

73752-0-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LEGANIEDS LLC,

Appellant.

v.

WT PROPERTIES LLC,

Respondent.

BRIEF OF RESPONDENT

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 COURT OF APPEALS
 STATE OF WASHINGTON

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INTRODUCTION

This case is far less complex than the Appellant's brief suggests, and ultimately comes down to two issues of law:

(1) Whether an exception to the already disfavored merger doctrine prevents the extinguishment of an easement where a secured lender holds a deed of trust on the parcel benefited by the easement; and (2) Whether a property owner can enforce an equitable covenant in a plat against a party that owns no property in that plat, when the owner seeking to enforce the covenant purchased its property from the very people who caused the alleged violation, and when the owner owns the very property upon which the alleged violation exists.

At summary judgment, King County Superior Court Judge Mary Roberts rejected Appellant's merger argument and ruled that WT Properties (hereinafter "Respondent") holds an easement across Appellant's property (hereinafter the "Access Strip"). Judge Roberts held that merger did not occur when the dominant and servient estates came into common ownership, because at that time there was a secured lender that held a deed of trust which encumbered the dominant or benefited parcel, but not the servient parcel. Because a merger in such a situation would extinguish the easement and impair the rights of a secured lender in its collateral, thereby operating to prejudice the rights of an innocent third party, Judge Roberts ruled that the easement survived and ran with the land to the successor of the dominant parcel, the Respondent.

Of the lengthy factual background provided by the Appellant, some of which is misstated, only a portion is relevant and necessary in order to

decide the issues mentioned above. Because the Introduction is designed to be a “concise introduction,” see RAP 10.3(a)(3), Respondent will address the facts that Appellant set forth in its Introduction and identify the facts material to this appeal in Respondent’s Statement of the Case, below.

ASSIGNMENTS OF ERROR

Respondent assigns no error to the trial court.

STATEMENT OF THE CASE

1. The Maybook Plat was created in 1948 and recorded under King County recording number 3806233. CP 110. The plat contains a restriction which reads as follows:

No lot or portion of a lot of this plat shall be divided and sole or resold, or ownership changed or transferred, whereby the ownership of any portion of this plat shall be less than the area required for the use district stated on this plat, namely, **6,000 square feet** for residence R-1 use.

All lots in this plat are restricted to residence R-1 use, **with a minimum width of sixty (60) feet**, governed by restrictions, rules and regulations of County Resolution No. 6954 and any subsequent changes made therein by official county resolution.

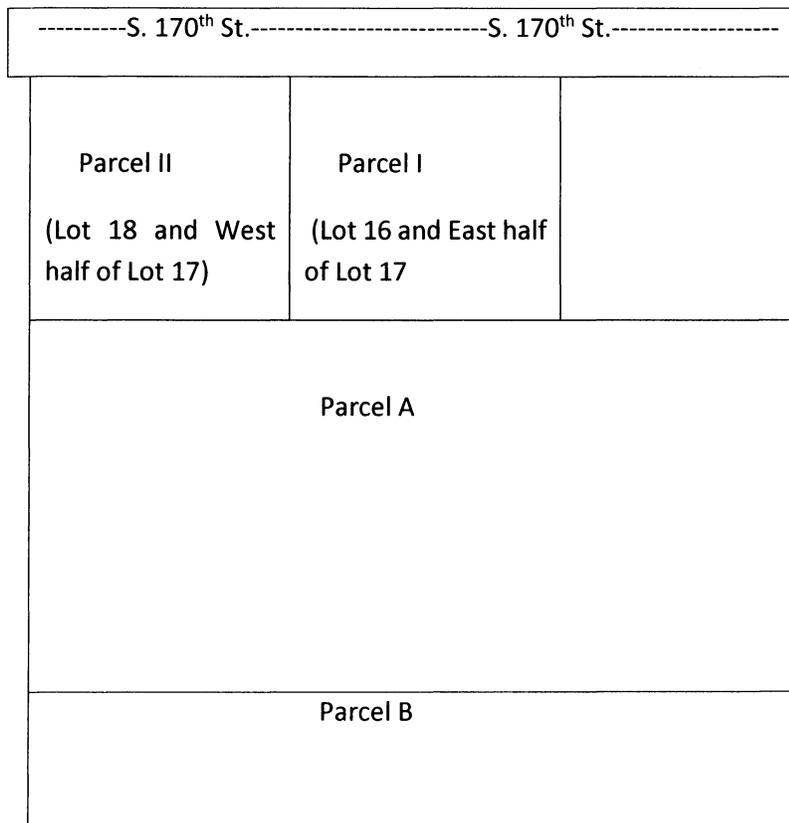
(emphasis added). CP 110.

