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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 REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff replies to defendants' arguments in the order stated

A. This easement passes by deed, with sufficient language indicating intent to convey.

Defendants' argue there is no sufficient language of grant, suggesting the plat alone cannot create one The language of grant, however, is supplied by the deed, which refers to the plat for the description of what is granted By the description in the grantee's deeds, "Lot [ ], Plat of Rosario Estates, according to the plat recorded in Volume ," " 'the map becomes, 'in legal effect, a part of the description ' The reference, therefore, "has the same legal effect as the description contained in the plat " *Saterlie v Lineberry*, 92 Wn App 624, 627 (1998), quoting *Moore v Clarke*, 157 Wash 573, 581 (1930)

Although the easement in this case is created by a recorded deed, by reference to a recorded plat, easements may be created by a contract lacking the formalities of a deed, and the grant does not have to be in any particular form

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of words *Kalinowski v. Jacobowski*, 52 Wash 359, 362 (1902)(contract by which a party paid for a "right of way" over defendant's land, without words of conveyance, created easement.) Obstruction of an easement, however formed, will be enjoined, the legal remedy of damages is never deemed an adequate remedy *Id* at 368

Although the mere label on the plat drawing within the area bounded by the seawall, roads and shop/office would have been sufficient to create an easement appurtenant to lots referring to the plat, this plat contains an express "dedication,"[1] which itself is understood to convey an easement The word "dedicate" is often used in the form "dedicate to the use of" lot owners, or residents of , or other designations indicating an easement appurtenant to lot grantees and their successors, even though the term is more strictly used to create public rights Courts give such language the plainly intended effect Thus, when the makers of a plat stated, "we further dedicate the golf links and playgrounds " to lot owners, "the purported dedication is to the owners of lots and lands of the development " *Cleveland Realty Co v Hobbs*, 261 N C 414, 135 S E 2d 30, 35 (1964)(enjoining construction of a road across the area designated as golf links) In *Horrighs v Elfrank*, 727 S W 2d 910 (Mo App 1987), the court noted

> "It is sufficient to observe that the defendants' contention that an easement for park purposes in favor of the lot owners must fail because such an easement was not granted to the general public is without merit Confusion often exists because of a failure to observe a careful distinction between proper use of the term "dedication" to categorize the creation of rights of use in the general public and the use of that term in reference to the creation of rights of use in an individual or a group of individuals The

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[1] The words used in the plat are "FALCON CORPORATION, DEDICATES to the use of the LOT OWNERS all SIDE ROADS, ALLEYS, & DRIVEWAYS shown, together with free access to, and use of, the RECREATION AREA "

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general subject is analyzed and discussed in Annot , Conveyance With Reference to Plat, 7 A L R 2d 608 (1949) "

727 S W 2d at 913 See also 7 A L R 2d 608 at § 3 10, notes 5-8 and Bruce and Ely, Law of Easements and Licenses, § 4 31 (2001)[2]

This is such a case of non-technical use of the word "dedicate" to create rights of use a group of grantees and their successors

As the plat is incorporated in the deed, the general rights indicated in the plat are conveyed as an easement appurtenant to each lot The grantor and his successors retain title, unlike the case of a dedication to the public if accepted in accord with local law, but that title is burdened with the common easement

B. No "servient tenement" need be indicated by the plat for this easement, other than the area of the easement itself.

Defendants are mistaken in their assumption that the plat need designate a "servient tenement" other than the recreation area itself The "servient tenement," as to any park or road or other area for common use indicated on a plat to which lot owners' deeds refer, is the park or other such common-use

