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NO. 372154

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CYNTHIA HEBERT AND JAMES D. HEBERT,
husband and wife

Appellants,

v.

SPRING CREEK EASEMENT OWNERS ASSOCIATION (RMA)
BOARD OF TRUSTEES
SPRING CREEK EASEMENT OWNERS ASSOCIATION (RMA) Board
of Trustees

Respondents,

BRIEF OF APPELLANTS
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A. INTRODUCTION

This case involves disputes between the Appellants (the “Heberts”) who are homeowners in the “Spring Creek” development, and the Spring Creek Easement Owners Association¹ (the “Association”), substantially revolving around a gate and installed by the Heberts in 2004, on their property and within the Association’s roadway easement, as well as boulders the Heberts had placed on their property for safety and security purposes along the shoulder of the roadway. The Heberts obtained approval from the Association in 2004 and 2005 for the installation of the gate, and neither the Association or any of the other individual lot owners (the “Owners”) raised objection to the gate or boulders until 2017.

On July 18, 2017, the Association Board, headed by a newly elected president, decided at a board meeting that the gate and boulders violated provisions of the CC&Rs and demanded that the Heberts immediately remove the gate and the boulders. The Heberts protested the removal of the gate and boulders on the grounds that they were necessary for their safety and security; that they had installed the gate with the authorization of the Association many years prior; and that neither the Association or the Owners had complained that the gate or boulders interfered with their use of the easement over the course of the prior twelve years. In October 2017,

¹ “Spring Creek Road Maintenance Association” filed articles of Amendment on April 26, 2018, amending its name to Spring Creek Easement Owners Association.” The case captioning in the consolidated cases still retains the two different names, but they both are the same “Association” referred to in this Brief.

the Board retained a contractor to push the boulders off the side of the road, causing damage to the Heberts' fences and property, and in November 2017 the Board had the contractor remove the gate, causing damage to the gate and the Heberts' property.

The Heberts attributed the Association Board's change of heart to the fact that their immediate neighbor, Marion Deardorff, had personal differences with the Heberts, and had been elected president of the Association Board in April 2017, just a short time prior to their taking this action. The Association made a special assessment upon the Heberts for the cost of paying the contractor to remove their gate and boulders. The Heberts refused to pay the Association's assessments, as they claimed the damages to their gate and property were greater than the amount of the Association fees, and that the assessments for removal of the gate were wrongfully imposed because the gate and boulders were wrongfully removed.

Cynthia Hebert initially brought suit, pro se, seeking damages for the wrongful removal of the gate and the boulders by the Association. In turn, the Association brought a second action seeking to enforce claimed Association assessments (substantially assessed against the Heberts for the cost of the removing the gate and boulders) and sought foreclosure on the Heberts' property. The two suits were subsequently consolidated.

The Court erred in deciding on summary judgment that the "Association clearly has the better of the argument," side-stepping multiple issues of material fact, and avoiding the making of any findings of fact or

conclusions of law by simply ruling against the Heberts on all aspects of the case(s).

B. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its August 5, 2019 letter decision granting Summary Judgment and Dismissing the Heberts' Claims. CP 0685. (Copy provided in Appendix).

2. The trial court erred in entering its September 12, 2019 Order Granting Spring Creek Easement Owners Association and Spring Creek Road Maintenance Association's Motions for Summary Judgment, and Decree of Foreclosure. CP 0786-0791. (Copy provided in Appendix).

3. The trial court erred in entering its September 12, 2019 Judgment and Decree of Foreclosure. (Copy provided in Appendix).

4. The trial court erred in entering its October 21, 2019 letter decision denying the Heberts' Motion for Reconsideration. CP 0857. (Copy provided in Appendix).

5. The trial court erred in entering its December 16, 2019 Order Denying Motion for Reconsideration. CP 0865-0866.

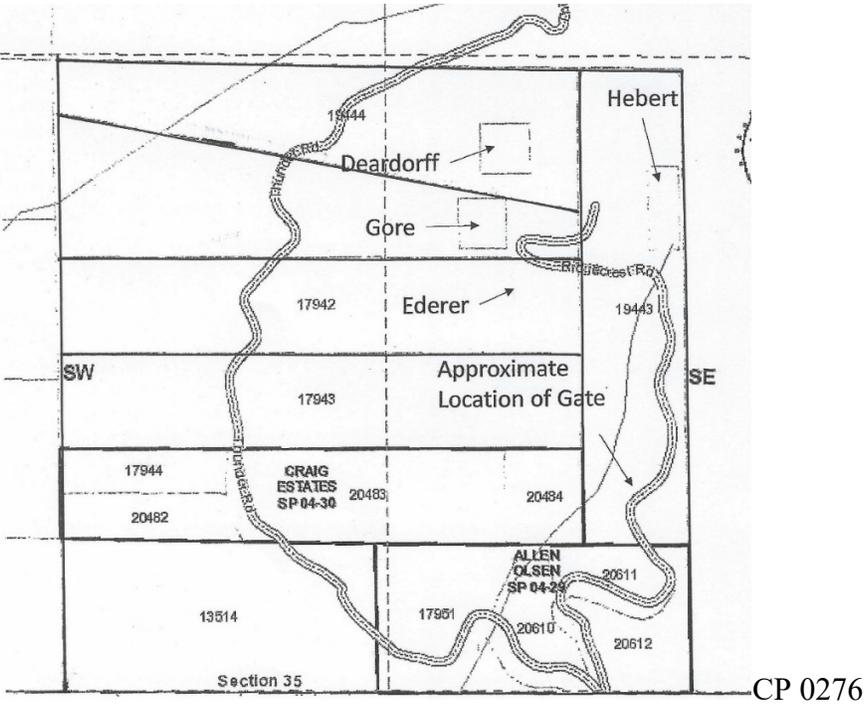
C. STATEMENT OF THE CASE

1. Factual History

"Spring Creek" is an eight-parcel development located in Kittitas County Washington. CP 0023. The Parcels are subject to certain Covenants, Conditions and Restrictions, recorded on 8/25/2003. (the "CC&R's") (Copy provided in Appendix). The Heberts acquired Parcel 7 of Spring Creek,

which is roughly a twenty-acre parcel, in 2003. In the winter of 2004 and in January of 2005, the placement of the Heberts' gate was discussed and approved by the Association Board². CP 0084, 0094

The Heberts, at that time, indicated to the Board that they would be open to removing the gate if the Association decided to place a gate at a different location further down the roadway. CP 0094. In May of 2005, the Heberts' constructed a permanent gate on their property, and across the Association's easement right of way, in place of the prior chain gate. *Id.* Below, for illustrative purposes, is a drawing showing the layout of the Spring Creek Development and location of the Heberts' (former) gate:



² The Heberts understood the Board's approval of the gate to be permanent, though some of the Board Meeting Minutes refer to their approval as "temporary", as the Board wanted to see how the location of the gate was working over the summer of 2005 and revisit the any issues in the fall of 2005. No issues were subsequently raised in the fall of 2005, or thereafter until 2017. CP 0084

In the Winter of 2004, there was a board discussion of installing guardrails along certain portions of the roadway, but the Board decided at that time it would be too expensive. CP 0084. In the Spring of 2006, the Heberts had boulders placed, at their own expense, for safety purposes, along a dangerous corner of the roadway. CP 0084. The boulders were placed on the Heberts' property, but within the easement. At that time, two other homeowners also placed barriers along dangerous sections of the road. CP 0084. Between 2006 and 2016 there were no known discussions of the Heberts' gate or placement of the boulders/barriers along the roadway at any Association meeting. CP 0084.

In July of 2017, after the Heberts' gate had been in place for over twelve years, the Association abruptly demanded that the Heberts' gate and the boulders be removed. CP 0085. The Heberts' disputed the Association's authority to order them to remove the gate and the boulders since they had initially obtained permission from the Association; because they had been in place for so long with no issues or objection; and because the Heberts had strong concerns about their safety and security if the gate and/or the boulders were to be removed. The Heberts requested an Association board hearing on the matter, and a hearing was scheduled for September 5, 2017. CP 0085. On the date of the Association hearing, the Heberts were forced to evacuate their property due to the Jolly Mountain Fire, which threatened to destroy the Heberts' property and horses. *Id.* The Heberts hired a mediator who contacted the Association, who contacted the president of the

Association, and was subsequently told not to call back. *Id.* The Heberts' attorney also sent several emails and letters to the Board's counsel explaining the history and legal reasons the CC&Rs did not prohibit the Heberts' gate or boulders, and urging the Board to pursue mediation to resolve the dispute rather than go down the path of litigation. CP 476-0477, 0480-0481, 04840-0485. Rather than to re-schedule the hearing, or agree to mediation, the Association opted to pursue self-help, and hired a contractor who entered upon the Heberts' property and pushed the boulders placed by the Heberts off the side of the road, causing damage to the Heberts' property, and then removed the gate, causing damage to the gate and to the Heberts' property. CP 0085, 0024.

Following the Association's removal of the gate and boulders, the Association assessed the Heberts the cost of paying the contractor for removing the Heberts' gate and boulders. The Heberts protested the imposition of these costs as Association assessments since they believed the removal of the gate and boulders by the Association to have been wrongful, and they claimed damages against the Association, as a result of their actions, in an amount greater than the Association assessments.

2. Procedural History

The original Complaint in these matters was filed by Cynthia Hebert April 5, 2018, who represented herself Pro Se. CP 0001-0005. The original complaint sought damages for the removal of the gate by the Association, but also made a claim of "Harassment." On May 10, 2018, she filed an

Amended Complaint that was substantially the same as the original complaint. CP 0006-0010.

On July 12, 2018, the Association brought a Motion for Summary Judgment arguing: “[t]he Court should exercise its gatekeeping function³ to put an end to this case before the Association expends further time and resources defending it.” CP 0013-0021.

On August 9, 2018, Spring Creek Road Maintenance Assoc., filed a Complaint for Foreclosure of Delinquent Assessment Lien, bringing a separate action seeking to foreclose upon the Heberts’ property for alleged unpaid Assessments, Attorneys fees, and Costs in the claimed amount of \$22,250.33 (the “Second Action”). CP 0955-0961. The Complaint in the Second Action made no mention of the pending suit or issues concerning the Heberts’ gate or boulders but sought collection of the amounts the Association assessed against the Heberts for Association’s removal of the gate and boulders.

The Heberts retained an attorney who filed a Motion to Allow Plaintiff to File Second Amended Complaint on September 24, 2018 (CP 0136), and an Agreed Order of Dismissal on September 27, 2018, dismissing Ms. Heberts’ pro se cause of action for “Harassment.” CP 0140. The Second Amended Complaint added Ms. Heberts’ husband, James Hebert, as a plaintiff, clarified and sought damages due to the Association’s

³ The ironic choice of words is noted.

removal of the gate and boulders, and brought claims for declaratory relief requesting the Court to clarify the Heberts' rights under the CC&Rs with respect to the gate and boulders. CP 0151-0156.

On November 23, 2018, the Association filed a Motion for Summary Judgment in the Second Action (CP 0965-0975), arguing essentially, "the only two issues relevant to this Motion are whether the Association levied assessments upon Defendants and whether Defendants paid those assessments." CP 0975.

On November 27, 2018, the Heberts filed an Answer in the Second Action, bringing counterclaims against the Association for improper maintenance of the Easements and damages emanating from the Associations removal of the gate and boulders. CP 1050-1054. The counterclaims asserted the Heberts' damages were "in an amount which exceeds the assessments which Plaintiff/Counterclaim Defendant is suing to foreclose against Defendants/Counterclaim Plaintiffs herein." CP 1053. It is not entirely clear from the record when/if a motion to consolidate the two cases was filed, but on December 3, 2018, the Association filed a Response to Motion to Consolidate (CP 0157 (opposing consolidation of the two cases), and on December 6, 2018, the Association also filed an Opposition to Motion to Consolidate in the Second Action. CP 1079-1083.

On December 13, 2018, matters went to hearing before Judge Sparks, who Denied the Associations' Summary Judgment Motions and authorized the consolidation of the cases (CP 0166), ordering that the two

cases “shall hereby be consolidated and tried as one proceeding.” CP 0167. Despite that the two cases were consolidated, on June 19, 2019 the Association brought two separate summary judgment motions: a Motion for Summary Judgment (CP 0233-0257), and a Renewed Motion for Summary Judgment, emanating from the Association’s claims in the Second Action. CP 0346-0368.

Both Motions went to hearing together before Judge Sparks on July 18, 2019, and on August 5, 2019, Judge Sparks issues a short decision letter directing that “Summary judgment should be granted to the HOA on each issue and the final judgment should include reasonable attorney fees. Counsel should prepare final paperwork and note the matter for presentment.” CP 0685-0686.

On September 12, 2019, the Court entered an Order Granting Spring Creek Easement Owners Association and Spring Creek Road Maintenance Association’s Motions for Summary Judgment, and Decree of Foreclosure, granting Summary Judgment upon both of the Association’s Motions and dismissing all of the Heberts’ claims (CP 0786-0791), and entered a Judgment and Decree of Foreclosure in the amount of \$69,345.40, of which \$47,542.97 were attributable to the Association’s Attorney’s Fees and Costs. CP 0792-0796. No Findings of Fact or Conclusions of Law were entered in conjunction with the Order or Judgment. *Id.*

On September 20, 2019, the Heberts filed a Motion for Reconsideration of Final Summary Judgment Order and Awarded Fees and

Costs. CP 800 – 806. On October 21, 2019, Judge Sparks issued a Decision Letter stating only: “By this letter the Court hereby DENIES the Heberts’ Motion for Reconsideration of Final Summary Judgment Orders and Awarded Fees and Costs, filed September 20, 2019.” CP 0857. No reasoning, basis, findings, or conclusions explaining the decision were provided. *Id.*

D. SUMMARY OF ARGUMENT

The Association sought summary judgment arguing that the CC&Rs grant the Association the exclusive authority to erect gates and that the CC&Rs forbid property owners from blocking or impeding access to the roadway easements. However, the plain language of the CC&Rs do not endow the Association with such broad powers. Nowhere do the CC&Rs prohibit the Owners from erecting gates on their own property within the Easements. Rather, the CC&Rs grant the Owners reciprocal, nonexclusive easements for the purpose of access, ingress and egress, and the CC&Rs grant the Association an easement for the purpose of repairing and maintaining the Easements. The CC&Rs also assign the responsibility for repairing and maintaining the Easements to the Association.

In the CC&Rs, the Declarant of the CC&Rs reserved for itself the right to install entry gates. The Association contends that, as “the successor in interest to the Declarant” this provision gives the Association “exclusive authority to erect gates.” However, the Association has not established themselves to be the successor in interest to the Declarant. Further, the

relevant language only reserves a right to erect entry gates, and does not purport to grant “exclusive authority” or to prohibit the Owners from installing gates on their property.

The Association further argues that a provision under the CC&Rs granting the Owners the right to install *utilities* within the Easements “forbids property owners from blocking or impeding access to the roadway easements.” Again, the Association misstates the language in the CC&Rs. Assuming the language in the CC&Rs pertaining to utilities applies to the Heberts’ gate, it merely applies established principles of easement law – that the servient owner’s use be reasonable and not infringe upon the access, ingress and egress of the other Owners.

Since the language contained in the CC&Rs does not expressly bar the placement of the gate and boulders by the Heberts upon their own property and within the Easements, established principals of easement law govern whether the Heberts’ gate and/or boulders unreasonably interfered with the Easement rights of the Association. There are many issues of material fact surrounding this question which the Association has not established in its favor. Actually, the uncontested facts strongly support that the Heberts’ gate and boulders did *not* unreasonably interfere with the easement rights of the Association – most obviously, the fact that the Association initially approved the installation of the gate, and the fact that the gate and boulders were in place for more than a dozen years without issue or complaint.

