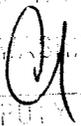


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 38955-0-II

Jefferson County Cause No. 07-2-00144-1

IN THE COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

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ALBERT YAUNKUNKS Appellant

v.

JON SCHLEIGER Respondent

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Appellant's Brief

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## **A. Introduction**

Appellant Albert Yaunkunks purchased real property (Lot 2) from Grantors Paul and Beth Templet pursuant to a Statutory Warranty Deed recorded on March 10, 2005. Respondent Jon Schleiger acquired the neighboring parcel (Lot 1) pursuant to a Quit Claim Deed recorded September 24, 2003. Two recorded plats were incorporated by reference in the deeds of both conveyances: the Original Plat recorded April 19, 1996 and the Amended Plat recorded October 4, 1999. The purpose of the Amended Plat was to change the boundary line between Lot 1 and Lot 2. An easement was indicated on the face of both plats. The Grantor Templet testified that the purpose of the easement was to provide access for both lots.

After trial, the court determined that Yaunkunks did not have an easement over a portion of Lot 1 contrary to what was depicted on the face of the plat and contrary to the testimony of Templet. Yaunkunks appeals the decision of the trial court because an express easement was created and the easement has not been legally extinguished.

## **B. Assignments of Error**

1. Did the court err when it determined that the filing of the Amended Plat recording the boundary line adjustment between Lot 1 and Lot 2 did not create an express easement for Lot 2 (CP 143 Finding #11 and CP 140 - Memorandum and Order RE: Motion for Reconsideration).
2. Did the court err when it reversed its oral opinion that Appellant Yaunkunks, owner of Lot 2, had a right to rely upon the plat filed of record which showed that the cul-de-sac was located on a portion of Lot 1, and that he had a right to open and utilize a portion of that cul-de-sac? (CP 139-140 Memorandum and Order RE: Motion for Reconsideration.)
3. Did the court make a factual error when it held that the easement was not created for a beneficial purpose for Lot 2, contrary to the evidence at trial? (CP 140 Memorandum and Order RE: Motion for Reconsideration.)

## **C. Statement of the Case**

Appellant Albert Yaunkunks is the owner of Lot 2 of Mountain View Lot Subdivisions as per Plat recorded in Volume 1 of Large Lots, Page 74-75, and amended in Volume of 1 of Large

Lots, Page 98-99, official records of Jefferson County, Washington, all in Section 36, Township 29N, Range 1W, Willamette Meridian, Jefferson County, Washington ("Lot 2") (Ex. 8). Allen Paul Templet and Beth Farrell Templet, husband and wife, are the predecessors in interest of Appellant Yaunkunks' real property, Lot 2. Albert Yaunkunks purchased Lot 2 from Allen Paul Templet and Beth Farrell Templet via a Statutory Warranty Deed dated March 3, 2005, recorded under Jefferson County Auditor's File Number 495700 (Ex. 8).

Respondent John Schleiger is the owner of Lot 1 of Mountain View Large Lots, Subdivision, as per Plat recorded in Volume of Large Lots, Page 74-75, and amended in Volume of 1 of Large Lots, Page 98-99, official records of Jefferson County, Washington, all in section 36, Township 29N, Range 1W, Willamette Meridian, Jefferson County, Washington, ("Lot 1") (Ex. 7). Schleiger took ownership of Lot 1 after his sister, Karen Askin, who acquired the property via a Statutory Warranty Deed from the Templets, conveyed it to him via a Quit Claim Deed dated September 24, 2003, recorded under Jefferson County Auditor's File Number 475552 (Ex. 7).

One of the issues at trial was the legal description for Yaunkunks' Lot 2. Yaunkunks' Statutory Warranty Deed referenced two separate plats in the legal description (Ex. 2 and Ex. 5). The language of the deed described the land *as per* the Original Plat recorded *and* amended by the Amended Plat. A plain reading of this language indicates that both plats describe the land, which is possible for all attributes with the sole exception of the boundary line between Lot 1 and Lot 2, which is the only difference between the two plats. Because they differ, both plats cannot govern as to the description of this boundary: one must take priority over the other to determine the correct boundary. Despite this ambiguity in the deed, the trial court determined that the deed from the Templets to Yaunkunks "clearly stated that Lot 2 was per the *Amended Plat* (emphasis supplied) of the Mountain View Large Lot Subdivision" (CP 145 finding #16). However, there was nothing "clear" about the legal description as it pertained to the boundary.

