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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 33159-8-III

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

MARK and JENNIFER HANNA, husband and wife,

Appellants

vs.

ALLAN AND GINA MARGITAN, husband and wife; and HAROLD L. and PATRICIA CROWSTON, husband and wife; DAN R. BOND and JANE DOE BOND, husband and wife; DAN M. BOND and JANE DOE BOND, husband and wife; RYKEN LIVING TRUST and Trustees CARL and CAROLE RYKEN; STEVE and SHANNON MOSER, husband and wife; and AVISTA CORPORATION, INLAND POWER AND LIGHT CO.,

Respondents.

BRIEF OF RESPONDENTS CROWSTON, BOND, AND MOSER

EWING ANDERSON, P.S.

By: _____
DAVID E. EASH, WSBA 6684
Attorney for Respondents Crowston, Bond, and Moser

522 W. Riverside Avenue, Suite 800
Spokane, WA 99201-0519
(509) 838-4261

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I. INTRODUCTION

Respondents Harold L. and Patricia Crowston, husband and wife; Dan R. Bond and Jane Doe Bond, aka Mary Ann Bond, husband and wife; Dan M. Bond and Jane Doe Bond, husband and wife; and Steve and Shannon Moser, husband and wife, acting by their attorney, David E. Eash of Ewing Anderson P.S., file this brief in response to the brief filed by the Appellants, Mark Hanna and Jennifer Hanna (collectively "Hannas"). For the purpose of the brief, these respondents will be identified as the "Moser Parties."

Each of the Moser Parties owns real property adjacent to or near the property which comprises Short Plat 1227-00. From decades prior to the approval of Short Plat 1227-00 in 2000, the property consisting of Short Plat 1227-00 was subject to privately granted and recorded easements for ingress, egress, and utilities for the benefit of the property owned by the Moser Parties. In this respect the interests and legal positions of the Moser Parties in this case are essentially identical to Respondent Rykens. The Moser Parties adopt by reference in their entirety the positions set forth in the Brief submitted by the Ryken Living Trust and Trustees Carl Ryken and Carole Ryken. Specifically, The Moser Parties submit that their

previously recorded and privately granted easements were not extinguished by the approval of Short Plat 1227-00, and that LUPA has no application to privately granted easements. The trial court properly granted the summary judgment motion of the Moser Parties (and those of other Respondents), holding that the approval of the short plat did not extinguish the privately granted easements.

II. ISSUES

Whether the trial court properly granted summary judgment holding that the previously recorded privately granted easements were not extinguished by the adoption of the short plat, and that LUPA has any application to such easements.

III. STATEMENT OF THE CASE

The Moser Parties adopt by reference the Statement of the Case set forth in the Brief of Respondents Rykens, which accurately reflects the procedural history of the case and accurately states the real issues in this case.

Additional pertinent facts are undisputed. That is, each of the Moser Parties owns waterfront lots to the south of Short Plat 1227-00. (CP 661-675, CP 639-645) Each of the waterfront lots owned by the Moser Parties

has privately granted easements of record for utilities and easements for ingress and egress over the existing road passing through the short-platted property which predate Short Plat 1227-00. (CP 661-675, CP 639-645) Throughout the years, various easements of record were granted over the property for the benefit of the property now owned by the Moser Parties, including that certain easement granted in quit claim deed wherein Rowland J. Bond and Marion G. Bond, husband and wife, are grantors, and Dan R. Bond is grantee, recorded October 22, 1971, under Spokane County Auditors File No. 582440C. (CP 639-645) A Grant of Mutual Easement Agreement was recorded August 18, 1995, under Recording No. 9508180129 of Spokane County that confirmed prior earlier easements of record for the benefit of the properties owned by the Moser Parties. (CP 661-675). The switchback road over the property that is now Short Plat 1227-00 to the waterfront lots owned by the Moser Parties is easily identifiable on the ground because it has been used for ingress and egress continuously for decades, and also because the existing road was clearly marked on the preliminary short plat map of Short Plat 1227-00. (CP 661-675). Due to the topography in the area, the switchback road to the waterfront lots owned by the Moser Parties has always been and

continues to be the only practical ingress and egress route for land access to these properties. (CP 661-675, CP 639-645) The Moser Parties have each been continuously using the existing road for ingress and egress from the 1980s or before without challenge, and their use has continued to the present without challenge following approval of Short Plat 1227-00. (CP 661-675, CP 639-645)

