

NO. 37974-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

JOHN RAYMOND BRADFORD and CINDY BRADFORD, husband
and wife; LAWRENCE KERBS and CHRISTINE KERBS, husband and
wife; and JAMES VANSHUR and NANCI VANSHUR, husband and
wife,

Respondents,

v.

CHARLES AND RUTH ADAMS TRUST,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY
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ADAMS OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
APPENDICES	iii
TABLE OF AUTHORITIES	iv
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR & ISSUES ON APPEAL.....	2
A. Assignments of Error	2
B. Issues on Appeal	3
III. STATEMENT OF THE CASE.....	4
A. Underlying Facts.....	4
B. Procedural Facts.....	10
1. Commissioner’s Summary Judgment Ruling, August 2007	11
2. Superior Court’s September 18, 2007, Revision of Summary Judgment.....	13
3. Superior Court’s November 29, 2007 Reconsideration Order to Address Ownership	15
4. Judgment and Fee Award.....	16
IV. ARGUMENT.....	17
A. Summary of Argument	17
B. Standard of Review.....	19
C. Easement Law and Why the Use Grant Does Not Convey an Ownership Right To The Dominant Estates, Lots 1, 2 and 3	20

	<u>Page</u>
D. The Language of the Easement and Restrictive Covenant is Clear and The Use by the Servient Land Owner is Not Contrary to the Terms of the Use Grant	24
E. The Dock Does Not Violate the Restrictive Covenants.....	29
F. Easements do not Convey Ownership: Adams Owns the Dock and May Keep or Remove it at His Discretion.....	29
G. A Legal Use of an Interest in an Estate Does Not Create a New Right for Another Holder of an Interest in the Same Estate.....	37
H. The Court’s Remedy Is Overly Broad	38
I. The Court Erred in Considering Linda DeBord’s Declaration.....	39
J. Respondents’ Fee Award Should be Vacated and Adams Awarded Fees for Trial.....	41
K. Request for Fees on Appeal	41
V. CONCLUSION.....	42

APPENDICES

APPENDIX A: Greaves Short Plat (CP 189) A-1

APPENDIX B: Declaration of Access and Use
Covenants (CP 19-93).....B-1 – B-4

APPENDIX C: Amendment to Declaration of Access
and Use Covenants (CP 194-95).....C-1 – C-2

APPENDIX D: Judgment, June 20, 2008 (CP 14-16)..... D-1 – D-3

APPENDIX E: Memorandum Opinion and Order Re:
Motion for Revision, September 18, 2007
(CP 85-87)..... E-1 – E-3

APPENDIX F: Memorandum Opinion Re Motion for
Reconsideration, November 29, 2007 (CP 32-35)..... F-1 – F-4

APPENDIX G: Memorandum Opinion, August 23, 2007
(CP 96-99)..... G-1 – G-4

APPENDIX H: Enlarged Photo of Dock, 2007 (CP 148) H-1

APPENDIX I: Enlarged Photo of Dock, 2007 (CP 40).....I-1

TABLE OF AUTHORITIES

STATE CASES

Washington Cases	<u>Page</u>
<i>Alejandre v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007).....	8
<i>Allied Stores Corp. v. North West Bank</i> , 2 Wn. App. 778, 469 P.2d 993 (1970).....	32
<i>Bakke v. Columbia Valley Lumber Co.</i> , 49 Wn.2d 848, 351 P.2d 520 (1960).....	30
<i>Bauman v. Turpen</i> , 139 Wn. App. 78, 160 P.3d 1050 (2007).....	38
<i>Botton v. State</i> , 69 Wn. 2d 751, 420 P.2d 352 (1967).....	30-31
<i>City of Olympia v. Palzer</i> , 107 Wn. 2d 225, 728 P.2d 135 (1986).....	17, 20, 23, 29
<i>City of Seattle v. Nazarenius</i> , 60 Wn. 2d 657, 374 P.2d 1014 (1962).....	22
<i>Coast Storage Co. v. Schwartz</i> , 55 Wn.2d 848 351 P.2d 520 (1960).....	22
<i>Cole v. Laverty</i> , 112 Wn. App. 180, 49 P.3d 924 (2002).....	29
<i>Colwell v. Etzell</i> , 119 Wn. App. 432, 81 P.3d 895 (2003).....	29
<i>Crisp v. VanLaecken</i> , 130 Wn. App. 320, 122 P.3d 926, 929 (2005).....	22
<i>Denaxas v. Sandstone Court</i> , 148 Wn. 2d 654, 63 P.3d 125 (2003).....	19
<i>Dickson v. Kates</i> , 132 Wn. App. 724, 133 P.3d 498 (2006).....	23

	<u>Page</u>
<i>Drainage District Number 2 of Snohomish County v. City of Everett,</i> 171 Wash. 471, 18 P.2d 53 (1933).....	37, 38
<i>Dunsmuir v. Port Angeles Gas, Water, Electric Light & Power Co.,</i> 24 Wash. 104, 63 P. 1095 (1901).....	33
<i>Fluke Capital & Mgmt. Servs. v. Richmond,</i> 106 Wash.2d 614, 724 P.2d 356 (1986).....	20
<i>Foster v. Nehls,</i> 15 Wn. App. 749, 551 P.2d 768 (1976).....	38
<i>Glen Park Associates, LLC v. State, Department of Revenue,</i> 119 Wn. App. 481, 82 P.3d 664 (2003).....	32
<i>Green v. Lupo,</i> 32 Wn. App. 318, 647 P.2d 51 (1982).....	26
<i>Griffin v. Thurston County,</i> ___ Wn.2d ___, 196 P.3d 141 (2008).....	36
<i>Harris v. Ski Park Farms, Inc.,</i> 120 Wn. 2d 727, 844 P.2d 1006 (1993).....	24
<i>Hollis v. Garwall, Inc.,</i> 137 Wn.2d 683, 974 P.2d 836 (1999).....	26, 40
<i>In re Arbitration Agreement Between Liberty Lake Sewer District Number 1 and Liberty Lake Utilities Company, Inc.,</i> 37 Wn. App. 809, 683 P.2d 1117, 683 P.2d 1117 (1984).....	33
<i>In re Marriage of Schweitzer,</i> 132 Wn.2d 318, 937 P.2d 1062 (1997).....	40
<i>In re Personal Restraint of Dalluge,</i> 162 Wn.2d 814, 177 P.3d 675 (2008).....	36
<i>Little-Wetzel Co. v. Lincoln,</i> 101 Wash. 435, 172 P. 746 (1918).....	19, 37
<i>Lowe v. Double L Properties, Inc.,</i> 105 Wn. App. 888, 20 P.3d 500 (2001).....	26
<i>Mielke v. Yellowstone Pipeline Co.,</i> 73 Wn. App. 621, 870 P.2d 1005 (1994).....	21

	<u>Page</u>
<i>Nationwide Mut. Fire Ins. Co., v. Watson</i> , 120 Wn.2d 178, 840 P.2d 851 (1992).....	40
<i>Olympic Pipe Line Co. v. Thoeny</i> , 124 Wn. App. 381, 101 P.3d 430 (2004), <i>rev. denied</i> , 154 Wn.2d 1026, 120 P.3d 577 (2005).....	21
<i>Puget Sound Service Corp. v. Dalarna Management Corp.</i> , 51 Wn. App. 209, 752 P.2d 1353 (1988).....	8
<i>Roeder Co. v. Burlington N., Inc.</i> , 105 Wn.2d 567, 716 P.2d 855 (1986).....	23
<i>Rozner v. City of Bellevue</i> , 116 Wn.2d 342, 804 P.2d 24 (1991).....	36
<i>Sanders v. City of Seattle</i> , 160 Wn.2d 198, 156 P.3d 874 (2007).....	19, 21
<i>Schwab v. City of Seattle</i> , 64 Wn. App. 742, 826 P.2d 1089 (1992).....	26
<i>Skinner v. Holgate</i> , 141 Wn. App. 840, 173 P.3d 300 (2007).....	20
<i>State v. JP</i> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	36
<i>State v. Montejano</i> , ___ Wn. App. ___, 196 P.3d 1083 (2008).....	36
<i>State v. Sturtevant</i> , 76 Wash. 158, 135 P. 1035, 138 P. 650 (1913)	31
<i>Sunnyside Valley Irr. Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003).....	22, 23
<i>Thompson v. Smith</i> , 59 Wn. 2d 397, 367 P.2d 798 (1962).....	29
<i>Tradewell Group, Inc. v. Mavis</i> , 71 Wn. App. 120, 857 P.2d 1053 (1993).....	20
<i>U.S. Life Credit Life Ins. Co. v. Williams</i> , 129 Wn.2d 565, 919 P.2d 594 (1996).....	40

	<u>Page</u>
<i>Victoria Tower Partnership v. Lorig</i> , 40 Wn. App. 785, 700 P.2d 768 (1985).....	25
<i>Zobrist v. Culp</i> , 95 Wn. 2d 556, 627 P.2d 1308 (1981).....	22, 26

Other Cases

<i>Cherokee Pipe Line Co. v. Newman</i> , 593 P.2d 90 (Okla.1979).....	33
<i>Kutschinski v. Thompson</i> , 101 N.J. Eq. 649, 138 A. 569 (1927).....	29
<i>Sulphur Springs Valley Electric Cooperative, Inc. v. Tombstone</i> , 1 Ariz. App. 268, 401 P.2d 753 (1965).....	33

Constitutional Provisions, Statutes and Court Rules

RAP 18.1.....	41
RAP 18.1(a)	41
RCW 64.04.010	23
RCW 65.04.020	23
RCW 79.105.430	1, 3, 10, 30, 32, 35, 42
RCW 79.105.430(1).....	34, 35
RCW 79.105.430(2).....	34
RCW 79.105.430(2)(c)	25
RCW 79.105.430(3).....	34
RCW 79.105.430(2)(c)	25
WAC 332-30-144.....	30, 32, 34
WASH. CONST. ART. 17, § 1.....	25, 30, 31

Treatises and Other Authorities

CAMBRIDGE DICTIONARY OF AMERICAN ENGLISH, 2ND ED.
(2007)..... 26-27

5 CASNER, A., AMERICAN LAW OF PROPERTY § 19.10 (1952)33

POWELL ON REAL PROPERTY, VOL. 4 SEC. 34.02[1].....21, 23, 30

RESTATEMENT (FIRST) OF PROPERTY § 450 (1944) 18, 20

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8(3)
(2000).....22

17 STOEBUCK & WEAVER, WASHINGTON. PRACTICE, REAL
ESTATE: PROPERTY LAW, § 2.1 (2008)21, 23, 30

1 THOMPSON, G., REAL PROPERTY § 55 (1964).....32

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY
UNABRIDGED (1993).....26

I. INTRODUCTION.

This appeal is about the use, responsibility, liability, and ownership of a dock on Lake Sutherland that sits over State-owned lake bed. The dock abuts part of one lot, and part of the easement on that lot for recreational use and access to the lake. The parties are successors in interest to the original owner of land who subdivided it into four parcels, only one of which, Lot 4, abuts the lake. The easement for access and recreational use was created and recorded in 1987 to enhance the sale of Lots 1, 2, and 3. A prior owner of Lot 4 built the dock in the early 1990's.

The legal issue involves the scope of the non-vehicular easement of way and recreational use over the narrow L-strip of land to and bordering the lake. In spring 2004, Lot 4 was chosen by and is now owned for the benefit of glass sculpture artist Randy Adams and his family. ("Adams"). At issue are the competing rights under the easement and state law of Adams' predecessors in interest to build and (for them and now for Adams) to have exclusive use of the dock which sits outside the area specified in the easement and over State-owned lake bed; and of Respondents who claimed – and were given by the trial court – full ownership rights in the dock neither they nor their predecessors in interest built or paid for; and which RCW 79.105.430 states they cannot own because their lots do not abut the lake shore where the dock is.

Adams contends the trial court erred on summary judgment by ruling the other lot owners acquired an ownership interest in the dock via the easement or that the easement now goes beyond its bounds to the dock.

II. ASSIGNMENTS OF ERROR & ISSUES ON APPEAL.

A. Assignments of Error.

1. The trial court erred in granting title – “ownership and control” – to the dock to the owners of Lots 1, 2, and 3.” CP 15, ¶ 2.
2. The trial court erred in ruling that the owners of Lots 1, 2, and 3 “are to be involved with decisions regarding the dock” and that agreement among all four lot owners is “necessary as to upkeep and improvements” of the dock. CP 15, ¶ 2.
3. The trial court erred in ruling that the agreement of all four lot owners is “necessary with regard to upkeep and improvements of the recreation area.” CP 15, ¶ 2.
4. The trial court erred in enjoining the owner of Lot 4 from restricting access to the dock.
5. The trial court erred in impliedly holding that the dock was within the area specified by the easement and by equating the dock with the recreational area defined by the easement. CP 15, ¶ 2.
6. The trial court erred in not ordering the dock removed after finding it is an impediment to the use of the easement and thus must be a violation of the restrictive covenant, absent agreement by all parties as to its use.
7. The trial court erred in considering the DeBord declaration.
8. The trial court erred in granting summary judgment where there is an issue of fact with regard to whether the dock is a permissible use by the servient estate.

B. Issues on Appeal.

1. Where the language of the instrument unambiguously defines the physical extent and the scope of use of an easement and restrictive covenant for lake access, did the trial court err in extending use and ownership rights beyond the defined bounds to a dock that did not exist when the instrument was drawn; which lies outside of the physical area of the easement; and is over State-owned aquatic lands which carry a statutory requirement that docks are to be owned only by the owner of the property that directly adjoins the dock-site?

2. Where the language of the easement and restrictive covenant do not grant an ownership interest in the lake bottom over which the dock is built or in the land appurtenant to it; and where RCW 79.105.430 prohibits permission to build a dock over State-owned lake bottom except to the owner of the land appurtenant to the proposed dock, and also prohibits the transfer of title of a dock separate from the sale of the adjoining land, did the trial court err in granting the Respondent easement-holders joint, full ownership of the dock?

