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MARY JEAN CAHAIL
SAN JUAN COUNTY WASHINGTON

Judge Vicki I Churchill
Trial set for Jan 27, 2004

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 Plaintiffs' Trial Brief

I. INTRODUCTION

The following principal issues are presented

1 Does the present successor to the maker of a waterfront plat have the right to develop or otherwise exclude lot owners from an apparent waterfront recreation area owned by the platter, depicted and labelled on the plat and of which the plat contains an explicit "dedication" for the lot owners' free access and use?

2 Is such an apparent recreation area for the lot purchasers' free access and use sufficiently depicted on the plat map to create an easement appurtenant to the platted lots for its recreational use, where the words "RECREATION AREA" on the plat map are surrounded by the depiction of existing structures a concrete seawall along the waterfront, a concrete driveway inland and parallel to the seawall, a concrete driveway intersecting the seawall and parallel driveway on one

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

side and, on the remaining side, a rectangular concrete non-recreational building, the long side of which is oriented perpendicular to the seawall and parallel driveway and extends about 60% of the distances between them?

3. Did the immediate successor to the platter, who was the plaintiffs' grantor, reach an agreement upon the lot owners' right of free access to and use of the apparent "recreation area" within boundaries designated by reference to existing structures, binding upon his successors, where he and his successors maintained the area for the recreational use of lot owners and they did use it for more than 25 years without restriction until shortly before suit was brought?

4 When the platter and its immediate successor contracted to obligate lot owners in this plat and adjoining plats to pay them a monthly fee of $4 00 "for maintenance of recreation area," and maintained the waterfront area at issue as well as tennis courts elsewhere for the lot owners' common use for nearly 40 years, did they assume an obligation binding upon their successors to continue maintaining the apparent waterfront recreation area for the use of those lot owners?

In addition to the plat made by Falcon Corporation and specific representations made to the plaintiffs by Geiser, their grantor and Falcon's immediate successor, plaintiffs will submit further evidence on the following subjects (1) Falcon's promotional literature for selling lots in the plat, (2) the common contracting and conveyancing practice of Falcon, for the sale of Rosario Estates lots, and of Geiser, for sale of lots in both that and Geiser's adjoining plats, and (3) Geiser's and successors' correspondence to plaintiffs and other lot owners regarding the recreation area and fees pertaining to it

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II. FACTS

A. BACKGROUND; PLAT DESIGNATION OF THE RECREATION AREA

"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 The platted area was part of a much larger estate on Cascade Bay known as Rosario, in which Robert Moran built a mansion, with the roads, park area and outbuildings mentioned below, after he retired from the ship maintenance and construction business he founded and operated with his brothers in Seattle The plat, Ex 1 hereto, shows a waterfront area designated "RECREATION AREA," north and east of the ground immediately around the mansion and seaward on the Cascade Bay side of the platted lots The apparent "RECREATION AREA" may be seen by reference to the plat drawing as an area bounded by four structures drawn on it

(1) the "CONCRETE SEAWALL" along the front of Cascade Bay and (at the south end) a section of sidewalk extending southwest on a tangent off that arc to intersect

(2) the "CONC DRIVEWAY" leading over the breakwater, with is the short side nearest the mansion, intersecting with

(3) the long "CONCRETE DRIVEWAY" inland and parallel to the seawall and walkway, which extends from the breakwater driveway to

(4) the building labelled "SHOP" (with the "OFFICE" on the seaward side) extending nearly the entire distance between and perpendicular to the seawall and the inland parallel driveway

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B. OTHER STRUCTURES REFERRED TO IN EVIDENCE

1 **Seawall sidewalk:** The top of the concrete seawall shown on the plat forms one side of a sidewalk which at the south end extends at a tangent southwest to intersect the breakwater driveway at a somewhat less than 90° angle

2 **Boatel and Boatel sidewalk:** The "SHOP" building outlined on the plat is an imposing three story white concrete building, originally containing Moran's machine shop It was converted into rooms by Geiser and used for many years as a motel for transient arrivals by boat, so documents and witnesses refer to it as the "Boatel," although it is now only used for storage The shop/boatel has an abutting sidewalk along its west wall leading from the driveway inland and parallel to the seawall to a point near its south end near the seawall itself

3 **Pond or Lagoon:** There is a dumbbell shaped concrete lined shallow pond built by Moran, shown on the plat but mislabelled "swimming pool," extending from a point near the shop/boatel toward driveway leading to the breakwater, to a point about the middle of the recreation area

4 **Family pool and other swimming pools:** Adjacent and inland from the seawall walkway, between the dumbbell shaped pond and the breakwater driveway, across the walkway and a bit north from the snack bar mentioned below, there is an actual swimming pool, commenced by Falcon and completed by Geiser shortly after he succeeded Falcon, with a patio and changing area on one side and a small office for the harbormaster on the other, enclosed by a low fence This pool is sometimes called the "marina pool" but is more often and here referred to as the "family pool," to distinguish it from a swimming pool constructed some years later by Geiser in front of the hotel dining room, for adult use only and called the "adult pool " Inside the Moran mansion, below the dining room, there is also a "therapeutic pool" and exercise facilities

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5 **Shuffleboard courts:** Inland and uphill from the family pool are two shuffleboard courts within the recreation area, which have replaced shuffleboard courts originally built by Falcon or Geiser nearer the "boatel "

6 **Boat ramp and moorage:** Seaward and adjacent the recreation area, near the south corner with the breakwater, there is a concrete boat launching ramp into the bay and an adjacent wooden walkway leading to pilings and floats for moorage, the wooden walkway only being indicated on the plat [The plat shows some moorage extending from the breakwater directly north, which was never built]

7 **Snack Bar:** Also seaward and adjacent the recreation area, between the walkway to the moorage and the breakwater and just inland from the boat launching ramp, is a building used for and commonly referred to as the snack bar Peter Vincent's sales office was on the seaward side of the snack bar

8 **Tennis Courts:** About five years after purchasing the property from Falcon, Geiser built a set of tennis courts well up on the hill well inland from the plat of Rosario Estates, near the end of Cascade Lake nearest to the plat and also near and accessible from the entrance road to Rosario Resort and the various Rosario plats

9 **Rosario Drive (Boatel road); chain link fence:** The entrance road is now called Rosario Drive The "concrete driveway" inland and parallel to the seawall, partly cut into the uphill slope from the water, which defines the inland side of the recreation area is commonly called "the boatel road," but it is a part of Rosario Drive There was a chain link fence (referred to on the plat at along the seaward edge of this driveway (which is raised about two feet from the ground seaward from it), only the fence posts cut down to about a foot and a half high now remain The plat drawing refers to this fence as "HIGH WIRE FENCE " The perimeter description refers to it as "the high wire-mesh fence on the

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Southerly side of a concrete driveway" which forms the southerly (seaward) boundary of the plat perimeter

10 **Twin houses:** Inland and up the hill from the recreation area are two houses Moran built for his brothers, called the "twin houses " These are shown on the plat on lots 16 and 17 Sarah Geiser and her first husband purchased lot 16 in 1962 Geiser sold lot 17, with its house, to the plaintiffs in 1968

C. PROMOTION AND SALE OF LOTS IN ROSARIO ESTATES AND OTHER ROSARIO PLATS.

After platting Rosario Estates, Falcon sold a number of lots, some with small houses built for sale. Falcon sold Rosario in April of 1960 to Gilbert Geiser and his wife, Gleda, along with partners by the name of Walker who quitclaimed their interest back to the Geisers a few months later

Geiser platted a series of other subdivisions from Rosario, inland and uphill from the plat of Rosario Estates Rosario Estates #2 (1963), Rosario #3 (1966), Rosario Shores (1968), Rosario Pallisades (1968), and Pallisades South (1979) These later plats do not depict or describe a recreation area or publicly accessible waterfront

On the recorded plat of Rosario Estates, 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]

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[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)

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

A set of covenants for the Rosario Estates plat were recorded at the same time by Falcon, in which the only mention of the recreation area is a statement that developer reserved the right to run utility lines in it as well as in the streets and the lots Covenants recorded pertaining to the adjacent Rosario plats developed by Geiser mention nothing about any recreation area

Falcon began excavation of the "family pool" in the recreation area, which Geiser completed after he purchased the property from Falcon Falcon created a pamphlet to sell lots in Rosario Estate advertizing the advantages of owning "*a share of this fabulous million-dollar estate!* To be sub-divided into building sites " Within the descriptive material is a copy of the Rosario Estates plat map, exactly as it appears on the recorded plat Also in the material are the statements, at p 5

> "You will swim in the most modern, heated swimming pool containing over 117,7000 gallons of pure, filtered mountain spring water The pool is to be completed by the Spring of 1960
>
> "After your swim, how about a barbecue on one of the new grills in the *[sic]* Rosario's spacious recreation area or maybe a game of shuffleboard?"

In May of 1960, after completing the purchase of Rosario from Falcon, Geiser opened the Rosario Resort at "The Big House" shown on the plat of Rosario Estates Falcon, Geiser and their successor owners of Rosario for more than forty years, maintained the recreation area and lot owners within Rosario Estates and the adjoining plats have used it and the family pool within it, along with guests of the resort The expense of maintenance was partly defrayed by a $4 00 monthly fee assessed by the resort owner to lot owners until late 1996 or early 1997

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1. Language of purchase contracts and deeds pertaining to recreation area and maintenance fees.[2]

A good number of deeds and real estate contracts have been found, with the first transaction involving each parcel listed in date order Fulfillment deeds to some contracts are noted, but search has not been made for all of them Language pertaining to payments related to recreation by the buyer or grantee to the seller is quoted below the row showing the recording number, date, grantee, grantor and subject lots In this list, "R E " = Rosario Estates, "R E 2 [or 3]" = Rosario Estates No 2 [or 3], "R P " = Rosario Palisades, "R.S " = Rosario Shores, "P S " = Palisades South

There is considerable variation in these contracts and conveyances, but some generalizations may be made. The same purchase contract forms appear to have been used both as unrecorded initial agreements and recorded real estate contracts Falcon used a form of purchase agreement which contained no printed language relating to recreation areas or related fees but developed language and typed in a clause covering that subject and water service fees Geiser used a printed form with **ROSARIO** at the top (the "ROSARIO form") containing such a clause, which his correspondence suggests he may have obtained from Falcon

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[2] Contracts or deeds to persons other than plaintiffs are offered to establish the conveyance practices of Falcon, relevant to interpretation of its plat of Rosario Estates, and of Geiser, relevant to what Geiser intended to convey to plaintiff and plaintiff intended to accept, consistent with the deeds' references incorporating the plat description, including the plat depiction and references to the recreation area To the extent they may be considered as offered to prove the fact of an understanding, they are admissions of defendants' predecessors in interest and not hearsay ER 801(d)(2), Cleary, et al , McCormick's Handbook of the Law of Evidence (2d Ed 1972) § 268, pp 647-649 To the extent they may be considered as hearsay, ER 803(a)(15) excepts statements contained in documents affecting an interest in property from the hearsay rule, as does ER 803(a)(16) as to documents 20 years or more prior to trial

