

74869-6

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No. 74869-6-I

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

ALPINE VILLAGE, INC.

Appellant

v.

**LOUIS A. LEWIS, PIER POINT CONDOMINIUM ASSOCIATION,
et al.,**

Respondents

BRIEF OF RESPONDENTS

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COURT OF APPEALS, DIVISION I

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I. INTRODUCTION

Plaintiff/Appellant Alpine Village, Inc. (“Appellant” or “Alpine”), acquired undeveloped property in Oak Harbor Washington that is located within an area originally included in the Pier Point Condominium Binding Site Plan (“the BSP” or “the Pier Point BSP”). The property was acquired from the developer of the BSP, Donna Mott, at the low price of \$80,000, long after the expiration of the amended construction schedule contained in the BSP. Alpine attempted to secure additional amendments and extensions of the BSP, but the City of Oak Harbor denied Alpine’s requests and the denial was affirmed on appeal.

In this its third lawsuit regarding the subject property, Alpine sought to support a new development application by asking the trial court for a declaratory judgment that easements created solely for the benefit of those properties developed with condominiums as part of the Pier Point BSP should apply to and benefit Alpine’s property, which cannot be developed as part of the Pier Point BSP. Defendants/Respondents, individual owners of the developed Pier Point Condominiums and the Pier Point Condominium Association (collectively “Respondents” or

“Defendants/Respondents”), cross claimed for declaratory relief that the easements at issue benefit only those properties developed as part of Pier Point Condominiums pursuant to the Pier Point BSP and did not benefit Alpine’s property.

The parties cross-moved for summary judgment, each asserting that the case involved purely legal issues.

The trial court, the Honorable Alan R. Hancock presiding, granted the Defendants/Respondents’ motion for summary judgment and denied Plaintiff/Appellant Alpine’s motion for summary judgment, dismissing Alpine’s complaint in full and entering declaratory judgment in favor of Defendants. The trial court ruled on two separate legal bases to conclude that the easements at issue did not benefit Alpine’s property: (1) the “Declaration of Easements” at issue did not benefit Alpine’s property because the Declaration was not effective upon its execution due to merger of title, and it was never subsequently referenced or included in any transfer to Alpine, as would be required to benefit Alpine’s property; and (2) the unambiguous, plain language of the Declaration of Easements demonstrated that the easements were intended to apply to and benefit only the properties that were developed pursuant to the Pier Point BSP.

On Appeal, Alpine provides no legal authority contrary to the trial court's multiple legal grounds at summary judgment. Instead, Alpine merely attempts to re-characterize the Declaration of Easement as a generic grant of easement effective upon its execution. But Alpine fails to address merger of title or the fact that the property was not transferred in reference to the Declaration of Easement or as a portion of property divided pursuant to the Pier Point BSP. Alpine also asks the Court to "imply" a generic intent to benefit any development in the Declaration of Easement, despite the express recitations of the intent to benefit only property developed as part of the Pier Point BSP. Finally, Alpine asks the Court of Appeals to consider a wholly new legal claim not presented to the trial court, in order to conclude that the trial court's interpretation of the Declaration of Easement frustrates its intent and that it therefore should be unilaterally amended by the Court of Appeals. Legal arguments should not be considered for the first time on appeal, particularly were they would result in such sweeping relief and have been only superficially briefed. But even if considered, Alpine's new claim and request for unilateral amendment to the Declaration of Easement does not survive careful scrutiny.

II. RESTATEMENT OF ISSUES FOR REVIEW

The issues raised by Alpine at pages 5-6 of the Brief of Appellant are more accurately characterized as follows:

A. Pursuant to the legal principle of merger of title, could the Declaration of Easement executed by Donna Mott with respect to properties owned exclusively by her establish any enforceable “benefit” before Donna Mott conveyed the properties to third parties with reference to the Declaration of Easement?

B. Did the Declaration of Easement benefit Appellant Alpine’s property where: the Declaration of Easement was established while both the purported benefitted and burdened properties were in single ownership by the Grantor Donna Mott; Alpine’s property was not conveyed to Alpine with any express or implied reference to the Declaration of Easement; and the Declaration of Easement was never otherwise conveyed or extended to Alpine’s property?

C. Even if the Declaration of Easement was effective when executed, does its plain language establish the declarant Donna Mott’s intent that the easements contained therein benefit the property only as developed as Pier Point Condominiums consistent with the Binding Site Plan and not as part of other development?

D. Where the Declaration of Easement is unambiguous on its face that the owner and author Donna Mott expressly intended the easements to benefit the property only as developed as Pier Point Condominiums consistent with the Binding Site Plan and not as part of any other development, is there any legal basis to consider extrinsic evidence to suggest a contrary intent?

E. Should the Court consider for the first time on appeal Appellant Alpine's new alternative claim never pleaded or argued to the trial court that the Declaration of Easement should be unilaterally modified pursuant to the doctrine of changed neighborhood or changed conditions?

F. If the Court of Appeals is willing to consider Appellant Alpine's new claim raised for the first time on appeal, should such claim fail where: (1) Alpine provides no Washington authority authorizing judicial revision of an express easement; and (2) all evidence presented at summary judgment suggests that the intent and purpose of the Declaration of Easement was satisfied and enforced by the trial court—not defeated?

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III. STATEMENT OF THE CASE

A. Development Pursuant to a Binding Site Plan.

In August of 1988, Donna L. Mott purchased eight residential lots, which are now owned by Plaintiffs and Defendants to this litigation. Clerk's Papers ("CP") at 190 (Declaration of Christon C. Skinner ("Skinner Decl."), Ex. A).

On November 19, 1991, the City of Oak Harbor ("the City") approved Binding Site Plan 9-91 for the division and development of Ms. Mott's property as Pier Point Condominiums.¹ CP at 192 (Skinner Decl., Ex.B, recorded under AFN 91018478, records of Island County). The BSP provided for the "phased development" of 16 condominium units in eight, two-unit buildings. *Id.* These units were to be constructed in four phases, to be completed by October 1, 1996. *Id.* The City of Oak Harbor approved an amendment to the BSP allowing it to be built in eight phases of one building each, the last to be completed by January 15, 1996 (recorded under Auditors

¹A binding site plan is an alternative method of land division authorized in RCW 58.17.035. Binding site plans may only be used for divisions for (1) industrial or commercial use, (2) lease of mobile homes or travel trailers - typically a mobile home park, and (3) condominiums. For binding site plans to be used, local governments must adopt procedures for their review and approval. A specific binding site plan provides exact locations and detail for the type of information appropriately addressed as a part of property division, such as infrastructure, certification, and other requirements typical of subdivisions.