2. Respondent owns what the parties have identified as Parcel A, which lies directly to the south of and abuts the Access Strip. (CP 35-38). Parcel A is not a lot in the Maybrook Plat. See CP 110.

3. Respondent also owns what the parties have identified as Parcel B, which lies directly to the south of and abuts Parcel A. CP 35-38. Parcel B is not a lot in the Maybrook Plat. See CP 110.

4. Rehabitat Northwest owns what Respondent has previously referred to as Parcel I (Lot 16 and ½ of Lot 17 of the Maybrook Plat) and Parcel II

(Lot 18 and ½ of Lot 17 of the Maybrook Plat).¹ CP 135-137. Both Parcel I and Parcel II lie directly north of Parcel A, sitting between it and S. 170th St. Both Parcels I and II consist of lots in the Maybrook Plat. See CP 110. 5. In early 2006, Parcels A, B, I, and II were all owned by the Prasads. CP 215. Because Appellant’s diagram is slightly inaccurate, Respondent provides the following diagram that illustrates what the property layout looked like as of early 2006.



6. Later that year, on October 12, 2006, the Prasads conveyed Parcels I and II to Rehabitat Northwest. CP 135-137. When doing so, the Prasads expressly reserved an easement for ingress, egress, and utilities across a

¹ In the Statutory Warranty Deed conveyed by the Prasads to Rehabitat Northwest, Inc. in 2006, Parcel I and Parcel II are identified as Parcel A and Parcel B. CP 135-137. Because we already have a Parcel A and Parcel B in this matter, these parcels are known herein as Parcel I and Parcel II.

portion of Parcels I and II. CP 136. The easement is legally described as follows:

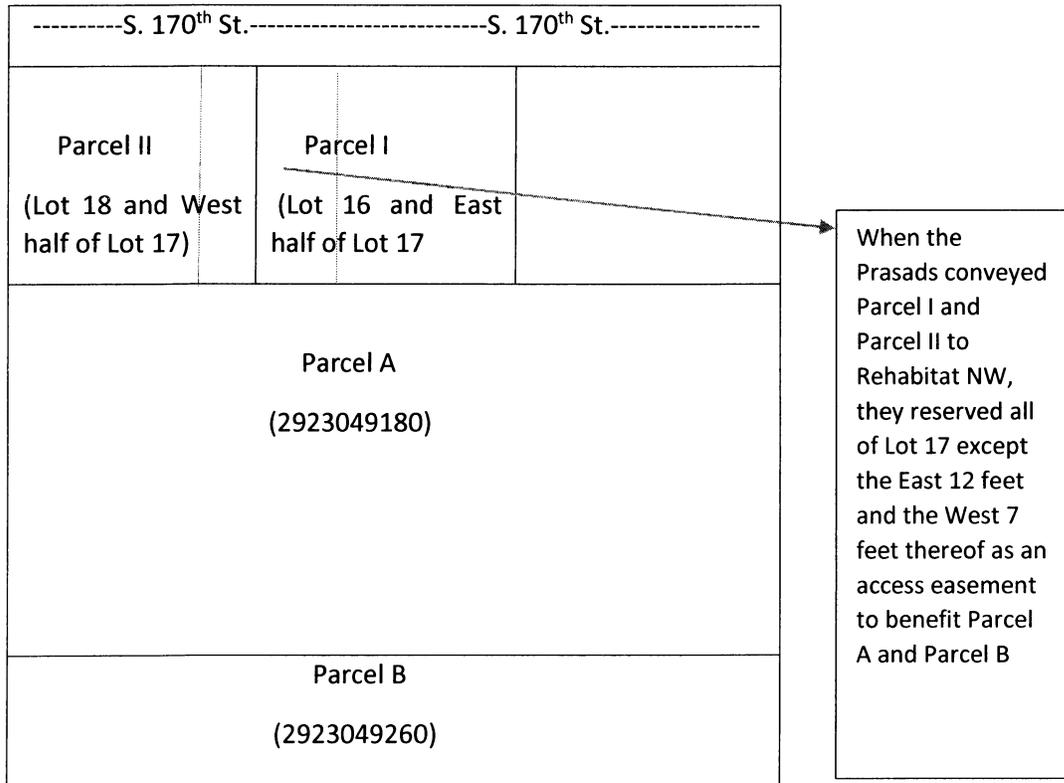
All Subject to the Reservation of an easement from South 170th Street, for ingress, egress, and utilities, over, under and across, the following described real estate:

(hereinafter the "Access Easement")

The East 41.00 feet of the West 48.00 feet of Lot 17, Maybrook, according to the plat thereof recorded in volume 45 of plats, page 66, records of King County, Washington.

(also known as the "Access Strip"). CP 136.

As of October 12, 2006, the layout of the property was as follows:



7. The following year, on February 14, 2007, the Prasads conveyed a Deed of Trust describing Parcels A and B to Viking Bank to secure a financial obligation. CP 139-147. The Deed of Trust includes the following language:

Conveyance and Grant. For valuable consideration, ***Grantor conveys to Trustee in trust*** with power of sale, right of entry and possession and for the benefit of Lender as Beneficiary, ***all of Grantor's right, title, and interest in and to the following described real property, together with all*** existing or subsequently erected or affixed buildings, improvements and fixtures; ***all easements***, rights of way, and appurtenances, all water, water rights and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters, (the "Real Property") located in King County, State of Washington.

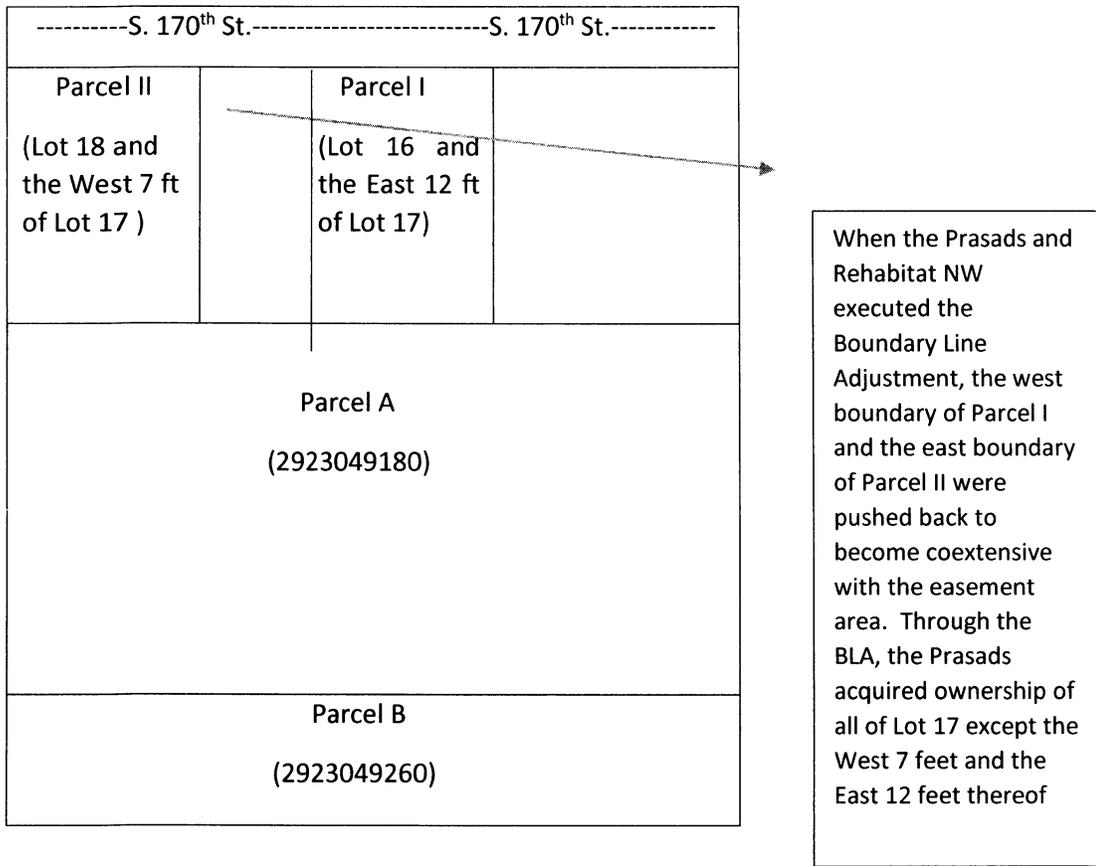
(emphasis added). CP 140.