3. Where the terms of the easement are unambiguous, did the trial court err in trying to determine the intent of the grantor; and did the trial court further err by failing to strike an irrelevant declaration either as to that irrelevant intent or because it was filled with inadmissible hearsay?

4. Should Respondents' attorneys' fee award be vacated if Appellant prevails on appeal?

5. Should Appellant be awarded attorney fees for trial and/or appeal if he prevails?

III. STATEMENT OF THE CASE.

A. Underlying Facts

Randy Adams and his family live at 318 Lake Sutherland Road, which is Lot 4 of a short plat of land on Lake Sutherland, Clallam County, a short drive from Port Angeles. CP 108, p. 4:24-25 (Adams Dep.); CP 238 (Deed). Margareta Greaves was the original owner of the larger parcel from which Lot 4 was short-platted along with three other adjoining lots. CP 189 (short plat), App. A. The short plat was done for the purpose of selling the lots. CP 157. In developing the short plat, Mrs. Greaves consulted with a real estate agent, Mrs. DeBord, and an attorney, Gary Colley. As part of the short plat, Mrs. Greaves had Mr. Colley draft an easement of access and use and associated covenants which provided the other three lots access to Lake Sutherland for recreational purposes to enhance their sale value. CP 190-193, App. B, "Use Grant." The short plat and Use Grant were signed, acknowledged and then recorded. CP 189, 190.

Lot 4 has a long narrow neck of land 50 feet wide by 423 feet long extending from the southeast portion of the property to the shore of Lake Sutherland. CP 189, App. A. The Use Grant grants an access easement to owners of Lots 1, 2, and 3 for foot traffic along this long neck to a narrow strip of Lot 4 that is 50 feet wide and 75 feet long and abuts the lakeshore, where State ownership begins. This lakefront-abutting portion of the

property is “reserved and dedicated to the recreational use of all of the owners of the above-described parcels [Lots 1-4 of the short plat].” CP

191. The Use Grant provides for access as follows:

1. Access. The road access identified as Lake Sutherland Road upon the face of the above-described short plat is hereby dedicated as a nonvehicular easement for ingress and egress to the owners of the above parcels to allow for access to that portion of Lot 4 depicted upon said short plat, which is located in the southeast corner of said Lot 4, and is an area approximately 50 feet wide by 423 feet long **with its southern terminus being Lake Sutherland**. This dedication shall not be in derogation of any other rights which may now exist for the use of said Lake Sutherland Road by any person.

In addition to the above described access, there is hereby further dedicated a nonvehicular easement for ingress and egress to the owners of the above parcels to allow for access to Lake Sutherland. This dedicated access shall be located upon that portion of Lot 4 depicted upon said short plat which is located in the southeast corner of said Lot 4 and is an area approximately 50 feet wide and 423 feet long with its southern terminus being Lake Sutherland. This dedication shall not preclude the owner of Lot 4 from any development upon that above-described portion of Lot 4 subject to this easement so long as sufficient area is preserved for said nonvehicular ingress and egress to Lake Sutherland.

2. Use. **A portion of Lot 4** of the above-described short plat being an area approximately 50 feet wide and 75 feet long and described as the southerly 75 feet **of said Lot 4**, is hereby reserved and dedicated to the recreational use of all of the owners of the above-described parcels. This dedication is to allow for the joint use and enjoyment of Lake Sutherland and its immediately adjoining upland property as described in this dedication. The owners of the above parcels shall not place any improvements upon or make any use of said dedicated area that are inconsistent with the intent of preserving the area for recreational enjoyment.

CP 190-192 (emphasis added). The right of access thus terminates at the shoreline of Lake Sutherland. Similarly, the right of use does not extend beyond Lot 4’s boundaries.

The lots were all originally sold by Mrs. Greaves in January 1989.

CP 176, 149. None of the current owners was an original purchaser of a lot. Tim and Lynn Fraser purchased Lots 2 and 4 in 1989 and built their home on Lot 4. CP 196-197. The Frasers were the first to build on their lot and the first to live on their property full time. CP 177. After building their home in the early 90's, they also built the deck and dock. CP 196 - 197 (Fraser Dep.). To build the dock, Mr. Fraser obtained permits to place pilings in the lake on which to build the dock. CP 197, p. 8:2-10. Mr. Fraser testified that he asked each of the other lot owners to participate in building the deck within the 50 x 75 easement area. CP 197-98, p. 8:16-9:9. He also sought the other lot owners' participation in building the dock in the lake. *Id.* None of the other owners wanted to help pay for or build either the deck or the dock, except for one day's worth of help by Mr. Frick on Lot 3 to help lay down the decking. CP 198, p. 9:3-9; CP 199, p. 13:5-16.

Mr. Fraser testified that, after the dock was completed, he discussed with the other lot owners that "the dock was owned by me [Fraser] and used by permission." CP 198, p. 9:10-14; 199. No one disputes that Fraser built and paid for the dock. Mr. Fraser summarized this in his February 16, 2006 letter where he stated: "the easement for use was a walking path to the beach with use of the upland (decking) area only and did not include the dock." CP 205. Consistent with this history, Mr. Fraser allowed the owners of Lots 1 and 3 to use the dock with his express permission. CP 198 – 200. Thus, from 1989 to 1993, the other lot owners used the easement and beach access intermittently, and used the dock by

permission. *Id.*

The properties have changed hands a number of times over the years. The current owner of Lot 1, Nancy Vanshur, took ownership on May 14, 1993. CP 206, Vanshur Dec. From 1995 to 2006, the Vanshurs used the dock seasonally to moor their boat and paddleboat. CP 208. Mr. Fraser, the original owner of Lots 2 and 4, has testified that this use was permissive. CP 198 -200. On October 10, 1997, the Frasers sold Lot 4 to Ann Rosencrantz and Marguerite Baker. On December 1, 1998, the Frasers sold Rosencrantz and Baker Lot 2, and the Kerbs, the current owners of Lot 2, purchased it from Rosencrantz and Baker on July 6, 2005. CP 178 and CP 228. In July 2004, Rosencrantz and Baker sold Lot 4 to Randy Adams to live there with his wife and children and have his work space as a full-time glass sculpture artist. CP 153 (Adams Dec.), 108-109 (Adams Dep.), and 238 (Deed).¹ Randy and his family have lived on the property as their residence since July, 2004. CP 153.

The Kerbs were aware when they purchased the property, and signed off on as part of the sales documents, that the dock use was permissive and day use only, CP 227, 229,² and shortly thereafter that Adams claimed ownership of the dock. Despite this knowledge, Larry

¹ Technically, Charles and Ruth Adams purchased Lot 4 from Baker and Rosencrantz in 2004 and later placed the property in trust for Randy. CP 153. Randy selected and negotiated sale of the property because it is his family home and work space. CP 109-10.

² The "Remarks" section of the listing agreement for Lot 2 attached to Mr. Kerbs' declaration states: "This property comes with easement rights for lake access on Lots 4. **Per seller, the dock is day-use only.**" CP 227 (emphasis added). This is echoed in the only item contained in the Addendum/Amendment to Purchase and Sale Agreement.

Kerbs' Declaration states that they mistakenly "presumed [they] would be as though we jointly owned the dock and designated area of Lot 4, with the owners of Lots 1, 3, and 4." CP 225. John and Cindy Bradford, the current owners of Lot 3, purchased it on October 2, 1998. CP179 and 231. The Bradfords also purchased the lot under the erroneous representation of the listing party that there was "shared lake frontage, dock, picnic area and beach." CP 231.³

The house on Lot 4 was vacant for almost a year before Adams bought it and moved in the summer of 2004. *See* CP 112, p. 19:16-19. Several friends of the Vanshur sons, who Randy stopped while they were driving a vehicle down the "non-vehicular easement," told him that, because the house had been vacant "they had just gotten into the convenient habit of violating the easement." CP 112, p. 19:4-19. This habit apparently did not stop once Randy and his family arrived.

After moving in Randy had problems with unauthorized use of the easement, including vehicular access and use of the dock for parties and drinking by unaccompanied teenaged children as well as unsupervised use by nonresident invitees; there was, "for the first couple of weeks [after moving in the summer of 2004], a flood, a constant flood of friends of [the

³ The variations in descriptions of the lake access and dock use in the sales promotional materials illustrates 1) the need for prospective buyers to check out what they can, such as the public records delineating the bounds of an easement; and 2) why Washington law places the burden on buyers to follow through on disclosures or representations made by sellers. *See Alejandro v. Bull*, 159 Wn.2d 674, 689-90, 153 P.3d 864 (2007); *Puget Sound Service Corp. v. Dalarna Management Corp.*, 51 Wn. App. 209, 752 P.2d 1353 (1988).

Vanshur boys] coming down to the dock. There were three occasions when they drove down.” CP 112, p. 19:24-20:2. *See* CP 154. Randy attempted to work out the issues of dock use with his neighbors, but his several efforts at compromise and accommodation, unfortunately, were not successful. CP 114-115; CP 155:20-22; CP 141, 142 (letters).

Because of concerns with his father’s ultimate liability as dock owner and his inability to get cooperation from the neighbors to solve the problems (including signed waivers of liability which were refused), CP 155, ¶¶ 1 & 3,⁴ (Adams Dec.); CP 114, p. 28 – CP 115, p. 29 (Adams Dep.), Randy sought assistance from Gary Colley, the attorney who originally drafted the Use Grant. CP 143. Randy also discussed the issues with the original purchaser of Lot 4 and builder of the dock, Tim Fraser. CP 154. Randy learned that Mr. Colley many years earlier had provided a legal opinion that the dock was not covered by the easement and was constructed outside of the area described in the easement, and therefore was completely controlled by the Lot 4 owner. CP 157-158. Randy also understood that along with the ownership of the dock, he was responsible for care and maintenance, as well as the liability for the dock. CP 115 and 155.

In spring 2006, Randy performed necessary repairs to deteriorating portions of the deck and dock. CP 155. As part of the repairs, Randy

⁴ “I have no problem in granting permissive use of the dock if I receive a release and hold harmless from the users and am able to enforce reasonable times of use and prevent the storage of personal property on the dock.” CP 155, ¶ 3.

removed most of a section of walkway connecting the dock to the shore.

Id. In its place, he put a narrow gangplank, gate, and locked the dock. *Id.*

The modifications actually allowed for broader access to the lakeshore itself while safeguarding the dock. CP 155. *See* CP 148, App. H (2007 enlarged photo of dock); CP 40, App. I (enlarged photo of dock).

B. Procedural Facts.

On May 8, 2006, Respondents⁵ filed their Complaint seeking a judicial declaration that Adams was not “the sole owners or sole users of the dock.” CP 249, Complaint, ¶ 3.3. Respondents also sought injunctive relief compelling Adams to permit access to the dock as well as damages for restoring the dock to its original condition. CP 249-250. Adams’ Answer denied all claims and asserted as an affirmative defense ownership of the dock, including ownership of the dock pursuant to RCW 79.105.430. CP 257-59.

On July 6, 2007, the Respondents filed for summary judgment seeking declaratory judgment as to the ownership and use of the dock and a permanent injunction prohibiting the owner of Lot 4 from restricting use of the dock. CP 174-240. The motion also sought summary judgment on the issue of prescriptive easement. *Id.*

On July 18, 2007, Adams filed his opposition to the motion for summary judgment, an objection to the declaration of Linda DeBord, and

⁵ Respondents on appeal and plaintiffs below are the current owners of Lots 1, 2, and 3, John and Cindy Bradford, Lawrence and Christine Kerbs, and James and Nanci Vanshur, collectively “Respondents”.

a cross-motion for summary judgment seeking a judicial declaration that Adams is the sole owner of the dock. CP 151-168 (cross-motion and response) and CP 255-56 (Objection). Adams objected to the DeBord declaration because 1) the statements in the declaration were hearsay; and 2) extrinsic evidence may not be considered in determining the intent of the grant where the language of an easement or restrictive covenant is unambiguous. CP 90; CP 255-56.

The Respondents filed their response to Adams' summary judgment motion and reply to his opposition to Respondents' motion for summary judgment on July 31, 2007. CP 100-150. They were all heard by Commissioner Knebes on August 10, 2007, and recorded by audio tape. *See I RP.*

1. Commissioner's Summary Judgment Ruling, August 2007.

Commissioner Knebes' memorandum decision was filed August 23, 2007. CP 96-99, App. G. He found there were questions of fact as to easement by prescription and as to any damages alleged, and no party has challenged this ruling. CP 97.⁶ Although the Commissioner found there were no issues of fact preventing resolution as to whether the Adams are the sole owners and users of the dock, CP 97, his opinion did not formally decide the issue of ownership. Rather, he simply granted the motion with regard to all lot owners' full use of the dock and enjoined any actions by Adams that barred or limited Respondents' use. CP 99.

⁶ Respondents later voluntarily dismissed their claims for prescriptive easement and damages in June, 2008, permitting the appeal to proceed. CP 23-24 and 21-22.

Commissioner Knebes' opinion states the following undisputed facts:

1. Marguerite Greaves was the common owner of all four lots and her intent in granting an easement to provide for lake access and recreational use of the lake was to enhance the value of each of the parcels. CP 96.

2. The Commissioner found that access and use rights of owners of Lots 1, 2 and 3 to the 50 x 75 foot lakefront portion of the Lot 4 for recreational purposes was granted by the easement that was duly recorded in 1987 and amended in 1992.

3. No improvements inconsistent with such access and use can be constructed by any lot owner. CP 98-99.

4. The Frasers built the dock "attached to the deck at the end of the recreational area." CP 97.

5. The dock is appurtenant to the land. CP 98.

The Commissioner also held he could look to the surrounding circumstances at the time the covenants were created to interpret the restrictive covenants. CP 98. And while the Commissioner did not specifically decide if the language of the Use Grant was ambiguous, he nevertheless looked to extrinsic evidence to determine intent. Based on that evidence, he concluded that, if Greaves had wanted to preserve the right to Lot 4 to build a dock on the end of the recreation property, she could have reserved that right in the covenants. CP 98-99. He also found that it was the intent of Greaves that the lot owners "work together so that

they could jointly use and enjoy Lake Sutherland” and that the covenants implied a sharing of costs associated with any upkeep or improvements to the recreation area as well as “an agreement concerning such issues,” CP 99, even though there is no such language in the Use Grant. The Commissioner also concluded that who built and paid for the dock was of no consequence.