The Templets were the owners of the real property known as the Mountain View Large Lots Subdivision, section 36, Township 29N, Range 1W, Willamette Meridian, Jefferson County. The Templets subdivided this real property by filing a plat with Jefferson County thereby creating five lots. The plat drawing was created by

surveyor Northwest Territories Inc. ("NTI"). This plat, Mountain View Large Lot Subdivision ("Original Plat"), was signed by the Templets and recorded on April 19, 1996. Of the lots created, Lots 1 and 2 are the subjects of this matter (Ex. 2).

Per the Original Plat (Ex. 2), Lot 2's northern boundary extended along the line known as North 87° 42' 31" West for a distance of 627.83 feet, continued as the northwest portion along the line known as North 15° 37' 2" West for a distance of 287.35 feet, and continued as the western boundary along a series of lines enclosing the easement known as "Templet Drive" beginning with the point indicated as Number 1 on Templet Drive. The Original Plat also indicated on its face that Lot 2 has an existing septic system (Ex. 2).

Schlieger, who was involved in the original sale to his sister, Karen Askin, wished to have the boundary between Lot 1 and Lot 2 changed prior to the sale of Lot 1. At Schlieger's request, on June 25, 1999, the Templets filed a Petition to Amend the Mountain View Large Lots Subdivision (CP 142 Finding 3) (RP 21).

On September 9, 1999, Jefferson County entered findings that the amendment should be allowed (CP 142 Finding #4) (Ex. 4). Arnold Wood, a local surveyor, prepared documents to change the

boundary between Lots 1 and 2. However, a new plat was never created and filed as required by law. WAC 332-130-50 (3)(b)<sup>1</sup>. Wood admitted this in testimony (CP 14) (RP 10).

On approximately October 4, 1999, the Original Plat was re-recorded in Volume of 1 of Large Lots, Page 98-99 with one change ("Amended Plat"). The Amended Plat was identical to the Original Plat, with the sole exception of the boundary line adjustment between Lot 1 and Lot 2 (Ex. 5). Arnold Wood made the change to the boundary line and placed his surveyor stamp on the original NTI drawing. The boundary appears to have changed on the Amended Plat drawing to extend along the line known as North 45° 40' 28" East for a distance of 717.84 feet. The Amended Plat did not change the location of the easement or the 120-foot cul-de-sac (Ex. 5).

Arnold Wood testified that the Department of Natural Resources, when archiving county records, discovered that he had violated the law by re-filing an Original Plat created by another surveyor (RP 9, lines 1-17). The Board of Licensing for Surveyors demanded that Wood correct these errors (RP 10, lines 15-23).

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<sup>1</sup> (b) Alterations, amendments, changes, or corrections to a previously filed or recorded map, plat, or plan shall only be made by filing or recording a new document;

Arnold Wood corrected his mistakes and filed a new survey of the plat on July 5, 2005 ("Third Plat"), after Yaunkunks took ownership of Lot 2 (RP 11, lines 16-23) (Ex. 9). A copy of the Third Plat was never sent to Yaunkunks (RP 18, line 5).

Schleiger commenced this action alleging that Defendant Yaunkunks interfered with the easement known as Templet Drive and to quiet title "to the midline of Templet Drive against all encroachments and claims of the defendant other than the easement for ingress, egress and utilities" (CP 5, lines 11-14). Yaunkunks counterclaimed against Schleiger for quiet title and for damages due to encroachment and trespass. At trial, the issue arose as to the location of the original easement in a portion referred to as the "cul-de-sac". Per the Original Plat and the Amended Plat, the cul-de-sac was a turnaround circle with a 60-foot radius. The filing of the Amended Plat to adjust the boundary line between Lots 1 and 2 did not change the location of the Templet Drive and cul-de-sac easement. However, because of the boundary line change, a portion of the cul-de-sac part of the easement came to be situated on Lot 1 (Ex. 5).