File No. 92000451, records of Island County). CP at 73-75 (Plaintiff's Mot. For Summ. J., Ex. 7).

On May 18, 1992, Donna Mott, who was then still the sole owner of the property covered by the BSP, recorded a Declaration of Pier Point Condominium containing covenants, conditions, restrictions and reservations ("the Declaration"). CP at 194-215 (Skinner Decl., Ex. C). The Declaration provided a development schedule for the condominiums to be developed in up to eight phases, but that no phase could be added more than seven years after the recording of the declaration. *Id.* at 195.

B. Easements Established for Pier Point Condominium.

On May 19, 1992, Donna Mott, still sole owner of the lots in the BSP, recorded a "Declaration of Easement" for the Pier Point Condominiums under Island County Auditor's File No. 92009147. CP at 68-70 (Plaintiff's Exhibit 5). The Declaration of Easement provides as follows:

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

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

- (1) ingress, egress, and the installation, maintenance, and/or repair of utilities over, under, and across that portion of Lot 1 and Lot 6 of the Building [sic] Site Plan, which is delineated on the Condominium Plan of Pier Point Condominiums, Division No. 1, recorded as Auditor's No. 92009143, records of Island County, Washington, and labeled as "Access and Utility Easement."
- (2) the installation, maintenance and/or repair of utilities, including, but not limited to, power utilities, sanitary sewer . . . and for the ingress and egress reasonable necessary for such purposes, over, under and across those portions of DECLARANT'S above-described property as built or as marked and delineated in the referenced Building [sic] Site Plan as utilities;
- (3) landscaping purposes over the portion of Declarant's property delineated in said Binding Site Plan, including, the ingress and egress reasonably necessary for such purposes; and
- (4) the ingress and egress **reasonably necessary to serve each phase or building of Pier Point Condominiums as constructed in accordance with the referenced Building [sic] Site Plan**, and for such sidewalks as may be required by the City of Oak Harbor, Washington, with respect to the subsequent phases of Pier Point Condominium.

. . .

The easement provided herein, is binding upon the DECLARANT, her heirs, successors, and/or assigns,

and are to serve the owners of the specified condominium buildings, their heirs, successors and/or assigns, and, as such, shall be considered as running with the land.

(Emphasis added.) CP at 68-70 (Declaration of Easement).²

Each easement described in the Declaration of Easement specifically references the Pier Point Condominium BSP and the condominiums to be constructed in accordance therewith. *See id.*

Then, in May, August and November 1992, Condominium Plans for Pier Point Division Numbers 1, 2, and 3 were recorded at Island County Auditor's File Nos. 92009143, 92016201, and 92021109, respectively, in order to develop Phases 1, 2, 3, and 4, of Pier Point Condominiums. CP at 232-33; 235-36; 238-39 (Skinner Decl., Exhibits D, E, F). Those division plans each contained references to "access and utility easement" and cross-referenced the "Declaration of Easement" for the same. *See id.*

Each individual Defendant/Respondent acquired his or her property with a description based on the respective Pier Point Division and the unit within that division, which specifically referenced the Declaration of Easement and transferred an interest therein. CP at 76-88 (Deeds to Defendants).

² The Declaration of Easement found at CP 68-70 is attached hereto as Appendix A.

The legal descriptions contained in the individual Defendants' deeds, which transferred a specific unit in the respective Pier Point Divisions, created based on individual division plans, are distinct from Alpine's deed, which merely transferred all property originally acquired by Donna Mott as a whole with exceptions from that area for the four phases of Pier Point Condominium development created by the Condominium Plans for Pier Point Division Numbers 1, 2, and 3. *Compare* CP 66-67 (Alpine's deed); *to* CP at 190 (Donna Mott's deed). Alpine's deed and legal description contained no reference to the Condominium Plans for the Pier Point Divisions or to the Declaration of Easement created in conjunction therewith, as the deeds to the individual Defendants/Respondents did. *Compare* CP 66-67 (Alpine's deed) *to* CP at 76-88 (Defendants' deeds).

At the time that Donna Mott recorded the Declaration of Easement, she was the sole owner of all of the property in the BSP. CP at 68. That is, she created a declaration of easement that both benefitted and burdened her own property and no one else's property. The Declaration of Easement and the easements contained therein were created specifically and solely to serve and benefit the future owners of the specified condominium units

developed pursuant to the BSP, who would take title to their respective properties with reference to the Declaration of Easement. See CP at 69-70.

C. Development Pursuant to the Pier Point BSP.

Phases one through four of the Pier Point Condominium development were completed in a timely manner. Individual Defendants/Respondents Lois A. Lewis, John C. Royce, Jr. Alice S. Smith, David A. Jasman, Sue M. Karahalois, Robert T. Severns, and Rhonda Lee Severns (f/k/a Rhonda Lee Haines), own real property with developed condominiums within the BSP. CP at 243-44 (Answer ¶ 5.1). Defendant/Respondent, Pier Point Condominiums Association (“the Association”) is an active Washington corporation formed for the purpose of conducting business as a condominium association. CP at 244 (Answer ¶ 5.2).

Phases five, six, seven and eight were never completed. (Phases 5-8 were neither completed within the time period provided by the BSP nor that provided by the Declaration). CP at 232-33; 235-36; 238-39 (Skinner Decl., Exhibits D, E, F).

D. Transfer to Alpine After Expiration of the BSP.

In 2001, long after the amended, “phased” construction schedule for building and development pursuant to the Pier Point

BSP had expired, Donna Mott conveyed the property that had not been developed as part of the BSP to Plaintiff/Appellant Alpine. Ms. Mott conveyed the property to Alpine at the low price of \$80,000.00. CP at 66-67 (Ex. 4 to Pls' Mot. For Summ. J.).³ The property acquired by Alpine is referred to in the Complaint and the summary judgment pleadings as the "Subject Property."