At the time the short plat was approved, no mention was made of the existing privately granted easements, and the short plat decision gave no indication that the existing easements were waived, relinquished, or otherwise affected. (CP 364-372) .

IV. ARGUMENT

The Moser Parties support and adopt the arguments of the other Respondents, and in particular those of Respondents Rykens. The legal and factual circumstances of the Moser Parties and the Rykens parties are almost identical. Both Rykens and the Moser Parties own property benefited by previously recorded private easements across the property which later became Short Plat 1227-00. The findings of fact, conclusions, and decision of Spokane County and the short plat itself express nothing to

suggest that the private easements were extinguished or waived in the short plat approval process.

Briefly summarized:

1. Easements are rights to use property whether they are granted privately, come into play through prescriptive use or as a matter of necessity, or whether they are dedicated through the grant by the owner for a public or private purpose.

2. Easements may be appurtenant for the benefit of specific lands and "become part of the realty." Easements appurtenant are irrevocable and pass with the land from owner to owner.

3. Termination of easements is disfavored, and privately granted easement may be revoked only with consent of the parties.

4. The private grant of an easement is not a "dedicated" easement within a short plat approval process (RCW 58.17), and therefore is simply not a land use decision as that term is defined in LUPA, RCW 36.70C.020.

5. The private grant of an easement is not a land use decision within a short plat approval process (RCW 58.17), and is therefore not subject to a 21-day deadline for appeal under LUPA.

6. There is nothing in the short plat approval statute (RCW 58.17) that requires a final short plat to depict privately granted easements.

The privately granted easements of record here are clearly easements appurtenant for the benefit of property owned by the Moser Parties and Rykens. In assessing the interplay of privately granted easements of record and LUPA, it is useful to recognize that such easements "*become part of the realty*" Clippinger v. Birge, 14 Wn.App. 976, 986-87, 547 P.2d 871 (1976). That is, they are an element of ownership that is incidental to ownership of the benefited parcel. It is not ownership in the subservient parcel but rather ownership in the right to use the subservient parcel within the express limits of the easement for the benefit of the benefited parcel.

Nowhere in LUPA is there an indication that by its purpose or its operation does LUPA provide the basis and create a forum whereby ownership or incidence of ownership interest in real estate such as a privately granted easement can be altered. And no case cited by Appellant goes so far as to suggest that actions brought under LUPA have anything to do with modifying private ownership of real estate.

Asche v. Bloomquist, 132 Wn.App. 784, 799, 133 P.3d 475 (2006), involved a case involving a disputed building permit. Wenatchee

Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 181, 4 P.3d 123 (2000), involves an appeal of a decision to approve a residential development project. Samuel's Furniture, Inc. v. State, Department of Ecology, 147 Wn.2d 440, 462, 54 P. 3d 1194 (2002), involved a grade and fill permit and building permit. Cedar River Water and Sewer Dist. v. King County, 178 Wn.2d 763, 315 P.3d 1065 (2013), involved a dispute over a joint development agreement between two counties. Habitat Watch v. Skagit County, 155 Wn.2d 397, 120 P. 3d 56 (2005), involved a dispute over a special use permit.

Virtually all of the LUPA cases cited by Appellant clearly deal with decisions of public agencies involving land use. None of these cases purport to alter actual ownership interests and incidence of ownership. None of this is surprising since LUPA is all about land use decisions. The bottom line is that Appellant has provided no authority whatsoever for the proposition that LUPA has any affect on privately granted easements.

