lot 5 "privacy"
26

1 with the Guests and that there were Guest “privacy” discussions between the parties before the
2 Langes obtained the Guests’ approval of the Langes new deck plans in March 2011.

3 The Guests testified at trial and below that the Langes notified the Guests in September
4 2011 within a week of the Guests moving into 6833 Main Sail Lane, Lot 5 that the Langes and
5 the Lange deck was “encroaching” on the Guests’ Lot 5 land and property approximately 5 feet
6 wide and 30 feet long down the length the Guests’ home on the west side of Lot 5 but not to
7 worry, the Langes would remove the deck in Spring 2011 when they tore down their deck to
8 build a new one and would not put it back on Lot 5.

9
10 The Langes admitted at trial that Nu Dawn Homes Limited Partnership and SeaFirst
11 Mortgage Corporation were the joint fee simple titled owners of the Spinnaker Ridge
12 Development real property and Lot 4 and Lot 5. “Nu Dawn Homes Incorporated” was not the
13 owner of Lot 5. The Langes admitted at trial that there was no Lot 4 deck or any other easement
14 on any part of Lot 5. The Langes did not challenge or dispute that the Guests’ title to Lot 5 was
15 not subject to any Lot 4 owner patio or deck easements on Lot 5 at trial.

16
17 In addition, the Langes admitted at trial that David Lange knew what the word “vacated”
18 meant when he wrote the words “vacated” easement on the graph paper new deck drawing that
19 David Lange had prepared, but that he ‘regretted’ he had used that word. The Langes admitted
20 at trial that the Langes had presented the same Lange deck drawings and plans to the ACC on
21 March 12, 2011 and March 14, 2011 that the Guests had seen and had approved, and that the
22 Langes had asked the ACC to approve the same plans which the ACC did. David Lange also
23 admitted at trial that the ACC was composed of multiple members and not one member yet he
24
25
26

1 only spoke to one member, the ACC Chair, and that the Langes did not return to the ACC as
2 required to notify the ACC – and the Guests – that the Langes’ deck plans had changed.

3 The Guests have no burden to show that the Langes took a calculated risk in 2011 and at
4 all times thereafter with regard to their deck, or that the Langes were negligent (not reached at
5 trial as the Court would not allow the Langes’ negligence to reach the jury for decision), willful
6 or indifferent. Again, it is the *Langes’* burden to prove the negative by clear and convincing
7 evidence – that they did not take a calculated risk, that they did not act in bad faith, or that they
8 were not negligent, indifferent or willful a burden they cannot meet or satisfy under the
9 undisputed facts and Lange trial and other admissions.
10

11 Having failed to meet and satisfy test factor one, the second test factor is not reached and
12 the Guest requested mandatory injunction must issue.

13
14 **2. SECOND LANGE TEST FACTOR:
15 THE LANGES FAIL**

16 **The Langes must prove by clear and convincing evidence that
17 the damage to the Guests was and is ‘slight’, and that the benefit
18 to the Guests of removal and ejection would be ‘equally slight’.**

19 If reached, the Langes cannot prove by clear and convincing evidence that the Lange
20 deck, personal property and presence on Lot 5 damage to the Guests was and is slight, or that
21 removal of the deck and personal property and ejection of the Langes from Lot 5 would be
22 equally slight. Again, it is the Langes’ burden under *Arnold* and *Proctor* to prove by clear and
23 convincing evidence this test factor which the Langes cannot do not only under the trial evidence
24 but also the underlying facts and circumstances. In March 2011, David Lange told the ACC that
25
26

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1 he would personally stop the Guests from building the Lot 5 deck that the Guests' intended to
2 build on their own land, and the Guests that he would stop them.

3 It is undisputed that the Guests have paid over \$40,000.00 in out of pocket in attorneys'
4 fees, litigation and Lange deck related costs and expenses still increasing, that it was painful to
5 the Guests, that the Guests had altered their daily living because of the Lange deck on Lot 5 and
6 the Langes' use of that deck and presence on Lot 5 and that Suzanne Guest felt like a prisoner as
7 a result. Real property expert appraiser Edward Greer testified at that the "loss of value", "loss
8 of privacy" and "loss of use" resulting from the Lange deck on Lot 5 and encroachment was over
9 \$25,000.00. The Guests had intangible damages. Dennis Moore testified that the Guests spent
10 over \$3,700.00 because of water damage to the Guests' Lot 5 home on the west side where the
11 Lange deck was which was probably caused by the Langes bubbler and watering system under
12 the Langes' deck and on the Guests' Lot 5 land.

