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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 JUL 10 AM 10:41

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'  
REPLY BRIEF

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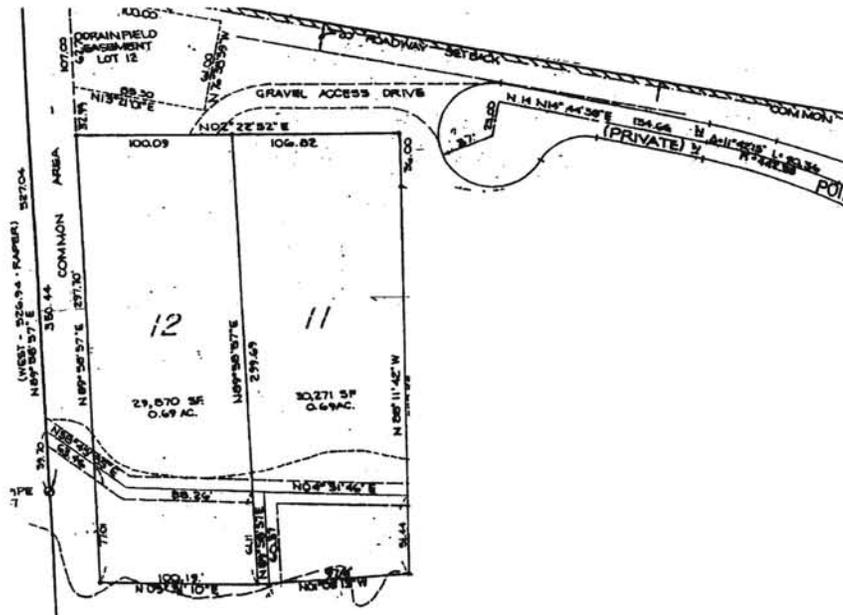
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I. ARGUMENT

The limited appeal presented by Appellants/Cross Respondents Dean and Rosemarie Francis (“Francis”) focuses upon the decision by Judge Ira Uhrig that a Gravel Access Drive (“GAD”) depicted on the face of the Plat of the Pointe on Semiahmoo Phase II, Ex. 1 (“Plat”), was not an easement for the benefit of Francis’ Lot 12. In response, Respondents/Cross Appellants Clynt and Jan Nauman (“Naumans”) ignore the underlying facts and law, and instead attempt to impose requirements that do not exist to effectively create such a property right. The avoided and ignored facts and law leave no question that the Trial Court’s conclusion that the GAD is not an easement for the benefit of Lot 12 was factually and legally erroneous.

A. Naumans Attempt to Create Facts That Are Not in the Record.

The critical at-issue depiction of the GAD is shown on the face of the Plat as follows:



Ex. 1. Before addressing the heart of Naumans’ contentions, it is important to first address a number of their misstatements as to the record.

a. Naumans suggest that the GAD was required by Whatcom County as part of the Plat process “apparently” to “avoid any direct access to the public road system over the drain field easements that are east of the southernmost and northernmost lots. (See RP 1021, 1039-40; Ex. 1...)” Amended Brief of Respondents, p. 11. There are two interesting aspects of this statement. First, the referenced testimony to substantiate this “apparent” purpose is that of Richard Prieve, the engineer responsible for

the Plat and inclusion of the GAD on the Plat. By referencing his testimony, Naumans inherently validate the credibility of his account.

Second, and more importantly, Mr. Prieve cited a more specific “purpose” for his inclusion of the GAD on the Plat: 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. There are no facts to dispute this point.

b. Naumans state, as if a factual truth, that the GAD was not described as an easement on the Plat, but merely as part of the common area, and therefore available for all to use. Amended Brief of Respondents, p. 11. They cite, as support for this proposition, the Plat map and inexplicably the testimony of Clynt Nauman in which he read the Plat words on the map. Whether or not the GAD is an easement is precisely the issue in the case, and is a question of law, based upon the intent of those who created the Plat. 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). Naumans’ attempt to establish their position through repetition as if it is a fact is meaningless.