E. ARGUMENT

This appeal is for the purpose of reviewing the granting of Summary Judgment to Spring Creek. Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom in favor of the nonmoving party. If reasonable persons might reach different conclusions, the motion should be denied. *Klinke v. Famous Recipe Fried Chicken*, 94 Wash. 2d 255, 256-57, 616 P.2d 644, 645 (1980); *Millikan v. Board of Directors*, 93 Wn.2d 522, 532, 611 P.2d 414 (1980); *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 552, 588 P.2d 1174(1979). The court must view the facts and any inferences in a light most favorable to the nonmoving party. See *Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999). The function of the summary judgment is to avoid a useless trial; and a trial is not only not useless but absolutely necessary where there is a genuine issue as to any material fact. *Wheeler v. Ronald Sewer Dist.*, 58 Wash. 2d 444, 446, 364 P.2d 30, 32 (1961). The appellate court reviews an order granting summary judgment de novo, engaging in the same inquiry as the trial court. See *Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 392, 879 P.2d 276 (1994).

(1) The Plain Language of the CC&R's Did Not Prohibit the Gate

In their Motion for Summary Judgment, the Association makes a

number of inaccurate and/or misleading assertions about the language of the CC&Rs in an effort to conjure up what the deem to be “exclusive authority” of the Association to control the roadways, and thus prohibit the placement of gates by the Lot Owners . Such assertions by the Association set forth their Motion for Summary Judgment include:

“The CC&Rs grant the Association the exclusive authority and responsibility to operate, maintain, and repair the roadway easements.” CP 00237.

“The Association has the exclusive responsibility to ensure maintenance of the roadway easements to the specifications of Paragraph 4.2, which requires that roads be plowed to a minimum of 16 feet. The CC&Rs do not grant this power and authority to the owners.” CP 00237.⁴

“Paragraph 5.1 of the CC&Rs forbids property owners from blocking or impeding access to the roadway easements.” CP 00238.

“In the same vein, they grant the Association, as the successor in interest to the Declarant, the exclusive authority to erect gates.” CP 00238.

Despite the Association’s assertions, the plain language contained in the CC&Rs does not track with their arguments. The court gives great weight to the intent of the parties, as expressed in the plain language of a contract. *St. John Med. Ctr. v. DSHS*, 110 Wash. App. 51, 65, 38 P.3d 383, 391 (2002); *In re Estate of Wahl*, 99 Wn.2d 828, 830-31, 664 P.2d 1250

⁴ The HOA’s reference to plowing to “a minimum of 16 feet” is erroneous. The original Paragraph 4.2 of the CCRs contained 16-foot plowing language, but Article 4.2 was amended in its entirety in the Supplemental Covenants, Conditions and Restrictions, filed with the CCRs, and the amended language of Article 4.2 is shown above. The “specifications” cited by the HOA did not survive the amendment and are not part of the CCRs.

(1983). The actual language contained in the CC&Rs pertaining to the Association's assertions or "exclusive authority" are as follows:

3.2. Repair and-Maintenance Rights and Duties of Association: The Association shall maintain and repair the Easements, or shall contract for such maintenance and repair to assure maintenance of the Easements in good condition.

3.3 For the purpose of performing any maintenance or repair as authorized by this Article, or for purposes of making emergency repairs necessary to prevent damage to a portion the Property or the Easements, or for any other purpose reasonably related to the performance by the Board of its responsibilities under this Declaration, the Association (and its agents and employees) shall have an irrevocable easement over and onto all portions of the Easement Property, and shall also have the irrevocable right after reasonable notice to the Owner, and at reasonable hours, to enter onto any Lot.

5.1 Access, Use and Maintenance Easements: Declarant expressly reserves for the benefit of the Owners reciprocal, nonexclusive easements for access, ingress and egress, over and under all of the Easements. Declarant expressly reserves the right to install entry gates and move the location of the road and therefore the easement.... In addition, in the Easements, the Owners of the Lots may install utilities, including but not limited to: sanitary sewer, water, electric, gas, television receiving, or telephone lines or connections, provided, however such use of the Easements shall be reasonably necessary for use and enjoyment of a Lot in the Property and such use shall not infringe on any Lot Owner's use of the Easement for access, ingress and egress. Such Easements shall be appurtenant to, binding upon and shall pass with the title to, every Lot conveyed.

(complete CC&Rs also in Appendix):

What is evident from the plain language of the CC&R's is that nowhere do they create the "exclusive authority" or prohibitions the Association contends. What the CC&Rs do, is to grant two easements: 1) a "*nonexclusive* easement" to the Lot Owners for access, ingress and egress;

and 2) an “*irrevocable* easement” to the Association for the purpose of maintenance or repair. (Italics added).

The CC&Rs then, under Article 3.2, assign the Association responsibility to maintain and repair the Easements: “[t]he Association shall maintain and repair the Easements, or shall contract for such maintenance and repair to assure maintenance of the Easements in good condition.” Contrary to the Association’s characterization of this language, it confers an *obligation* upon the Association, not “exclusive authority.” It is true that the CC&Rs obligate *only* the Association to maintain and repair the Easements. But the Association seeks to distort the plain language of this provision, which imposes a *duty* upon the Association, into a grant of “exclusive authority.” That is not at all what this language says, and the contention that this language establishing Association’s responsibility to maintain and repair the Easements somehow prohibits the Owners from erecting gates or performing maintenance has no basis. Such an interpretation would entail absurd results, where an Owner would be in violation of the CC&Rs for filling a pothole or clearing the road if the Association failed to do so.

Similarly, the Association misstates the language under Article 5.1, asserting it gives them “exclusive authority to erect gates.” The language in Article 5.1, which the Association relies upon in asserting this is: “Declarant expressly reserves the right to install entry gates...” As a threshold issue, under Article 5.1 the *Declarant* reserved the right to install

entry gates for itself, not for the *Association*. In its Motion for Summary Judgment, the Association alleges to have acquired this right from the Declarant, as “the successor in interest to the Declarant.” Nowhere in the record of this case have we found any authority or explanation for how the Association became the “successor in interest” and acquired the rights of the Declarant. In order for the Association to assert a right reserved to the Declarant, they must meet their burden of establishing the basis for which they claim to have acquired the Declarant’s rights for themselves. The Association has not done this.

Even if the Association had established that they had acquired the rights of the Declarant, the language under Article 5.1 still does not purport to exclude the Lot Owners from installing gates upon their lots. It bears noting that the Declarant used the word “expressly” and not the word “exclusively” in reserving the right to install entry gates. If the Declarant had intended to create an exclusive right, it could have simply used the word “exclusive,” -- but it did not.

Other provisions of the CC&R’s demonstrate that Declarant similarly reserved rights for itself (and not to others), where the intent was clearly not to create an exclusive right for itself. For example, under Article 2.14 (as amended), the CC&Rs state: “Declarant or its authorized agent may display one construction sign per Lot to advertise Lots for sale. Such signs shall not exceed 32 square feet.” By the Association’s logic, such language would have given the Declarant “exclusive authority” to display for sale

signs because it did not grant the right to display signs to anyone else. Of course, the Association has never taken the position the language under Article 2.14 bars the Owners from displaying for sale signs.

The Association then contends that the language under Article 5.1 granting the Lot Owners the right to install *utilities* within the easements, prohibits the Heberts' gate. The relevant language in Article 5.1 reads: "in the Easements, the Owners of the Lots may install utilities, including but not limited to: sanitary sewer, water, electric, gas, television receiving, or telephone lines or connections, provided, however such use of the Easements shall be reasonably necessary for use and enjoyment of a Lot in the Property and such use shall not infringe on any Lot Owner's use of the Easement for access, ingress and egress." Of course, it is a stretch to argue that a gate is a "utility," and subject to this provision at all. But even if a gate is a utility, this language only tracks with well-established principles of easement law. The questions of whether the use is "reasonably necessary" in conjunction with whether it infringes on the access, ingress, and egress of the Owners involve issues of material fact, which the Association seeks to avoid by arguing that this provision constitutes an absolute bar to Lot Owners erecting gates on their own property.

As detailed above, nothing contained in the language of the CC&Rs prohibits the Owners from erecting gates or boulders on their own property and within the Easements. Of course, this does not mean the Owners are free to place gates or obstructions at their whim. The Lot Owners and the

Association have defined Easements, and the question of whether placement of a gate or boulders unreasonably interfered with the rights of the easement holders would be a matter of easement law, requiring examination of the facts surrounding the necessity of the restriction and the reasonableness of the burden it imposes.

(2) The Association Did Not Establish an Unreasonable Interference With Their Use

As detailed above, the CC&R's contain no express prohibition to the placement of gates or boulders (or guardrails) by an Owner, within the Easements. The only grounds available to Association to complain about the Heberts' gate would be one of alleged interference with their easement rights. However, the Association did not establish the Heberts' gate or fence interfered with its easement rights. In fact, the Board did not even attempt to make a determination as to whether the gate or boulders constituted an unreasonable burden upon its Easement. Instead, they considered it their job to make a *legal* determination of whether the language of the CC&Rs prohibited the Heberts' gate and Boulders. In the words of Association president Marion Deardorff, "On July 18, 2017, a properly noticed board meeting occurred. The Board discussed the boulders and gate; I and the other board members concluded they were in *violation of the Association's governing documents* and needed to be removed." CP 0024. (Italics added). Apparently the Board considered themselves qualified and comfortable enough asserting their legal determination of what the

CC&R language said, even while on notice from the Heberts' attorney of the reasons he disagreed with their legal analysis, to reject the offer of mediation, and proceed with the self-help remedy of removing the gate and boulders.

An "easement" is a nonpossessory right to use the land of another. *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wash. App. 178, 183-85, 401 P.3d 468, 471-72 (2017), citing *Maier v. Giske*, 154 Wn. App. 6, 15, 223 P.3d 1265 (2010). The person who benefits from an easement, known as the easement holder or dominant estate owner, has a property interest in the land subject to the easement, known as the servient estate. *Id.*, citing *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 654-55, [*184] 145 P.3d 411 (2006). The easement represents a burden on the servient estate. *Id.* at 655. In general, the owner of a servient estate may use his or her property in any reasonable manner that does not interfere with the easement holder's use of the easement. *Id.*, citing *Littlefair v. Schulze*, 169 Wn. App. 659, 665, 278 P.3d 218 (2012). In addition, a servient estate owner may engage in reasonable conduct that affects access to the easement as long as that conduct does not unreasonably interfere with the easement holder's use. *Id.*, citing *Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowners' Ass'n*, 173 Wn. App. 778, 792-93, 295 P.3d 314 (2013) (addressing the installation of a gate that restricted access to an easement).

Washington Courts have grappled before with the question of whether the placement of a gate in an easement constitutes an unreasonable

interference. “Whether or not the owner of land, over which an easement exists, may erect and maintain fences, bars, or gates across or along an easement way, depends upon the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case; the nature and situation of the property subject to the easement; and the manner in which the way has been used and occupied. *Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowners' Ass'n*, 173 Wash. App. 778, 792-93, 295 P.3d 314, 322 (2013), citing *Rupert*, 31 Wn. App. at 30-31. “Accordingly, when determining whether a gate or its ease of use unreasonably interferes with easement rights, we consider (1) the increased burden on the servient estate, (2) whether the restrictions on the gate are reasonably necessary for protection, and (3) the degree to which the gate interferes with the dominant owner's use.” *Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowners' Ass'n*, 173 Wash. App. 778, 793, 295 P.3d 314, 322 (2013).

In this case, the Association has not established, beyond any issue of material fact, that the Heberts’ gate or boulders unreasonably interfered with the easement rights of the Association. Importantly, the Association and the Owners were granted separate easement rights in the CC&R’s, each with separate purposes. The Association’s easement rights were granted for the purpose of maintaining and repairing the Easement Property. The Owners’ reciprocal easements between each other were for the purpose of

access, ingress, and egress. If any individual Owner had a complaint that the Heberts' gate or boulders unreasonably interfered with their access, ingress, or egress, such would be their claim, and only their claim, to pursue. The Association has no standing to pursue such a claim on the behalf of an individual Owner⁵. The Association could only complain about alleged interference with its own easement rights pertaining to maintenance and repair. Regardless, the uncontested fact that the gate and boulders were in place for more than twelve years, without any issues, strongly supports the position that the gate or boulders did *not* unreasonably interfere with the Association's ability to perform maintenance or repair, nor the Owners' rights of access, ingress, or egress. Repairs and maintenance continued unabated that whole time, and the Owners accessed their properties with no apparent issues.

Other than conclusory statements, the only direct evidence the Association provided in its Motion for Summary Judgment, in suggesting the Heberts' gate and boulders interfered with the Association's ability to maintain and repair the roads was contained in the Declaration of Benito Chavez, Jr. (CP 00259). Mr. Chavez⁶ provided snowplowing and "other services" for the Association, (CP 00260) and was the contractor

⁵ As the Map (CP 0276 and above) shows, the Hebert's gate on Ridgecrest Road only affected a couple of the other properties, and all properties but the Heberts were accessible by Thunder Road, which was not affected by the Heberts' gate or boulders.

⁶ Mr. Chavez's company is BCK Contracting, LLC CP 0404.

responsible for removing the Heberts' gate and boulders at the Association's behest. *Id.* Mr. Chavez declared, for example, that "[t]he boulders made it difficult to maintain the road at the required sixteen foot width." (CP 00261). While Mr. Chavez may have been inconvenienced by having to plow around the gate and boulders, he himself possessed no easement, and would not be a proper party to claim interference with easement rights. The Association never established how a minor complaint by the snowplow operator (obviously obtained at the request of Association counsel in order to prepare a Declaration) somehow constituted an unreasonable hardship upon the HOA. Did the snowplow operator charge the Association more for his inconvenience? If so, such is not alleged. Whatever the hardship upon the Association may have been, the question of whether it is unreasonable is determined in conjunction with the reasonable needs of the servient estate. *See Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowners' Ass'n*, 173 Wn. App. 778, 792-93, 295 P.3d 314 (2013) (addressing the installation of a gate that restricted access to an easement). The reasonableness of a restraint depends on a balancing of the necessity of the restraint for the protection of the servient estate against the degree of interference with the easement holder's use. *Id.* The Association has never established, by any measure, that the inconvenience alleged by the snowplow operator outweighed Heberts' needs for safety and security. This would involve substantial issues of material fact which could not be decided upon summary judgment.

The Association Board decided at its July 18, 2017 meeting that the Heberts' gate and boulders were "in violation". CP 0332 – 0334 The minutes include the following entry:

Gate & Rock Removal - The subject of removal of the rocks and gate was discussed. We reviewed the history of the gate installation and membership meeting where it was discussed. In addition, several large boulders are located on the easement placed there by Jim & Cynthia Hebert. The gate and boulders block or impede ingress with some of the owners and snow plowing service expressing concern over their placement. After discussion, the board declared them to be in violation and will contact the associations legal representative to request Jim & Cynthia Hebert remove both the gate and boulders. CP 0333

Other than mentioning that "some of the owners and snow plowing service expressing concern over their placement," there is no evidence that the Board gave consideration to the Heberts' (or other Owners') reasonable concerns for safety and security or the reasonableness of any burden the gate or boulders may have imposed upon the easement rights of the Association. In response to the Board's declaration that the Heberts' gate and boulders were "in violation," the Heberts' attorney, Robert Spitzer sent several letters and emails to the Board's attorney describing the history of the gate, the Heberts' legitimate safety and security concerns, and the reasons why the installation of the Gate did not violate the terms of the CC&Rs. In his August 31, 2017 letter, Mr. Spitzer stated:

As a legal matter, there is nothing in the Declaration which prohibits the members from agreeing to allow a gate over a portion of the roads, given that access to the Association and members who access their properties through the gate has not been impeded. As a safety and security matter, who can reasonably object to the gate, given what has

already transpired? Do the individual Board members really wish to force removal of a safety and security gate which has been there over 12 years, without legal justification, and risk some future problem? CP 479-481. CP 0481.