13
14
15 Guests had a duty and obligation to "give" real property and land to the Langes that the
16 Guests had purchased under Washington real property law. The Langes cannot do that.

17 The Langes cannot meet the second *Arnold* and *Proctor* test factor.

18 Having failed to meet – and being unable to meet - the second *Arnold* and *Proctor* test
19 factor, the Langes have failed and cannot proceed to the third *Arnold* and *Proctor* test factor.

20 The damage continues. The Langes to date have stopped the Guests from completing
21 their Lot 5 deck and have prevented the Guest from full use and enjoyment of their Lot 5 land,
22 preventing the Guests from enjoying the Lot 5 Puget Sound, Commencement Bay and Calvos
23 Passage water view that the Guests purchased in 2004 appropriating it for themselves. *See* April
24
25
26

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W-14

1 8, 2013 Kaye Bickford Declaration with attached exhibits previously filed herein and prior Guest
2 Declarations.

3 The Langes did not provide any evidence at trial or otherwise that removal of the Langes'
4 deck from Lot 5 would not benefit the Guests. It was evident from the Guests' trial testimony
5 that removal of the Langes and the Langes' deck from Lot 5 would result in great benefit to the
6 Guests.
7

8 The Langes only have themselves to blame for the situation that the Langes face today.

9 At trial, the Langes admitted that they are the Guests' deck and 'easement' indemnitors
10 adopting and assuming the 1987 ESM recorded indemnity contract and indemnity duties and
11 obligations to the Guests defined by the plain, clear and unambiguous words in that indemnity
12 document. That indemnity contract, by its own words, requires that the Langes refrain from
13 making any claims against the Guests for filing any action or lawsuit against the Guests or seek
14 any money, relief, remedy, judgment and/or recovery against the Guests. That indemnity
15 contract, and those Lange indemnity duties and obligations are:
16

- 17 (1) perpetual;
- 18 (2) without limit or limitation,
19 not limited or restricted in any way by dollar amount,
20 scope, nature, type of indemnity (i.e. removal of the Lange deck is included)
21 or time period;
- 22 (3) without exclusion;
- 23 (4) without exemption;
- 24 (5) without condition or parameter other than as related to and/or arising out
25 of the construction and/or use of a patio or deck on part of Lot 5
26 and/or the use and/or utilization of the patio or deck 'easement';

and

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1 (6) with no reservation of any Lange or Lot 4 owner right, ability, power or
2 opportunity to challenge, dispute, litigate, appeal and/or deny any Guest
3 Lange indemnity claim and/or cause of action or to fail to pay, reimburse,
4 indemnify or compensate the Guests for any Guest indemnity claims, damages
fees, costs, expenses and/or loss.

5 The Langes cannot meet test factor two under the evidence and facts and therefore cannot
6 proceed to test factor three.

7 **3. THIRD TEST FACTOR:**
8 **LANGES FAIL**

9 **The Langes must prove by clear and convincing evidence**
10 **that there is room for a Guest structure suitable for the area**
11 **where the Lange deck sits on Lot 5, and that the Lange deck**
12 **and the Langes' presence on Lot 5 does not limit the Guests'**
13 **use of Lot 5 in any way or any future use of Lot 5.**

14 As above, the Langes cannot meet or satisfy test factor three under the facts and
15 evidence. It is the Langes' sole burden to prove by clear and convincing evidence that the
16 Langes' deck on Lot 5 and/or the Langes' presence on Lot 5 does not impede or impair the
17 Guests ability to locate a suitable structure on that area of Lot 5 or that the Lange deck on Lot 5
18 does not limit the Guests' use, enjoyment and possession of their Lot 5 land or limit the future
19 use of Lot 5 in the future to avoid the issuance of a mandatory removal and ejection injunction.

20 The undisputed evidence is that the Langes have impaired and impeded the Guests' use
21 of the entirety of Lot 5, have interfered with the Guests' ability to enjoy the Lot 5 water view that
22 the Guests' purchased in 2004 and that the Langes have prevented the Guests from completing
23 the Guests' Lot 5 deck on Lot 5, with identifiable limit on the Guests' and any other future use of
24 the entirety of Lot 5.
25
26

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1 Having failed to meet test factor three, the Langes cannot proceed to test factor four or
2 avoid issuance of a mandatory permanent removal and ejection injunction.

