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Respondent Schleiger is both factually and legally incorrect in his argument regarding an easement being terminated by estoppel. State law is clear: Easements established by dedication are property rights that cannot be extinguished without the approval of the easement owner. RCW 64.04.175. An easement depicted on a short plat may not be extinguished without a formal amendment to the short plat. *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 658, 145 P.3d 411 (2006). 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).

Yaunkunks is not aware of any Washington case law that directly supports Schleiger's position regarding termination of the easement right by estoppel. There does appear to be some authority in the Washington Real Property Desk Book, Chapter 10, Easements and Licenses, Omar S. Parker, Jr., section 10.6 (6):

If the easement owner, by nonuse or other circumstances, misleads another party into believing that there is no encumbrance on the land and the party relies and acts on that representation, the easement owner may be estopped from reasserting the easement to the other party's detriment. Annot., 25 A.L.R.2d § 14 at 1305 (1952). The elements of equitable estoppel must, however, be present. *Id.*

Nonetheless, the factors above are not present in this case. For the defensive doctrine of equitable estoppel to apply, Schleiger must show some fraudulent act on the part of Yaunkunks.

Schleiger incorrectly contends that Yaunkunks acquiesced to Schleiger's utilization of Lot 1 that is subjected to the cul-de-sac depicted on the Amended Plat. The record does not support Schleiger's argument.

Schleiger further contends that Templet acquiesced to his utilization of Lot 1 and that Templet's actions estop Yaunkunks from claiming what was legally part of his deed.

Templet did not testify that he allowed Schleiger to construct his driveway, outbuildings, and residence knowing that they were interfering with the cul-de-sac, a necessary requirement for Schleiger's estoppel argument. In fact, the only thing the record states is that Templet allowed Schleiger to move some personal items on the property before the sale as long as he did no damage (RP 28). When Templet was asked specifically about who placed the encroachments on the cul-de-sac he answered "I have no idea who erected the fence." (RP 41).

Schleiger's argument that acquiescence applies is not supported by Washington case law. The case cited by Schlieger,

Huff v. Northern Pacific Railway Company, 38 Wn.2d 103 (1951), is inapplicable, where the issue involved an easement by prescription and the court found that the silence by appellant did not estop him from asserting that his use continued to be adverse. *Id.* at 115.

Schlieger did not cite any case on point that advances his position.

The *Thompson* case *supra*, contradicts Schleiger's argument by the rule that where a right of way is established by reservation, the land remains the property of the owner of the servient estate and he is entitled to use it for any purpose that does not interfere with the proper enjoyment of the easement. *Thompson*, 59 Wn.2d at 407-408. Schlieger could use his property until such time that Yaunkunks took title and demanded that Schleiger open up the cul-de-sac as reflected on the Amended Plat. There is no legal authority that would support a finding that the easement cul-de-sac across Lot 1 was terminated.

Absolutely no evidence was presented at trial that would lead a reasonable fact finder to conclude that Templet misled Schleiger into believing that the portion of the cul-de-sac across Lot 1 was terminated. Yet this is precisely Schleiger's argument.

Schleiger claims that:

"he [Schleiger] apparently believed that the effect of the agreement obtained with the common grantor Templet was to move the cul-de-sac area to the south of the line of the newly described Lot 1; that after the amendment the cul-de-sac area was still located entirely on Lot 2, but moved southerly to accommodate the location of the line newly agreed to with Templet."

Schleiger's brief, page 3, last paragraph.

There is no evidence that Templet led Schleiger to believe the easement across Lot 1 was terminated. Schleiger's subjective unilateral belief is inadmissible and cannot be considered as evidence that contradicts the plainly depicted easement on the Amended Plat. Especially when this testimony is contrary to the grantor Templet's testimony that the intent of the cul-de-sac was to be wide enough so emergency vehicles could turn around. (RP 40). Therefore, the Trial Court erred, because if it was considering intent, then the evidence shows that the intent of the Grantor is contrary to the ultimate finding by the Trial Court.

However, Yaunkunks assigns error to the Trial Court in even considering this evidence, as noted by its ruling:

"but one of the things the court is to consider are the intentions -- is the intention of the grantor and the grantee at the time the easement is created and I don't think it requires an ambiguity. I think that is one of the factors that the court is supposed to consider in determining whether there's been, for instance, as

alleged, and overburdening of the use with reference to the servient estate, is the dominant estate overburdening that easement." (RP 25, line 3 - 10).

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 Templet's intent. There is no reason to consider extrinsic evidence in determining intent, even if it did exist. 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 and what was depicted on the Amended Plat, and therefore is reversible error.

Respectfully submitted this 17 day of December, 2009.



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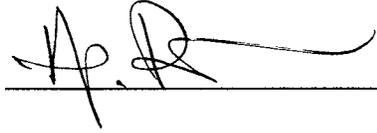
On the date stated below, I caused a copy of the following documents to be served on the parties listed below by the method(s) indicated:

1. Motion Permitting Filing of Reply Brief
2. Declaration of Shane Seaman
3. Appellant's Reply Brief
4. Certificate 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 2336 Washington Street Port Townsend WA 98368 | Attorney for Plaintiff WSBA # 2536 Tel: 360/385-1400 Fax: 360/385-1317 harrylu@cablespeed.com | <input checked="" type="checkbox"/> First-class U.S. mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Fed-Ex/overnight delivery <input type="checkbox"/> Personal delivery <input type="checkbox"/> E- mail |
| Albert Yaunkunks PO Box 1362 Port Hadlock WA 98339 | Defendant | <input checked="" type="checkbox"/> First-class U.S. mail <input type="checkbox"/> Certified Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Fed-Ex/overnight delivery <input type="checkbox"/> Personal delivery <input type="checkbox"/> E- mail |

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

Signed at Port Hadlock, Washington this 18th day of
December, 2009.



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