In a follow up email on September 1, 2017, Mr. Spitzer offered: “My suggestion is that the Board defer any decision on the alleged "violations", and instead that we engage in a discussion about how the owners can achieve their goals of properly maintaining the road, and to engage a mediator to address that issue.”

The Board Meeting Minutes do not show the Board gave any consideration whatsoever to the Heberts’ concerns for safety or security, and rather than considering Mr. Spitzer’s suggestion of engaging in discussion or engaging a mediator to address the issues of the gate and boulders, the Board elected to pursue the self-help remedy of sending a contractor to remove the Heberts gate and boulders.

(3) The Association Authorized the Heberts’ Gate

The Heberts have provided conclusive evidence that the Association authorized the installation of their gate in 2004-05. In their Motion for Summary Judgment, however, the Association relied exclusively upon the Declaration of Marion Deardorff to assert that the Heberts had installed the gate “without permission or authority from the Board.” (CP 0239-0240). In her Declaration, Ms. Deardorff gave a detailed accounting of what she claims transpired between the Association and the Heberts in 2004 - 2005

regarding the gate and boulders (CP 0270 – 0271). Her sworn Declaration states such things as:

“In 2004, without the permission or authority of the Board, the Heberts installed a chain gate across Ridgecrest Road on the southern portion of their parcel, blocking access to the Association's easement.” and

“Without the permission or authority of the Board, plaintiffs went ahead and installed a permanent gate prior to the May 26, 2005 meeting that impeded access for ingress and egress.” and

“Also without the permission or authority of the Board, in 2004 the Plaintiffs also installed large boulders along the edge of Ridgecrest Road on the Association's easement.”

There is a fundamental problem, however, with using Ms. Deardorff's Declaration to establish such alleged facts: Ms. Deardorff has absolutely no personal knowledge of *anything* that transpired regarding Spring Creek in 2004 – 2005. She was not an Owner and did not live in the Association in 2004 – 2005 (CP 0102). She did not move to Spring Creek until 2014 and did not become president of the Association until April 2017 -- more than a decade later (CP 0269). A declaration in support of summary judgment must be made on personal knowledge⁷. *Nilsen v. Quality Loan Servicing Corp. of Wash.*, No. 74133-1-I, 2016 Wash. App. LEXIS 614, at *5 (Ct. App. Mar. 28, 2016). Cynthia Sullivan, on the other hand, was an Owner in 2004-05, did attend all Association meetings at that time and did

⁷ While a custodian of records may testify as to records if they satisfy the provisions of RCW 5.45, Ms. Deardorff testified as to multiple facts of which she had no personal knowledge in her Declarations, not just records.

have first-hand knowledge of what transpired the meetings. Her Declaration establishes, in conjunction with the Spring Creek Homeowners Meeting Minutes, that the location of the Heberts gate was authorized by the Association. (CP 0904). The parties may dispute whether the Association's approval of the gate in 2004 was temporary or permanent, but that dispute is of little consequence. The January 31, 2005 Board meeting minutes contain the following entry:

Gates in Easement

Following all the discussion above, the topic of gates were raised again. Jim and Cynthia Hebert had placed a chain across the easement on the property line between Lot 7 and Lot 8. There was a discussion on safety concerns with a chain across the road and Cynthia commented she would replace it with a gate. There was a lengthy discussion on the legality of placing a gate on the easement and putting a gate up without written approval from Plum Creek and Sapphire Skies who both have legal easements.

A majority of the homeowners agreed (7-1) to install a gate at the entrance to the Spring Creek Property where it comes up from Ridge Crest Road and Pat Deneen's property. To do this, Cynthia Hebert was going to get written approval from Plum Creek and Sapphire Skies prior to erecting the gate. If written approval cannot be obtained, it was agreed to authorize Cynthia Hebert to install a temporary gate at the location of the chain. This temporary gate would be reviewed in the summer and a definite timeline established for it's removal. CP 0094,0326.

The May 26, 2005 Home Owners Meeting Minutes contains more discussion of gates, including confirmation of the previous approval of the Heberts' gate, whether it was to remain temporary, whether the location would be changed, whether outside approvals were needed, who should pay

for a permanent gate, reports of trespassers with automatic rifles, whether “Spring Creek is hated by the local community”, and other related issues. CP 0329-0330. As this shows, many issues of material facts existed at that time regarding the extent of the burden imposed by the Heberts’ gate and the reasonableness in terms of the safety and security concerns of the Heberts. The Association considered such issues and authorized the gate at that time, but their position now is that their authorization can be revoked twelve years later because the CC&Rs don’t allow the gate or boulders. Ms. Deardorff’s Declaration cannot begin to resolve the issues of material fact that existed then or now.

Even assuming the Association’s approval could be revoked some twelve years later, the legal question would still be one of easement rights – specifically, did the Heberts’ gate or boulders unreasonably interfere with the easement rights of the Association? The fact that the Association approved the easement in 2004 (whether “temporary” or “permanent”) strongly indicates that the Heberts’ gate and boulders did not constitute an unreasonable interference with the Association’s easement. In any case, multiple issues of fact exist in determination of the question, and Summary Judgment should have been denied.

(4) Statute of Limitations

If, in fact, the Heberts’ gate and/or boulders constituted a breach or violation of the CC&Rs, such occurred in 2004–2005. Under RCW 4.16.040 an action upon a contract in writing, or liability express or implied

arising out of a written agreement must be commenced within six years. The Association's cause of action, if they had one, would have accrued more than twice the statutory period prior to their removal of the gate and boulders by the Association. Of course, the Association did not bring an action seeking removal of the gate, but instead elected to pursue the self-help remedy of having their contractor enter upon the Heberts' property and remove the gate and boulders, and there was thus no cause of action by the Association whereby the Heberts' could raise the statute of limitations. The Association, however, should not be allowed to side-step the statute of limitations by using self-help rather than bringing a legal action.

(5) The Heberts Acquired a Prescriptive Easement

Ironically, if the Court were to find that the Association did not grant permission for the gate and/or boulders in 2004, as the Association contends, all the elements of prescriptive use will have been met, and the Heberts would have acquired a prescriptive easement (or extinguishment of the Association's easement) during the more than twelve years the gate and boulders were in place.⁸ To establish a prescriptive easement, a claimant

⁸ An easement may be extinguished through adverse use by the servient estate. Whether an easement is extinguished through adverse use is determined by applying principles of adverse possession. A possessor may gain title by adverse possession if the use is open, notorious, continuous, uninterrupted, and adverse to the property owner for the prescriptive period of 10 years. Because the servient estate owner is already in possession of the property, the prescriptive period does not begin until the adverse use of the easement is clearly hostile to the dominant estate's interest in order to put the dominant estate owner on notice. Hostile use is difficult to prove because the servient estate owner has the right to use his or her land for any purpose that does not interfere with the enjoyment of the easement. "Hostility" requires that the claimant treat the land as his own as against the world throughout the statutory period. *Seaman v. Beckwith*, No. 56560-5-I, [2007 Wash. App. LEXIS 1895, at *9](#) (Ct. App. July 9, 2007).

must prove: (1) use adverse to the title owner; (2) open, notorious, continuous and uninterrupted use for 10 years; and (3) that the owner knew of the adverse use when he was able to enforce his rights. *Lee v. Lozier*, 88 Wash. App. 176, 181, 945 P.2d 214, 217 (1997), citing *Bradley v. American Smelting & Ref. Co.*, 104 Wn.2d 677, 693, 709 P.2d 782 (1985). If the Association did not give its permission for the gate or boulders, the Heberts' use was adverse, and it is not disputed that Heberts' use was open, notorious, continuous and uninterrupted (up until the Association wrongfully removed the gate and boulders). It is also uncontested that the Association knew about the Heberts' use all along. The Heberts did not bring a claim of prescriptive use because they considered their use to be permissive rather than hostile. However, prescriptive rights accrue regardless of whether the claimant brings suit.

(6) Protest of Assessments is Not a Basis for Dismissal of All the Heberts' Claims

In its Renewed Motion for Summary Judgment, the Association argued, "The Heberts Have No Right to Withhold Payment," (CP 00365), relying upon a drastically over-broad interpretation of the *Panther Lake Ass'n v. Juergensen* case, 76 Wash. App. 586, 887 P.2d 465 (1995). The Association argued the *Panther Lake* case to hold that a homeowner cannot refuse to pay or offset amounts assessed by an Association under any circumstances, and if they do so, their claims against the Association must be dismissed. Indeed, the *Panther Lake* case held that the Lot Owners'

refusal to pay Association assessments in that case was not a valid way to protest Association's decision not to pursue legal action against a road construction contractor. But our case presents a very different set of circumstances and legal issues to those under *Panther Lake*. *Panther Lake* involved HOA Lot Owners who refused to pay their dues in protest against the HOA's decision not to seek damages against a contractor who had performed faulty roadwork. The court ruled that the proper remedy for the Lot Owners would be to seek declaratory relief against the HOA for failing to seek damages from the contractor, but refusing to pay their HOA dues was not an acceptable remedy. The homeowners were not contesting the HOA assessments themselves, they were protesting the HOA's decision not to bring suit against the outside contractor.

The facts of our case, and the issues involved, are very different from *Panther Lake*. The Heberts brought suit for damages for the wrongful removal of their gate and boulders. CP 0001. The Association made special assessments against the Heberts demanding that the Heberts pay for the very wrong over which the Heberts were seeking redress. CP 1029. The Heberts were contending that, not only was the Association's action in removing the gate wrongful (and thus the assessments requiring to pay for it wrongful), but that the Heberts had suffered even greater damage to their property. CP 1038.

Nothing in the *Panther Lake* case says that a homeowner may not bring a suit against an HOA for damages. In fact, the CC&Rs themselves

state that, “The Board, any Owner, ... shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by this Declaration ...” (CP 0068). This is the same provision of the CC&Rs the Association cites as authorizing their claims, and it applies equally to the “Board” as it does to “any Owner”. Of course, a homeowner may bring suit against an Association. The Heberts did bring suit for damages and declaratory relief, but the Association’s overly-broad argument, based upon *Panther Lake*, was that the Heberts’ refusal to pay its assessments for removing the gate and boulders -- the same subject matter of the Heberts’ claims against the Association -- necessitated dismissal of all the Heberts’ claims. Essentially, the Association argues that under *Panther Lake*, the Heberts were required to admit defeat and pay all assessments, including for removal of the gate and boulders, at the penalty of having all their claims entirely dismissed. However, *Panther Lake* does not make such a broad ruling.

While the Heberts admitted they owed some amount of Association dues, for the regular maintenance and expenses of the Association, the amount the Heberts sought for the wrongful removal of the gate and boulders and damage to their property greatly exceeded the amount of such regular fees, and thus at least offset the amounts the Association was seeking. The *Panther Lake* case addressed a question of whether the Lot Owners could offset against amounts they owed to an HOA, stating:

Lot Owners also argue that because offsets are allowed in ordinary lien foreclosure actions, they should, by analogy, be made available as a defense to foreclosures by the Association. We disagree. The relationships between the parties and the offsetting liabilities in normal foreclosure actions and the present case are not analogous. In foreclosure cases cited by Lot Owners, offsets were based on a breach or liability of the party against whom the offset was asserted. *Seattle First Nat'l Bank, N.A. v. Siebol*, 64 Wn. App. 401, 405, 824 P.2d 1252 (offset against bank for lost profits based on bank's breach of promise to provide inventory financing), review denied, 119 Wn.2d 1010, 833 P.2d 386 (1992); *Swenson v. Lowe*, 5 Wn. App. 186, 188, 486 P.2d 1120 (1971) (offset against contractor for deficiencies in contractor's performance); *see also Davis v. Altose*, 35 Wn.2d 807, 812-13, 215 P.2d 705 (1950). Here, Lot Owners seek to offset deficiencies in the road against their assessments. An offset based on the contractor's breach may be asserted by the Association against the contractor, but not by members against the Association's assessments. *Panther Lake at*, 76 Wash. App. 591, 887 P.2d 468 (1995).

However, the issue of offset with respect to the Heberts is not analogous with the Lot Owners in *Panther Lake*. The *Panther Lake* court differentiated the offsets claimed by the Lot Owners in that case from “offsets ... based on a breach or liability of the party against whom the offset was asserted.” *Id.* The Heberts’ offsets are exactly that – they are based on a breach or liability of the party (the Association) against whom the offset was asserted (the Association). Thus, *Panther Lake* did not find that Association fees withheld as offsets were impermissible when the offsets were based upon a breach or liability of the same Association.

Further, the *Panther Lake* case expressly states that “seeking declaratory relief if the Association acts beyond its authority” constitutes a

proper remedy for owners. See *Id.*, at 76 Wash. App. 591, 887 P.2d 468. The Heberts sought specific declaratory relief and, even if their withholding of Association assessments could be considered wrongful, nothing in the *Panther Lake* justifies dismissal of their claims for declaratory and other relief.

(7) The Business Judgment Rule is Inapplicable

The Association's principal argument in their Motion for Summary Judgment is titled "The Business Judgment Rule Requires Dismissal of All of Plaintiff's Claims." (CP00247). The argument is misplaced and not applicable to this case. The "business judgment" rule immunizes *management* from liability in a corporate transaction undertaken within the corporation's power and *management's* authority where a reasonable basis exists to indicate that the transaction was made in good faith. *Para-Medical Leasing v. Hangen*, 48 Wash. App. 389, 395, 739 P.2d 717, 721 (1987) (Italics in original). In this case, the individual directors or "management" of the Association are not named and there is no need or occasion to immunize them from liability. The business judgment rule does not protect a corporation or entity from its own actions – only management when they act in good faith. *See Id.*

The Association further argued "The Court Should Dismiss Plaintiffs' Claim for Negligence Based on The Alleged Acts of The Snow Plow Operator. CP 0254 Their argument begins with the assertion that "Plaintiffs allege the Association is vicariously liable for the alleged

liability of Benito Chavez, whom they claim negligently removed plaintiffs' boulders, damaged their fence, and compromised the integrity of the roadway." They go on to argue that "[a]n employer is not liable for the acts of an independent contractor," and "[Mr. Chavez] was and is and independent contractor." (CP 0255) Thus, "[t]he claim of negligence based upon the alleged acts of the snowplow contractor should be dismissed." (CP 00256).

This argument is misplaced because the Heberts do not allege negligence on the part of Benito Chavez, or vicarious liability thereof. The Heberts brought their claims directly against the Association for wrongfully causing the gate and boulders to be removed and damaging their property. The distinction of whether they retained Chavez as an employee or as a contractor has absolutely no bearing upon the matter. The Association is responsible for their own actions. Under the Association's legal reasoning, a party could escape liability for murder by hiring a contractor (rather than an employee) to be the hit man.