3 **4. FOURTH TEST FACTOR:**
4 **LANGES FAIL**

5 **The Langes would have to prove by clear and convincing admissible evidence**
6 **that it was not practical to remove the Lange deck and personal property**
7 **from Lot 5 or for the Langes not to be on Lot 5.**

8 The Langes cannot meet or satisfy test factor four and therefore cannot proceed to the last
9 factor or avoid the issuance of a mandatory permanent injunction removing the Lange deck and
10 personal property from Lot 5 and ejecting the Langes from Lot 5.

11 The Langes' deck installer, Jerry Bannister, testified by telephone at trial.

12 Jerry Bannister testified consistently with his 2013 *Guest v. Lange* deposition which was
13 published at trial and is of record in this case, along with the original David Lange deposition
14 transcript and the two volumes of Karen Lange's deposition transcript also of record.

15 Jerry Bannister testified in 2013 and at trial that he is a licensed Washington contractor
16 specializing in deck construction. He testified that it would take no more than 1 to 2 days and
17 approximately \$1,200 to completely remove the Lange deck from Lot 5 in a safe and complete
18 manner and reconfigure the Lange deck to be entirely and solely on Lot 4 in a completely safe
19 manner. It was not a big deal. Mr. Bannister testified at trial that he had reconfigured decks
20 before.

21 Removing the Lange deck and Lange personal property from Lot 5 is quick, easy,
22 practical and inexpensive.

23 The Langes cannot meet or satisfy test factor four.
24
25
26

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1 agreement and contract enforceable against themselves. The Langes have no one but themselves
2 to blame for the indemnity situation that the Langes face today. The terms of that Lange
3 assumed indemnity are outlined and governed by the plain, clear and unambiguous words in the
4 1987 recorded ESM document, indemnity terms, duties and obligations that the Guests cautioned
5 the Langes about in January 2011 as evidenced by Guest's trial testimony.

6
7 The Langes knew that an indemnity contract was an insurance contract when the Langes
8 invited error at the *Guest v. Lange* trial and persisted in the position that the 1987 ESM recorded
9 'patio or deck easement' document with its indemnity contract was a valid document. The
10 Langes knew that the 1987 ESM recorded document was not valid before trial. The Langes and
11 Lange counsel knew before trial – and at trial – that “Nu Dawn Homes Incorporated” did not
12 own SR Lot 5 and that Nu Dawn Homes Incorporation was not the Spinnaker Ridge developer.
13 In fact, the Langes repeatedly admitted at trial that Nu Dawn Homes Inc. did not own Lot 5, Nu
14 Dawn Homes Limited Partnership and SeaFirst Mortgage Corporation did. The Langes also
15 admitted at trial that the Langes knew in 1993 before they purchased Lot 4 that no Lot 4 deck or
16 any other easement existed on any part of Lot 5 existed, and that no Lot 4, Lot 4 owner or any
17 Lange deck easement on any part of Lot 5 was ever conveyed to the Langes by deed. *See* David
18 Lange April 5, 2013 published deposition transcript in the record herein, and Lange admissions
19 at trial.
20
21

22 Yet the Langes nonetheless voluntarily adopted and assumed the 1987 ESM indemnity
23 contract at trial and admitted at trial that they had the duty and the obligation to indemnify the
24 Guests for any use and/or utilization of any Lange deck, any Lange deck alleged easement or the
25 1987 ESM recorded document according to its terms, words and provisions.
26

CP 4101

W-20

1 In April/May 2013, Judge Culpepper ruled that any and all of his orders and/or judgments
2 were subject to revision, modification and vacation at any time, not only prior to trial, during
3 trial but also after trial and of course after judgment by discovery of additional facts or law. In

4 May 2013, Judge Culpepper ruled that if the easement was not an easement, it was not an
5 easement notwithstanding that the 1987 ESM document had the word easement on it and
6 notwithstanding his own rulings. See September 29, 20-14 Declaration of Suzanne Guest and
7 prior Guest filings in this action including the Guests Notice of Lange April 2013 partial
8 summary judgment admissions.
9