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Recorded deeds which are not in fulfillment of prior recorded purchase contracts contain no language relating to recreation areas or related fees Deeds recorded in fulfillment of recorded purchase agreements contain no such language prior to 1967 A 1967 fulfillment deed and fulfillment deeds found from 1971 and thereafter have clauses typed in relating to recreation area and related fees, sometimes the same clause as the real estate contract and sometimes varying from it

Recording Number	Type	Date	Grantor	Grantee	Property lot(s), plat
50915	Deed	7/25/58	Falcon	Crooke	3 & 18-B, C, D, E, R E
50916	REK	7/31/58	Falcon	Wilkins	53, R E
	"Purchaser agrees to pay the sum of $8 00 a month for the water and dock privileges However, $4 00 for water shall not be due until the home on the above lot is constructed "				
50917	REK	8/2/58	Falcon	Latof	25W, R E
	[same as Wilkins]				
50924	REK	8/4/58	Falcon	Triebel	24EE, R E
	[same as Wilkins]				
50923	REK	8/6/58	Falcon	Reynolds	54, R E
	[same as Wilkins]				
50922	REK	8/21/58	Falcon	Deason	1, R E
	"Purchaser agrees to pay the sum of $8 00 per month for the water and dock privileges "				
50921	REK	5/8/59	Falcon	Curtiss	18-A, R E
	"Purchaser agrees to pay the sum of $4 00 as dock charge and upon construction of a residence on the herein described property, purchaser agrees to pay a $100 00 tap-on fee for water service and thereafter to pay the sum of $6 00 per month, a sum total of $10 00 for dock and water "				
50651	REK	5/8/59	Falcon	Roehl	4, R E
	"Purchaser agrees to pay the sum of $4 00 per month for dues for such use of the dock and recreation area and at such time when construction is started on said lot then and in that event purchaser shall pay the sum, in addition to the $4.00, of $6 00 for monthly water service and the sum of $100 00 water connection fee "				

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[*Comment* There is no apparent mention prior to this provision of use of the dock or recreation area to serve as a reference for the word "such" in the above provision.]

{52934	SA	10/25/60	Falcon	Collins	4, R E
{72256	Deed	1/13/61	Collins	Roehl	"
{85134881	Deed	4/30/85	Roehl Est	Henke	"
50920	REK	7/23/59	Falcon	Schwerin	22W, R E

"Purchaser agrees to pay Seller or his assigns the sum of $4 00 per month as recreation area maintenance charge and upon the construction of a residence on the herein described property, purchaser agrees to pay a $100 00 tap-on fee for water service and thereafter pay the sum of $6 00 per month, a total of $10 00 for water and maintenance of the recreation area "

49721	Deed	9/2/58	Falcon	Carlson	2, R E
49722	Deed	9/2/58	Falcon	Worthington	18, R E.
50919	REK	5/12/59	Falcon	Weddle	10, R E

"Purchaser agrees to pay the sum of $4 00 per month for use of the dock and recreation area as shown on the plat of Rosario Estates, and upon the beginning of construction on the herein described lot, purchaser agrees to pay $100 00 water connection fee and $6 00 per month for water service "

51010	REK	8/1/59	Falcon	Milligan	29W, R E

"Purchaser agrees to pay the sum of $4 00 per month for maintaining the recreation area and upon the beginning of construction on said herein described property, purchaser agrees to pay a $100 00 water tap on fee and thereafter the sum of $6 00 per month for water service, total sum to be collected would then be $10.00 "

51233	REK	8/25/59	Falcon	Kendall	20W, R E

"Purchaser agrees to pay Seller or his assigns the sum of $4 00 per month as recreation area maintenance charge and upon the construction of a residence on the herein described property, purchaser agrees to pay a $100 00 tap on fee for water service and thereafter pay the sum of $6 00 per month, a sum total of $10 00 for water and maintenance of the dedicated recreation area "

52028	REK	3/14/60	Falcon	Sholdt	33, R E

"Purchaser agrees to pay the sum of $4 00 per month for maintaining the recreation area and upon the beginning of construction on said herein described property, purchaser agrees to pay a $100 00 water tap on fee and thereafter the sum of $6 00 per month for water service, total sum to be collected would then be $10 00 water and maintaining the recreation area "

52282	REK	6/13/60	Geiser & Walker	Grover	15, R E

"Purchaser agrees to pay the sum of $4 00 per month for the maintainance *[sic]* of the recreation area and upon the beginning of construction on said property, purchaser agrees to pay the sum of $100.00 water tap on fee and thereafter the sum of $6 00 per month for water service, total sum to be

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collected to be $10 00 for recreation maintance *[sic]* and water service. [Partly illegible material following appears to state that seller agrees to accept advance principal payments at option of purchaser]

54989 REK 6/25/61 Geiser Davidson 28W, R E
"(7) Purchaser shall pay to sellers, so long as purchaser shall have an interest in said property, the sum of $4 00 per month for the maintenance of recreation area, said payments to become due on the 1st day of each and every month immediately upon execution of this contract Purchase shall pay the sum of $100 00 to sellers for water tap-on fee, said sum to be due when purchaser shall commence construction Thereafter, purchaser, so long as purchaser shall have an interest in said property, shall pay to sellers the sum of $4.00 per month for water supplied, said payments to be due on the 1st day of each and every month immediately after the water hook-up charge is due "
*[This is the printed "***ROSARIO** *form" contract]*

{55056 SA 6/25/61 Geiser A Myers I 28W, R E
{63061 Deed 2/16/66 A Myers I Davidson "

54358 REK 10/18/61 Geiser Shaw 11, R E
[**ROSARIO** form]

54439 REK 11/17/61 Geiser Wehling 26, R E
[**ROSARIO** form]

54441 REK 10/29/62 Geiser Trinkhaus 28E, R E
[**ROSARIO** form]

65767 REK 3/31/67 Geiser Henke 21, R E #3
[**ROSARIO** form]

66503 REK 6/1/67 Geiser Rathburn 18, R E #3
[**ROSARIO** form]
{78068 Deed 12/21/71 " " "
["Grantee his heirs and assigns shall pay to grantor his heirs and assigns the sum of $4 00 per month for the maintenance of recreation area, said payments to become due on the 1st day of each and every month immediately upon execution of this contract Grantee shall pay the sum of $100.00 to grantor for water tap-on fee, said sum to be due when grantee shall commence construction Thereafter, grantee, so long as grantee shall have an interest in said property, shall pay to grantors the sum of $4 00 per month for water supplied, said payments to be due on the 1st day of each and every month immediately after the water hook-up charge is due
"This deed is given in fulfillment of that certain real estate contract between the parties hereto dated 1st day of June, 1967, and conditioned for the conveyance of the above encumbrance arising by, through or under the grantee in said contract, "

67683 Deed 11/15/67 Geiser Grove 44&45, R E
[same as 12/21/71 fulfillment deed to Rathburn with appropriate reference to contract date of 9/18/65]

77013 REK 9/10/67 Geiser Grossman 9, R S

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[**ROSARIO** form]
{113579 Deed 9/20/1967 Geiser " "
[same as 12/21/71 fulfillment deed to Rathburn with appropriate reference to contract date]

67172 REK 9/15/67 Geiser Northfield 15&16,R E #3
[**ROSARIO** form]
{68134 Deed 9/21/67 Geiser " "
[same as 12/21/71 fulfillment deed to Rathburn with appropriate reference to contract date]

69688 REK 8/30/68 Geiser James 1-5, R E #2
[**ROSARIO** form, with "$4 00 as one owner" in first blank]
{102217 Deed 8/31/68 Geiser James "

70483 Deed 11/20/68 Geiser Henke 17, R E

70982 REK 3/19/69 Geiser Newell 31, R P
"Recreation fees of $4 00 per month to apply
Water supplied at $4 00 per month after connection "
{95132 Deed 3/20/69 Geiser Newell "

74148 REK 8/10/70 Geiser Knopp 38, R P
[**ROSARIO** form]
{113769 Deed 8/10/70 " " "
"Grantee and his assigns shall pay to Grantors so long as Grantors *[sic]* and their assigns have an interest in the said property, the sum of $4 00 per month for the maintenance of the recreation area, said payments to become due on the 1st day of each and every month immediately upon execution of this Deed Grantee shall pay the sum of $100 00 to Grantors for water tap-on fee, said sum to be due when Grantors *[sic]* shall commence construction Thereafter, Grantee, and his assigns, so long as Grantors *[sic]* and their assigns shall have an interest in said property, shall pay to Grantors the sum of $4 00 per month for water supply, said payments to be due on the 1st day of each and every month immediately after the water hook-up charge is due "

75786 REK 4/3/71 Geiser Weiner 52, R E
[**ROSARIO** form]

79920 REK 7/18/72 " Wheeler 10, R S
[**ROSARIO** form]
{82509 Deed 10/2/72 " " "
[same as 12/21/71 fulfillment deed to Rathburn with appropriate reference to contract date]

95498 Deed 2/28/77 Geiser Henke 52, R E

107671 REK 4/20/79 Geiser Morton 10, P S
"The seller, upon receiving full payment of the purchase price and interest in the manner above specified, to execute and deliver to purchaser a STATUTORY WARRANTY FULFILLMENT DEED to said real estate, , and subject to the following

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a EASEMENTS AND RESTRICTIONS OF RECORD
b THE PURCHASERS AND THEIR GRANTEES, HEIRS, ADMINISTRATORS, SUCCESSORS AND ASSIGNS AGREE TO PAY TO GEISER LAND COMPANY OR THEIR GRANTEES, HEIRS, ADMINISTRATORS, SUCCESSORS AND ASSIGNS THE MINIMUM SUM OF $4 00 PER MONTH FOR THE MAINTENANCE OF RECREATION AREA, SAID PAYMENTS TO BECOME DUE ON THE 1st DAY OF EACH AND EVERY MONTH IMMEDIATELY UPON EXECUTION OF THIS REAL ESTATE CONTRACT
c THE PURCHASERS AND THEIR GRANTEES, HEIRS, ADMINISTRATORS, SUCCESSORS AND ASSIGNS AGREE TO PAY TO GEISER LAND COMPANY OR THEIR GRANTEES, HEIRS, ADMINISTRATORS, SUCCESSORS AND ASSIGNS THE SUM OF $250 00 FOR EACH WATER TAP-ON, SAID SUM TO BE DUE WHEN PURCHASER SHALL COMMENCE CONSTRUCTION THEREAFTER, PURCHASERS AND THEIR GRANTEES, HEIRS, ADMINISTRATORS, SUCCESSORS AND ASSIGNS AGREE TO PAY TO GEISER LAND COMPANY OR THEIR GRANTEES, HEIRS, ADMINISTRATORS, SUCCESSORS AND ASSIGNS THE MINIMUM SUM OF $6 00, OR THE GOING RATE, PER MONTH FOR WATER SUPPLIED, SAID PAYMENTS DUE ON THE 1st DAY OF EACH AND EVERY MONTH IMMEDIATELY AFTER THE WATER HOOK-UP IS DUE "

