

No. 67762-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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POINTE II ON SEMIAHMOO OWNERS ASSOCIATION dba SUNSET POINTE  
OWNERS' ASSOCIATION,

Appellants/Cross Respondents,

v.

CLYNT NAUMAN and JAN NAUMAN, husband and wife and the marital community  
comprised thereof,

Respondents/Cross Appellants,

and

DEAN FRANCIS and ROSEMARIE FRANCIS, husband and wife and the marital  
community comprised thereof,

Appellants/Cross Respondents.

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APPELLANTS/CROSS RESPONDENTS DEAN AND ROSEMARIE FRANCIS'  
OPENING BRIEF

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I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The Trial Court committed legal error by failing to judicially estop Appellant/Cross Respondent Pointe II on Semiahmoo Owner's Association ("Association") from disputing that the Gravel Access Drive ("GAD") depicted on the face of the Plat of the Pointe on Semiahmoo Phase II, Ex. 1 ("Plat"), which is the Francis' driveway to their home, is an easement for the benefit of Lot 12.

2. The Trial Court committed legal error in failing to dismiss claims or arguments by Respondents/Cross Appellants Clynt and Jan Nauman ("Naumans") challenging the GAD's status as an easement.

3. The Trial Court committed legal error by imposing a higher burden of proof than required when it held that Appellants/Cross Respondents Dean and Rosemarie Francis ("Francis") must prove that there was "clear intent" that the GAD be an easement.

4. There is a lack of substantial evidence to support all of the Trial Court's Findings of Fact, Conclusions of Law, and rulings that the GAD is not an easement for the benefit of Lot 12 of the Plat.

5. There is a lack of substantial evidence to support the Trial Court's Findings of Fact, Conclusions of Law, and rulings that Naumans' proposed use of the GAD will not unreasonably interfere with the easement rights of Lot 12.

6. There is a lack of substantial evidence to support the Trial Court's Findings of Fact, Conclusions of Law, and rulings relating to Naumans' right to use the GAD as an access to their proposed boathouse.

7. There is a lack of substantial evidence to support the Trial Court's Findings of Fact, Conclusions of Law, and rulings relating to proper restrictions on Naumans' use of the GAD as an access route.

8. The Trial Court committed legal error by refusing to recognize the rights associated with that Easement recorded at Whatcom County Auditor's File No. 2110600951 on June 10, 2011, and to otherwise incorporate such rights into the scope of relief granted to Naumans.

9. There is a lack of substantial evidence to support the Trial Court's Findings of Fact, Conclusions of Law, and rulings relating to Francis' alleged efforts to obtain approvals and to construct improvements on Lots 7 and 12 of the Plat, their use of the Plat's common areas, and the treatment of Francis by the Association.

10. There is a lack of substantial evidence to support all of the Trial Court's Findings of Fact, Conclusions of Law, and rulings relating to Francis' actions towards Naumans' boathouse and use of the GAD.

B. Issues Pertaining to Assignments of Error.

Assignment of Error No. 1. Prior to trial, the Trial Court denied Francis' Motion in Limine requesting that it judicially estop the Association from arguing that the GAD was not an easement for the benefit of Lot 12. CP 213-14.

Assignment of Error No. 2. As part of Naumans' response to Francis' Motion in Limine against the Association, Naumans argued that they could present argument and evidence relating to the GAD's status as an easement for the benefit of Lot 12. CP 1792-97. In reply, Francis raised an objection to Naumans' ability to dispute the status of the GAD, based upon lack of standing, and therefore lack of subject matter jurisdiction. CP 191-95. The Trial Court denied this request. Francis renewed this objection in their Objections to Defendants' (Proposed) Findings of Fact and Conclusions of Law ("Objections to Findings"), CP 132-79, and Objections to Defendants' (Proposed) Final Judgment ("Objections to Judgment"), CP 115-29.

Assignment of Error Nos. 3, 5, and 6. Francis challenge the following Findings of Fact and Conclusions of Law by the Trial Court in relationship to Assignment of Error Nos. 3, 5, and 6:

- i. The Court finds that the GAD to Lot 12 is not an easement, exclusive or otherwise, based on its reading and interpretation of the plat map, CCRs, Bylaws, Statutory Warranty Deeds, and other evidence at trial including related exhibits (collectively, 'GAD-related Trial Exhibits'), and including the testimony of Richard Prieve, which the Court found to be inconsistent and inconclusive on the GAD/easement issue.

CP 986.

- ii. The evidence, including the GAD-related Trial Exhibits establishes that no owner was granted greater access rights to their respective lots than other owners. The reference to 'Gravel Access Drive' for Lots 1 and 12 did not create an easement by these words, and the reference appears to be simply to show the extended access drive necessary to access the Lots 1 and 12 at the extreme northern and southern ends of the Sunset Pointe development.

CP 986-87.

- iii. The Court finds that the Association had never previously asserted the GAD to Lot 12 (or the similar GAD to Lot 1) was an exclusive easement prior to the Naumans' boathouse application.

CP 987.

- 12) The Association shall approve the Naumans' boathouse application in accordance with the modifications testified to by Mr. Landsem, who replaced Mr. Telgenhoff as the Association's designated Architectural Reviewer, as follows:

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- d. Reasonable access to and from the structure shall be across and through the common area to the east of Lots 10-12, including use of the GAD. This access shall be designed in such a manner as to allow for reasonable access to the Nauman boathouse.

CP 989-90.

- 27) The Court disagrees with the factual basis for the denial of the Naumans' boathouse application, because it finds:

- a. The GAD is only an access road to Lot 12. The evidence, including the GAD-related Trial Exhibits fails to show a clear intent to create an easement, exclusive or otherwise. Mr. Prieve's testimony was not only inconsistent on the easement issue, but his testimony sought to add words to the Sunset Pointe plat, CCRs, and Bylaws that do not exist. Further, he acknowledged that he did not have personal knowledge of any changes that may have been agreed to by the County and the original developer between the preliminary plat approval and final plat approval.

CP 978.

- 13) The Court further finds that the Association breached Section III of the CCRs by failing to preserve the common areas for the benefit of all members and by allowing the usurping of the common areas by the Francises. The Court specifically directs that neither the Francises nor the Association shall act in such a manner as to impede access to the boathouse/garage structure upon its completion or to block the Naumans' view to the east through the common area [sic]

CP 990.

- 28) ...Mr. Landsem concluded that the design and aesthetics of the planned boathouse was acceptable, subject only to a reduction of height to 28.5 feet. He further offered his opinion that a setback of eight (8) feet from the northern boundary line of Lot 11 was appropriate under the totality of the circumstances. Although not binding on the Court, he concluded from his review of the GAD-related Trial Exhibits (as part of his review of the Francis application to pave the GAD) than [sic] no easement existed.

CP 980. Francis preserved this error in their Objections to Findings. CP 138, 142, 145, 147-48, and 150-51.