Alpine's deed describes the Subject Property acquired from Ms. Mott as "Lots 1-4 & 18-21 Block 7, Oak Grove Addition," together with a portion of the adjacent street, with an exception for the four developed phases of the Pier Point Condominium. CP at 67. While the Subject Property included what would have been phases five through eight of the Pier Point Condominium development, the deed reverted to the original land description "minus" the developed phases of the BSP, because the development schedule contained in the BSP had expired—no additional phases of Pier Point Condominiums could be built and the property could not be described as phases of the BSP or in reference to the BSP. Therefore, the legal description of the property conveyed to Alpine neither contained nor referenced Pier

³ The deed to Alpine and legal description of the property conveyed, which are central to the Respondents' legal arguments, are attached hereto as Appendix B.

Point Division Nos. 1, 2 or 3, the BSP, or the Declaration of Easement at issue. CP at 67.

Alpine's deed conveying ownership of the Subject Property does not include any language that references the Declaration of Easement or that conveys an easement to Alpine for ingress, egress or utilities. CP at 66-67. Further, Alpine is not and has never been the owner of a condominium building or unit constructed as part of the BSP and is, therefore, not an owner of property that was intended to benefit from the Declaration of Easement.

However, Alpine's property remains burdened by and "subject to" the easements for ingress, egress and utilities previously created and conveyed by Donna Mott. See CP at 66. Those easements benefit the owners of property within the Pier Point BSP. See CP at 232-39 (Skinner Decl., Exs. D, E, F).

Finally, it was undisputed that the individual Defendants and their successors in interest have consistently and continuously used and maintained the easements and related improvements for approximately twenty years. CP at 29; see *also* Plaintiff's Response to Defendants' Motion for Summary Judgment at page 2, lines 4-8.⁴

⁴ Plaintiff's Response to Defendants' Motion for Summary Judgment was not previously designated as part of the record on appeal. Contemporaneously

E. Prior Litigation Between the Parties.

In 2008, Alpine brought a lawsuit against Defendants under Island County Superior Court Cause No. 08-2-00229-7, to “quiet title” to the Subject Property, and on August 27, 2009, title was quieted in favor of Alpine. CP at 49-50 (Pl’s Mot. For Summ. J., Ex. 1). As part of that quiet title decision (made after a summary judgment hearing), the court concluded that the Subject Property was “not common area of the Pier Point Condominiums and is not subject to the declarations, conditions, restrictions, reservations contained in the Declarations of the Pier Point Condominium, but is subject to the conditions and easements contained in the Binding Site Plan #9-91 as Amended.” CP at 51-53 (Pl’s Mot. For Summ. J., Ex. 2). (Emphasis added.)

After the court made its decision, Alpine applied to the City of Oak Harbor for an amendment to the phased construction schedule that was part of the Pier Point BSP. The City denied the application on the ground that it lacked authority to permit an amendment to a construction schedule that had already expired. Alpine appealed the decision of the City to the Oak Harbor hearing examiner. The hearing examiner affirmed the city’s decision. Alpine

with filing Respondents’ Brief, Respondents file a Supplemental Designation of Clerk’s Papers designating Plaintiff’s Response as part of the record.

appealed the decision of the hearing examiner to the Island County Superior Court.

On December 27, 2011, Island County Superior Court affirmed the decision of the hearing examiner by letter decision and by subsequent order. CP at 54-65 (Pl's Mot. For Summ. J., Ex. 3). The Court ruled that the City did not have the authority to allow an extension of a construction schedule in the BSP after it expired. *Id.* at 55. Further, the Court ruled that the Pier Point Condominium owners had the right to enforce the 7-year limitation on additional construction or condominium phases in the Declaration of the Pier Point Condominium as a running covenant. *Id.* at 62-63 (July 29, 2011 Letter Ruling at 5-6). The Court's July 29, 2011, letter opinion was attached to and incorporated into its order. In the letter ruling, the Court concluded that while the Declaration only applies to the developed phases of the BSP, the conditions and easements continued to apply to—meaning burden—the remaining, undeveloped properties originally included in the BSP. CP at 62. (July 29, 2011 Letter Ruling at 5).

F. Current Lawsuit.

In this third lawsuit filed by Alpine related to the Subject Property, Alpine asked the trial court to declare as a matter of law,

that even though Alpine's property is no longer part of the Pier Point BSP, Alpine should still have the benefits of all the planning and each of the easements that were created for the owners of units in buildings that were actually constructed as part of the Pier Point Condominiums and within the required schedule. CP at 112 (Complaint ¶ 2.2). Alpine had submitted an application to the City of Oak Harbor for a permit to construct low income housing on the Subject Property, but prior to issuing any such permits, the City required Alpine to: (1) obtain a declaratory judgment as to whether the easements created for the BSP continued to benefit Alpine's Subject Property despite the fact that it was never developed pursuant to the BSP; (2) find a location for the project that does not use the easements; or (3) "provide an existing document" that clearly establishes Alpine's right to use the easements. *Id.*

G. Procedural History and Ruling on Summary Judgment.

Alpine filed the underlying lawsuit for declaratory judgment that the Pier Point Condominium easements benefitted its Subject Property. Alpine asserted that: it had "the right of ingress and egress and utilities and other rights granted pursuant to [the] Declaration of Easement recorded under Island County Auditor's File Number 92009147 and also those easement rights granted by

the Binding Site Plan No. SPR 9-91 as amended and Lots A, B and C of Oak Grove Addition.” CP at 112-13 (Complaint ¶ 2.8).

The Defendants/Respondents brought a counterclaim for declaratory judgment, alleging that “the Subject Property is burdened by and ‘subject to’ the easements for ingress, egress and utilities previously created and conveyed by the original grantor when the Pier Point Binding Site plan was submitted and approved by the City of Oak Harbor.” CP at 245 (Answer/Counterclaim ¶5.12). Defendants/Respondents further asserted that the “Declaration of Easement was created to serve and benefit the future owners of the specified condominium buildings, once they acquired ownership of the condominium units.” CP at 246 (Answer/Counterclaim ¶ 5.16). But Alpine “is not an owner of a condominium building constructed as part of the Pier Point Condominiums binding site plan and is, therefore, not an owner benefitted by the aforementioned Declaration of Easement.” *Id.* (Answer/Counterclaim ¶ 5.17).

