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No. 74869-6-I

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

ALPINE VILLAGE, INC., Appellant,

v.

LOIS A. LEWIS, PIER POINT CONDOMINIUM
ASSOCIATION, et al., Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

#14-2-00372-7

BRIEF OF APPELLANT ALPINE VILLAGE

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INTRODUCTION

This appeal asks whether Appellant Alpine Village has a right to benefit from easements that run through its property. In 1991, Alpine's predecessor, Donna Mott, applied to the City of Oak Harbor to build the Pier Point Condominiums – eight buildings with two units each. She signed a binding site plan with the City, requiring her to develop the condominium in four phases, completed by October 1, 1996. As part of the residential development, Ms. Mott recorded a May 18, 1992 Declaration of Easement, creating easements for utilities and ingress and egress to benefit “the owners, present and future, of the...described property and any legally subdivided portions.” (Declaration of Easement, Exhibit 5 to Plaintiff's Motion for Partial Summary Judgment; CP 68-70) (Attached as Appendix C).

Ms. Mott built four of the eight buildings, but the project stalled. On August 1, 2001, she sold the remaining undeveloped property to Appellant Alpine Village, subject to “restrictions, reservations, agreements and easements of record.” (Alpine Village Deed; CP 66-67). Although Alpine Village tried to resuscitate the binding site plan and complete the last four phases, the existing condominium owners and the Pier Point Condominium Association opposed further construction. On December 27, 2011, Island County Superior Court

Judge Alan Hancock ruled that the binding site plan had expired and “any further phases of the Pier Point Condominium are barred.” (12/27/11 Order on Direct Judicial Review at 3; CP 54-65).

With the binding site plan gone, Alpine Village submitted alternative plans to build a residential duplex on part of the undeveloped property, using the existing utility and access easements. The City questioned whether Alpine Village had rights to the easements, and this declaratory judgment action followed. On February 8, 2016, Judge Hancock ruled against Alpine Village, concluding “the Declaration of Easement was intended to benefit owners of built condominium units within developed phases of the condominium development and not owners of property that was not part of the developed phases of the condominium project.” (Order Granting Declaratory Judgment ¶ X; CP 8) (Attached as Appendix B).

Judge Hancock assumed that Ms. Mott granted easements only to residences built under the binding site plan. This was incorrect. Although constructing a phase of condominium project under the site plan was a sufficient condition for using the easements, it was not a necessary one. Any compatible residential development on the property benefits from the existing easements.

The necessary condition is that further development not use the easements in a categorically different or incompatible way.

Appellant Alpine Village now appeals.

I. ASSIGNMENTS OF ERROR

Alpine Village assigns error to the Island County Superior Court's: (1) Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion For Summary Judgment (CP 11-13) (attached as Appendix A); and (2) Order Granting Declaratory Judgment in Favor of Defendants and Denying Plaintiff's Request for Declaratory Judgment, (CP 1-10) (attached as Appendix B), both entered February 8, 2016. Specific assignments of error include:

A. The trial court erred as a matter of law by granting Defendants' motion for summary judgment and denying Plaintiff's motion for partial summary judgment. (Summary Judgment Order; CP 11-13) (Appendix A).

B. The trial court erred as a matter of law by denying Plaintiff's request for declaratory judgment and dismissing Plaintiff's complaint with prejudice. (Declaratory Judgment Order; CP 1-10) (Appendix B).

C. Paragraph F of the Declaratory Judgment Order is an error of law, characterizing Pier Point Condominium Association as a homeowner's association.

D. Substantial evidence does not support Paragraph J of the Declaratory Judgment Order, and it is an error of law.

E. Paragraph L of the Declaratory Judgment Order is an error of law.

F. Substantial evidence does not support Paragraph M of the Declaratory Judgment Order, and it is an error of law.

G. Paragraph N of the Declaratory Judgment Order is an error of law.

H. Paragraph T of the Declaratory Judgment Order is an error of law.

I. Paragraph U of the Declaratory Judgment Order is an error of law.

J. Paragraph V of the Declaratory Judgment Order is an error of law.

K. Paragraph X of the Declaratory Judgment Order is an error of law.

L. Paragraph Y of the Declaratory Judgment Order is an error of law.

Issues related to these assignments of error are:

M. “An easement appurtenant which runs with the land is not a mere privilege to be enjoyed by the person to whom it is granted or by whom it is reserved.” Heg v. Alldredge, 157 Wn.2d 154, 161, 137 P.3d 9 (2006). The Declaration of Easement created reciprocal utility and access easements for all parcels in the development. Did the trial court err by restricting benefit of the easements only to Pier Point Condominium owners?

N. With an expressly granted easement, “the extent of the right acquired is to be determined from the terms of the grant properly construed to give effect to the intention of the parties.” Brown v. Voss, 105 Wn.2d 366, 371, 715 P.2d 514 (1986). The common grantor of the easements, Donna Mott, created them with a binding site plan to develop her property as residential condominiums. Did she intend to withhold the benefit of the easements to later residential development if the binding site plan expired?

O. “If there is any ambiguity as to the existence of an easement, we determine the intention of the parties by examining such factors as the construction of the pertinent language, the circumstances surrounding the transaction, the situation of the parties, the subject matter, and the subsequent acts of the parties

involved.” Kirk v. Tomulty, 66 Wn. App. 231, 238, 831 P.2d 792 (1992). The current owners have successfully impeded full development of the condominium property by opposing Alpine Village’s use of the easements. Does the pertinent language, situation of the parties, subject matter and subsequent acts of the parties all support full development Ms. Mott’s property?

P. “When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished.” Restatement (Third) of Property (Servitudes) § 7.10 (2000). The trial court terminated the easements benefitting Alpine Village’s property after the binding site plan expired. Should the Court instead amend the easement’s description to include similar residential developments to the existing condominiums?

II. STATEMENT OF FACTS

A. Donna Mott Recorded The Declaration Of Easement To Fully Develop Her Property

In August 1988, Donna Mott purchased eight contiguous lots in downtown Oak Harbor, Washington. (1988 Deed; Exhibit A to 10/1/15 Skinner Dec; CP 190). The property was part of a

grandfathered plat known as the Oak Grove Addition. In 1974, the City of Oak Harbor vacated an unbuilt platted road running along the south boundary of the property. Other than providing lot boundaries, the original plat did not determine development of the property.