Francis also object to the following portions of the Final Judgment in association with Assignment of Error Nos. 3 and 5:

7. ORDERED, ADJUDGED, AND DECREED that Defendants are entitled to a Judgment declaring that the area to the east of Lot 11 and identified as 'Gravel Access Drive', which is located within Common Area of the Pointe on Semiahmoo Phase II, is not an easement of any kind, exclusive or otherwise,

based on the plat map or any other evidence at trial AND FURTHER that no one owner in the Pointe on Semiahmoo Phase II has any greater or lesser right to use the Gravel Access Drive than any other owner;

8. ORDERED, ADJUDGED, AND DECREED that Defendants are entitled to a Judgment that the Plaintiff's denial of the Boathouse Application was arbitrary, capricious, and in bad faith, and that the Plaintiff's consent to construct the Boathouse was unreasonably withheld, AND FURTHER that Plaintiff's denial of the Defendants' request to access their boathouse through the Common Area to the east of Lot 11 and/or over the Gravel Access Drive was also arbitrary, capricious, and unreasonable;

CP 495.

iv. The Association shall allow the Naumans to access the Boathouse across and through the Common Area to the East of Lots 10 through 12, including across and through/over the Gravel Access Drive. This access shall be designed in such a manner as to allow for reasonable access to the Defendants' Boathouse.

CP 496.

These objections were preserved by Francis. CP 117.

Assignment of Error Nos. 4. Francis respectfully object to the following Findings of Fact and Conclusions of Law in relationship to Assignment of Error No. 4:

f. The proposed frequency of ingress/egress is reasonable and would not constitute an unreasonable interference with the GAD and the

Frances' [sic] use of the GAD even if the GAD were a non-exclusive easement.

CP 980.

- d. The piling of dirt in the common area did not unreasonably interfere with other members' use of the common area...

CP 971. All were preserved by Francis. CP 134, 142.

Francis also object to the portions of the Final Judgment challenged in relationship to Assignment of Error Nos. 3 and 5.

Assignment of Error No. 7. Francis challenge the Findings of Fact and Conclusions of Law and portions of the Final Judgment as cited in relationship to Assignment of Error Nos. 3, 5, and 6 in relationship to Assignment of Error No. 7, and the following:

- f. The proposed frequency of ingress/egress is reasonable and would not constitute an unreasonable interference with the GAD and the Frances' [sic] use of the GAD even if the GAD were a non-exclusive easement.

CP 980.

- e. The orientation of the planned boathouse, such that ingress/egress is to the east across the GAD, is the most practical orientation in light of limitations of space, turning radius of boat trailers, and complications posed by the location of Lot 12's reserve drain system;

CP 979-80.

Assignment of Error No. 8. Francis respectfully objects to the following portions of the Final Judgment in association with Assignment of Error No. 8:

13. ORDERED, ADJUDGED, AND DECREED that the Easement recorded at Whatcom County Auditor's File No. 2110600951 on June 10, 2011, regardless of when adopted, ratified, and/or recorded, is subordinate to all rights, declarations, judgments, orders and injunctive relief granted through this Judgment and this case, including but not limited to the Defendants' right to construct the boathouse and use the Common Area and/or Gravel Access Drive;

CP 497. This objection was preserved by Francis. CP 117-18.

Assignment of Error Nos. 9 and 10. Francis challenge the following Findings of Fact and Conclusions of Law in relationship to Assignment of Error Nos. 9 and 10:

- a. Similar applications of the nature and scope of the Naumans' application had been routinely approved for other members, subject only to the normal collaborative process with the ARC (*e.g.*, the construction of Alfreds, Lee, Williams', and Francis' residences and landscaping, Defendants' Tr. Exh. 15-19, 23-27, 29-32);

CP 971.

- b. The piling of dirt in the common area was consistent with prior similar uses by members that did not require approval of the Association;

CP 971.

- b. The Naumans' complaints to the Association about allowing the usurpation of common area by the Alfreds and the Frances [sic] and appearance of favoritism;

CP 972.

- 17) The Association's action by filing suit against the Naumans is inconsistent with the Association's handling of prior instances of breaches of Section VI of the CCRs, for example, by Mr. Lee and the Francises during construction of their respective residences. Mr. Lee was admonished verbally and in writing after-the-fact, while the Frances [sic] were neither admonished nor penalized in any fashion for performing work on Lot 12 and in the northern and eastern common areas without prior approval. The Francises, in particular, were allowed to proceed with certain aspects of construction of their residence on Lot 12 and common areas without fully complying with the AR Process.

CP 973.

- 23) The Court concludes, therefore, that the Association's handling of the Naumans' boathouse application sought to apply higher standards for approval in the AR Process than was historically applied by the Association to applications by other members.

CP 975.

- 24) ...and Mrs. Francis' position that the Gravel Access Drive ('GAD') to Lot 12 was an exclusive easement.

CP 976.

- b. The Association wrongfully and purposely applied more restrictive standards and protocols to the Naumans' boathouse application, *i.e.*, the Architectural Guidelines, Defendants' Tr. Exh. 10, the Architectural Review Checklist, Defendants' Tr. Exh. 8, and the SMA, which had not been formally adopted by the Association.

CP 978.

- c. If the Association had not been pre-disposed to deny the Naumans' boathouse application for improper reasons, the modest variance needed by the Naumans for the northern boundary line of Lot 11 would ordinarily be granted, just as the Frances [sic] were granted a similar variance for their northern boundary line with the northern common area.

CP 979.

- 29) ...The Association had allowed other members to usurp portions of the common area to the south, east and north, and showed favoritism to influential members—particularly to the Alfreds and the Francises in approving projects in the common areas under Section III of the CCRs and on individual lots under Section VI to the CCRs.

CP 980-81.

- 5) Under the totality of the evidence introduced at trial, the Court finds the Association's attempt to selectively enforce other portions of the CCRs against the Naumans for their actions in the common area on December 6, 2007 to be discriminatory, arbitrary, and capricious and in bad faith.

CP 983.

- 7) Moreover, modest transgressions by members, of Section VI of the CCRs involving physical alterations more significant than the Naumans' actions were seldom acted upon by the Association beyond doling out verbal admonishments. In many instances, the Association chose to not enforce Section VI of the CCRs at all, particularly against favored members (such as against members of the Board of Directors) for similar minor acts in prior years.

CP 983-84.

- 8) Under the totality of the evidence introduced at trial, the Court finds the Association's attempt to selectively enforce the CCRs against the Naumans for their actions on Lot 11....

CP 984.

- a. The Association required the Naumans' boathouse application to comply with the more restrictive Architectural Guidelines, the Architectural Review Checklist, and the SMA despite that no member has previously been required to comply with these application protocols and standards in similar circumstances and none of these protocols and standards had been properly adopted by the Association.

CP 985.

- v. The Court finds that the Association's position on the character of the GAD to Lot 12 was adopted purposely, deliberately and in bad faith by the Association, in complicity with and at the urging of the Frances, [sic] to improperly deny the Naumans' boathouse application. The Association's position likely improperly influenced and prejudiced Mr. Telgenhoff's decision as the designated Architectural Reviewer for the Naumans' boathouse application.