The parties filed cross motions for summary judgment, each acknowledging that there were no disputes of material fact and that the trial court, the Honorable Alan R. Hancock presiding, should decide the case as a matter of law. See CP at 43-88 (Plaintiff’s

Motion for Summary Judgment); CP at 22-42 (Defendants' Motion for Summary Judgment).

The trial court denied Plaintiff/Appellant Alpine's motion and granted the Defendants/Respondents' motion, ruling in pertinent part as follows:

Turning to the legal issues presented, I first note that Ms. Mott's Declaration of Easement was not effective when recorded. That is, no easements were created at that time. That is because she owned all of the property affected by the Declaration and one cannot have an easement over one's own property. Rather, it became effective as the underlying property was conveyed to others with reference to or subject to the Declaration. As the four phases of the condominium development were approved and units conveyed therein, the owners of the units then obtained the easement rights set forth in the Declaration.

As the defendant owners correctly point out, however, the same cannot be said for Alpine Village's property. This property was not conveyed with reference to the Declaration of Easement. Thus, no easement rights under the Declaration of Easement were ever granted to Alpine Village. Alpine Village has not cited any legal doctrine or authority that would permit the Court to rule that it received the benefit of the easements set out in the Declaration of Easement despite the fact that its property was not conveyed with reference to the Declaration of Easement, and the Court is not aware of any such authority. This is a complete answer to Alpine Village's lawsuit.

Even if Alpine Village's property had been conveyed with reference to the Declaration of Easement, such a reference would have been

ineffective because Alpine Village's property was never developed as part of the Binding Site Plan for the condominiums.

The plain language of the Declaration of Easement makes it clear that it was not intended to benefit Alpine Village's property. It is elementary that the Court is to give effect to the intention of the parties which is determined by a property construction of the language of the instrument itself. . . .

The Court should determine the original party's intent to an easement from the instrument as a whole.

. . .

The Declaration of Easement by its express terms is intended, quote, "for ingress, egress, and utilities to serve and benefit the Pier Point Condominiums affecting lot 1 or building 1 as delineated in said Building Site Plan and to serve and benefit each successive phase of condominium development affecting lot or building 2 through 8 as shown in said Building Site Plan." Unquote. (Emphasis in the original)

. . .

Thus, the easement was plainly intended to benefit owners of units within developed phases of the condominium development and not owners of property that is not part of developed phases of the condominium development. The language of section 1 and section 4 of the Declaration of Easement further supports this interpretation, as the defendants correctly point out.

The easements set forth in the Declaration must be viewed in the light of the condominium development and not with regard to some other potential use or uses of the property. The intent was clearly to provide for the orderly development of the phases of the condominiums, taking into account the

existing and planned infrastructure, setback requirements, and other planning considerations. These might well be different if some other hypothetical use or uses of the property were to be considered.

As the Court has previously ruled, Alpine Village's property remains burdened by, that is, subject to, the easements contained in the Declaration. But it does not follow from this fact that Alpine Village should have the benefit of the easements running through the defendants' property. The grantor, Ms. Mott, clearly intended the easements to benefit only those property developed as part of the Pier Point Condominiums pursuant to the Binding Site Plan. And if it were otherwise, there would have been no purpose for Ms. Mott to have expressly recited that the easements were to serve each phase for building of the Pier Point Condominiums, quote, "as constructed in accordance with the referenced Building Site Plan," unquote, as it states in section 4 of the Declaration.

Alpine Village points to language in the Declaration of Easement providing as follows, quote, "Now therefore, for and in consideration of mutual benefits of a nonmonetary nature, the receipt and sufficiency of which is hereby acknowledged, the declaration does hereby declare for the benefit of the owners, present and future, of the above-described property, and legally subdivided portions thereof, an easement for the following," unquote.

From this language Alpine Village argues that the intent of the Declaration was that the easements would benefit future owners of the property regardless of whether further phases of the condominium project were developed. But this interpretation of the Declaration is inconsistent with other provisions of the Declaration that I noted previously.

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

Accordingly, the Court rules in favor of the defendant condominium unit owners and against Alpine Village. The Declaration of Easement was not effective until the underlying property was conveyed with reference to the Declaration. Alpine Village's property was not conveyed with reference to the Declaration and therefore Alpine Village's property does not benefit from the easements set forth in the Declaration.

Furthermore, the plain language of the Declaration and related easement documents clearly indicate that they were intended to apply to and benefit only the properties actually developed as the Pier Point Condominiums.

VRP at 8:9-13:12 (CP at 124-129) (internal citations omitted).

IV. ARGUMENT

A. Standard of Review.

Respondent agrees that summary judgment rulings are reviewed by the Court of Appeals de novo, with the Court of Appeals engaging in the same inquiry into the evidence and issues as the trial court. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 485, 258 P.3d 676 (2011). Summary judgment should

be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Here, the parties cross-moved for summary judgment, each agreeing and stipulating that there were no disputes of fact and that resolution by the trial court at summary judgment was proper. See, e.g., VRP at 3:22-25 (CP at 119) (“The parties agree that there is no genuine issue of material fact and that the issues presented are legal issues. Therefore, summary judgment is appropriate in one form or another.”).

B. The Declaration of Easement Was Not Effective Until Properties Were Conveyed in Reference Thereto.

Appellant Alpine asserts that by the Declaration of Easement, Donna Mott created “reciprocal” easements that took effect in 1992 when the declaration was executed. Appellant’s Brief at 18. But Alpine fails to provide any factual or legal support to establish how the Declaration of Easement became effective upon its execution when all of the properties described therein were held in common ownership by the declarant Donna Mott. Alpine wholly fails to address the legal theory of merger of title, or the legal requirement that the properties subject to the Declaration of Easement be conveyed with reference thereto, both of which were raised by Defendants/Respondents at summary judgment and were

expressly relied upon by the trial court in ruling in favor of Defendants and against Plaintiff Alpine.

“As a general rule, one cannot have an easement in one’s own property.” *Radovich v. Nuzhat*, 104 Wn. App. 800, 805, 16 P.3d 687 (2002). This is based on the principle of merger of title, whereby when the dominant and servient estates of an easement are in common ownership, no easement can exist. *See id.*

However, in the case of real estate developments or condominiums, it is common to create easements and covenants in one, separate document entitled a “declaration,” which becomes effective when the developer conveys a parcel subject to the declaration. Restatement (Third) of Property (Servitudes) §2.1 (2000), Cmt. c at 54.

c. Creation of servitudes in general-plan and common-interest-community developments.