c. Naumans state that “[t]o address the County’s concern that each lot have access to the private road, the common area is dedicated for, among other purposes, the ‘maintenance and operation of the road system.’ (Ex. 2, § III).” Amended Brief of Respondents, p. 11. There is not one piece of evidence to support this assertion. Rather, the testimony from Mr. Prieve was to the contrary: the GAD was included on the Plat “to assure that Lot 12 had an access, an individual access for a driveway.” RP 1019, lines 16-18.

d. Naumans then state that “the developer ‘had in mind’ that the owners of Lot 11 would access their lot over the GAD. (RP 340-42; Ex. 92(9)).” Amended Brief of Respondents, p. 11. Again, the referenced testimony is of Mr. Nauman, and how he interpreted what the developer intended from a drawing on a septic drain field permit. This is not evidence of what anyone “had in mind,” but merely the opinion of a very interested party as to a drawing; meaning it is not a fact.

e. Naumans maintain that the evidence establishes that they “regularly used and maintained the GAD east of their property.” *Id.* at p. 12. This is simply not true. The referenced support for this “fact” is the testimony of Mr. Nauman that he “mowed” grass on the GAD, RP 133, and generally “took care” of the northern end of the subdivision. RP 344-

45. Naumans never used the GAD for ingress and egress to their property, nor otherwise used the GAD for any meaningful purpose because they already have their own private driveway access across the common area.

f. Naumans continue to maintain that they cannot use their existing private driveway across the common area to access their stand-alone boathouse because they cannot cross a primary and secondary septic drain field, thereby limiting the turning radius for a boat trailer. Amended Brief of Respondents, p. 13. Initially, this statement misrepresents the very testimony of Mr. Nauman. There is no evidence that the potential route using their existing private driveway will impact their drain field. Instead, the only potential conflict concerns a portion of a “reserve” drain field, and therefore there is no potential conflict with Naumans’ actual drain field. RP 338, lines 13-19.

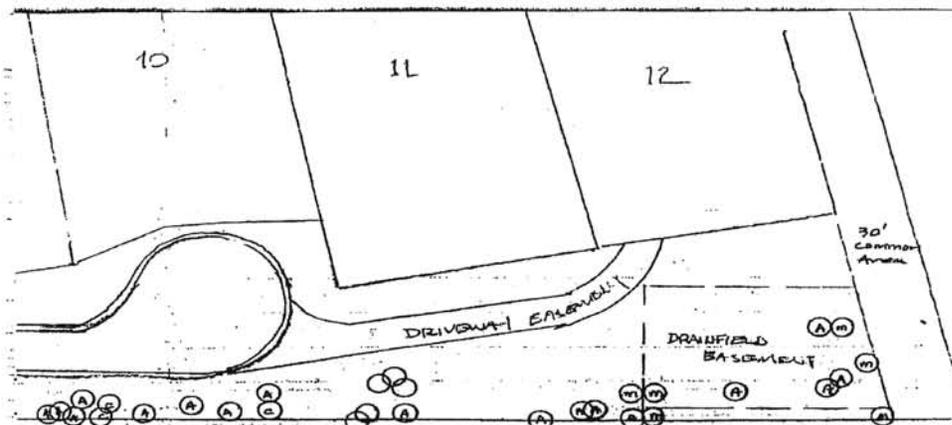
Further, the relied-upon testimony as to the inability to operate over the reserve drain fields for an access route is that of Mr. Nauman. However, Naumans performed no investigation or research into the possibility of using gravel instead of cement as the material for the access route, or whether they could move the reserve to a different area. RP 472, lines 7-25; RP 473, lines 1-13. In fact, the evidence is undisputed that Naumans could use their existing driveway and operate across the reserve

drain field by using grasscrete, all without any conflict with existing regulations. RP 732, lines 16-25; RP 733, lines 1-18. The evidence was also undisputed that the Naumans could move the reserve drain field to the common area, in order to allow them to use this area for ingress and egress. Even if they could not locate the route across the drain field, Mr. Nauman testified that he could physically gain access to a boathouse that utilized their existing driveway. RP 453, lines 9-25.

g. Naumans continue to misrepresent that they were not informed of the particulars of Francis' home prior to construction. This is not true. Francis were required to show Naumans their plans before construction, and Francis arranged for such a meeting to occur. Mr. Nauman greeted Francis at this meeting by getting out of his car and announcing that Francis had the "audacity" to come to his front door when Mr. Francis voted to file a lien against Naumans' 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.