To reconfigure the property – and make it easier to develop residential condominiums – Ms. Mott signed a binding site plan agreement with the City. (Binding Site Plan No. SPR 9-91; Exhibit 6 to 9/18/15 Motion for Partial Summary Judgment; CP 71-72). The City code authorized binding site plans for condominiums as an alternative to subdividing the property. (OHMC 21.80.010) (“alternative to subdivision or short subdivision requirements under this title, and as allowed by Chapter 58.17 RCW, divisions of land may be completed by binding site plans”). The City approved the plan on November 19, 1991. (Binding Site Plan; CP 71-72).

The binding site plan displayed easements for utilities and driveways serving eight duplex condominium buildings. Although the recorded site plan contained the easements, it did not formally grant them to eventual owners. Instead, Ms. Mott recorded a Declaration of Easement on May 18, 1992. (Declaration of Easement; CP 68-70) (Appendix C). The Declaration has four sections that are central to the parties’ dispute.

First, the Declaration provides two legal descriptions for the benefitted and burdened property. The first description relies on the Oak Grove Addition Plat:

Lots 1, 2, 3, 4, 18, 19, 20, and 21, Block 7, OAK GROVE ADDITION, according to the plat thereof recorded in Volume 2 of Plats, page 29, records of Island County, Washington.

(Declaration of Easement at 1; CP 68). The second uses the binding site plan:

Lot 1 through Lot 8, inclusive, of City of Oak Harbor Binding Site Plan No. SPR-9-91, as approved November 19, 1991, and recorded December 3, 1991...

(Declaration of Easement at 1; CP 68). No dispute exists that the Declaration of Easement covers all the Mott property.

Second, in a "Whereas" clause, the Declaration describes the purpose for the easements.

WHEREAS, DECLARANT desires to establish the necessary easements for ingress, egress, and utilities to serve and benefit the Pier Point Condominium affecting Lot 1 or building 1, as delineated in said Building Site Plan and to serve and benefit each successive phase of condominium development affecting Lot or Building 2 through 8 as shown in said Building Site Plan.

(Declaration of Easement at 1; CP 68). The trial court concluded that this paragraph determined the scope of the easements. (Declaratory Judgment Order ¶ X; CP 8).

Third, the Declaration dedicated the easements to the future owners of the described property. (Declaration of Easement at 1; CP 68) (“declare for the benefit of the owners, present and future, of the above-described property, and any legally subdivided portions thereof, an easement for the following”). The Declaration then defined four specific easements:

- Ingress, egress, and the installation, maintenance, and/or repair of utilities over, under, and across that portion of Lot 1 and Lot 6 of said Building Site Plan...;
- The installation, maintenance and/or repair of utilities, including, but not limited to, power utilities, sanitary sewer lines, sanitary sewer cleanouts, manholes, water utilities, water lines, drainage utilities, storm sewer lines, catch basins, hydrants and water meters...;
- Landscaping purposes over the portion of Declarant’s property delineated in said Building Site Plan, including the ingress and egress reasonably necessary for such purposes; and
- The ingress and egress reasonably necessary to serve each phase or building of Pier Point Condominiums as constructed in accordance with the referenced Binding Site Plan...

(Declaration of Easement at 2; CP 68-69).

Fourth, the Declaration created easements appurtenant – running with the land.

The easement provided herein, is binding upon the Declarant, her heirs, successors, and/or assigns, and are to serve the owners of the specified condominium buildings, their heirs, successors and/or assigns, and, as such, shall be considered running with the land.

(Declaration of Easement at 2; CP 69).

From May to November 1992, Ms. Mott constructed phases 1 through 4 of the Pier Point Condominiums. (Declaratory Judgment Order ¶ K; CP 4). This included building the driveways for buildings 1 through 4 and laying a sewer line across the northern part of the property – ending on lots now owned by Alpine Village. (Alpine Village Map; Exhibit C to Sherman Dec.; CP 108). When each of the eight condominium units sold, they were purchased subject to the easements in the Declaration of Easement. (Declaratory Judgment Order ¶ L; CP 5).

Construction halted after November 1992 and never resumed. Half the Mott property remains undeveloped.

B. When The Project Stalled, Ms. Mott Sold The Remaining Undeveloped Property

On August 1, 2001, Donna Mott sold Alpine Village the remaining undeveloped property. (2001 Deed; Exhibit 4 to 9/18/15

Motion for Partial Summary Judgment; CP 66-67). Alpine Village purchased the entire parcel except for the four built phases of the Pier Point Condominiums. The Deed's legal description reads:

Lots 1, 2, 3, 4, 18, 19, 20 and 21, Block 7, Oak Grove Addition...

Except Phase 1 of City of Oak Harbor Binding Site Plan No. SPR 9-91, as approved November 19, 1991...

Also Except Phase 2 and Phase 3 of the Amended Pier Point Condominiums Site Plan as approved on January 6, 1992...

Also Except Phase 4 of the Amended Pier Point Condominiums Binding Site Plan as approved on January 6, 1992...

(2001 Deed, Exhibit A; CP 66-67).

Alpine Village also purchased the property subject to "restrictions, reservations, agreements, and easements of record." (2001 Deed at 1; CP 66). This included the 1992 Declaration of Easement and the existing driveways and sewer lines running over parts of the undeveloped property. (Alpine Village Map; CP 108).

Ms. Mott's sale of the undeveloped property created a lengthy dispute between the Pier Point Condominium Association and its members, on the one hand, and Alpine Village on the other. Pier Point owners include the mayor of Oak Harbor and former city council members. The Association claimed that the undeveloped

property was common area for the condominium and not available for further development. The City agreed, concluding on May 2, 2005, that the property had “no clear development rights” separate from the Condominium. (2/21/14 Moser Letter; Exhibit 2 to Plaintiff’s Response to City’s Motion for Dismissal; Sub #25; CP ___)*. Alpine Village appealed to Island County Superior Court and on August 27, 2009, Judge Hancock reversed the City’s decision. The Court quieted title to the undeveloped property as fee simple in Alpine Village. Alpine Village v. Pier Point Condominiums, et al., Island County No. 08-2-00229-7 (August 27, 2009) (Order Re: Quiet Title) (Exhibit 1 to 9/18/15 Motion for Partial Summary Judgment; CP 49-50).