10 David Lange admitted at trial that the word "exclusive" did not exist in the 1987 ESM
11 recorded alleged Lot 5 'deck easement' purportedly granted to Lot 4 owners. There were no
12 words in that 'easement' document that any alleged Lot 5 easement 'ran with the land'. There
13 were no words in that 1987 document that bound any future Lot 5 owners, successors or assigns.
14 An easement "in gross" to a person and not on the land itself does not run with the land and is
15 revocable by a subsequent owner as here. The Guests revoked any permission that the Langes
16 had to build any deck on any part of Lot 5, to be on any part of Lot 5 or to use any deck on any
17 part of Lot 5. The Langes are encroachers.
18

19 The Langes invited error at trial, are bound by that invited error and must accept the
20 consequences of that error – the jury's verdict was based on false facts and false law and must be
21 undone and vacated leaving only the Langes' admissions and assumption of full indemnity to the
22 Guests.
23

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1 The jury's verdict was not supported by the evidence. At trial, David Lange correctly
2 admitted to the jury, to the court and to the Guests in open court – as he had in April 2013 - that
3 the Lange deck on Lot 5 had 'nothing to do' with any easement.

4 The Langes repeatedly admitted at trial that there was no Lot 4 easement on any part of
5 Lot 5, repeatedly admitting that the January 31, 1986 recorded Spinnaker Ridge Development
6 final plat disclosed and revealed that there was no Lot 4 easement of any kind on any part of Lot
7 5, and that the Spinnaker Ridge Developer and the two fee simple title owners of the Spinnaker
8 Ridge Development real property and all SR Lots were (1) Nu Dawn Homes Limited Partnership
9 and SeaFirst Mortgage Corporation, and no other, i.e. *not* Nu Dawn Homes Incorporated or Inc.
10 See also RCW 58.17.165 and *Halverson v. City of Bellevue*, 41 Wn. App. 457, 704 P.2d 1232. 4

11 By Washington law, every subdivision final plat filed of record must contain a certificate
12 giving the full and correct description of the lands divided identifying all the owners of the real
13 property who have given free consent to the division with any dedication, as here, signed and
14 acknowledged before a notary as a deed "by all parties having any ownership interest in the lands
15 subdivided and recorded as part of the final plat". RCW 58.17.165 and Gig Harbor Municipal
16 Code (GHMC) in effect from 1966 through 1996, 5.0 through 15.0 attached to *Declaration of*
17 *Suzanne Guest* in support of the Guest CR 59 Trust Motion.

18 As evidenced by Trial Exhibit 20 admitted at trial, Nu Dawn Homes Inc. identified as the
19 owner of Lot 5 in the incomplete and invalid 1987 ESM 'deck easement' did not own SR Lot 5,
20 Nu Dawn Homes Limited Partnership owned SR Lot 5 a separate legal entity. The platting
21 statute requires the consent of and the identification of *all* owners of the divided real property on
22 the final plat, with all easements and all property lines of all residential lots, along with the
23 }
24 }
25 }
26 }

GUEST CR 59 MOTION FOR RECONSIDERATION - 22



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1 location, dimension and purpose of any easement, to prevent future title disputes. *Halverson* at
2 460.

3 The legislative bodies have the sole authority to approve final plats and to adopt or
4 amend any platting ordinances, not the courts. Any decision approving a final plat is reviewable
5 by a superior court by a “writ of review” but only if an application to review the approval of a
6 final plat and the identity of the real property owners on the plat is made to the court within 30
7 days of a city’s decision to approve the final plat which did not occur here. Any “writ to
8 review” the Spinnaker Ridge final plat would have had to have been filed by February 1986
9 more than two decades ago.

11 Respectfully, this Court had and has no authority to alter the identity of the owners of SR
12 Lot 5 and the Spinnaker Ridge Development real property by instructing the jury in 2014 twenty
13 eight (28) years after approval and recording of the SR final plat that the 1987 ESM recorded but
14 defective Lot 5 ‘deck easement’ gave the Langes any “right” to build a deck on any part of Lot 5
15 or to use any deck on any part of Lot 5 under Washington law. *See Halverson* at 461.

17 The Langes’ indemnity duties and obligations to the Guests are not limited to the
18 payment of money. Indemnity, as in this case and instance, also requires whatever it takes to
19 compensate for and/or remediate the damage and loss. In this instance, remediation and
20 compensation not only paying the Guests money it also take the form of immediate and
21 permanent removal of the Lange deck and any Lange personal property from Lot 5 and the
22 permanent ejection of the Langes from Lot 5.