Per Grantor Templet's testimony, the purpose of the Templet Drive easement was for the owners of both Lot 1 and Lot 2 to have

ingress and egress to “carry out their business” (RP 25-26). Further, per Templet’s testimony the purpose of the cul-de-sac portion of the easement with its 60-foot radius (120-foot diameter) was to permit a large enough turnaround for emergency equipment (RP 40 -41).

At the close of trial, the court issued an oral opinion. In that proceeding, counsel for Yaunkunks inquired whether Yaunkunks had the right to rely upon the Amended Plat and whether Yaunkunks had the right to open that portion of the cul-de-sac located on Lot 1 owned by Schlieger. The Judge answered affirmatively, stating that was the intent of the ruling (CP 108-109).

Several months after the close of trial, Schleiger prepared proposed findings of fact and conclusions of law, as well as a Motion for Reconsideration (CP 122-127). In the Motion, Schleiger contended that the judge made a factual error because the court noted that the cul-de-sac was not in the original location from the Original Plat to the Amended Plat (CP 100, paragraph 8). Yaunkunks, upon review of the Report, Partial Verbatim Report of Proceedings (CP 103-116), did not find any error as claimed by Schleiger. In fact, both parties agreed that the Amended Plat did not relocate the easement. Schleiger also contended that it was

Grantor Templet's intent to terminate any easement rights of Lot 2 upon and across Lot 1 (CP 102 paragraph 12 (c)). This assertion is contrary to Templet's testimony (RP 25-26 & 40 -41).

Yaunkunks objected to the Motion for Reconsideration (CP 122 -127) and filed Objections to the Proposed Findings of Fact and Conclusions of Law (CP 120-121). Most importantly, Yaunkunks filed objections to Proposed Finding Numbers 2 and 16. Yaunkunks contended that Schleiger had not met the legal requirements for reconsideration pursuant to CR 59 (a) (7) & (9) (CP 134).

Schleiger replied, contending that it was not the intent of Grantor Templet to provide Lot 2 with any easement rights over Lot 1 (CP 133-138). This is contrary to the evidence introduced at trial. Per Paul Templet's testimony:

Direct Examination:

A I'm not sure how well it stated it, but the intention was that the road was placed there to County spec, we didn't-<sup>2</sup>

(RP 24)

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<sup>2</sup> Yaunkunks objected at this juncture. The trial court in ruling on the objection, stated that one of the issues for the court to consider was the intention of the grantor and grantee at the time the easement was created. (RP 25)

A. ...And its [referring to the easement] basically for both of those prop-both those property owners to make use and ingress and egress, and to carry out their business.

(RP 25)

A ...Maybe it wasn't stated clearly enough, but it was- The intent was to provide both of those people with the use of the road for purposes of coming and going.

Q And by "coming and going," does that mean to any portion of their property that they need to get to?

A There's no restriction I see anywhere on it. And I can't understand why that would ever come up.

(RP 26)

Cross Examination of Templet.

Q -"The parties agree to use said roadway for normal ingress and egress related to the property they own." Is that correct?

A Right.

(RP 32)

Q Now, the cul-de-sac, as it exists today, is it opened up?

A As I last saw it several weeks ago, it was restricted to the point of being unusable by County regulation.

Q And how do you figure that?

A It was- It- The purpose of the cul-de-sac is to allow emergency equipment, according to the documents I got from- from Jefferson County, to allow emergency equipment to turn around and be able to leave in a forward direction. If- If a fire engine or emergency vehicle came to respond to a call and had to back on to Crescent Valley, that would be an extremely dire situation.

Q So, your- If I understand correctly, then, your intent, then, when you- when you platted this-

A As per the- As per the County's-

Q - was to have a 60-foot wide open circle so emergency vehicles could turn around.

A Yeah, yeah.

(CP 40-41)

During trial Yaunkunks called as a witness a surveyor, Finis Brewer. Brewer was asked questions about locating the center pin of the easement cul-de-sac placed by the surveyor Wood and the location of the easement cul-de-sac on the ground. During Brewer's testimony Schlieger explicitly stipulated that there was a 60-foot radius from the center pin of the cul-de-sac portion of the easement, making it 120 feet in diameter (CP 51).