Next, on November 23, 2009, Judge Hancock ruled that the Condominium’s covenants did not bind the undeveloped property, but the conditions and easements of the binding site plan did.

Fee simple title to the real property legally described in attached Exhibit A is not common area of the Pier Point Condominiums and is not subject to the declarations, conditions, restrictions, [and] reservations contained in the Declarations of the Pier Point Condominium, but is subject to conditions and easements contained in the Binding Site Plan #9-91 as Amended, provided that

* Appellant has filed a supplemental designation of clerk’s papers and CP cites do not yet exist for these documents. The brief cites to the sub number to identify the document.

Plaintiff is reserved the right to seek amendment of the Binding Site Plan.

Alpine Village, No. 08-2-00229-7 (November 23, 2009) (Order Re: Condominium) (Exhibit 2 to 9/18/15 Motion for Partial Summary Judgment; CP 51-53).

Alpine Village attempted to amend the construction schedule for the binding site plan, but the City again refused, concluding that the construction deadline had expired. On December 27, 2011, reviewing the City's decision, Judge Hancock ruled that neither the City's Ordinances nor the Condominium's covenants permitted resuscitation of the binding site plan.

Any further phases of the Pier Point Condominium are barred. Only if all landowners who have the benefit of the 7-year time limit on further phases were to waive its effect and agree that further phases could be constructed could the binding site plan be amended to that effect.

Alpine Village v. City of Oak Harbor, No. 11-2-00137-1 (December 27, 2011) (Order On Direct Judicial Review) (Exhibit 3 to 9/18/15 Motion for Partial Summary Judgment; CP 54-65).

Alpine Village returned to the drawing board to create an acceptable residential development for the property.

C. The Trial Court Ruled Alpine Village Had No Right To Use The Easements On Its Land

In January 2012, Alpine Village submitted pre-application materials to the City, seeking permits to develop Lot A -- the northeast corner of the property. (10/14/14 Sherman Dec. at 2; CP 102) (Lot Map; Exhibit B to Sherman Dec.; CP 107). The proposal was for one building with two condominium units, similar to the existing structures. After conducting its integrated review process for the application, the City raised an objection first voiced by the Association and its members.

The City of Oak Harbor received public comments expressing the opinion that development on Oak Grove Lot A does not have the legal right to use the easements that were established as part of the Pier Point Condominiums Binding Site Plan and subsequent divisions. City staff have reviewed the easements in question and it is not clear that development on Lot A has rights to use this access/utility easement for storm and sewer infrastructure.

(City Review Comments at 3-4; Exhibit 1 to Plaintiff's Response to City's Motion for Dismissal; Sub #25; CP __).

To obtain a permit, the City required Alpine Village to provide:

(1) a declaratory judgment from Island County Superior Court that specifically addresses Alpine's right to use this easement; (2) show how storm and sewer utilities can serve the site which do not make use of the easement in question; or (3) provide an existing

document which clearly establishes Alpine's right to use this easement.

(City Review Comments at 4; Sub #25; CP __). Alpine Village returned to Superior Court for a third time, filing this lawsuit for a declaratory judgment.

The parties filed cross-motions for summary judgment, and on October 29, 2015, Judge Hancock ruled in the Association's favor. (10/29/15 Trans.; CP 117-130) (2/8/16 Summary Judgment Order; CP 11-13) (2/8/16 Declaratory Judgment Order; CP 1-10). The trial court concluded that Alpine Village's property "does not 'benefit' by or from the...Declaration of Easement...or any other related easements or rights provided in the Pier Point Binding Site Plan 91-1." (Declaratory Judgment Order ¶ U; CP 7). But the property "remains 'subject to' and is burdened by the...Declaration of Easement...and the easements granted in the Pier Point Binding Site Plan 91-1." (Declaratory Judgment Order ¶ Z; CP 9). Alpine Village always recognized the easements burdening its property. It sought the same benefits the other property owners enjoyed.

The trial court cited three legal conclusions to support its declaratory judgment. First, the Declaration of Easement became

effective only when Donna Mott sold property to a condominium purchaser.

The easements described within the Declaration of Easement became effective at the time that the underlying property was conveyed to the owners of the condominium units. As each of the four phases of the Pier Point condominium development were approved and the condominium units were conveyed in accordance with the Division Plans and Binding Site Plan, the owners of the units then obtained the easements rights set forth in the Declaration.

(Declaratory Judgment Order ¶¶ U; CP 7).

Second, the 2001 Deed from Donna Mott to Alpine Village did not reference the Declaration of Easement or grant a right to use the easements.

The legal description set out in the deed to the property conveyed by Donna Mott to Plaintiff, contains no reference to the Condominium Plans for the Pier Point Divisions or to the recorded Declaration of Easement created in conjunction therewith. The deed by which Alpine Village acquired its property does not include any language that references the Declaration of Easement nor does it convey an easement to Alpine Village for ingress, egress, access or utilities.

(Declaratory Judgment Order ¶¶ N; CP 5).

Third, the easements benefited the Pier Point Condominiums exclusively.

The Declaration of Easement was intended to benefit owners of built condominium units within developed phases of the condominium development and not

owners of property that was not part of the developed phases of the condominium project. The language of section one and section four of the Declaration of Easement further supports this interpretation.

The easements set forth in the Declaration of Easement must be viewed in light of the condominium development and not with regard to some other potential use or uses of the property.

(Declaratory Judgment Order ¶¶ X-Y; CP 8-9).

Alpine Village filed this timely appeal on March 8, 2016. (Notice of Appeal; Sub #72; CP __)*. Because the trial court erred by terminating the easements' reciprocal benefits to the remaining property in the legal description, Alpine Village now respectfully requests this Court to reverse the trial court and enter declaratory judgment for Appellant.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the trial court's summary judgment and declaratory judgment *de novo*. Lee v. State, __ Wn.2d __, __ P.3d __, 92708-1, 2016 WL 3042994, at *2 (May 26, 2016) ("summary judgment orders are reviewed de novo, and this court engages in the same inquiry as the trial court"); Nollette v. Christianson, 115 Wn.2d

* Appellant has filed a supplemental designation of clerk's papers and CP cites do not yet exist for these documents. The brief cites to the sub number to identify the document.