(8) Denial of Motion for Reconsideration Was on Untenable Grounds

Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion." *Fishburn v. Pierce Cty. Planning & Land Servs. Dep't.*, 161 Wash. App. 452, 472, 250 P.3d 146, 157 (2011); *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d

729 (2005). A decision constitutes an abuse of discretion when it is manifestly unreasonable or based on untenable grounds or reasons. *Gosney v. Fireman's Fund Ins. Co.*, 3 Wash. App. 2d 828, 880, 419 P.3d 447, 477 (2018); *Kreidler v. Cascade Nat'l Ins. Co.*, 179 Wn. App. 851, 861, 321 P.3d 281 (2014). A court's decision is based on untenable grounds if the factual findings are unsupported by the record; *Id.*, citing *In re Marriage of Fiorito*, 112 Wn. App. 657, 664, 50 P.3d 298 (2002). The Heberts' Motion for reconsideration detailed the many reasons the Court should have reconsidered its award of Attorneys' Fees and costs; should not have dismissed the Heberts claims against the Association; and should not have dismissed the Heberts' requests for declaratory relief. The record shows that between the Motion, Declarations, and Oppositions, nearly sixty pages were filed with the Court pertaining to this Motion. Judge Sparks gave no reasons or basis whatsoever for his denial of the Heberts' Motion for Reconsideration other than to say DENIED. In this case, the factual findings are nonexistent, unsupported by the record, and thus based on untenable grounds.

E. CONCLUSION

The trial court erred in granting summary judgment to the Association when multiple issues of material fact existed concerning the long-standing location of the Heberts' gate and boulders and the question of any burdens imposed upon the Association's Easement for the purpose of repair and maintenance of the roadway. The trial court also erred in

dismissing the Heberts' claims for damages and for declaratory relief, and in denying the Heberts' Motion for Reconsideration. This Court should reverse the trial court's summary judgment and order for foreclosure. Costs on appeal, including reasonable attorneys' fees should be awarded to the Heberts.

DATED this 14th day of May, 2020.

Respectfully submitted,

John Comstock

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The Comstock Law Firm, PLLC
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Attorney for Appellants

APPENDIX



2 Civil

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KITTITAS

L. Candace Hooper
Judge
Department One



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Scott R. Sparks
Judge
Department Two

August 5, 2019

Mr. Richard T. Cole
PO Box 638
Ellensburg, WA 98926

Mr. Peter M. Ritchie
PO Box 22680
Yakima, WA 98907-2680

Ms. Marlyn K. Hawkins
701 Pike Street Suite 1150
Seattle, WA 98101

RE: Hebert v. Spring Creek Easement Owners Assoc., and
Spring Creek Road Maintenance Assoc. v. Hebert
Kittitas County Superior Court case # 18-2-00104-1 (consolidated)

Counsel:

The Court has spent sufficient time reviewing the facts and the law surrounding this case to confidently set forth a decision. As is not contested, the Heberts placed a gate across an HOA controlled easement and placed boulders adjacent to and/or within portions of said easement. These impediments or obstructions were removed and the HOA seeks reimbursement for the costs associated therewith. The HOA also seeks payment of assessments attributable to snow plowing, some of which was accomplished outside of the strict boundaries of the HOA. Due to the conflict surrounding the gate and the boulders the Heberts are delinquent in paying their assessments, and in addition object to paying for snow plowing outside of the strict confines of the HOA boundaries.

The HOA clearly has the better of the argument. The language from the HOA (and the obvious need for certainty when managing disparate property interests) mandates that the HOA be responsible for the easements within the HOA and that said responsibility extinguishes the landowners' rights thereto. Said more simply, since the HOA is required to maintain the easements, the landowners may not. Since the HOA had to expend funds to "undo" what the Hebert's had done, the HOA is entitled to reimbursement.

Sarah H. Keith
Court Administrator

Kittitas County Courthouse
205 West Fifth Avenue Room 207
Ellensburg, Washington 98926
509-962-7533
00685

Robin Raap
Assistant Court Administrator

Regarding the off-site snow plowing, it is hard to image a more necessary expense that the HOA could undertake to benefit the HOA. Since snowplowing is obviously a mandatory duty of the HOA, all logic and reason require that the HOA clear the roads leading to the HOA so that the homeowners can access the roads within the HOA. To only plow the interior roads without plowing the exterior roads would mean access to these homes would be frustrated... clearly an illogical and undesirable result.

As has been the law in this state for many years, land owners who own property subject to an HOA have diminished rights over their property included in the HOA. "Lot Owners' remedies are limited to making their wishes known to the Association, casting their votes, and seeking declaratory relief if the Association acts beyond its authority. Lot Owners are not permitted to compound the Association's problems by unilaterally withholding assessments." *Panther Lake Ass'n v. Juergensen*, 76 Wn.App. 586, 591 (1995).

Summary judgment should be granted to the HOA on each issue and the final judgment should include reasonable attorney fees. Counsel should prepare final paperwork and note the matter for presentment.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott R. Sparks". The signature is fluid and cursive, with the first name "Scott" being the most prominent part.

Scott R. Sparks

SRS/hs

cc: Court File



2 Civil

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IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KITTITAS

Cynthia Hebert and James D. Hebert,)
husband and wife,)

NO. 18-2-00104-1 (Consolidated)

Plaintiffs,)

v.)

ORDER GRANTING SPRING
CREEK EASEMENT OWNERS
ASSOCIATION AND SPRING
CREEK ROAD MAINTENANCE
ASSOCIATION'S MOTIONS FOR
SUMMARY JUDGMENT, AND
DECREE OF FORECLOSURE

Spring Creek Easement Owners)
Association (RMA) Board of Trustees)

Defendant.)

SPRING CREEK ROAD)
MAINTENANCE ASSOC., a)
Washington nonprofit corporation,)

Plaintiff,)

NO. 18-2-00284-19

v.)

JAMES D. HEBERT and CYNTHIA S.)
HEBERT, husband and wife and their)
marital community; and JOHN DOES)
1-10,)

Defendants.)

**Order Granting Spring Creek Easement
Owners/Road Maintenance Association
Motions for Summary Judgment - 1**

LAW OFFICES OF
MEYER, FLUEGGE & TENNEY, P.S.
230 South Second Street · P.O. Box 22680
Yakima, WA 98907-2680
Telephone (509) 575-8500

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1 THIS CONSOLIDATED MATTER having come before the Court on July 18, 2019
2 upon motions for summary judgment filed by Spring Creek Easement Owners Association
3 and Spring Creek Road Maintenance Association, and the Court having considered the file,
4 heard argument of counsel, and the Court having reviewed the files and records herein,
5 specifically including:

- 6 1. Plaintiff's Motion for Summary Judgment and Decree and Foreclosure filed on
7 November 13, 2018 (in case 18-2-00284-19 prior to consolidation with the
8 Heberts' claims);
- 9 2. Declaration of Marlyn Hawkins in support of Motion for Summary Judgment
10 and Decree of Foreclosure, and the exhibits attached thereto, filed with the
11 above-listed motion;
- 12 3. Declaration of John Craig in Support of Motion for Summary Judgment and
13 Decree of Foreclosure, and the exhibits attached thereto, filed with the above-
14 listed motion;
- 15 4. Spring Creek Easement Owners Association's Renewed Motion for Summary
16 Judgment and Decree of Foreclosure, filed on June 19, 2019;
- 17 5. Supplemental Declaration of Marlyn Hawkins in Support of Renewed Motion
18 for Summary Judgment and Decree of Foreclosure and the exhibits thereto, filed
19 on June 19, 2019;

- 1 6. Supplemental Declaration of John Craig in Support of Renewed Motion for
2 Summary Judgment and Decree of Foreclosure and the exhibits thereto, filed on
3 June 19, 2019;
- 4 7. Declaration of Benito Chavez in Support of Renewed Motion for Summary
5 Judgment and Decree of Foreclosure and the exhibits attached thereto, filed on
6 June 19, 2019;
- 7 8. Spring Creek Easement Owners Association's Motion for Summary Judgment;
- 8 9. Declaration of Marion Deardorff in Support of Motion for Summary Judgment,
9 with attachments;
- 10 10. Declaration of Peter M. Ritchie in Support of Motion for Summary, with
11 attachments;
- 12 11. Declaration of John Craig;
- 13 12. Declaration of Benito Chavez, Jr.;
- 14 13. Plaintiff Heberts' Response to Spring Creek Easement Owners Association
15 Motion for Summary Judgment and to Spring Creek Road Maintenance
16 Association's Renewed Motion for Summary Judgment and Decree of
17 Foreclosure, with attachments;
- 18 14. Declaration of Cynthia Sullivan Hebert;
- 19 15. Declaration of Jon Koloski;
- 20 16. Second Declaration of Peter M. Ritchie in Support of Motion for Summary
21 Judgment;

1 17. Spring Creek Easement Owners Association's Reply in support of Motion for
2 Summary Judgment; and

3 18. Spring Creek Easement Owners Association's Reply in Support of Renewed
4 Motion for Summary Judgment and Decree of Foreclosure;

5 19. Declaration of Marlyn Hawkins in Support of Attorneys' Fees and Costs;

6 20. Affidavit of Peter Ritchie;

7 And the Court finding there are no genuine issues of material fact preventing
8 summary judgment,

9 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED
10 as follows:

11 1. Defendant Spring Creek Easement Owners Association's Motion for Summary
12 Judgment is GRANTED.

13 2. There are no material issues of fact precluding partial summary judgment on
14 behalf of Defendant Spring Creek Easement Owners Association, and said
15 defendant is entitled to summary judgment dismissal of all of Plaintiffs James
16 and Cynthia Hebert's claims;

17 3. Plaintiff Spring Creek Road Maintenance Association's Renewed Motion for
18 Summary Judgment and Decree of Foreclosure is GRANTED;

19 4. This Court shall enter a Judgment and Decree of Foreclosure in favor of Spring
20 Creek Road Maintenance Association which includes the principal amount of
21 \$21,802.43 and pre- and post-judgment interest at the contractual rate of 18%.

1 5. Defendant Spring Creek Easement Owners Association and Plaintiff Spring
2 Creek Road Maintenance Association are entitled to a Judgment against
3 Plaintiffs James and Cynthia Hebert for their reasonable attorney fees, costs, and
4 expenses under the HOA Act and as provided in the Association's Declaration
5 of Covenants, Conditions and Restrictions.

6 6. The attorneys' fees and costs incurred by the Association in prosecuting the
7 foreclosure are reasonable and are ordered in the amount stated in the Judgment;

8 ~~7. The attorneys' fees and costs incurred by the Association in the defense of the~~
9 ~~Heberts' claims are reasonable and are ordered in the amount stated in the~~
10 ~~Judgment.~~ SM

11 DATED this 12th day of Sept., 2019.

13 
14 THE HONORABLE SCOTT SPARKS

15
16
17 Presented by:

18 
19 PETER M. RITCHIE, WSBA #41293
20 Meyer, Fluegge & Tenney, P.S.
21 Attorneys for Defendant Spring Creek
Easement Owners Association

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Approved as to Form;

MARLYN K. HAWKINS, WSBA No. 26639
Attorneys for Plaintiff Spring Creek Road
Maintenance Association

Approved as to Form;

RICHARD T. COLE, WSBA #5072
Attorneys for Plaintiffs
James and Cynthia Hebert



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KITTITAS COUNTY
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IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KITTITAS

Cynthia Hebert and James D. Hebert,)
husband and wife,)

NO. 18-2-00104-1 (Consolidated)

Plaintiffs,)

v.)

ORDER GRANTING SPRING
CREEK EASEMENT OWNERS
ASSOCIATION AND SPRING
CREEK ROAD MAINTENANCE
ASSOCIATION'S MOTIONS FOR
SUMMARY JUDGMENT, AND
DECREE OF FORECLOSURE

Spring Creek Easement Owners)
Association (RMA) Board of Trustees)

Defendant.)

SPRING CREEK ROAD)
MAINTENANCE ASSOC., a)
Washington nonprofit corporation,)

Plaintiff,)

NO. 18-2-00284-19

v.)

JAMES D. HEBERT and CYNTHIA S.)
HEBERT, husband and wife and their)
marital community; and JOHN DOES)
1-10,)

Defendants.)

**Order Granting Spring Creek Easement
Owners/Road Maintenance Association
Motions for Summary Judgment - 1**

LAW OFFICES OF
MEYER, FLUEGGE & TENNEY, P.S.
230 South Second Street · P.O. Box 22680
Yakima, WA 98907-2680
Telephone (509) 575-8500

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1 THIS CONSOLIDATED MATTER having come before the Court on July 18, 2019
2 upon motions for summary judgment filed by Spring Creek Easement Owners Association
3 and Spring Creek Road Maintenance Association, and the Court having considered the file,
4 heard argument of counsel, and the Court having reviewed the files and records herein,
5 specifically including:

- 6 1. Plaintiff's Motion for Summary Judgment and Decree and Foreclosure filed on
7 November 13, 2018 (in case 18-2-00284-19 prior to consolidation with the
8 Heberts' claims);
- 9 2. Declaration of Marlyn Hawkins in support of Motion for Summary Judgment
10 and Decree of Foreclosure, and the exhibits attached thereto, filed with the
11 above-listed motion;
- 12 3. Declaration of John Craig in Support of Motion for Summary Judgment and
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1 17. Spring Creek Easement Owners Association's Reply in support of Motion for
2 Summary Judgment; and

3 18. Spring Creek Easement Owners Association's Reply in Support of Renewed
4 Motion for Summary Judgment and Decree of Foreclosure;

5 19. Declaration of Marlyn Hawkins in Support of Attorneys' Fees and Costs;

6 20. Affidavit of Peter Ritchie;

7 And the Court finding there are no genuine issues of material fact preventing
8 summary judgment,

9 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED
10 as follows:

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12 Judgment is GRANTED.

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14 behalf of Defendant Spring Creek Easement Owners Association, and said
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16 and Cynthia Hebert's claims;

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18 Summary Judgment and Decree of Foreclosure is GRANTED;

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1 5. Defendant Spring Creek Easement Owners Association and Plaintiff Spring
2 Creek Road Maintenance Association are entitled to a Judgment against
3 Plaintiffs James and Cynthia Hebert for their reasonable attorney fees, costs, and
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5 of Covenants, Conditions and Restrictions.

6 6. The attorneys' fees and costs incurred by the Association in prosecuting the
7 foreclosure are reasonable and are ordered in the amount stated in the Judgment;

8 ~~7. The attorneys' fees and costs incurred by the Association in the defense of the~~
9 ~~Heberts' claims are reasonable and are ordered in the amount stated in the~~
10 ~~Judgment.~~ SM

11 DATED this 12th day of Sept., 2019.

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13 
14 THE HONORABLE SCOTT SPARKS

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16
17 Presented by:

18 
19 PETER M. RITCHIE, WSBA #41293
20 Meyer, Fluegge & Tenney, P.S.
21 Attorneys for Defendant Spring Creek
Easement Owners Association

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Approved as to Form;

MARLYN K. HAWKINS, WSBA No. 26639
Attorneys for Plaintiff Spring Creek Road
Maintenance Association

Approved as to Form;

RICHARD T. COLE, WSBA #5072
Attorneys for Plaintiffs
James and Cynthia Hebert



2 Civil

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KITTITAS

L. Candace Hooper
Judge
Department One



Scott R. Sparks
Judge
Department Two

FILED
21 OCT 19 AM 11:02
KITTITAS COUNTY CLERK

October 21, 2019

Mr. Richard T. Cole
PO Box 638
Ellensburg, WA 98926

Mr. Peter M. Ritchie
PO Box 22680
Yakima, WA 98907-2680

Ms. Marlyn K. Hawkins
Ms. Alexis Ducich
701 Pike Street Suite 1150
Seattle, WA 98101

RE: Hebert v. Spring Creek Easement Owners Assoc., and
Spring Creek Road Maintenance Assoc. v. Hebert
Kittitas County Superior Court case # 18-2-00104-1 (consolidated)

Counsel:

By this letter the Court hereby DENIES the Hebert's Motion for Reconsideration of Final Summary Judgment Orders and Awarded Fees and Costs, filed September 20, 2019.