2. Superior Court’s September 18, 2007, Revision of Summary Judgment.

Adams filed a timely motion for revision. CP 93 and 89-91. The motion stated it was not seeking revision of the ruling relating to the prescriptive easement issues or damages claims. CP 93. Adams argued that the Commissioner erred in extending the easement’s rights and construing the covenants so as to preclude the owner of Lot 4 from constructing a dock for his own use outside of the bound specified in the Use Grant. CP 89-90. Adams also argued that the issue of ownership was unresolved, which left open the untenable position that the owner of Lot 4 must forever maintain the dock and assume the liability that goes with it, while having no control over it. CP 90-91.

On September 18, 2007, Judge Wood entered an Order Granting Summary Judgment and Injunction. CP 82-83. The Order granted all four lot owners joint use and enjoyment of Lake Sutherland on and from the 50 foot by 75 foot piece of property, and the full use of the dock . *Id.* The Order granted Respondents’ request to enjoin the owner of Lot 4 from preventing or prohibiting Respondents, their families, and invitees from

full use and enjoyment of the defined area and the dock. *Id.*

The trial court also issued a memorandum opinion explaining his order on revision. CP 85-87, App. E. Like the Commissioner's opinion, Judge Wood found that the owner of Lot 4 paid for and built the deck and the dock. CP 87. Likewise, he found that the easement was for the recreational use and enjoyment of Lake Sutherland and that no owner was allowed to construct improvements that were inconsistent with the grant of that easement and use. CP 85. Judge Wood concluded as a matter of law that the "dedication clearly prohibits any use which inhibits or curtails that purpose." CP 86.⁷ Then, in his written memorandum opinion, Judge Wood held that the dock interfered with the use of the other lot owners. CP 86. But after determining that the dock impedes access and use under the Use Grant, Judge Wood then ruled, not that the interfering structure should be removed, but that the owners of Lots 1, 2, and 3 have a right to full use of the dock. Why? Because "the dock adjoins the land; is within the area contemplated for the recreational use and enjoyment of all owners; and joint use of the recreational area defined in the dedication cannot occur if one party is allowed to construct improvements and use the improvements to the exclusion of the others." CP 86.⁸ Judge Wood also

⁷ The court articulated the issue to be decided as "... does construction of said improvement interfere with the recreational use of the lake by the other owners in violation of the Declaration of Access and Use Covenants." CP 86. Put another way, the court was simply required to address whether the use of the servient property is proper and the improvement is legal under the terms of the grant.

⁸ Judge Woods' finding that the dock is within the area of use is contrary to the Commissioner's finding that the dock is built outside of the recreational area defined in the Use Grant. CP 87.

held that, once it was built, access to the dock cannot be restricted. CP 87.

**3. Superior Court's November 29, 2007
Reconsideration Order to Address Ownership.**

Like the Commissioner's ruling, Judge Wood's initial ruling did not explicitly decide the issue of ownership and the liability and responsibility that goes with ownership. CP 85-87. Adams therefore filed for reconsideration. CP 79-81, 72-74, 58-60. The motion sought specific revisions pertaining to the issue of whether the dock is owned by Adams and that any use and access rights exist only so long as the dock is retained. CP 58-60, 72-74, and 79-81. Judge Wood requested a hearing on October 5, 2007, CP 66, and Respondents filed response papers. CP 62-65.

The hearing was held October 12, 2007, CP 46, but the recording was inadequate and did not allow for transcription. At the hearing, Judge Wood requested additional briefing on the subject of ownership of the dock, specifically requesting 1) if a determination of ownership was appropriate on summary judgment, 2) if the previously entered Order should be amended to reflect the amended covenants' definition of "owner", and 3) additional information regarding attorney's fees. CP 45-46. Respondents submitted briefing on November 2, 2007. CP 45-54.

On November 29, 2007, Judge Wood filed a new memorandum decision that also addressed attorney's fees. CP 32-35, App. F. The trial court held that the Use Grant implied that, once an improvement is built within the dedicated area, it becomes itself a part of the dedicated area,

available for joint use and enjoyment by all lot owners. CP 32. The trial court thus held that, once constructed, the party constructing the improvement does not control the use nor does it retain a right to remove it without the consent of all of the property owners, and that the ownership and control of the improvement transfers to all lot owners. CP 32 -33. The Court also held that the Use Grant requires agreement by all parties as to whether future improvements may be constructed or removed. CP 33.

Notably, and contrary to the September 18 opinion, the trial court found that the dock had been constructed without request for a contribution to the improvement and that it was open for the joint use of all lot owners until Adams restricted use, CP 33, contrary to Mr. Fraser's testimony submitted by Adams.

4. Judgment and Fee Award.

On March 6, 2006 the trial court issued a Memorandum Opinion awarding plaintiffs \$16,947.60 in attorney fees as the prevailing party under the enforcement terms of the Use Grant. CP 28-31. The court entered the Judgment for Costs and Fees for \$17,269.66 on June 20, 2008, CP 14-16, and associated findings of fact and conclusions of law. CP 17-20.

The trial court entered the final Judgment on July 20, 2008, which states the final terms of the ruling on summary judgment and the injunction. CP 14-16, App. D. The key provisions of the judgment are paragraphs 2 and 3, which in effect supersede the prior decisions. They state as follows at CP 15:

2. Plaintiffs are entitled to recreational use of the dock appurtenant to the land on lot 4. Ownership and control of the dock is with all the owners. All of the owners are to be involved with decisions regarding the dock. Agreement among the owners is necessary with regard to upkeep and improvements of the recreation area, including the dock

3. Defendants are permanently enjoined from preventing or prohibiting Plaintiffs, their families and invitees from recreational use and enjoyment of the 50 foot x 75 foot parcel of lot 4, the recreational area, the deck and the dock. Invitees must be accompanied by the lot owners. Any use by invitees must be in conjunction with the owner's use. Renters may use the property to the same extent as the owner (landlord), provided that only one party, either owner or tenant, may have the right of use of the property at one time.

IV. ARGUMENT.

A. Summary of Argument.

The trial court's ruling on Adams' motion for reconsideration explicitly granted Respondents, the owners of Lots 1, 2 and 3, ownership rights in the dock where none existed before. The trial court erred in interpreting the easement and restrictive covenant to grant ownership rights in the owners of Lots 1-3. The trial court made an unjustifiable "leap" from first recognizing *access and use* rights to the dock under the easement and restrictive covenant, to granting *ownership* rights in the dock to the owners of Lots 1-3. A restrictive covenant, by definition, is not an affirmative grant of interests in land, but a restriction placed on the owner of land as to his or her free use of the land. *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986). Likewise, an easement is not a grant of ownership. Rather, an easement is "a right, distinct from ownership, to use in some way the land of *another*, without compensation." *Id.*, emphasis added.

It is well-settled property law that the non-possessory interests represented by the easement burdening Lot 4 entitle the owners of Lots 1-3 to a lesser degree of control over the areas affected by the easement than the fee owner of Lot 4, Adams, who has a possessory interest:

The owner of [an easement] ... is not entitled to the protection which is given to those having possessory interests. The fact that the owner of an easement is not deemed to have a possessory interest in the land with respect to which it exists indicates a *lesser degree of control* of the land than is normally had by persons who do have possessory interests. Thus a person who has a way over land has *only* such control of the land as is *necessary* to enable him to use his way and has no such control as to enable him to exclude other from making any use of the land which does not interfere with his.

RESTATEMENT (FIRST) OF PROPERTY § 450 (1944) (emphasis added).

In this case, the language of the Use Grant is unambiguous and, thus, under Washington law must be construed within the scope of the ordinary meaning of its words.

The first vice in the ultimate ruling below was to hold that the Use Grant impressing Lot 4 with the easement of access and use conveyed an ownership interest in the dock. Neither the text of the Use Grant nor the nature of an easement permit or require this result. The statute that governs dock rights over State lake beds expressly forbids it. Since it is contrary to law, that decision must be vacated.

On summary judgment, the undisputed facts and applicable law require holding that Adams owns the dock. The only issue is whether the holder of an easement is entitled to extend it onto the servient estate's property (chattel or real) beyond the bounds expressed in the instrument,

to increase his or her use without the express agreement of the servient estate owner, confirmed in writing and duly recorded? The rule in this state is no – this unilateral extension may not be done. *Sanders v. City of Seattle*, 160 Wn.2d 198, 214-215, ¶ 27, 156 P.3d 874 (2007) (“the extent of the easement, like any other conveyance of rights in real property, is fixed by the language of the instrument granting the right.”); *Little-Wetzel Co. v. Lincoln*, 101 Wash. 435, 445, 172 P. 746 (1918) (“If the initiation of the right to convey water over the land of another originated as an easement, no subsequent user would convert the right into a stronger title.”). The rule applies here to prevent what could otherwise lead to the unraveling of the basic aspects of easement law.

B. Standard of Review.

The appellate court engages in the same inquiry on the same record as the trial court when reviewing an order of summary judgment. *Denaxas v. Sandstone Court*, 148 Wn.2d 654, 662, 63 P.3d 125 (2003). Summary judgment is appropriate if the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). The court must consider all facts submitted and all reasonable inferences drawn from them in the light most favorable to the nonmoving party. *Denaxas*, 148 Wn.2d at 662. The court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion as to the facts and correct application of the applicable law entitles the moving party to the requested relief. *Id.*

Here, the court reviews all assignments of error *de novo*.

Review of the entitlement to a fee award is *de novo*. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).

Review of the amount of attorney's fees is under abuse of discretion.

Skinner v. Holgate, 141 Wn. App. 840, 857, 173 P.3d 300 (2007); *Fluke Capital & Mgmt. Servs. v. Richmond*, 106 Wash.2d 614, 625, 724 P.2d 356 (1986). Adams challenges only Respondents' entitlement to fees if Adams prevails on appeal.

C. Easement Law and Why the Use Grant Does Not Convey an Ownership Right To The Dominant Estates, Lots 1, 2 and 3.

The Use Grant filed with the Greaves Short Plat creates an easement that burdens Lot 4 (the servient estate) to the benefit of Lots 1, 2, and 3 (the dominant estates). The Use Grant also imposes restrictive covenants that burden all four lots of the Greaves Short Plat vis-à-vis each other. While courts acknowledge the clear differences between easements and the restrictive covenants, the rules of interpretation follow the same logic. Nevertheless, some distinctions are important.

An easement is a "right, distinct from ownership" that allows the dominant tenant "to use in some way the land of another, without compensation." *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 778 P.2d 135 (1986). This is basic property law, as shown by the long-time formulation quoted *supra* in the RESTATEMENT. RESTATEMENT (FIRST) OF PROPERTY § 450 (1944).

An easement thus is simply a limited "interest in land." It is never

an “estate in land” and also is nonpossessory. 4 POWELL ON REAL PROPERTY, § 34.02[1] p.34-10 and 34-11 (2002 - Update). Professor Stoebuck describes it this way:

Like estates in land, [easements] are property rights or interests. Unlike estates, they do not give those who hold them the full spectrum of rights known as “possession” but, rather, what are sometimes called “usufructuary” rights. They are rights that were contained within the right of possession and carved out of it by the owner of the possessory estate: sticks taken out of the bundle.

17 STOEBUCK & WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW, § 2.1 (2008). Moreover, due to the nature of the easement right and the importance of stability for both the dominant and servient landowners, neither the boundaries nor the character of the easement can be changed without the express written consent of all parties, which is then recorded, as discussed *infra*.

Washington law uniformly holds that the extent of an easement, like any other conveyance of rights in real property, is fixed by the language of the instrument granting the right. *Olympic Pipe Line Co. v. Thoeny*, 124 Wn. App. 381, 393, 101 P.3d 430 (2004), *review denied*, 154 Wn.2d 1026, 120 P.3d 577 (2005). An easement must be construed strictly in accordance with its terms in an effort to give effect to the express intentions of the parties, as stated in the instrument. *Sanders v. City of Seattle, supra*, 160 Wn.2d at 214-215. *Mielke v. Yellowstone Pipeline Co.*, 73 Wn. App. 621, 622, 870 P.2d 1005 (1994). A party therefore is privileged to use another's land **only** to the extent expressly allowed by the easement. *Id.* The intent of the original parties to an

easement is determined from the instrument as a whole. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981). If the plain language is unambiguous, extrinsic evidence will not be considered. *City of Seattle v. Nazarenius*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962). “The consent of all interested parties is prerequisite to the relocation of an easement.” *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 854, 351 P.2d 520, 525 (1960).

Division Two thus recently recognized that “Judicial relocation of established easements ... would introduce uncertainty in real estate transactions” and “invite endless litigation between property owners as to whether a servient estate owner may relocate an existing easement without a dominant estate owner's consent.” *Crisp v. VanLaecken*, 130 Wn. App. 320, 325-326, 122 P.3d 926, 929 (2005). The principle articulated by this Court is well reasoned and holds true regardless of whether it is the servient estate or the dominant estate that seeks to relocate, expand, or contract an established easement – uncertainty in real estate transactions is undesirable and any judicial proclamation that creates it is bad public policy. Even the minority view that is articulated in the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8(3) (2000) and rejected in *Crisp* precludes relocation or variation of a fixed easement without the express consent of the servient estate, or here, Adams. *Id.* In line with this reasoning, the Supreme Court in *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003), held that an easement can only be expanded “if the express terms of the easement manifest a clear intention

by the original parties to modify the initial scope based on future demands” and such intent is clearly manifest on the “face of the easement.” *Sunnyside Valley Irr. Dist.*, 149 Wn.2d at 884.

In short, there is no basis to expand or enlarge the Use Grant here without the written, recorded consent of the owner of Lot 4 – Adams. This requires reversal of the trial court and entry of summary judgment in favor of Adams’ ownership of the dock.