24 The Langes indemnity duties and obligations to the Guests are permanent and perpetual.
25 They cannot be changed. The Court cannot add or insert any words into the 1987 indemnity
26

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1 contract that the Langes voluntarily adopted at trial. There is no ambiguity in the 1987
2 indemnity words and language. Without ambiguity, no extrinsic evidence if any can be
3 considered.

4 With full Guest indemnity, the Langes cannot obtain any relief, remedy, money or
5 judgment against or from the Guests. With fully indemnity, the Langes cannot sue the Guests or
6 file any claims against the Guests. With full indemnity, the Langes must indemnify and pay the
7 Guests for any claims, suits, causes of action, orders, decisions, acts, omissions, verdicts and/or
8 judgments brought against, entered, and/or obtained regarding the Guests by any person, entity
9 or individual.

10
11 Without waiver of the Langes' lack of standing and therefore the court's lack of
12 jurisdiction over any Lange challenge, dispute, denial or request for any relief, remedy, order or
13 judgment in this case, even if the Langes had the threshold right, ability, power or opportunity to
14 defense or assert any claims in this case the Langes could still not meet and satisfy the threshold
15 required five *Arnold* and *Proctor v. Huntington* factors by clear and convincing evidence to
16 permit the court to even substitute a "liability rule" for the Washington traditional absolute
17 "property rule" that entitles the Guests to a permanent mandatory injunction from this court
18 compelling the immediate removal of the Lange deck from Lot 5 and all Lange personal property
19 and permanently ejecting the Langes from Lot 5 at the Langes' cost and expense.

20
21
22 Given that the Langes cannot meet the *Arnold* and *Proctor* factors, the court's equity
23 jurisdiction is not reached and the court has no discretion: the mandatory injunctions requested
24 by the Guests must issue as a matter of law and a matter of right.



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1 A trial court cannot grant the “exceptional relief” in an “exceptional case” which this is
2 not by refusing to enforce a private citizen’s property right for the benefit of another private
3 citizen without “clear and convincing” evidence that all five *Arnold* and *Proctor* requirements
4 are met. The protection of private property rights – as here - is a “sacred right” that exists in a
5 free society and in Washington State. *Arnold* at 152, *Proctor*, dissent at ¶25, 1124.

6
7 The ability to use a “liability rule” in the place of the traditional absolute “property rule”
8 is a narrow exception to the rule that property rights are enforced in Washington State. An
9 encroacher, here the Langes, must prove each of the five *Arnold* requirements by clear and
10 convincing evidence. A few inches is a “slight” loss. The loss not only of a 5 foot wide x 30
11 foot long strip of Lot 5 land with a Puget Sound water view – and the Langes blocking the
12 Guests from finishing the Guests’ Lot 5 deck - is not a “slight loss”. *Proctor* ¶29. Webster’s
13 Third New International Dictionary 2142 (2002) defines “slight” as “small of its kind or in
14 amount: scanty, meager” and “something (as an amount, quantity, or matter) that is slight or
15 insignificant”.
16

17 VII. CONCLUSION

18 The Guests respectfully request that the Court reconsider its orders and judgments in the
19 Langes’ favor, vacate those orders and the jury’s verdict and/or order a new Guest damages trial,
20 and issue an immediate mandatory injunction permanently removing the Lange deck and any
21 Lange personal property from Lot 5, enjoining and prohibiting any other Lot 4 owner from
22 constructing any deck or any patio on any part of Lot 5 and permanently ejecting the Langes
23
24
25
26

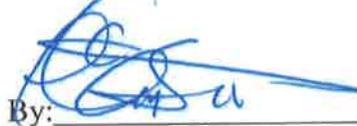
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1 from Lot 5 and enjoining and/or prohibiting any other Lot 4 owner from being on Lot 5 or using
2 any deck or patio on Lot 5.

3 DATED this 29 day of September, 2014.

4 EISENHOWER CARLSON, PLLC

5 
6 By: _____

7 L. Clay Selby, WSBA # 26049
8 Stuart C. Morgan, WSBA # 26368
9 Attorneys for Christopher and Suzanne Guest

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

John Burleigh Burleigh Law, PLLC 3202 Harborview Dr. Gig Harbor, WA 98335-2125	<input checked="" type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile
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DATED this 29th day of September 2014 at Tacoma, Washington.


 Amy Jean Shackelford, PLS
 Legal Assistant to Stuart C. Morgan

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June 28, 2018 - 4:56 PM

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