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[2] The last referenced text writers note "Easements implied from reference to a plat also are sometimes confused with easements that arise by express or implied dedication One reason for the confusion is that, in many jurisdictions, the act of filing a plat constitutes an offer to dedicate to the public the streets and parks specified on the plat Moreover, some courts inappropriately use the term "private dedication" to refer to easements implied from reference to a plat The practical difference between easements implied from reference to a plat and easements created by express or implied dedication is that easements implied from reference to a plat are private servitudes that have a life separate and apart from rights created in the general public by acts of dedication Thus, when a dedicated subdivision street is vacated, lot owners generally retain private implied easements that can be terminated by the government only upon the payment of just compensation " Bruce and Ely, *op cit* As noted in our principal brief, Washington qualifies the last statement to apply only to streets "reasonably necessary" to a lot owner The same qualification was noted pertaining to a lot owner's right in streets marked on a plat, and streets were specifically distinguished from "parks, playgrounds or similar facilities" to which no such qualification applies, in *Hurt v Lenchuk*, 223 S 2d 350, 352 (Fla App 1969)

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area itself The designation "park" or "recreation area," as in this case, is the grantor's representation to each potential purchaser that a common right to so use the indicated area is included in the conveyance of a each lot in the plat

In no case found by this writer has a "servient tenement" been separately called out, nor is the absence of such a designation mentioned by any case or text writer as a problem preventing the creation of an easement for park use of an area so designated in a plat

Hence, when all the lots are sold and the developer turns the management of the common area over to a homeowner's association, each lot owner has a right to the specified use of a common area even if most of the others would rather abandon it, illustrated in the case of a bridle trail by *Pearson v Virginia City Ranches Assn* , 298 Mont 52, 993 P 2d 688 (2000) The court noted the developer did not and could not grant the owners' association any right in the bridle trail which it could convey free of the common right of use

By contrast, when a "floating" right is conveyed for the grantee to establish a future road or railroad or other use of land within a larger area termed the grantor's "servient tenement," the location of the grantee's use need not be specified, but the location of this "servient tenement" must be The cases cited by defendant, *Berg v Ting*, 125 Wn 2d 544 (1995), at 551, and *Netherlands Am Mtge Bank v Eastern Ry & Lumber Co* , 142 Wash 204 (1927), at 211-212, stand for that proposition But the separate designation of a "servient tenement" is entirely unnecessary when the location of the easement is specified and the location of its boundaries are indicated and in existence, not "floating "

The North Carolina case cited by defendants in connection with this topic, *Stines v Willyng*, 81 N C App 98, 344 S E 2d 546 (1986), does not

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involve a floating easement or the designation of a "servient estate" for one at all It is, rather, a case in which a plat labelled as "Park Property," an area at the top edge of the plat drawing north and west of certain lots on the periphery of the platted property itself, with nothing at all to indicate where this "park" ended beyond those lots The court held this was patently defective to grant or reserve an easement because the "park" was not capable of being located

> "[a] description which leaves the subject of the contract, the land, in a state of absolute uncertainty, and which refers to nothing extrinsic by which it might possibly be identified with certainty, is patently ambiguous Parol evidence is not admissible to aid such a description and the instrument which contains it is void. [Citation omitted]
>
> "A description is 'latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made ' 'In such case plaintiff may offer evidence, parol and other, with reference to such extrinsic matter tending to identify the property, and defendant may offer such evidence with reference thereto tending to show impossibility of identification, i e , ambiguity ' [Citation omitted]"
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> 81 N C App at 100, quoting *Bradshaw v McElroy*, 62 N C App 515, 516, 302 S E 2d 908, 910 (1983)[ellipses and parenthetic notes in original]

Applying those principles, the court concluded that the "top line of the plat" could not serve as a boundary because it was itself undescribed and "does not join a clearly demarcated eastern or western terminus for the area" Hence, the court concluded, "There is absolutely no reference here to anything on the plat itself which is 'sufficient to serve as a pointer or a guide to the ascertainment of the location of the land '" *Id* at 101, quoting *Allen v Duvall*, 311 N C 245, 249, 316 S E 267, 270 (1984)

The plat in the instant case is quite sufficient to point out the location of the land represented to be for the lot owners' common use as a "recreation area," as shown below

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C. The plat creates an easement by reference.