h. Naumans maintain that the Trial Court was correct in concluding as a matter of fact that Appellant/Cross Respondent Pointe II

on Semiahomoo Owners Association (“Association”) had never identified the GAD as an easement for Lot 12. Amended Brief of Respondents, p. 16. This is absolutely false. Ms. Nauman herself, while creating a landscaping plan for the Plat in 2002 as her role on the Landscaping Committee, included within the landscaping map a depiction of the GAD, with her handwriting inside that stated “Driveway Easement.” RP 1218, lines 18-25; RP 1219, line 1, Association’s Ex. 54.



The Association also treated the GAD as an easement for the benefit of Lot 12 in relationship to the improvements on Lot 12 and Naumans’ proposed boathouse.

i. Naumans attempt to create certain “facts” by inserting their “concerns” or what they “believed” was happening. For instance, they referenced that they “believed” the reviewer, Craig Telgenhoff, was being coached by, inter alia, Francis, and that Francis directed him to conclude

certain things. Amended Brief of Respondents, pp. 21-22. These “beliefs” are not “facts,” despite Naumans’ attempt to the contrary. There is no evidence that Francis directed Mr. Telgenhoff to make certain findings and conclusions, or reach certain decisions.

j. Naumans contend that their boathouse was the only project subjected to the standards of the Shoreline Management Act (“SMA”). *Id.* at 21. This is not only false, but Naumans themselves confirmed through an independent survey that Francis’ house was subjected to and complied with the setback requirements of the SMA. Ex. 49.

k. Naumans suggest that Francis perpetuated this action, and that there was something inappropriate in their intervening, by pointing to a small portion of an e-mail from Dean Francis. Amended Brief of Respondents, p. 24. The totality of the at-issue e-mail, however, is a desire for Naumans to comply with the Covenants, Conditions, and Restrictions (“CCRs”) for the Plat, not to improperly advance a personal goal. Ex 92(56).

B. Naumans Lack Standing to Challenge the GAD’s Status as an Easement for Lot 12.

Naumans do not dispute that the Association, as owner of the common area, agree that the GAD is an easement for the benefit of Lot 12.

This is a fact that is beyond dispute in this case, as this was acknowledged by the Association in open court. Appellants/Cross Respondents Dean and Rosemarie Francis' Opening Brief, pp. 27-33. Nor do Naumans dispute that the Association has authority to convey an easement in the common area for the benefit of Lot 12. Nor do Naumans contend that they have some "property" interest in the GAD that provides an interest for them to challenge the admission by the Association that the GAD is an easement.<sup>1</sup>

Instead, they simply point to § III of the CCR's as providing them with standing to challenge the existence of a private easement between Francis and the Association within the common area. Amended Brief of Respondents, pp. 36-37. Not surprisingly, Naumans do not reference the particular language in this section that supposedly creates this "interest" because the provision actually establishes to the contrary. In particular, Section III provides as follows:

Common areas shall be maintained and managed by The  
Pointe On Semihamoo Phase II Owners Association,

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<sup>1</sup> In a footnote, Naumans reference the lack of an order on this issue, thereby at least suggesting the absence of a preservation of the legal error for review on appeal. Amended Brief of Respondents, p. 36, n. 9. The problem with this argument, as Naumans no doubt recognize by not more formally addressing the issue, is that lack of standing is a subject matter jurisdiction issue, which can be raised at any time. 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).

sometimes referred to herein as the 'Owners Association' or simply the 'Association'. The Association shall have the sole and exclusive responsibility for the operation, management and preservation of such common areas.

Ex. 2, p. 6, § III (emphasis added). Nothing could be clearer: The Association, and only the Association, has the responsibility and right to address the management of the common areas. This provision does not in any way provide Naumans, as lot owners, with any "interest" or "right" associated with the granting of an individualized easement from the Association to Lot 12 in the common area: it establishes the opposite.