On January 27, 2009 the trial court issued a *Memorandum and Order Re: Motion for Reconsideration* (CP 139-140). The trial

court reversed itself, holding that the Amended Plat did not create an easement over the portion of the cul-de-sac on Lot 1 for the benefit of Lot 2 (CP 140). The trial court erred in reversing itself by adopting Schleiger's contention that is neither supported by the testimony and evidence introduced at trial, nor by existing law.

#### **D. Argument**

##### Standard of Review.

Yaunkunks assigns both errors of law and errors of fact in this case. Findings of fact are reviewed under a substantial evidence standard, which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). If substantial evidence supports a finding of fact, an appellate court should not substitute its judgment for that of the trial court. *Id.* Questions of law are reviewed de novo. *Id.* The parties' intentions are questions of fact, while the legal consequences of such intentions are questions of law. *Id.*

The trial court was in error by not finding the existence of the easement cul-de-sac across Lot 1 for the benefit of Lot 2. As set

forth below this is both due to an error of law regarding the creation and extinguishment of easements on a plat and an factual finding not supported by the testimony in court. Respectfully Yaunkunks request reversal of the trial court's decision and a order directing new findings be entered.

**Issue 1: The easement shown on the Amended Plat is part of the legal description of Yaunkunks' property.**

The trial court made a legal error when it ignored the fact that the Amended Plat created an express easement for both Lot 1 and Lot 2. After testimony, the trial court found that the legal description for Yaunkunks' property (Lot 1) was that described in the Amended Plat (CP 145 finding #16). Therefore under rules of law, Yaunkunks was conveyed an expressly granted easement when he took title to Lot 2.

The Legal Description Incorporates What is On the Plat Map.

Since the court found that the legal description in the Amended Plat governs, and the Amended Plat clearly depicts on its face an easement on Templet Drive including the cul-de-sac, under established legal precedent, this is an expressly created easement of which a portion burdens Lot 1 for the benefit of Lot 2.

Where a deed references a map of the land conveyed, the map and the deed are to be construed together, and the map becomes, "in legal effect, a part of the description...<sup>3</sup>." *Saterlie v. Lineberry*, 92 Wn. App. 624, 627-628, 962 P.2d 863 (1998). The legal description in a deed referencing to a plat of a survey incorporates the plat and field notes into the deed, and furnishes the true description of the boundaries of the land conveyed. *Greenblum v. Gregory*, 160 Wash. 42, 47, 294 P. 971 (1931). When a reference becomes thus incorporated into the deed, all of the lines thereof have the same effect as monuments, in controlling the courses and distances therein set out. *State ex rel. Battersby v. Board of Tide Land Appraisers*, 5 Wash. 425, 32 P. 97 (1892). See also *Columbia V. R. Co. v. Portland & S. R. Co.*, 49 Wash. 88, 89, 94 P. 918 (1908) (held that purchaser took title to property referenced in maps and field notes without regard to the surveyed line -- and in determining its rights under its contract of purchase, it must be held to have purchased the land so described, not that

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<sup>3</sup> *Moore v. Clarke*, 157 Wash. 573, 581, 289 P. 520 (1930); accord *Cragin v. Powell*, 128 U.S. 691, 9 S. Ct. 203, 32 L. Ed. 566 (1888). It should be noted that some jurisdictions hold that while discovery of the parties' intent is the overriding objective, as a general rule, "where there is a conflict between the description in a deed and that shown by an attached map, the map controls the description." *Ganus v. Cuoco*, 351 So. 2d 224, 226 (La. Ct. App. 1977); see also *Withington v. Derrick*, 153 Vt. 598, 572 A.2d 912, 914-15 (1990) (holding that where an ambiguity or error exists with regard to a description in a deed, an attached map or survey relating to the ambiguity or error will control).

actually surveyed); See also *Flint v. Long*, 12 Wash. 342, 41 P. 49 (Wash. 1895).

The law is clear: That which is shown on the plat becomes a part of the legal description for Lot 2, *including the easement and portion of the cul-de-sac upon Lot 1.*

The Amended Plat Created an Easement on Lot 1.