A restrictive covenant (sometimes referred to as a negative easement), in contrast, places limitations on the manner in which an owner or holder of an interest in land can use that land, but does not grant the holder of the dominant tenant the right to use or access the land. *City of Olympia, supra*, 107 Wn.2d at 229. Thus, “A negative easement consists solely of a veto power over use,” but not over ownership. POWELL ON REAL PROPERTY, VOL. 4 SEC. 34.02[2] p.34-15 [2002]. Simply put, an easement allows its holder to go upon the land owned by another and a restrictive covenant allows the holder to limit the owners’ use of the land. *Dickson v. Kates*, 132 Wn. App. 724, 731, 133 P.3d 498 (2006), *citing* 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW, §§ 2.1, 3.1, at 80, 123 (2004).

Easements must be conveyed in the form of a deed that complies with the statute of frauds. RCW 64.04.010 and 020. Generally, the interpretation of a deed is a mixed question of fact and law. *Roeder Co. v. Burlington N., Inc.*, 105 Wn.2d 567, 571-72, 716 P.2d 855 (1986). Where the parties agree either that the language is unambiguous, or ambiguous,

but agree on all the material historical facts, summary judgment is appropriate. *See, e.g., Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 736, 844 P.2d 1006 (1993). However, where there is an ambiguity and the parties disagree as to the facts and circumstances surrounding the formation of an easement or restrictive covenant, summary judgment would not be appropriate.

D. The Language of the Easement and Restrictive Covenant is Clear and The Use by the Servient Land Owner is Not Contrary to the Terms of the Use Grant.

Turning first to the easement, the language granting the easement is clear and unambiguous. The Use Grant gives an appropriate description of the extent of the bounds of the easement and defines the easement's scope clearly. In a nutshell, the Owners of Lots 1, 2, and 3 are granted foot access along a 50 foot by 423 foot section of Lot 4 that extends along the eastern bounds from Lake Sutherland road to Lake Sutherland. Importantly, the granting language clearly states that the "terminus" is Lake Sutherland. The language of the Use Grant also grants an easement for foot access and use of a 50 foot by 75 foot portion of the southerly corner of Lot 4 for "the recreational use of all lot owners." CP 191. The Use Grant specifically states that it is for "the joint use and enjoyment of Lake Sutherland." CP 191.

The terminus of the easement for recreational use and access is not only clearly articulated, but also necessary because Greaves was not and could not be the owner of the lake or its bed. Rather, ownership of the

lake and its bed resides in the State of Washington. WASH. CONST. art. 17, §1. Further, while Greaves could arguably transfer riparian rights to the owners (to fish, sun bathe, and swim in the lake), under statute, the right to build a dock cannot be transferred outside of the ownership of the adjoining upland property, here Lot 4. RCW 79.105.430(2)(c).

As with the language granting a nonvehicular easement for access, there is no ambiguity in the location of the easement described in the use section of the Use Grant or the use allowed. Each lot owner has the right of access to, and the use and enjoy for recreational purposes of 50 feet of shoreline upland to a point 75 feet from the lake. Consistent with the language granting access up to (but not over) the shoreline, the language of the Use Grant conveying an easement to the southerly 75 feet of Lot 4 does not, and cannot, convey rights to any property beyond the area defined by the language. The easement simply allows the owners of each lot joint use of the lake frontage for recreational purposes.

Like the description of the physical extent of the easement, there is no ambiguity in any of the terms related to use in the Use Grant. Determination of whether a written instrument is ambiguous is a matter of law to be determined by the court, and such a determination is subject to independent appellate review. *Victoria Tower Partnership v. Lorig*, 40 Wn. App. 785, 788, 700 P.2d 768 (1985). In construing the document that grants an easement, the duty of the court is to ascertain and give effect to the intention of the parties as determined from the language of the entire document; and only if an ambiguity exists should the court consider the

circumstances of the parties at the time of the grant. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981); *Green v. Lupo*, 32 Wn. App. 318, 321, 647 P.2d 51 (1982).⁹

Interpretation of restrictive covenants likewise centers on the intent of the parties by giving the language “its ordinary and common meaning”; but the Court “will not read the covenant so as to defeat its plain and obvious meaning.” *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-696, 974 P.2d 836, 843 (1999). The context rule may apply to permit a *limited* use of extrinsic evidence but *not* evidence that contradicts any terms in the instrument or vary or modify a written word, or purport to show “a party’s unilateral or subjective intent as to the meaning of a contract word or term.” *Id.* Even if the term “improvements” or “recreational use” required interpretation, each is clearly used within the document consistent with its common usage and meaning. For example, “recreational use”, as it is commonly understood, consists of activities like sunbathing, swimming, picnicking, and similar activities that are personal, relaxing, fun, and noncommercial in nature. Recreation is undertaken for the simple pleasures and enjoyment of the activity (or lack of activity). WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (1993) defines recreation as: “refreshment of strength and spirits after work; *also* : a means of refreshment or diversion.” CAMBRIDGE DICTIONARY OF

⁹ *Accord, Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 894, 20 P.3d 500, 503 (2001), quoting, *Rupert v. Guntner*, 31 Wn. App. at 31, 640 P.2d 36). *See also, Green v. Lupo*, 32 Wn. App. at 321, 647 P.2d 51. *Schwab v. City of Seattle*, 64 Wn. App. 742, 751, 826 P.2d 1089, 1093 (1992).

AMERICAN ENGLISH, 2ND ED. (2007), defines recreation as: “something done for pleasure or relaxation, or such activities generally.” Similarly, “improvement” in the context of the Use Grant clearly means an improvement to land such as a house, utility line, well, concrete slab, or the like.

What is not addressed by the instrument on its face, quite understandably, is whether any structures or improvements by the owner of Lot 4 which lie outside of the physical bounds described by the easement are or can be limited or restricted or prohibited. The dock, of course, is outside the bounds defined by the Use Grant. And the Use Grant, like any easement, does not purport to control property rights outside its bounds. Nor could it.

The Frasers constructed the dock, which is situated wholly over State-owned aquatic lands, but attaches to the deck built within the bounds of the easement at the waterline. The dock does not encroach physically on the grant of the easement. The dock is not built “upon” the easement as articulated by the clear language of the Use Grant. Because the dock is not located within the bounds of the easement that are clearly set forth in the Use Grant, the dock and its use are not covered by the Use Grant’s grant and cannot be controlled by it. As such, under the Use Grant, the Adams are free to use, restrict use, and generally do with the dock what they want.

Importantly, while the trial court found on summary judgment that the existence of the dock impairs the joint use and enjoyment of the land,

the Respondents did not submit any evidence that shows the dock actually impedes joint use as contemplated in the Use Grant. Noticeably absent from the record is any allegation that the dock restricts access, use and enjoyment of Lake Sutherland. Rather, the allegations are that Respondents have enjoyed the use of the dock in the past with the permission of the owners of Lot 4 and want to continue to use the dock in the future. While it is certainly understandable why Respondents want to continue to use the dock and also acquire ownership rights in the dock, the facts, taken in the light most favorable to the nonmoving party, do not show that the dock actually impairs, impacts, restricts or in any way negatively affects the respondent lot owners' use and enjoyment of the easement that is actually granted. The facts before the trial court on summary judgment actually show that the easement holders still have usable shoreline extending for approximately 47 of the 50 feet of shoreline. CP 155. There is also a section of low front beach access to the lake in front of which the dock does not extend. *See* CP 155 and CP 236-237 (photos); CP 148 and 40, enlarged photos, App. H & I. That area of beach access is likewise shown in the photos to be accessible by boat. In fact, Mr. Fraser testified that he would pull his boat up on shore. CP 200. There is also an area of shallow water now protected by the dock from waves.¹⁰

¹⁰ Even if the scope of the easement or restrictive covenant is held to extend beyond the bounds specified in the Use Grant (which Adams contends is contrary to established law), the issue then becomes a question of permissible use. If permissible use is the determining issue the trial court erred in granting summary judgment, or it erred in the scope of its remedy, as argued in § H. The error with regard to summary judgment is

E. The Dock Does Not Violate the Restrictive Covenants.

Since the dock does not encroach on the physical bounds of the easement in any manner, is located over land that is not burdened by the restrictive covenants within the Use Grant, and is a use consistent with the recreational purpose because it provides some enhancement by reducing wave impact on the shoreline, the restrictive covenants also do not apply.

F. Easements do not Convey Ownership: Adams Owns the Dock and May Keep or Remove it at His Discretion.

While there may be material issues of fact in dispute regarding the interpretation and extent of the easements at issue *if* the language of the grant is found to be ambiguous, there are no issues of material fact with regard to the issue of ownership and control of the dock, at least with regard to whether the Adams must retain the dock. The trial court simply erred in granting an ownership interest in the dock to the owners of Lots 1, 2 and 3. CP 86.

As stated above, an easement is not an ownership interest in land.

City of Olympia v. Palzer, supra, 107 Wn.2d at 229; *Kutschinski v.*

Thompson, 101 N.J. Eq. 649, 138 A.569, 573 (1927). An easement is only

because “The owner of a servient estate has the right to use his land for any purpose not inconsistent with its ultimate use for reserved easement purposes,” *Colwell v. Etzell*, 119 Wn. App. 432, 439, 81 P.3d 895 (2003), *citing Beebe v. Swerda*, 58 Wn. App. 375, 384, 793 P.2d 442 (1990). *See also, Thompson v. Smith*, 59 Wn.2d 397, 407-408, 367 P.2d 798 (1962). As such, whether the use of the property undertaken by the servient estate owner (here construction of the dock) was proper under the grant of easement is a question of fact that turns on the extent and mode of use. *Thompson v. Smith, supra*, 59 Wn.2d at 408; *Cole v. Lavery*, 112 Wn. App. 180, 185, 49 P.3d 924 (2002). And the question, “does the dock restrict or impede the recreation use of the other lot owners (Lots 1, 2 and 3),” cannot be answered without resorting to a determination of the facts.

a limited, nonpossessory “interest in land” and “clearly is never an “estate in land.” POWELL ON REAL PROPERTY, VOL. 4 SEC. 34.02[1] p.34-10 and 34-11. 17 STOEBUCK & WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 2.1 (2008); *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 848, 351 P.2d 520 (1960). Here, there is no dispute that the Use Grant conveys an easement, not an ownership right.

Because the easement grants no ownership interest in the land, there is no lawful basis to award an ownership interest in the dock, which is at most a fixture to the land beyond the reach of the easement. Further, it is undisputed that the earlier owner of Lot 4 built and paid for the dock. Respondents have not claimed adverse possession of the dock. Nor could they. The dock is built over State-owned aquatic lands in a navigable lake to which the Washington State Constitution vests ownership rights in the State. WASH. CONST. art. 17, §1 states that ownership of the “beds and shores of all navigable waters in the state” is vested in the State.

The right to build a dock on a navigable lake is controlled by statute and long settled common law and belongs to the owner of the adjoining upland property, *Adams*. See RCW 79.105.430 and WAC 332-30-144. The riparian or littoral rights are specific rights of an upland owner and “[i]t is necessary to remember, ... that riparian rights do not stem from the ownership of a portion of the lake bed, but are an incident to the ownership of the shore, whether the lake be navigable or nonnavigable.” *Botton v. State*, 69 Wn.2d 751, 754, 420 P.2d 352, 355 (1967), citing *Johnson v. Seifert*, 257 Minn. 159, 100 N.W.2d 689

(1960). The *Botton* court further explained that, vis-à-vis the State, “there are no riparian rights in the owners of lands bordering on navigable waters of this state.” *Id*, citing *Hill v. Newell*, 86 Wash. 227, 230, 149 P. 951 (1915); *State v. Sturtevant*, 76 Wash. 158, 163, 135 P. 1035, 138 P. 650 (1913). WASH. CONST. art. 17, § 1.

Thus, in order to vest an ownership right in the dock in the dominant estate, Lots 1, 2, and 3, the court would have to grant an ownership interest in the land itself, which is contrary to all settled law on easements, ignores the plain language of the grant, and is contrary to RCW 79.104.430.

Respondents argued on summary judgment that the dock is appurtenant to and affixed to the land and, thus, they have use *and* ownership rights to the dock as a necessary extension of the easement so that they may continue to use and enjoy the easement as intended. CP 183 and 188. But the existence of the dock is not a “necessary extension” of the easement. In fact, Judge Wood held this dock is an *impediment* to access to Lake Sutherland and appurtenant to the easement. If it is considered an impediment and a violation despite being outside the bounds, it necessarily is contrary to the Use Grant and must be removed by Adams to the extent it blocks or interferes with any lake access from the shore – unless the Respondents can agree with Adams on reasonable use and release and hold harmless agreements to address liability issues.

Moreover, a judicial remedy granting ownership and control of the dock exceeds what is allowed by law. It also fails to consider and apply

all of the necessary issues relating to ownership. Simply because property is affixed in some manner to land does not make it a fixture. A ‘fixture’ is still nothing more than a chattel, which has been annexed to and becomes a part of realty even though it retains its separate character and may be removed and become personalty again. *Allied Stores Corp. v. North West Bank*, 2 Wn. App. 778, 783, 469 P.2d 993, 996 (1970), *citing Frost v. Schinkel*, 121 Neb. 784, 238 N.W. 659, 77 A.L.R. 1381 (1931); 1 G. THOMPSON, REAL PROPERTY § 55 (1964).

Here the dock is simply lumber that has been assembled into the current structure. While courts can find that building materials combined with labor become ‘improvements’ to real property, irretrievably losing their separate identity, such is not always the case. *Id.*, *citing Rogers v. Gilinger*, 30 Pa. 185, 72 Am.Dec. 694 (1858). Whether an ‘improvement’ is also a ‘fixture’ is a mixed question of fact and law. *Id.* *citing*, 1 G. THOMPSON, REAL PROPERTY § 55 (1964). Generally, a chattel becomes a fixture if: (1) it is actually annexed to the realty, (2) its use or purpose is applied to or integrated with the use of the realty it is attached to, and (3) the annexing party intended a permanent addition to the freehold. *Glen Park Associates, LLC v. Dept. of Revenue*, 119 Wn. App. 481, 487-488, 82 P.3d 664 (2003), *citing Dept. of Revenue v. Boeing*, 85 Wn.2d at 667-68, 538 P.2d 505 (1975).