CP 988.

- c. The Association, directly and through its designated Architectural Reviewer, Mr. Telgenhoff, imposed setback requirements beyond those imposed on other members in similar circumstances, and refused to grant variances or to authorize reasonable uses of the common areas that had been freely granted to other members in similar circumstances. The Association's inconsistent and purposely selective enforcement of Section VI of the CCRs against the Naumans was arbitrary, capricious and in bad faith.

CP 989.

## II. STATEMENT OF THE CASE

This is a multi-party and multi-issue case stemming from a dispute between the Association and Naumans relating to Naumans' proposal to build a boathouse and use a portion of the common area of the Association

for access to the boathouse. Francis intervened to argue that their lot had an access easement over the GAD, which Naumans proposed to use to access their proposed boathouse. CP 215-23 and 243-55. The GAD is the Francis driveway to their home, and the only way to get to their home.

A. Creation of the Plat and Designation of the GAD.

Pointe Subdivision was created through a plat with Whatcom County on February 20, 1992. Ex. 1. The subdivision comprises 12 high-end lots. Approval of the Pointe Subdivision was memorialized in a September 2, 1987, Findings of Fact, Conclusions of Law and Decision (“Decision”) issued by then Whatcom County Hearing Examiner, the Honorable Charles R. Snyder. Ex. 71. Several components of the Decision are relevant to the GAD:

- the Decision recognized that the 12 lots would be served by an internal, private road which would access Semiahmoo Drive.

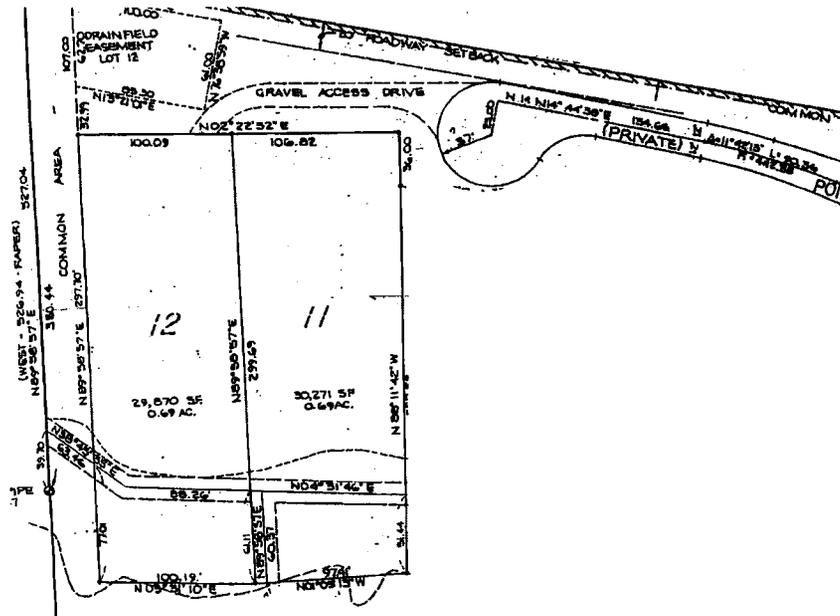
- the Decision imposed the following “condition” on approval:

As the proposed private access road does not abut any of the proposed lots, a blanket easement or a series of specifically located easements shall be established to ensure that each lot has legal and physical access to the private road through the common area.

Ex. 71 at p. 15, ¶ 9. Richard Prieve, who was the engineer responsible for the Pointe Subdivision, RP 1015, lines 3-6, testified at trial that he

recommended to the developer that each lot have its own private driveway access because in his experience, buyers of high-end lots did not want to share driveways. RP 1015, lines 7-17. He explained: “We discussed that with the owner and our preference was to have individual access to the lots rather than sharing any access.” RP 1015, lines 22-24. The developer therefore instructed him to accomplish this for the Plat. RP 1015, line 25; RP 1016, lines 1-9.

The at-issue GAD is shown on the Plat as follows:



Ex. 1. The Plat is generally served by the private road called Pointe Road North. As can be seen, this road ends at Lot 10. The GAD originates on one end of Pointe Road North and on the other end at Lot 12.

Mr. Prieve explained the circumstances surrounding inclusion of the GAD on the Plat:

- Pointe Road North ended at Lot 10, rather than continued to Lot 12 because the: “developer we worked with, ah, Robert Johns is an architect by profession and he literally wanted to make the road as small as possible or reduce the carbon footprint and that was as small as we could get it without going to the end.” RP 1016, lines 24-25; RP 1017, lines 1-6. He was instructed to align the route so as to save as many trees as possible. RP 1017, line 25; RP 1018, lines 1-4.

- The GAD was required by Whatcom County “to assure that Lot 12 had an access, an individual access for a driveway.” RP 1019, lines 16-18. He therefore placed the GAD on the Plat “to provide access to Lot 12, period.” RP 1019, lines 10-11. See also RP 1021, lines 16-20. (“That actual language and the drawing on there was, I believe, required by the county to insure that that access or that Lot 12 had access to that and not to the road, to the public road or across the drain field.”)

- Mr. Prieve testified that prior to plat approval and installation of infrastructures, he had visited the property, and there was no driveway or other road where the GAD is indicated on the Plat. Instead, it was treed and undeveloped. Therefore, the GAD was not an indication of a preexisting driveway. RP 1018, lines 5-23.

- Mr. Prieve further testified that the GAD could not have been intended as a continuation of Pointe Road North:

Q. If the gravel access drive was merely a continuation of the private road, would it be wide enough under the county regulations at the time?

A. No.

Q. Why not? What were the county regulations at the time?

A. The county regulations look for that road if I remember right, two 12-foot lanes.

\* \* \*

Q. And based upon your knowledge, how wide is the gravel access drive that's depicted on the face of the plat?

A. I think it's either 15 or 16 feet.

RP 1020, lines 1-14.

In terms of the ultimate effect of including the GAD on the Plat, Mr. Prieve initially explained that he was ultimately responsible for compliance with all requirements on the layout of the roads and access points. RP 1015, lines 3-6. As the engineer of record, the intent of the

GAD was to create an easement for the benefit of Lot 12, exclusive for its use for ingress and egress to the lot:

Q. I think you testified that as far as you know, the intent of the gravel access drive was for the exclusive ingress and egress to Lot 12; is that correct?

A. That's correct.

\* \* \*

Q. In the context of your understanding, it was the intent for the gravel access drive to be for the exclusive ingress and egress to Lot 12, would that mean as far as you understood no one else could use it to gain vehicular ingress and egress to their lot?