Real-estate developments involving multiple parcels or units almost always include easements and covenants. Typically, the servitudes are set out in a separate document, often labeled a declaration, or reciprocal-easement agreement, which is recorded and then incorporated by reference in the deeds to the individual parcels or units. . . .

. . .

Recording a declaration or plat setting out servitudes does not, by itself, create servitudes. So long as all the property covered by the declaration is in a single ownership, no servitude

can arise. Only when the developer conveys a parcel subject to the declaration do the servitudes become effective. Ordinarily the intent to convey a lot or unit subject to the declaration is expressed in the deed, but the intent may also be inferred from the circumstances. If the declaration has been recorded, a conveyance of a lot or unit to a consumer purchaser sufficiently manifests the intent to effectuate the development plan and subject all property in the development to the terms of the declaration. **A conveyance to someone other than a consumer purchaser does not raise the same inference of intent to effectuate the development plan. If the deed makes no reference to the declaration, the property conveyed is not subject to the servitudes contained in the declaration in the absence of other clear and convincing evidence of intent.**

Id. at cmt c (Emphasis added); *see also Lake Limerick County Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 256, 84 P.3d 295 (2011) (reasoning that a servitude is not effective so long as the property covered by the declaration is in single ownership, but becomes effective when the developer conveys subject to the declaration).

Here, when the Declaration of Easement was recorded in 1992, Donna Mott remained the sole owner of the property covered by the declaration. Based on the above principles, the Declaration of Easement was not effective when recorded, and would only become effective when the underlying property was conveyed in reference to or subject to the declaration.

C. Alpine's Property Was Not Conveyed in Reference to the Declaration of Easement, Nor Was the Declaration Otherwise Extended to Alpine's Property.

The properties owned by the individual Defendants were indeed conveyed subject to the Declaration of Easement. The Declaration of Easement was specifically referenced in the Condominium Plans of the three Pier Point Divisions that divided and established the individual Condominiums, and the units were conveyed to Defendants based on such divisions. CP at 76-88.

The same is not true with respect to Alpine's property. Alpine's Subject Property was not divided or developed as part of a Pier Point Division. Alpine's Subject Property was not conveyed with any reference to the Declaration of Easement, neither by conveying a unit or piece of property divided pursuant to a division plan that referenced the Declaration of Easement, nor by a separate reference or conveyance. See CP at 66-67. Further, the Subject Property was not intended to benefit from the Declaration of Easement, as it was not developed as part of the Pier Point Condominium and the BSP.

As the trial court expressly ruled, the fact that the transfer of the Subject Property from Donna Mott to Alpine was "subject to easements of record" does not mean that the property was

conveyed with the benefit of the easements; rather, it means the property remains burdened by the easements. See VRP at 11:6-11 (CP 127); *see also* Appellant's Brief at 19, 20 (failing to provide any legal authority to the contrary).

Likewise, Alpine's argument that the fact that the deed to Alpine failed to "mention" the easements did not result in the termination of the burden or benefits of the easements also misses the point. See Appellant's Brief at 19. As the trial court held, the Declaration of Easement did not create enforceable burdens or benefits upon its execution/recording because the property subject to the Declaration of Easement was in common ownership by the grantor Donna Mott at the time of its execution. VRP at 8:9-13 (CP 124). It was not until the properties were transferred to third parties with reference to the Declaration of Easement that the easements became effective and enforceable. VRP at 8:14-20 (CP 124). Therefore, it was not that *the failure to mention the easement* nullified the easement. Rather it was that the Declaration of Easement did not become effective until referenced in a transfer of the underlying property, which never occurred with respect to the Subject Property transferred to

Alpine. VRP at 8:21-9:1 (CP 124-25). This Alpine wholly ignores and fails to address. See Appellant's Brief at 19-20.

Similarly, Alpine's reliance on the fact that the legal description of the property covered by the Declaration of Easement included the area later transferred to Alpine, while ignoring that the Declaration of Easement was not effective until the underlying property was transferred to a third party with reference to the Declaration of Easement, again misses the point. See Appellant's Brief at 20. Regardless of the property described in the Declaration of Easement, the document was not effective to benefit or burden such property until such property was conveyed with reference to the Declaration of Easement. This simply did not occur with respect to Alpine's Subject Property.

Finally, the assertion by Alpine that it purchased its property "subject to" the binding site plan and therefore has a right to rely on the easements intended for the binding site plan, when it purchased the property after the binding site plan had expired and could not legally be renewed, is an assertion without factual or legal support. See Appellant's Brief at 20-21.

Indeed, Alpine's reliance on the case of *Howell v. King City*, 16 Wn.2d 557, 134 P.2d 80 (1943) is wholly misplaced. In

that case, owners of properties within an abandoned plat asserted that they maintained private easement rights to the vacated plat roads. The court agreed, holding that “since the dedicator of a plat could not defeat a grantee’s right to an easement in the street on which his land abuts, common grantees from him cannot, among themselves, question the right of ingress and egress over the street as shown on the plat.” *Id.* at 559. That case is inapplicable here.

Here, Alpine fails to acknowledge or address the trial court’s legal conclusion that Alpine’s property did not initially benefit from the Declaration of Easement and would not benefit from such easements until the property was conveyed in reference to the Declaration of Easements—which never occurred. Unlike the property owner in *Howell*, Alpine’s property never benefitted from the Declaration of Easement and cannot now enforce such easements against the owners of properties that were developed as part of the Pier Point BSP and do benefit from the easements.

No matter how many different ways Alpine seeks to characterize the Declaration of Easement as a grant of reciprocal easements that was effective upon execution, that simply is not supported by the facts or law, as the trial court expressly ruled. As

a result of the legal principle of merger of title, the Declaration of Easement did not benefit any property until such property was conveyed in reference to the Declaration of Easement. For Alpine, that event never occurred.

D. But Even if the Declaration of Easement were Effective on Execution, Grantor Donna Mott Unambiguously Intended to Limit the Benefits of the Declaration of Easement to those Properties Developed Pursuant to the Binding Site Plan.