In this case, if the dock is a fixture, then ownership must rest in the owner of the upland property. RCW 79.105.430;¹¹ WAC 332-30-144.

¹¹ RCW 79.105.430(1) states (emphasis added):

Likewise, if the dock is a chattel, then the law presumes that the person who placed it for his or her own purposes retains ownership. Specifically, Washington law recognizes that when a person with no interest in the land (such as Adams' lack of interest in the lake bed under the water) affixes an article thereto in the furtherance of his own purposes (*i.e.*, the dock), the *presumption* is that he intends to reserve title to the chattel in himself. *In re Arbitration Agreement Between Liberty Lake Sewer District No. 1 and Liberty Lake Utilities Company, Inc.*, 37 Wn. App. 809, 683 P.2d 1117, 683 P.2d 1117 (1984), *citing Strong v. Sunset Copper Co.*, 9 Wn.2d 214, 230, 114 P.2d 526 (1941); *Dunsmuir v. Port Angeles Gas, Water, Elec. Light & Power Co.* 24 Wash. 104, 117, 63 P. 1095 (1901).¹²

Here the dock is not built over the land burdened by the easement or restrictive covenant; it is built over a State-owned lake in which the original builder and current owner have no interest. Mr. Fraser, who built the dock, is the only person who can provide testimony with regard to his intent to retain title to the dock. He testified that he intended to, and

(1) ***The abutting residential owner*** to state-owned shorelands, tidelands, or related beds of navigable waters, other than harbor areas, may install and maintain without charge a dock on the areas if used exclusively for private recreational purposes and the area is not subject to prior rights, including any rights of upland, tideland, or shoreland owners as provided in RCW 79.125.400, 79.125.460, 79.125.410, and 79.130.010. ***The dock cannot be sold or leased separately from the upland residence.*** The dock cannot be used to moor boats for commercial or residential use. This permission is subject to applicable local, state, and federal rules and regulations governing location, design, construction, size, and length of the dock. Nothing in this subsection (1) prevents the abutting owner from obtaining a lease if otherwise provided by law.

¹² *Accord, Cherokee Pipe Line Co. v. Newman*, 593 P.2d 90, 92 (Okl. 1979); *Sulphur Springs Valley Elec. Coop., Inc. v. Tombstone*, 1 Ariz. App. 268, 401 P.2d 753, 758 (1965). See also 5 A. CASNER, AMERICAN LAW OF PROPERTY § 19.10 (1952).

believed he did, retain ownership of the dock. Mr. Fraser's testimony is corroborated by the fact that, regardless of the method of construction whether on pilings or on floats, the dock exists at the pleasure of the State. The State may require its removal at any time if it determines the dock interferes with navigability. *See* RCW 79.105.430(3). Therefore, if the dock cannot be considered a "fixture" to the land owned by the owners of Lot 4, then the dock is simply the personal property of the owner of Lot 4, who paid for and built it, and for which title is confirmed by RCW 79.105.430(1) & (2). Subsection two provides that even a mooring buoy may only be installed and maintained by "the abutting upland owner."¹³ Subsection (e) of the WAC is in accord, as it prohibits the abutting upland owner from transferring control. *See* WAC 332.40.144.¹⁴

¹³ RCW 79.105.430(2)(c) states:

- (2) The abutting residential owner to state-owned shorelands, tidelands, or related beds of navigable waters, other than harbor areas, may install and maintain a mooring buoy without charge if the boat that is moored to the buoy is used for private recreational purposes, the area is not subject to prior rights, including any rights of upland, tideland, or shoreland owners as provided in RCW 79.125.400, 79.125.460, 79.125.410, and 79.130.010, and the buoy will not obstruct the use of mooring buoys previously authorized by the department.
- (c) The buoy cannot be sold or leased separately from the abutting residential property. The buoy cannot be used to moor boats for commercial or residential use, nor to moor boats over sixty feet in length.

¹⁴ The permission [for a dock] shall apply only to the following:

- (a) An 'abutting residential owner,' being the owner of record of property physically bordering on public aquatic land and either used for single family housing or for a multifamily residence not exceeding four units per lot.

- (c) A 'private recreational purpose,' being a nonincome-producing, leisure-time, and discretionary use by the abutting residential owner(s).
- (4) Limitations.

Vesting ownership rights in the dock thus violates the statute and the regulation controlling docks on State-owned lakes because it transfers ownership separate from title, transfers permission to build and maintain the dock to someone other than the abutting upland property owner, and creates multi-family use and ownership of the dock in non-abutting land owners.

RCW 79.105.430 is applicable in both evaluating the validity of the trial court's remedy and evaluating who is the owner of the dock. There is no dispute that the dock is situated over State-owned land under the lake. Because State land cannot be adversely possessed, use of that land is granted through permission or a license. Here, the license to build the dock was granted to the Frasers by State and local authorities. Mr. Fraser testified that he obtained permits to construct the dock, CP 197, and that he paid for all of the materials himself and performed the labor. CP 197-199. Mr. Fraser and his successors in interest could build and transfer their interests in the dock since the statute grants only the owners of abutting residential land to State-owned shoreline the right to build and maintain a dock for private recreational purposes. RCW 79.105.430(1). Under RCW 79.105.430, a dock constructed over the state owned aquatic lands cannot be leased or sold separate from the upland residence so that Judge Wood did not have legal authority to grant ownership in the dock to

(e) The permission is not transferable or assignable to anyone other than a subsequent owner of the abutting upland property and is continuously dependent on the nature of ownership and use of the properties involved.

Respondents. *Id.*

The primary objective of any statutory construction inquiry is “to ascertain and carry out the intent of the Legislature.” *State v. Montejano*, ___ Wn. App. ___, ___, 196 P.3d 1083, 1084 (2008); *citing Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). The courts look first to the text of a statute to determine its meaning. *Griffin v. Thurston County*, ___ Wn.2d ___, ___, 196 P.3d 141, 143 (2008), *citing Kilian v. Atkinson*, 147 Wn.2d 16, 20-21, 50 P.3d 638 (2002). The Court may also discern plain meaning from related provisions and the statutory scheme as a whole. *Id.*, *citing, Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). If statutory language is unambiguous, the Court need not employ canons of statutory construction. *Id.*, *citing, Kilian*, 147 Wn.2d at 20, 50 P.3d 638. The goal in construing a statute is to implement the legislature’s intent as gleaned from the statute’s plain language and ordinary meaning. *See, e.g., State v. JP.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). *In re Personal Restraint of Dalluge*, 162 Wn.2d 814, 820, 177 P.3d 675, 678 (2008).

Even assuming for the sake of argument that the term “owner” in the statute could include the owners of dominant estates that have easement and use rights in the abutting upland property, such an interpretation fails here because the Amendment to the Use Grant at issue here specifically limits the definition of Owner to *one family per lot*. As such, even under the most expansive interpretation, the Use Grant itself limits the owner of Lot 4 to one family, Adams. As such, Adams or a

subsequent purchaser are the only ones who can own the lot, the right to build a dock in front of the lot, and the dock itself.

G. A Legal Use of an Interest in an Estate Does Not Create a New Right for Another Holder of an Interest in the Same Estate.

It has long been the law in Washington that the dominant estate holder cannot enlarge or expand the easement. *E.g., Little-Wetzel Co. v. Lincoln, supra*, 101 Wash. At 445: “It is the rule that the owner of the dominant estate can make no larger use of his easement or change its character in any way so as to increase the burden on the servient estate.” The trial court judgment in *Little-Wetzel Co.* that allowed an expansion of water rights and imposition of “an additional service on the servient estate” was therefore reversed. Reversal is also required here for the unjustified expansion of the Use Grant.

Similarly, in 1933 the Washington Supreme Court addressed the issue of whether improvements made by a dominant estate holder to an easement created new rights for the benefit of the servient owner. In that case, the Court was required to decide if a “man-made” lake created by an impoundment across a normally dry stream vested a right in the servient estate to require the dominant estate to maintain the improvement. The Court held it did not. *Drainage Dist. No. 2 of Snohomish County v. City of Everett*, 171 Wash. 471, 479-480, 18 P.2d 53 (1933). The same must also be true here where the roles of the dominant and servient estates are reversed. The owner of a dominant estate has no right to insist on the continuation or maintenance of an artificial condition built by and for the

benefit of the servient estate simply because the dominant estate also incidentally benefits from the artificial condition, particularly where, as here, the artificial condition is *outside* the bounds of the easement that gives the dominant estate its limited rights of access and use. *See Id.* “The servient estate has a right to confine the owner of the dominant one strictly within his rights” and hold the dominant estate to the limitations of the easement and covenants. *Id.* That is what Adams seeks here.

H. The Court’s Remedy Is Overly Broad.

While courts generally have broad latitude to craft injunctive relief in affirmative and negative easement cases, modification or more often removal of the offending obstruction has been the appropriate relief. *Bauman v. Turpen*, 139 Wn. App. 78, 94, 160 P.3d 1050, 1058 (2007). *See also, Foster v. Nehls*, 15 Wn. App. 749, 753, 551 P.2d 768, 772 (1976) (land is generally considered a unique commodity which cannot be adequately replaced by money, and equity should intervene to restore land to the full enjoyment of the rightful owner). Even where removal is not preferred, no case in Washington has granted the court authority to transfer title of property, either realty or personalty, to cure a violation or impingement of a restrictive covenant or easement.

At most, the proper remedy is removal of the dock to allow for the same access to the lake by all lot owners. A less restrictive remedy would require the owner of the land who has the sole right to build such a dock to modify the dock to allow for greater access and use of the defined easement while still allowing the servient estate free use of the owned

land. For example, the swim area behind the dock could be enlarged by moving the dock further out from shore, or by reducing the size of the dock. Likewise, access to the dock could be by a removable gangplank.

I. The Court Erred in Considering Linda DeBord's Declaration.

The language of Judge Wood's memorandum shows he considered Linda DeBord's declaration to evaluate the intent of Greaves in drafting the Use Grant. Specifically the court held that the language of the Use Grant "contemplates a joint and equal use" and that the word 'dedication' "strongly indicates an intent that the area described be used only for that dedicated purpose." CP 86. But these conclusions necessarily stem from the DeBord declaration, which is in large part hearsay, double hearsay, or extrinsic evidence to alter the terms and meaning of the Use Grant.

Adams objected to the declaration as inadmissible and argued it must be disregarded for purposes of summary judgment because it violates ER 802 and 805. Many of the statements also lack foundational testimony and clearly are not based on personal knowledge as required by ER 602.¹⁵ Mrs. DeBord did not draft the Use Grant and she cannot speak to Mrs. Greaves' subjective intent in having Gary Colley draft the document. Similarly, Mrs. DeBord's declaration also states that the concept of the dock belonging only to Lot 4 was "ridiculous," even though the attorney who drafted the Use Grant was taking that position. Mrs. DeBord

¹⁵ For example, Ms. DeBord states in paragraph 16 of her declaration that "although the Frasers built the dock, and may have felt they owned it, anything built on the access from Lot 4 was intended for the joint use of the lot owner's". CP 171.

reasoned that the interpretation was wrong because “the lot is appurtenant to the shared shoreline and because it is contrary to Marguerite Greaves’ instructions and intentions.” CP 172. Mrs. DeBord’s declaration does not provide sufficient foundation to show that she has personal knowledge on which to base the statements without resorting to hearsay statements from the late Marguerite Greaves. As such, there is little information in the declaration that is relevant to the issues and admissible.

Even more important, the evidence, even if admissible for other reasons, is being submitted for the sole purpose of showing the generalized intent of the grantor beyond the words in the instrument. But such evidence is only admissible “to determine the meaning of [the] specific words and terms used in the covenants, and *only* in the case of ambiguity will the court look beyond the document to ascertain intent from surrounding circumstances” *Hollis v. Garwall, Inc., supra*, 137 Wn.2d at 696. The Supreme Court made very clear that “admissible extrinsic evidence does *not* include: evidence of a party’s unilateral or subjective intent as to the meaning of a contract word or term; evidence that would show an intention independent of the instrument; or evidence that would vary, contradict or modify the written word.” *Id.*, 137 Wn.2d at 695 (emphasis by the Court).¹⁶

Because the DeBord declaration violates all these principals, to the

¹⁶ See also *In re Marriage of Schweitzer*, 132 Wn.2d 318, 326-27, 937 P.2d 1062 (1997); *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569-70, 919 P.2d 594 (1996); *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851 (1992).

extent that the superior court relied on this declaration - and it must have because no other extrinsic evidence supporting the plaintiffs' interpretation of the covenant or the easement was submitted - the trial court committed reversible error and this document cannot be used on review. *Id.*

J. Respondents' Fee Award Should be Vacated and Adams Awarded Fees for Trial.

If this Court agrees that the trial court erred in granting summary judgment on the issue of ownership and vesting an ownership right in the dock to the owners of Lots 1, 2 and 3, or erred in extending the clear scope and extent of the Use Grant to the dock, then Respondents' award of attorney's fees under the terms of the Use Grant must be vacated. In that case, or if he otherwise prevails, Adams is entitled to an award of trial court attorney fees since the Use Grant provides for a fee award to the prevailing party.¹⁷

K. Request for Fees on Appeal.

Adams is also entitled to an award of its fees on appeal if he prevails since the Use Grant provides for a fee award. RAP 18.1.¹⁸ Adams therefore requests an award of fees if he prevails on appeal.

¹⁷ The Use Grant provides: "4. Enforcement. If the parties hereto or any of them ... shall violate or attempt to violate any of the covenants and dedications herein contained, it shall be lawful for any other person or persons owning any real property situated in said short plat ... to prosecute a proceeding at law or equity ... and recover ... an award of reasonable attorney's fees to the prevailing party."

¹⁸ RAP 18.1(a) provides: "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court."

V. CONCLUSION.

Adams respectfully requests the Court hold that, consistent with basic principles of easements, the Use Grant means what it says. The easement for Respondents' access and recreational use of Lake Sutherland is just that, an easement that is limited to the scope and bounds stated in the Use Grant; the easement does not extend beyond the shoreline to the dock; Adams owns the dock consistent with RCW 79.105.430, the Use Grant, and Washington property law; and, consequently, any use of the dock by Respondents is, and must be, by permission of Adams, not by right under the Use Grant. Respondents' attempt to extend and expand the scope and bounds of the Use Grant cannot be done under the law.