594, 600, 800 P.2d 359 (1990) (in declaratory judgment order, “conclusions of law involving the interpretation of statutes and municipal ordinances...are reviewed de novo”).

IV. THE EASEMENTS CREATE RECIPROCAL BENEFITS AND BURDENS ON ALL THE PARCELS

This case involves the scope of easements in the unusual case of a half-finished binding site plan. The trial court concluded that only condominium units built under the plan benefit from the platted easements. But Washington caselaw, together with the original grantor’s intent, proves the opposite. Donna Mott created reciprocal easements that burdened and benefitted all lots developed from her parcel. The easements facilitated the full development of the property and were not reserved solely for Pier Point Condominium owners. The Declaration names the binding site plan and Pier Point Condominiums because that was the most expedient path to full development.

A. The Reciprocal Easements Took Effect In 1992

The first premise in the trial court’s ruling is that because the easements’ grantor, Donna Mott, did not expressly grant their benefits to Alpine Village, these rights do not exist. “Alpine Village has not cited any legal doctrine or authority that would permit the

court to rule that it received the benefit of the easements set out in the Declaration of Easement despite the fact that its property was not conveyed with reference to the Declaration of Easement.” (10/29/15 Trans. at 9; CP 125).

There are five flaws to this reasoning. First, the 2001 Deed from Ms. Mott to Alpine Village was subject to “easements of record.” (2001 Deed; CP 66-67). Whatever benefits and burdens attached to the property passed with it. And this was the same language as that in the deeds to the condominium buyers. (Condominium Deeds; Exhibits 8-15 to 9/18/15 Motion for Partial Summary Judgment; CP 76-88).

Second, failing to mention an easement in a deed does not terminate its burdens or benefits.

An appurtenant easement is part of the realty it benefits. It passes with the dominant estate unless the parties otherwise agree...6A R. Powell, *The Law of Property* § 899[3] [i], at 81A-126 (1992) (Patrick J. Rohan ed., 1991) (“even if the owner of the dominant estate conveys his or her land without specific mention of the easement, the conveyance nevertheless incorporates the easement”). Thus, its omission from a conveyance is without legal significance and would not cause a reasonably prudent person to inquire beyond the record.

Olson v. Trippel, 77 Wn. App. 545, 552-53, 893 P.2d 634 (1995); Heg v. Alldredge, 157 Wn.2d 154, 161, 137 P.3d 9 (2006) (“follows the land without any mention whatever”).

Third, as the legal description in the Declaration of Easement illustrates, the access and utility easements benefited and burdened the entire parcel under the Oak Grove Plat and the binding site plan. (Declaration of Easement; CP 68-70). This is not the case of a road passing over one parcel to service another. The driveways, parking areas, entrances and exits run over each lot to serve the others. (Alpine Village Map; CP 108). This is the archetype of reciprocal easements.

Fourth, Ms. Mott and Alpine Village had no express or implied agreement to exclude the undeveloped property from the easements. When Alpine Village purchased the remaining property, it did so subject to the existing access and utility easements. The reciprocal easements shown on the recorded site plans and described in the Declaration of Easement were part of the property.

Fifth, recording the building site plan created private easements for all who purchased property subject to the plan. Howell v. King Cty., 16 Wn.2d 557 134 P.2d 80 (1943). In Howell,

property owners subject to a long abandoned plat argued over who owned a vacated public road. The Supreme Court concluded that all adjoining properties have a private easement over the right of way.

Though the public easement is lost, the private easement persists. Van Buren v. Trumbull, 92 Wash. 691, 159 P. 891, L.R.A.1917A, 1120. This holding is based upon the principle that, since the dedicator of a plat could not defeat a grantee's right to an easement in the street upon which his land abuts, common grantees from him cannot, as among themselves, question the right of ingress and egress over the street as shown on the plat.

Howell, 16 Wn.2d 557at 559.

Since it purchased property subject to the binding site plan and Declaration of Easement, Alpine Village obtained all the benefits and burdens those recorded servitudes created. As the next section discusses, the underlying purpose of the easements was to subdivide the property into buildable lots, not to benefit only the Pier Point Condominium owners. Alpine Village's property legally benefits from the access and utility easements.

B. The Grantor Intended Full Development Of Her Property, Not To Withhold The Benefit Of The Easements

The second premise in the trial court's ruling is that "the plain language of the Declaration of Easement makes it clear that it was not intended to benefit Alpine Village's property." (10/29/15 Trans.

at 9). Because the Declaration creates easements for each successive phase of development under the binding site plan, the Court concluded that only Pier Point Condominium buildings and owners may benefit. This is incorrect as a matter of law.

First, the plain language of the Declaration of Easement burdens and benefits all of the property without distinction. By using the legal description from the Oak Grove Addition Plat, the Declaration implies it applies to the entire property, regardless of whether the binding site plan is complete or not. (Declaration of Easement; CP 68-70). Had the Declaration intended to benefit only the completed condominium buildings, it would have said so. But the easements applied to – and benefited – the property, not the buildings.

Furthermore, the Declaration expressly identified who should benefit from the easements.

NOW, THEREFORE, for and in consideration of mutual benefits of a nonmonetary nature, the receipt and sufficiency of what are hereby acknowledged, the DECLARANT does hereby declare for the benefits of the owners, present and future, of the above-described property, and any legally subdivided portions thereof, an easement for the following:...

(Declaration of Easement at 1; CP 68). Judge Hancock rejected this interpretation, concluding it conflicts with other provisions of the Declaration.

The language of the Declaration as a whole clearly indicates that the future owners of property within the originally contemplated development including all eight phases would benefit from the easement *only if such property was actually developed into condominium phases pursuant to the Binding Site Plan.*

(10/29/15 Trans. at 12; CP 128) (emphasis added).

The trial court interpreted the Declaration of Easement as creating a condition subsequent --- a lot benefitted from the reciprocal easements only if developed under the binding site plan. But the Declaration never stated this condition. Furthermore, the Declaration does not describe what would happen if the binding site plan expired. The trial court, not Donna Mott, concluded that the remaining undeveloped property would not benefit from the easements.