{91172300 Deed 6/20/79 Geiser Morton 10, P S "SUBJECT TO THE FOLLOWING "

[same as conditions a,b & c above, except not all capitals]

2. The "ROSARIO" form of purchase agreement.

The contract heading and pertinent parts of the form are as follows

ROSARIO

EAST SOUND ORCAS ISLAND, WASHINGTON

CONTRACT FOR SALE OF REAL ESTATE

THIS AGREEMENT, made and entered into this __ day of ___, 19__, between _____, hereinafter called the "sellers" and _____, hereinafter called "purchaser,"

WITNESSETH

That the sellers agree to sell to the purchaser, and the purchaser agrees to purchase of the seller the following described real estate situate in San Juan County, State of Washington, to-wit

DESCRIPTION Lot No ___, Plat of Rosario Estates, as recorded in Volume 2 of Plats, Pages _ and __, records of San Juan County, Washington, with appurtenances, Together with an undivided (1/2) one-half interest in

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mineral rights the balance of which are reserved to the grantor herein

PURCHASE PRICE

CONDITIONS

(7) Purchaser shall pay to sellers, so long as purchaser shall have an interest in said property, the sum of $4 00 per month for the maintenance of recreation area, said payments to become due on the 1st day of each and every month immediately upon execution of this contract Purchase shall pay the sum of $100 00 to sellers for water tap-on fee, said sum to be due when purchaser shall commence construction Thereafter, purchaser, so long as purchaser shall have an interest in said property, shall pay to sellers the sum of $4 00 per month for water supplied, said payments to be due on the 1st day of each and every month immediately after the water hook-up charge is due

D. GEISER'S SALES TO PLAINTIFFS AND DEALINGS WITH THE ROSARIO PROPERTY OWNERS ASSOCIATION 1966-1971

Mr Henke first expressed an interest to Geiser in purchasing a lot in Rosario in 1966 Mr Geiser referred him to Peter Vincent, a real estate agent with an office on the premises The presence of the waterfront recreation area and the ability of Rosario lot owners to use it, including the family pool, without charge except for the $4 monthly maintenance fee was a selling point mentioned by Mr. Vincent The boundaries of the recreation area were apparent by the maintenance of the grounds as well as the monuments surrounding the plat depiction of it, from Moran's shop converted to the "Boatel" on the east to the driveway leading to the breakwater on the west, seawall sidewalk and the inland parallel driveway, part of Rosario Road. These boundaries were pointed out by Mr Vincent and understood by Mr Henke

Mr Henke was shown the ROSARIO form of real estate contract and thereafter wrote a letter to Mr Vincent with questioning various provisions of the form contract Mr Geiser wrote the following response 1/20/1967

"Dear Mr Henke

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"Mr Peter Vincent has passed your letter along to me for answering, feeling that I can better explain the intent of the contract as referred to in your questions which I will do by your enumeration

"1 The mineral right clause in the contract is a Texas hangover and could be deleted if it is a factor in a sale

"4 The property when recorded includes the dedication of the beach area between the Snack Bar and the Boatel as jointly on a recreation area and I will get a photostatic copy of this at the time the recording is made

"5 My attorney has informed me that by the agreement on the seller's *[sic]* part to make payments for water I am obligated to furnish same

"Mr Vincent informs me that he is holding lots #4 and #21 for your decision

"I hope I have adequately answered your questions and of course hope that you decide to become one of the Rosario family "

Plaintiffs bought lot 21 of Rosario No 3, the adjacent plat, one of the above referenced lots, executing the form contract after Mr Henke interlineated several deletions and additions to its language, without modification of condition (7) They intended to build on it but before they did so were informed by Mr Vincent that Geiser was building a new house and was to sell his house, the easterly of the "twin houses" just down the hill, built by Moran for his brothers and shown on the plat of Rosario estates, lots 16 and 17 Plaintiffs bought the house and lot 17 from Geiser and later sold lot 21 The Henkes' purchase of lot 17 was outright by deed, financed by a bank loan Plaintiffs later bought the lots immediately downhill and uphill from lot 17, lot 52 in 1977 by deed from Geiser, where they later built a garage, and lot 4 in 1985 by deed from the Roehl Estate Lot 4 serves as their front (seaward) yard upon the inland driveway parallel to the seawall which is now a part of Rosario Road Plaintiffs' house and this downhill sloping yard have a view across the recreation area and the marina to Cascade Bay and beyond

The description of the property conveyed in all of the Henkes' deeds reads simply

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

In 1971, a "Rosario Property Owners Association" was formed by some lot owners in the several Rosario plats, including Mr Henke as a member of its board as well as James Dahl, one of Mr Geiser's principal employees who owned several lots and larger unplatted tracts nearby The Association's purpose was to promote the enforcement of restrictive covenants and other common interests of lot owners, one of them being expressed in a letter to all property owners expressing its agreement with a letter from Geiser stating the rights of property owners in the apparent recreation area and privileges elsewhere, which it quoted in full The Association's letter was found in the business records of Rosario maintained by Mr Geiser

"TO ALL ROSARIO PROPERTY OWNERS

"In July 1971, after a public meeting, a property owner's association was formed to be known as ROSARIO PROPERTY OWNERS ASSOCIATION and by unanimous vote the following were elected to the Board of Directors Mr Bradly F Henke,

"One of the main concerns of this association was the use of the recreation area as understood, or mis-understood, by various people and the following explanation of rights and privileges has met with the concurrence of the Board of Directors of the Rosario Property Owners Association

[here quoting Mr Geiser]

" 'Mr Walter Baker, President
Rosario Property Owners Association
Rosario Estates
Eastsound, Washington 98245

" 'Dear Walt

" 'I have been informed that the Recreation Committee of your organization intends to approach me on Friday requesting that I give them some answers as to my interpretation of recreation rights, privileges and properties, and I am dictating this letter to you without the benefit of their direct questions, as I anticipate being off the Island Friday and possibly Sunday

" 'When Mr Curton subdivided the first Rosario Estates subdivision in 1958 and recorded the restrictions, there was no mention made in these recorded restrictions as to recreation privileges, etc However,

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in the Dedication of that plat, I quote as follows "Falcon Corporation does hereby, through its officers, declare this plat of Rosario Estates' and dedicates to the use of the lot owners all side roads, alleys and driveways shown, together with free access to, and use of, the Recreation Area " 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

" 'It is my intention that the tennis court property from the north-south (side with the gate) side and extending to the lake and to the road westerly to the area enclosed by the road, will be property owner's area in cooperation with the resort guests The future improvements of this area will probably include a picnic area, perhaps a barbecue pit and floats for those who wish sailing dinghys or fishing punts to use on the lake It is also possible that swimming facilities will some day be added in this area also

" 'I have also extended to my property owners the privilege of using the adult pool in front of the dining room on the bay side of the Mansion Lodge, and have also invited any of these property owners or in fact, anyone on the Island who has arthritic or other physical problems to use the therapeutic pool This I only ask is done with discretion in regards to peak time use and convention use of the Lodge and the use of the downstairs facility should be with the approval of the Front Desk Use of the inside swimming pool is something that will take some negotiating, as I believe some people have the idea this is a right and I have never considered it as such

" 'The limitation of use of the family pool to property owners and their guests, I feel should be very similar to that of any swim club in a residential area, The pool is listed with the state as a semi-private pool and therefore, can not be made open to the public and must have some limitations

" 'Regarding moorage, Mr Curton's original contracts called for the fact that there would be docking privileges, and was very careful always to point out that this did not include moorage

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" 'Mrs Geiser and I feel that the use of the recreation facilities for ninety percent or more of the time, has been harmonious and not offensive. We hope that the formation of the Property Owners Association will add, rather than detract from this harmony We are most interested that the people that use the facilities, govern the facilities

" 'Sincerely,
ROSARIO INC

/s/
Gilbert H Geiser
President' "

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

"Sincerely,

ROSARIO PROPERTY OWNERS ASSOCIATION

/s/
Walter F Baker
President"

No later uncertainty in the boundaries of the recreation area or dispute concerning the rights of lot owners to use it is reflected in any subsequent correspondence of Mr Geiser's

E. PERTINENT EVENTS AT ROSARIO SUBSEQUENT TO 1971.

Geiser owned Rosario until 1980, then he sold it on a real estate contract His wife, Gleda, died soon after that and some time thereafter he married Sarah Geiser, who was formerly his executive secretary With assistance from a partner, Mr Geiser bought Rosario back from the 1980 buyer's bankruptcy estate in 1984 Geiser died in 1987 during partnership dissolution proceedings with his partner, a receiver was appointed, and Sarah Geiser managed the property for the receiver until the property was sold to Rosario Resort Limited Partnership in 1987

By this time, all of the buildable lots had been sold other than some used in connection with the resort The limited partnership continued to invoice lot owners in all of the Rosario plats for the $4 00/month recreation maintenance fee,

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on a quarterly basis, until sometime in 1997 On 10/29/1998, Rosario Resort Limited Partnership conveyed the property to defendant Oly Rose, LLC

Shortly after defendant Rockresorts began managing the "Rosario Resort and Spa" for Oly Rose in 2001, it constructed a fence enclosing the family pool and part of the recreation area around it, about one-third of an acre Rockresorts then excluded persons other than resort guests from using the pool and the enclosed area unless they joined an expensive club to have use of the "spa facilities " Shortly before the plaintiffs' earlier summary judgment motion herein, this higher fence was removed and a fence restored enclosing only the pool and the adjacent changing building on side and the small office on the other

Defendant Oly Rose is currently planning for new resort structures north of the breakwater driveway to a point near the lagoon mislabelled "swimming pool" on the plat, so as to appropriate for the exclusive use of the resort about half of the recreation area shown on the plat and described in Mr Geiser's 1971 letter quoted above

F. Other Rosario Records of Correspondence regarding the Recreation Area and Fees[3]

The only other communication to a property owner from Mr Geiser which defendants have found among their business records at Rosario, other than the 1956 letter to Mr Henke and the 1971 letter to the property owners' association, is a letter to Mr William L Harpham dated 3/19/1985, a successor to Newell[4]