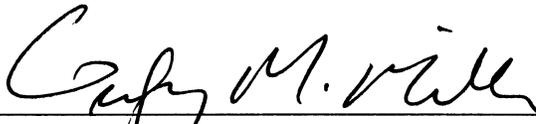
Adams further requests that, if the Court reaches the issue of whether the dock interferes with Respondents' right to the access and use granted by the Use Grant, that this Court hold either: 1) since it lies outside the bounds of the easement, as a matter of law the dock does not interfere with that access and use and Respondents have no remedy under the Use Grant; or 2) there is a disputed question of material fact as to whether the dock interferes with their access and use under the Use Grant and the Use Grant entitles them to a remedy notwithstanding the fact the dock is outside the bounds of the Use Grant, and this requires trial. However, as to the second possibility that the dock could potentially, after a trial, be found to interfere with such access and use, Adams requests a ruling that, as a matter of law, the only potential legal remedy available to Respondents is to require Adams to remove or reduce the dock such that

their access and use of the lake shore via the Use Grant is not unduly restricted.

Adams also requests that the trial court's fee award to Respondents be vacated and that Adams be awarded his reasonable fees for both the trial court and on appeal.

DATED this 27th day of January, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By: 
Gregory M. Miller, WSBA No. 14459
Counsel for Appellant Adams

APPENDICES

APPENDIX A: Greaves Short Plat (CP 189) A-1

APPENDIX B: Declaration of Access and Use
Covenants (CP 19-93).....B-1 – B-4

APPENDIX C: Amendment to Declaration of Access
and Use Covenants (CP 194-95).....C-1 – C-2

APPENDIX D: Judgment, June 20, 2008 (CP 14-16)..... D-1 – D-3

APPENDIX E: Memorandum Opinion and Order Re:
Motion for Revision, September 18, 2007
(CP 85-87)..... E-1 – E-3

APPENDIX F: Memorandum Opinion Re Motion for
Reconsideration, November 29, 2007 (CP 32-35)..... F-1 – F-4

APPENDIX G: Memorandum Opinion, August 23, 2007
(CP 96-99)..... G-1 – G-4

APPENDIX H: Enlarged Photo of Dock, 2007 (CP 148) H-1

APPENDIX I: Enlarged Photo of Dock, 2007 (CP 40).....I-1

APPENDIX A

NOTE

574181

SHORT PLAT

A PORTION OF THE NW 1/4, NW 1/4 SEC. 21, T. 30 N, R. 8 W, WM.
CLALLAM COUNTY, WASHINGTON

for
M. GREAVES

LEGEND

- SET REBAR (CAP "LS
DIPS WHITE WOODEN
GUARD POST.
- FOUND " CONDUIT (CAP
"LS 12223"
- △ FOUND " I.P.
- ▨ 30' EASEMENT FOR
INGRESS, EGRESS
& UTILITIES
- ▬ EXIST. 15' RIGHT OF
WAY PER A.F. 419120.

NOTES:

1. THE EAST LINE OF GOV. LOT 4 (WEST LINE OF GOV. LOT 3) WAS HELD AS SHOWN ON THE SURVEY AS RECORDED IN VOL. 9 OF SURVEYS, PG. 18, RECORDS OF CLALLAM CO., WA.
2. THE "S" OF LAKE SUTHERLAND RD. ON THIS SHORT PLAT IS THE "S" OF AN EASEMENT BASE FOR INGRESS & EGRESS AS PER A.F. 410429 & A.F. 419120.

DESCRIPTION

PARCEL "A"

THAT PORTION OF GOVERNMENT LOT 4, SECTION 21, TOWNSHIP 30 NORTH, RANGE 8 WEST, W.M., CLALLAM COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS, BEGINNING AT THE NORTHEAST CORNER OF SAID GOVERNMENT LOT 4, THENCE EAST ALONG THE NORTH LINE OF SAID LOT 4 A DISTANCE OF 431.25 FEET; THENCE SOUTH 89°12' WEST TO THE WEST LINE OF SAID GOVERNMENT LOT 4, THENCE SOUTH 89°12' WEST ALONG THE WEST LINE OF SAID GOVERNMENT LOT 4 TO THE POINT OF BEGINNING.

PARCEL "B"

THE WEST 30 FEET OF THE EAST 800 FEET OF THE WEST 1,024 FEET OF GOVERNMENT LOT 4, SECTION 21, TOWNSHIP 30 NORTH, RANGE 8 WEST, W.M., CLALLAM COUNTY, WASHINGTON.

PLAT DESCRIPTION

BEGINNING AT THE NORTHWEST CORNER OF SECTION 21, TOWNSHIP 30 NORTH, RANGE 8 WEST, W.M., THENCE ALONG THE NORTH LINE OF SAID SECTION SOUTH 60°15'11" EAST A DISTANCE OF 605.00 FEET; THENCE SOUTH 89°12' WEST A DISTANCE OF 147.00 FEET MORE OR LESS TO THE SHORELINE OF LAKE SUTHERLAND; THENCE ALONG SAID SHORELINE SOUTH 02°02' WEST A DISTANCE OF 64.70 FEET; THENCE NORTH 89°12' WEST A DISTANCE OF 431.25 FEET MORE OR LESS; THENCE NORTH 89°12' WEST A DISTANCE OF 147.00 FEET; THENCE SOUTH 89°12' WEST A DISTANCE OF 431.25 FEET TO THE POINT OF BEGINNING. SITUATE IN CLALLAM COUNTY, STATE OF WASHINGTON.

SURVEYOR'S CERTIFICATE

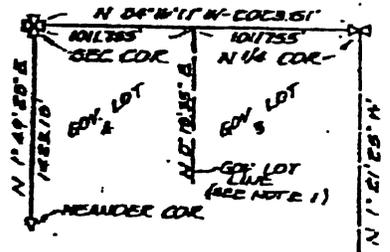
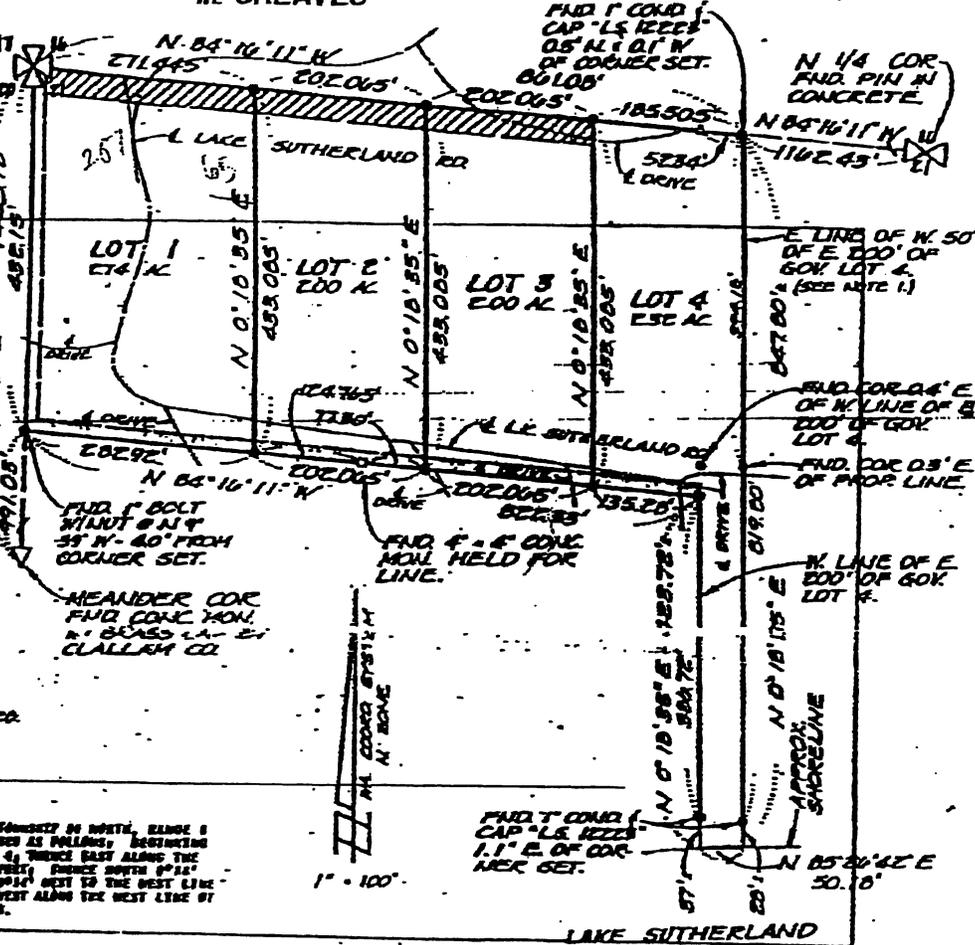
I, ROBERT G. WINTERS, REGISTERED AS A LAND SURVEYOR BY THE STATE OF WASHINGTON, CERTIFY THAT THIS PLAT IS BASED ON AN ACTUAL SURVEY OF THE LAND DESCRIBED HEREIN, CONDUCTED BY ME OR UNDER MY SUPERVISION; THAT THE COURSES AND DISTANCES ARE SHOWN HEREON CORRECTLY.

ROBERT G. WINTERS, P.L.S.
11/11/11

EXHIBIT 1 SHEET 1 OF 2

R.H. WINTERS Co. INC.
SURVEYING & MAPPING

409 W. WASH.
P.O. BOX 1042
SEQUIM, WA.
PH: 325-2262



SECTION SUBDIVISION

APPENDIX B

589349

8-
FILED IN CLALLAM COUNTY
BY Mary Greaves
REGISTERED CLERK OF CLALLAM COUNTY

1987 APR 13 AM 10:42

DECLARATION OF ACCESS AND USE COVENANTS

VOL 767 PAGE 449
CLALLAM COUNTY AUDITOR
CLALLAM COUNTY, WASH.
BY Mary Greaves REGISTERED CLERK

MARGUERITE GREAVES, as the common owner of

through 4 of Short Plat recorded in Clallam County Auditor's Office under Volume 16, page 11 of Short Plats, being a portion of the northwest quarter of the northwest quarter, Section 21, Township 30 North, Range 8 West, Willamette Meridian, Clallam County, Washington, hereby makes the following covenants and commitments for the benefit of the above-described property:

All restrictions, limitations and conditions hereinafter set forth shall be observed by and be binding upon the original covenantor and each buyer, personal representative, grantee, successor in interest and assigns to the above-described property.

1. Access. The road access identified as the Lake Sutherland Road upon the face of the above-described short plat is hereby dedicated as a nonvehicular easement for ingress and egress to the owners of the above parcels to allow for access to that portion of Lot 4 depicted upon said short plat, which is located in the southeast corner of said Lot 4, and is an area approximately 50 feet wide by 423 feet long with its southern terminus being Lake Sutherland. This dedication shall not be in derogation of any other rights

h/h/h/S

VOL 767 PAGE 449

CA

EXHIBIT 2

B-1

190

which may now exist for the use of said Lake Sutherland Road by any person.

In addition to the above described access, there is hereby further dedicated a nonvehicular easement for ingress and egress to the owners of the above parcels to allow for access to Lake Sutherland. This dedicated access shall be located upon that portion of Lot 4 depicted upon said short plat which is located in the southeast corner of said Lot 4 and is an area approximately 50 feet wide and 423 feet long with its southern terminus being Lake Sutherland. This dedication shall not preclude the owner of Lot 4 from any development upon that above-described portion of Lot 4 subject to this easement so long as sufficient area is preserved for said nonvehicular ingress and egress to Lake Sutherland.

2. Use. A portion of Lot 4 of the above-described short plat being an area approximately 50 feet wide and 75 feet long and described as the southerly 75 feet of said Lot 4, is hereby reserved and dedicated to the recreational use of all of the owners of the above-described parcels. This dedication is to allow for the joint use and enjoyment of Lake Sutherland and its immediately adjoining upland property as described in this dedication. The owners of the above parcels shall not place any improvements upon

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or make any use of said dedicated area that are inconsistent with the intent of preserving said area for recreational purposes.

3. Term of Covenants. These covenants and dedications are for the benefit of and run with land and all parties who gain title to or possession of the land above described are bound by these covenants. These covenants shall run with the land perpetually and are binding on the grantor and all persons claiming under her and they may not be changed in whole or in part without the express written concurrence of all of the owners of said short plat.

4. Enforcement. If the parties hereto or any of them, their heirs, assigns or successors in interest shall violate or attempt to violate any of the covenants and dedications herein contained, it shall be lawful for any other person or persons owning any real property situated in said short plat, or having a vendee's interest under a real estate contract to purchase any real property situated in said short plat to prosecute a proceeding at law or equity against the person or persons violating or attempting to violate any such covenants to prevent him or them from so doing and/or to recover damages arising from such violations which damages shall include an award of reasonable attorney's fees to the prevailing party.

SS 89949

5. Invalidation of any of these covenants by a judgment of any court of competent jurisdiction shall not affect any of the other provisions which shall remain in full force and effect.

IN WITNESS WHEREOF, the undersigned has on this 8 day of April, 1987, affixed her signature.

Marguerite Greaves
MARGUERITE GREAVES

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

On this 8 day of April, 1987, before me, Amy T. Wisecarver, a Notary Public of said State, duly commissioned and sworn, personally appeared MARGUERITE GREAVES, known to me (or proved to me on the oath of _____) to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Amy T. Wisecarver
NOTARY PUBLIC in and for the
State of California
Residing at OAKLAND, CA
My Commission Expires: 11-12-90

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APPENDIX C

667010

FILED FOR RECORD AT THE REQUEST

Lynn Colley
RECORDED

1992 APR 15 PM 3:23

AMENDMENT TO
DECLARATION OF ACCESS AND USE COVENANTS
VOL. _____ PAGE _____
MARY HORDYK, AUDITOR
CLALLAM COUNTY, WASH.