Second, the Declaration of Easement is ambiguous on its scope. An argument exists for one of two conflicting interpretations: either the easements exclusively benefit the current condominium owners or they benefit all the property subdivided under the binding site plan. When a grant of easement is ambiguous, “extrinsic

evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions." Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Here, Donna Mott's intention was clear – to build eight duplex condominium buildings and sell the units. In other words, to develop the property to its maximum potential. She intended the easements to benefit and burden her entire parcel. The method for development was a binding site plan and the Declaration of Easement used the plan to locate the easements. But the trial court erred by assuming that Ms. Mott meant to exclude the undeveloped property from the easements' benefits. No evidence supports transforming the binding site plan into a condition subsequent. The benefits and burdens of the reciprocal easements apply to all consistent residential developments, not simply Pier Point Condominiums. To hold otherwise, as the trial court did, depreciates the value of the undeveloped property significantly. No rational developer would do that.

Finally, it makes no sense to require Alpine Village to duplicate the sewer lines and driveways on the property solely to

serve the new buildings. The binding site plan allowed a more rational development of the overall parcel than the narrow lots in the Oak Grove Addition plat. Forcing Alpine Village to add more impermeable surfaces for driveways and more underground pipes for sewer defeats any gains from the existing site plan. As a matter of common sense and land use planning, Alpine Village should be able to use the driveways and sewer pipes that run through its property.

V. To Preserve the Plan of Development, The Court May Modify The Declaration of Easement For Compatible Uses

The trial court's ruling amounted to a forfeiture of Alpine Village's easement rights. Because it could not resuscitate the binding site plan, Alpine Village lost the right to use the driveways and sewer lines meant to serve its property. Judge Hancock terminated the easements' benefits when Alpine Village could not add to Pier Point Condominium's buildings.

The common law does not sanction such a drastic outcome. Under the Restatement (Third) of Property (Servitudes), a court should attempt to save a plan of development before declaring it void.

When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude. Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating the servitude.

Restatement (Third) of Property (Servitudes) § 7.10 (2000). Also known as the changed conditions doctrine, courts appropriately modify easements when the underlying circumstances compel it.

Washington courts apply the doctrine of changed circumstances when a condition in a servitude no longer provides any benefit.

Before affirmative relief by way of cancellation or modification of a restrictive covenant is available, a material change in the character of the neighborhood must have occurred so as to render perpetuation of the restriction of no substantial benefit to the dominant estate and to defeat the object or purpose of the restriction.

St. Luke's Evangelical Lutheran Church of Country Homes v. Hales, 13 Wn. App. 483, 485, 534 P.2d 1379 (1975). In St. Lukes, the change was from residential to commercial use of the property. Here, the change is expiration of the binding site plan.

Withholding the benefits of the easements to Alpine Village defeats the purpose of the easements. The original intent was to have 16 condominium owners use and maintain the driveways and utility lines. Now, the existing eight Pier Point Condominium owners would rather have open space than four new duplex buildings. But the Association benefits from having eight additional owners pay for maintaining the driveways and utility lines. The infrastructure was designed and built for 16 condominium units, not eight. This Court appropriately modifies the Declaration of Easement to allow Alpine Village to construct the additional buildings as originally planned.

CONCLUSION

The Island County Superior Court concluded that a real estate developer intentionally diminished the value of her undeveloped land. Donna Mott created reciprocal easements on her property to facilitate its full development, not impede it. Appellant Alpine Village respectfully requests this Court to reverse the trial court's declaratory judgment. As a matter of law, Alpine Village benefits from the easements created to permit development of its property.

DATED this _____ day of July, 2016.

BURI FUNSTON MUMFORD, PLLC

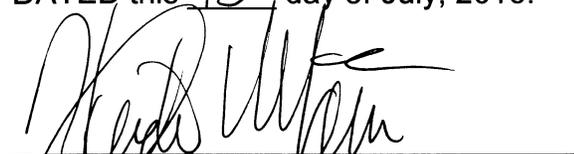
By 
Philip J. Buri, WSBA #17637
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Brief of Appellant Alpine Village to:

Christon Skinner
791 SE Barrington Dr.
Oak Harbor, WA 98277
Attorney For: Respondents

DATED this 15TH day of July, 2016.


Heidi Main

APPENDIX A

FEB - 8 2016

DEBRA VAN PELT
ISLAND COUNTY CLERK

Hon. Alan R. Hancock
Hearing date: February 8, 2016
Hearing Time: 9:30 a.m.

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

ALPINE VILLAGE, INC, a Washington
Corporation,

Plaintiff,

vs.

LOIS A. LEWIS, PIER POINT
CONDOMINIUM ASSOCIATION, et al,

Defendants.

NO. 14-2-00372-7

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

This matter having come on as a "special set" hearing by the Court on October 29, 2015, pursuant to the Plaintiff's Motion for Partial Summary Judgment and the Defendants' Motion for Summary Judgment; and the Plaintiff appearing through its attorney, C. Thomas Moser; and the Defendants Pier Point Condo Assoc., Sue Karahalois, Alice Smith, Robert Severns, Rhonda Severns (f/k/a Rhonda Haines Pitt) Lois Lewis, John Royce Jr., and David Jasman appearing through their attorneys, Law Offices of Christon C. Skinner, P.S.; and the Court having considered the records and files herein, including:

1. Plaintiff's Motion for Partial Summary Judgment;
2. The Declaration of Plaintiff's Counsel, C. Thomas Moser and exhibits thereto;

- 1 3. Defendants' Motion for Summary Judgment;
- 2 4. The Declaration of Christon C. Skinner in Support of Defendants' Motion for
- 3 Summary Judgment and exhibits thereto;
- 4 5. Defendants' Opposition to Plaintiff's Motion for Summary Judgment;
- 5 6. The Declaration of Rhonda Severns in Opposition to Plaintiff's Motion for
- 6 Summary Judgment and exhibit thereto;
- 7 7. Plaintiff's Response to Defendants' Motion for Summary Judgment;
- 8 8. Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Partial
- 9 Summary Judgment;
- 10 9. Defendants' Reply in Support of Their Motion for Summary Judgment; and
- 11 10. The complete court file in this cause;
- 12
- 13