as well as:

Merger. There shall be no merger of the interest or estate created by this deed with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without written consent of the lender.

(emphasis added). CP 145.

8. In May of 2007, the Prasads executed a boundary line adjustment with Rehabitat Northwest, whereby Rehabitat conveyed title to the Access Strip to the Prasads. CP 84-85, 151. By doing so, the Prasads and Rehabitat caused a portion of a lot (Lot 17) in the Maybrook Plat to be divided and transferred, such that the portion of the Maybrook Plat that the Prasads acquired was less than sixty (60) feet wide and less than 6,000 square feet, in direct violation of the Maybrook Plat restrictive covenant. The Access Strip is 41 ft. wide and 4,100 square feet in area. CP 84-85, 151. After executing the boundary line adjustment, the layout of the property looked as follows:



9. In 2011, the Prasads defaulted on their financial obligation to Viking Bank. The trustee of the Viking Bank Deed of Trust issued a Notice of Trustee’s Sale on July 6, 2011. CP 87-90.
10. On October 28, 2011, Respondent purchased Parcels A and B at the trustee’s sale for \$110,001.00. CP 92-95.
11. On May 4, 2012, Appellant Leganieds LLC purchased the Access Strip from the Prasads. CP 66-67. A simple reference to the Maybrook Plat and the Access Strip’s title history would have clearly informed Appellant that it was purchasing a parcel that had been divided in violation of the restrictive covenant, and which was subject to an access easement. See CP 110.

ARGUMENT

A. Appellant Cannot Enforce the Maybrook Plat Equitable Covenant Against Respondent in Order to Invalidate or Enjoin Respondent's Easement Across Petitioner's Land.

1. An Equitable Covenant Cannot Be Enforced Against a Non-Owner.

There are generally two types of covenants that “run with the land”: equitable covenants and real covenants. *Hollis v. Garwall*, 137 Wn.2d 683, 688, 974 P.2d 836, 840 (2001). The *Hollis* Court held that a restriction on the face of a plat is an equitable covenant. *Id* at 841. Customarily, Washington courts have not differentiated between the two. *Id.* at 840. A covenant may be enforced among original parties as a matter of contract law. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 257, 215 P.3d 990 (2009). For successors to be bound, an equitable covenant must be (1) a written promise, enforceable between the original parties; (2) that touches and concerns the land or that the parties intend to bind successors; (3) which is sought to be enforced by an original party or a successor, against an original party or **successor in possession**; (4) who has notice of the covenant. *Hollis v. Garwall, Inc.*, 137 Wn. 2d 683, 691 (1999) (emphasis added).

An easement is a "right, distinct from ownership, to use in some way the land of another, without compensation." *City of Olympia v. Palzer*, 107 Wn. 2d. 225, 229, 728 P.2d 135 (1986). This right allows an easement holder to go onto land possessed by another. 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW, §§ 2.1, 3.1, at 80, 123 (2004). Thus, one who holds an easement is not a “successor in possession.” A covenant, on the other hand, imposes use restrictions on the possessor of the property. *Id.*

Appellant argues that the subject easement was “void ab initio,” a Latin and legal phrase meaning “void from the beginning.” Despite Appellant’s use of this legal term, Appellant offers absolutely no case law to support its claim that the easement was invalid or void upon its inception. As mentioned above, covenants originate as a matter of contract. When a contractual term has been allegedly violated, it becomes a matter of enforcement. Contracts do not automatically render easements void, in any context. The issue is whether the easement is actually a violation of the covenant, and whether Appellant can legally enforce the covenant against Respondent.