Sincerely,

Scott R. Sparks

SRS/hs

cc: Court File

Sarah H. Keith
Court Administrator

Kittitas County Courthouse
205 West Fifth Avenue Room 207
Ellensburg, Washington 98926
509-962-7533

Robin Raap
Assistant Court Administrator

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2 Civil

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KITTITAS COUNTY

Cynthia Hebert and James D. Hebert,
husband and wife

Plaintiffs,

v.

Spring Creek Easement Owners Association
(RMA) Board of Trustees

Defendants.

No. 18-2-00104-1 (Consolidated) ✓

ORDER DENYING MOTION FOR
RECONSIDERATION
~~(proposed)~~

SPRING CREEK ROAD MAINTENANCE
ASSOC., A Washington nonprofit corporation

Plaintiff,

v.

JAMES D. HEBERT and CYNTHIA S.
HEBERT, husband and wife and their marital
community; and JOHN DOES 1-10

Defendants.

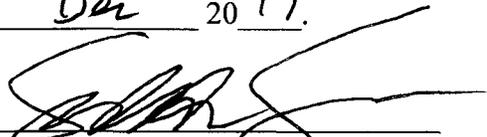
No. 18-2-00284-19

IT IS HEREBY ORDERED the Cynthia Hebert and James D Hebert's Motion For
Reconsideration of Final Summary Judgment Orders and Awarded Fees and Costs, filed

1 September 20, 2019, is DENIED.

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DATED this 16 day of Dec 20 19.



THE HONORABLE SCOTT SPARKS

COVENANTS, CONDITIONS AND RESTRICTIONS

This Declaration is made and entered by Cle Elum's Sapphire Skies, LLC, a Washington Limited Liability Company, referred to below as ("Declarant"). Declarant does hereby declare and set forth covenants, conditions and restrictions ("CC&R's") to run with all of the lands described below as provided by law, which covenants, conditions, restrictions, and reservations of easements shall be binding upon all parties and persons claiming an interest in any of the property described hereafter, and which covenants, conditions, restrictions, and reservations of easements shall be for the benefit of and limitations upon all future owners, and being for the purpose of keeping said real estate desirable, uniform and suitable in architectural design and use as specified herein.

The following disclosures and representations are made:

- A. The land affected by this Declaration, as of the date of execution of this Declaration, is legally described on *Exhibit A* attached hereto (the "Property").
- B. The current configuration of the lots (the "Lots") is as depicted on the map of the Property attached hereto as *Exhibit B*. The drawing is intended to indicate the current intended location and layout for the Property, and to provide a way to identify Lots and areas referred to in this Declaration. The current configuration of Lots is subject to change at the discretion of the Declarant, with regard to portions of the Property, which are then owned by the Declarant.
- C. Declarant intends by this document to impose upon the entire Property described herein, a mutually beneficial and enforceable common plan of reciprocal covenants, conditions and restrictions.

Therefore, Declarant hereby declares that the Property shall be held, conveyed, sold, and improved, subject to the following declarations, limitations, covenants, conditions and restrictions, all of which are for the purpose of enhancing and protecting the value and attractiveness of the Property, and every part thereof, as residential recreational land. All of the limitations, covenants, conditions and restrictions shall constitute covenants and encumbrances which shall run with the land and shall be binding upon Declarant and its successors-in-interest and assigns for its term and all parties having or acquiring any right, title, or interest in or to any part of the Property.

ARTICLE I

ASSOCIATION, ADMINISTRATION, MEMBERSHIP AND VOTING RIGHTS

- 1.1 Organization of Association: An Association is or shall be incorporated as SPRING CREEK EASEMENT OWNERS ASSOCIATION (the "Association"), pursuant to the Washington Corporation Act.
- 1.2 Duties and Powers: The duties and powers of the Association are those set forth in this Declaration. The primary functions of the Association shall be the maintenance, operation and repair of the private road easements over and across the Property for the purpose of ingress and egress to the Lots. A map of such roads is attached hereto as *Exhibit C* (the "Easements"). A further purpose of the Association is the collection of Assessments and payment of common expenses to maintain, operate and repair the Easements (the "Common Expenses").
- 1.3 Membership: The Owner of a Lot shall automatically, upon becoming the Owner of that Lot, be a Member of the Association, and shall remain a Member thereof until such time as his or

her ownership ceases for any reason, at which time his or her membership in the Association shall automatically cease.

- 1.4 Transferred Membership: Membership in the Association shall not be transferred, pledged, or alienated in any way, except upon the transfer of ownership of the Lot to which it is appurtenant; and then Membership shall immediately transfer to the new Owner. Any attempt to make a prohibited transfer is void. When a Lot is transferred to a new Owner, the Association shall have the right to record the transfer of Membership upon its books, and thereupon the old membership outstanding in the name of the former Owner shall be null and void.
- 1.5 Classes of Membership; Voting Requirements: The Association shall have one class of voting membership. Each Lot owner will have one vote per lot.
- 1.6 Membership Meetings: There shall be one regular meeting of the Members of the Association each year, such special meetings of Members of the Association as determined by the Board of Trustees, or called for by at least twenty percent of the Members.
- 1.7 Board of Trustees: The day-to-day affairs of the Association shall be managed by a Board of Trustees comprised of three (3) members, to be elected annually by a majority vote of a quorum of the members then present and voting or present by way of a proxy. Members representing fifty percent (50%) of Lot ownership shall constitute a quorum.
- 1.8 Use of Agent: The Board of Trustees, on behalf of the Association, may contract with a professional management agent for the performance of maintenance and repair and for conducting other activities on behalf of the Association, as may be determined by the Board.

ARTICLE 2

RESIDENCE AND USE RESTRICTIONS

- 2.1 Land Use and Building Type: The Property is a rural residential community. A goal and objective of these Covenants, Conditions and Restrictions is to maintain a quality community appearance, insure compatible development of land and structures, and to protect and enhance real estate values. The Property is designed and intended to be a territorial view community, and all design and improvement guidelines, and all covenants, conditions, and restrictions contained herein shall be construed to further this intent that views from each parcel remain unobstructed.
 - (a) Minimum Dwelling Size: Each dwelling structure shall consist of a minimum of One Thousand Five Hundred (1,500) square feet, exclusive of basement, garages, patios, breezeways and detached storage rooms. For purposes of this provision, a dwelling with a daylight basement shall include the daylight basement area toward the total square footage. No mobile or manufactured homes shall be allowed.
 - (b) Roofs: All roofs and roof materials shall be fire retardant and as approved by applicable governmental authorities. Subject to governmental approval, the following roof materials are permitted: metal, tile, slate, or fire-retardant, dimensional shake shingles, architectural composition (Elk Prestique Plus 30-year or comparable) shingles, and comparable roofing materials. Untreated cedar shakes or shingles shall not be permitted. On at least 80% of roof, minimum roof pitch shall be 6/12.
 - (c) Construction: All homes constructed on each Lot shall be built of new materials, with the exception of "décor" items such as used brick, weathered planking, and similar items. No homes on any Lot shall consist, in whole or part, of a mobile home, nor of "factory built housing" (as that term is defined in RCW 43.22.450 as in effect at the time of

execution of this Declaration.) Siding shall be cement fiber board, logs or cedar. When accent material is used, such as rock, brick, stone, or EIFS, it shall be used for a minimum of 20% of the exterior surface area visible from the private roads serving the Property. Where accent materials abut corners, said corners shall be wrapped in the accent materials for a minimum distance of twenty-four (24) inches on each face. Windows and doors shall be fitted with a minimum of 3½" of trim both vertical and horizontal.

- (d) Antennae and Satellite Dishes: No antenna, satellite dish or other device for the transmission or reception of radio, television, satellite signals or other form of signal transmission or reception of any sort (except "mini dishes") shall be visible from community roads or the primary building site of any parcel.
- (e) Fencing: All fences and fencing materials fronting community roads shall be primarily of wood, or wood grain composite, and shall be wood rail variety. No barbed wire may be used on the property perimeter. Fence height shall be a maximum of 8 feet from ground elevation.
- (f) Outbuildings: All outbuildings (detached garages, etc.) must complement the dwelling in material and color and must be placed in an unobtrusive location within the main building site, and must be set back or even with the front of the house or set further from the private roads than the main building site. This requirement may be waived if an acceptable plan is submitted and approved in writing by a majority of the Members, provided the plan is compatible and will enhance the Property without materially impairing views from other Lots.
- (g) Exterior Colors: Exterior colors of all buildings shall be of moderate hues and/or earth tones.

2.2. Recreational vehicles, boats, trailers, campers, etc. shall not be parked in the public right of way or on community roads for a period of time exceeding 18 hours, nor shall they be parked in the right of way on a daily or regular basis. All residents or guests staying more than 24 hours shall park their vehicles on private property.

2.3 Vegetation Restrictions: No vegetation, other than existing vegetation in excess of 72" high as of March 2003, shall be allowed to restrict the view from the primary dwelling on any existing lot or any lot created by future subdivision of existing lots. View shall be defined as the area within the following lines: a line at each end of the main face of the habitable portion of the main dwelling, parallel to a line perpendicular to the center of the main face, and that area within 30 degrees of the outside of each line (Exhibit E). This restriction shall be liberally construed so as to maintain views from the Lots. Mature timber and trees may be removed only for the following reasons: for the purpose of maintaining views as outlined above (section 2.3), as well as to provide access roads, clear building sites and surrounding yards and open space, or to remove diseased and dangerous trees, as certified diseased or dangerous by a licensed and or accredited arborist or forester.

2.4 Motorcycles snowmobiles and motorized ATVs and recreational vehicles: ATV's and motorcycles are permitted for ingress and egress along easement roads. Use is also permitted on Owner's Lot if said lot is 20 acres or larger.

2.5 Vehicle & Equipment Storage: All inoperable vehicles and equipment must be stored inside of an enclosed building. All stored recreational vehicles shall be placed behind the front elevation of the house, and must be screened from view.

2.6 Vacation Provisions. Any Lot may be used for vacation purposes and have a motor home or vacation trailer for a period of time not to exceed twelve weeks per calendar year. Said



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recreational vehicles are not to be left on property unless otherwise permitted by these CC&R's.

- 2.7 **Business Use Prohibited:** No trade, craft, business, or commercial or manufacturing enterprise or activity of any kind, other than a professional business conducted from an office inside the home and which does not generate excessive customer traffic, shall be conducted or carried on upon any Lot within the Property. This Section is specifically intended to prohibit maintenance or operation of a day care, unless required to be permitted by law. In addition, no goods, equipment, vehicles, materials or supplies used in connection with any business or commercial activity shall be permitted, kept, parked, stored, dismantled, or repaired on any Lot or street within the Property, unless stored entirely within a structure permitted by these CC&Rs.
- 2.8 **Nuisance Prohibited:** No noxious, illegal, or offensive activities shall be carried on in any Dwelling, or in any part of the Property, nor shall anything be done thereon which may be or may become an annoyance or a nuisance to, or which may in any way interfere with, the quiet enjoyment of each of the Owners of his or her respective Dwelling Lot, or which shall in any way increase the rate of insurance for the Property, or cause any insurance policy to be canceled or to cause a refusal to renew the same, or which will impair the structural integrity of any building. No Lot within the Property shall be used as a dump for trash or rubbish of any kind, and all garbage or other waste shall be kept in appropriate sanitary containers for proper disposal. No waste, including rocks, dirt, lawn, or shrubbery clippings shall be dumped anywhere on the Property. Mulching yard waste is permitted.
- 2.9 **Temporary Structures:** No structure of a temporary character, basement only, tent, shack, garage, barn, prefabricated structure or other outbuildings, or trailer shall be used as a residence, except on a temporary basis during the course of evident construction of the primary dwelling, but in no case longer than 14 months. No mobile homes are permitted on the property.
- 2.10 **Time of Completion:** Any Dwelling or structure erected or placed on any Lot in the Property shall be completed as to exterior appearance, including finished painting, within fourteen (14) months from the date of commencement of construction.
- 2.11 **Utilities:** All utilities to be installed, including cable, phone, power, and any other utilities shall be installed underground. No overhead utilities shall be allowed.
- 2.12 **Animals:** Animals include horses, dogs, cats, caged birds, fish in tanks, and other small household pets which shall be permitted on Lots. Dogs shall not be allowed to run at large or to create a disturbance for other Owners. Dogs are permitted within the Easements only when accompanied by their owners or their agents. Persons accompanying the dog shall scoop animal waste.
- Animals including horses, livestock and poultry can be raised for purpose of private use and enjoyment, provided they are not kept, bred or maintained for any commercial purpose. Pigs shall not be permitted. All animal enclosures must be kept in a neat, clean, and odor free condition at all times.
- 2.13 **Signs:** Professional appearing signs advertising Lots for sale or rent, including the temporary daytime display of signs advertising open houses, may be displayed on the appropriate Lot, provided that such signs shall be of reasonable and customary size, not to exceed five (5) square feet. Declarant, or its authorized agent may display one construction sign per Lot to advertise Lots for sale. Such signs shall not exceed 32 square feet.
- 2.14 **Garbage and Refuse Material:** No property shall be used or maintained as dumping ground for discarded equipment, rubbish, trash, garbage, or similar material. After initial

construction of the residence, all garbage and trash shall be kept in covered containers. No cans shall be visible until such day as designated for refuse pick up.

2.15 Mail Boxes: Mail boxes shall be at specified group locations as per U.S. Post Office requirements.

2.16 No Warranty of Enforceability: While Declarant has no reason to believe that any of the restrictive covenants contained in this Article 2 or elsewhere in this Declaration are or may be invalid or unenforceable for any reason or to any extent, Declarant makes no warranty or representation as to the present or future validity or enforceability of any such restrictive covenant. Any Owner acquiring a Lot in the Property in reliance on one or more of such restrictive covenants shall assume all risks of the validity and enforceability thereof and, by acquiring the Lot agrees to hold Declarant harmless therefrom.

ARTICLE 3

REPAIR AND MAINTENANCE

3.1 Owner's Maintenance Responsibilities: Each Owner shall have responsibility for maintaining the exterior of their residence and all other buildings and improvements located upon their Lot. Each parcel shall be maintained in a clean, sightly condition at all times and shall be kept free of litter, junk, trash, rubbish, garbage, debris, and excess building materials.

3.2 Repair and Maintenance Rights and Duties of Association: The Association shall maintain and repair the Easements, or shall contract for such maintenance and repair to assure maintenance of the Easements in good condition.

3.3 For the purpose of performing any maintenance or repair as authorized by this Article, or for purposes of making emergency repairs necessary to prevent damage to a portion the Property or the Easements, or for any other purpose reasonably related to the performance by the Board of its responsibilities under this Declaration, the Association (and its agents and employees) shall have an irrevocable easement over and onto all portions of the Easement Property, and shall also have the irrevocable right after reasonable notice to the Owner, and at reasonable hours, to enter onto any Lot.