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[3] Letters from defendants or their predecessors, by their agents, have been produced by defendants from their own business records, so there is no question as to their authenticity They are offered as admissions by a party-opponent See footnote 2 above and ER 1007 Such admissions are not hearsay ER 801 (d) As to documents 20 years or more in existence, see also ER 803(a)(16)

[4] Newell's non-standard contract from Geiser of 3/19/69, Aud # 70982, is noted in the table above It includes the typewritten statement, "Recreation fees

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in lot 31 of the plat of Rosario Palisades Mr Harpham had inquired about the $4 00 recreation maintenance fee for which he was invoiced The text of the letter in its entirety between salutation and closing is as follows

> "Your letter to the Rosario Resort Development Company has been forwarded to me as present owner of Rosario Resort For your information, I owned and managed Rosario from its inception until I sold in 1980 and bought it back in late 1984
>
> 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
>
> We added the privileges in the Mansion when we added the hot pool, but made it very clear that this was a revokable privilege and not a right
>
> The interim owners, because of ever increasing numbers of people, had to cancel that privilege, and I have not reoffered it at this time
>
> We are, however, working on a plan to offer home owners who are residents, added privileges on a club basis and for a more practical fee
>
> The small fee agreed to at purchase can be and is an important factor in land value if and when time comes to sell the property you own, and we feel it well justified, underpriced, and totally reasonable
>
> If you feel justified, you may cease payments with the understanding that it is not possible at this time to reinstate your property rights to the outside pool recreation area and tennis courts
>
> We hope you'll decide to be a participant "

The emphasis on the words "privileges," "right" and "home" is Geiser's

Chris Vierthaler, who will testify on behalf of defendants, wrote to new property owners in the Rosario plats during the 1990s as executive secretary of Rosario and Geiser Land Co , while Sarah Geiser was manager after Mr Geiser's death and thereafter She used a form letter, with little variation, to new owners within the Rosario plats An example is her letter to Alan Schulman of 10/31/1994

> "We have been advised of your recent Rosario area property purchase Welcome to the Rosario Community! We would also like to let you know of your property owners' privileges and fees
>
> "As Rosario property owners, your recreation privileges include
>
> Use of our tennis courts (outdoor)

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of $4 00 to apply "

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Use of our family swimming pool (seasonal) and adjacent recreation area
Discounted memberships at the Rosario Spa

Resident homeowners are also eligible for year-round moorage based on space availability and charged on a per-foot basis

"These privileges are not transferrable to renters or friends staying in your home wile you are absent, although your guests are welcome to accompany you Daily and weekly Spa facility passes are available for purchase should you not wish to become a Spa member

"Recreation fees are $4 00 per month and are included with your quarterly water billing or billed once a year if water has not been hooked up Should you purchase another Rosario lot, additional recreation fees are waived "

Ms Vierthaler also wrote often to lot owners who inquired as to the purpose of the $4 00 per month fee for which they were invoiced An example is her letter to Charles D'Iorio of 2/27/1995

"Thank you for writing to inquire about the Rosario Recreation fees

"When the property was originally subdivided, even before Rosario became a Resort, a condition of sale was the payment of a $4 00 monthly recreation fee as a recreation area upkeep contribution, due from each owner - except if one owner had two or more parcels, in which case he only had to pay one fee

"The recreation fees, which by no means would even cover more than a small percentage of the real estate taxes on the recreation areas, do help in the maintenance of these areas The major benefit for a property owner is the appreciation of land values in Rosario Plats, as well as the joint usage of these areas

"Although not all property owners take advantage of the recreation areas, your guests and family are also eligible to use them

"Over the years, there have been a few property owners who have refused to pay these fees, in which case their privileges were suspended As penalty for not paying the fees, upon the sale of their property they have been assessed a $500 00 fee to re-instate the recreation privileges for the new owner "

10/7/97, a new general manager, French, advised a lot owner named Blanchard

"The recreation fee has been discontinued, pending the program's re-organization The tennis courts, swimming pool by the marina (seasonal) and recreational lawn area with play equipment will remain available,

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however, occasionally these areas may be reserved for private resort functions "

The resort owners ceased collecting the $4 00 per month fee from Rosario lot owners at some point in 1997 Several years after defendant Oly Rose's 1998 purchase of Rosario from Rosario Resort Limited Partnership, Suzan Chamberlayne, on behalf of the Rosario Property Owners Association, welcomed a new General Manager with a letter of 2/14/2001 including the following statement

> "The relationship between the RPOA and the Resort begins with the fact that (since 1958) as each Rosario property owner takes title, they receive 'free access to and use of the recreation area', including the tennis courts and area surrounding the pond north of the marina, including the pool there "

Mr Schorr wrote back to Ms Chamberlayne 2/17/01, thanking her for her letter but saying nothing in response to this assertion [5]

Mr Schorr directed a general letter announcing a new recreation fee arrangement, the date of which is unstated but which appears from its text to be June, 2001, addressed to "Dear Rosario Estates Property Owner " Presumably, the same text was sent to lot owners in the other Rosario plats This letter announced the spa club arrangement, the "club" facilities said to include the family pool in the recreation area as well as facilities outside the recreation area The letter advised that the membership fee for lot owners would be $420 per year, which was represented as less, on an annual basis, than the fees which would be charged for non Rosario property owners

Plaintiffs declined to join the spa club, defendants excluded them from using the family pool, and this suit followed shortly thereafter While the suit has been

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[5] This pair of letters will be offered as an admission by conduct defendant's manager's failure to deny the assertion made by the Rosario Property Owners Association's letter Cleary et al , McCormick's Handbook of the Law of Evidence (2d Ed 1972) § 270, pp 651 -655

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pending, defendant Oly Rose has confirmed its plans to construct new resort buildings within the recreation area between the breakwater driveway and the dumbbell shaped pond or lagoon.

III. ARGUMENT

A. SUMMARY OF ARGUMENT

Contracts and Deeds for the sale of lots designated in a plat incorporate the provisions of the plat, including roads and common areas depicted and written descriptions of common rights, within the description of what is granted as a matter of law In the context of the physical condition of the recreation area as established by Falcon and maintained by Geiser, there is no ambiguity in the boundaries depicted by the Rosario Estates plat

Geiser's 1967 letter to Mr Henke, upon which Mr Henke was entitled to rely in his subsequent purchases, confirms his understanding that the Rosario Estates plat created common rights of lot owners in "the beach area between the Snack Bar and the Boatel" as a common recreation area

Geiser's 1971 letter to the Rosario Property Owners Association, including lot owners from all of the Rosario plats, expresses potential uncertainty in the boundaries of the recreation area but then spells them out by reference to existing structures consistently with the plat description If there was any uncertainty or dispute concerning the recreation area boundaries, the express acceptance by the Association of Mr Geiser's statements in that letter constitutes a boundary line agreement, followed by many years of use of uninterrupted maintenance of the common area by Mr Geiser and use of it by the lot owners, including the family pool within it, making that agreement effective and binding on successors

The terms of the ROSARIO form of real estate contract and the later fulfillment deeds create an agreement obligating lot owners from all Rosario plats to pay Geiser a $4 00 fee "for maintenance of recreation area," and obligating

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Geiser, as the specified consideration, to continue maintaining it for their use on a permanent basis It is apparent from Geiser's 1971 letter to the Association and his letter to Harpham that he adopted this interpretation of the rights of Rosario plat owners, in that he distinguished the rights of lot owners to use the recreation area, including the family pool, from the privileges he might extend to use the adult pool and other resort facilities outside of the recreation area

The Rosario Estates plat lot owners' common easement is not exclusive, it is consistent with use of the recreation area by lot owners in the other Rosario plats who have also agreed to pay the fixed recreation area maintenance fee, as well as use of it by guests of the developer's adjacent resort

B. PAROL EVIDENCE IS ADMISSABLE, AND THE "DEAD MAN'S STATUTE" DOES NOT APPLY TO WRITINGS OF THE DECEASED.

It may be contended that all evidence of representations made to Mr Henke and other lot buyers, including Falcon's brochure, is in violation of the rule of merger, as applied to deeds The contention is answered at p 7, n 2, above As the Court noted in *Anderson v McRae*, 495 S W 2d 351, at 360-361 (Tex Ct Civ App 1973), prior or contemporaneous representations may be shown if they are inducements for taking of the deed They show what was the true or additional consideration to the purchaser. As to the brochure,

> "even if some of the appellees purchased their lots without having seen the brochures, such advertisements would be consistent with and corroborative of the making of the prior representations which appellees alleged had been made to each of them as inducements, and would be in the nature of admissions tending to confirm what was actually represented "
>
> 495 S W 2d at 361

Like those appellees in *Anderson*, Mr Henke never saw Falcon's brochure of 1958 or 1959, in which representations are made at p 5 concerning the recreation area and the new pool then under construction, or Mr Geiser's 1985 letter to William Harpham, in which Mr Geiser noted the "property rights to the outside pool

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recreation area and tennis courts" of owners outside of Rosario Estates, whose only connection to the recreation area was their contract to make payments for recreation area maintenance Nonetheless, these items of evidence are corroborative of the representations he will testify were made to him, and they are admissions of Falcon and Geiser which are binding upon their successor in interest, Oly Rose

The successor acquires his interest in property "burdened with the same liability of having the declarations used against him " Cleary, McCormick on Evidence, p 648 (1972), noting cases collected at 4 Wigmore, Evidence § 1080, pp 135-6 In a proper case, the unrecorded obligation of a predecessor of a purchaser for value without notice may be cut off, as to that purchaser, under the recording statute, but the maintenance and use of an area demarked by existing structures on the ground gave notice to the successors of Geiser, as did the recording of the purchase contracts containing undertakings regarding the recreation area. The business records of Rosario affecting property, collected by its executive secretary, Ms Vierthaler, contained all of the documents in evidence containing these declarations, so Oly Rose, having actual notice of some apparent interest of the lot owners in the apparent recreation area, would have discovered all of those documents documents readily upon inquiry before purchase and had them upon purchase

The only other significant evidentiary issue which plaintiff anticipates concerns the "Dead Man's Statute," RCW 5 60 030 The statute in relevant part reads

> " in an action or proceeding where the adverse party sues or defends as deriving right or title by, through or from any deceased person , then a party in interest or to the record, shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him, or in his presence, by any such deceased person "

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All parties derive their property interests from Gilbert Geiser and his first wife, Gleda

The statute "serves to protect the decedent and those who take or claim under him by virtue of his writings " The statute applies only to oral testimony, it does not bar documents written or executed by the decedent or other documents relating to them *Hampton v Gilleland*, 61 Wn 2d 537, 543 (1963), *Thor v McDearmid*, 63 Wn App 193, 202 (1991) Nearly all the evidence concerning Mr Geiser's intentions here consists of his writings, his 1967 letter to Mr Henke, his 1971 letter to the property owners' association, and his 1985 letter to Mr Harpham