An easement is an irrevocable interest in land. *Bakke v. Columbia Valley Lumber Co.*, 49 Wn. 2d 165, 170, 298 P.2d 849 (1956). The extent of the right acquired in an easement is derived from the granting instrument. The duty of the court is to “ascertain and give effect to the intention of the parties, which is determined by a proper construction of the language of the instrument.” *Schwab v. City of Seattle*, 64 Wn. App. 742, 751, 826 P.2d 1089 (1992).

In determining the scope of an easement that is created by express grant, “the extent of the right acquired is to be determined from the terms of the grant properly construed to give effect to the intention of the parties.” *Brown v. Voss*, 105 Wn.2d 366, 371, 715P.2d 514 (1986). The courts should determine the original parties' intent to an easement from the instrument as a whole.

Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d 873, 880, 773 P.3d 369 (2003). “What the original parties intended is a question of fact and the legal consequences of that intent is a question of law.” *Id.* If the plain language of the instrument is unambiguous, the court should not consider extrinsic evidence. *Sunnyside*, 149 Wn.2d at 880 (citing *City of Seattle v. Nazareus*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962)). An instrument is ambiguous only when it is “fairly susceptible to two different interpretations, both of which are reasonable.” *Quadrant Corp. v. Am. States Is.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005).

Because the Declaration of Easement is not ambiguous, the court cannot and should not look beyond its plain language.

As the trial court held, “[t]he grantor, Ms. Mott, clearly intended the easements to benefit only those properties developed as part of the Pier Point Condominiums pursuant to the Binding Site Plan.” VRP at 11:11-4 (CP 127).

The Declaration of Easement, by its express, unambiguous language, was intended “to establish the necessary easements for ingress, egress, and utilities to serve and benefit the Pier Point Condominiums affecting Lot 1 or Building 1, as delineated in said Building Site Plan and to serve and benefit each successive

phase of condominium development affecting Lot or Building 2 through 8 as shown in said Building Site Plan.” CP at 68 (Pls’ Mot. Summ. J. Ex. 5 at p.1).

Section (1) of the Declaration of Easement goes on to reference the easement for “ingress, egress, and the installation, maintenance and/or repair of utilities over, under, and across that portion of Lot 1 and Lot 6 of said Building Site Plan,” “delineated on the Condominium Plan of Pier Point Condominiums, Division No. 1, recorded as Auditor’s No. 92009143.” See Appendix A.

Further, section (4) of the Declaration of Easement granted ingress and egress only to the extent “reasonably necessary to serve each phase or building of Pier Point Condominiums as constructed in accordance with the referenced Building Site Plan.” See Appendix A.

The Declaration of Easement defined “said Binding [or Building] Site Plan to be that recorded under Auditor’s File No. 91018478 and amended January 6, 1992 and recorded under Auditor’s File No. 92000451. See Appendix A.

Therefore, regardless of the fact that the Declarant and Grantor Donna Mott owned all of the property contained within the BSP, “Lot 1 through Lot 8,” the easements contained in the

Declaration of Easement were intended only to apply to and benefit the properties actually developed as the Pier Point Condominiums pursuant to the BSP.

When the BSP was approved by the City of Oak Harbor, the clear intent of both the City and the owner was to provide for an orderly land division for the construction of condominiums – not single family residences, or commercial building or low income housing. Easements were created to benefit only those owners of units within constructed buildings, taking into account the existing and planned infrastructure, setback requirements and other planning issues affecting the development of condominium buildings.

The fact that the Court has previously ruled that Alpine's property remains "subject to" the easements of record does not affect this conclusion, but rather supports it. Indeed, the term "subject to" is routinely used to describe burdens on real property or exceptions from title. When a parcel of land is "subject to" an easement, it is burdened by the easement in question, not benefitted.

The fact that Alpine's "subject property" remains burdened by the easements does not change the conclusion that the

Grantor, Donna Mott, intended the ingress, egress and utility easements to *benefit only* those properties developed as part of the Pier Point Condominiums pursuant to the BSP. If the easements were as general in nature as Alpine contends, there would be no purpose for the grantor to have expressly recited the application of the easements as needed to serve each “phase or building” of the Pier Point Condominiums “as constructed in accordance with the referenced “Building [Binding] site plan.”

Likewise, the trial court expressly addressed Alpine’s argument that the mere fact that the Declaration of Easement referred to the entire property subject to the Pier Point BSP results in the conclusion that the Declaration of Easement continues to benefit the entire property regardless of whether it was developed pursuant to the BSP. See Appellant’s Brief at 22. As the trial court ruled, the court is required to read the entire easement as a whole, and “[t]he language of the Declaration as a whole clearly indicates that the future owners of property within the originally contemplated development including all eight phases would benefit from the easement only if such property was actually developed into condominium phases pursuant to the Binding Site Plan.” VRP at 12:12-7 (CP 128) (Emphasis added).

Alpine appears to alternatively argue that the Declaration of Easement is ambiguous in scope, asserting that the Declaration could be interpreted in one of two ways, “either the easements exclusively benefit the current condominium owners or they benefit all the property divided under the binding site plan.” Appellant’s Brief at 23. But those two alternatives are not divergent—both support the conclusion that the Declaration of Easement on its face expressly limits its application to properties developed and divided pursuant to the BSP in one of the successive condominium phases. There is no ambiguity. Alpine’s Subject Property was not developed or divided as part of the Pier Point BSP pursuant to RCW 58.17.035.⁵

Further, the case law is clear that even if a provision may be interpreted as ambiguous on its face, extrinsic evidence should not be used to advance an interpretation contrary to the express language of a document. Extrinsic evidence should only be used to “illuminate what was written, not what was intended to be written.” *Wilkinson v. Chiwawa Communities Ass’n*, 180 Wn.2d

⁵ Alpine did not argue at summary judgment that the Declaration of Easement was ambiguous. Rather, Alpine argued that the only evidence relevant to the declarant Donna Mott’s intent with regard to the Declaration of easement was the Declaration itself together with the text of the Binding Site Plan. CP at 18:7-9 (Plaintiff’s Reply to Defendants’ Opposition to Plaintiff’s Motion for Summary Judgment at 2).

241, 251-52, 327 P.3d 614 (2014). The court should not consider extrinsic evidence that would “vary, contradict or modify the written word” or “show an intention independent of the instrument.” *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999)

Donna Mott’s intent is evident from the unambiguous, plain language—she intended the easements to benefit only the property developed as part of the Pier Point Condominium BSP. A more general intention to “develop the property to its maximum potential” cannot now be implied without supporting evidence and contrary to the express language of the Declaration of Easement, as Alpine seeks to do. See App’s Br. at 24.