A. Correct.

RP 1037, lines 2-16. See also, RP 1033, lines 24-25; RP 1034, lines 1-5 (intent of GAD was “exclusive for the ingress and egress of Lot 12...”). Mr. Prieve also opined that the GAD, and his understanding of its intent, ensured compliance with the Decision’s requirement for either a blanket easement or establishment of “specifically located easements” “to insure [sic] that each lot has legal and physical access to the private road through the common area.” RP 1037, lines 19-25; RP 1038, lines 1-7.

The Trial Court asked two questions of Mr. Prieve. It first requested identification of all indications on the Plat that support the conclusion that the GAD was an easement exclusive to Lot 12. He answered, “because it is directed right to Lot 12, it starts at the end of the

road to Lot 12, it starts at the end of the road and it's identified as a gravel access drive and because it terminates at Lot 12." RP 1039, lines 2-10.

The Trial Court then asked why there was not a similar route drawn on the Plat for Lot 2, which was on the other end of the subdivision, implying that the gravel access drive drawn on the Plat for Lot 1 necessarily extended to the benefit of Lot 2, even though not connected. RP 1039, lines 11-14. Mr. Prieve responded that there was adequate room within the common area adjacent to the gravel access drive for Lot 1 to gain access to Lot 2. RP 1039, lines 15-25; RP 1040, lines 1-9.

B. Treatment of the GAD as an Easement.

The GAD is the Francis driveway, and only access route to their home. The Association has allowed them at all times to use the GAD for their access route, and have allowed them to gravel the driveway route. It is also important to recognize that the Trial Court found and concluded that the Association has the right to control the use of its common areas, including the GAD. CP 228. Over time, the GAD has been consistently treated and referenced by property owners as an "easement:"

- Ms. Nauman, the Defendant, created a landscaping plan for the Plat in 2002 as her role on the Landscaping Committee. As part of this process, she used a Plat map to indicate potential plantings. Included

within this map by Ms. Nauman was a depiction of the GAD, with handwriting inside that stated “Driveway Easement.” RP 1218, lines 18-25; RP 1219, line 1.

-Naumans purchased their Lot 11 through a Statutory Warranty Deed that included by reference “Easement as delineated or dedicated on the face of said plat; For ...gravel access drive....” Ex. 11, pp. 17-20.

C. Expert Testimony That GAD Is an Easement for Lot 12.

Several experts concluded that the GAD was an easement for the exclusive right of access to Lot 12. Mr. Prieve provided his expert opinion as to what was created by the GAD’s. He first confirmed that over the years, he had occasion to create easements on the face of plats by simply including them in a drawing. RP 1022, lines 7-22. This was a recognized technique in his profession. RP 1022, lines 23-24. From his experience as an engineer and professional surveyor, such an inclusion would not need a meets and bounds legal description, nor use of the word “easement.” RP 1022, line 25; RP 1023, lines 1-20.

Mr. Prieve concluded, from looking at the GAD as drawn on the Plat, and based upon his experience as a land surveyor and engineer, that it had the characteristics of an easement, RP 1023, line 25; RP 1024, lines 1-4, and was an easement exclusively for Lot 12:

(BY MR. LEE) In the context of your profession as a[n] engineer and licensed surveyor, do you have an opinion as to whether or not the gravel access drive indicated on the face of the plat is or is not an easement?

A. It's an easement for ingress and egress to that specific lot.

Q. And do you have an opinion as to whether or not, again, in the context of your profession, as to whether or not that easement is particularly exclusive for ingress and egress purposes to Lot 12?

A. It's that's why it's directed right at Lot 12. It doesn't go to Lot 11. It's specifically for Lot 12 for ingress, egress.

RP 1024, lines 23-25; RP 1025, lines 1-11.

Craig Telgenhoff, owner of a design firm, also concluded that the

GAD was an easement:

Q. I have been reading your materials and it appears to me that you have reached a conclusion that that [the GAD] is an easement for the benefit of Lot 12; is that correct?

A. Correct.

Q. And I believe it's your opinion that that easement is intended, at least, for ingress and egress to be exclusive for Lot 12; is that correct?

A. That's correct.

RP 1177, line 25; RP 1178, lines 1-8.

It is true that architect Doug Landsem believed that the GAD was not an easement for the benefit of Lot 12, but reached this conclusion because: (1) the word "easement" was not used; and (2) there was no legal description. RP 734, lines 23-25; RP 735, lines 1-11. He conceded

that he lacked the professional experience to reach this conclusion, had not performed any research to determine what was needed under the law to create an easement, including whether a legal description or the word “easement” was necessary. RP 735, lines 12-22. He further conceded that a surveyor or an engineer could use the Plat and determine where the GAD was physically located by digitizing it or creating a field survey of the edges of the driveway. RP 736, lines 2-17. In fact, this was done by Naumans’ surveyor to physically locate the GAD. Ex. 49.

D. Interference With Francis’ Access to Lot 12.

Francis’ only access to Lot 12 is across the common area on which the GAD exists, and the area that Naumans propose to install a second driveway for their boathouse. The layout of the proposed boathouse and the route Naumans desire to use runs directly across the GAD. Ex. 7 (Pointe II 001351). This requires rerouting of Francis’ only route to their property. RP 456, lines 13-25; RP 457, lines 1-4.

Naumans maintained that access across the common area and GAD was the only route they could use to the boathouse, rather than using their already existing driveway and cutting across their yard because this route would cross their septic reserve drain field and result in an impervious surface. RP 471, lines 16-25; RP 472, lines 1-6. Naumans

performed no investigation or research into the possibility of using gravel instead of cement, or whether they could move the reserve to a different area. RP 472, lines 7-25; RP 473, lines 1-13. Mr. Nauman also conceded that he could physically gain access to a boathouse that utilized their existing driveway. RP 453, lines 9-25. In fact, the evidence is undisputed that Naumans could re-route their boathouse access and use their existing driveway, without any conflict with existing regulations. RP 732, lines 16-25; RP 733, lines 1-18.

Naumans have also represented that they would only use the route on a handful of occasions each year. However, Mr. Nauman conceded that use could be more than that, if he were to perform work on his stored boat, or needed to get other items in the boathouse. RP 458, lines 17-25; RP 459, lines 1-25; RP 460, lines 1-6. He also conceded that construction of the boathouse would entail use of the common area and the GAD, and impact Francis' access to Lot 12. RP 460, lines 7-25; RP 461, lines 1-25; RP 462, lines 1-12. It is inherent in the proposed use of backing up of a trailer with a boat, and associated use, will block the Francis from getting to their home.

The impact of the construction activity was confirmed by Mark Schouten, who provided one day of work on the boathouse, until stopped

by the Association. During that one day, Mr. Schouten explained that he had parked an excavator on the GAD, that workers parked on the GAD, and that his work caused periods where someone would have been unable to access Lot 12 across the common area. RP 1290, lines 10-25; RP 1291, lines 1-7.

E. Alleged Unfair Treatment of Naumans' Proposal.

Many of the findings and conclusions address a perceived “unfairness” associated with the Naumans’ boathouse proposal, and conclusion that they had been subjected to different standards than those applied to various lot owners, including Francis in relationship to the house they constructed on Lot 12. These findings and conclusions do not directly relate to Francis’ issues, except for the fact that they are focused on Francis and suggest that they participated in the actions.

