COUNTY CLERKS OFFICE
FILED

AUG - 5 2003

MARY JEAN CAHAIL
SAN JUAN COUNTY, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR SAN JUAN COUNTY

Bradley F. Henke and Judith M. Henke, Plaintiffs, vs. Oly Rose, LLC and Rockresorts International, LLC Defendants.	NO. 02-2-05188-1 MEMORANDUM IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

This case concerns a question answered affirmatively by the relevant opinions of courts of every state considering it found by undersigned counsel's research: Do the owners of lots sold by reference to a plat showing recreational areas for their use have, absent contrary language in the plat or their deeds, a common property right to the recreational use of those areas?

Although there are many such plats in Washington, as elsewhere, with designated beaches, golf courses and other areas for community use, the unrestricted development of which would contradict the expectations of the lot purchasers and diminish the value of their property, there does not appear to be any reported appellate decision in this state answering this question.

II. Procedure

Plaintiffs originally noted a motion for partial summary judgment as

Henke and Richter
221 First Avenue West, Suite 215
Seattle; Washington 98119
(206) 282-2911

3906

ORIGINAL

requested here for June 23, 2003. It was supported by the affidavit of plaintiff Bradley F. Henke, an affidavit of plaintiff's counsel with certain documents attached, requests for admission to the defendants, with their responses ("RFA (number)," hereafter), and the affidavit of Peter Vincent. Mr. Vincent was the real estate broker having an exclusive agency to sell the platted lots for the owners of the resort, Gilbert Geiser and his partnership, with whom plaintiffs dealt.

Defendants responded with several affidavits, which flesh out the relevant history of the resort and its dealings with property owners concerning the recreation area somewhat. A declaration of Sarah Geiser, who bought a lot in 1962 with her prior husband (and sometime after his death married Mr. Geiser) and who worked at Rosario resort from that year to 1994, attaches as an exhibit a 1971 letter of Mr. Geiser's, in which a lot owners' association generally concurred, describing an understanding of the bounds of the recreation area in reference to some terms and structures not contained on the plat. Plaintiffs' motion was thereafter withdrawn prior to the scheduled hearing on it.

The motion is now renewed with a supplemental affidavit from Mr. Henke relating the terms and structures used by Mr. Geiser to describe the recreation area to the monuments shown in the plat and referenced in his and Mr. Vincent's prior declarations.

III. FACTS

"Rosario Estates," a subdivision of part of Gov. Lot 3, Sec. 6, T. 36 N, R. 1W, W.M. and Gov. Lots 3,4 and 5, and the NE 1/4 SW 1/4 of Sec. 31, T. 37N, R. 1W, W.M., in Eastsound, Orcas Island, was platted by its then owner Falcon Corporation, of Texas, June 26, 1958. RFA 1. The plat, Ex. 1 hereto, shows a waterfront area designated "RECREATION AREA," the rights in which of the plaintiffs and other lot owners are in dispute in this case. The "RECREATION AREA" may be seen by reference to the plat drawing as an area between identified

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

landmarks: the "CONCRETE SEAWALL" on Cascade Bay to the southeast and the southwesterly extension of that arc along a walkway shown on the plat; the labelled "CONCRETE DRIVEWAY," on the northwest; the "CONC. DRIVEWAY" (leading to the docks) on the south side; and on the east side a building labelled "SHOP" (with the "OFFICE" on the seaward side) extending most of the distance between the seawall and the concrete driveway opposite to it. Those were the bounds of it as represented by the agent for the sales of the lots, on behalf of the owners, Peter R. Vincent. Aff. Henke; Aff. Vincent.

Directly beneath the description of the platted land in the upper right corner of the plat is the following

"DEDICATION[1]

> "FALCON CORPORATION, a corporation organized and existing under the laws of the STATE of TEXAS, owner in fee simple of the land hereon platted, does hereby, through its officers, declare this PLAT of "ROSARIO ESTATES" and DEDICATES to the use of LOT OWNERS all SIDE ROADS, ALLEYS & DRIVEWAYS shown, together with the free access to, and use of, the RECREATION AREA." [capitalization as in original]

This dedication is signed by the president of Falcon Corp., Ralph Curton, and its secretary.

A set of covenants for the plat were recorded at the same time which contain nothing pertinent to the use or description of the recreation area except that the developer reserved the right to run utility line in it as well as in the streets and the lots. Dec. Linde, Ex. 3.

Rosario resort opened in 1960, by which time the unsold lots and other areas were owned by a partnership including Gilbert Geiser, the resort manager. Dec. Sarah Geiser. The hotel for paying guests was and still is "THE BIG

---

[1] Text writers and many of the cases note that, while "dedication" properly refers to creation of rights in the public, the term is often used more loosely. *See*, *Horrighs v. Elfrank*, 727 S.W.2d 910, 913 (Mo. App. 1997).

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

HOUSE" designated on the plat, which Mr. Moran had originally built for himself, commonly referred to as the mansion. Dec. Henke. The outdoor pool in the recreation area was built within a year from then and made available for the use of lot owners and resort guests. Dec. S. Geiser.