Naumans also casually reference the enforcement provisions of Section X of the CCRs as providing an "interest" in the private easement as granting standing. This provision only authorizes a lot owner to prosecute a claim against another lot owner who is "violating or attempting to violate said covenants and restrictions" contained in the CCRs. Id. at p. 16, § X. Naumans have never asserted any claim arising from Francis' actual or perceived violation of any CCR; nor does the issue of the existence of an easement from the Association to Lot 12 have anything to do with the CCRs. Indeed, the only connection between the existence of a private easement right between the Association and Lot 12 and the CCRs is in relationship to the management of the common areas,

to which the CCRs specifically make clear that the Association has “the sole and exclusive responsibility for the operation, management and preservation of such common areas.” *Id.* at p. 6, § III (emphasis added).

Nor do Naumans address the application of Timberlane Homeowners Assoc. Inc. v. Brame, 79 Wn.App. 303, 307-08, 901 P.2d 1074 (1995) to this situation because there is no way to avoid it. 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 exact same result applies in this case.

C. The Plat on Its Face Created an Easement for Lot 12 in the GAD.

In seeking to justify the Trial Court’s decision that the GAD, on its face, is not an easement, Naumans rely upon three arguments that are unequivocally contrary to already established law. First, in a footnote, Naumans argue that the standard of proof necessary to establish an easement is “clearly” not by a preponderance of evidence. Amended Brief of Respondents, p. 39, n. 11. This is incorrect for two reasons. First,

whether or not the uncontroverted representation on the Plat is an easement is a question of law. Sunnyside Valley Irr. Dist. v. Dickie, supra, 149 Wn.2d at 880. Moreover, any question of fact is subject to the general preponderance of the evidence standard, just like any other civil proceeding.

More importantly, Naumans rely upon two substantive arguments that are contrary to law to avoid the fact that the GAD is an easement. First, they maintain that the GAD cannot be an easement because it does not contain the word “easement” on the face of the Plat. As Naumans’ maintain:

Further, the GAD is not described as an ‘easement,’ exclusive or otherwise, on either the plat or in the CCR’s. If the original developers intended for the north and south GADs to be easements, they could have described them as ‘easements,’ as they did for the drain field and drainage easements.

Amended Brief of Respondents, pp. 40-41. It has long been 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).

Thus, in Rainier View Court Homeowners Association, Inc. v. Zenker, 157 Wn.App. 710, 238 P.3d 1217 (2010), an easement was found by indication of an area on a plat map as nothing more than “Tract B” and the word “park.” More recently, in Littlefair v. Schulze, \_\_\_ Wn.App. 3d \_\_\_, \_\_\_ P.3d \_\_\_ (June 5, 2012), Division II of the Court of Appeals found an easement arising from the depiction on a plat map of a 40-foot area labeled “Gordon Road (private).” The word easement was never used, and need not be used to create an easement.

Existence of easement rights arising out of the GAD’s representation is further established by the recognition of the area as an “easement” in the documents conveying Naumans their property. In the deed, the conveyance is specifically made subject to “Easement as delineated or dedicated on the face of said plat;...gravel access drive.” Ex. 11, pp. 17-20. Further proof that the word “easement” was not necessary to create such rights from the Plat arises from the fact that the “5 foot vehicle access prohibition area” that is noted on the face of the Plat has been recognized as an “easement.” Id.

In an attempt to avoid this problem, Naumans make their second misstatement of the law in arguing that there must be “dedication language” on the Plat to convey an easement, and that this is missing

because there is no deed or other language somewhere that indicates such a dedication. Amended Brief of Respondents, pp. 39-41. Naumans misstate the law. There is absolutely no requirement that “words” must be used, or a deed recorded to create an easement, or to accomplish a “dedication.” Instead, the dedication comes from the lines on the Plat showing the location of the GAD, and its associated words “Gravel Access Drive.”

This is precisely what is allowed and defined under RCW 58.17.165, which provides that 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 purpose intended by the donors or grantors as aforesaid.” See 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law § 5.2, at 278 (2d ed. 2004) (“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.”) This is precisely why the court in 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) rejected an

argument that there was lack of a dedication to create an easement arising from the depiction of a route to a particular property with the words “access ease, utility ease, [and] well access ease.”<sup>2</sup>

Similarly, in Moore v. Clarke, 157 Wash. 573, 289 P. 520 (1930), a dotted line on a plat map was sufficient to evidence an easement. Finally, in Littlefair v. Schulze, an easement was found to be “dedicated” from the drawing on a plat map of a 40-foot wide route with the words “Gordon Road (private)” and indication of the route on the conveying documents to the parties. Here, the route is indicated, with the words “Gravel Access Drive” and was specifically included on Naumans’ deed, which itself is sufficient dedication. Ex. 11, pp. 17-20 (“Easement as delineated or dedicated on the face of said plat; For ...gravel access drive ....”)