The trial court had to make a determination as to which plat, the Original Plat or the Amended Plat, the legal description in the Yaunkunks deed referred. Schleiger did not want the boundaries as set forth in the Original Plat, so he introduced evidence that the Amended Plat was valid and controlling. Schleiger confirmed this by Wood's testimony that the requirements of RCW 64.04.010 and RCW 64.04.020 were followed in the amendment process by Templet's signing the Amended Plat and being approved by the County (RP 4). This was further confirmed by Schleiger's introduction of the Amended Plat showing the signatures (Ex. 5). This was his evidence, and the court should give the benefit of it to both parties.

In making its finding # 16, the trial court stated that the legal description on Yaunkunk's deed was clearly per the Amended Plat. So be it. Schleiger wanted the boundaries between the lots

changed and in the process of doing so created an easement. The Grantor Templet's act of acknowledging the plat map—clearly showing the easement cul-de-sac upon Lot 1—created an expressly deeded easement for the benefit of Lot 2. Looking at the four corners of the document, nothing indicates that that portion of the 60-foot radius (120-foot diameter) was anything other than an easement for ingress, egress and utilities. Nothing indicates it was solely for the benefit of Lot 1. Further, as shown below, the intent was to provide access for both lots and a large enough turnaround for emergency vehicles. By law, there is an easement across Lot 1.

Easements Established by Dedication Are Property Rights.

Once dedicated on the plat, the easement cannot be changed without the approval of the dominant estate. This is supported by both statute and case law. Per RCW 64.04.175:

“Easements established by dedication are property rights that cannot be extinguished or altered without the approval of the easement owner or owners unless the plat or other document creating dedicated easements provides for an alternative method or methods to extinguish or alter the easement.”

The plat clearly shows the existence of a 60-foot radius (120-foot diameter) cul-de-sac over and across a portion of Lot 1 and Lot 2. Per the plat notes, Templet Drive, including the cul-de-sac portion of Templet Drive, is an “easement for ingress, egress and utility purposes” (Ex. 2 & 5).

Schlieger did not cite any authority in his motion for reconsideration that would contradict the general rule holding that the easement depicted on the plat is expressly created. Even reviewing possible cases that may be advanced in support of Schlieger’s position, such as *McPhaden v. Scott*, 95 Wn.App. 431, 433, 975 P.2d 1033 (1999)<sup>4</sup>, the general rule is that an easement clearly depicted on a properly filed plat map becomes part of the legal description.

However, *McPhaden* is distinguished from the present case, in that the *McPhaden* court found that an express easement burdening real property was not created by a recorded map alone, because the recorded document did not constitute a conveyance of a property interest, which

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<sup>4</sup> The *McPhaden* case is factually similar to issues presented at the trial court regarding the irregularities under state law of filing the Amended Plat.

must be by deed in order to comply with the Statute of Frauds. *McPhaden* at 435. In contrast, the deeds conveying Lot 1 to Schlegler and Lot 2 to Yaunkunks both incorporated by reference the easement indicated on the face of the Amended Plat and therefore the easement interest was clearly and legally conveyed by deed in compliance with the Statute of Frauds. The *McPhaden* court also noted that an easement shown on a plat may not be extinguished without a formal amendment. See also *Moore v. Clarke*, 157 Wn. 573, 289 P. 520 (1930).

The rule explained in *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 145 P.3d 411 (2006) should be followed here. A party may create private easements by including the donation or grant in a plat or short plat. *Id.* at 653. An easement depicted on a short plat may not be extinguished without a formal amendment to the short plat. *Id.* at 658. See also *Bunnell v. Blair*, 132 Wn. App. 149, 154, 130 P.3d 423 (2006) (The intent to dedicate property for public use is evidenced by presenting for filing a final plat or short plat that shows the dedication on its face).