Along with their water bills from the resort, a recreational fee of $4.00 per month was paid quarterly by lot owners. Dec.s Vierthaler and S. Geiser; Supp. Dec. Henke. This nominal fee was apparently connected with their use of the pool as well as a dock and tennis courts outside the recreation area. Some real estate contracts with lot owners, not including any transactions with plaintiffs, contained a stipulation by which the purchaser agreed "to pay the sum of $4.00 per month for dues for such use of the dock and recreation area ...." Dec. Linde, Ex. 1. Gilbert Geiser, in a letter to another property owner concerning the recreation fee of March 19, 1985, [Dec. Vierthaler, Ex. 6], stated:

> "Although the $4.00 recreation fee was established before my 1960 arrival, in the original subdivision, and when the Mansion was a private home with no pools and no tennis courts to offer, we have continued that same fee to our property owners."

The balance of that letter suggests that Mr. Geiser was thinking of replacing the $4/month recreation fee with some other fee arrangement, but until defendants did so in recent years as recounted below, it was not changed. See Ex. 4 to the Vierthaler declaration, a letter of July 1996, referring to the $4/month fee; see also, Aff. Henke, Supp. Dec. Henke.

Plaintiffs' initial purchase within the plat was lot 51, in 1966, which they had intended to build on but sold when they bought lot 17 with the large old house previously owned by Gilbert Geiser and his wife in 1968. This was one of two outlying houses shown along with the mansion on the original plat, reportedly built by Mr. Moran for his brothers around the end of the 19th century. Plaintiffs later bought the lots on either side of lot 17, lot 52 in 1977, where they have a garage,

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

and lot 4 in 1985, which serves as their yard fronting Rosario Road looking across the recreation area and Cascade Bay. RFA 2 - 3; Aff. Henke.

The description of the property conveyed in the Henkes' deeds reads:

> "Lot [ ], Plat of Rosario Estates, according to plat recorded in Volume 2 of Plats, pages 3 and 3A, in San Juan County, Washington."

The plat shows within the RECREATION AREA a diagramed dumbbell shaped area with a bridge across it, mislabeled "SWIMMING POOL", which was and is actually a concrete lined lagoon about 1.5 feet deep built by Mr. Moran and fed by a pipe from the waters of the lake above the development in Moran State Park. Aff. Henke.

The actual swimming pool is the one described by Sarah Geiser as having been built in 1961, sometimes called the "marina pool," with a bathhouse and patio located in the recreation area toward the south end of the sea wall and north of the marina, in the location noted on the copy of the plat attached as Ex. 1 hereto. Aff. Henke; Supp. Dec. Henke. This facility was surrounded by a low fence until the summer of 2001 and is now again so fenced.[2] The marina pool was maintained by the resort owners and used without charge by lot owners and their guests as well as guests of the resort. Aff. Henke. When plaintiffs purchased lot 17, the pool was so in use. In that transaction, Mr. Vincent told plaintiffs, on behalf of the development owners, that all lot owners had the use of the pool facility and all other parts of the recreation area without charge. Aff. Henke; Aff. Vincent.

There is also an outdoor pool outside of the platted area near the mansion,

---

[2] Defendants removed the low fence and built a higher fence in 1971 around about 1/3 of an acre of the recreation area including the marina pool. Within the last few weeks, after the motion for summary judgment was brought in this case, defendants removed this higher fence and replaced it with another low fence immediately surrounding the marina pool facility. Aff. Henke; Supp. Dec. Henke.

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

built sometime after the marina pool, and an indoor pool and various exercise facilities within the mansion, all chiefly for use of paying guests of the resort.

In 1971, a "Rosario Property Owners Association" was formed by some lot owners, including Mr. Henke, for the purpose of arriving at a common understanding with Mr. Geiser as to their rights and privileges to use facilities in the resort and in the recreation area. Supp. Dec. Henke; Dec. S. Geiser, Ex. 1. At that time the resort was managed by Rosario, Inc., of which Mr. Geiser was President, while the unsold land, including the recreation area, was owned by Geiser Land Company. Dec. S. Geiser. Mr. Geiser wrote a letter to the President of the Property Owners Association pertaining to all of these subjects and describing, *inter alia*, Geiser's understanding of the recreation area, which he signed as President of Rosario, Inc., only:

> "Upon my purchasing Rosario in 1960, I assumed as assignee, the obligations made by Mr. Curton. Mr. Curton, to the best of my knowledge, never actually set down a legal description of the Recreation Area, but in the recorded plat plan, it shows it in front of the Swimming Pool, which in actuality is the Lagoon in the beach area.
>
> "I have always assumed that the Recreation Area extended from the West side of the Boatel sidewalk; inside the seawall sidewalk, West to the concrete driveway leading to the present snack bar, breakwater and pier to the floats; and as a Northern boundary, the chain link fence. This could be questioned by either your organization or myself, but I think this is a fairly good description of everybody's idea.
>
> "There seems to be a little misunderstanding as to the rights and privileges, and in my estimation the rights of the property owners legally are limited to the use of this area, so described."

This letter was read at the first meeting of the property owners' association, endorsed over the signature of its President on its behalf, and then sent to all property owners in the form of Ex. 1 to the Declaration of Sarah Geiser. The endorsement reads:

> "Approved and accepted by the Board of Directors of Rosario Property Owners Association on August 15th, 1971."

Mr. Henke was then a member of that board.