The facts actually show the following:

- Francis’ proposal to build a house on Lot 7 was denied by the Association. Ex. 45.

- Every action they took for their house on Lot 12 was approved by the Association, including construction of the house, storage of construction materials, and relief from the 15 foot setback, which was only requested to occur against common area. It is noteworthy that Naumans

seek relief from the setback, but propose to do so against the common property line with Francis.

- Francis were subjected to the same standards as Naumans.

- Naumans have taken vindictive actions at Francis throughout, including the constant patrolling of Francis' construction by Ms. Nauman, including taking pictures; Ms. Nauman's trespass on Francis' property to interfere with excavation work; the misrepresentation by Ms. Nauman that Francis did not have power to Lot 12; the appeal of Francis' shoreline permit; providing of harassing letters from their attorneys' demanding compliance with unreasonable requests; pulling up survey stakes; and telling workers that Francis did not have proper permits. Ex. 14.

- Naumans raised an unsupported contention that Francis failed to comply with the 15-foot setback requirement of the SMA. Naumans went so far as to obtain a court order allowing a survey of Francis' property. This survey proved that Francis complied with the setback. Ex. 49.

- Naumans bitterly complained that they were not advised of Francis' building proposal. However, Mr. Nauman conceded that Francis arranged and came over to Naumans' house and attempted to discuss the project before construction began. RP 441, lines 13-21. Mr. Nauman greeted them by getting out of the car and announcing that they had the

“audacity” to come to his front door when Mr. Francis voted to file a lien against the Nauman property for failure to pay past dues. RP 441, line 25; RP 442, lines 1-25; RP 443, lines 1-25; RP 444, lines 1-25; RP 445, lines 1-25; RP 446, lines 1-4. He then told Francis he was going to make their life a living hell. RP 1248, lines 18-21. Francis stayed, and Naumans expressed their immediate concerns about Francis’ proposed house. RP 446, lines 9-25; RP 447, lines 1-25; RP 448, lines 1-13.

- Naumans never provided Francis with any information relating to their proposed boathouse, including the fact that they were proposing to reroute Francis’ driveway, despite complaining that Francis did not involve them in their house process. RP 450, lines 7-19. Nor have Francis ever participated in the review process for the Naumans’ proposal. RP 738, lines 7-12.

- Naumans appealed Francis’ shoreline application, without talking to them, or attempting to resolve the differences. RP 1225, lines 23-25; RP 1226, lines 1-3; RP 1232, lines 16-18.

- Finally, the size, location, and configuration of the proposed boathouse was described by Mr. Landsem as “shouting at your neighbors.” RP 738, lines 13-25; RP 739, lines 1-25.

### III. ARGUMENT

A. The Trial Court Erred in Failing to Grant Francis' Motion In Limine to Prevent the Association From Arguing That the GAD was Not an Easement, and Prohibiting Naumans From Arguing to the Contrary -Assignment of Error Nos. 1-2.

As a matter of procedural rulings between these parties, the Trial Court should have concluded that the GAD was an easement for the benefit of Lot 12. First, the Association consistently took the position that the GAD was an easement for the benefit of Lot 12. In response to Naumans' Motion for Partial Summary Judgment, the Association stated: "The Lot 12 Statutory Warranty Deed states that Lot 12 has an easement over the gravel access drive....Given the Lot 12 easement, it is therefore reasonable for the association to ensure that access to Lot 12 is maintained." CP 2667. Second, during oral argument on Naumans' motion, counsel for the Association represented to the Trial Court that:

To that level we don't -- we don't believe that the Francis's have an exclusive easement. We don't believe that the Francis's can -- can prevent anyone from accessing their property. The only thing that we would arguably allow is that the Francis's could not prevent someone who was interfering with their access. To the extent that anyone interferes with their access we believe the gravel access road is an easement to the Francis's in that if someone is preventing their access they do have a right because they have no other way to get to Pointe Road North.

CP 201.

These admissions are a natural extension of the position historically taken by the Association. For instance, one of the Associations' Board members disclosed to the Architectural Reviewer that "Our [the Association's] position is ongoing that the access drive is for Lot 12's benefit only." CP 202. This was followed by the Reviewer's decision on Naumans' proposal, in which he stated without qualification: "In the original plat plan, the community granted an easement to gain access to Lot #12." CP 204.

Based upon these admissions, Francis sought application of judicial estoppel to prevent the Association from arguing to the contrary. Francis' Motion in limine was denied. A trial court's application of judicial estoppel is reviewed under an abuse of discretion standard. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn.App. 222, 227–28, 108 P.3d 147 (2005) (citing Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001)).

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Such abuse of discretion occurred here. Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and then subsequently seeking an advantage by taking an inconsistent position. Skinner v. Holgate, 141 Wn.App. 840, 847, 173 P.3d 300 (2007). It is applied pursuant to the following inquiries:

(1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party successfully persuaded a court to accept the party's earlier position but then creates the perception that the court was misled when it adopts a later, inconsistent position; and (3) whether the party would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 848 (citing New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001)).

Here, each of these elements requires its application to the Association. The Association's position that the GAD is an easement for the benefit of Lot 12 as represented in pleadings and in open court would be inconsistent with any contention to the contrary now.

As to the need to obtain success based upon the assertion, full adjudication of an inconsistent position is not required. Instead, the question is whether or not the inconsistent position creates an unfair advantage. Skinner v. Holgate, supra, 141 Wn.App. at 847. Thus, judicial

estoppel applies where a prior inconsistent position is beneficial to the litigant or accepted by the court. Johnson v. Si-Cor Inc., 107 Wn.App. 902, 909, 28 P.3d 832 (2001). It does not require that there “be a prior specific inconsistent court order.” Id.

In terms of the prior representations, the Association pointed out that the GAD was an easement for the benefit of Lot 12 in conjunction with its argument that it owns the common area and has control to regulate its use. Such consideration, according to the Association, included the right to protect the “easement” granted to Lot 12: “Given the Lot 12 easement, it is therefore reasonable for the association to ensure that access to Lot 12 is maintained.” CP 2667. The result of the motion was an order that included the following conclusions:

1. Those areas outside of the platted lots are common areas;
2. The common areas are owned in fee by the Association;

\* \* \*

4. The Association has the right to make a determination regarding the approval or denial of an application to use the common areas so long as it is consistent with the provisions of the CCRs and applicable law.

CP 228. Accordingly, the Association's underlying contention was accepted by the Trial Court, and it prevailed. At the very least, it made a representation that was seemingly relied upon or accepted by the Court.