Not only was the easement not void upon its inception, Appellant cannot enforce the Maybrook Plat equitable covenant against Respondent because Respondent does not own any land in the Maybrook Plat. This is the prime factor that differentiates this case from *Rush v. Miller*, upon which Appellant relies. 21 Wn. App. 156, 584 P.2d 960 (1978). In that case, the covenant was sought to be enforced against an owner of land in the plat. Respondent merely holds an easement, which by definition is the right to go onto and use land that is possessed by another. As such, Respondent is not a “successor in possession,” which is prerequisite to a party enforcing an equitable covenant against one who was not an original party to the covenant. Appellant has no right to enforce the equitable covenant against Respondent.

2. Leganieds Cannot Enforce the Equitable Covenant Because it Has Unclean Hands and is Estopped by its Prior Actions.

Appellant’s argument is perplexing because it holds title to the very property on which it alleges an improper use exists in violation of the Maybrook Plat equitable covenant. Moreover, Appellant bought its

Maybrook Property, the Access Strip, from the Prasads, the very people who created the easement which they now seek to enjoin.

There are a number of equitable defenses available to prevent enforcement of a covenant: merger, release, unclean hands, acquiescence, abandonment, laches, estoppel, and changed neighborhood conditions. *St. Luke's Evangelical Lutheran Church v. Hales*, 13 Wn. App. 483, 488, 534 P.2d 1379 (1975) review denied, 86 Wn.2d 1003 (1975); 5 Richard R. Powell, *Real Property* 679[1], [2] (rev. ed. 1991); see *Tindolph v. Schoenfeld Bros.*, 157 Wash. 605, 608, 611, 289 Pac. 530 (1930). Regarding the equitable defense of unclean hands, it has often been said that “he who seeks equity must do equity” and “he who comes into equity must come with clean hands.” *Retail Clerks v. Shopland Supermarket*, 96 Wn. 2d. 939, 949, 640 P.2d 1051 (1982); *Malo v. Anderson*, 62 Wn. 2d. 813, 817, 384 P.2d 867 (1963). The defense of estoppel has been recognized in Washington running covenant cases when the claimant himself has violated the restriction he seeks to enforce. 17 Washington Practice: Real Estate: Property Law § 3.18, at 158.

The Maybrook Plat and the Access Easement Appellant seeks to enjoin were matters of public record at the time Appellant purchased the Access Strip from the Prasads. Therefore, Appellant had constructive notice of the restriction in the Maybrook Plat, as well as the existence of the Access Easement. Further, Appellant had constructive notice of the fact that the Access Strip is only 4,100 sq. ft. in area and 41 ft. wide, both clear violations of the covenant Appellant now seeks to enforce. The Access Easement, which Appellant asserts violates the equitable covenant, was in existence prior to Appellant’s purchase of the Access Strip, and was actually created by Appellant’s predecessor in interest, the Prasads, the very party

Appellant purchased the Access Strip from. An exhaustive search of relevant case law revealed not a single case in any jurisdiction where a party seeking to enforce an equitable covenant actually owned the land upon which the alleged violation exists.

Appellants' prior actions preclude it from enforcing the equitable covenant. It acquired the Access Strip with full knowledge that it was purchasing property with dimensions that violated the equitable covenant. Moreover, it owns the very property on which it alleges a violation exists, and purchased this property directly from the party that caused the alleged violation. At this time, Appellant's property is still in direct violation of the equitable covenant. Leganieds' prior actions are inconsistent with the equitable relief it now seeks, and these actions support Respondent's defenses of estoppel and unclean hands. Leganieds cannot enforce the covenant.