> "A transaction means the doing or performing of some business between parties, or the management of any affair To be a transaction in such a case, the manner concerning which the testimony is given must involve some act by and between the parties for the benefit or detriment of one or both of the parties It has been held, and properly so, that the test of transactions with [the] deceased is whether [the] deceased, if living, could contradict the witness of his own knowledge "
>
> *Bentzen v Demmons*, 68 Wn App 339, 344 (1993)

Peter Vincent, the real estate agent for Mr Geiser from 1965 to 1970, including the sales to plaintiffs, is not an interested party, so his testimony on any subject is not barred by the statute He has nothing "to gain or lose by the action in question " *Wildman v Taylor*, 46 Wn App 546, 549 (1987)

The protection of the statute is waived at trial by a protected party's introduction of evidence concerning the transaction at a prior summary judgment motion *Bentzen v Demmons*, 68 Wn App 339, 343-343 (1993) That includes evidence "of a negative character, i e , testimony regarding what a transaction was not " In *Bentzen*, the protected party had filed an affidavit asserting what the decedent, his aunt, did not tell him, concerning her alleged agreement to make a will in favor of the interested party

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> "We conclude that Demmons' statements that his aunt never told him of the existence of the oral contract constituted a waiver of the deadman's statute sufficient to overcome the bar imposed by the statute Even though Demmons did not testify about the specific transaction, his negative testimony went to the heart of Bentzon's claims and the matters directly at issue in this case He was testifying, in effect, that such an agreement did not exist and that no services were performed in reliance on it "
>
> 68 Wn App at 346

Plaintiff has waived the bar of the statute, and so have defendants The declaration of Sarah Geiser dated June 12, 2003, introduced in opposition to plaintiffs' motion for summary judgment, states that she began work at Rosario in 1962, became Mr Geiser's executive secretary in 1971, and after marrying Mr Geiser after her former husband's and his former wife's deaths became manager after Mr Geiser's death in 1987 She states,

> "4 As lot owners, we had an obligation to pay $4 00 per month as dues for use of the recreation area
> "9 As a property owner in Rosario Estates, and as the Executive Secretary to the Managing Partner of the Resort in 1971, I was aware of discussions between the owners and Resort ownership regarding use of the "recreation area " It was unclear as to precisely what area owners were given permission to access in that the Plat itself, as well as the Plat covenants, did not grant an easement to specific lands nor was there a description given of the area to be dedicated to recreational use
> "14 As a current owner in Rosario Estates, and as a former employee, it had never been my understanding that the owners had a formal easement but rather were permitted use consistent with use by Resort guests of Resort facilities developed by the Resort "

This is all testimony regarding regarding or drawn from Mr Geiser's statements or purported understandings, as owner of Rosario, concerning the recreation area It opens up the door for Mr Henke to rebut with his own testimony as to other statements on the same subject matter by Mr Geiser

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

The writer has found no Washington case concerning the rights in a park or common area other than a street depicted on a plat of the owners of lots sold by reference to it Good discussions of the subject, with many citations to cases

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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

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of it [6] The Court expressed the rationale of 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 of the part of the street which they had gained by vacation [7]

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[6] 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 "

[7] 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

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lot buyers within other plats, who had no prior appurtenant easement, to use the Rosario Estates recreation area, consistent with the Rosario Estate grantor's reserved right to use the area in common with his grantees

Geiser's reference to his standard ROSARIO contract's provision for reservation to the grantor of half the mineral rights as "a Texas hangover", in his 1967 letter to Henke, suggests that Geiser took over a form developed initially by Falcon In any event, he continued an established practice of Falcon to charge a $4 00 fee for maintenance of the recreation area

The earlier fulfillment deeds from Falcon and Geiser have no provision mentioning the recreation area or $4 00 fee Some later fulfillment deeds by Geiser contain the same language as condition (7) of the ROSARIO form. Others, from 1967 and later, provide for a permanent obligation

> "Grantee his heirs and assigns shall pay to grantor his heirs and assigns the sum of $4 00 per month for the maintenance of recreation area, " [11/15/67 deed to Grove Aud # 67683, 12/21/71 deed to Rathburn Aud # 78068 and later deeds in fulfillment of ROSARIO contract]

The variety of language used by Falcon and Geiser when they added clauses to a printed form attests to somewhat slap-dash drafting, but in the main the phrasing demonstrates an undertaking by the platter and his successor to use the $4 00 per month fee to maintain the recreation area shown on the plat of Rosario Estates Thus, the developers apparently intended to provide lot owners not merely "free access to, and use of" that area, but to maintain the area in good condition for the lot owners, as well as resort guests, to use

The developers' contracts are not consistent with the defendants' contention that they intended lot owners to have a mere revokable privilege to use the area Their contracts are consistent with the plaintiffs' contention that they intended lot owners to have a right to use the area, consistent with the apparent meaning of the

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depiction of the RECREATION AREA in the plat of Rosario Estates and the dedication language referring to it

Deeds in fulfillment of a recorded ROSARIO form contract from 1967 and thereafter, as well as a different contract form from 1979, make payment of a fee for the maintenance of recreation area an obligation binding upon purchaser's successors

When the parties' initial purchase agreement contains a covenant for payment of a recreation area maintenance fee, whether recorded or not, the later execution and recording of a without any such covenant does not "merge" the purchase contract's covenant out of the parties' transaction The doctrine of merger does not apply to collateral agreements which are not fulfilled by the conveyance itself *Peoples Nat Bank v Nat Bank of Commerce*, 69 Wn 2d 682, 689 (1966) Where the deed does contain a covenant on the same subject as the purchase contract, then of course the deed language is the parties' final agreement *Id*

There is no ambiguity in the phrase, "for the maintenance of recreation area," used in the ROSARIO form contract and many fulfillment deeds The words used in contracts and deeds are given their ordinary and non-technical meaning, within their context, *Hogland v Omak Wood Products*, 81 Wn App 501, 504 (1996), and ambiguity, if any, is resolved against the seller or grantor *Kunkel v Meridian Oil*, 114 Wn 2d 896, 901 (1990)

"Maintenance" is a noun meaning "1 act of maintaining state of being maintained SUPPORT 2 something that maintains 3 the upkeep of property or equipment Webster's New Collegiate Dictionary (G & C Merriam Co 1979) "Maintain" is a verb meaning "to keep in an existing state (as of repair, efficiency, or validity) preserve from failure or decline < ~ one's health> <

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~ machinery > 2 to sustain against opposition or danger uphold and defend < ~ a position > *Id*

The performance promised by the drafter of the contract and grantor, as the consideration of the grantee's payment of $4 00 per month, is the upkeep of recreation area or keeping it in an existing state of repair The existing recreation area was the waterfront RECREATION AREA designated in the Rosario Estates plat but used by lot owners in all Rosario plats, and the tennis courts which Mr Geiser built later, about 1966 For all Rosario lot purchasers, the ROSARIO form contract provision could only have been understood to refer to these areas

The contracts for payment, by the purchaser, of $4 00 per month for maintenance of recreation area arguably do not specify a promised performance by the seller, but they clearly imply one A first contracting party's payment to a second for certain conduct, accepted by the second party, implies that party's promise to carry out that conduct *Henson v Employment Security*, 113 Wn.2d 374, 379-80 (1989)

Two conclusions appear to follow from the drawing and language of the Rosario Estates plat, the contracts and conveyances by Falcon and Geiser in that plat and the other Rosario plats, and the pertinent correspondence of Mr Geiser from 1967, 71 and 85 quoted above The developers' intentions were to convey to the lot owners of Rosario Estates, at least, a non-exclusive easement for the use of the recreation area shown on the Rosario Estates plat They also contracted maintain that recreation area for payment of $4 00 per month by all Rosario lot owners, as well as merely keeping the recreation area open, which Geiser extended to maintenance of the tennis courts he built later Thus, although the easement established by the Rosario Estates plat extends only to lot owners in that plat, Geiser's contracts with owners of the other Rosario plats extend the benefit of that easement to them as well

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221 First Avenue West Suite 215
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(206) 282-2911

E. 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 common use, with which their contract to pay a small periodic maintenance fee is consistent.

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 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 depicted on the plat for the Court to describe it by reference to monuments shown on 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

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Seattle, Washington 98119
(206) 282-2911

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 '"
>
> 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 "

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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 " 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*

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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 (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 platter's depiction of an area for a recreational use on the original plat was held to have created an easement, the burdens of which ran with that area as a servient estate and the benefits of which ran with the lot owners' dominant estates Successors to the developer's interest in the area depicted for recreation are not innocent purchasers, because the plat puts them upon record notice of the lot owners' rights Specific mention of the easements in conveyances to the developer's and the lot purchasers' successors 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)

Common sense requires the result of the above noted law lots conveyed by reference to a plat depicting a park or recreation area - especially one on the waterfront - carry with them an easement allowing the lot owners' to use the recreation area and preventing the platter's successors from appropriating it to their own exclusive use

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There is a right of common use of the recreation area by purchasers of lots in the other Rosario plats and resort customers, as well as owners in Rosario Estates *Thompson v Smith*, 59 Wn 2d 397, 407-8 (1962), states and illustrates the rules 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 that 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,[8] but their claim of a right to exclude the use of the basin by the developer's adjacent yacht club was denied

Geiser's letters also make clear that he understood the lot owners of all of the Rosario plats to have a right, rather than a mere privilege, to use both the recreation area and the tennis courts which he built up on the hill, which he then contracted to maintain in consideration of payment by them of $4 00/month As to lot owners other than those in Rosario Estates, the right to use the waterfront recreation area and tennis courts arises by contract, as part of the implied consideration for their promised periodic payments. An express consideration of the lot owners' payment of the $4.00 fee, common to the lot owners of all of the plats, including Rosario Estates, is the promise of Geieser and his successors keep up the condition of the recreation area, including the "family pool," and the tennis courts

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[8] 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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The lot owners' contracts to pay Geiser for maintenance of recreation area are not at all inconsistent with the right of Rosario Estates plat owners to the continued existence of an open waterfront RECREATION AREA for their common use by virtue of the plat 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), illustrates the position of the plaintiffs *Wilkinson* collects the New York cases to that date on the interpretation of a plat with a designated area for recreation, in the context of similar 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 Plaintiff's attempt to defeat the lot owners' easement was rebuffed

> "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)

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It is equally difficult to believe that plaintiffs would ever have bought - or that Geiser intended to sell them - property adjacent to the waterfront recreation area unless that included some right in the recreation area. This case differs from *Wilkinson* only in that we also have the developer's written acknowledgments that the plat did create such a right in lot owners

What would be flatly inconsistent with the plat of Rosario Estates, in which Geiser sold plaintiffs their three lots, is for Falcon's present successor to build on the recreation area and exclude lot owners from it, which Oly Rose now proposes to do but Falcon and Geiser never did