Independent of this error, however, was the Trial Court's refusal to prevent Naumans from presenting evidence or arguing that the GAD was not an easement because they lacked standing. Whether a party has standing and whether a court has subject matter jurisdiction to hear a claim are questions of law, reviewed de novo. Spokane Airports v. RMA, Inc., 149 Wn.App. 930, 939, 206 P.3d 364 (2009), rev. denied, 167 Wn.2d 1017, 224 P.3d 773 (2010). Once the status of the GAD was established between Francis and the Association, Naumans had no standing to raise an opposition.

Naumans had no independent interest in the common area or GAD, but are merely members of the Association, which had the authority to regulate the use of common areas; acquire, hold, and encumber real property; and grant easements or other property interests in real property. RCW 64.38.020(6)(8) and (9). Naumans, cannot assert or challenge actions of the Association in relationship to its independent ownership interests, including its admission that the GAD is an easement for Francis.

An independent interest is a question of standing:

A party has standing to raise an issue if it ‘has a distinct and personal interest in the outcome of the case.’ Erection Co. v. Department of Labor & Indus., 65 Wash.App. 461, 467, 828 P.2d 657 (1992), affd., 121 Wash.2d 513, 852 P.2d 288 (1993). Stated another way, a party has standing if it demonstrates ‘a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted.’

Timberlane Homeowners Assoc. Inc. v. Brame, 79 Wn.App. 303, 307-08, 901 P.2d 1074 (1995) (quoting Primark, Inc. v. Burien Gardens Associates, 63 Wn.App. 900, 907, 823 P.2d 1116 (1992)). For instance, courts have long recognized that there must be vertical privity “i.e., privity between the original parties to the covenant and the present disputants” to enforce a restrictive covenant. Leighton v. Leonard, 22 Wn.App. 136, 139, 589 P.2d 279 (1978).

Even more on point is Timberlane Homeowners Assoc. Inc. v. Brame, supra, 79 Wn.App. There, a homeowners association attempted to enforce the easement rights of its members in a common area in response to a claim of adverse possession. The Court of Appeals concluded that the Association could not assert the “easement” rights of its members, as it lacked a distinct and personal interest in the alleged easement, and therefore lacked standing. Id. at 307-10.

The same is true here, where the easement runs from the Association to Lot 12. Naumans lack the prerequisite interest in the GAD to dispute the existence of a determined easement. The lack of standing ultimately means that the Court lacked subject matter jurisdiction of the issue. Skagit Surveyors & Engineers, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556-57, 958 P.2d 962 (1998) (when a petitioner lacks standing, the court is without subject matter jurisdiction to entertain the claim).

B. The Trial Court Erred in Finding and Concluding That the GAD Was Not an Access Easement for the Benefit of Lot 12 Only-Assignment of Error Nos. 3, 4, and 5.

The Trial Court found and concluded that the GAD was not an easement for the benefit of Lot 12, exclusive or otherwise, and entered the following as part of the judgment:

7. ORDERED, ADJUDGED, AND DECREED that Defendants are entitled to a Judgment declaring that the area to the east of Lot 11 and identified as ‘Gravel Access Drive’, which is located within Common Area of the Pointe on Semiahmoo Phase II, is not an easement of any kind, exclusive or otherwise, AND FURTHER that no one owner in the Pointe on Semiahmoo Phase II has any greater or lesser right to use the Gravel Access Drive than any other owner;

CP 495. Whether the GAD was an easement involved a mixed question of fact and law. Niemann v. Vaughn Community Church, 154 Wn.2d 365,

374, 113 P.3d 463 (2005); Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Under this, what “the original parties intended is a question of fact and the legal consequence of that intent is a question of law.” Sunnyside Valley Irr. Dist. v. Dickie, *supra*, 149 Wn.2d at 880. Findings of fact are reviewed under a substantial evidence standard, which requires that “there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true.” Pardee v. Jolly, 163 Wn.2d 558, 566, 182 P.3d 967 (2008) (citing Sunnyside Valley Irr. Dist. v. Dickie, *supra*, 149 Wn.2d at 879).

An initial issue at trial was anticipated to be the scope of evidence the Trial Court could consider in interpreting the meaning of the GAD. Certainly, the Trial Court should have endeavored to determine the intent and meaning of the GAD from the Plat. M.K.K.I., Inc. v. Krueger, 135 Wn.App. 647, 654, 145 P.3d 411 (2006), *rev. denied*, 161 Wn.2d 1012, 166 P.3d 1217 (2007). Francis maintain that the Trial Court could expand the scope of its examination to evidence of the surrounding circumstances. Although Naumans suggested that such could only be introduced if the document was found to be ambiguous, they nonetheless offered and did not object to extrinsic evidence, and relied upon and pointed to extrinsic

evidence. Accordingly, there can be no objection to admission of extrinsic evidence on appeal.<sup>1</sup>

1. Even If Examination Is Limited to the Face of the Plat, Its Intent to Create an Exclusive Easement for Lot 12 Is Unambiguous.

Even if surrounding circumstances should not have been considered, the GAD's designation on the Plat proves that the Trial Court's findings and conclusions are in error. It is recognized that "any words which clearly show the intention to give an easement....are sufficient to effect that purpose, providing the language is sufficiently definite and certain in its terms." Beebe v. Swerda, 58 Wn.App. 375, 379, 793 P.2d 442 (1990). For a plat, a private easement can be created simply by drawing and indicating the route on the face of the plat. M.K.K.I., Inc. v. Krueger, supra, 135 Wn.App. at 653. Indeed, under RCW 58.17.165, roads not dedicated to the public must be shown on the face of the plat, and any "dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quit claim deed to the said donee or donees, grantee or grantees for his, her or their use for the

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<sup>1</sup> To the extent Naumans attempt to argue to the contrary, the law supports a contrary conclusion, or adoption of a contrary conclusion. Since Nauman were the first to introduce extrinsic evidence, and did not object to introduction of such evidence, they are unable to raise such objection now, although Francis reserve the right to argue to the contrary if they do.

purpose intended by the donors or grantors as aforesaid.” Lines on the plat itself are sufficient to create an easement. See Moore v. Clarke, 157 Wash. 573, 289 P. 520 (1930) (dotted line on plat map evidence easement).

The question is whether the route demarcated “GRAVEL ACCESS DRIVE” that goes from one end of the private road to Lot 12 was intended to be an easement for the benefit of Lot 12, and whether the Trial Court erred in concluding to the contrary. The Trial Court initially erred in applying an incorrect legal standard, as it required proof of “a clear intent to create an easement for the benefit of Lot 12, exclusive or otherwise.” CP 978. Only a preponderance of evidence needed to be shown.

Naumans have never provided a logical explanation as to what the GAD is, if not an easement. The Trial Court inherently recognized that Francis had a “right of access” across the GAD, but concluded that this did not translate into an easement. This is a distinction without meaning. The term “right of access,” is merely the definition of an easement, as has long been recognized by courts. See State v. Calkins, 50 Wn.2d 716, 719-20, 314 P.2d 449 (1957) (“Thus, since the property owner has no easement, i.e., no right of access to the highway itself....”); A.J. Abdalla v. State Highway Commission, 134 S.E.2d 81, 85 (S.Ct. N.C. 1964) (“It is for this

reason that an abutting landowner's right of access to a public highway is generally defined as an easement,..."); Regency Outdoor Advertising, Inc. v. City of Los Angeles, 139 P.3d 119, 125 (S.Ct. CA 2006) ("We identified these abutter's easements as the right of access to and from the lot....") Saying that Francis have a "right of access" is simply a different way of saying that they have an easement.