The landmarks referenced by Mr. Geiser's 1971 letter are explained in the

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

Supplemental Declaration of Mr. Henke. "Boatel" was a name for the "SHOP," Moran's machine shop, with the "office" at one end of it, shown on the plat; the "Boatel sidewalk" was and is alongside the west wall of that building connecting the "concrete driveway on one side to the seawall on the other. The "seawall sidewalk" mentioned by Mr. Geiser is the top of the "concrete seawall" shown on the plat. That walkway is shown on the plat to diverge from the shorefront at its south end to continue south past the pool facility, the use of which is in dispute, and to intersect the "conc. driveway," shown on the plat. The latter driveway is the "driveway leading to the present snack bar, breakwater and pier to the floats" mentioned by Mr. Geiser. The "chain link fence" mentioned by Mr. Geiser "as a Northern boundary" is no longer present, but the bottoms of the fence posts remain in place, embedded in concrete, abutting the south edge of the "concrete driveway" shown on the plat which is now part of Rosario Way.

After assisting in drafting and filing its articles of association and attending this first meeting, Mr. Henke ceased to take any active part in the property owners association and quite forgot this letter until reminded of it by Sarah Geiser's declaration.

Thereafter the Resort continued to collect the $4.00 per month recreation "dues," along with water payments.[3] Also thereafter, the recreation area and marina pool, as well as the dock and tennis courts outside the recreation area, continued to be maintained by the resort and used in common by lot owners, their families and guests and resort guests. Dec. S. Geiser; Aff. Henke; Supp. Dec. Henke.

---

[3] The $20/month water fee and $4/month recreation fee were billed together as one monthly charge of $24 until 1996, when a separate water company was split off and the $20 water billed separately by "Rosario Utilities, L.L.C." Dec. Vierthaller, Ex. 4.

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

Sometime in the 1980s, a shack, still in place, about ten feet by fifteen feet in area, was erected by the resort operators southwest of the marina pool and used to rent motorscooters and, more recently, kayaks.

Shortly after defendant Rockresorts began managing the hotel for defendant Oly Rose in 2001, defendants constructed a higher fence enclosing the marina pool and part of the recreation area around it, about one-third of an acre. They then replaced the $4/month recreation fee with a very different fee arrangement. Owners of lots within the plat were offered the opportunity to purchase a purported privilege to use the marina pool and the other pools and exercise facilities within the resort and outside of the plat, in exchange for an initial fee and continuing "membership fees." Aff. Henke, RFA 15 - 19. In 2002, these fees were set out in a letter from Thomas H. Juliano, as "General Manager of Rosario Resort and Spa," as a $100 initial fee or $50 renewal fee and a fee of $420 for a "12-month Membership" or $250 for a "Summer Membership." Aff. Henke, Ex. 2. Since this system was instituted, plaintiffs and other lot owners who have not paid these fees have been excluded from using the marina pool and, until a few weeks ago, any of that part of the recreation area within the fence erected in 2001. RFA 17, 18; Dec. Henke. Subsequent to plaintiffs' earlier motion for summary judgment, as noted above, that fence was removed and replaced by low fence on the perimeter of the pool facility itself. Supp. Dec. Henke.

IV. ARGUMENT

Defendants' counsel wrote to plaintiffs' counsel, March 21, 2003:

> "It appears that the overriding issue for Mr. Henke is the ability of the Resort to develop within the "recreation area". It is our position that the developer of the plat in which the Henkes own never intended to limit its ability to develop the area in question."

Aff. Richter, Ex. 1. This motion addresses that issue.

A. Texts and Washington cases involving platted streets state that lot owners have an easement to use common areas designated in a plat.

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

The writer has found no Washington case concerning the rights in a park or common area other than a street designated on a plat of the owners of lots sold by reference to it. Good discussions of the subject, with many citations to cases elsewhere, are in 25 Am Jur 2d, Easements and Licenses, §§ 25 and 26 (1996) and an Annotation, Conveyance with Reference to Plat, 7 A.L.R.2d 607, at Part III Parks and other open areas, pp. 650-667 (1949).

The common result from the cases noted in these sources, variously justified by the courts on the basis of an express or implied grant or estoppel, is stated by one text:

> "When a developer conveys lots in a subdivision by reference to a plat, each grantee receives an implied easement over streets and other common areas delineated on the plat."
>
> Bruce and Ely, Law of Easements and Licenses, § 4:31 "Easements implied from reference to plat", p. 4-86 (2001).

The rule is consistent with the more general principle regarding conveyances of platted lots:

> "Where a deed references a map of the land conveyed, the map and deed are to be construed together, and the map becomes, 'in legal effect, a part of the description.' "
>
> *Saterlie v. Lineberry*, 92 Wn. App. 624, 627 (1998), quoting *Moore v. Clarke*, 157 Wash. 573, 581 (1930).

The Washington cases most closely related to the issue here are concerned with the special case of the rights of the owners of lots in subdivisions laid out with streets dedicated to the public and subsequently vacated. In *Van Buren v. Trumbull*, 92 Wash. 691 (1916), the first case of this kind, the Court affirmed a trial court judgment confirming an easement in favor of lot owners against other lot owners who obtained the vacation of a platted street (which was never opened by the public pursuant to the 1890 statute) and then attempted to bar common use

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

of it.[4] The Court expressed the rationale which underlays the cases concerning recreational common areas from other states surveyed below.