14 And the court having determined that there are no genuine issues of any
15 material fact presented and that judgment should be entered in favor of the
16 Defendants and against the Plaintiff as requested by the Defendants in their
17 pleadings and motion, as a matter of law; and the court deeming itself fully advised,
18 now, therefore,

22 IT IS ORDERED that Defendants' Motion for Summary Judgment is
23 GRANTED. Accordingly, the Plaintiffs' complaint should be DISMISSED WITH
24 PREJUDICE and a Judgment granting declaratory relief should be entered as
25 requested by the Defendants in their Motion for Summary Judgment; and it is further,
26 ORDERED that Plaintiffs' Motion for Partial Summary Judgment is DENIED;

1 Dated this 8th day of February, 2016.

2
3
4 

5
6 The Honorable Alan R. Hancock
7 Island County Superior Court Judge

8 **ALAN R. HANCOCK**

9 Presented by:

10 LAW OFFICES OF CHRISTON C. SKINNER, P.S.

11
12 

13
14 Christon C. Skinner / WSBA #9515
15 Attorney for Defendants Pier Point
16 Condo Assoc., Sue Karahalos,
17 Alice Smith, Robert Severns,
18 Rhonda Severns (f/k/a Rhonda
19 Haines Pitt) Lois Lewis, John Royce
20 Jr., and David Jasman

21 Copy Received; Approved as to Form:

22
23
24
25 C. Thomas Moser, WSBA #7287
26 Attorney for Plaintiff, Alpine Village, Inc.

APPENDIX B

FEB - 8 2016

DEBRA VAN PELT
ISLAND COUNTY CLERK

Hon. Alan R. Hancock
Hearing date: February 8, 2016
Hearing Time: 9:30 a.m.

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

ALPINE VILLAGE, INC, a Washington
Corporation,

NO. 14-2-00372-7

Plaintiff,

vs.

ORDER GRANTING
DECLARATORY JUDGMENT IN
FAVOR OF DEFENDANTS

LOIS A. LEWIS, PIER POINT
CONDOMINIUM ASSOCIATION, et al,

&
DENYING PLAINTIFF'S
REQUEST FOR DECLARATORY
JUDGMENT

Defendants.

This matter came before this court for presentation of an order GRANTING Declaratory Judgment in favor of Defendants as requested in their counterclaim and DENYING Declaratory judgment requested by Plaintiff in its complaint; the Plaintiff appearing through its attorney, C. Thomas Moser; the Defendants Pier Point Condo Assoc., Sue Karahalois, Alice Smith, Robert Severns, Rhonda Severns (f/k/a Rhonda Haines Pitt) Lois Lewis, John Royce Jr., and David Jasman appearing through their attorney, Christon C. Skinner; and the court having previously entered an order granting Defendants' Cross Motion for Summary Judgment and Denying Plaintiff's Motion for Partial Summary judgment; and the court finding that a justiciable

1 controversy exists between the parties to this proceeding; and that just cause exists
2 for the entry of this order and judgment, now, therefore it is
3

4 ORDERED that Declaratory Judgment be granted in favor of Defendants as
5 follows:
6

7 A. In August of 1988, Donna L. Mott purchased eight residential lots located
8 within the City of Oak Harbor, Washington.
9

10 B. On November 19, 1991, the City of Oak Harbor ("City") approved Binding
11 Site Plan 9-91 ("BSP") for a proposed condominium development project known as the
12 "Pier Point Condominiums" that would be built on property then owned solely by
13 Donna Mott. That approved BSP provided for the "phased development" of sixteen
14 condominium units in eight, two-unit, buildings. These units were to be constructed in
15 four phases, the last to be completed by October 1, 1996 (recorded under Auditor's
16 File No. 91018478, records of Island County).
17
18
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20

21 C. The City later approved an amendment to the BSP allowing it to be built in
22 eight phases of one building (two units) each, to be completed by January 15, 1996.
23 The amended BSP was recorded under Auditors File No. 92000451, records of Island
24 County.
25
26

27 D. Phases one, two, three and four of the Pier Point Condominium
28 development project were completed, but Phases five, six, seven and eight were never
29 completed.
30
31
32

1 E. Defendants Lois A. Lewis, John C. Royce, Jr. Alice S. Smith, David A.
2 Jasman, Sue M. Karahalios, Robert T. Severns, and Rhonda Lee Severns (f/k/a
3 Rhonda Lee Haines), each own real property with developed condominiums within the
4 BSP.
5

6
7 F. The Defendant, Pier Point Condominiums Association, is an active
8 Washington corporation formed for the purpose of conducting business as a
9 homeowner's association. The members of the Pier Point Condominiums Association
10 are persons who own condominiums within the Pier Point BSP.
11

12
13 G. The Plaintiff, Alpine Village, Inc., is the owner of certain real property
14 located adjacent to the Pier point Condominiums in Oak Harbor, Washington.
15 Plaintiff's deed describes the property acquired from the developer of the Pier Point
16 Condominiums, (Donna Mott) as "Lots1-4 & 18-21 Block 7, Oak Grove Addition,
17 together with a portion of the adjacent street, with an exception for the four developed
18 phases of the Pier Point Condominium." The real property acquired from Ms. Mott by
19 Plaintiff is the property that would have been phases five through eight of the Pier
20 Point Condominium development project, had the project been fully "built out." Plaintiff
21 acquired its interest in the Mott property in 2001, after the amended, "phased"
22 construction schedule for building and development within the BSP boundaries had
23 expired.
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1 H. On May 18, 1992, Ms. Mott, who was then still the sole owner of the
2 property covered by the BSP, recorded a "Declaration and Covenants, Conditions,
3 Restrictions, and Reservations of Pier Point Condominium" ("Declaration").
4

5 I. On May 19, 1992, Ms. Mott, while still the sole owner of all of the lots in the
6 BSP, recorded a "Declaration of Easement" for the Pier Point Condominiums under
7 Island County Auditor's File No. 92009147.
8
9