This concession is independently established by the demarcation on the Plat. The route touches and serves only Lot 12. See M.K.K.I., Inc. v. Krueger, supra, 135 Wn.App. at 655. Indeed, the fact that it is shown at all indicates that the drafters of the Plat intended this area to be something more than just common area available for use by everyone.

Naumans suggested on occasion that the GAD does not use the word "easement," thereby indicating that it is ineffective as such. However, no particular words are necessary to create an "easement," including by express application to the word "easement." Instead, all that is necessary is a showing of an intent to create an easement, which is more than adequately created by the lines drawn on the Plat, with the words "GRAVEL ACCESS DRIVE." For example, in Rainier View Court Homeowners Association, Inc. v. Zenker, supra, 157 Wn.App., an easement was found by indication of an area on a plat map as nothing

more than “Tract B” and the word “park.” The lack of any indication on the face of the Plat to the word easement is further proven by the fact that the drafters did not use the word “easement” in association with the five foot setback to Semiahomoo Drive that is shown on the Plat, yet has always been treated as an easement.

Here, the drafters used the words “gravel access drive” to indicate a clear right to “access.” The “common area” is written in a location on the face of the Plat distinctively from the GAD. The GAD must be something different or additional to just normal common area, and is a definitive route from one point to another point. It is a route, and its stated purpose is unmistakable: it is intended to be a means to “access.” An easement is a right to use property owned by another. M.K.K.I., Inc. v. Krueger, *supra*, 135 Wn.App. at 654. The depicted “drive” on its face indicates a route to access Lot 12, and was intended as an easement, which, by the lines, can only mean access to and from Lot 12.

Nor does the fact that the GAD lacks a metes and bounds legal description matter, since a legal description is not required to create an easement. Maier v. Giske, 154 Wn.App. 6, 15, 223 P.3d 1265 (2010). All that is required for the statute of frauds is an ability to locate the servient

estate. Sunnyside Valley Irr. Dist. v. Dickie, *supra*, 149 Wn.2d at 880. Smith v. King, 27 Wn.App. 869, 870-71, 620 P.2d 542 (1980).

Naumans essentially conceded this fact when they represented that they “do not dispute the Francis’ right to access Pointe Road North over the common area, since that right is expressly provided for on the face of the plat.” CP 1793. The writing on the Plat was sufficient “dedication language” to create an easement. As noted in one treatise: “Washington law is quite explicit that dedications may be made by showing them on the face of the plat; by statute the plat operates ‘as a quitclaim deed’ for dedications so depicted.” 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 5.2, at 278 (2d ed. 2004). Further, as RCW 58.17.165 provides:

Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid.

Naumans recognized this deficiency by persuading the Trial Court to include a “potential” explanation of what the GAD was:

The reference to ‘Gravel Access Drive’ for Lots 1 and 12 did not create an easement by these words, and the reference appears to be simply to show the extended access drive necessary to access the Lots 1 and 12 at the

extreme northern and southern ends of the Sunset Pointe development.

CP 986 (emphasis added). Mr. Prieve provided the only evidence on this issue when he testified that the Plat referenced a private road for the benefit of the entire plat as “Pointe Road North.” This private road ends at the commencement of the GAD. If the uniquely different area designated as the GAD was intended to be part of the private road system, then Pointe Road North would not have terminated.

Even more important, the GAD could not, as proposed by the Trial Court, be a private road for the benefit of all the lots under the regulation in effect at the time. Pointe Subdivision has 12 lots. Under the applicable road standards, “private access roads” in the county serving nine or more lots required that such route meet “public road improvement standards.” Whatcom County Development Standards, Map A-6, Minimum Standard for Urban Private Roads (1984). If the GAD was intended to be for the benefit of all the lots, then it would have been required to be (1) paved; (2) 60 feet wide with culverts, (3) two lanes; (4) 22-24 feet wide in terms of actual roadway; and (5) to also have paved shoulders. Whatcom County Development Standards, Map A-4, Local, Minor & General Access Roads Rural Public Roads. Given its configuration, it could not have been

intended to serve all the lots. As Mr. Prieve explained. RP 1020, lines 1-14. There were no facts presented to refute this testimony.

2. Establishment of an Exclusive Easement Is Supported by Extrinsic Evidence.

Consideration of the extrinsic evidence leaves no doubt that the GAD was intended, indeed required, to be an easement for the exclusive benefit of Lot 12. The facts at trial were completely uncontested:

- The reference in the Decision that lots were to be provided with a blanket “or specifically located easements.” The GAD’s depiction flows logically from this requirement.

- Reference in deeds to the GAD as an easement.

- Mr. Prieve explained that as the person responsible for the Plat, the GAD was required by the county to guarantee access to Lot 12, and to guarantee its exclusive driveway access. He placed the indication on the Plat with the full intention that it be an easement for the exclusive benefit of Lot 12. The Trial Court justified rejection of all of Mr. Prieve’s un-refuted testimony because it was “inconsistent” and he sought to introduce words to the Plat. Naumans are invited to identify where there is an inconsistency in Mr. Prieve’s testimony, and even if so, how it disproves every un-refuted fact presented by Mr. Prieve. Moreover, Mr. Prieve does

not seek to add words to the face of the Plat, only provide the background for the GAD, and its intent to be an exclusive easement for the benefit of Lot 12. The word “easement” need not be included on the document to create an easement, so this word is not being sought to be added.

- The historical maintenance and use of the GAD.

- The fact that the GAD was referenced as an easement in the document conveying the common area in conveying Lot 12 and the Naumans’ property.

- The Association’s consistent treatment of the GAD as an easement, its allowance by Francis to use it as their only access to their home, and allowing Francis to improve the GAD. Allowing Francis to pave the GAD for their only access route is in and of itself a basis to conclude that the GAD is an easement for the benefit of Francis.

Rainier View Court Homeowners Association, Inc. v. Zenker, supra, 157 Wn.App. is instructive and analogous. There, the question was whether indication of a “Parcel B” on the plat map as a “park” created an easement for the benefit of later phases of the development. In finding such an intention, the court relied almost entirely on the hearing examiner’s decision approving the plat. In particular, it pointed to the fact that the hearing examiner indicated that the park was a necessary amenity

for the development and its approval, and was approved with the understanding that it would be needed for all phases. Id. at 722. The same situation exists here.

There are no facts in the record to support the Trial Court's findings or conclusions as to the proper interpretation of the GAD's inclusion on the Plat. Instead, the only facts in the record establish that the GAD was intended to be an easement for the exclusive benefit of Lot 12.