> "Resort must be had to fundamental principles. One who plats property upon which streets have been laid out, and who sells property with reference thereto, cannot, by an act of his own, defeat the right of his vendee to use the platted streets for the purposes intended. He is estopped to deny or impeach rights thus acquired. ...
>
> " 'The doctrine has for its object the suppression of fraud and the enforcement of honesty and fair dealing. Where, therefore, lots have been offered for sale, and have been purchased in accordance with a map or plat upon which streets are made to appear, it is presumed that the purchase was induced, and the price of the lots enhanced thereby, and the seller is estopped to deny the right which has thus been acquired.' "
>
> 92 Wash. 693-4, including quotation from *Norfolk v. Nottingham*, 96 Va. 34, 30 S.E. 444 (1898)[citations omitted].

In this case and in *Howell v. King County*, 16 Wn.2d 557 (1943), on very similar facts following vacation of a street by the County, the Court confirmed easements in adjoining lot owners against other adjoining lot owners who sought to prevent common use the part of the street which they had gained by vacation.[5]

B. All jurisdictions which have considered the issue hold that lot owners have a common easement to use parks and other recreational areas, other than streets, designated for the use of lot owners in a plat.

Since a plat is part of the deed's description of what is granted, *Saterlie*, *supra*, the plat supplies the representation element of the estoppel rationale expressed in *Van Buren* and *Howell*. The estoppel element of reasonable reliance

---

[4] Laws of 1890, ch. 32 ch. XIX, p. 603 "Any county road, or part thereof, which has heretofore been or may hereafter be authorized, which remains unopened for public use for the space of five years after the order is made or authority granted for opening the same, shall be and the same is hereby vacated, and the authority for building the same barred by lapse of time."

[5] The rule of these cases concerning vacated platted public streets has since been qualified by the "reasonably necessary" (for access) holding in *Capital Hill Meth. Church v. Seattle*, 52 Wn.2d 359, 369 (1958), where the Court refused to recognize private rights to continue using a platted street vacated by public authorities (to allow construction of a hospital) in lot owners who did not abut the vacated street and had other reasonable access to their property without use of it.

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

distinguishes the implication of private rights in dedicated streets from those in private parks. While it may be presumed that a lot purchaser relies upon only public streets necessary to "reasonable" access to his lot, and may expect public authorities to have the power to vacate other streets without compensation to him, as in *Capital Hill Meth. Church* (52 Wn.2d at 369), there is no other reason to reserve a recreation area for the private use of lot owners except to induce them to purchase lots. The courts of other states which have considered the question of lot owners' rights in recreational areas set aside for them, as well as in squares or parks set aside for the public, have recognized this, leaving as the only issue whether a given area is sufficiently designated for the Court to describe it by reference to monuments shown in the plat.

Cases from many jurisdictions are surveyed in *Horrighs v. Elfrank*, 727 S.W.2d 910 (Mo. App. 1987), in which the owners of lots in a lake front development were arrayed against remote grantees from the developer of a certain Lot 10 on the waterfront labeled "Park." The plat also stated

> "Those areas designated as 'parks' shall be for the use of all Lot Owners and guests only and for private non-commercial use. Dedicators reserve the right, however, to grant concessions of a commercial nature in those areas designated as 'parks.'"

A trial court judgment for the Lot 10 owners was reversed and judgment directed for the other lot owners establishing their right to use lot 10 for a park and for access to the lake. The Court treated the plat provision as having the same effect as the separately recorded restrictive covenants in a Georgia case in which specified lots were "dedicated to the use of a park or recreation area for the benefit of the residents of said subdivision".

> "The cases establish that a conveyance by reference to a plat can grant a private easement for the use of an area for park purposes. 'It is well settled that when a subdivision contains an attraction such as a park or lake which renders the lots more desirable, the sale of lots in reference to a plat showing the attraction will create an irrevocable easement in such an area for the lot owners.'"

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

727 S.W.2d at 914, quoting *Hendley v. Overstreet*, 253 Ga. 136, 318 S.E.2d 54 (1984)(lot owners with deeds referencing covenants recorded by developer held to have easements to use the "park" lots for recreation, as against buyers at tax sale).

The Court continued:

> "The scope of the lot owner's easement to use lot 10 for park purposes is to be determined by a construction of the plat. ... 'In the interpretation of maps and plats all doubts as to the meaning of the owner should be resolved most strongly against him;....' *Mosely v. Searcy*, [363 S.W.2d 561 (Mo. 1962)], at 563.
>
> ...
>
> ... "The location of Lot 10 is such that it is reasonable to conclude a recreation use of that lot should include access to and the use of the lake."

A Florida case, *McCorquodale v. Keyton*, 63 So.2d 906 (Fla. 1953), is similar. In their plat, developers dedicated its streets as public ways and then stated they "also dedicate that parcel and part of said land lying between the Gulf Coast Highway and the Gulf of Mexico as 'Sunnyside Park' for the use of property owners of said plat." The developer then started operating a sandwich stand in the "park" and contracted to sell it to a third party. A judgment for the lot owners enjoining obstruction of the park was affirmed, the court citing the A.L.R.2d annotation noted above. The court stated the general rule:

> "Whenever the owner of a tract of land subdivides the same into lots and blocks, lays off streets and other public ways and designates portions of said lands to be parks, playgrounds or similar facilities or uses similar words calculated to encourage prospective purchasers to buy said lots, and actually sells lots with reference to the plat, he becomes bound to his grantees by the plat and the representations thereon. As the maker of the plat and the one who selects the words used thereon, it will be construed against him. Common honesty requires that he perform that which at the time of the conveyance he represented he would perform."