Appellant argues that the trial court erred in that it restored the preexisting easements to the short plat, stating that, "This is in spite of the law that requires all roads not dedicated to the public (private roads) be

clearly depicted on the face of the plat. (RCW 58.17.165) (Appellant's Brief at 22).

As pointed out by Respondent Rykens, RCW 58.17.165 is addressing the dedication of roads, and states that "*Roads not dedicated to the public must be clearly marked on the face of the plat.*" In other words, where the short plat includes a dedicated road, and that road is intended to be private rather than public, then the short plat must clearly show on its face that it is a private road (not dedicated to the public). This provision is not stating, as Appellant seems to suggest, that a privately granted easement for any purpose, whether it is for a road or for some other purpose, must appear on the final short plat map.

The Moser Parties also join with Respondent Rykens and emphasize that Appellant misstates the operation and effect of the earlier May 23, 2013, Summary Judgment Order, which specifically reserved the issue of whether the adoption of the short plat extinguished preexisting easements. A closer reading of the May 23, 2013, order will reveal that this issue was not decided at that time. Thus, the specific issue now before this Court was properly heard and decided by Judge Clarke on January 22, 2015.

V. CONCLUSION

The Moser Parties, specifically Respondents Harold L. and Patricia Crowston, husband and wife; Dan R. Bond and Jane Doe Bond, aka Mary Ann Bond, husband and wife; Dan M. Bond and Jane Doe Bond, husband and wife; and Steve and Shannon Moser, husband and wife, join with Respondents Rykens and the other Respondents in asserting that privately granted easements appurtenant, not created in the process of approving a plat, are not extinguished by approval of the plat merely because the private easements are not depicted on the final short plat. Appellant Hanna has presented no authority for the proposition that LUPA was ever intended to modify private grants of incidents of real property ownership such as privately granted easements.

The Respondents respectfully request that the Superior Court's order granting summary judgment be upheld.

DATED this 19th day of May 2015.

EWING ANDERSON, P.S.

By: _____
DAVID E. EASH, WSBA 6684
Attorney for Respondents Crowston, Bond, and Moser

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May 2015, a true and correct copy of the foregoing document was served on the following in the manner set forth herein:

☐ U.S. MAIL ☐ HAND DELIVERED ☐ OVERNIGHT MAIL ☐ TELECOPY (FAX) ☒ EMAIL	Peter A. Witherspoon Workland & Witherspoon, PLLC 601 W. Main, Ste. 714 Spokane, WA 99201 pwitherspoon@workwith.com
☐ U.S. MAIL ☐ HAND DELIVERED ☐ OVERNIGHT MAIL ☐ TELECOPY (FAX) ☒ EMAIL	Stanley E. Perdue Perdue Law Firm 41 Camino De Los Angelitos Galisteo, NM 87540 perduelaw@me.com
☐ U.S. MAIL ☐ HAND DELIVERED ☐ OVERNIGHT MAIL ☐ TELECOPY (FAX) ☒ EMAIL	J. Gregory Lockwood J. Gregory Lockwood, PLLC 421 W. Riverside Ave., Ste. 960 Spokane, WA 99201 jgregorylockwood@hotmail.com
☐ U.S. MAIL ☐ HAND DELIVERED ☐ OVERNIGHT MAIL ☐ TELECOPY (FAX) ☒ EMAIL	William J. Schroeder Gregory C. Hesler Paine Hamblen LLP 717 W. Sprague Ave., Ste. 1200 Spokane, WA 99201 William.schroeder@painehamblen.com Greg.hesler@painehamblen.com

☐ U.S. MAIL	David A. Kulisch
☐ HAND DELIVERED	Randall Danskin
☐ OVERNIGHT MAIL	1500 Bank of America Financial Cntr.
☐ TELECOPY (FAX)	601 W. Riverside Ave.
☒ EMAIL	Spokane, WA 99201
	dak@randalldanskin.com

DAVID E. EASH

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