BY _____ DEPUTY

The undersigned as the common owners of Lots 1 through 4 of Short Plat recorded in Clallam County Auditor's Office under Volume 16, page 111 of Short Plats, being a portion of the Northwest Quarter of the Northwest Quarter, Section 21, Township 30 North, Range 8 West, Willamette Meridian, Clallam County, Washington, hereby amend that certain Declaration of Access and Use Covenants imposed upon the above-described property pursuant to a document recorded April 13, 1987 in Volume 767, page 449 through 452, under Auditor's File No. 589949, records of Clallam County, Washington, by adding to said Declaration of Access and Use Covenants the following provisions:

1. Definitions. The term "owner" or "owners" as used in the above-referenced Declaration of Access and Use Covenants for purposes of the Covenant paragraphs entitled Access and Use shall be limited to one single family per each of the four existing lots.

2. Subdivision. The four lots currently comprising the above-described short plat shall not be further subdivided for any purpose including sale or lease.

IN WITNESS WHEREOF, the undersigned have on this 24 day of March, 1992, affixed their signatures.

Tina Fraser
Tina Fraser

Lynn Fraser
Lynn Fraser

Michael Frick
Michael Frick

Gail Frick
Gail Frick

Jim Neville
Jim Neville

Angie M. Neville
Angie Neville

VOL 956 PAGE 211

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667010

JMC

STATE OF WASHINGTON)
) ss.
COUNTY OF CLALLAM)

On this 11th day of March, 1991, before me the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared TIM FRASER and LYNN FRASER, husband and wife, known to be the individuals named in and which executed the within and foregoing instrument; and they acknowledged to me that they signed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed the day and year first above written.

Robert R. Chamberlain
NOTARY PUBLIC in and for the
State of Washington
My Commission Expires: 3/23/93

STATE OF WASHINGTON)
) ss.
COUNTY OF CLALLAM)

On this 24th day of March, 1991, before me the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared MICHAEL FRICK and GAIL FRICK, husband and wife, known to be the individuals named in and which executed the within and foregoing instrument; and they acknowledged to me that they signed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed the day and year first above written.

Christine J. Harty
NOTARY PUBLIC in and for the
State of Washington
My Commission Expires: 8-15-92

STATE OF WASHINGTON)
) ss.
COUNTY OF ~~CLALLAM~~ PIECE)

On this 22nd day of February, 1991, before me the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared TIM NEVILLE and ANGIE NEVILLE, husband and wife, known to be the individuals named in and which executed the within and foregoing instrument; and they acknowledged to me that they signed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed the day and year first above written.



Cynthia A. Juskin
NOTARY PUBLIC in and for the
State of Washington
My Commission Expires: 4-9-94

VOL 956 PAGE 212

6717136

APPENDIX D

1 **SCANNED 3**

2 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
3 **IN AND FOR THE COUNTY OF CLALLAM**

4 JOHN RAYMOND BRADFORD AND
5 CINDY BRADFORD, HUSBAND AND
6 WIFE; LAWRENCE KERBS AND
7 CHRISTINE KERBS, HUSBAND AND
8 WIFE; AND JAMES VANSHUR AND
9 NINCI VANSHUR, HUSBAND AND
10 WIFE,

11 **Plaintiffs,**

12 **vs.**

13 **CHARLES AND RUTH ADAMS TRUST,**

14 **Defendant.**

NO. 06 2 00413 5

JUDGMENT

08 9 00762 4

FILED
CLALLAM CO CLERK
JUN 20 P 2 39
BARBARA CHRISTENSEN

15 **I. JUDGMENT SUMMARY**

- 16 A. Judgment Creditor: JOHN & CINDY BRADFORD; LAWRENCE AND CHRISTINE KERBS;
17 JAMES AND NINCI VANSHUR
18 B. Judgment Debtor: CHARLES AND RUTH ADAMS TRUST
19 C. Principal Judgment amount: \$16,947.60
20 D. Interest to date of Judgment: -0-
21 E. Post entry of Judgment interest at 12% per annum.
22 F. Costs in the amount of: \$322.06
23 G. Attorney for Judgment Creditor: CRAIG L. MILLER
24 H. Attorney for Judgment Debtor: GARY COLLEY

25 **JUDGMENT**

26 THIS MATTER having come before the undersigned Judge of the above-captioned
Court on Motions for Summary Judgment on August 10, 2007, the Court having previously
entered an Order Granting Summary Judgment and Injunction in favor of Plaintiffs on

JUDGMENT - 1
Vanshur - Adams
word/share-clm-vanshur-atty-fcc-judgmt 6-12-08

CRAIG L. MILLER
Attorney at Law
711 East Front Street, Suite A
Port Angeles, WA 98362
(360) 457-3349 - (360) 457-3379 (fax)

September 18, 2002, including an Order for payment of attorneys' fees, said Order having been amended on March 19, 2008 to read in its entirety as follows:

1. All four lot owners are entitled to joint use and enjoyment of Lake Sutherland on and from the 50 foot x 75 foot dedicated piece of property described in the covenants on the finger of land on lot 4, of the M. Greaves short plat, recorded at Volume 16 of short plats, page 11, under Auditor's file number 574181, records of Clallam County, Washington.

2. Plaintiffs are entitled to recreational use of the dock appurtenant to the land on lot 4. Ownership and control of the dock is with all the owners. All of the owners are to be involved with decisions regarding the dock. Agreement among the owners is necessary with regard to upkeep and improvements of the recreation area, including the dock.

3. Defendants are permanently enjoined from preventing or prohibiting Plaintiffs, their families and invitees from recreational use and enjoyment of the 50 foot x 75 foot parcel of lot 4, the recreational area, the deck and the dock. Invitees must be accompanied by the lot owners. Any use by invitees must be in conjunction with the owner's use. Renters may use the property to the same extent as the owner (landlord), provided that only one party, either owner or tenant, may have the right of use of the property at one time.

4. Under the covenants, Plaintiffs are entitled to attorney's fees for having to enforce them in a court of law. The amount of attorney's fees shall be decided after presentation by Plaintiffs' counsel of an affidavit regarding the attorney's fees incurred.

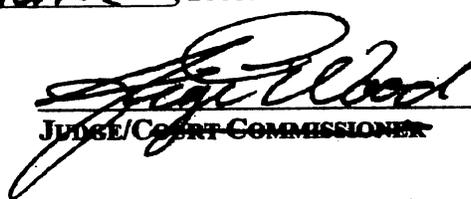
Said Notice of Presentation regarding attorneys' fees having been submitted together with findings of fact based upon this Court's Memorandum Opinion issued March 6, 2008,

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IT IS HEREBY ADJUDGED:

Plaintiffs are hereby awarded a Judgment for attorneys' fees of \$ 16,947.60 and costs in the amount of \$ 322.06, for a total judgment of \$ 17,269.66, plus interest thereon of TWELVE PERCENT (12%) per annum.

DATED THIS 20 day of June, 2008.

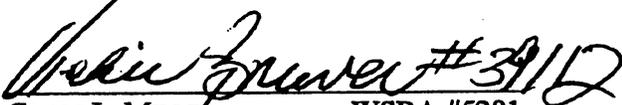


JUDGE/COURT COMMISSIONER

PRESENTED BY:

CRAIG L. MILLER, P.S.

BY:


CRAIG L. MILLER WSBA #5281
Attorney for Plaintiffs

APPENDIX E

SCANNED - 3

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**SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM**

JOHN RAYMOND BRADFORD and)
CINDY BRADFORD, husband and wife;)
LAWRENCE KERBS and CHRISTINE)
KERBS, husband and wife; and JAMES)
VANSHUR and NANCI VANSHUR,)
husband and wife,)
Plaintiffs,)
vs.)
CHARLES and RUTH ADAMS TRUST,)
Defendant.)

FILED
CLALLAM COUNTY
SEP 18 2007
2:43 p.m. ef
BARBARA CHRISTENSEN, Clerk

NO. 06-2-00413-5
MEMORANDUM OPINION
AND ORDER RE MOTION FOR
REVISION

On August 30, 2007 the Defendant filed a Motion for Revision of an opinion of Court Commissioner William Knebes dated August 23, 2007. The Court has reviewed the matter pursuant to RCW 2.24.050.

By a written document entitled "Declaration of Access and Use Covenants" Marguerite Greaves, the common owner of Lots 1 through 4 of the short plat at issue, dedicated a 50' by 75' piece of land abutting Lake Sutherland "to the recreational use of all of the owners." The dedication was for "the joint use and enjoyment of Lake Sutherland and its immediately adjoining upland property as described . . ." In addition, the language of the dedication made it clear that no improvements were to be made upon said area "that are inconsistent with the intent of preserving said area for recreational purposes."

E - 1

GEORGE L. WOOD
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

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It is clear from the language of the Declaration that the 50' by 75' area was dedicated for the main purpose of using and enjoying Lake Sutherland. The use and enjoyment of Lake Sutherland was accomplished by the dedication of an area of land referred to as the "adjoining upland property." The dedication clearly prohibits any use which inhibits or curtails that purpose.

The issue becomes whether a dock may be constructed on the lake directly in front of the 50' lake frontage to the exclusive use of only one owner, i.e. does the construction of said improvement interfere with the recreational use of the lake by the other owners in violation of the Declaration of Access and Use Covenants?

Clearly it does. As it exists now the dock extends into Lake Sutherland. To the extent of its dimensions it obstructs the use of the lake by the other property owners. The parties only have 50' of lake frontage and a dock of the size at issue here clearly limits the ability of the other owners to use and enjoy the lake as contemplated in the Declaration.

The next issue then concerns the right of the other owners to actually utilize the dock. The Court agrees with the reasoning of Commissioner Knebes. The language of the Declaration clearly contemplates a joint and equal use. It is noted that the Declaration uses the word "dedicated". A "dedication" strongly indicates an intent that the area described be used only for that dedicated purpose, in this case the joint use and enjoyment of Lake Sutherland. Joint use cannot occur if one party is allowed to construct improvements and use those improvements to the exclusion of the other owners. If such occurred, the use of the dedicated

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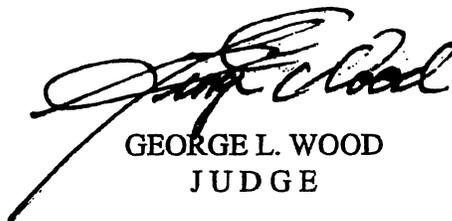
property by the other owners would be restricted by the extent of that improvement. Only when all parties enjoy the improvements can full use of the property for recreational purposes be assured.

Here the dock adjoins the land and is clearly within the area contemplated for the recreational use and enjoyment of all the owners, i.e. Lake Sutherland. All owners are entitled to its full use. The original builder of the dock may have been able to request the others to contribute toward the costs of the improvements, but once built, he and his successor have no authority to restrict its use to the exclusion of the other owners.

ORDER

Based upon the aforesaid Memorandum Opinion it is now, therefore, ORDERED that the Defendant's Motion for Revision filed August 30, 2007 is hereby denied.

DATED this 18th day of Sept., 2007.


GEORGE L. WOOD
JUDGE

E - 3

APPENDIX F

SCANNED- 4

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**SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM**

JOHN RAYMOND BRADFORD and)
CINDY BRADFORD, husband and wife;)
LAWRENCE KERBS and CHRISTINE)
KERBS, husband and wife; and JAMES)
VANSHUR and NANJI VANSHUR,)
husband and wife,)
Plaintiffs,)
vs.)
CHARLES and RUTH ADAMS TRUST,)
Defendant.)

FILED
CLALLAM COUNTY
NOV 29 2007
4:21 p.m. LF
BARBARA CHRISTENSEN, Clerk

NO. 06-2-00413-5

MEMORANDUM OPINION
RE MOTION FOR
RECONSIDERATION AND
ATTORNEY FEES

The Defendants filed a Motion for Reconsideration or in the Alternative to Amend Judgment on September 28, 2007. The Motion for Reconsideration was in reference to the Court's Memorandum Opinion and Order Re Motion for Revision filed September 18, 2007. Oral argument was heard on October 5, 2007 at which time the Court requested briefing on certain issues including ownership of the dock and reasonable attorney's fees. The parties filed their additional briefing on or before the due date of November 2, 2007.

With regard to ownership of the dock it is clearly implied within the covenants that once an improvement is built within the dedicated area it becomes itself a part of the dedicated area, available for the joint use and enjoyment of all the property owners. Once constructed, a party does not control the use of that improvement and it likewise follows that said party does not retain a right to remove it without the consent of all of

Memorandum Opinion
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GEORGE L. WOOD
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

NOTE

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the property owners. As a part of the dedicated area, ownership and control of the improvement is with all the owners.

Likewise it is unreasonable to suggest that the building of improvements can occur without the consent of all the owners. Improvements cannot be "inconsistent with the intent of preserving said area for recreational purposes". What constitutes an "inconsistent" use can only be a decision made by the owners who use the property.

The Court agrees with the reasoning of Commissioner Knebes in his Memorandum Opinion dated August 23, 2007 where he suggests that the covenants themselves imply that an agreement between the parties is necessary with regard to upkeep and improvements to the recreation area:

"Certainly the covenants imply a sharing of costs associated with any upkeep or improvements to the recreation area, but also in agreement concerning such issues."

It is the Court's finding that the dock and future improvements shall be governed by the agreement of the parties. The dock in question was built without a request for a contribution. However, until the Defendants restricted the use of the dock, it was clearly open for the joint use of all the property owners. All of the owners, therefore, should be involved with its future.

The Defendants have also raised an issue concerning the proposed order on summary judgment. The Defendants argue that the term "full use" is inappropriate and should be modified to read "reasonable use". The Court finds that "recreational use" is

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the proper term and should be inserted in paragraphs two and three of the proposed order.

The Defendants also argue with the use of the term "invitees" in paragraph three of the proposed order. The term "invitees" is appropriate so long as any invitees are accompanied by the owners. The use contemplated by the covenants does not give the owners a right to simply designate others to use the dedicated area. Any use by "invitees" must be in conjunction with the owner's use. In addition, renters may use the property to the same extent as the owner (landlord).