63 So.2d at 910.

These cases all recognize that the prospect of common recreational use of a waterfront area is a particularly compelling inducement to the purchase of lots, which must be protected if supported by the language of a plat. A Maryland court considered an unrecorded plat shown to lot purchasers on which a waterfront area across a road from the lots was designated "community beach and park."

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

Although the recorded plat lacked that designation, the Court enjoined the developers' successors from opening the area to public and more commercial recreational use:

> "The relation of lots in a water front development to the water differs from that of abutting lots to a city square. There is naturally a greater dependence, if indeed, we should not say that access to the water is an essential, for in that access lies the purpose of the settlement and the purchase of lots in it."
>
> *Williams Realty Co. v. Robey*, 175 Md. 532, 2 A.2d 683, 686 (1938); *see also*, *Klein v. Dove*, 205 Md. 285, 107 A.2d 82, 86-7 (1954)(lot owners held to have an easement for the use of an unlabelled corridor to water shown on plat, which the court inferred must be for community access, no other reason for it appearing. 107 A.2d at 85).

The same rules are recognized in many other cases, of which some are noted below: *Putnam v. Dickenson*, 142 N.W.2d 111 (1966)(Lot owners held to have affirmative easement to use square designated "Park" on plat). *Kirchen v. Remenga*, 291 Mich 94, 288 N.W. 344 (1939)(lot owners held to have easements to use other lots designated for park purposes; their failure to object to the later erection of buildings consistent with recreational use held not an abandonment). *Maddox v. Katzman*, 332 N.W.2d 347 (Ia. Ct. App. 1982)(inland lot owners granted injunction against waterfront lot owners who obstructed their access to lots labelled "Green's Beach" and referenced in covenant expressing the lot owners' rights to use it.) *Cree Meadows, Inc. v. Palmer*, 68 N.M. 479, 362 P.2d 1007 (1961)(lot owners granted injunction against contrary development of area designated "golf course" in plat). *Ute Park Summer Homes Assn. v. Maxwell Land Grant Co.*, 77 N.M. 249, 427 P.2d 249 (1967)(lot owners shown a plat including a designated golf course, even though the plat was never recorded, held to have rights precluding contrary development of that area; judgment for developer reversed). *Cleveland Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E.2d 30 (1964)(same as *Ute Park Summer Homes*, except that the plat showing the golf course was recorded). *Hackert v. Edwards*, 22 Conn. Sup. 499, 175 A.2d 381

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

(1961)(deed reference to right to use park designated in map on file with town clerk created an express easement, citing the A.L.R.2d annotation mentioned above).

In all of the above cases, the original plat was held to have created an easement, the burdens of which ran with the servient estate and the benefits of which ran with the lot owners' dominant estates. Successors to the developer are not innocent purchasers, because reference to the plat puts them upon notice of the lot owners' rights. Specific mention of the easements in conveyances to the developer's and the lot purchasers' successors, beyond mention of the plat, is entirely unnecessary to affect their rights. As noted in the *Cree Meadows* case, where a successor developer was the plaintiff,

> "The burden and benefits run with the land in favor of subsequent grantees in the subdivision, and the inclusion of the reference in the deed to the plaintiff neither adds to nor detracts from the legal effect of the original dedication."
>
> 362 P.2d at 1011; *also see*, *Maddox v. Katzman*, 332 N.W.2d 347, 351-2 (Ia. 1982).

C. The developer's successors may not show that no enforcible right was intended to be conveyed.

This issue, if it arises, calls for the traditional application of the parol evidence rule. While evidence may always be offered to explain the circumstances of the representation in the plat, *Harris v. Ski Park Farms*, 120 Wn.2d 727, 742 (1993)(as to construction of a deed), parol evidence may not contradict a writing which within the context of its circumstances is not ambiguous. If it is ambiguous, the plat referenced in a deed must be construed against the developer because any ambiguity in a deed is so construed. *Kunkel v. Meridian Oil*, 114 Wn.2d 896, 906-7 (1990).

Pearson v. Virginia City Ranches Assn., 298 Mont. 52, 993 P.2d 688 (2000), addresses the parol evidence issue in reference to a pertinent fact pattern.

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

A 1973 plat depicted and labelled a bridle path. Lots were sold by reference to it, by deeds with no specific reference to the bridle path but including the usual language, "subject to easements and restrictive covenants of record." Many years thereafter, no actual bridle path having been developed and fences, barns, ponds and other structures having encroached on the area designated for it, a majority of the homeowners' association succeeding to the developer's rights to maintain common areas voted to remove references to the bridle path from the plat. Upon suit by the dissenting minority, the Court held that the encroachments were not clearly inconsistent with the lot owners' future use of the bridle path and applied the rule that a non-exclusive easement is not lost by nonuse or use by another. 993 P.2d at 695-6. Judgment for the dissenting minority of lot owners was affirmed:

> "This Court's holdings with respect to an express easement by reservation establish that an easement arises when a purchaser's deed refers to a plat where an easement is depicted and labeled. In this case, the intent of the parties to create a bridle path easement was manifested through the language in their deeds and the plat. Accordingly, extrinsic evidence regarding the intent of the parties is inadmissible."
>
> 993 P.2d at 693.