C. The Trial Court Erred in Concluding That Naumans Have an Independent Right to Use the GAD-Assignment of Error No. 6.

In conjunction to improperly concluding that the GAD was not an easement for the benefit of Lot 12, the Trial Court erred in granting any right to Naumans to use the GAD. In effect, the Trial Court granted a superior right to Naumans than any other lot owner to use the GAD:

- 4) The Association shall approve the Naumans' boathouse application in accordance with the modifications testified to by Mr. Landsem, who replaced Mr. Telgenhoff as the Association's designated Architectural Reviewer, as follows:

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- d. Reasonable access to and from the structure shall be across and through the common area to the east of Lots 10-12, including use of the GAD. This access shall be designed in such a manner as to

allow for reasonable access to the Naumans boathouse.

CP 989-90. This ruling is in direct conflict with the Trial Court's Finding of Fact that no party has any superior rights to the common area.

The Trial Court's finding above and conclusion granting Naumans access across the GAD provides just the special treatment and access rights that the Trial Court found did not exist, when it concluded that no easement existed for Lot 12. This type of internal inconsistency is prevalent throughout the Trial Court's ruling.

D. The Court Erred in Failing to Impose Limitations on the Naumans' Use of the GAD-Assignment of Error No. 7.

Again, the Naumans already have their own long standing private driveway. Instead of reconfiguring the proposed boathouse to use this access route, which the record established without contradiction can be done, they want to instead obliterate the Francis' only access route to their home, and create a second route across the GAD.

In objecting to the Trial Court's judgment, Francis proposed that the following limitations on Naumans' use of the GAD be included:

This access shall be designed in such a manner as to allow for reasonable access to the Defendants' Boathouse but only for use of such structure as storage for a boat, with access gained to the structure across the Gravel Access Drive limited to three to four times a year.

Naumans, its successor and assigns shall be prohibited from using the structure allowed in this action to be used for any purpose other than a building for storage of a boat and boat accessories, including, but not limited to, a prohibition from using the structure as a garage for motor vehicles. Design of the structure and access route, construction impacting the Gravel Access Drive, and any future use of the Gravel Access Drive by Naumans shall occur in a manner that allows for uninterrupted, unencumbered and unrestricted ingress and egress to Lot 12.

CP 119. Inclusion of this provision is inherently appropriate given the Trial Court's Finding of Fact that none of the lot owners have any greater right to use the common area. This restriction is necessary to comport the Trial Court's findings and conclusions, and the current status which grants Naumans' unrestricted and unlimited right to use the GAD and surrounding common area for access to their proposed boathouse. Naumans consistently pledged that their use of the GAD would be limited to three to four times a year for storage of their boat. The Final Judgment should have incorporated this pledge as a limitation on all future use of the GAD and common area by Lot 11. Moreover, although Naumans sought to protect their right to use the GAD, they fail to provide any protection for use of the GAD for Lot 12. The GAD is the only access route to Lot 12, while the Naumans' use will be a second access route to their Lot 11.

E. The Trial Court Committed Legal Error by Ruling on the Enforceability of the Association's Subsequently Recorded Easement-Assignment of Error No. 8.

In granting Naumans superior rights to use the GAD over everyone, the Trial Court ruled that these rights were superior to a recently recorded easement granted by the Association:

13. ORDERED, ADJUDGED, AND DECREED that the Easement recorded at Whatcom County Auditor's File No. 2110600951 on June 10, 2011, regardless of when adopted, ratified, and/or recorded, is subordinate to all rights, declarations, judgments, orders and injunctive relief granted through this Judgment and this case, including but not limited to the Defendants' right to construct the boathouse and use the Common Area and/or Gravel Access Drive;

CP 497. This document recognizes an easement for ingress and egress for the benefit of each lot of the Plat at the location where driveways have been located. This includes recognition of an easement for the benefit of Lot 11 for Naumans' driveway.

At the very end of the case, when seeking to introduce the judgment that they desired, Naumans brought up this newer easement for the very first time. They did not object or seek to limit the easement granted to Lot 11, but, inter alia, requested that the Trial Court invalidate that portion of the Easement that recognized an easement for ingress and egress for Lot 12 across the GAD, which is the general location of

Francis' driveway. This was premised on the notion that this Court has found that the GAD is not an easement for the benefit of Lot 12.

The Trial Court committed legal error in restricting the enforceability of this easement. The Trial Court found that the Plat process did not result in creation of an easement across the GAD for the benefit of Lot 12. The Trial Court did not reach any conclusion that the GAD could never be an easement for the benefit of Lot 12. From a substantive perspective, the Association had every right to grant easements in the common area, including over the GAD for the benefit of Lot 12, which it did when it allowed Francis to pave the route as their only access route. RCW 64.38.020(9) (A homeowner's association has right to "[g]rant easements...over the common areas...").

More fundamentally, this second easement was never a subject of this action, nor included within the context of any claims or underlying pleadings of the Naumans. Its meaning, enforceability, and impact was never litigated, either from a factual or legal perspective. The Trial Court erred as a matter of law by going beyond the record to rule on the enforceability of the second easement.

F. There Is a Lack of Substantial Evidence to Support That Naumans Were Burdened With Unequal Standards or Otherwise Unfairly Treated-Assignment of Error Nos. 9 and 10.

The Trial Court clearly allowed itself to be swayed, inappropriately, by the Naumans' theme that they had somehow been subjected to mistreatment at the hands of the Association and Francis, and further subjected to standards not imposed on Francis. There is a lack of substantial evidence to support these findings and conclusions.

Instead, the facts, as set out herein, establish that the Naumans were treated just the same way as Francis, and subjected to the same standards. Francis did not receive any better treatment at any point along the review process. The absence of any facts to support this conclusion undermines virtually every decision of the Trial Court, including those relating to the easement issue.

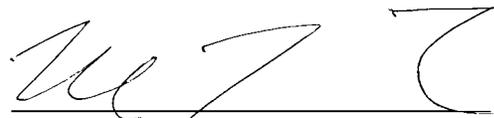
Indeed, the facts support one conclusion: that Naumans' proposed boathouse and actions have been a vindictive retaliation for Francis' construction of a house. Such conclusion flows from a variety of facts, including Ms. Nauman's abusive behavior towards Francis, Mr. Nauman's overtly hostile position when Francis approached them, a double standard in demanding complete knowledge and involvement in the Francis'

proposals but secrecy with their own application, and ultimately, proposal of a building that is shouting at Francis.

IV. CONCLUSION

Francis have only one way to access their home, across the GAD. Meanwhile, Naumans have long had their own private driveway to their house, and in proposing to construct the boathouse want a second and independent access route which would run right through the Francis' own driveway. Francis simply want what everyone else has, including the Naumans: a private driveway. The Trial Court erred in failing to provide them these rights clearly intended on the Plat, and equitably appropriate under the circumstances.

DATED this 30<sup>th</sup> day of January, 2012.



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