Naumans argue that Zunino v. Rajewski, 140 Wn.App. 215, 165 P.3d 57 (2007) is the more applicable case. However, that case was not dealing with a plat or dedication on the face of a plat map, but instead a written “easement” that was executed as part of a process to establish a lot through an exemption process, and at a time when the owner of both the

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<sup>2</sup> Naumans, of course, argue that M.K.K.I., Inc. v. Krueger is distinguishable, apparently because the word “ease” was used in the area. Again, the word “easement,” which in fact was also not used in the plat considered in M.K.K.I. v. Krueger, need not be used, and its lack of use cannot defeat existence of a dedication.

burdened and benefited property were one and the same. Moreover, the subsequent conveyance of the allegedly benefited property did not contain a reference to the alleged easement. Under these circumstances, the court found a lack of intent to convey a present interest in an easement. Here, on the other hand, the route and words were contained on the Plat map, and by law, this constitutes a dedication and conveyance of a present interest. Moreover, the easement was referenced in both the deeds for Naumans and Francis.

D. The Extrinsic Evidence Can Lead to Only One Conclusion: That the GAD Was Intended as an Easement for Lot 12.

Naumans shockingly complain that the Trial Court should not have considered extrinsic evidence, but then argue that this evidence supports their conclusion. Amended Brief of Respondents, p. 42. What is shocking is that Naumans were the first party to present extrinsic evidence of the surrounding circumstances associated with the GAD as an easement, included extrinsic evidence in the proposed findings and conclusions, and therefore have no place to complain about the Trial Court's consideration. RP 673.

More importantly, there is not a single piece of extrinsic evidence that supports the Trial Court's conclusion. Indeed, the very existence of

the Francis' driveway in the common area proves that the GAD is an easement for the benefit of Lot 12. This is further substantiated by the fact that the owners of Lot 12 have no other way to access the property, other than over the GAD. Naumans' only response to Richard Prieve's uncontroverted and overwhelming testimony, as the very person responsible for drafting the Plat and placing the GAD on it, is to suggest that he only provided testimony of what he "intended" to be written on the document, but did not explain what was actually placed on the Plat. Amended Brief of Respondents, p. 43. Suffice it to say that the record speaks for itself, and Mr. Prieve's testimony relating to the circumstances and reasoning surrounding inclusion of the GAD addresses what and why it was placed on the Plat. See Appellants/Cross Respondents Dean and Rosemarie Francis' Opening Brief ("Francis' Brief"), pp. 14-19; 41-43.

Naumans also argue that there is substantial evidence to support the Trial Court's underlying conclusions that (1) adopting Mr. Prieve's conclusion would add language to the Plat; and (2) the GAD was merely an extension of the private road. Amended Brief of Respondents, pp. 43-44. Naumans do not cite, reference, or otherwise provide any indication of this supporting evidence because there is none. Mr. Prieve's testimony that the GAD was required by Whatcom County to assure uninterrupted

access for Lot 12, created an easement, and the GAD could not be an extension of the private road because it did not meet county requirements, was uncontested. RP 1020.

Naumans next rely upon the perceived physical requirement that Lot 2 must use the GAD ending on Lot 1 for ingress and egress, as evidence that the GAD was not intended to be an easement for the benefit of the lots at the end of the depicted route. In particular, they argue as follows:

Furthermore, as the court elicited in questioning Prieve, his claim that the GAD's were private driveways that could not be shared made no sense in light of the fact that Lot 2, like Lots 1 and 12, was separated from the private road...If Lot 2 could not share the GAD with Lot 1, it would essentially be landlocked, and would somehow have to 'make [do]' on its own:

Amended Brief of Respondents, p. 44. The problem with this argument is that Naumans fail to acknowledge the answer to the Trial Court's question provided to Mr. Prieve:

THE COURT: What about the gravel access drive that goes to Lot 1? Anybody have that up there somewhere? Because it looks to me like it bypasses Lot 2.