10 J. Each easement described in the Declaration of Easement specifically
11 references the Pier Point Condominium BSP and the condominiums to be constructed
12 in accordance therewith.
13
14

15 K. In May, August and November 1992, Condominium Plans for Pier Point
16 Division Numbers 1, 2, and 3 were recorded under Island County Auditor's File Nos.
17 92009143, 92016201, and 92021109, respectively, in order to develop Phases 1, 2, 3,
18 and 4, of Pier Point Condominiums. The division plans for Phase 1 recorded under
19 AFN 92009143 contains specific references on the map to "access and utility
20 easement" and also cross-references the "Declaration of Easement" by its auditor's file
21 number. Although the plans for divisions 2 and 3 recorded under AFN 92016201 and
22 92021109, do not specifically refer to the AFN for the Declaration of Easement, the
23 plans contain the notation "See Declaration" in specific reference on the maps for
24 access, utility and pedestrian easements.
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1 L. Each of the individual Defendant/condominium owners acquired title to their
2 respective properties through the conveyance of a deed that contained a legal
3 description. The legal description incorporates the pertinent, Pier Point Division
4 number related to that condominium unit and the owner's specific unit number within
5 that division. The individual division plans reference the declaration of easement. The
6 transfers of individual units to the condominium owners with reference to the specific
7 divisions, conveyed each condominium unit subject to the entire plan and project,
8 including the easements referred to in the Declaration of Easement.
9

10 M. Unlike the deeds conveyed to Defendant condominium owners, the legal
11 description in the Plaintiff's deed only transferred to Plaintiff all of the property
12 originally acquired by Donna Mott in 1988 "except" the four phases of Pier Point
13 Condominium development created by the Condominium Plans for Pier Point Division
14 Numbers 1, 2, and 3.
15

16 N. The legal description set out in the deed to the property conveyed by
17 Donna Mott to Plaintiff, contains no reference to the Condominium Plans for the Pier
18 Point Divisions or to the recorded Declaration of Easement created in conjunction
19 therewith. The deed by which Alpine Village acquired its property does not include any
20 language that references the Declaration of Easement nor does it convey an
21 easement to Alpine Village for ingress, egress, access or utilities.
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1 O. Although the real property that the Plaintiff acquired from Donna Mott was
2 originally included within the Pier Point BSP, no condominium building or units have
3 been constructed on any portion of that property.
4

5 P. In prior litigation between these parties, this court determined that the
6 property the Plaintiff acquired from Donna Mott is no longer a part of the Pier Point
7 BSP. In that ruling, the court also held that the property acquired by Plaintiff from
8 Donna Mott remained burdened by and subject to the easements for ingress egress
9 and utilities previously created and conveyed by Ms. Mott as the original grantor. This
10 court also "quieted" title to Plaintiff's property as against the above named Defendants
11 and held that the Plaintiff's property was not a "common area" of the Pier Point
12 Condominiums and was not subject to the "declarations, conditions, restrictions and
13 reservations" contained in the declaration of the Pier Point Condominium, but that
14 Plaintiff's property was subject to the conditions and easements contained in the
15 Binding Site Plan as amended.
16
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22 Q. Neither the Plaintiff nor its predecessor in title, Donna Mott, have ever used
23 or maintained the easements referred to in the Declaration of Easement and the
24 Division Plans.
25
26

27 R. The aforementioned Declaration of Easement was not effective or
28 enforceable merely upon its recording.
29

30 S. At the time the Declaration was recorded, Donna Mott owned all of the
31 property affected by the declaration. Generally, one cannot have an easement over
32

1 one's own property. The title to property and any easements "merge" when the
2 benefitted and burdened property are owned by the same person.
3

4 T. The easements described within the Declaration of Easement became
5 effective at the time that the underlying property was conveyed to the owners of
6 condominium units. As each of the four phases of the Pier Point condominium
7 development were approved and the condominium units were conveyed in accordance
8 with the Division Plans and Binding Site Plan, the owners of the units then obtained
9 the easement rights set forth in the Declaration.
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13 U. The Plaintiff's property described in Exhibit A to the Plaintiff's complaint
14 does not "benefit" by or from the aforementioned recorded, Declaration of Easement
15 for ingress, egress and utilities recorded on May 18, 1992, under auditor's file number
16 92009147; or any other related easements or rights provided in the Pier Point Binding
17 Site Plan 91-1. The Plaintiff's property described in Exhibit A to the Plaintiff's
18 Complaint was conveyed by the grantor with no direct or indirect reference to the
19 Declaration of Easement.
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24 V. Even if Plaintiff's property had been conveyed with reference to the
25 Declaration of Easement, such a reference would have been ineffective as a matter of
26 law because Alpine Village, Inc.'s property was never developed as part of the Binding
27 Site Plan for the condominium units. The plain language of the Declaration of
28 Easement makes it clear that it was not intended to benefit Plaintiff's property since no
29
30
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1 buildings or condominium units were ever constructed on the property acquired by
2 Plaintiff from Donna Mott.

3
4 W. The Court is required to give effect to the intention of the party or parties
5 when construing easements and deeds and other instruments affecting interests in
6 real property. The court achieves this by a proper construction of the language of the
7 instrument itself. *Schwab v. the City of Seattle*, 64 Wn. App. 742 (1992). The Court
8 should determine the intent of the original party who created the easement by
9 construing the instrument as a whole. *Sunnyside Valley Irrigation District v.*
10 *Dickie* 149 Wn.2d 873 (2003).