The common practice of selling lots adjacent a planned golf course is analogous in this respect *See*, *Cree Meadows, Inc v. Palmer*, 68 N M 479, 362 P 2d 1007 (1961), *Ute Park Summer Homes Assn v Maxwell Land Grant Co* , 77 N M 249, 427 P 2d 249 (1967), *Cleveland Realty Co v Hobbs*, 261 N C 414, 135 S E.2d 30 (1964), all cited above The purchaser of a lot on the 17th fairway is not typically promised free use of the course, but he is entitled to rely on the plat's implicit representation that an area designated as a golf course will not be filled up with more lots and houses or some other intensive development by the platter In *Cree Meadows*, the restriction on use of an area for a golf course arose from covenants rather than a plat, but the court applied the principles of the cases dealing with parks shown in a plat Defendants were the original developers, the plaintiff in this case was the later owner of the golf course who unilaterally purported to extinguish the restriction as to a part of the golf course area which had not been developed, which plaintiff sought to put to another use Judgment for the plaintiff was reversed and directed for defendants

> "Certainly, ownership of the fee is not incompatible with the easement, and, even though the defendants while they owned the golf course made a charge for the use thereof, this does not mitigate against the right of the defendants and their grantees, who purchased the property in relieance on the existence

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of the golf course, to have the area preserved as a place of natural beauty and view, "

362 P 2d at 1010

Even if no golf course is ever built, the lot owners who buy in reliance on a map depicting one near their lots remains entitled to rely on there being no inconsistent development of the area *Ute Park Summer Homes Assn* , 427 P 2d at 252 The purchasers of lots in the plat of Rosario Estates, are in the same way entitled to rely on the RECREATION AREA designated on their plat being maintained as open space and that they have the use of it, from Rosario Road to the seawall and the sidewalk extending as a tangent from it between the family pool and the snack bar, between the breakwater driveway that sidewalk intersects on one side and the boatel on the other That lot purchasers were asked to pay a small fixed fee for its maintenance, and did so, is entirely consistent with their right to rely on the promise of the plat's designation of the recreation area and guarantee of their "free access to, and use of" that area

Consistent with these evident understandings, although Geiser extended the resort building from the original Moran mansion extensively, he never built or proposed building any resort structure in the recreation area

F. As a matter of law, the court may not conclude that no enforceable right in the RECREATION AREA was intended to be conveyed, given the deeds' reference to the plat depicting it and the plat's express representation that lot owners shall have free access to, and use of, that area.

This issue 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 in light of that evidence against the

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developer, because any ambiguity in a deed is construed against the grantor. *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 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

In short, defendants cannot maintain that Falcon and the lot purchasers did not understand their conveyances to have granted them appurtenant easements in the RECREATION AREA labelled and dedicated in the plat The only contention left to them is that this area is not sufficiently definite to create such an easement As shown below, that contention is against the plain evidence and would require

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the Court to ignore the monuments on the ground to which the plat map explicitly refers

G. The boundaries of the "RECREATION AREA" are sufficiently designated by reference to monuments shown in the plat.

Defendants apparently will contend that the plat is ambiguous, but interpreted with reference to the physical condition and structures on the ground to which it has reference, it is not The court does not examine the deeds and plat in a vacuum As the Court noted in *Sengelder v Hill*, 21 Wash 371, 379 (1899), quoting *Ames v Lowry*, 30 Minn 283, 15 N W 247

> "Parol evidence is, and must of necessity be, always admissable to identify the property described in and conveyed by a deed, to ascertain to what property the particulars in the deed apply For this purpose, as against a subsequent purchaser from the same grantor, any fact going to show the identity may be shown, if the record of the deed be constructive notice of such fact The record is constructive notice of any fact as to which it puts a party examining the state of the title upon inquiry, suggests the line of inquiry, and the existence of which will probably be ascertained by diligently following such inquiry "

Hence, the Court must construe the plat's depiction and reference to the RECREATION AREA in the context of the condition of the structures depicted around those words on the plat map and in the context of the land around them

The other consideration is the practical construction of the deeds referring to the plat of Rosario Estates by the parties This too can be examined, not to contradict the deed but to interpret it

> "The duty of the court is to ascertain not what the parties may have secretly intended, as contradistinguished from what their words express, but rather what is the meaning of the words used The court's duty is twofold interpretation and construction, *i e* , first, to find the true sense of the written words as the parties used them, as evidenced by (1) the facts and circumstances at the time of the transaction and (2) by the practical construction given by the parties while in interest with respect to the ambiguity, and secondly, after the true sense is ascertained, to subject the instrument, in its operation, to established rules of law "
>
> *Vavrek v Parks*, 6 Wn App 684, 690-691 (1972)

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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 reproduced in the published opinion which is appended to this brief The plat drawing shows their lots separated from Pamlico Sound by "Driftwood Drive" and an area in dispute along the Pamlico River, where it broadens into the Pamlico Sound, extending a long distance in front of all ten of the platted lots, additional land at each end, and one discontinuous lot seaward of the road at one end (the southeast), lot 29A At the extreme northwest end of this strip between the road and the water is the word "BEACH " The platter then sold his land in the vicinity, including one adjoining lot and an area by metes and bounds including the area in dispute to the defendant Despite the fact that the word "BEACH" appears at one end of long area, and the plat does not specify any bearings or distances for the boundaries of this area, the court rejected that the defendants' contention that it was not sufficiently identifiable There was no lot, road, building or other interruption of the area depicted on the plat from the word "BEACH" at one end to the other end, and the Court thought it clear that the entire area was the "BEACH "

> "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 of Crystal Beach Estates recorded in
>
> "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 of Crystal Beach Estates "
>
> 365 S E 2d at 168

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 later known

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as the boatel Since that building has existed many years and its location is marked with a label ("SHOP") 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 condition of these structrures and the maintenance of the grass and placement of recreational facilities within the area they surround removes any possible ambiguity from the meaning of the plat depiction and dedication The west side of the building as shown on the plat defines a clear straight line which naturally would be projected to complete the enclosure of the area, and in fact had grass on one side of it and gravel on the other, at the time of the plat and deeds to Henke Subsequently the gravel was replaced by pavement when the "Discovery House" east of the shop/Boatel was built Oly Rose had plain constructive notice of the boundary in that location

Contrast to *Hinson* and this case another North Carolina reported decision, *Stines v Willyng, Inc* , 81 N C App 98, 344 S E 2d 546 (1986) *Stines* concerned two park areas labelled on a plat The Court noted the general rules,

> "The law endeavors to give effect to the intention of the parties, whenever that can be done consistently with a rational construction However, '[w]hen an easement is created by deed, either by express grant or by reservation, the description thereof "must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers There must language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land
>
> " 'It is to be stressed that an alleged grant or reservation of an easement will be void and ineffectual only when there is such an uncertainty appearing on the face of the instrument itself that the court--reading the language in the light of all the facts and circumstances referred to in the instrument--is yet unable to derive therefrom the intention of the parties as to what land was to be conveyed ' "
>
> 344 S E 2d at 547-8, quoting *Allen v Duvall*, 311 N C 245, 316 S E 2d 267, 270 (1948)

Washington law is the same *Bigelow v Mood*, 56 Wn 2d 340, 341 (1960) An easement may be of indefinite description if the boundaries of the servient estate are sufficient, *Seattle v Nazarenus*, 60 Wn 2d 657, 660-61 (1962), but in this kind

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of case the easement is coextensive with the servient estate, so the only question is whether it is sufficiently depicted to "derive the intention of the parties as to what land was to be conveyed " One of the park areas in *Stines* provided no indication of a northern boundary at all, apparently continuing to and indefinitely past the top line of the plat drawing, which was obviously not a perimeter or boundary itself Hence, the description was insufficient

Another case involving a recreation area whose boundaries are not shown by courses and distances is *Anderson v McRae*, 495 S W 2d 351 (Tex App 1973) In *Anderson*, lot owners obtained a judgment declaring their right to use areas for recreation The court described the plats at issue

> "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

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> 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 land within the "RECREATION AREA," although not within the perimeter of platted lots and not delineated by any calls of bearings and distance, is sufficiently identifiable by landmarks existing on the ground and shown and labelled on the plat around those words, as in *Hinson* and *Anderson* They are "artificial monuments," as defined in Definitions of Surveying and Associated Terms, p 110 (Am Cong on Surveying and Mapping, and Am Soc of Civil Engineers 1978)

> "monument, artificial--A relatively permanent object used to indentify the location of a survey station or course Object include manmade structures such as abutments, stone markers, concrete markers, and railroad rails "

The perimeter description of the Rosario Estates plat includes a long course along one of the artificial monuments, "thence with a high wire-mesh fence on the Southerly side of a concrete driveway to a point " The "concrete driveway" referred to is the inland road parallel to the seawall For the RECREATION AREA, the point at the east end of the inland bound of the recreation area defined by that same driveway is the projection of the line roughly perpendicular to it and the seawall from the west side of the SHOP That eastern boundary is the only logical inference from the plat drawing, and it was and remains apparent on the ground by maintained grass to the east and gravel, later replaced by pavement, on the west Adverse possession cases project a straight line in analogous circumstances

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221 First Avenue West, Suite 215
Seattle, Washington 98119
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> "Courts may create a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settle boundary disputes Stoebuck [17 Wash Prac Real Estate Property Law] § 8 9 at 495 [1995]. *Frolund v Frankland*, 71 Wn.2d 812, 820 (1967), *overruled on other ground*, *Chaplin v Sanders*, 100 Wn 2d 853 (1984) Courts are not required to find a blazed or manicured trail along the path of the disputed boundary, it is reasonable and logical to project a line between objects when the extent of the adverse possessor's claim is open and notorious as the character of the land and its use requires and permits *Frolund*, 71 Wn 2d at 820
>
> *Lloyd v Metecucco*, 83 Wn App 846, 853-4 (1996), *see also*, *Bryant v Palmer Cooking Coal Co* , 86 Wn App 204, 212 (1997)

When Mr Geiser described the recreation area which he was obliged by the plat to recognize, he described the same area for which plaintiffs contend 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, seawall and shop boundaries of the recreation area which are apparent from the plat itself Notably, the sidewalk along the west wall of the shop/Boatel projects from the wall to the previously fenced seaward side of the inland concrete driveway parallel to the seawall, but the sidewalk does not extend entirely seaward to the seawall But Mr Geiser thought his designation of the sidewalk as the east boundary clear enough, it being obvious that the straight line of that sidewalk should be projected to the seawall The law, noted in the paragraph above, follows the same logic That was the practical construction of the plat's depiction of and reference to the recreation area for all of the years from 1958 through Gil Geiser's death in 1987 and Sarah Geiser's management of the property to 1994.