D. The developer's construction and maintenance of facilities consistent with the recreational use of the "recreation area" does not evidence an abandonment or adverse possession of any part of it.

A New York case cited by the Missouri Court of Appeals in *Horrighs*, *Wilkinson v. Nassau Shores*, 1 Misc.2d 917, 86 N.Y.S.2d 603 (1949), collects the New York cases to that date on the interpretation of such a plat, in the context of such events. A plat designated an area "Community Beach," and lot owners, their guests and prospective purchasers used bathing facilities erected by the developer for a nominal fee. Later, the developer went out of business, no one paid the taxes on the property, and plaintiff bought the land at a tax sale. Plaintiffs attempt to defeat the lot owners' easement was rebuffed:

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

> "The use of the words "Community Beach" appearing on the filed map would clearly seem to indicate an intention that the beach was for the use of the owners of the lots. ...
>
> "The swimming pool and bathing pavilions [referred to in a sales brochure] are located on the portion of the filed map referred to as 'Community Beach'.
>
> ...
>
> "The plaintiff makes much of the fact that the property owners never used the beach and bathing facilities without payment of a fee. He also points out that the bathing beach and facilities have always been available for use of the public. In fact he contends the only difference between the use of the facilities by the property owners and the public at large is that the property owners paid a reduced fee. ... It is difficult to believe that these various property owners would ever have bought what was believed to be highly residential property adjacent to a beach unless they felt that they were getting some right in the beach.
>
> "In addition, it is well settled that where a developer of land sells lots with reference to a map on which squares or parks or beaches are designated and representations are made by the developer that such parks or squares or beaches are for the use of the lot owners, the purchasers of such lots acquire an easement in such parks, squares or beaches by implication and representation."
>
> 86 N.Y.S.2d at 607-8 (citing many New York cases).

So here, a $4/month fee was paid by the Rosario Estates lot owners for their use of a dock and tennis courts outside the designated recreation area, in common with resort guests, as well as the pool in the recreation area. True, a lot owner might contest any fee conditioning his use of any part of the recreation area. But would any reasonable person object to so small a fee, or think it worth his effort and expense to challenge it, given the developer's construction and maintenance of improvements for his and others' common use?

Nor does the lot owners' failure to challenge the resort operator's maintenance of the small shack for renting motorscooters and kayaks support any claim of adverse possession. In Kirchen v. Remenga, 291 Mich 94, 288 N.W. 344 (1939), the Court granted owners of platted lots an injunction restraining the developer's successors from using and selling certain lands platted 50 years earlier for park purposes. "A hotel, grocery store, boat livery, powerhouse, garage and other buildings were erected on the park land from time to time, but the use of

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

these structures has been for the most part discontinued." *Id.* at 346. These, the Court noted, "were regarded as a convenience not inconsistent with plaintiffs' use of the land for park purposes." *Id.* at 351. The encroachments were thus deemed similar, on a smaller scale, to those held not to diminish the public's rights in a quay on which private buildings had been erected, in *New Orleans v. United States*, 35 U.S.(10 Pet.) 662, 9 L.Ed. 573 (18). These buildings were "generally of a temporary nature, and were permitted, where private accommadation was in some degree connected with the public convenience. ... Some of these buildings have long since disappeared, and any of them which may still remain, do not subject the city or public to any inconvenience." 35 U.S. at 715, quoted 288 N.W. at 351. Accordingly, Michigan Court in *Kirchen* held that the construction and use of these buildings did not to result in any loss of the lot owners' rights by adverse possession, although they were held estopped to deny the right of one tavern to continue in operation on which the owner had spent a large sum making known improvements without objection. *Id.* at 352.

The use and maintenance of the marina pool by the resort, so long as it was for the common use of lot owners at such a nominal fee, and the resort's use of other facilities consistent with recreational use of the area, must be deemed permissive, and not a foundation of any prescriptive right adverse to the common recreational use rights of lot owners, under these authorities. The resort's later construction of the shack near the marina pool, used for renting motorscooters and kayaks, should be deemed permissive as well, because of the evident temporary nature of the tiny structure [Supp. Dec. Henke] and the convenience of its use in connection with the recreation of the lot owners and the public. The use of the shack within the last year of so by Rockresorts as a dock master's office is the first which may not be so regarded.

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

E. The boundaries of the "RECREATION AREA" is sufficiently designated by reference to monuments shown in the plat for the Court to reference in a judgment.

The North Carolina case noted above, *Cleveland Realty v. Hobbs*, was followed in *Hinson v. Smith*, 89 N.C. App. 127, 365 S.E.2d 166 (1988), rev. den. 373 S.E.2d 545 (1988): A developer sold lots to various owners in a plat showing their lots separated from Pamlico Sound by "Driftwood Drive" and an area labelled "Beach." He then sold land in the vicinity, including one adjoining lot and an area by metes and bounds including the "Beach," to the defendant. Despite the fact that plat, a picture of which is appended to the reported decision, does not specify any bearings or distances for the boundaries of the "Beach," the court rejected that the defendants' contention that it was not sufficiently identifiable. The Court observed:

> "The recorded plat manifests the intention of CLD [the developer] to set aside all the area north and west of Lot 29-A, south of the Pamlico River, east of Neville Creek, and north of Driftwood Drive to be a private easement for the purchasers and owners of all of the lots described and enumerated on the plat ....
>
> "Plaintiffs and other purchasers and owners of lots described in the recorded plat, therefore as a matter of law, had and have a private easement over and across all of the property designated as "Beach" on the recorded plat ...."
>
> 365 S.E.2d at 168.