B. The Access Easement Was Not Extinguished by Merger when the Prasads Acquired both the Dominant and Servient Estates.

The doctrine of merger rests on the general principle that one cannot have an easement in one's own property. *Radovich v. Nuzhat*, 104 Wn. App. 800, 801, 16 P.3d 687 (2001). Where the dominant estate and servient estate come into common ownership, the merger doctrine will operate to extinguish an easement. *Id.* However, the doctrine of merger has been greatly disfavored in Washington, both at law and in equity, since the early 1920's, and there are exceptions to its application. *In re Trustee's Sale of Real Property of Ball v. JP Morgan Chase Bank, N.A.*, Case No. 43194-7-II (WA Ct. App., Feb 20, 2014); *Radovich v. Nuzhat*, 104 Wn. App. 800 (2001); *Beecher v. Thompson*, 120 Wash. 520, 524, 207 Pac. 1056 (1922); *MKKI, Inc. v. Kreuger*, 135 Wn. App. 647, 654, 145 P.3d 411 (2006).

1. Washington Disfavors the Doctrine of Merger When it Prejudices the Rights of Innocent Third Parties.

Appellant acknowledges Washington's disfavor of the merger doctrine, but argues that such disfavor is limited by context and mostly arises in the area of mortgages, not necessarily in the context of easements. Appellant actually contends that "the merger doctrine is not disfavored in the context of easements and covenants." Appellant is incorrect, and has presented no case law to support such a distinction. *Radovich* very clearly states that Washington has disfavored merger for quite some time.

Washington Courts have consistently professed a refusal to recognize a merger where it would prejudice the rights of innocent third parties. *Radovich v. Nuzhat*, 104 Wn. App. 800, 805 (2001); *Nat'l Bank of Commerce v. Fountain*, 9 Wn. App. 727, 730, 514 P.2d 727 (1973); *Mobley v. Harkins*, 14 Wash.2d 276, 282, 128 P.2d 289 (1942). This concept is not limited to mortgages. Appellant's contention that "the *Radovich* case is the first easement/covenant case in Washington to hold that the merger doctrine is "disfavored" in the context of an easement" is incorrect. Of the cases cited above for the proposition that Washington disfavors the merger doctrine, the *Radovich* and *MKKI, Inc.* cases both involved disputes over whether an easement exists. Moreover, in the mortgage cases to which Appellant refers, the courts' disfavor of the merger doctrine rested on the need to protect the rights of innocent secured lenders. That same concern is present in this case. Washington disfavors the doctrine of merger in all circumstances where it prejudices an innocent third party.

Appellant has mistaken Respondent's argument to mean that Respondent itself was the innocent third party. Of course, this would not make sense as Respondent had no interest in any of the involved properties at the time the Prasads acquired both the dominant and servient estates.

Respondent very clearly expressed at summary judgment that it was not the Respondent, but Viking Bank, the secured lender, who was the innocent third party whose rights would have been prejudiced by a merger of the easement.

Viking Bank loaned funds to the Prasads, and in exchange required a deed of trust which by its language secured the loan against Parcels A, B, and “all easements” relating to those parcels.² This included the Access Easement, which was created the year before by the Prasads. Allowing the Access Easement to merge out of existence in such a situation would deprive a secured lender of rights it had specifically contracted to obtain. This is especially important where the subject easement provides access to the property, as a merger would most certainly diminish the value of the lender’s collateral, perhaps completely. Such a result would compromise, if not entirely defeat the stability of security interests in real property.

Of course, merger would apply if the Prasads held both the dominant and servient estates in 2007 without a lender having a security interest in the dominant estate. In that case, there would be no adversely affected innocent third party. However, that is not the case here. Viking Bank had a security interest in the Access Easement for the entire duration that the Prasads held both the dominant and servient estates. Appellant has made no attempt to explain how Viking Bank would not have been an innocent third party prejudiced by a merger. In order to protect the rights of innocent

² The Access Easement was encumbered by the deed of trust regardless of the deed making mention of it. *See Heg v. Alldredge*, 157 Wn.2d 154, 161, 137 P.3d 9 (2006) (“Easements appurtenant benefit a dominant estate and pass with the land to successors-in-interest”); *See Winsten v. Prichard*, 23 Wn. App. 428, 431, 597 P.3d 415 (1979) (quoting 2 THOMPSON ON REAL PROP., § 322, at 69 (repl. 1961)) (“An easement appurtenant is not a mere privilege to be enjoyed by the person to whom it is granted or by whom it is reserved. It passes by a deed of such person to his grantee and follow the land without any mention whatever.”)

secured lenders in the collateral for which they contracted, the Court must refuse to find a merger.