11
12
13
14 X. According to the express terms of the Declaration of Easement, the
15 Declaration is intended "for ingress egress and utilities to serve and benefit the Pier
16 Point Condominiums affecting lot one or building one as delineated in said Building
17 [Binding] Site Plan and to serve and benefit each successive phase of condominium
18 development affecting lot or building 2 through 8 as shown in said Building
19 Site Plan." The plain meaning of this language is that the Declaration of Easement
20 was intended to benefit owners of built condominium units within developed phases of
21 the condominium development and not owners of property that was not part of
22 developed phases of the condominium project. The language of section one and
23 section four of the Declaration of Easement further supports this interpretation.
24
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30 Y. The easements set forth in the Declaration of Easement must be viewed
31 in light of the condominium development and not with regard to some other potential
32

1 use or uses of the property. The condominium developer's clear intent was to provide
2 for the orderly development of the phases of the condominiums taking into account the
3 existing and planned infrastructure, setback requirements and other land use planning
4 considerations.
5
6

7 Z. The Plaintiff's property described in Exhibit A to the Plaintiff's complaint
8 remains "subject to" and is burdened by the aforementioned Declaration of Easement
9 recorded on May 18, 1992, under auditor's file number 92009147 and the easements
10 granted in the Pier Point Binding Site Plan SPR 91-1. It is further
11

12
13 ORDERED that the Plaintiff's Complaint for Declaratory Judgment is **Denied**.
14 The Plaintiff's Complaint shall be and it is hereby dismissed with prejudice and without
15 costs to either party.
16

17
18 DATED this 8th day of February, 2016.
19
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21
22 **ALAN R. HANCOCK**

23
24 _____
25 The Honorable Alan R. Hancock
26 Island County Superior Court Judge
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Presented by:

LAW OFFICES OF CHRISTON C. SKINNER, P.S.



Christon C. Skinner / WSBA #9515
Attorney for Defendants Pier Point
Condo Assoc., Sue Karahalois,
Alice Smith, Robert Severns,
Rhonda Severns (f/k/a Rhonda
Haines Pitt) Lois Lewis, John Royce
Jr., and David Jasman

Copy Received; Approved as to Form:

C. Thomas Moser, WSBA #7287
Attorney for Plaintiff, Alpine Village, Inc.

APPENDIX C

2-27(1)

VIR / CIVIL

92009147

DECLARATION OF EASEMENT

FILED FOR RECORD AT _____ M
_____ 19 _____ at request of
ART HYLAND, AUDITOR
ISLAND COUNTY, WASH.

THIS DECLARATION OF EASEMENT is made this 18th day of May, 1992, to state and establish the following:

WHEREAS, DONNA L. MOTT, as her separate estate, hereafter referred to as "DECLARANT", is the owner of that parcel of real property described as follows:

9-

Situate in the County of Island, State of Washington:

Lots 1, 2, 3, 4, 18, 19, 20, and 21, Block 7, OAK GROVE ADDITION, according to the plat thereof recorded in Volume 2, of Plats, page 29, records of Island County, Washington;

TOGETHER WITH that portion of vacated East Pioneer Way, as would attach by due process of law, said portion having been vacated by Ordinance 355, recorded July 23, 1974, under Auditor's File No. 275106, records of Island County, Washington.

Said property is also described as follows:

Lot 1 through Lot 8, inclusive, of City of Oak Harbor Binding Site Plan No. SPR-9-91, as approved November 19, 1991, and recorded December 3, 1991, under Auditor's File No. 91018478, records of Island County, Washington, and as amended by Amendment thereof, approved January 6, 1992, and recorded January 9, 1992, under Auditor's File No. 92000451.

5-20-72

WHEREAS, DECLARANT desires to establish the necessary easements for ingress, egress, and utilities to serve and benefit the Pier Point Condominiums affecting Lot 1 or Building 1, as delineated in said Building Site Plan and to serve and benefit each successive phase of condominium development affecting Lot or Building 2 through 8 as shown in said Building Site Plan;

A

NOW, THEREFORE, for and in consideration of mutual benefits of a nonmonetary nature, the receipt and sufficiency of what are hereby acknowledged, the DECLARANT does hereby declare for the benefit of the owners, present and future, of the above-described property, and any legally subdivided portions thereof, an easement for the following:

- (1) ingress, egress, and the installation, maintenance, and/or repair of utilities over, under, and across that portion of Lot 1 and Lot 6 of said Building Site Plan, which is delineated on the Condominium Plan of Pier Point Condominiums, Division No. 1, recorded as Auditor's No. 92009143, records of Island County, Washington, and labeled as "Access and Utility Easement."
- (2) the installation, maintenance and/or repair of utilities, including, but not limited to, power utilities, sanitary sewer

EXCISE TAX EXEMPT

DECLARATION OF EASEMENT -1

MAY 20 1992

MAXINE R. SAUTER

EXHIBIT

5

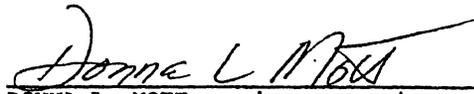
lines, sanitary sewer cleanouts, manholes, water utilities, water lines, drainage utilities, storm sewer lines, catch basins, hydrants, and water meters, and for the ingress and egress reasonably necessary for such purposes, over, under and across those portions of DECLARANT'S above-described property as built or as marked and delineated in the referenced Building Site Plan as utilities;

- (3) landscaping purposes over the portion of Declarant's property delineated in said Binding Site Plan, including, the ingress and egress reasonably necessary for such purposes; and,
- (4) the ingress and egress reasonably necessary to serve each phase or building of Pier Point Condominiums as constructed in accordance with the referenced Building Site Plan, and for such sidewalks as may be required by the City of Oak Harbor, Washington, with respect to the subsequent phases of Pier Point Condominiums.

Insofar as utilities are concerned, the easements provided above shall be deemed to be easements for the installation, maintenance, repair, and/or replacement of underground utilities. This easement for utilities expressly include utility lines and associated facilities for water, electricity, telephone, television cable, natural gas utility services, water and sewer utilities. As such, this easement shall also be deemed to benefit and specifically run in favor of such utility service providers as Puget Sound Power and Light Company, General Telephone Company, Viacom T.V. Cable Company, Cascade Natural Gas Company, the City of Oak Harbor, Washington, and their respective successors and assigns, providing them with the right to install, lay, construct, renew, operate, and maintain conduits, pipelines, cables, and wires, overhead or underground, with the necessary facilities and equipment for the purposes of providing the properties described in this document with electrical, telephone, television cable, natural gas, water, and sewer services.

The easement provided herein, is binding upon the DECLARANT, her heirs, successors, and/or assigns, and are to serve the owners of the specified condominium buildings, their heirs, successors and/or assigns, and, as such, shall be considered as running with the land.

IN WITNESS WHEREOF, the undersigned DECLARANT has executed this Declaration to be effective as of the date set forth above.


DONNA L. MOTT, as her separate
estate

E08:MOTT

5-20-92