The facts and the law are clear. Templet Drive, including the cul-de-sac portion, is an easement created as expressly depicted

on the face of the plat and per the intent of the Grantor, Templet. The Grantor Templet intended to create an easement that owners of both Lot 1 and Lot 2 could use for ingress and egress to carry out their business (RP 25). The amendment between the Original Plat and the Amended plat was for the sole purpose of changing the lot line between Lot 1 and Lot 2. However, functionally the amendment placed a portion of the cul-de-sac upon Lot 1, thereby creating an easement for Lot 2. Nowhere in the record does it show that the amendment was also for the purpose of reducing the size of the 60-foot radius (120-foot diameter) cul-de-sac, large enough for emergency vehicles to turn around. The trial court erred by reversing itself and finding that the part of the cul-de-sac portion of the expressly created easement across Lot 1 was not created by the Amended Plat (Ex. 5).

**Issue 2: Yaunkunks took title to Lot 2 relying upon what was depicted in the plats filed of record.**

The legal description of Yaunkunks' property references two plats. Both plats are exactly the same, except for one difference: the boundary line between Lot 1 and Lot 2. The location of the cul-de-sac remained unchanged in the Amended Plat.

At trial, the issue was raised as to which plat, the Original Plat or the Amended Plat, the Yaunkunks deed referenced (Ex. 8). In other words, based upon the legal description in the statutory warranty deed, upon which plat should a bona fide purchaser rely when determining the legal description, encroachments, easements and boundaries for Lot 2?

The trial court found that the Amended Plat controlled, therefore by this finding, Yaunkunks had a right to rely upon it and the fact that it depicted his right to the cul-de-sac. The general rule is that a person purchasing real property may rely on the record title to the property, in the absence of knowledge of title in another, or of facts sufficient to put him on inquiry. *Olson v. Trippel*, 77 Wn. App. 545, 550-551, 893 P.2d 634 (1995).

Contrary to the contention by Schleiger, the fence and his driveway did not put Yaunkunks on legal notice that he laid claim to the portion of the cul-de-sac upon Lot 1. Schleiger could not extinguish the easement by these acts.

An easement, unless expressly limited, lasts as long as the estate to which it is pertinent exists. 28 C.J.S. Easements §51 at 716, Note 55 (1941). Mere nonuse, for no matter how long a

period, would not extinguish an easement. *Thompson v. Smith*, 59 Wn.2d 397, 407, 367 P.2d 798 (1962).

Schleiger contended at trial and in his Motion for Reconsideration that there were equitable reasons to limit the use of the cul-de-sac across Lot 1. However, his argument was based upon his unilateral position that the easement should be changed to benefit his driveway access and accommodate a portion of his fence. The servient estate cannot unilaterally alter an easement. The rule cited in *Crisp v. VanLaeken*, 130 Wn. App. 320, 122 P.3d 926 (2005) is applicable, where this Court declined to adopt a rule proposed in Restatement (Third) of Property (Servitudes) section 4.8(3) (2000) that, under certain circumstances, would allow a servient estate owner to relocate the easement without the dominant estate owner's consent. The *Crisp* Court was following the holding in *MacMeekin v Low Income Housing, Institute, Inc.*, 111 Wn. App. 188, 190, 45 P.3d 570 (2002), where Division I adhered to the traditional rule that easements may not be relocated absent mutual consent of the owners of the dominant and servient estates, **regardless of how the easement was created** [emphasis added].

Yaunkunks never consented to the termination of the cul-de-sac. He took title to the property relying upon what was in his deed, which incorporated by reference the Original Plat and the Amended Plat. Because the trial court found that the reference to the Amended Plat governed the legal description in the deed, a plain reading of the deed language now describes the easement as burdening both Lot 1 and Lot 2. The easement itself was created in the Original Plat. The Amended Plat only changes the status of Lot 1 from the dominant estate to a servient estate for a portion of the existing easement.

Although Schleiger further contended that Grantor Templet's alleged acquiescence to the improvements on the easement made by Schleigler (including erection of a fence) showed intent to extinguish the easement, this is not supported by law or by the testimony (CP 137 lines 9-11). In fact, Grantor Templet's testimony contradicts Schleigler's contention that Templet acquiesced to the improvements, because Templet indicated that he had "no idea who erected the fence" (CP 41).