2. The Doctrine of Merger Does Not Apply if There are Other Intervening Encumbrances on the Property.

The doctrine of merger arises from the principle that “when the entire legal and equitable estates are united in one person, there can be no occasion to keep them distinct.” *Altabet v. Monroe Methodist Church*, 54 Wn. App. 695, 698, 777 P.2d 544 (1989). “Merger may occur when the fee interest and a charge, such as a deed of trust or encumbrance, vest in the possession of one person.” *In re Trustee’s Sale of Real Property of John W. Ball*, 179 Wn. App. 559, 564 (2014). However, “the doctrine of merger does not apply if there are other intervening encumbrances on the property.” *Altabet v. Monroe Methodist Church*, 54 Wn. App. 695, 698 (1989). An easement will not merge if there are outstanding interests in the servitude. 2 RESTATEMENT (THIRD) OF PROPERTY § 7.5 cmt d (2000). A number of other jurisdictions have also embraced this principle.³

The Prasads held the charge on the Access Strip – the Access Easement – which they reserved to benefit Parcels A and B when they deeded Parcels I and II to Rehabitat in 2006. The Appellant’s position is that in 2007 when the Prasads acquired the fee interest in the Access Strip through the boundary line adjustment, the fee interest in the Access Strip and the charge on the Access Strip were united in the Prasads, thereby causing a merger. This position ignores that the fact that there existed

³ “It has been held that an easement is not terminated by merger when the dominant tenement is encumbered by a deed of trust or a mortgage at the time ownership of the servient and dominant tenement is united in the same party. Preventing merger in such case equitably preserves the mortgagee’s security.” *See Pergament v. Loring Properties, Ltd.* (Minn. 1999) 599 N.W.2d 146, 149-151; *Lewitz v. Porath Family Trust* (Colo.App. 2001) 36 P.3d 120; *Heritage Communities of North Carolina, Inc. v. Powers, Inc.* (1980) 49 N.C. App. 656; Rest.3d Property, Servitudes, §7.5, com. d, p. 368; Note, *Property Law—To Merge or Not to Merge: Determining the Scope of Mortgage; The Mortgage Exception to the Merger Doctrine* (2000) 27 Wm. Mitchell L.Rev. 1331 [analysis of *Pergament v. Loring Properties, Ltd.* (Minn. 1999) 599 N.W.2d 146]).

another encumbrance, the Viking Bank deed of trust. The Viking Bank deed of trust was executed after the Prasads acquired the Access Easement – the charge on the Access Strip – but before the Prasads acquired their fee interest in the Access Strip. The Viking Bank deed of trust encumbered Parcels A, B, and the Access Easement that benefited Parcel A. Therefore, Viking Bank had a security interest in the servitude, which was an intervening encumbrance on the property. In such a scenario, the easement does not merge.

Appellant is correct that there are a number of cases where courts refuse to find a merger when a secured lender accepts a deed in lieu of foreclosure, but still needs the ability to enforce its deed of trust to foreclose out junior liens. However, Appellant's attempt to differentiate the principles set forth in those cases from the facts of this case is unconvincing. The mortgage cases reject merger so as to preserve the rights a secured lender acquired in its deed of trust. The same concern is present here. If the Access Easement was merged out of existence, Viking Bank's collateral would lose its access to S. 170th St., certainly diminishing the value of its security interest. When a bank forecloses on collateral pledged to secure a loan that has become delinquent, the value of the security interest is paramount to the bank's ability to collect on the borrower's debt.

In light of Washington's consistent rejection of the merger doctrine when it adversely affects secured lenders, and because of the intervening encumbrance – the interest Viking Bank had in the servitude – and the clear prejudice that merger in this circumstance would cause to an innocent third party, the Court must hold that the Access Easement survived and was not extinguished by merger.