E. The Court Should Reject Alpine’s New Claim for Extraordinary Relief Asserted for the First Time on Appeal.

Alpine asserts for the first time on appeal, in an argument limited to approximately two-and-a-half pages of briefing, that the Court should “modify” the Declaration of Easement based on the doctrine of “changed conditions” because the “underlying circumstances compel it.” See Appellant’s Brief at 25-27.

The Court of Appeals should disregard this issue improperly raised for the first time on appeal. An appellant may not raise a new

issue or legal theory for recovery for the first time on appeal. RAP 2.5(a); *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 482 (1992); *State v. Smith*, 130 Wn. App. 721, 728, 123 P.3d 896 (2005). To do so would deprive the Defendants/Respondents of an opportunity to frame its argument and respond to the argument before the trial court and would deprive the trial court the opportunity to rule on the issue. *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

The policy behind RAP 2.5(a) is particularly applicable here, where Appellant Alpine seeks sweeping relief in the form of the Court unilaterally modifying an easement contrary to the express terms of the document, and where Appellant Alpine provides less than three pages of briefing in support thereof with no case directly on point.

F. But Even if the Court of Appeals Addresses Alpine's Argument Improperly Raised for the First Time on Appeal, the Argument Fails.

Alpine asks the Court to modify the subject Declaration of Easements based on the doctrine of "changed conditions," as articulate in the Restatement (Third) of Property (Servitudes) § 7.10 (2000), and applied in Washington. See *St. Luke's Evangelical Lutheran Church of County Homes v. Hales*, 13. Wn. App. 484,

485, 534 P.2d 1379 (1975); Appellant's Brief at 26-27. Essentially Alpine argues that the expiration of the Pier Point BSP is a "changed condition" and that limiting the Declaration of Easements to only those properties developed as part of the Pier Point BSP would defeat the grantor's intent. See Appellant's Brief at 27.

In the case of *St. Luke's Evangelical Lutheran Church of County Homes*, plaintiffs asserted that a restrictive covenant restricting use of property for business purposes should no longer be applied or should be modified because a material change in the character of the neighborhood had occurred to "render perpetuation of the restriction of no substantial benefit to the dominant estate and to defeat the object or purpose of the restriction." *Id.* at 485. But even in that case, the trial court and the Court of Appeals was unwilling to find sufficiently changed circumstances to justify cancellation or modification of the covenant.

Here, the issues do not involve a covenant or restriction that is of no further benefit given changes to the surrounding circumstances. Rather, an easement is sought to be enforced to maintain—not defeat—the grantor's intent, limiting its application to the specific purposes outlined by the grantor.

Alpine has cited to no Washington case where an access

easement has been expressly and unilaterally modified to benefit parties not provided by the language of the original easement, and Respondents are aware of no such case law.

Further, Washington courts have expressly refused to apply the Restatement (Third) of Property (Servitudes) § 7.10 (2000) to modify an easement to relocate the easement on the servient estate's property, even where doing so would not prejudice the dominant estate. *Macmeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App. 188, 203-06, 45 P.3d 570 (2002).

In *Macmeekin*, the Court of Appeals expressly acknowledged the Restatement and that its Comment indicates that the provisions for modification and termination of servitudes based on changed conditions could apply to easements as well as covenants. *Id.* at 204-05. The court noted that while the Restatement's approach "favors flexibility," the traditional approach "favors uniformity, stability, predictability and property rights." *Id.* at 205-06. After concluding that Washington Supreme Court dictum suggested the traditional rule applied in Washington, the Court of Appeals refused to adopt the Restatement approach: "Although our Supreme Court has never directly addressed the issue of court-ordered relocation of easements, and we can only be guided by its

pronouncements in dicta, the dictum contains every indication that Washington adheres to the traditional rule that easements, however created, are property rights, and as such are not subject to relocation absent the consent of both parties.” *Id.* at 207.

Not only has Alpine provided no authority where a Washington court has unilaterally modified an express easement to extend the benefit contrary to the express language of the easement, but the only authority located on point suggests that Washington courts would refuse to do so.

V. CONCLUSION

While Appellant Alpine has attempted to make this appeal complicated, including by raising a new legal theory not considered by the trial court, the issues for consideration on this appeal are relatively simple.

Due to merger of title, the Declaration of Easement was not effective until the underlying property was transferred in reference to the Declaration. Because Alpine’s property was not conveyed in reference to the Declaration of Easement and the conveyance included no separate grant or conveyance of easement, Alpine’s property does not benefit from the Declaration of Easement or

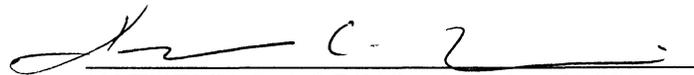
related easements.

But even if the Declaration of Easement is considered effective upon its execution, the unambiguous, plain language of the Declaration of Easement requires the conclusion as a matter of law that the easements contained therein were intended only to apply to and benefit the properties actually developed as the Pier Point Condominiums pursuant to the BSP.

The trial court correctly entered summary judgment in favor of the Defendants/Respondents and should be affirmed.

Respectfully submitted this 15th day of September, 2016.

GODDU LANGLIE LORING SANDSTROM PLLC



KATHRYN C. LORING, WSBA # 37662
PO Box 668
Friday Harbor, WA 98250
Attorney for Respondents

APPENDIX

Appendix A: Declaration of Easement (CP 68-70)

Appendix B: Statutory Warranty Deed, Mott to Alpine (CP 66-67)

APPENDIX A

2-27(1)

VICK 1 01001

92009147

DECLARATION OF EASEMENT

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

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

WHEREAS, DONNA L. MOTT, as her separate estate, hereafter referred to as "DECLARANT", is the owner of that parcel of real property described as follows: 9-

Situate in the County of Island, State of Washington:

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

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

Said property is also described as follows:

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

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

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

- (1) ingress, egress, and the installation, maintenance, and/or repair of utilities over, under, and across that portion of Lot 1 and Lot 6 of said Building Site Plan, which is delineated on the Condominium Plan of Pier Point Condominiums, Division No. 1, recorded as Auditor's No. 90009143, records of Island County, Washington, and labeled as "Access and Utility Easement."
- (2) the installation, maintenance and/or repair of utilities, including, but not limited to, power utilities, sanitary sewer