The intent of the original parties to an easement is determined from the deed 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. Nazarenes*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962). Because the trial court found that the Amended Plat governed the legal description in the deed, the ambiguous language concerning the boundary line was resolved. A plain reading of the language pertaining to the easement as indicated in the Amended Plat clearly indicates Grantor Temple's intent: The easement burdens both lots for the mutual benefit of the owners of each lot. There is no reason to consider extrinsic evidence in determining intent, even if it did exist.

The trial court also found that there existed no documents filed of record that extinguished the easement. In fact, Schleiger even stipulated that there was a 60-foot radius to the cul-de-sac portion of the easement as measured from the center pin placed by the Wood Survey. Therefore, the trial court erred by finding that Yaunkunks did not have an easement in that portion of the cul-de-sac across Lot 1.

**Issue 3: The court made a factual error when it ruled that the easement was not created for a beneficial purpose.**

The trial court's finding that easement was not created for a beneficial purpose is reviewed to determine if there is a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. *Pardee* 163 Wn.2d at 566.

When Schleiger moved for reconsideration, he contended that it was the intent of the Plaintiff and the common grantors to terminate any easement rights upon Lot 1 when it amended the common boundary line (CP 101). Yaunkunks replied that the Amended Plat (Ex. 5) depicted the same cul-de-sac in the same location. (CP 122-127) It was the adjustment to the boundary line that created the easement across Lot 1, and Schleiger failed to cite any authority to contradict this. His argument rested on his claim that there was no beneficial purpose to the cul-de-sac (CP 133).

Schleiger responded to Yaunkunks by stating "when the Plat was amended by the Common Grantor Templet, it was the intent not to provide Lot 2 any easement rights over any portion of Lot 1" (CP 133 Line 3). Schleiger went on to attempt to distinguish *Crisp, infra* incorrectly claiming that in the applicable analysis, Yaunkunks was the servient owner (CP 136 line 2). This

mislabeled confuses the issue at hand. The portion of the cul-de-sac with which we are concerned and which is the subject of this appeal is that portion that lies across Lot 1, making Schleiger's parcel (Lot 1) the servient estate and Yaunkunks' parcel (Lot 2) the dominant estate.

Schleiger further contended in his *Plaintiff's Reply To Defendant's Objections to Motion for Reconsideration*, that the "obvious acquiescence" by Templet to Schleiger's improvements to Lot 1 was evidence of a clear intent to extinguish the easement (CP 137 line 9-11). Nothing could be further from the truth when reviewing the testimony.

Templet testified that Schleiger approached him regarding adjusting the boundary between Lot 1 and Lot 2 (RP 21). Templet agreed to the adjustment because "as far as I'm concerned, I'm selling these lots" (RP 22 line 10). There was no testimony of an affirmative act on the part of Templet that constituted acquiescence to the driveway and fence placed within the cul-de-sac area by Schleiger. In fact, under examination by Schleiger, Templet was unsure of the exact time frame of the amendment creating the Amended Plat being approved by the County (RP 26, lines 18-24, RP 27 lines 1-2). Further, Templet stated he didn't even know who

built the fence (CP 41). Reviewing the record it is plain to see that the act of acquiescence necessary to show an affirmative intent to extinguish the easement is not in the evidence.<sup>5</sup>

In fact, Templet's testimony leads to the opposite conclusion. Templet stated on direct examination that the intent was for owners of both Lot 1 and Lot 2 to have ingress and egress to "carry out their business" (RP 25-26). Further, per Templet's testimony, the purpose of the cul-de-sac and its 60-foot radius (120-foot diameter) was to permit a large enough turnaround to accommodate emergency equipment (RP 40 -41). Schleiger even stipulated that the cul-de-sac portion of the easement had a 60-foot radius (RP 51).

The trial court's determination that Schleiger completed improvements to Lot 1 with Templet's knowledge is not supported by Templet's testimony. The trial court's finding that the easement was solely for the benefit of Lot 1 (CP 142, finding 2) and its ruling that there was no benefit to Lot 2 from the cul-de-sac (CP 140) clearly contradicts Templet's testimony. There is not a sufficient quantum of evidence to convince a reasonable mind that Templet intended the easement cul-de-sac to be extinguished. Immediately

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<sup>5</sup> Regardless, no document was ever created, acknowledge or filed extinguishing the easement.

after hearing the evidence at trial, while it was fresh in his mind, the trial judge made his oral ruling: He concluded that the easement portion across Lot 1 existed. When Schleiger moved for reconsideration, the trial court should not have granted his request. Respectfully, this Court should reverse the trial court, as its decision is not supported by the evidence.