ARTICLE 4

ASSOCIATION MAINTENANCE FUNDS AND ASSESSMENTS

4.1 Creation of the Lien and Personal Obligation of Assessments: The Declarant for each Lot owned within the Property, hereby covenants, and each Owner of any Lot by acceptance of a deed or contract therefore, whether or not it shall be so expressed in such deed or contract, is deemed to covenant and agree to pay to the Association the following Assessments, which shall be established and collected as needed and in a manner prescribed by the Board:

- Regular Assessments;
- Extraordinary Assessments

All Assessments, together with interest, costs, and actual attorneys' fees, shall be a charge and a continuing lien upon the Lot against which each Assessment is made. However, such lien shall be subordinate to the lien of any first mortgage or construction loan. Such liens may be enforced or foreclosed according to law, with attorney's fees and costs to be charged against the party being foreclosed. Each such assessment together with interest, costs and actual attorneys' fees, shall also be the personal obligation of the person who was the Owner of such Lot at the time when the Assessment fell due. No Owner of a Lot may exempt himself or

herself from liability for his or her contribution toward the Common Expenses by waiver of the use or enjoyment of the Easements or by the abandonment of his or her Lot.

- 4.2 Purpose of Assessments: The Assessments levied by the Association shall be used exclusively for the normal maintenance, operation, insurance and repair of the Easements. The Board may elect to have Regular Assessments designed to establish an adequate reserve fund for maintenance, operation, insurance and repair of the Easements. The obligations of the Lot Owners as it relates to maintenance of the easement roads shall be based upon the definition of "normal maintenance" condition of such easement roads, which is "grading, filling of potholes, culvert and/or ditch repair, brush clearing, adding lost surface materials, and such other maintenance as reasonably necessary to provide a smooth road for ingress and egress for owners of Lots herein specified. The roads shall be snowplowed, at a minimum, 16 feet wide, upon 6 inches of snowfall. It is the intent of these standards to maintain the Roads passable by four-wheel drive vehicles. It shall be the responsibility of Lot owners to plow their own driveways. A majority of the Lot Owners served by a particular Road may approve, in advance, any additional snowplowing, which snowplowing shall be paid for by said Lot Owners.
- 4.3 Regular Assessments: If the Board so elects, it may establish Regular Assessments. If it chooses to do so, the Board shall determine and fix the amount of the Regular Assessment against each Lot at least sixty (60) days in advance of the start of each fiscal year; provided, however, that the Regular Assessment may not be increased by more than ten percent (10%) above the Regular Assessment for the immediately preceding fiscal year, without the vote or written assent of members representing ownership of two-thirds (2/3) or more of the Lots.
- 4.4 Extraordinary Assessments: In addition to the Regular Assessments authorized above, the Board may levy, in any fiscal year, an Extraordinary Assessment applicable to that year only for the purpose of covering the actual cost of any reconstruction, repair or replacement of any Easements, due to damage or normal wear-and-tear, or to defray any unanticipated or underestimated expense not covered by the Regular Assessment.
- 4.5 Allocation of Assessments: Limited Exemption During Construction: Each Lot, including Lots owned by Declarant, shall bear an equal share of each Regular and Extraordinary Assessment. Except, Declarant shall be exempt from the payment of any Assessment on a Lot that does not include a completed Dwelling. This exemption shall be in effect only until a certificate of occupancy or its equivalent for the Dwelling has been issued or until one hundred eighty (180) days after the issuance of a building permit for the Dwelling, whichever first occurs.
- 4.6 Date of Commencement of Assessments; Due Dates: Subject to the foregoing exemption pending construction, the Regular Assessments provided for herein shall commence as to all Lots in the Property on the first day of the month following the completion of the roads or closing of the sale of the first Lot in the Property, whichever occurs later. Due dates of Assessments shall be the first day of every calendar month. No notice of such Assessment shall be required other than an annual notice setting forth the amount of the monthly Assessment.
- 4.7 Payment of Taxes Assessed Against Easements or Personal Property of Association: In the event that any taxes are assessed against the Easements or the personal property of the Association, rather than against the Lots, said taxes shall be included in the Assessments made under the provisions of this Article, and, if necessary, an Extraordinary Assessment may be levied against the Lots in an amount equal to said taxes, (regardless of any limitation otherwise applicable to Extraordinary Assessments set forth in Paragraph 4.4 above), to be paid in two (2) semi-annual installments, thirty (30) days prior to the due date of each tax installment.



- 4.8 Transfer of Lot by Sale or Foreclosure: The sale or transfer of any Lot shall not affect any Assessment lien, or relieve the Lot from any liability therefore, whether the lien pertains to payments becoming due prior or subsequent to such sale or transfer. Notwithstanding the foregoing, the sale or transfer of any Lot pursuant to foreclosure, or by deed in lieu of foreclosure, of a mortgage recorded prior to the recordation of a Notice of Delinquent Assessment covering such Lot, and given in good faith and for value, shall extinguish the lien of all Assessments which become owing prior to such sale or transfer. Sale or transfer pursuant to mortgage foreclosure shall not, however, affect the personal liability of the Owner for unpaid Assessments. Any Assessments for which the liens are extinguished pursuant to this Paragraph shall be deemed to be Common Expenses collectable from all of the Lots including the Lot for which the lien was extinguished.
- 4.9 In the case of any other conveyance of a Lot, the grantee of the same shall be jointly and severally liable with the grantor for all unpaid Assessments by the Association against the latter up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefore. However, any such grantee shall be entitled to a statement from the Board, setting forth the amount of the unpaid Assessments due the Association, and such grantee shall not be liable for, nor shall the Lot conveyed by subject to a lien for, any unpaid Assessments made by the Association against the grantor in excess of the amount set forth in the statement. Provided, however, the grantee shall be liable for any Assessment becoming due after the date of any such statement.
- 4.10 Enforcement of Assessment Obligation; Priorities; Discipline: If any part of any Assessment is not paid and received by the Association or its designated agent within thirty (30) days after the due date, such Assessment shall thereafter bear interest at eighteen percent (18%) interest until paid. Additionally, automatic late processing fees of Ten Dollars (\$10.00) per month shall be assessed for each month from the due date until the Assessment(s) and all late charges are paid. Each delinquent Assessment may be evidenced as a matter of public record by a Notice of Delinquent Assessment recorded by the Association or other party or parties entitled to enforce and/or receive the same, which recorded Notice of Delinquent Assessment shall provide notice to the public of the delinquency.

ARTICLE 5

EASEMENTS AND UTILITIES

- 5.1 Access, Use and Maintenance Easements: Declarant expressly reserves for the benefit of the Owners reciprocal, nonexclusive easements for access, ingress and egress, over and under all of the Easements. Declarant expressly reserves the right to install entry gates and move the location of the road and therefore the easement. Such changes at the determination of Declarant may be made only to meet grade, side slope, approach angles, base and surfacing requirements, cuts and fills, and radius requirements of county or municipal road standards for any future segregation. Any such change shall not cross the primary building site of a parcel, and shall be in approximately the same location, and as much as possible shall be located in the existing easement. In addition, in the Easements, the Owners of the Lots may install utilities, including but not limited to: sanitary sewer, water, electric, gas, television receiving, or telephone lines or connections, provided, however such use of the Easements shall be reasonably necessary for use and enjoyment of a Lot in the Property and such use shall not infringe on any Lot Owner's use of the Easement for access, ingress and egress. Such Easements shall be appurtenant to, binding upon and shall pass with the title to, every Lot conveyed.
- 5.2 Owners' Rights and Duties With Respect to Utilities: The rights and duties of the Owners of Lots within the Property with respect to utilities shall be as follows:

5.2.1 Whenever sanitary sewer, water, electric, gas, television receiving, or telephone lines or connections are located or installed within the Easements, which connections, or any portion thereof, lie in or upon or beneath Lots owned by other than the Owner of a Lot served by said connections, the Owners of any Lots served by said connections shall have the right, and are hereby granted an easement to the full extent necessary therefore, to enter upon the Lot or to have the utility companies enter upon the Lots in or upon or below which said connections, or any portion thereof lie, to repair, replace and generally maintain said connections as and when necessary.

5.2.2 In the event of a dispute between the Owners with respect to the repair or rebuilding of said connections, or with respect to the sharing of the cost thereof, then, upon written request of one of such Owners addressed to the Association, the matter shall be submitted to the Board, which shall decide the dispute, and the decision of the Board shall be final and binding on the parties.

ARTICLE 6

INSURANCE

6.1 Insurance: The Board at its discretion shall be authorized to obtain and maintain the following policies of insurance:

- (a) Hazard Insurance: To the extent that there are improvements made to the Easements which may be insured against casualty loss, a "master" or "blanket" type of hazard insurance policy or policies may be maintained, protecting such improvements against loss or damage by fire and all other hazards that are normally covered by the standard extended coverage endorsement, and all other perils customarily covered for similar types of projects. The Board may enter into additional endorsements, provisions, and exceptions.
- (b) Liability Insurance: A comprehensive general liability insurance policy covering the Easements. The liability policy shall provide coverage for bodily injury and property damage for any single occurrence, covering bodily injury and property damage resulting from the operation, maintenance, repair or use of the Easements, in such amounts as the Board may determine.

6.2 Waiver of Claim Against Association: As to all policies of insurance procured by the Association and maintained by or for the benefit of the Association and/or the Owners, the Association and the Owners hereby waive and release all claims against one another, the Board, and Declarant, and agree to limit their recovery to the extent of the Insurance proceeds available, whether or not the insurable damage or injury is caused by the negligence of or breach of any agreement by any of said persons.

6.3 Insurance Premiums: Insurance premiums for any blanket insurance coverage obtained by the Association and any other insurance deemed necessary by the Board shall be a Common Expense to be included in the Regular Assessments levied by the Association and collected from the Owners. That portion of the Regular Assessments necessary for the required insurance premiums shall be separately accounted for by the Association in the reserve fund to be used solely for the payment of premiums of required insurance as such premiums become due.

6.4 Trustee for Policies: The Association, acting through its Board of Trustees, is hereby appointed and shall be deemed trustee of the interests of all named insureds under policies of insurance purchased and maintained by the Association. All insurance proceeds under any

such policies as provided for in this Article 6 shall be paid to the Board of Trustees and held in trust. The Board shall have full power to receive and to receipt for the proceeds and to deal therewith as provided herein. Insurance proceeds shall be used by the Association for the repair or replacement of the property for which the insurance was carried or otherwise disposed of as provided in this Declaration. The Board is hereby granted the authority to negotiate loss settlement with the appropriate insurance carriers, with participation, to the extent they desire, of mortgagees who have filed written requests within ten (10) days of receipt of notice of any damage or destruction as provided in this Declaration. Any two (2) Directors of the Association may sign a loss claim form and release form in connection with the settlement of a loss claim, and such signatures shall be binding on all the named insureds.

ARTICLE 7

DESTRUCTION; CONDEMNATION

- 7.1 **Damage to Easements:** In the event of any destruction of any portion of the Easements, the repair or replacement of which is the responsibility of the Association, it shall be the duty of the Association to restore and repair the same to its former condition, as promptly as practical. The proceeds of any insurance maintained pursuant to Article 6 for reconstruction or repair of the Easements shall be used for such purpose, unless otherwise provided herein. The Easements shall be reconstructed or rebuilt substantially in accordance with the original construction plans. If the amount available from the proceeds of such insurance policies for such restoration and repair is inadequate to complete the restoration and repair, the Board shall levy an Extraordinary Assessment for the deficiency and proceed with such restoration and repair.
- 7.2 **Damage to Dwellings:** In the event of any destruction of any Dwelling or Dwellings, it shall be the duty of the Owner(s) of the Dwelling or Dwellings to A) restore and repair the same to its/their former condition, as promptly as practical. The Dwelling or Dwellings shall be reconstructed or rebuilt substantially in accordance with the original construction plans, or in accordance with the rules set forth herein or B) clear all debris and return property to its natural state as promptly as possible.
- 7.3 **Alternate Plans for Restoration and Repair:** Notwithstanding the provisions of Paragraphs 7.1 and 7.2, the Association shall have the right, by a vote of Members representing two-thirds (2/3) or more of the Lots, to make alternate arrangements respecting the repair, restoration or demolition of any damaged portion of the Easements. The alternate plan may provide for special allocation of insurance proceeds, modification of design, or special allocation of any necessary Assessments. Any plan adopted pursuant to this Paragraph shall be adopted within sixty (60) days of the damage or destruction.
- 7.4 **Condemnation:** The taking or partial taking of any portion of the Easements by condemnation or threat thereof shall be negotiated by the Owner of the portion of the Property subject to such taking. Any award shall be that of the Owner; provided, however, that if such taking has the effect of taking the only route of access of any Owner of any Lot, the award shall be deposited in the general funds of the Association for the purpose of securing alternate access for such landlocked Owner, with any remainder to the Owner of the Lot being condemned.

ARTICLE 8

DECLARANT'S RIGHTS AND RESERVATIONS

- 8.1 Declarant is undertaking the work of construction of certain improvements to the Property. Completion of that work and the sale or other disposition of the Lots is beneficial to the



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Property. In order that said work may be completed and said Property be established as a rural residential community, nothing in this Declaration shall be understood or construed to:

- (a) Prevent Declarant, any builder or their contractors or subcontractors from doing on the Property whatever is reasonably necessary or advisable in connection with the completion of the work including improving the Easements; or
- (b) Prevent Declarant, or any builder or their representatives from erecting, constructing and maintaining on any part or parts of the property, such structures as may be reasonable and necessary for the conduct of their business of completing said work and establishing said Property as a rural residential community and disposing of the same in parcels by sale or other disposition; or
- (c) Prevent Declarant or any builder from maintaining such sign or signs on any of the Property as may be necessary for the sale or disposition thereof.

8.2 So long as Declarant, or any builder or their successors-in-interest and assigns, owns one or more of the Lots established and described in this Declaration and except as otherwise specifically provided herein, Declarant and all builders, and their successors and assigns, shall be subject to the provisions of this Declaration.

8.3 In the event Declarant shall convey all of its right, title and interest in and to the Property to any partnership, individual or individuals, corporation or corporations, then and in such event, Declarant shall be relieved of the performance of any further duty or obligation hereunder, and such partnership, individual or individuals, corporation or corporations, shall be obligated to perform all such duties and obligations of the Declarant.

ARTICLE 9

DURATION AND AMENDMENT

9.1 Duration: This Declaration shall continue in full force and effect for a period of ten (10) years from the date hereof, after which time the same shall be automatically renewed for successive terms of ten (10) years each, unless a Declaration of Termination is recorded, meeting the requirements for an amendment as set forth hereafter. All Lots within the Property shall continue to be subject to this Declaration during the term hereof regardless of sale, conveyance or encumbrance.

9.2 Amendments: This Declaration may only be amended after written approval of two-thirds (2/3) of the Members representing 2/3 or more of the Lots. Provided, however, that so long as Declarant owns any Lots in the Property, no amendment shall be approved without Declarant's express written consent. Notwithstanding the foregoing, any amendment made to this Declaration shall have no force or effect on the interest of an existing mortgagee, the beneficiary of a deed of trust, or a contract vendor, which interest is recorded prior to such amendment unless or until their written consent thereto has been obtained.

9.3 Home Owner's Association: The Owners may form a Home Owner's Association ("HOA") to enforce these CC&Rs by written approval of fifty percent plus 1 of the Members. Provided, however, that so long as Declarant owns any Lots in the Property, no HOA shall be formed without Declarant's express written consent. Any such HOA shall replace the Association and shall have the enforcement rights set for in Paragraph 10.1 below, as well as the powers and responsibilities set forth in Exhibit D attached hereto.