Defendants properly acknowledge that a plat can create an implied easement As noted in our principal brief, easements for the use of property designated as a park in a plat are sometimes termed express, because the plat is incorporated in the deed description, and at other times termed implied The rights created as a result are the same, regardless of the theory and label used In either case, what is necessary is that the restriction in the use of the land be specified on the plat and that the plat contain references by word or diagram, in the words of the North Carolina Court in *Stines v Willryng* quoted above, "sufficient to serve as a pointer or a guide to the ascertainment of the location of the land " The area need not be specified by courses and distances where existing manmade or natural features of the landscape are indicated by the plat as bounding it

Thus, in the *Hinson v Smith,* 89 N C App 127, 365 S E 2d 166 (1988), rev den 373 S E 2d 545, quoted and discussed in plaintiffs' principal brief at 18, the plat diagram appended to the published decision shows an area labelled "Beach" bounded partly by an existing road and partly by water, with no bearings or distances specified for any boundary of it That was sufficient to locate the land practically, as extrinsic evidence of the existing monuments encircling the area made the plat's reference to those monuments a definite location of the area in question Likewise, in *Anderson v McRae*, 495 S W 2d 351, (Tex App 1973), discussed and quoted below in this section, the Court rejected the contention that an area reserved for recreation and roadway between platted lots and the shore was not thereby made an easement for their common use conveyed by their deeds referrin to the plat Here, as in *Hinson*, there is no dispute as to the existence on the ground of the monuments

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surrounding the area indicated by the drawing of the plat, and as in both *Hinson* and *Anderson*, the failure to describe the area by metes and bounds is immaterial The question for this Court is whether the plat, in the context of the existence of the structures surrounding the words "RECREATION AREA," points out an area bounded by those structures

The bounds of an area for specified use are indicated in a drawing by the delineation of a structure or natural monument which is obviously not for that use, such as the roads surrounding the park area in *Hinson*, or an not the developer's to convey, such as the water bound of the area at issue in that case In the case of the instant plat the public waters beyond the seawall are plainly not part of a recreation area The roads on two inland sides of the recreation area are not for recreation The existing building running across on the other inland side, labelled and then used as a "shop" and "office," is not for recreation The sea and these structures are therefore understood to bound the area

The plain meaning of the plat thereby corresponds to what the developer's salesman, Peter Vincent, told Mr Henke (Vincent Aff p 2, Henke Aff p 3). lot owners would have the use of the area including the dumbbell shaped lagoon above the words "RECREATION AREA," bounded on one side by the building labelled "shop" and on the other sides by the enclosing seawall and the enclosing roads The average person looking at this plat and looking at the actual structures on the ground can have had no other understanding of the area promised for his free access and use

The western boundary is as plainly indicated by the shop/office building as the roadways and seawall It is a long building nearly in line with the gas

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dock (the pier shown on the plat with fueling facilities), extending nearly the entire distance between the seawall and parallel road and perpendicular to them The placement of the words "recreation area" on the plat just under the diagram of the lagoon make it plain this is to be an open area, which is reinforced by the dedication language, so the shop/office building - about one lot-width from the lagoon as shown on the plat - is itself plainly the west boundary of that area A shop and office is not for recreation, just as roads are not for recreation

Defendants, at p 10 of their brief, argue "[t]he term 'Recreation Area' on its own does not connote an easement interest " The term was held to create an easement appurtenant to every lot in a plat in *Anderson v McRae*, 495 S W 2d 351 (Tex App 1973), quoted below in this section If not a park for the common use of lot owners, it is difficult to imagine what a "recreation area" could be, especially one referred to by the language used in this plat

The word, "Park" was placed within an elliptical area separated from each lot in a plat by a roadway, interpreted in *Pierce v Roberts*, 57 Conn 31, 17 Atl 275 (1888) The Court answered the contention of the platter's successors that the lot owners had no interest in the land since their deeds and the plat itself did not otherwise refer at all to the "park "

> "In the first place, the word 'Park' on the map cannot be eliminated from the deeds, but is, on the contrary, an inseparable part of those deeds, and thereby the grantors are estopped from appropriating the land in question to a use inconsistent with such designation The same argument that would give no force and effect to the plan and designation 'Park' on the map referred to, would also virtually nullify the effect of the plan and designation of the 'Road ' It would, however, doubtless be conceded that as to the latter the deed alone, in connection with the map, would constitute an irrevocable dedication of that space to public use, although there is no grant or covenant in the deed to that effect Why not give like effect to the plan and designation of 'Park?' That surely is a prominent and attractive feature of the plot, and indeed essential to its