The land within the "RECREATION AREA," although not delineated by any calls of bearings and distance, is likewise sufficiently identifiable by landmarks shown and labelled on the plat around those words. This case differs from *Hinson* only in that the east boundary of the recreation area is the west wall of a building, Moran's machine shop. Since that building, labelled "SHOP" on the plat, has existed many years and its location is marked on the plat, it is as good an indication of the location of that boundary as the concrete driveways and the seawall marked on the plat are of the other boundaries. The difference is therefore

Henke and Richter
221 First Avenue West, Suite 215
Seattle, Washington 98119
(206) 282-2911

not a meaningful distinction, and the area subject to the easement is sufficiently described by a judgment which attaches a copy of the plat and refers to permanent structures marked on it: the shop along with the driveways, the seawall and the walkway extending the straight line of the seawall to the driveway leading to the marina.

Mr Geiser's 1971 description of his understanding of the recreation area confirms this interpretation of the plat as a common understanding. His reference to the fence abutting the driveway, as the north boundary, and to the sidewalk abutting the shop (or "Boatel"), as the east boundary, in every practical effect accords with the driveway and shop boundaries of the recreation area which are apparent from the plat itself.

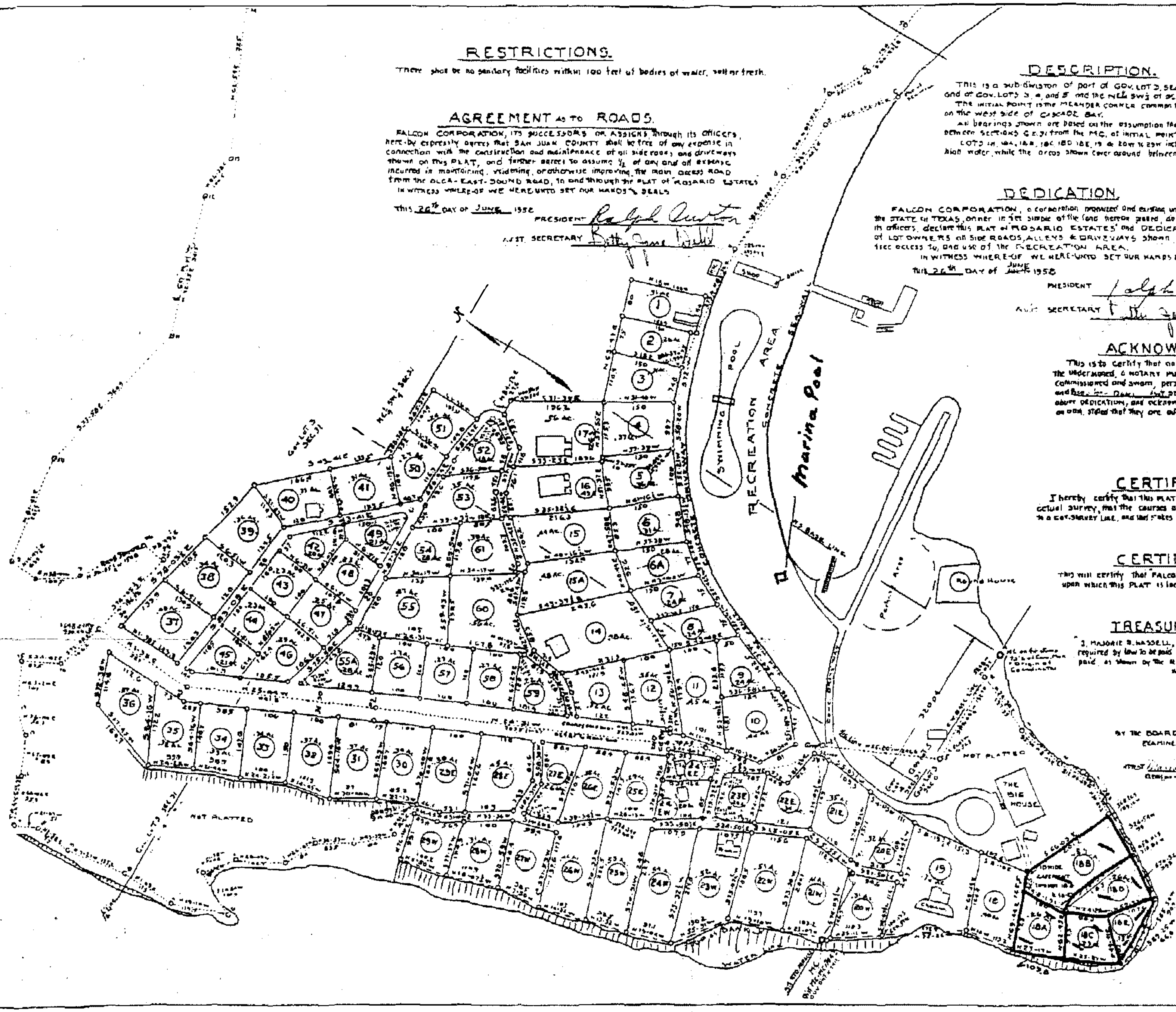
V. SUMMARY

For the reasons stated above, plaintiffs request that partial summary judgment be entered declaring the existence of an affirmative easement in favor of the lot owners of Rosario Estates to access to and use of all parts of the recreation area, bounded as above described with reference to the plat, and enjoining defendants or their successors from charging the lot owners a fee for the use of any part of it, including the marina swimming pool, and from excluding them from any part of it. A proposed form of order is filed herewith.