ARTICLE 10

GENERAL PROVISIONS

- 10.1 **Enforcement:** Any Owner, and any governmental or quasi-governmental agency or municipality having jurisdiction over the Property shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by this Declaration, and in such action shall be entitled to recover costs and reasonable attorneys' fees as are ordered by the Court. The Board may enforce any right any provisions contained herein relating to the maintenance, insurance, operation and repair of the Easements. Failure by any such person or entity to enforce any such provision shall in no event be deemed a waiver of the right to do so thereafter.
- 10.2 **Invalidity of Any Provision:** Should any provision of this Declaration be declared invalid or in conflict with any law of the jurisdiction where the Property is situated, the validity of all other provisions shall remain unaffected and in full force and effect.
- 10.3 **Conflict of Property Documents:** If there is any conflict among or between the Property Documents, priority shall be given to the Property Documents in the following order: Plat Map; this Declaration; Articles; bylaws; and rules and regulations of the Association. Notwithstanding the foregoing, any provision in any of the Property Documents, which is for the protection of mortgagees shall have priority over any inconsistent provision in that document or in any other Property Document.

EXHIBITS

- Exhibit "A" - Legal Description**
Exhibit "B" - Map depicting Lot configuration
Exhibit "C" - Map of roads
Exhibit "D" - Supplemental Articles for future Home Owners Association
Exhibit "E" - Main face diagram as defined in 2.3



EXHIBIT A
LEGAL DESCRIPTION

Lots 1 thru 8 of Section 35-21N-14E, auditor's file number
200308210059, book 29, page 50, as depicted on map attached as
Exhibit B.

EXHIBIT B - Lots

Spring Creek

SEC. 35 - T.21N. - R.14E, W.M.

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200 0 1 200 400 600
GRAPHIC SCALE FEET

SCALE: 1" = 200'
CONTOUR INTERVAL = 25'



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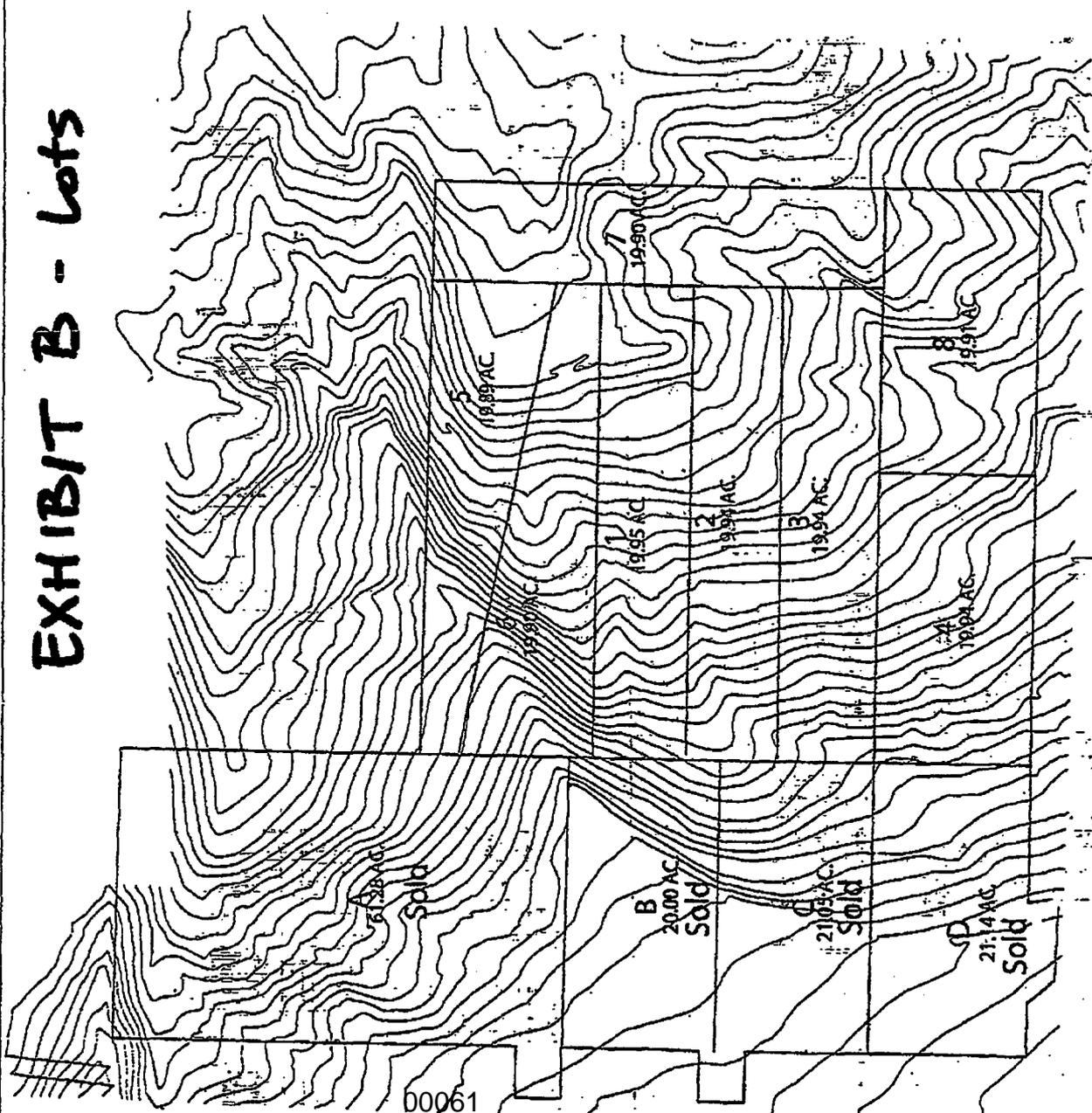


EXHIBIT D
SUPPLEMENTAL COVENANTS, CONDITIONS &
RESTRICTIONS

Upon the affirmative vote pursuant to Section 9.3 of the CC&R's to form a homeowner's association, the following Supplemental Covenants, Conditions & Restrictions shall apply, and the CC&Rs shall be revised as follows:

1. The designated sections of Article 1 of the CC&Rs shall be revised as follows:

"ARTICLE 1

ASSOCIATION, ADMINISTRATION, MEMBERSHIP
AND VOTING RIGHTS

- 1.1 Organization of Association: Pursuant to the Washington Nonprofit Corporation Act, a new association shall be incorporated, or the existing articles of incorporation for the SPRING CREEK EASEMENT OWNERS ASSOCIATION shall be amended to create the Spring Creek Homeowners Association, a Washington corporation (hereinafter the "Association"). The Association shall adopt new and/or amend existing articles and bylaws consistent with the original CC&R's, as modified by these Supplemental Covenants, Conditions & Restrictions. Adoption of same shall require the vote of Members representing fifty percent plus one of the Lots.
- 1.2 Duties and Powers: The duties and powers of the Association are those set forth in this Declaration, the Articles and Bylaws adopted by the Association, together with its general and implied powers of a nonprofit corporation, generally to do any and all things that a corporation organized under the laws of the State of Washington may lawfully do which are necessary or proper in operating for the peace, health, comfort, safety and general welfare of its Members, subject only to the limitations upon the exercise of such powers as are expressly set forth in this Declaration, the Articles and Bylaws. Without limiting the generality of the foregoing, the primary functions of the Association shall be enforcement of the covenants, the maintenance, operation and repair and insurance of the entry statement, private road easements over and across the Property for the purpose of ingress and egress to the Lots (A map of such roads is attached to the CC&R's as Exhibit C (the "Easements"), drainage system, common drainage and retention system and any other common amenities or elements which may be constructed and/or transferred to the Association. A further purpose of the Association is the collection of Assessments and payment of common expenses to maintain, operate, insure and repair the Easements and the other common amenities (the "Common Expenses").
- 1.3 Membership: The Owner of a Lot shall automatically, upon becoming the Owner of that Lot, be a Member of the Association, and shall remain a Member thereof until such time as his or her ownership ceases for any reason, at which time his membership in the Association shall automatically cease. Membership shall be in accordance with the Articles and Bylaws adopted by the Association.
- 1.4 Transferred Membership: Membership in the Association shall not be transferred, pledged, or alienated in any way, except upon the transfer of ownership of the Lot to which it is appurtenant; and then Membership shall immediately transfer to the new Owner. Any attempt to make a prohibited transfer is void. When a Lot is transferred to a new Owner, the Association shall have the right to record the transfer of Membership upon its books, and thereupon the old membership outstanding in the name of the former Owner shall be null and void.



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- 1.5 **Classes of Membership; Voting Requirements:** The Association shall have one class of voting membership. Each Lot owner will have one vote and voting procedures shall be set forth in the Articles and Bylaws adopted by the Association; provided, however, that no action of the members shall be taken without a quorum of Members participating directly or by proxy. A quorum shall be defined in the Articles and/or Bylaws but shall not be less than one-half of all Lot Owners.
- 1.6 **Membership Meetings:** Regular and special meeting of Members of the Association shall be held with the frequency, at the time and place, and in accordance with the provisions as set forth in the bylaws. Special meetings may be called by the Board of Trustees or Members holding at least twenty-percent of the voting power of the Members.
- 1.7 **Board of Trustees:** The affairs of the Association shall be managed by a Board of Trustees, which shall be established and which shall conduct regular and special meetings according to the provisions as set forth in the Articles and Bylaws.
- 1.8 **Use of Agent:** The Board of Trustees, on behalf of the Association, may contract with a professional management agent for the performance of maintenance and repair and for conducting other activities on behalf of the Association, as may be determined by the Board.
- 1.9 **Architectural Control Committee:** The Board shall form an Architectural Control Committee (hereinafter "ACC"). The ACC shall consist of three (3) members. The members shall be designated by the Board and shall serve such terms as are defined in the Bylaws adopted by the Association.
- 1.10 **Prohibition of Alteration and Improvement:** Subject to the exemption of Declarant hereunder, no structure, improvement, or alteration of any kind which will be visible from other Dwellings, private roadways serving the Property or any public right of way shall be commenced, erected, painted or maintained upon the Property, until the same has been approved in writing by the ACC.
- 1.11 **Plans and Approval:** The ACC shall base decisions to approve or deny proposals on the quality of the proposed workmanship and the materials to be used, the harmony of the proposal to the external design and existing structures, and as to location with respect to topography and finished grade elevation. The ACC shall also have the authority to develop and make available to all Owners within the Property, a set of rules and guidelines to assist Owners in preparing plans under this section. The rules and guidelines shall not be binding upon the Declarants or ACC, but shall set forth general criteria to be considered by the ACC in evaluating a particular application for architectural approval. The ACC shall consider and act upon any and all plans and specifications submitted for its approval under this Article and perform such other duties as from time to time shall be assigned to it by the Board, including the inspection of construction in progress to assure its conformance with plans approved by the ACC. The ACC may also take into account proposed exterior colors and materials in review of an application. Any application submitted to the ACC pursuant to this Article shall be deemed approved unless written disapproval or a request for additional information or materials by the ACC shall have been transmitted to the applicant within thirty (30) days after the date of receipt by the ACC of all required materials.
- 1.12 **Non-Liability of ACC Members:** Neither the ACC or Declarant, nor any member thereof shall be liable to the Association, or to any Owner for any loss, damage or injury arising out of or in any way connected with the performance of the ACC's duties hereunder unless due to the willful misconduct or bad faith of the ACC or member. The ACC shall review and approve or disapprove all plans submitted to it for any proposed structure, improvement or alteration, solely on the basis of the criteria established in this Declaration, aesthetic considerations and the overall benefit or detriment which would result to the immediate vicinity and the Property generally. The ACC shall not be responsible for reviewing, nor shall



its approval of any plan or design be deemed approval of, any plan or design from the standpoint of structural safety or conformance with building, zoning or other codes.

1.13 Minimum Standards: The minimum standards stated in Article 2 shall be binding upon the ACC unless and until this Declaration may be amended as provided below.

1.14 Member Review of Decisions: Notwithstanding the foregoing, any actions taken by the Board or the ACC pursuant to these Supplemental Covenants, Conditions & Restrictions may be reversed by the vote of an absolute majority of the members at a meeting properly called.

2. Section 2.1(f) shall be amended in its entirety by the following:

"(f) Outbuildings: All outbuildings (detached garages, etc.) must complement the dwelling in material, color and design and must be placed in an unobtrusive location within the primary building site, and must be set back or even with the front of the house. The ACC, at its discretion, may waive these requirements and the location requirement if an acceptable plan is submitted that is compatible and will enhance the property without overly restricting views from other Lots in the subdivision."

3. Section 2.1(g) shall be amended in its entirety by the following:

"(g) Exterior Colors: Exterior colors of all buildings shall be of moderate hues and/or earth tones and shall be approved by the ACC.

4. Section 2.11 shall be amended in its entirety by the following:

"2.11 Time of Completion: Any Dwelling or structure erected or placed on any Lot in the Property shall be completed as to exterior appearance, including finished painting, within fourteen (14) months from the date of commencement of construction. Provided, the ACC may extend the time requirement for completion on behalf of any Owner upon a showing of good cause, at the sole discretion of the ACC."

5. Section 2.13 shall be amended in its entirety by the following:

"2.13 Animals: Animals include horses, dogs, cats, caged birds, fish in tanks, and other small household pets which shall be permitted on Lots. Dogs shall not be allowed to run at large or to create a disturbance for other Owners. Leashed dogs are permitted within the Easements only when accompanied by their owners or their agents. Persons accompanying the dog shall scoop animal waste. The Board may enact as becomes necessary reasonable rules respecting the use of common areas by Owners walking their pets.

Animals including horses, livestock and poultry can be raised for purpose of private use and enjoyment, provided they are not kept, bred or maintained for any commercial purpose. Pigs shall not be permitted. All animal enclosures must be kept in a neat, clean, and odor free condition at all times. The Declarant or HOA may at any time require the removal of any pet or animal which it finds disturbing other Owners unreasonably, in the HOA's determination, and may exercise this authority for specific pets or animals even though other pets or animals are permitted to remain."

6. Section 2.14 shall be amended in its entirety by the following:

"2.14 Signs: Professional appearing signs advertising Lots for sale or rent, including the temporary daytime display of signs advertising open houses, may be displayed on the appropriate Lot without prior approval of the Board or the ACC, provided that such signs shall be of reasonable and customary size, not to exceed five (5) square feet. Declarant, or its



authorized agent may display one construction sign per Lot to advertise Lots for sale. Such signs shall not exceed 32 square feet.”

8. Article 4 shall be amended in its entirety as follows:

ARTICLE 4

ASSOCIATION MAINTENANCE FUNDS AND ASSESSMENTS

- 4.1 Creation of the Lien and Personal Obligation of Assessments: The Declarant, for each Lot, not including vacant Lots, owned within the Property, hereby covenants, and each Owner of any Lot by acceptance of a deed or contract therefore, whether or not it shall be so expressed in such deed or contract, is deemed to covenant and agree to pay to the Association the following Assessments, which shall be established and collected as provided herein and in the bylaws of the Association:

- Regular Assessments;
- Extraordinary Assessments; and
- Special Assessments

All Assessments, together with interest, costs, and actual attorneys' fees, shall be a charge and a continuing lien upon the Lot against which each Assessment is made. However, such lien shall be subordinate to the lien of any first mortgage or construction loan. Such liens may be enforced or foreclosed according to law, with attorney's fees and costs to be charged against the party being foreclosed. Each such assessment together with interest, costs and actual attorneys' fees, shall also be the personal obligation of the person who was the Owner of such Lot at the time when the Assessment fell due. No Owner of a Lot may exempt himself or herself from liability for his or her contribution toward the Common Expenses by waiver of the use or enjoyment of the Easements or by the abandonment of his or her Lot.