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> completeness The center piece contained no number to facilitate selection by a purchaser, but, on the contrary, it was given a name which in itself imported a design to set it apart and reserve it for the common benefit of all Now, although the defendants stoutly insist that the terms of the deed must not be varied by extrinsic evidence, yet virtually by their conduct and their claims they would erase from the map, which constitutes a part of the deeds, the name 'Park,' and insert in its stead 'Grantor's Lot,' or 'Wooding's Lot '"
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> 17 Atl at 276-7

Nothing in the English language or the common law has changed since that case to make the above reasoning less persuasive Further language in the deed specifying that a park is for the use of lot owners in not necessary, but it is consistent and further supports the conclusion that an easement is created All of the cases cited in part IV B of plaintiff's principal memorandum, at pp 10-14, proceed on the same basis

Defendants cite a Texas case, *Drye v Eagle Rock Ranch, Inc* , 364 S W 2d 196 (1963), at p 11 of their brief, claiming that it suggests easements will not be recognized for recreational purposes It stands for no such proposition In *Drye*, purchasers of a lots from a plat claimed an easement by estoppel to use for recreation a 1000 acre ranch which was not shown on the plat and was not owned by the entity which made the plat The Texas Supreme Court affirmed a Court of Civil Appeals decision rejecting their claim, which was not founded on the plat but upon parol representations relating to promised membership in a club which had a 25 year lease to use the property

A more apt Texas case, distinguishing *Drye*, is *Anderson v McRae*, 495 S W 2d 351 (Tex App 1973), in which lot owners obtained a judgment declaring their right to use areas for recreation The court described the plats at issue

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"The plats are in the record and they have drawn thereon an area in front of the lots appearing as a shoreline, running in a meandering course Between said line and the lot fronts are areas which are not subdivided into lots, but which are marked variously as "area reserved for recreation and roadway," and "roadway easement." Abutting on the other side of the meandering line, in the opposite direction from the lots, is an area which is designated "Brooks Lake "

The plats also contain statement by the platter that

"we hereby reserve for the owners of the lots the recreation and roadway areas as shown on said plat "

The Court described the developer's contentions and rejected them

"Appellant seems to contend that since the lake and roadways and recreational areas are not completely contained in the plats and are not described in detail by metes and bounds, that the trial court erred in finding that they were "designated" by the plats and became a part of the description when lots were sold by reference to the plats We do not agree It is clear from the plats that the intention was to include the roadways and recreational areas and the lake front as appurtenant to the subdivided lots, and the trial court had evidence to support its finding that such areas as had been "designated" on such plats As to the areas becoming a part of the description of the lots when the sellers executed deeds to the lots describing them by reference to the plats, it is well settled that when subdivided lots are conveyed by reference to a recorded plat, the matters contained in the plat become a part of the deed by incorporation by reference, [citations omitted]

"Appellant relies on *Drye v Eagle Rock Ranch, Inc* , 364 S W 2d 196 (Tex Sup 1962) We have carefully reviewed both the Court of Civil Appeals' opinion (347 S W 2d 730) and the Supreme Court opinion in *Drye v Eagle Rock Ranch, Inc* , and are convinced that the facts there are clearly distinguished from the facts here Without attempting to catalog all of the differences, we point out that in *Drye*, the large area of land sought to be made subject to the easements was not owned by the parties who subdivided and sold the lots, no representations had been made by the owners of the land sought to be impressed by the easements, the essential elements of estoppel were not present, the major portion of the disputed area was not shown on the subdivision plats, and the claimed easements were vague, 'easements in gross,' rather than 'easements appurtenant ' "