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H. To the extent there was uncertainty concerning the boundaries of the recreation area which Rosario lot owners had a right to use, according to the plat, Mr. Geiser's 1971 letter and the property owner association's acceptance of it defined them.

The cases finding a parol agreement to establish boundarys generally concern the line between adjoining fee parcels There must be either a bona fide dispute or both parties must be uncertain of the location of the boundary, they must arrive at an express meeting of the minds to resolve the dispute or uncertainty by recognizing a definite line as the true line, that line must be in some fashion marked on the ground, and the parties must take possession of the property by such occupancy or improvements as would reasonably give constructive notice to successors in interest *Johnston v Monahan*, 2 Wn App 452, 456-7 (1970), following Rest Contracts § 196(1) (1932) and 2 Tiffany, Real Property § 653 at 678 and 682 (3rd ed 1939), *Piotrowski v Parks*, 39 Wn App 37, 40 (1984)

There is no reason the principles should not apply to the boundaries of the easement conveyed by reference to the plat in this case An easement can be established by parol agreement, once acted on, *Hanson v Lee*, 3 Wn App 461, 466 (1970) The agreement is binding upon a successor, notwithstanding the recording statute, if the structure or occupation is "capable of evoking inquiry as to its significance " *Piotrowski*, 39 Wn App at 43

In *Lamm v McTighe*, 72 Wn.2d 587 (1967), the court applied the related doctrine of mutual recognition and acquiescence The Court noted the recognized boundary line (1) must be physically designated on the ground, "e g , by monuments, roadways, fence lines, etc " "(2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners must have in good faith manifested, by their acts, occupancy, a mutual recognition and acceptance of the designated line as the true boundary line," and that mutual recognition must extend for 10 years 72 Wn 2d at 593

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The doctrine differs from that of parol agreement because an express agreement is not required, and the occupancy demonstrating mutual recognition must extend for the period of the statute of limitations *Piotrowski*, 39 Wn App at 44 Again, the occupancy demonstrating mutual recognition for the limitations period establishes ownership, notwithstanding the recording statute

Here, there was an express agreement, and the common use of the property at issue continued without change for many years until defendants' attempt to deny lot owners the use of the family pool in 2001, by reason of which this action was commenced The agreed lines were physically designated on the ground by the monuments pointed out in Mr Geiser's 1971 letter These monuments were not erected by the parties but existed beforehand However, Oly Rose plainly had notice of facts sufficient to evoke inquiry about the parties' agreement

I. If the plat depiction of the RECREATION AREA is deemed ambiguous, the lot owners' appurtenant easement is nonetheless enforceable because Oly Rose had notice of Geiser's agreement with the Rosario Property Owners Association fixing its boundaries.

Plaintiffs deny that the plat depiction of the RECREATION AREA, coupled with the express dedication of free access and use of it to lot owners, is insufficiently definite to establish an appurtenant easement by the conveyance of lots according to the plat But assuming that it is, the plat still unambiguously demonstrates the platter's intent to do so and the lot purchasers' understanding that he had done so That alone is sufficient to "evoke inquiry" into any related agreements between the lot owners and Oly Rose's predecessors

Further, many lot owners had recorded purchase agreements or deeds, or both, giving record notice of their agreement to pay $4 00 per month for maintenance of recreation area and Falcon's and Geiser's corresponding obligation to maintain it for their use As a matter of law, Oly Rose had notice of these agreements *Baird v Knutzen*, 49 Wn 2d 308, 311 (1958) Moreover, Oly Rose's

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own deed by which it succeeded to the property formerly held by Falcon and Geiser, less the parcels sold by them, contained exclusions from the conveyance, copied from the exceptions from its title insurance policy, listing most of those real estate contracts and quoting the language of the standard "**ROSARIO**" form contract pertaining to the $4 00 per month recreation maintenance payment as well as the language from some deeds [Aud # 1998 1029017 Deed, 10/29/98 Rosario Resort Limited Partnership to Oly Rose, LLC, pp 26-28 Exceptions 31 - 37]

Given the plat dedication and depiction of a labelled recreation area, coupled with the existence of an actual swimming pool opposite the "snack bar," and shuffle board courts and other recreational equipment in the area, the lot owners' regular use of the entire area and these facilities, and the maintained grass west of the shop/Boatel meeting paving east of that building at a line projecting from it, Oly Rose would have to have been wilfully blind to assume there was no understanding between its predecessors and lot owners as to the boundaries of the RECREATION AREA referenced in the plat This eastern boundary, the seawall and inland parallel driveway and the driveway to the breakwater as a western boundary were apparent boundaries to the lot owners' recreational use of the area long before Mr Geiser died in 1994, even assuming they were not sufficiently depicted as boundaries by the plat

Oly Rose cannot be deemed a bona fide purchaser for value as to the rights of lot owners which it had inquiry notice *Miebach v Colasurdo*, 102 Wn 2d 170, 175 (1984)(setting aside sheriff's sale) Notice extends to everything which inquiry, followed by reasonable diligence would reveal

> "It is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinary man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will not be heard to say that he did not actually know of them In other words, knowledge of facts

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> sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed "
>
> *Id* at 175-6, quoting *Peterson v West*, 48 Wash. 339, 341 (1908), *Peterson* quoting 23 Am & Eng Ency Law (2d ed), p 495

Peterson was an action by buyers of land, from which a grantor had reserved the right to remove timber several conveyances back in the chain of title, to enjoin removal of the timber by the reserving grantor's successor Judgment was denied, as against their claim that they were bona fide purchasers for value because they had no notice that the time allowed for removal of the timber was other than as stated in their deed The Court observed, at 341, after the language above quoted

> "If they had no notice of the time allowed for the removal of the timber it was solely because they made no inquiry They could not blindly rely on the statement of their vendors . and they made no inquiry from any other source In fact they made no inquiry from their vendors, but relied on the recital conatined in the deed transmitted to them through the mail "

If Oly Rose had inquired at least from its vendor, what would it have discovered? They would have been given the same documents apparently affecting land which Christine Vierthaler, its executive secretary who was retained there by Oly Rose, had earlier retained and produced in this litigation: in particular the agreement between the Rosario Property Owners Association and Mr Geiser of 8/15/71 In the unlikely event Oly Rose did not know of the 1971 agreement before it purchased the Rosario property, it is only because it did not make the inquiry which the plat itself, as well as the lot owners' use of the land, should have excited

J. The construction of small structures consistent with recreation by the developer in the recreation area is not inconsistent with the lot owners' rights in all of it.

The lot owners' failure to challenge the resort operator's maintenance of the small harbormaster's office adjacent the family pool, opposite the changing facility, does not support any adverse construction of the plat or claim of adverse possession by the developer or successors In *Kirchen v Remenga*, 291 Mich 94,

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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 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 accommodation 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, the 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

A small shed was recently built on the west side of the seaward end of the office/"Boatel," intruding into the recreation area and used only for more storage, which plaintiffs request the Court to order removed A small, low white building was built adjacent the storage shed, abutting the seaward end of the office/"Boatel," which also intrudes into the recreation area As that small building is part of the resort's water treatment system, and presumably would be burdensome to relocate, plaintiffs do not request the Court to require its removal

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Stines v Willyng, Inc , 81 N C App 98, 344 S E 2d 546 (1986), in which one park area completely lacking a boundary on one side was held ineffective, rejected the defendant developer's claim that the other park area at issue had been abandoned Such an area "*dedicated* to the use of lot owners" created an appurtenant easement which could not be extinguished except through agreement or estoppel 344 S E 2d at 548-9, following *Realty Co v Hobbs*, 261 N C 414, 421, 135 S E 2d 30, 35-6 (1964), discussed above Estoppel might exist as to a permanent structure allowed to have been built within a park, as to that structure while its use continues and limited to the area occupied by that structure But the area thus abandoned extends no distance beyond the structure

IV. SUMMARY

For the reasons stated above, plaintiffs request that judgment be entered

(1) declaring the existence of an easement in favor of plaintiffs, appurtenant to their lots 4, 17 and 52 of the Plat of Rosario Estates, as a right in common with all of the lot owners of Rosario Estates, to access and use all parts of the recreation area, bounded as above described with reference to the surrounding structures depicted on the plat,

(2) requiring defendants to maintain the lawn and facilities of the recreation area, so described, in good condition for their normal use, including the family swimming pool during the normal summer and fall season,

(3) enjoining defendants from constructing or maintaining any building for the exclusive use of the resort in the recreation area, so described, or otherwise appropriating any part of it for their exclusive use; provided, that defendants may maintain the existing white building at the south end of the "SHOP" depicted on the plat of Rosario Estates, while that is used for sewage pumping and maintained in good order without offensive odors or other disadvantage to adjoining parts of

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the recreation area, and provided that the existing Harbor Master's Office at the southeast end of the family pool may be maintained while it is used for that purpose

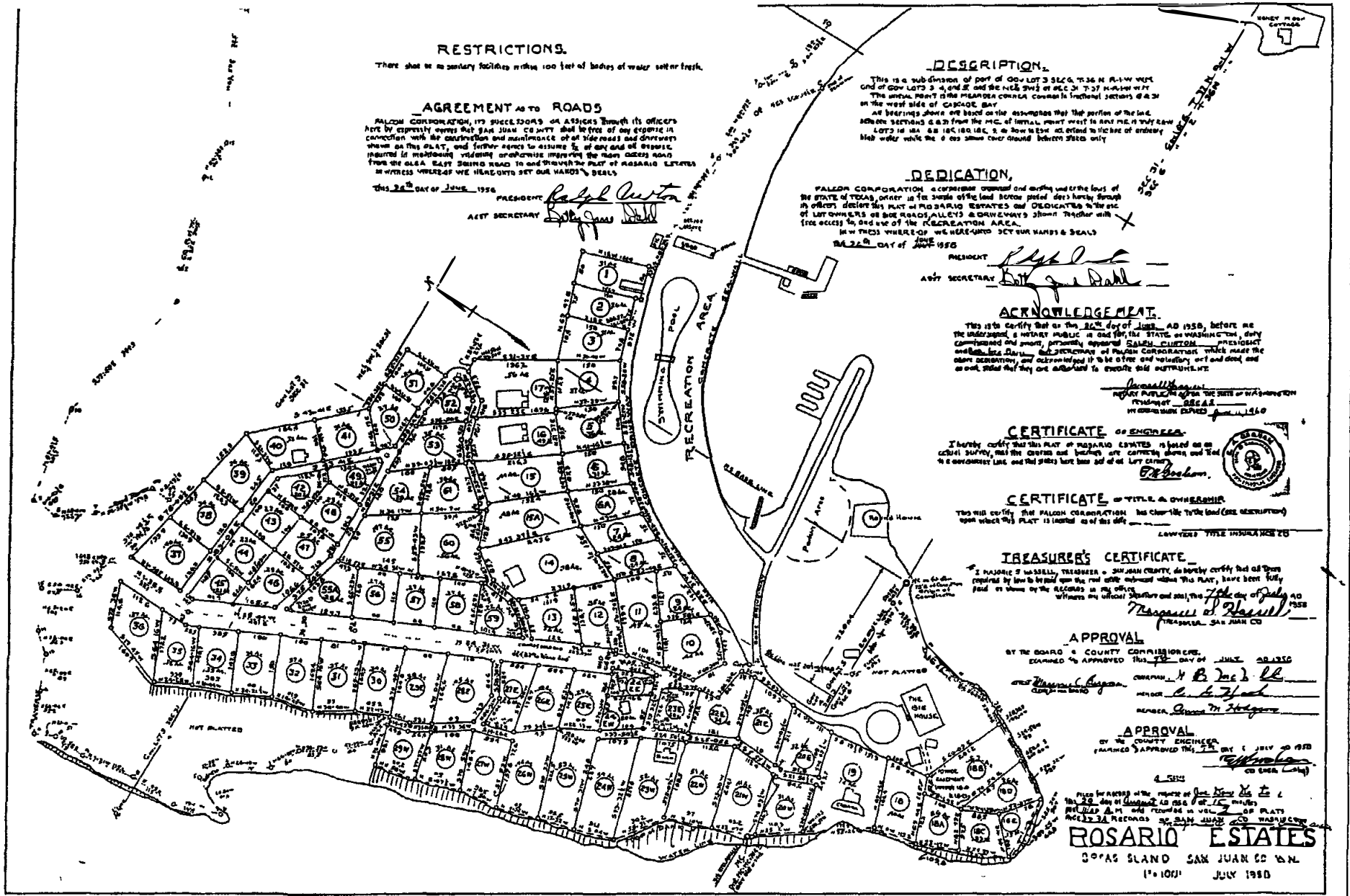
(4) enjoining defendants from demanding any fee from lot owners associated with use or maintenance of the recreation area, including the "family pool" and other facilities within it, in excess of $4 00 per month