With regard to attorney's fees, paragraph four of the covenants provides for "an award of reasonable attorney's fees to the prevailing party". The Plaintiffs have substantially prevailed in their action to enforce the covenants and are the "prevailing party".

The covenants provide for the award of reasonable attorneys fees specifically in cases seeking to prevent violations or attempted violations of "any of the covenants and dedications herein contained". The Defendant is correct, therefore, in the assertion that any fees awarded must be related to enforcement of the covenants. The claim for a prescriptive easement does not fall within the purview of the covenants and Plaintiffs are not entitled to fees incurred in pursuing that claim.

The Defendant has not challenged the reasonableness of the rate charged. The question as to the time expended on the covenant issue, however, is in dispute. Plaintiff counsel alleges 80%, while defense counsel asserts "no more than 20%-25%". The

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difficulty with Plaintiffs position is a lack of specificity reflected in the invoices. Local Court Rule 0.7 provides as follows:

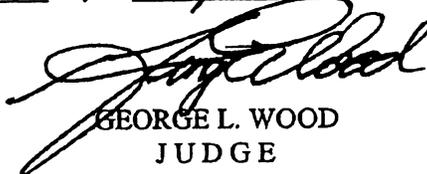
“Appointed counsel moving for the fixing or payment of fees, and counsel moving the Court to fix fees in any other case, shall itemize time, services rendered, and other detailed basis for the fees requested in affidavit form . . . the affidavit submitted by counsel who are not appointed by the Court shall be substantially in the form of Exhibit A-2.”

The above local rule is in conformity with case law which requires, among other factors, a detailed listing of the time and effort expended.

Based upon the general nature of the invoices submitted by Plaintiff it is impossible for the Court to make an informed decision as to what is reasonable. Clearly, a substantial portion of attorney time would have been devoted to the covenants. The declarations and depositions filed by Plaintiffs address not only historical use but also the existence of the covenants and the reference thereto in deeds and other documents. However, until the Court receives an affidavit in compliance with LCR 0.7, a ruling on the issue of fees cannot be made.

Based upon the rulings of the Court contained herein a new Proposed Order of Summary Judgment should be prepared and submitted upon presentation duly noted.

DATED this 29 day of Nov., 2007.


GEORGE L. WOOD
JUDGE

APPENDIX G

SCANNED-4

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SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

JOHN RAYMOND BRADFORD and)
CINDY BRADFORD, husband and wife;)
LAWRENCE KERBS and CHRISTINE)
KERBS, husband and wife; and JAMES)
VANSHURE and NANCI VANSHURE,)
husband and wife,)
Plaintiffs,)
vs.)
CHARLES and RUTH ADAMS TRUST,)
Defendant.)

FILED
CLALLAM COUNTY
AUG 23 2007
3:46 p.m. *[Signature]*
BARBARA CHRISTENSEN, Clerk

NO. 06-2-00413-5
MEMORANDUM OPINION

The Court has taken under advisement the Summary Judgment Motion by the Plaintiffs. This case concerns four parcels of real property created by a short plat in 1987. Plaintiffs are the owners of Lots 1, 2 and 3, and Defendant is the owner of Lot 4. Marguerite Greeves was the common owner of all four parcels of property. Her intent was to maximize the value of each of the parcels of property by creating access rights for all four lots to Lake Sutherland. The was done by easements and a Declaration of Access and Use Covenants that was recorded April 13, 1987, in Volume 677, page 449, under Clallam County Auditor's filed number 589949 (hereinafter covenants). The parties are second or third generation owners of each of their lots and each party bought with knowledge of the easements and covenants.

Lot 4 has an unusual shape in that there is a finger of land approximately 50 feet wide that projects down to Lake Sutherland. Plaintiffs' have access to Lake Sutherland across Lot 4 and down to the lake.

Paragraph 2 of the covenants provides an area approximately 50 feet wide and 75 feet long as the southerly 75 feet of Lot 4 reserved and dedicated to the recreational

Memorandum Opinion
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WILLIAM G. KNEBES
COMMISSIONER
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

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use of all the owners of the four parcels (hereinafter the "recreational area"). The owners promulgated an amendment to the covenants that was recorded April 15, 1992, in Volume 956, page 211 under Clallam County Auditor's file number 667010. The purpose of the amendment was to clarify that the term "owner" applied to one family per one lot for the purposes of the covenants.

The Frasers, original owners of Lot 4, built a dock attached to the deck at the end of the recreational area. Through the years the deck and dock have been shared by the various owners of the four lots until Defendant determined that the dock was separate from the real estate and therefore belonged to Defendant solely. Since that time, Defendant has barred the use of the other lot owners from the dock.

Plaintiffs Complaint requests a judicial declaration that Defendants are not the sole owners or users of the dock. Further, they request an injunction that would compel the Defendants to permit access by the Plaintiffs to the dock. They have an additional claim for damages and an Easement by Prescription. Finally, Plaintiffs request attorney fees pursuant to the terms of the covenants.

The Court denies any summary judgment as to an Easement by Prescription as there are material issues of fact that need to be heard. The same is true as to any claim for damages. The Court does not find any material issues of fact that preclude a decision concerning whether or not Defendants are the sole owners or users of the dock. Nor are there any materials issues of fact concerning the injunction request.

The Court's primary objective in interpreting restrictive covenants is to determine the intent of the parties. Mains Farm Homeowners Ass'n v. Worthington, 121 Wn. 2d 810, 815, 854 P. 2d 1072 (1993).

In Riss v. Angel, 131 Wn. 2d 612, 621, 934 P. 2d 669 (1997), the Court noted that historically Washington courts have held that restrictive covenants, being in derogation of the common law right to use land for all lawful purposes, will not be extended to any use not clearly expressed, and doubts must be resolved in favor of the

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free use of land. That case involved restrictive covenants in a subdivision and the Court held at page 623:

“The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court’s goal is to ascertain and give effect to those purposes intended by the covenants. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances. Mountain Park Homeowners Ass’n, 125 Wn. 2d at 344; Burton, 65 Wn. 2d at 622. The court will place ‘special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.’ Lakes at Mercer Island Homeowners Assoc., 61 Wn. App. at 181.”

In the present case, the parties are not the makers of the covenants and the Court’s goal is to ascertain and give effect to those purposes intended by the covenants. The Court can look to the evidence of the surrounding circumstances at the time the covenants were created, but the Court agrees with the Riss court that the purpose is to protect the collective interests of the land owners as opposed to applying rules of construction that favor the free use of land.

It is clear that the purpose of the covenants was to enhance the profitability of the entire parcel so that Marguerite Greeves could obtain the most money possible for her investment. To do that, she had to make each of the lots accessible to Lake Sutherland. That is why she dedicated a parcel of property 50 feet wide and 75 feet long at the terminus of Lot 4 to the recreational use of all of the owners of the parcels for the joint use and enjoyment of Lake Sutherland. Had Ms. Greeves wanted to preserve the right to Lot 4 to build a dock on the end of the recreation property, she

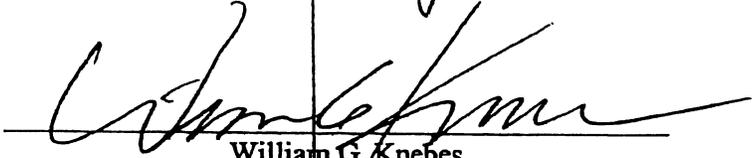
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could have reserved that right. She did not do so and it is clear that she intended the lot owners to work together so that they could jointly use and enjoy Lake Sutherland.

Defendant points to RCW 79.105.430 as authority for the proposition that Defendant is the only party that may install and maintain a dock. That statute does not define the term "residential owner". The purpose of that statute is to establish the preeminence of the State of Washington as to State-owned shore lands, tidelands or related beds of navigable waters. It may well be that the State will only allow one dock to abut the recreation area at the end of Lot 4, but under these facts it is not clear that the owner is necessarily the owner of Lot 4. Defendant's ownership of Lot 4 is heavily burdened by the covenants and easements that create a right in the owners of Lots 1, 2 and 3 to use the recreational area to enjoy Lake Sutherland. The covenants even go so far as to say that no one owner shall place any improvements upon or make any use of the dedicated area that is inconsistent with the intent of preserving said area for recreational purposes, and those purposes are to be enjoyed by all the owners. Certainly the covenants imply a sharing of costs associated with any upkeep or improvements to the recreation area, but also an agreement concerning such issues.

The dock is appurtenant to the land. The covenants envision an equal sharing of the right of access to Lake Sutherland. Each property owner is entitled to full use of the dock that is appurtenant to the land and Defendant's actions in barring Plaintiffs' use of the dock is in direct violation of the covenants and shall be enjoined. Plaintiffs are entitled to reasonable attorney fees for having to enforce the covenants in a court of law.

DATED this 23 day of August, 2007.



William G. Knebes
Court Commissioner

Memorandum Opinion
JAUSERS\WKNEBES\2007-2008\MEMOPINBRADFORDKERBSVADAMS1.DOC

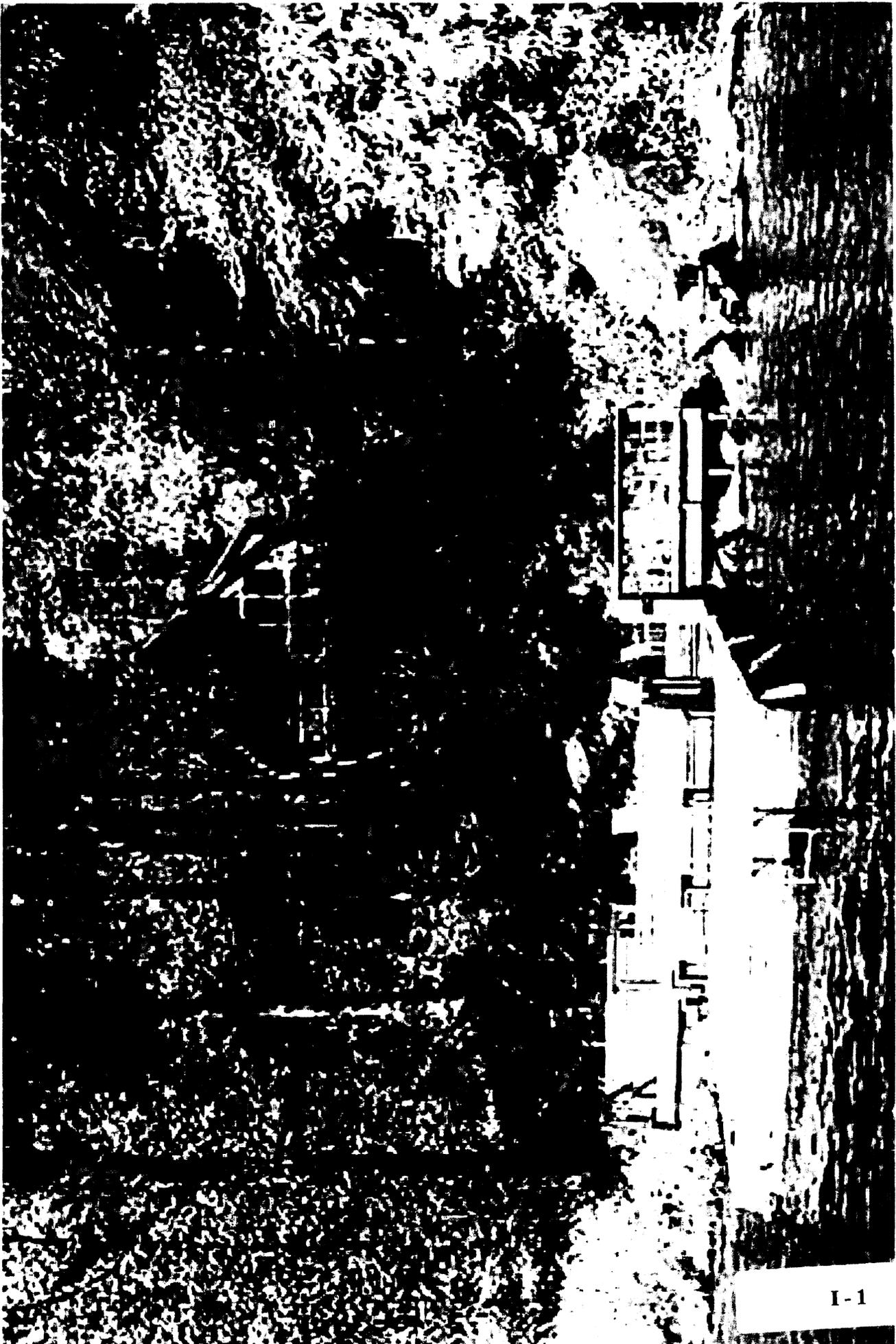
WILLIAM G. KNEBES
COMMISSIONER
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

APPENDIX H



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APPENDIX I



I-1

NO. 37974-1-II
WASHINGTON STATE COURT OF APPEALS, DIVISION II

CHARLES AND RUTH
ADAMS TRUST,

Appellant,

v.

JOHN RAYMOND
BRADFORD and CINDY
BRADFORD, husband and
wife; LAWRENCE KERBS
and CHRISTINE KERBS,
husband and wife; and
JAMES VANSHUR and
NANCI VANSHUR, husband
and wife,

Respondents.

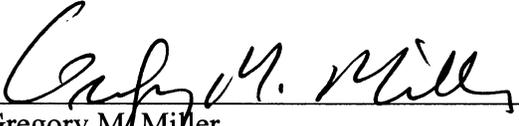
CERTIFICATE OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
09 JAN 28 PM 12:39
STATE OF WASHINGTON
BY _____
DEPUTY

I declare under penalty of perjury that I caused copies of the APPELLANT'S OPENING BRIEF, and this Certificate of Service by causing a true copy thereof to be served to counsel of record on January 27, 2009, as follows:

Craig L. Miller, WSBA #5281 CRAIG L. MILLER, P.S. 711 East Front Street, Suite A Port Angeles, WA 98362-3635 P: (360) 457-3349 F: (360) 457-3379 Email: cmiller@craigmiller.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other
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DATED this 27th day of January, 2009



Gregory M. Miller