DECLARATION OF EASEMENT -1

EXCISE TAX EXEMPT

MAY 20 1992

MAXINE R. SAUTER

EXHIBIT

5

5-20-92

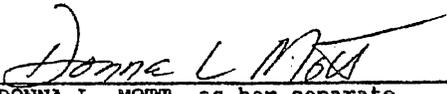
lines, sanitary sewer cleanouts, manholes, water utilities, water lines, drainage utilities, storm sewer lines, catch basins, hydrants, and water meters, and for the ingress and egress reasonably necessary for such purposes, over, under and across those portions of DECLARANT'S above-described property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

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

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

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

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


DONNA L. MOTT, as her separate
estate

E08:MOTT

5-20-92

APPENDIX B

When Recorded Return to:
ALPINE VILLAGE, INC.
P. O. Box 399
Oak Harbor WA 98277

#20 039505 TYPE WD
BR 853 PG 40 8/8/2001 3:13:07 PM \$9.00
ISLAND COUNTY AUDITOR
DEPUTY: GDW REQUESTED BY:
ISLAND TITLE COMPANY

Island Title Company
Order No: S78636 CBG

STATUTORY WARRANTY DEED

THE GRANTOR DONNA L. MOTT, a single person

for and in consideration of Eighty Thousand and 00/100...(\$80,000.00) DOLLARS

In hand paid, conveys and warrants to ALPINE VILLAGE, INC., a Washington corporation

the following described real estate, situated in the County of Island, State of Washington:

Lots 1, 2, 3, 4, 18, 19, 20 and 21, Block 7, OAK GROVE ADDITION, more fully described on Exhibit A attached hereto and made a part hereof.

Tax Account Nos. :S7738-05-00001-0, S7738-05-00002-0, S7738-06-00001-0, S7738-06-00002-0, S7738-07-00001-0, S7738-07-00002-0, S7738-08-00001-0

Subject to: Restrictions, reservations, agreements and easements of record.

Dated: August 1, 2001

Donna L. Mott
DONNA L. MOTT



STATE OF WASHINGTON
COUNTY OF Island

I certify that I know or have satisfactory evidence that DONNA L. MOTT the person who appeared before me, and said person acknowledged that she signed this instrument and acknowledged it to be her free and voluntary act for the uses and purposes therein mentioned in this instrument.

Dated: 8-2-01

C.B. Grovdahl
C. B. GROVDAHL
Notary Public in and for the State of Washington
Residing at Oak Harbor
My appointment expires: 8/1/05

ISLAND COUNTY WASHINGTON
REAL ESTATE RECORD TAX

AUG 6 2001
AMOUNT PAID \$ 1427.00
MAXINE R. BROWN
ISLAND COUNTY TREASURER

10-08-01

EXHIBIT A

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

TOGETHER WITH that portion of vacated East Pioneer Way, as would attach by due process of law, said portion having been vacated by Ordinance 365, recorded July 23, 1974, under Auditor's File No. 275106, records of Island County, Washington;

(Also known as Binding Site Plan No. SPR 9-91, recorded December 3, 1991, under Auditor's File No. 91018478, records of Island County, Washington and AMENDED by Instrument recorded January 9, 1992, under Auditor's File No. 92000451, records of Island County, Washington);

EXCEPT Phase 1 of City of Oak Harbor Binding Site Plan No. SPR 9-91, as approved November 19, 1991, and recorded December 3, 1991, under Auditor's File No. 91018478, records of Island County, Washington, and as amended by Amendment thereof, approved January 6, 1992, and recorded January 9, 1992, under Auditor's File No. 92000451, records of Island County, Washington; (also known as Pier Point Division No. 1 as approved May 8, 1992 and filed May 20, 1992 in Condominium Plans under Auditor's File No. 92009143, records of Island County, Washington);

ALSO EXCEPT Phase 2 and Phase 3 of the Amended Pier Point Condominiums Binding Site Plan as approved on January 6, 1992, and recorded January 9, 1992, under Auditor's File No. 92000451, records of Island County, Washington, said amendment revising Oak Harbor Binding Site Plan No. SPR 9-91, as approved November 19, 1991, and recorded December 3, 1991, under Auditor's File No. 91018478, records of Island County, Washington; (also known as Pier Point Division No. 2 as approved August 24, 1992 and filed August 25, 1992 in Condominium Plans under Auditor's File No. 92016201, records of Island County, Washington);

ALSO EXCEPT Phase 4 of the Amended Pier Point Condominiums Binding Site Plan as approved on January 6, 1992, and recorded January 9, 1992, under Auditor's File No. 92000451, records of Island County, Washington, said amendment revising Oak Harbor Binding Site Plan No. SPR 9-91, as approved November 19, 1991, and recorded December 3, 1991, under Auditor's File No. 91018478, records of Island County, Washington; (also known as Pier Point Division No. 3 as approved October 14, 1992 and filed November 2, 1992 in Condominium Plans under Auditor's File No. 92021109, records of Island County, Washington);

Situated in Island County, Washington.

- END OF EXHIBIT "

10-80-8

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 15th day of September, 2016, in the manner indicated below, I caused delivery of copies of the following documents:

Brief of Respondents

To:

Attorney for Appellant:

Philip J. Buri
Buri Funston Mumford, PLLC
1601 F Street
Bellingham WA 98225

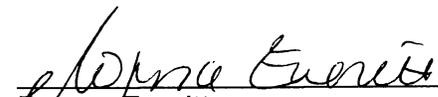
- Personal Service
- U.S. Mail
- Certified Mail
- Overnight Mail
- Fax # (360) 752-1500
- E-mail: philip@burifunston.com
heidi@burifunston.com

Attorney for Appellant:

C. Thomas Moser
Attorney at Law
1204 Cleveland Ave
Mount Vernon WA 98273

- Personal Service
- U.S. Mail
- Certified Mail
- Overnight Mail
- Fax # (360)
- E-mail: tmoser@advocateslg.com
triedell@advocateslg.com

Signed this 15 day of September, 2016 at Friday Harbor, WA.



Donna Everitt

2016 SEP 16 AM 11:45
COURT OF APPEALS
STATE OF WASHINGTON