THE WITNESS: There is enough, again, that is exclusive to Lot 1, but if you went up and measured it, there is enough room to the south of that access to build a driveway for Lot 2 without infringing on that other shown access.

RP 1039. There is no evidence refuting this testimony, and therefore no evidence to support Naumans' argument, or any conclusion by the Trial Court, that Lot 2 necessarily needs to use the GAD for Lot 1 for ingress and egress.

Naumans next maintain that the Trial Court properly ignored the requirement in the Plat approval contained in the September 2, 1987, Findings of Fact, Conclusions of Law and Decision that a blanket easement or "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. According to Naumans, we can all ignore this requirement because no such easements were created. In other words, the Trial Court was correct to ignore this evidence establishing that the GAD was intended to be an easement because it concluded that no such easement was created. Obviously, this logic places the conclusion desired to be found by the Trial Court in direct conflict with the facts. Despite Naumans' contention, this Court cannot just ignore the evidence that conflicts with the unsubstantiated finding. Indeed, the very fact that the Plat was created and accepted by the County

indicates that the requirement contained in the Plat approval was fulfilled, and the GAD thereby necessarily an easement as specifically required.

Finally, Naumans point to the fact that Mr. Prieve acknowledged that he did not know whether the county imposed any additional requirements on the developer between the preliminary and final plat approval as proving that reference in the CCRs to the common area as being for the operation of a road system, removed the obligation contained in the approval to have specific easements indicated on the Plat. Amended Brief of Respondents, pp. 45-46. First of all, the Trial Court never cited or relied upon this reference in the CCRs to support any finding, but is instead a new argument that has never been presented.

More importantly, there are no facts to establish that any changes were in fact imposed. Moreover, Mr. Prieve fully explained that his direct contacts with the county, not the ruling in the Plat approval, was what led to the inclusion of the GAD reference on the Plat.

Even if all of the points from Naumans were somehow logical, however, it still begs the ultimate question, which Naumans never address. Indication of the GAD on the Plat map was for some reason, and it has to have some legal significance. Naumans are careful in their brief not to repeat their long-standing concession that Francis had a right to use the

GAD, when they conceded 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 reality is that the only proper conclusion, based upon the Plat itself and extrinsic evidence, is that the GAD is an easement for the benefit of Lot 12.

E. There Is No Evidence to Support the Trial Court’s Conclusion That Naumans’ Use Will Not Interfere With Lot 12’s Easement.

As in the case of every other finding by the Trial Court, Naumans maintain that its finding that their use of the GAD, even if an easement for Francis, would not be unreasonable, without reference to any facts to support the conclusion. This is a function of the lack of any evidence to support this conclusion. Instead, the facts only support a conclusion that the construction and use of the GAD by Naumans will unreasonably interfere with the only route for Francis to gain access to their home. Francis’ Brief, pp. 22-24. The evidence is uncontested that the backing up of Naumans’ boat into Francis’ only access to their home would be an unreasonable interference. As the independent reviewer found, which remains uncontested:

It is my opinion that access to the proposed building be done from the applicants [Naumans] existing driveway off Pointe II road. Granting permission for the applicant to

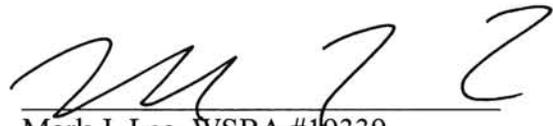
access the proposed boathouse through the neighbor's driveway would place an unfair burden on owners of lot 12, resulting in decreased privacy, safety and potential property devaluation.

Ex. 15. There has been not one piece of evidence cited by Naumans to dispute this conclusion, or the evidence presented by Francis of the impact arising from Naumans' use of the only access route to Francis' house. Appellants/Cross Respondents Dean and Rosemarie Francis' Opening Brief, pp. 22-24.

## II. 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 Francis' own driveway. Francis 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.

DATED this 15<sup>th</sup> day of June, 2012.



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