3. Whether the Prasads Acquired the Dominant and Servient Estates as Separate Parcels or as One Combined Parcel is Entirely Inconsequential to this Merger Analysis

The doctrine of merger generally holds that when both the servient and dominant estates come into **common ownership**, any easements burdening or benefiting the estates are extinguished. *Radovich*, 104 Wn. App. at 805; (citing RESTATEMENT (FIRST) OF PROPERTY § 497 cmt. a (1944) (emphasis added)). This is because of the principle that one cannot hold an easement across one's own property. *Schlager v. Bellport*, 118 Wn. App. 536, 539, 76 P.3d 778 (2003). "In order for the doctrine of merger to be implicated, there must be two tracts of land in separate ownership that subsequently come into common ownership." RESTATEMENT (FIRST) OF PROPERTY § 497 cmt. a.

The Appellant asserts that this case is unique and distinct from other cases involving easements and merger in that rather than acquiring common ownership of the dominant and servient estates as separate tracts, the Prasads acquired the servient estate through a boundary line adjustment, which united the two estates into one estate or parcel. This is a meaningless distinction, and the Appellant has offered no case law to support their contention that exceptions to the merger doctrine arise only where the tracts of land are commonly owned as separate tracts, rather than united as one parcel. Parcel A and the Access Strip were still separate parcels as far as Viking Bank was concerned, as the foreclosure on its deed of trust only foreclosed title as to Parcels A, B, and the Access Easement, not title to the Access Strip.

The rules and policies relating to the merger of easements all use the language "common ownership" or "unity of title." There are always "two interests" or "several estates": the dominant and servient estates. The theory

is that when one person owns both estates, they can no longer be dominant and servient, because although the privileges of use still exist, “they are no longer incidental to the ownership of the dominant tenement but have become incidents of the ownership of what was formerly the servient tenement.” RESTATEMENT (FIRST) OF PROPERTY § 497 cmt.

a. The “two estates” refers to the dominant and servient estates that existed before the alleged merger, and does not mean that one smaller tract cannot then be annexed into a larger one. The exceptions that then follow, in instances of prejudice to third parties or where the parties intended otherwise, are not based on any notion that there continue to be two estates, but rather that there were formerly two estates now in common ownership.

4. The Anti-Merger Clause in the Viking Bank Deed of Trust Prevents Merger from Extinguishing Viking Bank’s Rights Therein.

Washington courts also find an exception to the doctrine of merger where the owner of the dominant estate and the servitude, either expressly or impliedly, indicates an intention that two rights remain separate. *Anderson v. Starr*, 159 Wash. 641, 643, 294 Pac. 581 (1930); *Hilmes v. Moon*, 168 Wash. 222, 237, 11 P.2d 253 (1932). The Prasads expressed their intent to keep the Access Easement separate from the dominant estate when they executed the Viking Bank Deed of Trust. As mentioned above, the Deed of Trust contained an anti-merger clause that reads as follows:

Merger. There shall be no merger of the interest or estate created by this deed with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without written consent of the lender.

By assenting to this clause and executing the deed of trust, the Prasads expressly indicated that no interest created by the deed of trust shall

merge with any other interest in the property. A merger would lead to the very result that this provision was designed to prevent, and would be contrary to the intent of the Prasads as set forth in the deed of trust. Viking Bank was entitled to all the rights it secured when the Prasads conveyed the deed of trust. The agreement between the Prasads and Viking Bank should be enforced and respected, and because both parties stipulated that merger shall not apply, the Court should refuse to find a merger of the Access Easement.

CONCLUSION

The trial court ruled correctly that Respondent holds an easement across Appellant's property. Appellant has no right to enforce the Maybrook Plat equitable covenant against anyone, let alone Respondent. Therefore, this Court should affirm Respondent's easement across Appellant's property and reject Appellant's efforts to enjoin or restrict Respondent's use thereof.

DATED this 19th date of January, 2016.

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Certificate of Service

Pursuant to the laws of the state of Washington, the undersigned certifies under penalty of perjury that a true and correct copy of the foregoing document was sent by certified mail the following:

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DATED this 19th day of January, 2016.


Jessica N. Riefler

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