- 4.2 Purpose of Assessments: The Assessments levied by the Association shall be used exclusively to promote the recreation, health, safety and welfare of all the residents in the entire Property, for the improvement, maintenance, operation, insurance and repair of the Easements, any common drainage and retention system, and any agreed upon community landscaping, for the payment of utility bills associated with the common areas and entry statement, and for the common good of the Property. The Regular Assessments shall include an adequate reserve fund for maintenance and repair of the Easements and replacement of any items that must be replaced on a periodic basis.

- 4.3 Regular Assessments: Until the end of the Association's fiscal year immediately following the closing of the sale of the first Lot in the Property, the annual maximum Regular Assessment per Lot shall be such amount as set forth in the Property budget prepared by the Declarant, payable in monthly installments. Each Lot's share for the first fiscal year shall also be prorated based on the number of months remaining in that fiscal year. Thereafter, the Board shall determine and fix the amount of the annual Regular Assessment against each Lot at least sixty (60) days in advance of the start of each fiscal year; provided, however, that the annual Regular Assessment may not be increased by more than ten percent (10%) above the maximum Regular Assessment for the immediately preceding fiscal year, without the vote or written assent of a two-thirds (2/3) of the total voting power as identified in the Articles and bylaws. The Regular Assessment for 2003 is hereby set at \$360.00, payable in monthly installments of \$30.00 each month.

- 4.4 Extraordinary Assessments: In addition to the Regular Assessments authorized above, the Board may levy, in any fiscal year, an Extraordinary Assessment applicable to that year only for the purpose of covering the actual cost of any reconstruction, repair or replacement of any

Easement, entry statement, common drainage and retention system or roadways, including fixtures and personal property related thereto, or to defray any unanticipated or underestimated expense not covered by the Regular Assessment and, where necessary, for taxes assessed against the Drainage System or Infiltration System(s).

- 4.5 Special Assessments: In addition to the Regular and Extraordinary Assessments authorized above, the Board may levy Special Assessments (without limitation as to amount or frequency and without requiring a vote of Owners) against an individual Lot and its Owner for violations of any provisions within this Declaration, including the right of the Association to receive reimbursement for costs incurred in bringing that Owner and his or her Lot into compliance with the provisions of this Declaration and the bylaws, including actual attorneys' fees and costs.
- 4.6 Allocation of Assessments: Limited Exemption During Construction: Each Lot, including Lots owned by Declarant, shall bear an equal share of each Regular and Extraordinary Assessment. Except, Declarant shall be exempt from the payment of any Assessment on a Lot, which does not include a completed Dwelling. This exemption shall be in effect only until a certificate of occupancy or its equivalent for the Dwelling has been issued or until one hundred eighty (180) days after the issuance of a building permit for the Dwelling, whichever first occurs.
- 4.7 Date of Commencement of Assessments; Due Dates: Subject to the foregoing exemption pending construction, or pursuant to Declarant subsidy, the Regular Assessments provided for herein shall commence as to all Lots in the Property on the first day of the month following closing of the sale of the first Lot in the Property. Due dates of Assessments shall be the first day of every calendar month. No notice of such Assessment shall be required other than an annual notice setting forth the amount of the monthly Assessment.
- 4.8 Payment of Taxes Assessed Against Easements or Personal Property of Association: In the event that any taxes are assessed against the Easements or the personal property of the Association, rather than against the Lots, said taxes shall be included in the Assessments made under the provisions of this Article, and, if necessary, an Extraordinary Assessment may be levied against the Lots in an amount equal to said taxes, (regardless of any limitation otherwise applicable to Extraordinary Assessments set forth in Paragraph 4.4 above), to be paid in two (2) semi-annual installments, thirty (30) days prior to the due date of each tax installment.
- 4.9 Transfer of Lot by Sale or Foreclosure: The sale or transfer of any Lot shall not affect any Assessment lien, or relieve the Lot from any liability therefore, whether the lien pertains to payments becoming due prior or subsequent to such sale or transfer. Notwithstanding the foregoing, the sale or transfer of any Lot pursuant to foreclosure, or by deed in lieu of foreclosure, of a mortgage recorded prior to the recordation of a Notice of Delinquent Assessment covering such Lot, and given in good faith and for value, shall extinguish the lien of all Assessments which become owing prior to such sale or transfer. Sale or transfer pursuant to mortgage foreclosure shall not, however, affect the personal liability of the Owner for unpaid Assessments. Any Assessments for which the liens are extinguished pursuant to this Paragraph shall be deemed to be Common Expenses collectable from all of the Lots including the Lot for which the lien was extinguished.
- 4.10 In the case of any other conveyance of a Lot, the grantee of the same shall be jointly and severally liable with the grantor for all unpaid Assessments by the Association against the latter up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefore. However, any such grantee shall be entitled to a statement from the Board, setting forth the amount of the unpaid Assessments due the Association, and such grantee shall not be liable for, nor shall the Lot conveyed by subject to a lien for, any unpaid Assessments made by the Association against



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Kittitas Co Auditor CLE ELUMS'S SAPP SKIES COV 41.00

the grantor in excess of the amount set forth in the statement. Provided, however, the grantee shall be liable for any Assessment becoming due after the date of any such statement.

4.11 Enforcement of Assessment Obligation; Priorities; Discipline: If any part of any Assessment is not paid and received by the Association or its designated agent within thirty (30) days after the due date, such Assessment shall thereafter bear interest at eighteen percent (18%) interest until paid. Additionally, automatic late processing fees of Ten Dollars (\$10.00) per month shall be assessed for each month from the due date until the Assessment(s) and all late charges are paid. Each delinquent Assessment may be evidenced as a matter of public record by a Notice of Delinquent Assessment recorded by the Association or other party or parties entitled to enforce and/or receive the same, which recorded Notice of Delinquent Assessment shall provide notice to the public of the delinquency."

9. The first sentence of Section 6.1(b) shall be amended in its entirety as follows:

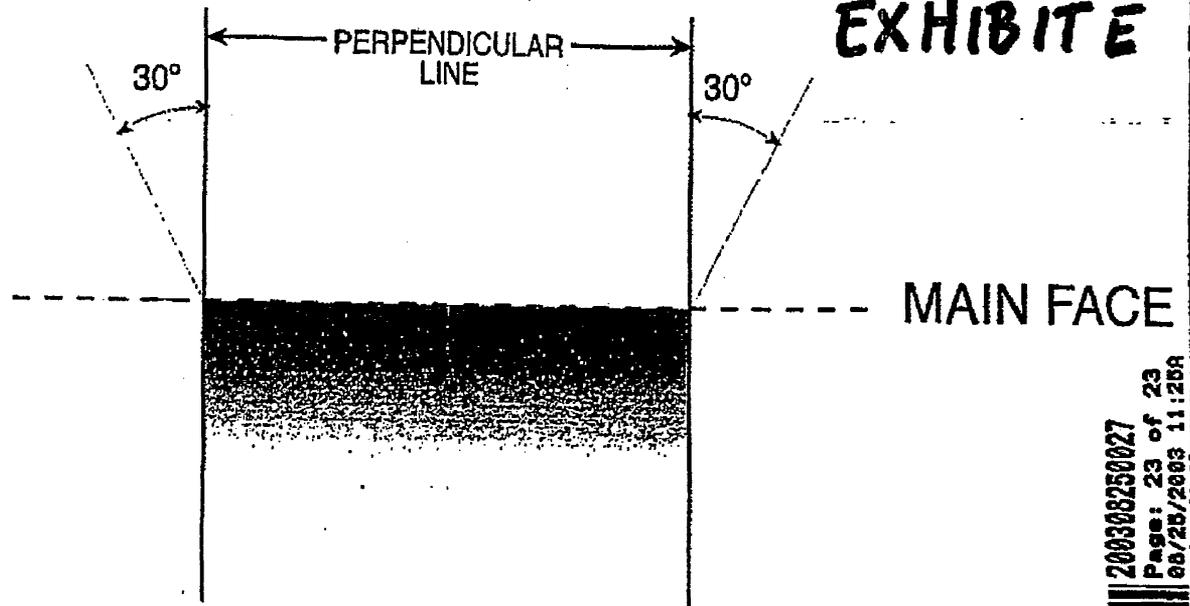
"(b) Liability Insurance: A comprehensive general liability insurance policy covering the Easements and any common drainage and retention system, and all public ways and other areas that are under the supervision of the Association."

10. Section 10.1 shall be amended in its entirety as follows

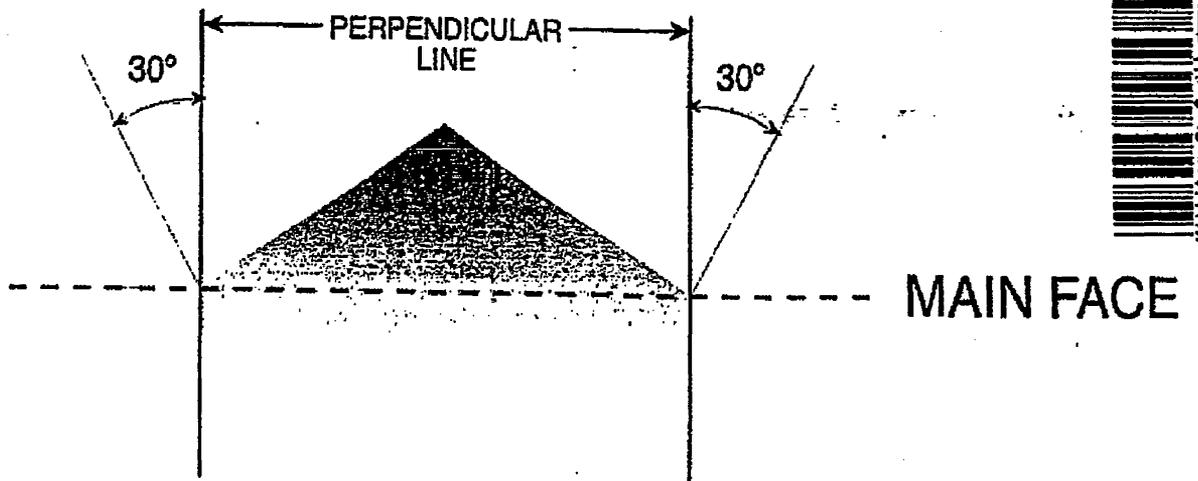
"10.1 Enforcement: The Board, any Owner, and any governmental or quasi-governmental agency or municipality having jurisdiction over the Property shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by this Declaration, and in such action shall be entitled to recover costs and reasonable attorneys' fees as are ordered by the Court. Failure by any such person or entity to enforce any such provision shall in no event be deemed a waiver of the right to do so thereafter."

EXHIBITE

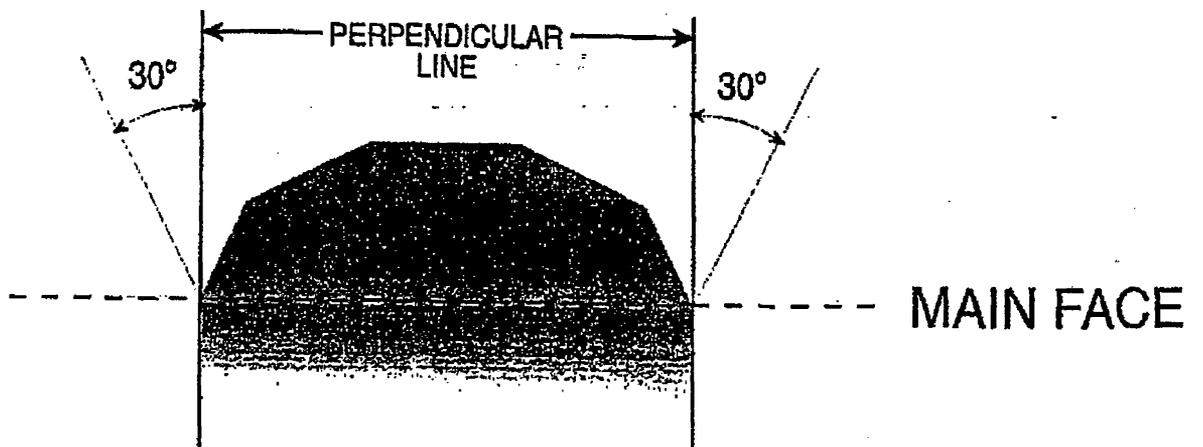
①



②



③



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06/25/2003 11:25A



Filed for Record at Request of and
Copy returned to:



Cle Elum's Sapphire Skies, LLC
315 39th Ave SW #8
Puyallup, WA 98937

DOCUMENT: First Amendment to the Declaration of Covenants, Conditions and Restrictions

Reference numbers of related documents:
Additional reference numbers on Volume: Page:

GRANTOR(S):
1. Cle Elum's Sapphire Skies, LLC

GRANTEE(S):

LEGAL DESCRIPTION:

Lots 1 thru 8 of Section 35, Township 21N, Range 14E

10741 0001 0062101

00070

**FIRST AMENDMENT TO THE
COVENANTS, CONDITIONS AND RESTRICTIONS**

This Declaration is made and entered by Cle Elum's Sapphire Skies, LLC, a Washington Limited Liability Company, referred to below as ("Declarant"). Declarant does hereby declare and set forth covenants, conditions and restrictions ("CC&R's") to run with all of the lands described below as provided by law, which covenants, conditions, restrictions, and reservations of easements shall be binding upon all parties and persons claiming an interest in any of the property described hereafter, and which covenants, conditions, restrictions, and reservations of easements shall be for the benefit of and limitations upon all future owners, and being for the purpose of keeping said real estate desirable, uniform and suitable in architectural design and use as specified herein.

2.4 of the Covenants, Conditions and Restrictions, recorded August 25, 2003, File Number 200308250027, shall be amended to read:

Motorcycles, snowmobiles and motorized ATVs and recreational vehicles: ATV's, snowmobiles and motorcycles are permitted for ingress and egress along easement roads. Use is also permitted on Owner's Lot if said lot is 10 (ten) acres or larger.



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Kittitas Co Auditor CLE ELUM SAPPHIRE SKIES&DT 21.00

Declarant:

CLE ELUM'S SAPPHIRE SKIES, LLC

By: The Herbrand Company, Inc., Its Managing Member

By: James E. Wood
James E. Wood, Vice President

Development

STATE OF WASHINGTON)
COUNTY OF Kittitas) ss.

On this day personally appeared before me, James E. Wood, to me known to be the Vice President of The Herbrand company and the Managing Member of Cle Elum's Sapphire Skies, LLC, and on oath stated his is authorized to execute said instrument as the free and voluntary act and deed of said LLC, for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed this 26 day of January 2004.



Victoria Angelini
NOTARY PUBLIC for Washington State
Residing at:
My Commission Expires:
Name Printed: Victoria Angelini

THE COMSTOCK LAW FIRM, PLLC

May 14, 2020 - 2:05 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37215-4
Appellate Court Case Title: Cynthia & James D. Hebert v. Spring Creek Easement Owners Assoc.
Superior Court Case Number: 18-2-00104-1

The following documents have been uploaded:

- 372154_Briefs_20200514140341D3176484_4706.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 20-0514 Hebert Brief of Appellant FNL SGN.pdf

A copy of the uploaded files will be sent to:

- lstoffel@barkermartin.com
- mhawkins@barkermartin.com
- ritche@mftlaw.com
- switzer@mftlaw.com

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