Respectfully submitted this 22 day of July, 2003.

HENKE AND RICHTER

by: _____
Eric Richter (WSBA 6978)



RESTRICTIONS.

There shall be no sanitary facilities within 100 feet of bodies of water, salt or fresh.

AGREEMENT AS TO ROADS.

FALCON CORPORATION, ITS SUCCESSORS OR ASSIGNS through its officers, here-by expressly agrees that SAN JUAN COUNTY shall be free of any expense in connection with the construction and maintenance of all side roads and driveways shown on this PLAT, and further agrees to assume ½ of any and all expense incurred in maintaining, widening, or otherwise improving the main access ROAD from the ORCA-EAST-SOUND ROAD, to and through the PLAT of ROSARIO ESTATES.
IN WITNESS WHERE-OF WE HEREUNTO SET OUR HANDS & SEALS

THIS 26th DAY OF JUNE 1958

PRESIDENT Ralph Curton

ASST. SECRETARY Betty Jane Dahl

DESCRIPTION.

This is a sub-division of part of GOV. LOT 3, SEC 6, T. 36 N.-R.-1 W.-W.M. and of GOV. LOTS 3, 4, and 5 and the NE¼ SW¼ of SEC 31-T. 37-N.-R. 1 W.-W.M.
The initial point is the MEANDER CORNER common to fractional sections 6 & 31, on the west side of CASCADE BAY.
All bearings shown are based on the assumption that that portion of the line between sections 6 & 31 from the M.C. of initial point west to next M.C. is truly E-W.
LOTS 1A, 16A, 18A, 18C, 18D, 18E, 19 & 20W to 23W incl. extend to the line of ordinary high water, while the areas shown cover ground between stakes only.

DEDICATION.

FALCON CORPORATION, a corporation organized and existing under the laws of the STATE of TEXAS, owner in fee simple of the land herein platted, does hereby, through its officers, declare this PLAT of ROSARIO ESTATES and DEDICATES to the use of LOT OWNERS all SIDE ROADS, ALLEYS & DRIVEWAYS shown together with free access to, and use of the RECREATION AREA.
IN WITNESS WHERE-OF WE HERE-UNTO SET OUR HANDS & SEALS
THIS 26th DAY OF JUNE 1958

PRESIDENT Ralph Curton

ASST. SECRETARY Betty Jane Dahl

ACKNOWLEDGEMENT.

This is to certify that on this 26th day of June A.D. 1958, before me, the undersigned, a NOTARY PUBLIC in and for the STATE of WASHINGTON, duly commissioned and sworn, personally appeared RALPH CURTON PRESIDENT, and Betty Jane Dahl ASST. SECRETARY, of FALCON CORPORATION, which made the above DEDICATION, and acknowledged it to be a free and voluntary act and deed, and on oath stated that they are authorized to execute said INSTRUMENT.

NOTARY PUBLIC in and for THE STATE of WASHINGTON
residing at ORCAS
my commission expires June 1, 1960

CERTIFICATE OF ENGINEER.

I hereby certify that this PLAT of "ROSARIO ESTATES" is based on an actual survey, that the courses and bearings are correctly shown and tied to a GOV. SURVEY LINE, and that stakes have been set at all LOT corners.

F. M. Graham

CERTIFICATE OF TITLE & OWNERSHIP.

This will certify that "FALCON CORPORATION" has clear title to the land (SEE DESCRIPTION) upon which this PLAT is located, as of this date ______

LAWYERS TITLE INSURANCE CO

TREASURER'S CERTIFICATE.

I, MARJORIE B. HASSELL, TREASURER of SAN JUAN COUNTY, do hereby certify that all taxes required by law to be paid upon the real estate embraced within this PLAT, have been fully paid, as shown by the RECORDS in my office.
Witness my official signature and seal, this 7th day of July AD 1958

Marjorie B. Hassell
TREASURER, SAN JUAN CO

APPROVAL

BY THE BOARD OF COUNTY COMMISSIONERS.
EXAMINED AND APPROVED this 7th DAY OF JULY AD 1958

ATTEST [illegible] CLERK of the BOARD

CHAIRMAN [illegible]

MEMBER [illegible]

MEMBER [illegible]

APPROVAL

BY THE COUNTY ENGINEER.
EXAMINED AND APPROVED this 7th DAY OF JULY AD 1958

CO. ENGR. (Acting)

Filed for RECORD at the request of [illegible]
this 28 day of August AD 1958, at 15 minutes past 11:00 A.M. and recorded in VOL 2 OF PLATS PAGE 3 7 3A RECORDS of SAN JUAN CO. WASHINGTON.

ROSARIO ESTATES

ORCAS ISLAND SAN JUAN CO. WN.

1" = 100' JULY 1958.

EXHIBIT 1