Anderson v McRae, 495 S W 2d 351, 358-9

The instant case is very much like *Anderson* and unlike *Drye* The

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recreation area is indicated by the plat, although not by metes and bounds, and the text of the plat states that it is for the use of lot owners Although no reference to parol representations is necessary here or was necessary in *Anderson*, parol representations pointed out the boundaries of the recreation area at the time of plaintiffs' purchase of their lots Aff Vincent, p 2, Aff Henke, p 3 Although not necessary as further proof, since the plat is unambiguous, these representations are admissible as inducements for plaintiffs' purchase of their lots and do not contradict the deed or the plat *Anderson*, 495 S W 2d at 360-361

Defendants finally argue at p 11 that "there is no such thing as a private dedication " As noted above, the platter's use of the word "dedicate" is plainly understood in the context to create private use rights The meaning of a deed, including a plat whose description is incorporated in a deed, is to be ascertained from reading the whole document, giving the words used their ordinary meaning A word is not isolated and given a "judicial meaning " *McKillop v Crown Zellerbach*, 46 Wn App 870, 873 (1987)

D. The plat does not merely grant a license.

Defendants conclude in this section that a mere license is granted by the plat language, "FALCON CORPORATION, DEDICATES to the use of the LOT OWNERS all SIDE ROADS, ALLEYS, & DRIVEWAYS shown, together with free access to, and use of, the RECREATION AREA " This contention, based upon subsequent use of the area by them and their predecessor owners of the Rosario lodge in common with lot owners, contradicts the plain meaning of that language

Defendants are correct in stating that easements are perpetual, while a

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license is revocable The quoted language contains no hint that the lot owners' right to use the recreation area is revocable It is not a license Plaintiffs were requested to pay a nominal amount toward upkeep of the recreation area, $4 00 per month, and did not object What reasonable man would go to court to contest that? Neither this, nor the successive lodge owners' general upkeep and common use of the area defeats the interest granted by plaintiffs' deed in reference to the plat *Thompson v Smith*, 59 Wn 2d 397, 407-8 (1962), states and illustrates the rules that a dominant easement holder's nonuse does not defeat the easement, and that a servient owner has the right to use the property in any way which does not interfere with the proper use of the easement Under the latter rule, an easement for the exclusive use of the dominant owner (which is tantamount to the fee) is never created unless that intention is spelled out expressly 2 G. Thompson, On Real Property, § 425 at p 656 (1980 ed) So, in *Easton v Appler*, 548 So 2d 691, 693-695 (Fla App 1989), lot owners were held to have an easement to use an excavated yacht turning basin "dedicated" to their use on the plat to which their deeds refer,[3] but their claim of a right to exclude the use of the basin by the developer's adjacent yacht club was denied It follows that the defendants and their predecessors have always retained the right to use the recreation area for their guests in common with the lot owners (which plaintiffs have never denied) Defendants and their predecessors having that common right, plaintiffs and their predecessors did not waive any right by not objecting to defendants' predecessor's construction of a pool for the common use of hotel guests and lot owners within the recreation

[3] The court notes "Although the parties use the term dedication, the lot purchasers' rights arise not by true dedication, which is an appropriation of land for use by the general public , instead, the purchasers' rights are based on principles of law applicable to private property " *Id* at 694 n 2

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area or any other structure consistent with the common recreational use of the area. Again, see plaintiffs' principal memorandum at Part IV D, pp 15-17, and cases cited therein For these reasons, the developer's successors past use of the recreation area in this case have not been inconsistent with the plaintiffs' claimed rights in common with them and are not evidence of an intent or interpretation of the plat other than to convey to lot owners that common easement

In short, the language and drawing of the plat, incorporated into plaintiffs' deeds, cannot be squared with a mere license, and the history of past use of the recreation area does not evidence an intent to grant lot owners a mere license rather than an easement By the consistent common law recognized in all jurisdictions in this country which have considered the issue, the plat language "dedicating" use of a recreation area to lot owners, and a corresponding label within a depiction of natural and artificial features of the landscape to form boundaries of that recreation area within the plat, creates an easement There is no ambiguity in the plat, given the landscape features referred to in it, so that plaintiffs are entitled to judgment as a matter of law

No facts which a trial could develop would sustain defendants' attempt to erase or re-write the unambiguous drawing and language of the plat referring to the "RECREATION AREA." Summary judgment should be granted

Respectfully submitted this 13 day of October, 2003

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