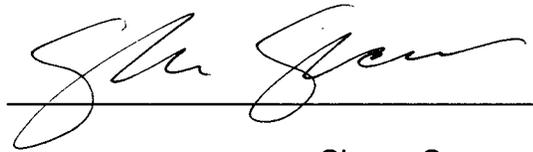
### **E. Conclusion**

Was an easement created across Lot 1 by the filing of the Amended Plat? Accepting the trial court's finding # 16 that Yaunkunk's deed clearly is as shown on the Amended Plat, then referring to the four corners of the document, there is a portion of an easement cul-de-sac that lies across Lot 1. A deed incorporating a plat map makes that which is shown on the map a part of the legal description. Easements can be created by the filing of a plat map. By law Yaunkunks has an easement right across Lot 1.

Clearly, the intent of Templet when he divided the land was to create an easement for both parties to use with a large enough turnaround for emergency vehicles. Given the opportunity to

change the cul-de-sac upon filing of the Amended Plat, the evidence clearly showed an intent to leave the cul-de-sac in the original location, BUT burden Lot 1 with the right of Lot 2 to utilize it. When Schleiger moved for reconsideration and requested the court find that there was no beneficial purpose for Lot 2 of the easement cul-de-sac across Lot 1, his contentions were not supported by the law or the facts of the case. The Trial Court erred by adopting his findings. Yaunkunks respectfully requests a reversal of the trial court's decision.

Respectfully submitted this 5 day of June, 2009.

A handwritten signature in black ink, appearing to read "Shane Seaman", written over a horizontal line.

Shane Seaman  
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Attorney for Appellant

COURT OF APPEALS  
DIVISION II

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**COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON**

JON SCHLEIGER,  
  
Respondent  
  
vs.  
  
ALBERT YAUNKUNKS  
  
Appellant.

No.: 38955-0-II  
  
Superior Court Cause No.  
  
07-2-00144-1  
  
DECLARATION OF SERVICE

On the dated stated below, I caused a copy of the following documents to be served on the parties listed below by the method(s) indicated:

- 1. Appellant's Reply Brief; and
- 2. Declaration of Service

Party/Counsel	Additional Information	Method of Service
Clerk of the Court Court of Appeals 950 Broadway, Suite 300 MS TB-06 Tacoma WA 98402-4454	Clerk of the Court Phone Number:253/593-2970	<input checked="" type="checkbox"/> First-class U.S. mail <input type="checkbox"/> Facsimile <input type="checkbox"/> USPS/ overnight delivery <input type="checkbox"/> Personal delivery <input type="checkbox"/> E- mail
Harry Holloway PO Box 596 Port Townsend WA 98368	Attorney for Plaintiff Phone Number:360/385-1400	<input checked="" type="checkbox"/> First-class U.S. mail <input type="checkbox"/> Facsimile <input type="checkbox"/> USPS/ overnight delivery <input type="checkbox"/> Personal delivery <input type="checkbox"/> E- mail
Albert Yaunkunks PO Box 1362 Port Hadlock, WA 98339	Appellant Phone Number:360/643-0645	<input checked="" type="checkbox"/> First-class U.S. mail <input type="checkbox"/> Facsimile <input type="checkbox"/> USPS/ overnight delivery <input type="checkbox"/> Personal delivery <input type="checkbox"/> E- mail

Certificate of Service

**Knauss & Seaman PLLC**  
203A. W. Patison Street  
Port Hadlock, Washington 98339  
(360) 379-8500 Fax (360) 379-8502

1 I certify under the penalty of perjury under the laws of the State of  
2 Washington that the foregoing is true and correct.

3 Signed at Port Hadlock, Washington this 5<sup>TH</sup> day of June, 2009.

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5 Kate Gamble  
6 Paralegal to Knauss & Seaman PLLC

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