Respectfully submitted this 23 day of January, 2004

HENKE AND RICHTER

by _____
Eric Richter (WSBA 6978)

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



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 all of any and all expense incurred in maintaining widening or otherwise improving the main access road from the OLD EAST SOUND ROAD to and through the PLAT of ROSARIO ESTATES

IN WITNESS WHEREOF WE HEREUNTO SET OUR HANDS & SEALS

this 24th day of June 1958

PRESIDENT Ralph Auston

ASST SECRETARY Dilly Jones Dahl

DESCRIPTION.

This is a subdivision of part of GOV LOT 3 SEC 6, T 36 N R 1 W WM and of GOV LOTS 3 & 4 and E ½ of the NE¼ SW¼ of SEC 31 T 37 N R 1 W WM

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 MC. of initial point west to and MC. N 89° 44' 30" W 2644 LOT 3 of SEC 6 & LOTS 1 & 2 of SEC 31 extend to the line of ordinary high water while the 6 acs shown cover ground between these lines 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 hereon together with free access to, and use of the RECREATION AREA.

IN WITNESS WHEREOF WE HEREUNTO SET OUR HANDS & SEALS

this 24th day of June 1958

PRESIDENT Ralph Auston

ASST SECRETARY Dilly Jones Dahl

ACKNOWLEDGEMENT.

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

Notary Public in and for the State of Washington
residing at Seattle
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 that the monuments are set and the lot corners will be set as shown.

E. R. Boehm

CERTIFICATE of TITLE & OWNERSHIP.

This is to 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 F MASSELL, 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 F. Massell
TREASURER, SAN JUAN CO

APPROVAL

BY THE BOARD of COUNTY COMMISSIONERS.

EXAMINED & APPROVED this 7th DAY OF JULY AD 1958

CHAIRMAN H. B. McNeill

MEMBER C. E. Wood

MEMBER Grace M. Hodgson

APPROVAL

BY THE COUNTY ENGINEER.

EXAMINED & APPROVED this 7th DAY OF July AD 1958

CO ENGR

Filed for record at the request of Jack Kelly Nis ft. this 29 day of August AD 1958 at 15 minutes past 10 A.M. and recorded in VOL 2 OF PLATS PAGE 33A Records of SAN JUAN CO WASHINGTON

ROSARIO ESTATES

ORCAS ISLAND SAN JUAN CO WN.

1" = 100' JULY 1958

of an additional easement to plaintiff is valid, plaintiff has an express easement over the subdivision's streets

[5] Defendants argue that their right to use the streets will be diminished due to greatly increased traffic and the possibility that plaintiff or her heirs will use them in a manner which is repugnant to their rights By virtue of defendants' easement, plaintiff acquired the use of the streets only to the extent that the use does not diminish defendants' rights No facts were presented to the trial court showing the nature of plaintiff's use The trial court properly concluded that the mere use of the streets by plaintiff as a means of ingress and egress to her 11 8 acre tract of land did not diminish or interfere with defendants' rights The question of what use or uses may diminish those rights is not before us

Affirmed.

WELLS and GREENE, JJ , concur



89 N.C. App 127

Wilbur HINSON and Wife, Irene Hinson

v

David Harold SMITH and Wife, Mamie W. Smith.

No 872SC868

Court of Appeals of North Carolina.

March 1, 1988

Owners of lots described in recorded plat brought action for declaration that area designated as "beach" in plat was dedicated to private use of owners and purchasers of lots in subdivision, and other relief The Superior Court, Beaufort County, Llewelyn J , granted summary judgment motion of owners of portion of tract designated as "beach," and appeal was taken. The Court of Appeals, Hedrick, C.J., held that owners and purchasers of lots described in recorded plat as matter of law had private easement over and across all property designated as "beach" on plat.

Reversed and remanded.

1 Dedication ⇐16(1), 19(5)

Dedication of easement may be in expressed terms or may be implied from owner's conduct, conduct which implies intent to dedicate may operate as express dedication, as where plat is made and land is sold in reference to plat.

2 Easements ⇐17(4)

Owners of lots described in recorded plat of subdivision had as matter of law private easement across all property designated as "beach" on plat.

This is a civil action wherein plaintiffs seek a declaratory judgment that an area designated as a "Beach" in a subdivision developed by defendants' predecessors in title is dedicated to the private use of the owners and purchasers of lots in the Crystal Beach Estates subdivision. Plaintiffs also seek a judgment directing defendants to remove any fixtures erected thereon. Further, plaintiffs seek damages in the amount of $2,000 00 actual damages and $10,000 00 punitive damages, together with the cost of the action, including reasonable attorney's fees Defendants moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure

The record before us discloses the following: In August 1964 Carolina Land Developers, Inc. [hereinafter CLD] recorded a plat of the "Crystal Beach Estates" subdivision in Map Book 17, Page 30 of the Beaufort County Registry Lots 5, 6, and 7 described on the recorded plat of Crystal Beach Estates were conveyed by CLD to Nannie Mae Hinson by deed recorded 20 August 1971 in Book 672, Page 856 of the Beaufort County Registry These lots were ultimately conveyed to plaintiffs by deed recorded in Book 836, Page 719 of the Beaufort County Registry [See map attached]

On 11 October 1971 CLD conveyed to defendants' predecessor in title Lot 29-A described in the recorded plat of Crystal Beach Estates and an additional tract described in metes and bounds This additional tract was not a numbered lot described in the recorded plat. The additional tract lies approximately north and west of Lot 29-A, south of the Pamlico River, north of Driftwood Drive, and is the most easterly portion of the property designated as "Beach" on the plat of Crystal Beach Estates The deed conveying Lot 29-A and the additional tract herembefore described to defendants stated

TO HAVE AND TO HOLD the aforesaid parcel of land together with all privileges and appurtenances thereunto belonging or in anywise appertaining unto Buyers, their heirs and assigns, in fee, forever, subject only to the following

8 Such rights, if any, as may have been dedicated to the other lot owners in Crystal Beach Estates by conveyances referring to that map entitled "Plat of Crystal Beach Estates, Commerical [sic] Section" by J Walter Jones, Jr , Registered Land Surveyor dated July, 1964 which is recorded in Map Book 17, page 30, of the Beaufort County Registry

The trial court granted defendants' motion for summary judgment and dismissed plaintiffs' claim for relief

McLendon & Partrick, P A., by Neal Partrick, Jr , Washington, for plaintiffs-appellants

Charles L McLawhorn, Jr , for Greenville, defendants-appellees

HEDRICK, Chief Judge

The only question before us is whether the trial court erred in entering the judgment dismissing plaintiffs' claim and declaring that "as a matter of law, the Defendants are entitled to quiet enjoyment of the property in question," and that "as a matter of law, there is no dedication, either expressed or implied, of the controverted property"

[1] Dedication of an easement may be in express terms or may be implied from the owner's conduct *Tise v Whitaker*, 146 N C 374, 59 S E 1012 (1907) Conduct which implies the intent to dedicate may operate as an express dedication, as where a plat is made and land is sold in reference to the plat. *Woody v Clayton*, 1 N C App 520, 162 S E 2d 132 (1968) In *Realty Co v Hobbs*, 261 N C 414, 421, 135 S E 2d 30, 35-36 (1964), Justice Clifton Moore, writing for the Court, stated

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right *to* have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. [Citations omitted.] It is said that such streets, parks and playgrounds are *dedicated* to the use of the lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. [Citations omitted.] It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel [Citations omitted] This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots [Citations omitted]

[2] In the present case, when the plat of Crystal Beach Estates was recorded and one lot was sold in reference to the plat, both the street and the "Beach" became private easements to the individual purchasing the lot. The record clearly discloses that Lots 5, 6, and 7 were conveyed to plaintiffs' predecessors in title before Lot 29-A and the "additional tract" of land including a portion of the "Beach" conveyed to defendants' predecessors in title

It is also clear that the conveyances of the lots refer to the recorded plat of Crystal Beach Estates The deed conveying Lot 29–A and the "additional tract" to defendants even stated that the conveyance was made subject to

> [s]uch rights, if any, as may have been dedicated to the other lot owners in Crystal Beach Estates by conveyances referring to that map entitled "Plat of Crystal Beach Estates, Commerical [sic] Section" by J Walter Jones, Jr, Registered Land Surveyor dated July 1964 which is recorded in Map Book 17, page 30, of the Beaufort County Registry

Contrary to defendants' contentions, the area referred to as "Beach" is clearly identifiable The recorded plat manifests the intention of CLD 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 purchasers and owners of all of the lots described and enumerated on the plat of Crystal Beach Estates recorded in Map Book 17, page 30 of the Beaufort County Registry

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 of Crystal Beach Estates The judgment for defendants is reversed and the cause remanded to the Superior Court of Beaufort County for further proceedings consistent with this opinion.

Reversed and remanded.

BECTON and SMITH, JJ, concur

